IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 32

Re: **Civil Appeal No 156 of 2014**

Between

GRAINS AND INDUSTRIAL PRODUCTS TRADING PTE LTD

… *Appellant*

And

(1) BANK OF INDIA
(2) INDIAN BANK

… *Respondents*

Re: **Civil Appeal No 158 of 2014**

Between

INDIAN BANK

… *Appellant*

And

(1) GRAINS AND INDUSTRIAL PRODUCTS TRADING PTE LTD
(2) BANK OF INDIA

… *Respondents*

JUDGMENT

[Bills of Exchange and Other Negotiable Instruments] — [Letter of credit transactions]

[Agency] — [Duties of Agent]

[Civil Procedure] — [Damages] — [Interest]

Grains and Industrial Products Trading Pte Ltd v Bank of India and another

[2016] SGCA 32

Court of Appeal — Civil Appeal Nos 156 and 158 of 2014
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Chan Sek Keong SJ
7 July 2015

23 May 2016 Judgment reserved.

Sundaresh Menon CJ (delivering judgment on behalf of Andrew Phang Boon Leong JA and himself):

Introduction

1 If payment and cash-flow form the lifeblood of commerce, then in the context of commercial transactions where the buyer and the seller are in different countries and the goods must be transported across borders, a documentary credit (also known as a "letter of credit") serves a vital role by providing security of payment against delivery thus benefitting both sellers and buyers (*Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 at [32]). To receive payment, the seller presents the stipulated documents, which the parties have agreed will signify the delivery or shipment of the goods. The bank issuing the credit ("the issuing bank") will often be located in the country of the buyer (*ie*, the applicant for

the credit). It is common for the issuing bank to instruct another bank in the country of the seller (*ie*, the beneficiary of the credit) to communicate the terms of the credit, to accept presentation of documents and to effect payment. This is often done for the convenience of the beneficiary who will thus be able to deal with a bank within his own country.

2 The framework that is established by *The Uniform Customs and Practice for Documentary Credits 600* ("UCP 600") provides the beneficiary an *additional* avenue to make the presentation of the stipulated documents within the validity period of the credit and to receive payment. Apart from the issuing bank, the beneficiary may also receive payment from a correspondent bank that is nominated to accept a presentation of documents and to effect payment on behalf of the issuing bank (defined as a "nominated bank" under Art 2 read with Arts 7(*a*) and 12(*b*) of UCP 600).

3 What happens if the beneficiary delivers the documents to the nominated bank not just for the purposes of presentation to it as the paying agent of the issuing bank, but also with a view to the nominated bank effectively agreeing to accept the documents as a transferee in exchange for its own agreement to make immediate or at least advanced payment before this has fallen due under the terms of the credit? In such circumstances, does the nominated bank receive the documents as agent of the issuing bank or is it acting as principal in its own right to the exclusion of any question of agency? If it receives the documents as agent of the issuing bank, what consequences arise from this as between the issuing bank and the nominated bank? And if the nominated bank does not accept the documents, is the beneficiary required to submit the documents once more to the issuing bank within the validity period of the credit? In this judgment, we address a number of these questions

by characterising the proper relationship between the issuing bank, the nominated bank and the beneficiary having regard to the factual background that underpins these appeals.

4 Civil Appeal Nos 156 and 158 of 2014 are appeals against the decision of the Judicial Commissioner ("the Judge") who heard the matter. His decision is reported as *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2015] 1 SLR 1213 ("the GD"). These appeals concern a letter of credit issued by the Mumbai Fort Branch of Indian Bank ("Indian Bank"). The Singapore Branch of the Bank of India ("Bank of India") was the nominated bank under the letter of credit. The beneficiary of the letter of credit is Grains and Industrial Products Trading Pte Ltd ("GRIPT"). It was unable to obtain payment despite having made a timely and complying presentation of documents to the nominated bank, Bank of India. Dissatisfied, it sued both Bank of India and the issuing bank, Indian Bank. The Bank of India and Indian Bank in turn claimed and counterclaimed against each other for indemnity and/or contribution. The Judge allowed GRIPT's claim against Indian Bank and dismissed its claim against Bank of India. He also dismissed Indian Bank's counterclaim against Bank of India.

5 Civil Appeal No 158 of 2014 ("CA 158/2014") is Indian Bank's appeal against the Judge's finding that it was liable to honour the credit in favour of GRIPT. Indian Bank also appeals against the Judge's dismissal of its counterclaim against Bank of India.

6 Civil Appeal No 156 of 2014 ("CA 156/2014") is GRIPT's appeal against the Judge's finding that Bank of India did not negotiate the credit. It pursues this only in the event that Indian Bank succeeds in its appeal that it

should not be held liable. In the event that GRIPT's claim succeeds only against Indian Bank, GRIPT also asks for pre-judgment interest and an order that it is entitled to recover from Indian Bank any costs that it may be obliged to pay Bank of India as a result of its unsuccessful suit against Bank of India. For reasons that will become evident later, we refer to this as a *Sanderson/Bullock* order.

Background facts

7 GRIPT was the beneficiary under a letter of credit issued by Indian Bank on 24 February 2012. The contract underlying the letter of credit was supposedly entered into on 6 February 2012 between GRIPT as sellers and Varun Industries Limited ("Varun") as buyers. Under the terms of the contract, GRIPT agreed to sell Varun a cargo of US No. 2 or better yellow soya beans to be shipped from the United States of America to Lanshan, People's Republic of China. We use the word "supposedly" because, as will become apparent, there is a dispute as to whether the shipment actually existed. As payment for the purchase of the cargo, Varun approached a number of banks to open an irrevocable letter of credit in favour of GRIPT. GRIPT and Varun agreed between themselves that payment under the letter of credit, which Varun was to procure, would only be made 180 days after its issuance.

8 GRIPT wished to receive payment before the maturity of the credit. To that end, it sought to sell the credit to a bank other than Indian Bank, the issuing bank, for advance payment. Having purchased the draft, the third-party bank would then claim reimbursement from Indian Bank at maturity. The act of purchasing a credit in this way is described as "negotiation" under Art 2 of UCP 600, though the representatives of GRIPT and Bank of India referred to it

as "discounting" in their correspondence. While there may be a slight difference in the technical definition of these two terms (see Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ("*Ellinger and Neo*") at p 188), nothing material turns on this. In this judgment, we use either of the terms "negotiation" or "discounting" to describe the purchase of the credit by a correspondent bank. If the credit was successfully negotiated, GRIPT would be entitled to a discounted amount of the sum secured by the letter of credit. Such a discount would usually reflect the interest and fees incurred by the third-party bank that made the payment ahead of its due date (Ali Malek QC and David Quest, *Jack: Documentary Credits* (Tottel Publishing, 2009) ("*Jack*") at paras 2.19 and 6.32).

9 On 24 February 2012, GRIPT's sales representative, Mr Shirkant Bhasi ("Bhasi"), called Mr S Rajendra Prabhu ("Prabhu"), the manager of the Trade Finance (Exports) Department of Bank of India, to enquire whether Bank of India was willing to negotiate GRIPT's draft. GRIPT alleges that during that conversation, Bhasi and Prabhu concluded an oral agreement for the Bank of India to "negotiate by discounting" a letter of credit for the sum of US$10,000,000 (+/- 10%) to be issued by the Bank of Baroda in favour of GRIPT. It should be noted that at the time of the conversation, GRIPT thought the letter of credit would be issued by Bank of Baroda as opposed to Indian Bank. The latter entity was not even mentioned during this conversation.

10 GRIPT is a subsidiary of Bunge Agribusiness Singapore Pte Ltd ("Bunge"). Ms Yeo Lye Cheng ("Yeo"), the Regional Director of the Trade & Structured Finance Department of the Financial Services Group of Bunge, wrote to Prabhu later on the same day to record the terms of that discussion for

Prabhu's "confirmation" and "acceptance". Bank of India did not respond to this email.

11 As it turned out, the letter of credit that was discussed between Prabhu and Bhasi was eventually issued by Indian Bank instead of Bank of Baroda. This letter of credit issued by Indian Bank shall hereinafter be referred to as the "Letter of Credit". The Letter of Credit was issued in favour of GRIPT for an initial sum of US$6,500,000.91. It incorporated the latest version of the Uniform Customs and Practice of Documentary Credits (*ie*, UCP 600). The Letter of Credit provided that Bank of India was the bank with which the credit was available "by acceptance". It is not disputed that this term meant that Indian Bank had appointed Bank of India as a nominated bank in accordance with UCP 600, whose authority included effecting payment to the beneficiary upon acceptance of documents presented to it (Art 2 read with Arts 7(a)(iv) and 12(b) of UCP 600). The Letter of Credit also appointed Bank of India to advise the credit, which meant that it was authorised by the Indian Bank to advise GRIPT of the terms of the credit and any amendments. A correspondent bank authorised to advise the credit is defined under Art 2 of UCP 600 as the "advising bank". In accordance with GRIPT's and Varun's earlier agreement, payment under the Letter of Credit was only due 180 days from the issuance of the Letter of Credit. As the Letter of Credit was issued on 24 February 2012, payment in accordance with its terms would fall due on 22 August 2012. The Letter of Credit was stated to expire on 26 March 2012, which meant that a complying presentation of the documents had to be made by this date in order to trigger the issuing bank's liability to make payment. Some of the other terms contained in the Letter of Credit may be summarised as follows:

(a) The documents required for presentation were: the original signed commercial invoice, one photocopy or fax copy of the original ocean bill of lading duly signed by shipping agent, and a copy of beneficiary certificate.

(b) All documents were to be sent to Indian Bank by registered airmail.

(c) Fax copies or photocopies of documents presented for negotiation would be acceptable.

(d) The documents would be acceptable notwithstanding any or all discrepancies with the exception that the invoice value drawn was not to exceed the maximum value and provided that the Letter of Credit had not expired.

(e) Indian Bank undertook to make payment on the due date of the Letter of Credit according to GRIPT's instructions if the documents were in accordance with the terms and conditions of the Letter of Credit.

(f) Bank of India could discount GRIPT's credit at GRIPT's own cost and upon GRIPT's request.

(g) The negotiating bank was to send the documents directly to Indian Bank certifying that the documents had been negotiated in conformity with the terms and conditions of the credit and claim reimbursement in accordance with the instruction shown in Field 53A of the Letter of Credit on the due date.

12 Acting in its capacity as the advising bank, Bank of India wrote to GRIPT on 27 February 2012 notifying it of the opening of the Letter of Credit. It expressly stated in the letter that it was doing so "without any engagement and responsibility on [its] part" and that it "shall be glad to consider" and was "prepared, at [its] option, to negotiate/discount" documents/drafts drawn in compliance with the terms and conditions of the Letter of Credit.

13 The sum payable under the Letter of Credit was amended twice on 28 February 2012 and 2 March 2012 to the final sum of $9,993,239.54. In each of the two letters Bank of India sent to notify GRIPT of the amendments, it was made clear that the notification was being made "without any responsibility on the part of [Bank of India]" and "[did] not constitute a confirmation of the credit".

14 GRIPT submitted the stipulated documents under the Letter of Credit (namely, the Bills of Exchange, Commercial Invoice, Photocopy of the Bill of Lading and Copy of the Beneficiary Certificate) to Bank of India on 16 March 2012 through its own agent, Standard Chartered Bank of Singapore. It was stated in the covering note accompanying the documents that "this presentation is subject to [UCP 600]". There was no immediate response from Bank of India following the aforesaid submission of the documents.

15 Over the following days, GRIPT's representatives sent a number of emails to Bank of India to check on the status of the transaction. On 21 March 2012, Mr Jason Chew ("Chew"), the Operations Manager of the Trade & Structured Finance Department of the Financial Services Group of Bunge, sent an email to Prabhu requesting him to "arrange for the discounting" of the Letter of Credit. The next day, Mr Rakesh Bangera ("Bangera"), the

Operations Executive of Bunge, wrote to Bank of India requesting as follows: "if the presented documents are clean, then pls [*sic*] provide the discounting details at your earliest convenience".

16 Bank of India denies having orally agreed to negotiate the Letter of Credit whether on 24 February 2012 (which was even before it had been issued (see [9] above)) or otherwise. Bank of India's case is that it had made it very clear to GRIPT that it would not consider negotiating the Letter of Credit unless GRIPT opened a current account with Bank of India. In support of its case, it points to an email dated 22 March 2012 where Prabhu said as follows:

> … Regarding the opening of the CD account, we had a discussion and it may not be possible if the account opening form is modified for us to open the account.
>
> *Regarding the L/C discounting, we may take up the same once the CD account is opened.* Kindly ensure that the CD account is opened at the earliest so that we may take this issue forward.
>
> [emphasis added]

17 Following this email, GRIPT continued to press Bank of India to negotiate the Letter of Credit. In the meantime, the expiry date of the Letter of Credit, which was 26 March 2012, came and went without any payment having been made. On 28 March 2012, Bangera wrote to Prabhu again stating: "[p]ls arrange for the discounting status for the Indian Bank L/C, the documented [*sic*] has been presented on 15 Mar 2012." In the meantime, GRIPT continued to take steps to open an account with Bank of India. Chew submitted account opening forms and documents on 3 April 2012 to Prabhu under cover of an email in which he stated:

> At the meantime as discussed last week, pls find attached the letter that was suggested.

> Please give your go ahead and we can get the process started and to have the USD9.74mm lc from Indian Bank discounted asap.

18 Bank of India did not respond to these two emails. Prabhu explained that GRIPT's representatives had unilaterally changed the terms stipulated on Bank of India's application form and that Bank of India's account opening form and current account rules had not been signed by GRIPT. On 9 April 2012, Prabhu spoke to Bhasi and Chew over the phone. He informed them that Bank of India was unable to open a current account based on the terms modified by GRIPT and suggested that GRIPT execute the application forms again without any modification. On 10 April 2012, Bank of India's Chief Executive Officer, Mr Alam Munir ("Mr Alam"), had a meeting with Bhasi at which Prabhu was not present. On 16 April 2012, Chew emailed Prabhu again requesting Bank of India to discount the Letter of Credit immediately. In the same email, Chew proposed an alternative arrangement under which Bank of India could hold the discounted proceeds pending its opening of an account.

19 On the next day, 17 April 2012, Bhasi emailed Prabhu stating:

> Pl refer our discussion had yesterday, you agreed to discount the Lc without recourse to GRIPT and pay us upon opening of bank account with BOI Singapore.
>
> Pl do the needful.

20 There was no response to this but on 18 April 2012, Bank of India transmitted to Indian Bank the documents which it had received from GRIPT more than a month earlier (see [14]).

21 In response, Indian Bank sent Bank of India by SWIFT a message dated 19 April 2012 entitled "Advise of Refusal". The reason for refusal was stated as follows: "Late negotiation. LC expired on 120326".

22 On 26 April 2012, Indian Bank wrote to Bank of India again informing them that it was holding the documents at Bank of India's "own risk and responsibility".

23 On the next day, GRIPT wrote to Indian Bank demanding that it accept the documents and honour the credit.

24 Subsequently, on 10 May 2012, GRIPT wrote to Bank of India stating that under UCP 600, Bank of India was deemed to have accepted the draft and documents on or after the fifth banking day from the date of presentation.

25 On 14 May 2012, Bank of India wrote to GRIPT and Standard Chartered Bank, stating that the documents were sent to Bank of India "on collection" and that Bank of India had acted as a collection agent. Bank of India then informed Indian Bank that it had conveyed its refusal of the documents to GRIPT.

26 On 3 July 2012, GRIPT's solicitors, Rajah & Tann LLP, wrote to Bank of India demanding that it pay GRIPT the sum of US$9,890,408.63. On 23 August 2012, they wrote to Indian Bank demanding payment of the sum of US$9,993,239.54. In the absence of any agreement, GRIPT filed proceedings against both Bank of India and Indian Bank on 22 September 2012.

27 We note that in the course of the cross-examination of Bhasi in the trial below, counsel for Bank of India, Mr Sarjit Singh Gill SC ("Mr Gill"), suggested to him that Varun had successfully procured Indian Bank to release the security it held in relation to the Letter of Credit on the basis that the Letter of Credit had expired. Bhasi was recorded as "looking puzzled" by this revelation. Nevertheless, there is nothing in the affidavits of evidence-in-chief

filed by the witnesses who gave evidence for Bank of India or, for that matter, Indian Bank to suggest that Indian Bank had at any time released to Varun any security it held in relation to the Letter of Credit.

The decision below

28 The Judge dismissed GRIPT's claim against Bank of India but allowed GRIPT's claim against Indian Bank. He also dismissed Indian Bank's counterclaim against Bank of India and made no order on Bank of India's claim against Indian Bank. He did so on the following grounds:

(a) GRIPT had failed to prove that Bank of India had orally agreed to confirm, honour or negotiate the Letter of Credit: at [14]–[70] of the GD.

(b) Bank of India had not at any time informed Indian Bank that it refused to be the confirming and/or negotiating bank but this did not prejudice Bank of India. Under UCP 600, a third-party bank had to agree that it would accept such duties before these could be imposed on it. Therefore, GRIPT's reliance on Art 8(d) of UCP 600 to argue that Bank of India was a confirming bank was misplaced: at [71]–[76] of the GD.

(c) The issuing bank, in this case, Indian Bank, was liable to honour the Letter of Credit pursuant to Art 7(a)(iv) of UCP 600 as long as a valid presentation of documents had been made either to it or to its nominated bank, and in this case, GRIPT had made a timely, complying presentation to Bank of India which was the nominated bank. Indian Bank was therefore liable: at [77]–[87] of the GD.

(d) Indian Bank's liability under Art 7(a)(iv) of UCP 600 was not premised on the nominated bank having accepted its nomination or having acted upon its nomination. Rather, as a matter of contract between Indian Bank and GRIPT, Indian Bank's liability to honour the Letter of Credit depended on a complying presentation having been made to Bank of India within the validity period of the Letter of Credit: at [89] of the GD.

(e) Indian Bank's counterclaim against Bank of India failed because the latter did not act upon or accept its nomination. Accordingly, no contract arose between Bank of India and Indian Bank and as between them, the former had no liability to the latter: at [95]–[99] of the GD.

29 The Judge's decision on the remaining issues of pre-judgment interest and costs can be summarised as follows:

(a) GRIPT was obliged to bear Bank of India's costs of defending the claim against it, and no *Sanderson/Bullock* order would be made because the causes of action that GRIPT had against Bank of India and Indian Bank were quite different. The Judge also exercised his discretion not to order pre-judgment interest because GRIPT had not made any substantial arguments as to why this should be ordered: at [105]–[107]; [108(a)] and [109]–[111] of the GD.

(b) Bank of India was to have its costs of defending the counterclaim brought against it by Indian Bank: at [108(b)] of the GD.

(c) GRIPT was to have its costs of the action against Indian Bank: at [108(c)] of the GD.

The parties' arguments

30 As noted earlier, there are two appeals before us. We first set out the parties' arguments in CA 158/2014 before we do so for CA 156/2014.

CA 158/2014

Appellant's (ie, Indian Bank's) arguments

31 Indian Bank is the appellant in CA 158/2014. There are two aspects to its appeal. The first is directed at the Judge's decision to allow GRIPT's claim. It argues that it should not be held liable to honour the Letter of Credit because:

(a) The arrangement between GRIPT and Bank of India was that the latter would not carry out *any* dealings in respect of the Letter of Credit until GRIPT had opened an account with it. On the basis of this arrangement, the presentation of the documents to Bank of India on 16 March 2012 was invalid or at least ineffective. GRIPT should have presented the documents directly to Indian Bank.

(b) The submission of the documents to Bank of India did not come within the meaning of the term "presentation" under UCP 600. First, Bank of India was acting as a collection bank for GRIPT rather than as the nominated bank of Indian Bank. Secondly, even if Bank of India was a nominated bank, Prabhu had been told to hold onto the documents pending the opening of the current account. On this basis, Bank of India never received the documents as Indian Bank's agent. Accordingly, GRIPT could not avail itself of Art 7(a) of UCP 600.

32 The second aspect of Indian Bank's appeal relates to its counterclaim against Bank of India. In the event it is found liable to pay GRIPT, Indian Bank appeals the Judge's dismissal of its *counterclaim* against Bank of India. It argues that it is entitled to an indemnity from Bank of India because the latter, as Indian Bank's agent, had breached its implied duty to forward to Indian Bank the documents it received from GRIPT within a reasonable time. As we have noted above, these documents were not forwarded until more than a month after receipt. We pause to highlight that Indian Bank's counterclaim and arguments on appeal envisage that an indemnity in respect of the amount paid or payable to GRIPT would follow from it establishing a breach of duty by Bank of India *qua* Indian Bank's agent. This is apparent from the following paragraphs of Indian Bank's counterclaim:

> 18. … In the event the Court finds [Indian Bank] liable to [GRIPT's] claim the [Indian Bank] avers that [Bank of India] is liable to indemnify [Indian Bank] against [GRIPT's] claim, interest and costs of this action and this counterclaim or to contribute to the full extent of [GRIPT's] claim, interest and costs or such further relief as the Court may deem fit to award.
>
> AND [Indian Bank] counterclaims against [Bank of India]:
>
> (1) An order that [Bank of India] does indemnify [Indian Bank] for any amount that [Indian Bank] may be liable to [GRIPT];
>
> …

33 Indian Bank has not counterclaimed for any loss suffered independent of its potential liability to GRIPT. Accordingly, in the trial below, Indian Bank did not lead evidence or make submissions before the Judge to argue that it had suffered a loss independent of its liability to GRIPT. Nor has any evidence of any such loss been put before us in the present appeal.

Respondents' arguments

(1) GRIPT's arguments

34 GRIPT argues that Indian Bank's case on appeal was not pleaded insofar as it alleges that Bank of India had made clear to GRIPT that it would not undertake *any transactions* until GRIPT had opened an account with it. Rather, its pleaded case was that Bank of India would not negotiate *any credit* until GRIPT had opened an account with Bank of India, and this, it is said, is quite different from the case that Indian Bank is seeking to run on appeal.

35 In any event, GRIPT argues that whether Bank of India did or did not stipulate any such condition is irrelevant in determining whether a valid presentation has been made. Under UCP 600, a beneficiary's obligation to present documents is discharged once he makes a timely and complying presentation to the nominated bank. This is so because the nominated bank is the agent of the issuing bank for the purposes of the presentation of documents.

36 GRIPT also argues that Indian Bank's contention that Bank of India was acting only as GRIPT's collection bank was likewise not pleaded. In any case, it contends that Bank of India was a nominated bank of Indian Bank and that GRIPT was therefore entitled to deliver the documents to Bank of India; this would constitute presentation within the meaning of Art 2 of UCP 600. It had in any case made clear its position that it was presenting the documents to Bank of India.

(2) Bank of India's arguments

37 As for Bank of India, it contends that Indian Bank cannot unilaterally impose obligations on it; as there was no contractual relationship between the two entities, there is no room for any express or implied duty to arise between them.

CA 156/2014

Appellant's (ie, GRIPT's) arguments

38 GRIPT is the appellant in CA 156/2014 and it appeals against three aspects of the Judge's decision, namely:

(a) the decision to dismiss its claim against Bank of India;

(b) the decision not to grant pre-judgment interest to GRIPT in respect of the sums owed by Indian Bank; and

(c) the decision not to make a *Sanderson/Bullock* order against Indian Bank in respect of any liability that GRIPT might incur for Bank of India's costs.

39 GRIPT relies on the following grounds to support its case that Bank of India should be liable to GRIPT:

(a) An initial oral agreement was concluded on 24 February 2012 under which Bank of India agreed to negotiate the Letter of Credit that GRIPT expected would be issued by the Bank of Baroda and received imminently; and a further oral agreement was subsequently reached between Bhasi and Prabhu to amend the identity of the issuing bank

from Bank of Baroda to Indian Bank. This change in the identity of the issuing bank was immaterial in any event given that both Bank of Baroda and Indian Bank are nationalised Indian banks.

(b) Bank of India's letter to Indian Bank on 18 April 2012 certified that it had negotiated the Letter of Credit and this is said to be the clearest indication that negotiation had in fact taken place.

(c) The Judge erred in finding that it was a condition precedent to Bank of India negotiating the Letter of Credit that GRIPT had to open an account with it. Consistent with this argument, GRIPT pointed to the fact that Bank of India had not insisted on such a requirement previously when it negotiated a letter of credit issued by State Bank of India in favour of GRIPT.

40 GRIPT further argues that as a matter of course, pre-judgment interest should be granted against Indian Bank from the date of maturity of the Letter of Credit.

41 GRIPT also seeks a *Sanderson/Bullock* order against Indian Bank in respect of any liability GRIPT may have for Bank of India's costs on the grounds that:

(a) Indian Bank had tried to shift liability to Bank of India; and

(b) it was necessary for GRIPT to safeguard its position by pursuing claims against both Bank of India and Indian Bank.

Respondents' arguments

(1) Bank of India's arguments

42 As against this, Bank of India argues that it had never agreed to negotiate the draft. It contends that:

(a) The oral discussion on 24 February 2012 related to a letter of credit to be issued by the Bank of Baroda and not Indian Bank. It therefore could not have related to the Letter of Credit which had not even been issued at that stage.

(b) The 18 April 2012 letter was a standard form used for forwarding documents regardless of the type of credit in question. Little weight should be attached to the use of the term "negotiation" in that letter.

(c) The Judge was correct to find that the opening of a current account was a precondition to Bank of India negotiating the Letter of Credit. Bank of India had dispensed with this precondition in the previous transaction involving the letter of credit issued by State Bank of India because GRIPT has been described as an "esteemed client" by the State Bank of India, and it was purely a gesture of goodwill aimed at establishing a long term relationship with GRIPT.

(2) Indian Bank's arguments

43 As for Indian Bank, it argues that pre-judgment interest should not be awarded because it was not unreasonable for it to resist GRIPT's claim.

44 Indian Bank also argues that it should not be liable for any costs GRIPT may incur *vis-à-vis* Bank of India because GRIPT's claims against the two banks are premised on distinct causes of action. Moreover, Indian Bank was not involved in the various dealings between GRIPT and Bank of India. Indeed, Bank of India had been the primary defendant as between the two banks and a large part of the trial below centred on Bank of India's liability.

Issues

45 The issues arising from CA 158/2014 are as follows:

(a) Whether GRIPT's submission of documents to Bank of India on 16 March 2012 constitutes a valid presentation. If it does, it follows that Indian Bank will be liable to honour the Letter of Credit at its maturity.

(b) If issue (a) is answered in the affirmative, whether Indian Bank is entitled to an indemnity from Bank of India.

46 The issues arising in CA 156/2014 are as follows:

(a) Whether Bank of India had in fact negotiated the Letter of Credit.

(b) If Indian Bank is held liable to honour the Letter of Credit and Bank of India is not, whether GRIPT is entitled to obtain pre-judgment interest on the sum in question from Indian Bank; and whether GRIPT is also entitled to a *Sanderson/Bullock* order in its favour.

Our decision in CA 158/2014

Was there a valid presentation?

47 There is no dispute that GRIPT transmitted the relevant documents to Bank of India on 16 March 2012, well within the validity period of the Letter of Credit. However, discussions were then held between the parties pertaining to the negotiation of the Letter of Credit. In the meantime, Bank of India did not forward to Indian Bank the documents which it had received or alert the latter to the fact that a presentation had been made until 18 April 2012. This was well past the expiry date of the credit on 26 March 2012. It was only then that Indian Bank came to know that GRIPT had submitted the documents to Bank of India within the validity period of the Letter of Credit. Indian Bank contends that the presentation was invalid because it had not received the documents until after the validity period of the Letter of Credit. From GRIPT's perspective, however, a valid and complying presentation was made when it submitted the documents to Bank of India, and it was wholly unnecessary for it to make a second presentation to Indian Bank.

48 To resolve this difference between the parties, we begin with the terms of UCP 600 since the Letter of Credit contains an express clause incorporating it.

49 Article 7 of UCP 600 offers a good starting point for our analysis, and it reads as follows:

> 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:

> …
>
> 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.
>
> [emphasis added in bold]

50 Article 7 confers on the beneficiary a right to make a presentation either to the issuing bank or the nominated bank. Article 7(a) provides that the issuing bank "must honour" the draft regardless of whether the documents are presented to the nominated bank or the issuing bank as long as it is a "complying presentation". The term "presentation" is defined in Art 2 of UCP 600 as the delivery of documents to "the issuing bank or the nominated bank". It follows from this that a presentation made to a nominated bank engages the liability of the issuing bank just as if the presentation were made to the issuing bank itself. In other words, once the beneficiary makes a complying, timely presentation to the nominated bank, the issuing bank's liability to honour to credit at its maturity is triggered if the nominated bank does not itself make payment. In our judgment, this follows because the issuing bank is taken to have authorised the beneficiary to present the documents to the nominated bank.

51 This interpretation of Art 7 finds widespread support amongst various academics and commentators. The authors of James E Byrne with Vincent M Maulella, Soh Chee Seng, Alexander V Zelenov, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2001) ("*Byrne*"), one of the leading treatises on the construction of UCP 600, state

that a first presentation to a nominated bank is the point of reference for determining the time at which the presentation was made (at p 190):

> **Meaning; Significance of "Presentation".** … On making a presentation, two principal consequences follow, namely the time for determination of whether the presentation is timely in light of the expiry date and any other deadline and any bank obligated on the credit to whom presentation is made initially or subsequently is obligated to either honor the presentation or provide a timely and adequate notice of refusal pursuant to UCP600 Article 16 (Discrepant Documents, Waiver and Notice).
>
> **a. First Presentation.** The first presentation to a nominated bank or the presentation directly to the issuer is significant because it marks the time at which it is determined whether or not the presentation is timely for the purposes of the expiration of the credit and any other deadline.
>
> [emphasis in original]

52 The consequence of treating a presentation to a nominated bank within the validity period of the credit as a timely presentation is that it triggers the issuing bank's liability to honour the credit at maturity. According to the authors of *Byrne*, Art 7 has this effect for the following reasons (at pp 353 and 370):

> **9. The Undertaking of an Issuer.** UCP600 Article 7 sets forth the undertaking of an issuer. It is a definite conditional undertaking to honor the timely presentation by the beneficiary of documents that comply with the terms and conditions of the credit … If [a] bank is nominated, *the condition is satisfied when required documents are timely presented to the issuer or to any bank so nominated and the issuer is obligated to cover for a nominated bank that does not act pursuant to its nomination by fulfilling its function in favour of the beneficiary. …*
>
> …
>
> **33. Conditions to the Issuer's Undertaking: Presentation to the Issuer or Nominated Bank and a Complying Presentation.**
>
> …

> b. The issuer is obligated to pay not only if the documents are presented to it *but also if they are presented to another nominated bank*. This provision is consistent with the notion that *nomination permits the beneficiary to present documents to the nominated bank, thereby obligating the bank that nominated it.*
>
> c. It should be noted that the issuer is obligated to the beneficiary if complying documents are presented to a nominated bank (that is, it receives them before expiry) even if the issuer does not receive them. This rule is contained in UCP600 Article 35 … regarding lost documents. …
>
> [emphasis in bold in original; emphasis in italics added]

53 The same view is taken by the authors of *Jack*:

> 5.18 If the credit is expressed to be available with a bank other than the issuing bank – such a bank being a 'nominated bank' in the terminology of the UCP – then the seller may present the documents to that bank instead of the issuing bank. Suppose that the nominated bank refuses documents which conform to the terms of the credit and are presented within time. If, but only if, the nominated bank has confirmed the credit then the seller has an action against it to enforce the credit. *But the seller can also sue the issuing bank without the need to present the documents again. The issuing bank's undertaking under Article 7 is to honour the credit if documents are presented either to the nominated bank or to the issuing bank. The nominated bank can be regarded as acting as the issuing bank's agent for receipt of the documents.* This may be important because if the documents were presented to the nominated bank close to the expiry of the credit then it may be too late to make a second presentation. …
>
> [emphasis added]

54 In the *Commentary on UCP 600* (International Chamber of Commerce Publication No. 680, 2007) ("*Commentary on UCP 600*") the point is put as follows, at p 62:

> Receipt of documents by a nominated bank that has neither expressly agreed to honour nor negotiate a complying presentation, nor acted on its nomination, constitutes presentation by the beneficiary under the documentary credit,

> but does not obligate the nominated bank to observe the provisions of sub-articles 14(a) and (b).

55 The position may be understood as follows:

(a) A letter of credit gives rise to a relationship between the issuing bank and the beneficiary and where, as here, it so provides, UCP 600 may be incorporated into its terms. Under the terms of that relationship, the issuing bank undertakes a liability on the terms of the letter of credit. If the issuing bank nominates a bank in accordance with UCP 600, then as between the beneficiary and the issuing bank, Art 7(a) of UCP 600 provides that the latter's liability is engaged as long as the beneficiary makes a valid and complying presentation to the nominated bank. For this purpose, it is immaterial whether the nominated bank has expressly agreed to honour the credit or to act on its nomination.

(b) This however is quite separate from the relationship between the issuing bank and the nominated bank, an issue to which we will turn shortly.

56 We emphasise that the parties have expressly chosen UCP 600 to govern their contractual relationship, and this is the position provided for under Art 7(a) of the UCP 600. In arriving at this position, we are doing no more than to give effect to the express terms that the issuing bank and the beneficiary have agreed between themselves. It follows from the passages cited at [53] and [54] that the effect of Art 7(a) of UCP 600 is that by nominating a bank, the issuer agrees to honour the credit as long as a timely and complying presentation is made to the nominated bank by the beneficiary whether or not the nominee wrongfully refuses to accept the documents. The

issuer in effect has agreed to be bound to honour the credit as long as the beneficiary acts in compliance with the terms and conditions of the credit. As far as the beneficiary is concerned, the issuer has constituted the nominee as its agent for receiving the documents and even if the nominee does not accept or discharge its agency appropriately, the beneficiary will not be prejudiced.

57 The thrust of Indian Bank's counterclaim appears to be that it would be unfair for it to come under a liability to honour the Letter of Credit in light of the late submission of the documents by Bank of India. While this might have a bearing on Indian Bank's position as against Bank of India, we hasten to point out that the allegedly late submission by Bank of India is immaterial insofar as the position between Indian Bank and the beneficiary is concerned, and, as we have noted above, this is supported by the academic commentaries on this issue. More fundamentally, it is for the issuing bank to determine such matters as whether it wishes to be governed by UCP 600 and if so, which bank it wishes to nominate; and having made those determinations, it takes the consequences that flow from the acts or omissions of the nominee at least as far as the issuer's liability to the beneficiary is concerned. In addition, the issuing bank is free to modify, in its contract with the beneficiary, the default position contained in Art 7(a) of UCP 600 should it require the beneficiary to make a separate presentation of documents to itself.

58 Indian Bank does not take issue with the basic proposition that a beneficiary who makes a timely presentation to a nominated bank will engage the liability of the issuing bank to honour the credit. However, it contends that by reason of certain matters that transpired in this case GRIPT did not in fact make a valid or complying presentation within the meaning of UCP 600.

59 In this regard, Indian Bank argues first, that whether there was a valid presentation depends on the purpose for which the documents were delivered to Bank of India. It places some emphasis on the fact that the Letter of Credit authorised Bank of India to "accept" the draft. Thus, when GRIPT approached Bank of India to negotiate the draft, Indian Bank contends that GRIPT approached Bank of India not as the agent of Indian Bank but as a principal in its own right with a view to it discounting the Letter of Credit and then taking the risk of having to present it to Indian Bank. Seen in this way, it contends that the dealing between GRIPT and Bank of India was a transaction that took place outside of the credit.

60 We do not agree. While it is true that GRIPT wanted Bank of India to negotiate the Letter of Credit, that by itself is insufficient to preclude the conclusion that the documents were *also* presented to Bank of India as a nominated bank. The documentary evidence on this is telling. GRIPT instructed its own agent, Standard Chartered Bank on 15 March 2012 to make a "presentation of documents" on its behalf to Bank of India. Acting on that instruction, Standard Chartered Bank forwarded the documents to Bank of India the next day *by* SWIFT message, stating amongst other things that "this presentation is subject to [UCP 600]". In our judgment, the SWIFT message is a clear indication that GRIPT did present the documents to Bank of India as the nominated bank. The fact that GRIPT and Bank of India were concurrently in discussions over the possibility of Bank of India discounting the Letter of Credit does not detract from the fact that as far as the beneficiary's position against Indian Bank is concerned, there had been a valid presentation when it presented the documents to Bank of India.

61 Indian Bank next argues against the finding that there had been a valid presentation on the ground that GRIPT had told Bank of India to "hold on to the documents". On this, we agree with GRIPT that there is no evidence to support this allegation. Our attention was drawn to Prabhu's affidavit of his evidence-in-chief, where he said that GRIPT's representatives requested that Bank of India "hold the documents and the [Letter of Credit] pending the opening of the current account". In our judgment, this statement has to be understood in its proper context, which was in relation to the separate attempt between GRIPT and Bank of India, to have the latter agree to *discount* the Letter of Credit. In that context, Bank of India's case was that they would only do so upon GRIPT opening an account with it. This had nothing to do with the question of whether there had already been a timely and valid presentation of the documents as far as Indian Bank was concerned.

62 Indian Bank's third argument is that Bank of India had made it clear to GRIPT that it would not transact with GRIPT until and unless GRIPT established a relationship with Bank of India by opening an account. GRIPT was therefore not entitled to deliver the documents to Bank of India. It should have presented them directly to Indian Bank once it knew Bank of India wanted nothing to do with GRIPT until the satisfaction of that precondition.

63 We do not agree. First, we are unable to find any evidential basis to substantiate this contention. As we have said, when Bank of India said it would not transact with GRIPT unless it opened an account, this was in the context of it negotiating the Letter of Credit as principal. As can be seen from Bank of India's Defence, it pleaded that:

> [Bank of India] had informed [GRIPT] that [GRIPT] would have to open a current account with [Bank of India] … before [Bank

> of India] would entertain future requests from [GRIPT] *to discount/negotiate any letter of credit.*
>
> [emphasis added]

64 Aside from this, there is a further point. We leave to one aside the extreme hypothesis where Bank of India expressly informs its nominating bank and GRIPT that it would not under any circumstances deal with GRIPT, which is not what happened in this case. Here, Indian Bank had nominated Bank of India and the latter never repudiated the nomination. Having made the nomination, it was not open to Indian Bank to seek to avoid liability to the beneficiary on the ground of any failure on *its* nominee's part. Any such failure would be a matter between Indian Bank and its nominee but it cannot displace the rights of the beneficiary, which is entitled to enforce the credit in accordance with its terms.

65 Indian Bank's final argument is that GRIPT treated Bank of India as its collection bank when it delivered the documents to it. By this, it means that GRIPT had engaged Bank of India as its agent to receive or collect the documents and present them on its behalf to the issuing bank. A transmission of documents on collection basis does not qualify as presentation under UCP 600 (*Byrne* at p 504). This is because a collection bank is not a party to the credit. It merely acts as the beneficiary's agent (as opposed to the issuing bank's agent) for the purposes of making presentation and receiving payment (*Jack* at para 7.3).

66 In our judgment, this was wholly inconsistent with the evidence. As we have already noted at [60] above, GRIPT's agent was Standard Chartered Bank, and when it sent the documents to Bank of India, it expressly stated it was doing so as a presentation under UCP 600.

67 In the circumstances, we affirm the Judge's decision insofar as he held Indian Bank liable to honour the Letter of Credit at its maturity.

Does Indian Bank have a right to be indemnified by Bank of India?

68 Indian Bank's counterclaim against Bank of India for an *indemnity*, in respect of, among other things, the latter's breach of its duty to act with reasonable despatch is founded on the existence of an agency relationship between the two entities. Indian Bank argues, in broad terms, that as its agent, Bank of India owed it an implied duty to act with reasonable care so as to not cause it to suffer losses. In order to succeed against Bank of India, Indian Bank must establish the following propositions:

(a) Bank of India is an agent of Indian Bank;

(b) Bank of India failed to act with reasonable care in respect of any duties it owed Indian Bank as its agent; and

(c) such a failure to act with reasonable care would entitle it to an indemnity from Bank of India in relation to its liability to GRIPT.

Is a nominated bank an agent of the issuing bank?

69 In our judgment, the position is quite simple. A nominated bank *can* be an agent of the issuing bank to the extent of the issuing bank's mandate. The agency relationship *will* arise insofar as the nominated bank *accepts* the authority granted by the issuing bank for it to transact with the beneficiary on its behalf. We return here to the distinction we drew at [55] above between the issuing bank's relationship with the beneficiary on the one hand and its own correspondent bank – or its nominated bank in the context of UCP 600 – on

the other. As we have noted at [56] above, the issuer's position may be affected even if the nominee refuses to accept or to act on the agency but this will be a consequence of the issuer's own agreement to be bound as long as the beneficiary acts in accordance with the terms of the credit. However, the issuer's position can also be affected by a nominated bank that acts on the nomination. A common example is a nominated bank that wrongly accepts non-complying documents and as we shall see at [73] below, such an act will bind the issuer as against the beneficiary though it leaves the issuer with remedies against the agent for its misfeasance.

70 An agency relationship will be found when a nominated bank acts on the issuing bank's mandate because when it does so, it has the power to affect the issuing bank's rights and liabilities as against the beneficiary on matters so authorised. At its core, agency connotes an agent being granted power or authority to affect the principal's legal relations as against third parties (*Scott v Davis* (2000) 204 CLR 333 at [227]). Such power is considered the cornerstone of the law of agency (F E Dowrick, "The Relationship of Principal and Agent" (1954) 17 MLR 24; Raphael Powell, *Law of Agency* (London: Pitman, 2nd ed, 1961) at 7). The essence of an agency relationship has been explained in G H L Fridman, *Canadian Agency Law* (LexisNexis, 2009) at p 4:

> Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

71 A nominated bank may be authorised under the credit to perform a variety of functions, and in practice, it is often asked to perform more than a

single function. These may include: (1) accepting the documents; (2) paying on the credit; (3) advising the beneficiary of the credit; (4) negotiating the credit; and/or (5) confirming the credit. The content and the scope of the nominating bank's authority can be ascertained from the credit terms as well as any instruction that the issuing bank may separately give to the nominated bank. We have noted at [11] above that in the Letter of Credit, Indian Bank appointed Bank of India both as a nominated bank and an advising bank. For present purposes, we are concerned with Bank of India's role as nominated bank more than its role as advising bank because Indian Bank's counterclaim is directed at Bank of India's handling of the documents that were presented and not at its communications with GRIPT as the advising bank. Having regard to the fact that the Letter of Credit provided that the credit was available "by acceptance" with Bank of India (see [11] above) and that it incorporates the default provisions of UCP 600, the authority that Indian Bank had granted Bank of India as nominated bank extended to performing the following acts:

> (a) examining documents presented to determine whether they constitute a complying presentation within five banking days following the day of presentation and forwarding documents to Indian Bank in relation to the complying presentation: Arts 14(a) and (b) and Art 15(c) of UCP 600;
>
> (b) accepting documents presented within the validity period of the credit if they were found to comply with the credit terms, and effecting payment upon such acceptance: Arts 7(a)(iv) and 12(b) of UCP 600; and

(c) rejecting documents presented if the presentation does not comply with the credit terms, provided that a notice to that effect is given to the presenter within the fifth banking day following the day of presentation: Arts 16(a), (c) and (d) of UCP 600.

72 The proposition that a nominated bank authorised by the issuing bank to transact with the beneficiary does so on behalf of the issuing bank and is the agent of the issuing bank to the extent of the authority granted has wide support both in the case law and in academic commentaries; see for instance: *St George Bank Ltd v Heinz Salzberger and Norma Salzberger* [2001] NSWCA 67 at [16]; *Swiss Bank Corporation v Jai Hind Oil Mills Co* (1994) 1 BCR 371; *Kronman (Samuel) & Co., Inc.* 218 App Div 624, 218 N.Y.S. 616 (1926); *Jack* at paras 4.20 and 6.6–6.8; Richard King, *Gutteridge and Megrah's Law of Banker's Commercial Credits* (Europa Publications, 8th ed, 2001) ("*Gutteridge and Megrah*") at pp 87–90; *Ellinger and Neo* at p 180; E P Ellinger, *Documentary Letters of Credit, a comparative study* (University of Singapore Press, 1970) ("*Ellinger (1970)*") at p 219; Dominique Doise, "The 2007 revision of the Uniform Customs and Practice for Documentary Credits (UCP 600)" (2007) 1 IBLJ 106 at p 109; Alan Ward, "The nature of negotiation under documentary credits" (1999) 14(9) JIBLR 292 at p 292; and King Tak Fung, *Leading Court Cases on Letters of Credit* (ICC Publishing, 2004) at p 18).

73 In the context of a letter of credit that is subject to UCP 600, the relationship between an issuing bank and a nominated bank that acts on the nomination constitutes an agency by reason of the authority that the issuing bank confers upon the nominated bank (see [71] above). When an issuing bank authorises a nominated bank to accept a draft and when the nominated

bank, acting in furtherance of such authority, accepts a presentation of documents made by the beneficiary, its acceptance binds the issuing bank, precluding it from taking a different stand from that taken by the nominated bank (Art 7(a)(iv) of UCP 600). It cannot then point to discrepancies in the documents or complain about them having arrived late at its premises to avoid liability to the beneficiary (*Amarnath Sanganaria v Sonali Bank* (2003) AIR (CAL) 255 at [22]; *Southern Ocean Shipbuilding Co Pte Ltd v Deutsche Bank AG and another* [1993] 3 SLR(R) 86 at [50]). Similarly, when such a nominated bank accepts the documents but does not make payment at maturity, the beneficiary can turn to the issuing bank to honour the draft (see Art 7(a)(iv) of UCP 600). One of the leading commentators on documentary credits, John F Dolan makes an instructive observation as follows in John F Dolan, "The Correspondent Bank in the Letter-of-Credit Transaction" (1992) 109 Banking LJ 396 ("*Dolan*") at pp 428 and 430 on the dynamics of agency between the issuing bank and the nominated bank:

> … The payer is best seen as an agent of the issuer whose acts of honor or dishonor bind the issuer. When the payer seeks funds from the issuer, however, the payer is seeking payment and stands in the shoes of a beneficiary presenting his documents to the issuer. If the documents are defective, the issuer may dishonor with impunity, and the payer must either look to the seller [citing inter alia Article 11(d) of UCP 400] or bear the loss.
>
> **By nominating a bank to act as the payer of the credit, the issuer has lost some control of the situation. It has, in effect, designated the payer as the party that will exercise the issuer's prerogatives when the seller presents its draft and documents for payment.** If the payer holds the documents in violation of Article 16 of the UCP [400] or fails to examine them and notify the seller of defects, the issuer will be precluded from claiming that the documents do not comply with the credit [citing Article 16(e) of UCP 400]. Similarly, if the payer honors the seller's draft in the face of noncomplying documents, the preclusion rule of the UCP [400] prevents the issuer from recovering the payment from the seller; and if the payer dishonors, the seller has rights against the issuer. **In**

> **short, the payer is the issuer's agent; if the payer stumbles, the issuer is bound. Thus, if the payer either pays or accepts, the issuer has no defense against the seller.**
>
> …
>
> Finally, if the payer fails to honor facially conforming documents, the seller has no cause of action against the payer. The payer, by definition, has not undertaken to honor the seller's draft and acts only as the issuer's agent. In the case of payer dishonour without justification, the seller's action must be against the issuer.
>
> [emphasis added in bold]

74 In the course of our analysis (at [72]–[73] above), we have referred to cases and academic authorities that pertained to previous versions of the UCP. But in our judgment, these authorities remain relevant to our analysis insofar as the previous versions of the UCP contain similarly worded provisions that correspond to those we have identified in UCP 600 which grant the nominated bank authority to transact with the beneficiary on the issuing bank's behalf. The authors of *Jack* observe in the context of UCP 600 that the agency relationship binds the issuing bank when the nominated bank accepts documents presented by the beneficiary regardless of whether the documents are in actual compliance with the credit:

> 6.17 By nominating a bank as the bank with which the credit is available, an issuing bank invites and authorises the nominated bank to receive and examine documents and to honour or negotiate, as the case may be. …
>
> 6.19 … UCP [600] Articles 7.c, 8.c and 12.b make clear that a nominated bank which honours a credit by accepting a draft or incurring a deferred payment obligation and which prepays or purchases the draft accepted or the deferred payment undertaking incurred, acts with the authority of the issuing bank and, provided that the presentation was a complying presentation, can look to the issuing bank or the confirming bank, if any, for reimbursement.

> 6.44 … [W]here the correspondent bank fails to observe a discrepancy between the documents presented and the terms of the credit … the acceptance of the documents by the correspondent bank (acting as nominated bank) will bind the issuing bank because the correspondent bank has acted as its agent to examine and accept or reject the documents. …

75 We are therefore satisfied that a nominated bank authorised to accept a presentation of documents becomes the issuing bank's agent for that purpose when it acts on the nomination or otherwise accepts the appointment. This is of course subject to any agreement to the contrary that the issuing bank and the nominated bank might have between themselves, as well as any modification that the issuing bank might make to the default terms contained in UCP 600 in terms of removing the authority it would otherwise be taken to have granted the nominated bank. With that in mind, we turn to examine Indian Bank's counterclaim.

Analysis

(1) Did Bank of India become an agent of Indian Bank?

76 Bank of India argues that without any contractual relationship between itself and Indian Bank, the latter cannot unilaterally impose obligations on it. At the hearing of these appeals, Mr Gill, submitted that by making clear it would not transact with GRIPT until it opened a current account, Bank of India in effect rejected the nomination. He further pointed us to Bank of India's advice letters sent to GRIPT stating that Bank of India was not incurring any liability on its part as evidence that it never engaged as nominated bank. We disagree.

77 We accept the basic proposition that agency cannot be unilaterally imposed. As between the issuing bank and the nominated bank, the latter's

consent would generally be required before agency duties (and rights) can arise. Indeed, consent of both the principal and agent is generally regarded as a prerequisite to agency (*Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130 at 1137 *per* Lord Pearson; American *Restatement (Third) of the Law of Agency*, § 1 (2006) ("*Restatement (Agency)*")). Where we disagree with Bank of India is over its contention that such consent did not arise on the present facts. First, Bank of India may have sought to impose conditions as to the terms on which it was prepared to deal with GRIPT. But it *never* conveyed any of this to Indian Bank which was its putative principal for this purpose and in this context. While it is true that Bank of India did not *expressly* inform either Indian Bank or GRIPT that it had consented to being a nominated bank, consent need not be expressed in words and can be inferred from conduct (see *Targe Towing Ltd v Marine Blast Ltd* [2004] 1 Lloyd's Rep 721 at [21] *per* Mance LJ (as he then was)). Bank of India knew it had been nominated under the Letter of Credit, at the very latest by 27 February 2012 when it advised GRIPT on the opening of the Letter of Credit. It was also aware of the presentation of documents made by GRIPT on 16 March 2012. If Bank of India did not wish to accept its appointment as nominated bank to receive documents on Indian Bank's behalf, it was open to Bank of India to refuse the delivery of those documents and to inform its appointor, Indian Bank, of this fact and also to inform GRIPT to forward the documents directly to Indian Bank as it was not willing to accept a presentation. This, it did not do. On the contrary, Bank of India seemed content to receive the documents and liaise with GRIPT on that basis. By receiving the documents, which GRIPT presented "subject to [UCP600]" and then holding onto them, and participating in active discussions with GRIPT to negotiate the Letter of Credit, we are satisfied that Bank of India had acted on its nomination and so had accepted the nomination.

78 Mr Gill also submitted that Bank of India should not be affixed with an agency relationship because it had made it clear that it would not incur any liability each time it advised GRIPT of the amendments to the terms of the Letter of Credit. With respect, this has no bearing on the issue of whether Bank of India had been constituted an agent of Indian Bank because those communications were made by Bank of India to GRIPT and not to Indian Bank. Mr Gill was unable to point us to any communication by Bank of India to Indian Bank informing the latter that Bank of India was not accepting its appointment as nominated bank or that it would not act as its agent and receive documents from GRIPT in that capacity.

79 As to the argument that Bank of India had made clear to GRIPT that it would not transact in any way with GRIPT until it had opened a current account and established a relationship, we have earlier observed (see [62]–[63] above), this is not borne out by the evidence. The evidence quite clearly shows that Bank of India did receive the documents from GRIPT and did continue to communicate with it. The correspondence between the parties suggests that Bank of India made it a precondition to *negotiating* the credit that GRIPT had to open an account with it; but this had nothing to do with the separate matter of it *receiving* the documents when these were presented by the beneficiary.

80 In all the circumstances, we are satisfied that Bank of India by conduct did accept its appointment as nominated bank, and it was therefore properly constituted as the agent of Indian Bank for the purposes of receiving the documents.

(2) As agent, did Bank of India owe Indian Bank any duties?

81 Upon the creation of an agency relationship, an agent and principal will owe each other various duties. It is of course possible for the parties to set out the terms of their engagement expressly. In the absence of express terms, this can also be dealt with as a matter of essential implied terms. In our judgment, the implied duties that a nominated bank owes the issuing bank would ordinarily be shaped by the scope of the authority conferred upon it. Thus a duty that may generally be implied in this setting is that the agent is to perform its obligations with care and skill (*Forsikringsaktieselskapet Vesta v Butcher and others* [1986] 2 All ER 488 at 507). Where a nominated bank is authorised to accept documents on the issuing bank's behalf, it would owe the issuing bank a duty to examine the documents with due skill, care and diligence before accepting them (see *Michael Doyle & Associates Ltd v Bank of Montreal* [1984] 11 DLR. (4th) 496 ("*Michael Doyle*") at [56]). Accepting non-compliant documents may subject the nominated bank to a liability for damages suffered by the issuing bank as a result of its breach or negligence. It also owes the issuing bank a duty to follow document rejection procedures stipulated under Art 16 of UCP 600, because its failure in this regard will bind the issuing bank as against the beneficiary. The central question before us pertains to the scope of the duty of reasonable skill and care and particularly in respect of what the Bank of India did, or failed to do, once it received the documents from GRIPT. Because the parties have expressly chosen UCP 600 to govern their relationship, it makes sense to proceed by analysing the duties of the nominated bank (both express or implied) as set out therein. While regard might perhaps be had to general principles of agency law (see, for example, *Ellinger and Neo* at p 185) in understanding the duties of the nominated bank, UCP 600 should be the first port of call.

82 In its case filed in relation to CA 158/2014 and in oral submissions before us, Indian Bank argued (in the context of claiming an indemnity from Bank of India) that Bank of India had failed to act with reasonable despatch and exercise skill, care and diligence in the performance of its duties *qua* Indian Bank's agent. In this regard, we note that in its defence and counterclaim, Indian Bank averred that Bank of India owed it a number of express or implied duties. We highlight below only the averments that are relevant to the arguments made by Indian Bank before us:

> 10 [Indian Bank] pleads that [Bank of India] owed to [Indian Bank], *inter alia*, the following express or implied duties under the [Letter of Credit]:
>
> …
>
> (b) to carry out [Bank of India's] Obligations with reasonable dispatch and if [Bank of India] cannot or will not carry out its obligation(s) when instructed or within a reasonable time, to inform [Indian Bank];
>
> (c) to exercise skill, care and diligence in the performance of [Bank of India's] Obligations as is usual and necessary in or for the ordinary and proper conduct of letter of credit business.
>
> 13 … [Indian Bank] in breach of the [Letter of Credit] or its duties to [Indian Bank] failed, within 5 banking days or at all, to:
>
> …
>
> (c) forward the documents determined to be a complying presentation to [Indian Bank].
>
> …

83 In short, Indian Bank contends that there is an express or implied duty on the part of Bank of India to forward the documents determined to be a complying presentation and/or to inform Indian Bank if any of Bank of India's obligations will not be carried out within a reasonable time. We would focus on a nominated bank's duty to forward documents as set out in UCP 600 and

highlight that the common law duty of an agent to provide information broadly reflects a similar position.

CONSTRUING UCP 600: *FORTIS BANK V IOB*

84 Before we discuss the duty to forward documents under UCP 600, it would be appropriate for us to set out the approach we take towards construing and implying terms into UCP 600. To this end, we refer to the decision of the English High Court in *Fortis Bank SA/NV and another v Indian Overseas Bank* [2010] 2 All ER (Comm) 28 ("*Fortis v IOB* HC") (which was affirmed on appeal by the English Court of Appeal in *Fortis Bank SA/NV and another v Indian Overseas Bank* [2011] 2 All ER (Comm) 288 ("*Fortis v IOB* CA")). There, five letters of credit ("L/C 1" to "L/C 5"), each subject to UCP 600, were issued by the defendant, Indian Overseas Bank ("IOB"), to the applicant. The letters of credit contained a request from IOB to the plaintiff, Fortis Bank ("Fortis"), to act as a confirming bank. The applicant presented the documents under L/Cs 1–3 to Fortis. Fortis accepted the documents and paid the applicant the amount due. The documents were then forwarded by Fortis to IOB. The documents presented under L/Cs 4 and 5 were subsequently forwarded by Fortis to IOB. IOB rejected the documents presented under L/Cs 1–4 on the basis of discrepancies. It refused to reimburse Fortis (in respect of the drawings under L/Cs 1–3) and also to make payment to the applicant (in respect of L/Cs 4–5) on the basis that there were discrepancies in the documents presented in respect of L/Cs 1–4 and for a different reason in respect of L/C 5. It gave a "return" notice under Art 16(c)(iii)(c) of UCP 600 stating that it was returning the documents in respect of all the presentations except for five presentations under L/C 3, in respect of which IOB said that it exercised its option to hold them under Art 16(c)(iii)(a) of UCP 600. After

various exchanges between the banks, Fortis finally requested that IOB return the documents immediately. Eventually each of the documents was returned by IOB, but not before periods of between 89 and 104 days had passed from the time the first set of documents had been rejected and 34 days from the time the second set of documents had been requested.

85 Among the issues that arose for preliminary determination before the English High Court was whether there was an inherent or implicit obligation on IOB to act in accordance with its disposal statement in the "return" notice issued pursuant to Art 16(c)(iii) of UCP 600 and also that it does so with "reasonable promptness".

86 The English High Court (*per* Hamblen J) noted (at [43]) that in relation to UCP 600, a "purposive approach to construction [was] appropriate" and this should "reflect 'the best practice and reasonable expectations of experienced market practitioners'". He then noted the approach of the English courts in relation to the implication of terms in UCP 600 (at [47]) as follows:

> In relation to implication it was common ground that English law principles applied, but IOB stressed that the court should be particularly wary of in effect implying terms into an international code. However, in relation to the UCP it is clear that this is something which English courts have been prepared to do, applying English law principles: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 at 39 and *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587 at 599.

87 We also note and accept the position expressed by the English Court of Appeal in *Fortis v IOB* CA that the international nature of UCP 600 must be appreciated when construing its provisions, a point made (*per* Thomas LJ) at [29]:

> [A] court must recognise the international nature of the UCP and approach its construction in that spirit. … *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. A literalistic and national approach must be avoided.*
>
> [emphasis added]

88 Hamblen J further observed (in our view, correctly) (at [54]) that requiring a bank to act in accordance with "normal, expected and long-established required [*sic*] international banking practice is unlikely to lead to difficulty or uncertainty". This is another way of postulating that no uncertainty can arise from giving effect to the normal expectations of parties to a transaction.

89 Ultimately, Hamblen J concluded that on a proper construction of Art 16 of UCP 600, the requirement to act in accordance with the disposal statement in a "return" notice *was* imposed on the issuing bank, as such a construction reflected "best practice" and "reasonable expectations of experienced market practitioners". He went on to observe (at [59]) that if this result could only be achieved by implying a term, he was satisfied that such a term should be implied.

90 Hamblen J also considered that a term that the documents should be returned within a period of time to Fortis should be implied. In this regard, he noted that where time for performance of an obligation was not expressly stated, it was to be performed within a reasonable time. He noted (at [75]) that a reasonable time in that context should refer to "reasonable promptness". We highlight his reasoning, which we find persuasive:

> 72 … *Timeous performance is clearly an important consideration both in relation to documentary credits and the*

> *UCP generally* and to art 16 in particular. Thus the refusal notice under art 16 must be given within five banking days of the presentation and by expeditious means. *The need for expedition in giving a refusal notice would be seriously undermined if there was no time constraint in respect of actions which are required to be taken following the giving of such a notice.*
>
> …
>
> 75 … *I also accept that given that it is established banking practice to act promptly in such circumstances*, and given the obvious importance of priority processing of documents following a return notice or instruction, *a reasonable time in this context means with reasonable promptness*. …
>
> [emphasis added].

91 We note for completeness that the English Court of Appeal in *Fortis v IOB* CA took the view that the need to return documents "promptly" could be found by construing Art 16 of UCP 600 bearing in mind its purpose (at [44]–[45]). It also rejected IOB's argument that requiring return of documents "promptly" or with "reasonable promptness" would cause uncertainty.

THE DUTY TO FORWARD: ART 15 OF UCP 600

92 Against the backdrop of those observations, we turn to consider Bank of India's actions in relation to forwarding the documents to Indian Bank under Art 15. Bank of India received the documents on or about 16 March 2012, which was well before the expiry date of 26 March 2012. We begin with Art 14(b) of UCP 600, under which Bank of India was required to assess if the documents were complying:

> A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.

93 We then turn to Art 15(c) of UCP 600, which, as expressed, deals with the duty of the nominated bank to forward documents under certain circumstances. Article 15(c) of UCP 600 provides as follows:

> When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.

94 Given the phraseology of Art 15(c), it is appropriate to first consider the position of a nominated bank that "honours or negotiates" the credit *ie*, the literal interpretation of the provision. In this regard, we note that the commentary in *Byrne* (at pp 713–714) makes the following points:

(a) Article 15(c) of UCP 600 has to be read in the context of Art 12(a), which provides that a nominated bank has no obligation to act pursuant to its nomination unless it agrees to do so.

(b) Article 15(c) is relevant to a decision of a nominated bank to pay or negotiate because the nominated bank will not be able to obtain reimbursement from the issuing bank if it does not forward documents.

(c) There is, "strictly speaking", no legal obligation on the part of the nominated bank (which pays on the credit) to forward the documents, except for the fact that its right to any reimbursement is conditioned on it forwarding documents.

(d) However, it is "also expected" that even if a nominated bank elects not to act pursuant to its nomination, it will forward documents to the issuing bank.

95 *Byrne* then makes some points under the rubric of "when documents must be forwarded". We reproduce the observations (at pp 714–715):

> **When Documents Must Be Forwarded**. *UCP600 Article 15(c) indicates that when a nominated bank determines that documents comply, it must forward them.* However, like the other subarticles in this article it does not indicate when "when" is. The *Drafters' Commentary* at 70 indicates that the revision attempted to address concerns expressed by ICC National Committees of a failure on the part of nominated banks to release documents immediately or even after the bank had been reimbursed. If the rule addresses this problem, the response must be hidden in the word "when". *The same analysis that applied to the prior subarticles should be applied here; that is, promptly within the normal cycle of operations and by the end of the next banking day after the determination has been made unless there is a compelling reason for any delay.*
>
> [emphasis added]

96 That passage from *Byrne* states the position succinctly, which is that the nominated bank must forward the documents when it determines they comply. *Byrne* puts a time frame on this in terms of the duty accruing "promptly within the normal cycle of operations", which is construed as meaning no later than the end of the next banking day after the determination has been made unless there is *compelling* reason for any delay. As will be seen below, our purposive interpretation of Art 15(c) broadly corresponds with this conclusion.

97 It is true that the plain words of Art 15(c) do not stipulate a time within which the documents must be forwarded. In our judgment, there is consistency in the approach proposed in *Byrne* and that taken by Hamblen J in *Fortis v IOB* HC albeit in a slightly different context. In *Fortis v IOB* HC, the court held the duty to return the documents upon rejection, under Art 16 was one to be performed with reasonable promptness. *Byrne*, on the other hand, speaking of the duty to forward the documents once the nominated bank determines it to be compliant, considers this should be done promptly. We too consider that there is a need for expedition in assessing whether a presentation is complying

and deciding on the next course of action that should follow such an assessment. Otherwise, the purpose underlying the UCP would be seriously undermined. We concur with the English High Court and the Court of Appeal in *Fortis v IOB* that timeous performance is of general importance across the UCP 600. We are therefore driven to accept the formulation in *Byrne* and hold that documents should be forwarded by a nominated bank under Art 15(c) promptly once it has assessed that the presentation is complying and it honours or negotiates the credit, and also as suggested in *Byrne*, this means by the end of the next business day after the determination has been made unless there are compelling reasons for any delay.

98 Turning to *Byrne*'s observation noted at [94(c)] above, we consider this to be a purely theoretical point. A nominated bank's right to reimbursement is *conditioned* on it forwarding the documents (see also Art 7(c) of UCP 600). A nominated bank would not negotiate the documents and make payment except with the expectation of reimbursement. In keeping with this practical reality, the mandatory language, namely, "*must forward*", in Art 15(c) must be taken to mean what it says. The timeous forwarding of documents contemplated by Art 15(c) also has the additional goal of *protecting an issuing bank* from acting to its detriment, such as by inadvertently releasing security after enough time has passed following the expiry of the credit.

99 In our judgment, it is conceivable that an issuing bank might act to its detriment and suffer loss in this way, by acting on the premise that it has no liability because there has been no compliant presentation. Indeed, if one has regard to the expectations underlying the UCP 600, this seems more foreseeable than the alternative hypothesis, which is that the negotiating bank

having negotiated the documents and made payment has then chosen without good reason not to forward the documents contrary to the express stricture in Art 15(c). The nominated bank is in a position to prevent any such loss by forwarding the documents to the issuing bank in a reasonably prompt manner and if it fails to do so without compelling reason, then it might well find itself liable to the issuing bank for losses the latter has suffered. Of course, such liability can be legitimately excluded as a matter of contract. It would also fall upon the issuing bank to show that the failure to forward documents caused the loss (as opposed to some other proximate cause such as a misrepresentation by the applicant) and that it had mitigated its losses.

100 We turn to the situation where the nominated bank decides not to honour or negotiate the credit after it determines that a presentation is complying. It would appear at first blush that this situation is not covered by Art 15(c). It might then be argued that there is no obligation on the part of the nominated bank to forward documents to the issuing bank in such a situation. In our judgment, this would be wholly untenable. In the case of a nominated bank that honours or negotiates the credit and thereafter makes payment, there is an in-built incentive to forward documents in the form of reimbursement. Such an incentive is non-existent in the case of a nominated bank that does not honour or negotiate the credit. Yet by accepting the documents and determining that it is complying, it has already acted to crystallise the issuing bank's liability to the beneficiary (see at [73] above). In these circumstances, we are unable to see how it could be said that an obligation to forward documents promptly cannot be found by construing Art 15(c) purposively, especially having regard to the foundation on which the article rests and having regard to the expectation of market players. To hold that there is no duty to forward the documents in such circumstances would seem likely to

result in placing the issuing bank in breach of its obligations. We say this because its liability would have crystallised as noted above, but it may not even know this and would not have the documents which are the foundation of its undertaking to pay.

101 It is observed in *Byrne* (at p 713) that Art 15(c) has to be read in the context of Art 12(a), which provides that a nominated bank has no obligation to act pursuant to its nomination unless it agrees to do so. In our judgment, the obligations prescribed expressly or impliedly by Art 15(c) are predicated on the nominated bank having acted on its nomination (and, as we have held, become an agent of the issuing bank). Viewed in this light, the phrase "honours or negotiates" in Art 15(c) must be understood and read purposively to refer to the decision of a nominated bank to act pursuant to its nomination by accepting the presentation of documents. Pursuant to Art 14(b) a nominated bank would have had five days following the day of presentation to determine whether the presentation is complying. It then has to decide whether it wishes to honour or negotiate the credit. In our judgment, on a purposive interpretation of Art 15(c), it would then be obliged to forward documents with reasonable promptness to the issuing bank *whatever course it should decide to take in relation to the credit* by virtue of its having accepted its nomination. This obligation is eminently sensible as the determination of a complying presentation by a nominated bank is a watershed to the extent that it creates a legal obligation on the part of the issuing bank pursuant to Art 7(a) of UCP 600 to pay the beneficiary at maturity. While the issuing bank will not be able to avail itself of the failure to receive documents timeously from the nominated bank to defend a demand for payment brought by the beneficiary, we can see no reason why it should not, (subject to the points noted at [99] above) be able to claim from the nominated bank any other independent loss it

might have suffered arising from the breach of that duty by the nominated bank. It is critical in our judgment not to conflate these independent analytical strands; they relate to separate matters.

102 We also agree that the purposive interpretation of UCP 600 must have regard to the expectations of market players. In this regard we note that *Byrne* emphasises the commercial expectations of the parties to a letter of credit transaction: even if a nominated bank elects not to act pursuant to its nomination, it will forward the documents to the issuing bank (see [94(d)] above). We consider this expectation to be strengthened where the nominated bank having accepted the nomination, determines compliance but thereafter decides not to pay or negotiate the credit because it has in such circumstances modified the legal position of the issuing bank in relation to the beneficiary. In this regard, we echo the view in *Fortis v IOB* HC (at [54]) that requiring a party to act in accordance with expected banking practice is unlikely to lead to difficulty or uncertainty. And the requirement to perform this duty with reasonable promptness is, in our judgment, consistent with the standard of commercial conduct that is expected in UCP 600.

103 In any case, we see no difficulty in implying a term to this effect into UCP 600 were it necessary to do so. It seems to us completely untenable to argue that the nominated bank can hold on to the documents indefinitely without forwarding it to the issuing bank after it has decided not to honour or negotiate the credit. For this reason, the touchstone of *necessity* for the implication of a term under Singapore law (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101]) has been satisfied. There is business efficacy in requiring the nominated bank to forward the documents after it determines that the presentation is complying

and decides not to honour or negotiate the credit; the issuing bank is thus made aware of its liability to the beneficiary and the nominated bank achieves a "clean break" from the particular transaction. If the parties were asked what the nominated bank should do with the documents if it decides not to honour or negotiate the credit after it had determined compliance, we are satisfied they would without hesitation agree that the nominated bank would have to forward the documents to the issuing bank. We see no reason for holding that this obligation should not be discharged promptly as we have already observed.

COMMON LAW DUTY TO FORWARD: NOMINATED BANK AS AGENT

104 For completeness we note that the duty to forward documents once a nominated bank accepts its nomination and becomes an agent of the issuing bank reflects the common law duty of an agent to return documents and provide information to its principal. When an agent is in possession of documents for his principal, he is under an obligation not to deal with those documents in such a way as would cause harm or loss to his principal. We first refer in this regard to the common law position on the duty of an agent to provide information. It has been noted in Peter Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) at para 6–021 that "an agent, is in general, under a duty to keep his principal informed about matters which are of his concern" (see also *Ocean City Realty Ltd v A &M Holdings Ltd* (1987) 36 DLR (4th) 94 at 98; *John D Wood & Co (Residential & Agricultural) Ltd v Knatchbull* [2003] 1 EGLR 33 and *Premium Reals Estate Ltd v Stevens* [2009] NZLR 384).

105 The common law position on the duty of an agent to inform and provide information to his principal has been concisely summarised in § 8.11 of the *Restatement (Agency)*, which provides as follows:

> **Duty To Provide Information**
>
> An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when
>
> (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
>
> (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

106 In relation to the common law duty of an agent to inform its principal, it is difficult to quarrel with the view that the triggering of the issuing bank's obligation to pay the beneficiary upon a complying presentation to the nominated bank is a matter which is of concern to an issuing bank and therefore that a nominated bank should be regarded as being under a duty to keep the issuing bank informed of this development. We also consider that the act of forwarding the documents to the issuing bank by the nominated bank would, in general, be sufficient to discharge this obligation.

107 As a general rule, where an agent has an obligation to perform a certain act for a principal, and no time is stipulated for performance, the law implies an obligation to perform it within a reasonable time (see Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2010) at para 07.007). We also observe that what is a reasonable time will depend on the circumstances (see *Hick v Raymond & Reid* [1893] AC 22 ("*Hick*") at 29 and *Scott v Scott* [1921] P 107 at 124). Our observation that the obligation to forward documents has to be discharged "promptly" in the context of UCP 600 would apply equally in the

common law context. For the avoidance of doubt, we have undertaken this analysis not because there is a need to do so, given our view that Art 15(c) of UCP 600 sufficiently encapsulates the nominated bank's obligations in this regard. Rather, it is to demonstrate that the analysis whether under UCP 600 or the common law leads to a broadly consistent conclusion.

108 In our judgment, the effect of the provisions and principles set out at [81]–[107] above in the context of the facts that are before us may be summarised as follow:

(a) We have found at [80] above that Bank of India was properly constituted as the agent of Indian Bank for the purpose of receiving the documents.

(b) Once it received the documents, Bank of India had a period of up to five days to determine whether there was a complying presentation of the documents and thereafter decide whether it was going to honour or negotiate the credit.

(c) Once it determined that there was a complying presentation and decided not to make payment itself, Bank of India had thereafter to forward the documents to Indian Bank with reasonable promptness to enable it to honour the credit.

109 For reasons that will become fully apparent in the next section, where we analyse the relief sought by Indian Bank in its misguided counterclaim, we are not inclined to consider whether Bank of India did in fact breach its duty on the present facts. To state the point briefly, Indian Bank's liability to GRIPT arises pursuant to Art 7(a) of UCP 600 (see [55(a)] and [67] above).

This was the very liability it undertook as a result of issuing the Letter of Credit. That being the case, Indian Bank could only look to Bank of India for damages (assuming this was pleaded) in relation to any independent loss that flowed from Bank of India's breach of duty *qua* agent. But no prayer for damages was pleaded, and no independent loss was identified in Indian Bank's pleaded case; nor was this raised in the trial below or in the submissions and arguments before us. Indian Bank's counterclaim focused exclusively on obtaining an indemnity in relation to its liability to GRIPT. Deciding whether there has been a breach of duty on the present facts when Indian Bank is clearly not entitled to any other relief (including nominal damages) would amount to granting declaratory relief to Indian Bank assuming it can establish a breach. Indian Bank has not prayed for such relief. Moreover, as noted in Lord Woolf & Jeremy Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 4th Ed, 2011) at para 4–99, the court would not be favourably disposed to grant a declaration that would serve no useful purpose even if it had been prayed for.

110 We do note that it was more than one month after the presentation of documents by GRIPT, on 18 April 2012, that Bank of India finally forwarded the documents to Indian Bank, and it was only then that Indian Bank finally came to know that a presentation had already been made much earlier. This would have to be assessed against the relevant circumstances such as the date of expiry and maturity of the Letter of Credit, Bank of India's reasons for the delay as well as the relative responsibility of each party in causing any independent loss and the steps taken by Indian Bank to mitigate such losses before deciding whether Indian Bank could succeed in a properly pleaded counterclaim for damages. However, *none* of this was explored at the trial.

(3) Is Indian Bank's claim for an indemnity tenable?

111 We turn to consider the case that *was* pleaded by Indian Bank.

112 In its pleaded case, Indian Bank sought an *indemnity* in respect of its liability to GRIPT from Bank of India on the basis that it had breached its express or implied duties as an agent. However, as we have found, Indian Bank's liability to GRIPT flows independently pursuant to Art 7(a) of UCP 600 – see the analysis at [47]–[57] above. Indian Bank's liability to GRIPT was the consequence of the application of UCP 600 in the context of the Letter of Credit that was issued and not the consequence of any breach by Bank of India of any obligations it may have owed Indian Bank. That being the case, a claim for an indemnity for the breach of Bank of India's duties as an agent is completely untenable. It could have been possible for Indian Bank to bring a claim against the Bank of India on the basis of the analysis set out at [81]–[108] above, if it had pleaded and was able to prove that it suffered damages as a result of the latter's breach of some duty.

113 But Indian Bank did not seek general damages against Bank of India in its counterclaim for any independent loss it might have suffered. In this regard, we note that this court observed in *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*") (at [61]) that a plaintiff need not plead a prayer for general damages subject to the qualification that the pleadings gave fair notice to the opposing party of the case that had to be met. Thus, a prayer for general damages need not be pleaded where it is in any event apparent from the pleadings that a claim for general damages is to follow upon a finding of a breach. Seen in that light, it seems clear to us from Indian Bank's counterclaim that it considered that the consequence that should flow from Bank of India's breach of duty was an

indemnity in relation to its liability to GRIPT and not general damages in relation to other independent losses. As we have already noted, the claim for an indemnity is untenable. The counterclaim, as pleaded, therefore does not give notice that Indian Bank is claiming a loss that is independent of its liability to GRIPT.

114 This conclusion is buttressed by the fact that neither at the trial nor before us did Indian Bank adduce any evidence to show that it *had* suffered a loss independent of its liability to GRIPT under and in accordance with the terms of the Letter of Credit. It might well be the case that Indian Bank has in fact suffered no other loss because it stands to be indemnified by Varun. On the other hand, it could also be the case that the Indian Bank has not appreciated that its counterclaim for an indemnity would not accommodate such an independent loss even if it were to succeed in establishing a breach of duty on the part of Bank of India.

115 In relation to Indian Bank's failure to lead evidence on any independent loss, we note that the High Court in *Chew Ai Hua Sandra v Woo Kah Wai and another (Chesney Real Estate Pte Ltd, third party*) [2013] 3 SLR 1088 ("*Sandra Chew*") has suggested that an assessment of damages may nonetheless be ordered in such circumstances where a breach is found but where no evidence of loss has as yet been led and there has been no application to bifurcate the trial in respect of issues of liability and quantification. We make some brief observations on this.

116 In *Sandra Chew*, the plaintiff sought to exercise an option to purchase the defendants' property. The defendants contended that the option had expired. The High Court found that the defendants were in breach of their

contractual obligations to the plaintiff. The court then turned to consider the plaintiff's prayer for specific performance of the contract. By that time, the property had already been sold to third parties. The court therefore determined that specific performance was not a viable remedy and moved to consider the plaintiff's alternative claim for damages. The court decided (at [58]) that the measure of damages would be the difference between the market value of the property at the date of completion and the contract price. However, there was no reliable evidence before the court of the market value of the property at the date of completion because the plaintiff had focused on the primary claim for specific performance. The court ordered that damages be separately assessed (at [62]) because it found in those circumstances that it would be unjust to award nominal damages to the plaintiff given that it was primarily specific performance that had been sought by the plaintiff. In so doing, the court held (at [69]) that, on the facts, any potential unfairness occasioned by giving the plaintiff another opportunity to provide evidence of loss could be addressed by narrowly circumscribing the assessment of damages and compensating the defendants in costs.

117 In our judgment, *Sandra Chew* was an exceptional case that is best understood by reference to the particular facts that were before the court. It is well-established that a plaintiff can only be awarded substantial damages if such damages have been proved; and that a court should award only nominal damages if adequate evidence of damages has not been properly adduced (see *Lee Chee Wei* at [65]). We are of the view that this position is not to be lightly displaced by ordering a further assessment of damages in circumstances where the questions of liability and the quantification of damages have not been bifurcated at the trial because, otherwise, it would give a plaintiff a second bite at the proverbial cherry.

118 We are satisfied that *Sandra Chew* is not applicable on the present facts because Indian Bank had framed its claim for relief exclusively in terms of an indemnity and did not raise any allegation of any loss independent of this (*ie*, damages) in its pleaded case. In that sense, Indian Bank's counterclaim is one step removed from *Sandra Chew* in a very fundamental aspect: there *was* an alternative prayer for damages *in lieu* of specific performance in *Sandra Chew*.

119 Bank of India submits that in any case no loss resulted from the breach given that the transaction relating to the Letter Credit was a synthetic trade arrangement. Notwithstanding our view that Indian Bank has not adduced evidence of any loss, we highlight for completeness that we do not accept Bank of India's characterisation of the transaction. At the hearing before us, Mr Gill argued that the transaction between Indian Bank and GRIPT was not a typical letter of credit transaction. Instead, he submitted that it was a species of financing pegged to an artificial trade. In reality, Mr Gill said, there was no shipment of cargo underlying the Letter of Credit, and for that reason, the documents were of little use to the issuing bank and the applicant. It may well be true that the transaction was in fact a synthetic trade arrangement, but as was noted by counsel for Indian Bank, Mr Tan Teng Muan ("Mr Tan") as well as by counsel for GRIPT, Mr Winston Kwek ("Mr Kwek"), this was not pleaded. Further, throughout the course of the proceedings, no suggestion had ever been made that the matter should be resolved in any other way than by reference to the principles governing letters of credit. In any case, the evidence given by Mr Bhasi and Mr Chew during the trial was that there had been an actual shipment of cargo except that the documents were photocopies, and they did not in fact agree with Mr Gill's suggestion that the Letter of Credit was a synthetic trade transaction.

120 All in all, Indian Bank's counterclaim against Bank of India fails to get off the ground because of the way its pleadings were framed and its failure to lead evidence relevant to the determination and assessment of loss. We therefore dismiss CA 158/2014.

Our decision in CA 156/2014

121 CA 156/2014 is GRIPT's appeal. GRIPT appeals against the Judge's dismissal of its claim against Bank of India and its claim for pre-judgment interest as well as for a *Sanderson/Bullock* order against Indian Bank. Its appeal raises the following issues:

(a) whether Bank of India had negotiated the Letter of Credit;

(b) whether pre-judgment interest should be ordered against Indian Bank; and

(c) whether a *Sanderson/Bullock* order should be made against Indian Bank.

122 We have noted at [6] above that GRIPT indicated that it wished to pursue the appeal against Bank of India only in the event that Indian Bank succeeds in its appeal in CA 158/2014 that it should not be held liable. The event upon which this aspect of its appeal is contingent did not eventuate since we found Indian Bank liable to honour the Letter of Credit to GRIPT in CA 158/2014. Nevertheless, for completeness, we propose to briefly examine whether Bank of India had negotiated the Letter of Credit given that extensive arguments have been canvassed on this issue both on appeal and in the proceedings below.

Did Bank of India negotiate the Letter of Credit?

123 It is settled law that the nomination of a bank under a credit does not give the beneficiary any right to enforce the credit against the nominee unless it adds its own undertaking (which is separate and independent to that of the issuing bank) by way of confirmation (see Art 8 of UCP 600) or if it transacts as principal with the beneficiary by negotiating the credit (Art 12(a) of UCP 600; *Jack* at para 1.8). Otherwise, the nomination is confined to nominating the bank for the purposes of receiving a presentation of the requisite documents. GRIPT's claim against Bank of India is premised on Bank of India having *negotiated* the Letter of Credit. The term "negotiation" is defined in Art 2 of UCP 600 to mean the act of purchasing the draft drawn upon a nominated bank, either by advancing or agreeing to advance funds to the beneficiary on or before the maturity of a credit. The question of whether a draft has been negotiated, like any other question of whether an agreement has been reached, is a question of fact that has to be determined by reference to all the surrounding circumstances. What is clear, however, is that the mere act of receiving, examining and forwarding the documents on the part of a nominated bank does not constitute negotiation (Art 12(c) of UCP 600) and this is because by those acts alone, the nominated bank does not itself incur or undertake a liability to the beneficiary to honour the draft.

124 GRIPT first approached Bank of India for it to negotiate its draft on 24 February 2012. GRIPT wanted to obtain early access to the funds by selling the credit to Bank of India. However, the actual monies payable would probably have to be discounted to reflect the interest accruing between the date of receipt of payment by GRIPT and the date on which payment would fall due from the issuing bank. GRIPT's case is that an oral agreement for

Bank of India to negotiate the Letter of Credit was concluded on 24 February 2012, the date of the very first communication between its representative, Bhasi, and Bank of India's representative, Prabhu. In our judgment, there are a number of difficulties with GRIPT's case in this regard. First, the conversation between the two parties related to a different issuing bank, namely Bank of Baroda, and not Indian Bank. This is reflected in the email that GRIPT's representative, Yeo sent to Bank of India later on the same day:

> Subject: *Offer:* Confirmation and discounting of 180-day structured LC to be issued by **Bank of Baroda, Mumbai, India** …
>
> Further to your discussion with [Bashi], this *email offer* is to confirm in writing the pricing and other terms and conditions pertaining to the confirmation and the discounting of the following Instrument (as defined below) on a without recourse basis.
>
> *Please provide your confirmation and agreement to the offer* and procedures within the next 2 business days by confirming your acceptance over return email to the above addressees.
>
> [emphasis added in italics and bold italics]

125 While the other terms provided in Yeo's email are by and large consistent with those appearing in the Letter of Credit, this is insufficient to evidence an agreement by Bank of India to negotiate the Letter of Credit. This is because the identity of the issuing bank is a significant term that could have been reasonably material to a nominated bank's decision of whether to negotiate a credit. In documentary credit transactions, the creditworthiness of the issuing bank is often of particular importance to a third-party bank because once it accepts the draft and has paid the beneficiary, its recourse is limited to seeking reimbursement from the issuing bank.

126 GRIPT sought to explain this. During cross-examination, Bhasi suggested that there had actually been a subsequent tele-conversation between

him and Prabhu at some point between 24 February and 1 March 2012 amending the identity of the issuing bank to Indian Bank. But even then, his testimony was tentative and inconclusive:

> A. I'm sure, sir, there may be a call in between. I'm not sure about it. I have not recorded that call. But generally it happens that, you know, if there is a change in the bank, we'll inform the bank, we call up and we do that.
>
> …
>
> Q. So what was said during the call? Let's just explore.
>
> A. As I said, I don't remember the call. I don't recollect. …

127 In our judgment, the Judge was well entitled to find that this was an afterthought rather than a recollection of what had in fact transpired. It only emerged for the very first time during trial after Bhasi's attention was drawn to this discrepancy. Aside from that, it was not pleaded at all. In our judgment, the existence of a subsequent conversation amending the terms of the purported oral agreement would have been a material fact that GRIPT should have adverted to, had it in fact transpired. In the circumstances, we are not minded to disturb the Judge's finding on this point.

128 There is a further reason why we do not think an agreement was reached on 24 February 2012. The express terms of the email of 24 February 2012 suggests that parties had yet to reach an agreement. Phrases such as "this email offer" and Yeo's asking Prabhu to provide his "confirmation and agreement to the offer" are more consistent with an offer or a proposal rather than a conclusive agreement. Similar phrases such as "revised offer" and "please accept" featured in her subsequent email dated 1 March 2012. GRIPT sought to underplay and explain the use of these phrases by saying Yeo was a layperson who was not well-versed with the legal implications of these terms. This did not find favour with the Judge, who found Yeo to be a highly

educated individual with substantial commercial experience having worked with banks and multi-national corporations for more than two decades. Again, there is no reason for us to disturb the Judge's conclusion.

129 It is significant that Bank of India did not respond affirmatively to any of Yeo's emails requesting its confirmation. On the contrary, Bank of India made it clear when it advised GRIPT of the opening of the Letter of Credit that there had been no negotiation and that it had incurred no liability itself under the Letter of Credit. In a letter addressed to GRIPT dated 27 February 2012, Bank of India said that it was discharging its duties as the Advising Bank "without any responsibility" on its part. It also informed GRIPT in that letter that it "shall be glad to consider negotiating documents" and was "prepared, at [its] option, to negotiate / discount bills drawn". Had the credit actually been negotiated on 24 February 2012, such language would have been out of place.

130 It is evident from the correspondence that by March 2012 the parties were stuck over Bank of India's insistence on GRIPT opening a current account before Bank of India would proceed with the negotiation. Bank of India's position was stated in Prabhu's email dated 22 March 2012:

> Regarding the L/C discounting, we may take up the same *once* the CD account is opened. Kindly ensure that the CD account is opened at the earliest *so that* we may take this issue forward.
>
> [emphasis added]

131 GRIPT's case is that these were two unconnected matters that happened to have taken place concurrently. We do not agree with GRIPT's contention that there was no nexus between the opening of an account and the negotiation of the credit. Indeed, GRIPT's representative, Chew had himself

linked the two in his email dated 3 April 2012 to Prabhu in which he submitted the application form and documents pertaining to the account opening:

> Please give your go ahead and we can get the process started and to have the USD 9.74mm lc from Indian Bank discounted asap.

132 Apparently, things came to a standstill at this point. Bank of India alleges that the account could not be opened because GRIPT amended certain terms in the account opening application form. On 16 April 2012, Chew sent an email to Prabhu reporting a discussion that GRIPT had had with Bank of India's CEO, Mr Alam, concerning an alternative proposal for Bank of India to discount the Letter of Credit immediately but to keep the discounted proceeds until GRIPT had successfully opened an account with it. On the next day, Bhasi emailed Prabhu alleging that the latter had agreed to discount the Letter of Credit and pay Bank of India upon the opening of the account. Bank of India argues that these are bare assertions though it did not respond to Bhasi's email.

133 Perhaps, this lack of a response is the only piece of evidence that favours GRIPT together with the cover letter under which Bank of India forwarded the documents to Indian Bank on the following day, 18 April 2012. The cover letter reads as follows:

> + Please advise/confirm the due date by authenticated message.
>
> *+ On due date, please authorise us to claim reimbursement as per credit terms.*
>
> This presentation of documents is subject to the Uniform Customs & Practices for Documentary Credit as stated in the above referred Letter of Credit.

> *We certify that the amount negotiated has been endorsed on the reverse of the original credit.*
>
> [emphasis added]

134 GRIPT placed emphasis on Bank of India's use of the phrase "we certify … the amount negotiated". On the face of it, these words suggest that Bank of India was informing Indian Bank that it had negotiated the Letter of Credit. However, it is important that the letter not be viewed in isolation but rather against the surrounding factual matrix. It is significant that by 18 April 2012, the Letter of Credit had already expired three weeks earlier. Having regard to this critical fact, we find it difficult to believe that Bank of India would negotiate the Letter of Credit at that late stage without seeking prior confirmation or acceptance of the documents on the part of Indian Bank. Indeed, Prabhu explained that when the documents were submitted to Indian Bank, he was alive to the possibility that Indian Bank might reject the documents. As to why the letter was worded in this manner, the Judge accepted Bank of India's explanation that the use of those words was a mistake occasioned by the fact that it had used a standard template for this purpose. On the whole, we do not think there is sufficient basis for us to interfere with the Judge's finding that the Letter of Credit was not negotiated by Bank of India.

135 Hence, we affirm the Judge's finding that Bank of India did not negotiate the Letter of Credit. It therefore follows that Bank of India, as a nominated bank that is not also a negotiating bank, is not liable to honour the Letter of Credit in favour of GRIPT. To that extent, we would have dismissed GRIPT's appeal in respect of Bank of India even if GRIPT had pursued it.

Whether pre-judgment interest and/or Sanderson/Bullock order should be ordered against Indian Bank

136 We turn to the remaining aspects of GRIPT's appeal. They relate to GRIPT's claim against Indian Bank. The Judge also ruled against GRIPT in relation to its claim for pre-judgment interest against Indian Bank and its claim for a *Sanderson/Bullock* order. GRIPT contends that in the event we find that Indian Bank is liable under the Letter of Credit, and if Bank of India is not, then it should also be entitled to pre-judgment interest and a *Sanderson/Bullock* order.

Whether GRIPT is entitled to pre-judgment interest

(1) The law on pre-judgment interest

137 Pre-judgment interest connotes the compensation awarded to a successful claimant for the time value of money the use of which was lost between the date on which the claimant's cause of action arose and the date of the judgment (*Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2006] QB 37 at [46]). The basis for the award lies in the fact that the unsuccessful defendant had wrongfully kept the successful claimant out of monies to which he has been shown to be entitled, during which time, the defendant instead had the use of it (*Harbutt's Plasticine v Wayne Tank and Pump Co* [1970] 1 QB 447 at 468; see also *Lee Soon Beng v Wee Tiam Sing* [1985-1986] SLR(R) 799 at [7]). Historically, the common law provided no remedy in damages for the late payment of a debt or damages (see *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd (No 3)* [1994] 1 SLR(R) 669 at [10]; *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 at [119]). The court's inherent power to award interest was traditionally confined to limited circumstances such as

where interest is claimed as special damages or under the equitable or admiralty jurisdictions (UK Law Commission, *Pre-judgment Interest on Debts and Damages, Item 4 of the Eighth Programme of the Law Reform: Compound Interest* (23 February 2004) ("*UKLC Report*") at p 7). Recognising that this was often capable of working injustice against claimants, reform efforts were initiated and these culminated in legislation that gave the courts the power to award interest. The Law Reform (Miscellaneous Provisions) Act 1934 was the first statute in England that gave the courts a general power to award interest in all cases. In Singapore, the equivalent of this power was first introduced by the Civil Law (Amendment) Ordinance (No 30 of 1940) which today, is contained in s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed) and that reads as follows:

> **Power of courts of record to award interest on debts and damages**
>
> 12. —(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, *if it thinks fit*, order that there shall be included in the sum for which judgment is given interest at such rate *as it thinks fit* on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.
>
> [emphasis added]

138 As a plain reading of the provision would suggest, interest is not awarded as of right. While the recoverability of interest is a matter of the court's discretion, we held in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay Investment*") at [100]–[103] that as a *general rule*, damages should commence from the date of accrual of loss. As a matter of principle, claimants who have been kept out of pocket without basis should be able to recover interest on money that is found to have been owed to them from the date of their entitlement until the

date it is paid. The object of leaving it to judicial discretion as opposed to laying down a fixed rule making interest payable as of right is to enable the courts to achieve justice across the infinite range of factual permutations that may confront the court by tailoring the award to fit the unique circumstances of each case. Such discretion would extend to a determination of whether to award interest at all; what the relevant rate of interest should be; what proportion of the sum should bear interest; and the period for which interest should be awarded (Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) at para 18-031).

139 Among the most commonly cited justifications for refusing an interest award or for diminishing the award of interest in some way is where the claimant has been guilty of inordinate delay in bringing the action (*Jefford and another v Gee* [1970] 2 QB 130 at 151). In *Robertson Quay Investment* (at [98]–[108]), the claimant commenced the originating suit more than five years after its loss accrued. No reasons were furnished by the claimant for this delay. On this ground, we departed from the general rule that interest on damages should commence from the date of accrual of loss in that case, and instead ordered that interest on the damages awarded should run only from the date of service of the Statement of Claim.

140 Our review of the jurisprudence reveals a number of other factors capable of influencing the exercise of the court's discretion (see The Law Reform Commission of Western Australia, *Report on Prejudgment Interest* (Project No. 70, Part I, 1981) at pp 26–27; New Zealand Law Commission, *Aspects of Damages: The Award of Interest on Money Claims* (Report No 28, May 1994) at pp 11–12; *Management 3 Group Pty Ltd (in liq) and another v Lenny's Commercial Kitchens Pty Ltd and another (No. 2)* [2012] 289 ALR

275 at [32]–[35]; *Batchelor v Burke* (1981) 148 CLR 448; *Hungerfords v Walker* (1989) 171 CLR 125; *Newall v Tunstall* [1970] 3 All ER 465). We distill them as follows:

(a) in the absence of a prescribed rate, what rate of interest would be appropriate to the relevant period(s);

(b) whether the claimant was dilatory in the bringing and conduct of the proceedings;

(c) whether the claimant had received compensation for the loss suffered from a source other than the defendant;

(d) whether the claimant had sought and been awarded damages which include damages for the loss of the use of money;

(e) whether the debt is paid immediately after proceedings are commenced; and

(f) whether the parties have agreed that pre-judgment interest should not be recoverable.

141 This list of factors is not to be regarded as rigid or fixed. Nor is it exhaustive. With these principles in mind, we turn to the facts before us.

(2) The present appeal

142 The Judge refused to award pre-judgment interest as he considered that GRIPT had provided no reason to justify such an award. In our judgment, this was wrong in principle. When GRIPT succeeded in its claim, it necessarily established that it had been wrongly held out of money to which it was

entitled. The award of pre-judgment interest should have followed in the absence of any reason being advanced as to why this should not be so. On the facts before us, we can discern no reason to depart from the general rule for interest to be awarded. As we have noted, Indian Bank had wrongly refused to pay GRIPT the full credit sum at the date of maturity of the Letter of Credit. None of the factors justifying a departure from the general rule were advanced and with good reason because in fact, none of them were engaged.

143 As to the rate of interest, the default interest rate of 5.33% per annum, prescribed by para 5 of Supreme Court Practice Direction No. 1 of 2007 should apply since the parties did not offer any reason for us to depart from this. Such interest shall run from the date at which the cause of action arose. The Letter of Credit was issued on 24 February 2012. Payment was stated on the Letter of Credit to be due 180 days from issuance, which was 22 August 2012. That is the date on which Indian Bank was liable to honour the Letter of Credit and we accordingly award GRIPT pre-judgment interest on the sum falling due under the Letter of Credit at the rate of 5.33% per annum from 23 August 2012 until the date of this judgment.

Whether GRIPT is entitled to a Sanderson/Bullock or other cost order against Indian Bank

(1) General principles applicable to *Sanderson/Bullock* order

144 We turn finally to the question of costs. Having failed in its action against Bank of India but succeeded against Indian Bank, GRIPT now seeks a *Sanderson/Bullock* order against Indian Bank in respect of GRIPT's anticipated liability for Bank of India's costs. A *Bullock* order is one where a plaintiff who commences an action against two defendants and succeeds only against one, and is ordered to pay the successful defendant's costs, is then

permitted to recover those costs together with his own costs from the unsuccessful defendant (*Bullock v London General Omnibus Co* [1907] 1 KB 264). A *Sanderson* order is to broadly similar effect though it requires both the plaintiff and the successful defendant to recover their costs directly from the unsuccessful defendant (*Sanderson v Blyth Theatre Co* [1903] 2 KB 533).

145 The object in making an order of this sort is to avoid injustice befalling a plaintiff who is faced with two or more defendants and reasonably does not know whom to pursue for the wrong done to him. As Peter Gibson LJ described it in *Irvine v Commissioner of Police of the Metropolis* [2005] EWCA 129 ("*Irvine*"):

> 22 … It is designed to avoid the injustice that when a claimant does not know which of two or more defendants should be sued for a wrong done to the claimant, he can join those whom it is reasonable to join and avoid having what he recovers in damages from the unsuccessful defendant eroded or eliminated by the order for costs against the claimant in respect of his action against the successful defendant or defendants. …
>
> 23 The court has a wide discretion over costs, and even where a claimant reasonably brings proceedings against two separate defendants and succeeds against one and fails against the other, there is no rule of law compelling the court to make a *Bullock* or *Sanderson* order (see *Hong v A&R Brown Ltd* [1948] 1 KB 515). That case demonstrates that the court must also consider whether it would work injustice on an unsuccessful defendant to make him liable for the costs of another defendant against whom the claimant had failed.

146 In deciding whether to grant a *Sanderson/Bullock* order, it has been suggested that the court may take into consideration the following list of factors (*Denis Matthew Harte v Tan Hun Hoe and another* [2001] SGHC 19 at [11]):

(a) what facts are reasonably ascertainable by the plaintiff before the decision is made to join the successful defendant;

(b) whether the facts are unclear to such an extent that it is necessary and prudent to safeguard the plaintiff's position by bringing in the successful defendant;

(c) whether the unsuccessful defendant has tried to shift all or some of his liability to the successful defendant or has characterised the facts in such a way as to suggest that the successful defendant is more blameworthy and should bear a greater proportion of the damages; and

(d) whether the plaintiff's claim against the two defendants are separate and distinct.

147 Factors (c) and (d) of the preceding paragraph were examined in *Irvine*. As regards factor (d), Gibson LJ observed that the court should consider whether the causes of action were distinct and also whether they were premised on different facts. He cited *Mulready v JH & W Bell Ltd* [1953] 2 All ER 215 ("*Mulready*") to illustrate the importance of the causes of action being connected in deciding whether to grant a *Sanderson/Bullock* order. In *Mulready*, the English Court of Appeal set aside a *Sanderson/Bullock* order because two *distinct* causes of action were pursued. The case concerned an employee injured in the course of his employment. The employee sued both the main-contractor and also his employer (who was a sub-contractor of the main contractor). His cause of action against his employer rested on the Building Regulations for failing to take suitable precautions to prevent him from falling. The court found that this was different from his cause of action

against the main contractor which rested on the Factories Act (UK, 1937) for failing to provide means to ensure his safety while working on the roof. Because the employee's situation was found to be different from the paradigm situation targeted by the order, the court refused to make a *Sanderson/Bullock* order. Lord Goddard held, at 219:

> A *Bullock* order is appropriate where the plaintiff is in doubt as to which of two persons is responsible for the act or acts of negligence which caused his injury, the most common instance being, of course, where a third person is injured in a collision between two vehicles and where the accident is, therefore, caused by the negligence of one or the other or both. It does not appear to us that it is an appropriate order to make where a plaintiff is alleging perfectly independent causes of action against two defendants where the breaches of duty alleged are in no way connected the one with the other.

148 As for factor (c), Gibson LJ said as follows:

> 31 A significant factor is likely to be whether one defendant puts the blame on another defendant. But as Mr Featherby rightly conceded, the fact that one defendant blames another does not in itself make the joinder of the other reasonable. … Defendants frequently blame others when things go wrong, but it does not follow that the claimant is thereby given liberty to sue others at the expense of the defendant against whom the claimant succeeds.

149 In our judgment, these factors may well be helpful indicators but their value is to the extent they can guide the court in considering the real question which is ultimately one of fairness and justice and this will often turn on whether the costs had been reasonably and properly incurred by the plaintiff as between himself and the successful defendant and whether the conduct of the unsuccessful defendant contributed to these costs being incurred by the plaintiff. In this regard, we find it helpful to refer to the following comments made by the English Court of Appeal in *Moon v Garrett and others* [2007] 1

Costs LR 41 at [38]–[39] in relation to the observations of Peter Gibson LJ in *Irvine*:

> 38. It seems to me that the … citation in [*Irvine*] demonstrates that **there are no hard and fast rules as to when it is appropriate to make a *Bullock* or *Sanderson* order.** The court takes into account the fact that, if a claimant has behaved reasonably in suing two defendants, it will be harsh if he ends up paying the costs of the defendant against whom he has not succeeded. Equally, if it was not reasonable to join one defendant because the cause of action was practically unsustainable, it would be unjust to make a co-defendant pay those defendant's costs. Those costs should be paid by a claimant. It will always be a factor whether one defendant has sought to blame another.
>
> 39. The fact that cases are in the alternative so far as they are made against two defendants will be material, but the fact that claims were not truly alternative does not mean that the court does not have the power to order one defendant to pay the costs of another. The question of who should pay whose costs is peculiarly one for the discretion of the trial judge.
>
> [emphasis added in bold]

(2) The present appeal

150 Would it be fair and just for Indian Bank to bear Bank of India's costs of litigation? The primary factor weighing against the making of such order is that the causes of action against Bank of India and Indian Bank were quite distinct. The former was premised on a *factual inquiry* of whether Bank of India negotiated the Letter of Credit. This was an inquiry to which Indian Bank was not party at all and could add nothing since it knew nothing about it. The latter, on the other hand, was based essentially on the *construction* of the issuing bank's contractual obligations under UCP 600.

151 As it turned out, the negotiation issue became the centrepiece of the litigation below. A large part of the trial was devoted to the battle between GRIPT and Bank of India on whether the Letter of Credit had in fact been

negotiated. Bank of India was in fact the primary defendant that GRIPT was pursuing.

152 In these circumstances, we do not see any basis to make Indian Bank liable for any part of Bank of India's costs of the litigation.

153 In our judgment, GRIPT should itself bear Bank of India's costs of the trial. It sued Bank of India as a negotiating bank and did not succeed in its claim. Costs should therefore follow the event.

Conclusion and costs

154 In the premises, insofar as CA 158/2014 is concerned, we affirm the Judge's decision and uphold GRIPT's claim against Indian Bank. GRIPT will have its costs of this appeal in relation to this issue. GRIPT will also have its costs of the trial to the extent that it relates only to Indian Bank's liability under the Letter of Credit. Indian Bank has failed in its appeal against the Judge's decision in respect of its counterclaim on account of its pleadings and misconceived case. Bank of India should therefore have its costs in relation to Indian Bank's counterclaim in the trial below and in this appeal.

155 As for CA 156/2014, GRIPT's appeal against Bank of India fails. We affirm the Judge's decision insofar as he found that Bank of India is not liable to GRIPT. We further affirm his decision not to make a *Sanderson/Bullock* order against Indian Bank. Bank of India and Indian Bank will have their respective costs of the trial and of the appeal against the Judge's findings on these two issues against GRIPT. We, however, allow GRIPT's appeal in respect of Indian Bank to the extent that Indian Bank is liable to pay pre-judgment interest on the sum due under the Letter of Credit. GRIPT will have

its costs of the trial and of this appeal in respect of this issue against Indian Bank.

156 The costs orders are to be taxed if not agreed. The payments made by way of security for the costs of the appeal are to be held until the cost awards have been finalised or agreed and are then to be paid out to meet the same.

157 The parties are at liberty to apply for clarification of the terms of the order including the costs orders.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Judge of Appeal

Chan Sek Keong SJ:

158 In their joint majority judgment at [1]-[157] above ("majority judgment" or "MJ" as a prefix), Sundaresh Menon CJ and Andrew Phang JA ("the majority judges") have dismissed the appeals in CA 156/2014 and CA 158/2014. I concur with the dismissals, and also the allocation of costs of the parties here and below. Both appeals have no merit.

159 In relation to CA 158/2014, Indian Bank, the issuing bank, pleaded that Bank of India, as nominated bank, was or acted as its agent under the Letter of Credit. Therefore, Bank of India owed it agency duties, including a duty to forward documents with reasonable despatch: (see MJ [68]). In examining Indian Bank's arguments on this issue, the majority judges considered the following questions:

(a) Is a nominated bank an agent of the issuing bank?

(b) Did Bank of India become an agent of Indian Bank?

(c) As agent, did Bank of India owe Indian Bank any duties?

160 In an extensive analysis of the principles of agency and the facts in this case, the majority judges, made the following findings

(a) a nominated bank can and will be an agent of the issuing bank if the conditions of an agency relationship are satisfied (see MJ [69]-[75]);

(b) Bank of India was or became an agent of Indian Bank as its conduct satisfied the conditions (see MJ [76]-[80]); and

(c) Bank of India as agent owed Indian Bank agency duties, in particular the duty to inform and to forward the documents timeously to Indian Bank as the issuing bank (see MJ [81]-[108]).

161 However, the majority judges decline to consider whether, on the facts of the case, Bank of India did breach these duties or any agency duty owing to Indian Bank as the latter had not pleaded a claim for damages and had not identified an independent loss flowing from a breach of duty by Bank of India as agent: (see MJ [109]-[110]).

162 Nevertheless, the majority judges also conclude from their findings that it would have been possible for Indian Bank to bring a claim against the Bank of India for breach of duty on the basis of the analysis set out at MJ [81]–[108] ("Analysis") if it had pleaded and was able to prove that it suffered any loss as a result of the latter's breach of some duty (see MJ [112]). It may be noted that the conclusion as expressed is self-validating.

163 In this judgment, the letters "SJ" when prefixed to a paragraph refer to a paragraph herein, and the abbreviation "Art" refers to an article in UCP 600, unless otherwise indicated. The majority judges' findings set out at SJ [160(a)-(c)] are unnecessary for the disposition of CA 158/2014. I have a different view of the legal relationship between a nominated bank and the issuing bank under a letter of credit incorporating UCP 600. Hence, I have difficulty in accepting some aspects of the Analysis. In relation to the conclusion at MJ [112], my view is that *on the facts of this case*, any claim by Indian Bank against Bank of India for damages for breach of duty, arising out of the Letter of Credit was bound to fail.

164 For this reason, it is incumbent on me give reasons for disagreeing. I provide, hereinafter, an alternative analysis of the three questions set out at SJ [159].

The primary issue addressed in the Analysis

165 Before proceeding with my alternative analysis, I should identify the primary issue that the Analysis is concerned with or about. After GRIPT presented the documents to Bank of India for negotiation on 16 March 2012, the parties discussed the possibility of negotiation but eventually Bank of India declined to do so because GRIPT failed to open a current account with it. This was a condition for Bank of India's agreement to negotiate the documents. As a result of the prolonged discussions, Bank of India forwarded the documents to Indian Bank on 18 April 2012, more than a month after they were presented to it. Indian Bank rejected them, wrongfully, on the ground of "late negotiation. LC expired on 120326". The issue is whether Bank of India in such circumstances owed Indian Bank a duty under UCP 600 to forward the documents to Indian Bank. If so, the second issue is whether the 34 days of delay was a breach of the legal obligation to forward the documents.

166 At the conclusion of the trial, the Judge held that Bank of India had not acted on its nomination and therefore it had not entered into any contractual relations with Indian Bank as per the terms of the Letter of Credit, and therefore owed Indian Bank no contractual duties. The Analysis concludes otherwise – that there is such a duty, but declined to decide whether the duty had been breached.

167 In this judgment, I provide an alternative analysis that Bank of India was not in breach of any duty to forward the documents to Indian Bank under

UCP 600, which sets out the contractual obligations of the parties to the Letter of Credit, and that in any event, if there were such a duty, Bank of India did not breach the duty.

(1) Is a nominated bank an agent of the issuing bank?

168 With respect to this question, the Analysis states:

> (a) A nominated bank can be an agent of the issuing bank to the extent of the issuing bank's mandate. The agency relationship will arise insofar as the nominated bank accepts the authority granted by the issuing bank for it to transact with the beneficiary on its behalf. At its core, agency connotes an agent being granted power or authority to affect the principal's legal relations as against third parties (see MJ [69]–[70]).
>
> (b) A nominated bank may be authorised to perform a variety of functions, including (1) accepting the documents; (2) paying on the credit; (3) advising the beneficiary of the credit; (4) negotiating the credit; and/or (5) confirming the credit. Under the Letter of Credit, Indian Bank authorised Bank of India as nominated bank to perform the following acts: (a) examining documents for compliance and forwarding them to Indian Bank if they comply: (b) accepting documents within the validity period of the credit; and (c) rejecting discrepant documents, in accordance with the relevant Articles in UCP 600 (see MJ [71]).
>
> (c) The proposition that a nominated bank authorised by the issuing bank to transact with the beneficiary does so on behalf of the

issuing bank and is the agent of the issuing bank to the extent of the authority granted has wide support both in the case law and in academic commentaries (see MJ [72] for list of authorities).

(d) When an issuing bank authorises a nominated bank to **accept** a draft and when the nominated bank, acting in furtherance of such authority, accepts a presentation of documents made by the beneficiary, its acceptance binds the issuing bank, precluding it from taking a different stand from that taken by the nominated bank: see Art 7(a)(iv) (see MJ [73] for authorities).

(e) In the context of UCP 600, the agency relationship binds the issuing bank when the nominated bank accepts documents presented by the beneficiary regardless of whether the documents are in actual compliance with the credit (see *Jack* cited at MJ [74]).

(f) A nominated bank authorised to accept a presentation of documents becomes the issuing bank's agent for that purpose upon its acceptance of the appointment (see MJ [75]).

(2) Did Bank of India become an agent of Indian Bank?

169 With respect to this question, the Analysis finds as follows:

(a) Bank of India, by not informing Indian Bank that it did not wish to be a nominated bank, and by receiving the documents, holding onto them, and participating in active discussions with GRIPT to negotiate the Letter of Credit, had acted on its nomination and so had

accepted the nomination, that is to say, as a nominated bank under the Letter of Credit (MJ [77]); and

(b) Bank of India by conduct did accept its appointment as nominated bank, and it was therefore properly constituted as the agent of Indian Bank for the purposes of receiving the documents: (see MJ [80]).

170 The conduct referred to at (b) above refers to acts of Bank of India described at (a). In relation to the act of holding on to the documents, it may be pointed out that the majority judgment finds that there is no evidence of "holding on to the documents" for the purposes of presentation, but that Bank of India was only holding on to the documents for the purpose of deciding whether or not to discount the draft (see MJ [61]), *ie*, to act on its nomination.

171 It is suggested that the conclusion that *by receiving* the documents *etc*, Bank of India was constituted as the agent of Indian Bank for the purposes *of receiving* the documents is somewhat odd. Nevertheless, the finding appears to be that Indian Bank appointed Bank of India as a nominated bank to receive the documents, and that Bank of India by receiving the documents *etc*, had acted on its nomination, or accepted the appointment as nominated bank, by conduct, and was thereby constituted an agent of Indian Bank.

172 The finding appears to be, or is, that the mere fact that Bank of India had to receive the documents presented by GRIPT under the Letter of Credit as a matter of practicality, in order to examine them was sufficient to constitute it as an agent of Indian Bank for that purpose.

173 It would also appear that, at this juncture of the Analysis, the focus of the Analysis seems to have shifted away from the propositions at MJ [71], [73]–[75] that it is upon the *acceptance* of the presentation by the nominated bank that would constitute it an agent of the issuing bank. It is not clear whether this is actually a change, and if so, why there is a change. It may or may not be significant for the purpose of determining whether the nominated bank became an agent by receiving the documents.

174 If the test of the existence of an agency relationship in this context is only the act of receiving the documents, then Bank of India became an agent because it undoubtedly received (as a physical act) the documents and had them in its possession for at least a month.

175 But if the test of the existence of an agency relationship is the acceptance of the documents in accordance with the terms of the Letter of Credit or the mandate given by Indian Bank to Bank of India, then on the facts, it seems to me that no agency relationship would have been established, because the Judge also found as a fact that Bank of India did not accept the documents for negotiation when requested by GRIPT.

(3) Did Bank of India owe Indian Bank any agency duties (assuming an agency existed)?

176 With respect to this question, the Analysis finds at MJ [81] that Bank of India would owe express and implied duties to Indian Bank within the scope of its agency, *ie*, to receive the documents. The Analysis identifies two duties as owing by Bank of India to Indian Bank: (1) the duty to forward documents to the issuing bank and (2) the duty to inform Indian Bank on matters of concern to the principal: (see MJ [104]-[108]).

Time to forward documents under Art 15(c)

177 With respect to the question *when* the documents must or should be forwarded to the issuing bank under Art 15(c), the Analysis states that "regard might perhaps be had to general principles of agency law in understanding the duties of the nominated bank under UCP 600". On this basis, the Analysis finds that the documents must be forwarded to the Indian Bank promptly, that is to say:

> (a) with reasonable promptness: see the English High Court decision in *Fortis Bank* HC (affirmed on appeal by the English Court of Appeal in *Fortis v IOB* CA (see MJ [84]-[91]); or
>
> (b) on the next banking day after determining that the documents comply (see *Byrne,* referred to at MJ [95], [97]).

178 Under Art 15(c), a nominated bank "must forward" the documents to the confirming bank or the issuing bank if it determines the presentation is complying and honours or negotiates. In construing the meaning of Art 15(c), the majority judges, applying a purposive interpretation, finds the meaning of Art 15(c) to be that the nominated bank must forward the documents to the issuing bank "whatever course it should decide to take in relation to the credit", that is to say, even if the nominated bank does not honour or negotiate, contrary to what is provided in Art 15(c) itself (see MJ [101]).

An alternative analysis

No agency relationship between a nominated bank and the issuing bank under a letter of credit incorporating UCP 600

179 As a matter of law, any person can be or act an agent of another, if both of them agree to form the relationship. Agency is a consensual relationship. The common law of agency is based on extremely general principles, as observed by the authors of *English Private Law* (Oxford University Press, 2nd Ed, 2007) (Andrew Burrows ed) ("*Burrows*"), in asking the question "[w]ho is an agent in law?" at para 9.01:

> An obvious meaning of the word "agent" is 'someone who acts for an on behalf of another'. The law of agency, not surprisingly, deals with situations where one person acts for another. The common law of agency is based on extremely general principles. **The paradigm reasoning, on which much of the rest of agency law is based, is that one person, usually called the principal, can give authority to, or authorises, another, the agent, to act on his behalf; and that the giving of authority confers on the agent a power to affect the legal positions of the person who gave the authority.** The principal may therefore become bound and/or entitled as against third parties with whom the agent deals: such persons are usually referred to as 'third party'. To distinguish this situation from other applications of agency reasoning… authority when conferred in the way above described is called 'actual authority'.
>
> [emphasis added]

180 Banks normally transact business with one another as principals for their own accounts, whether within the jurisdiction or across different jurisdictions. Banks provide banking and financial services to customers as principals, although in a specific transaction a bank may undertake agency duties for a customer. Banks are no different from other persons who provide services of one kind or another. For instance, a solicitor's primary role is to

provide legal services to clients, but he may in certain instances act as the client's agent, *eg*, in settling a court action: see *Burrows* at para 9.02.

181 A commercial letter of credit is merely a convenient mode of payment for goods across different jurisdictions in substitution for direct payment. When a buyer (of goods from an overseas seller) requests its bankers to issue a letter of credit to pay the seller in another jurisdiction, the bank does not issue the letter of credit on behalf of the buyer as its agent, but at its request as its banker. The bank merely performs a financial service to the buyer for its own account.

182 In financing cross-border trade, the issuer of a letter of credit normally appoints a correspondent bank in the seller's jurisdiction to act as an advising bank to advise the credit to the seller. For this reason, their legal relationship may be a relevant consideration in determining whether the relationship of a nominated bank and an issuing bank under a letter of credit is, or may give rise to, an agency relationship. In the present case, Bank of India was the advising bank as well as the nominated bank in relation to the Letter of Credit.

Is an advising bank an agent of the issuing bank?

183 The leading experts on the subject appear to be divided on this issue. However, *Byrne* is of the view that an advising bank is not an agent of the issuing bank. At para 16 on p 36, *Byrne* comments:

> **Agency**. Although UCP600 does not characterise the advising bank as an agent, it is sometimes so characterised [**footnote 16**]. Under UCP600, an advisor is separate from an issuer and beneficiary. It transmits the credit and any amendments for a fee but its transmission does not bind the issuer which is obligated on the credit when the credit leaves the issuer's operational control. Thus, sending the credit to the advisor obligates the issuer whereas if the advisor were an agent, the

> credit would only be operative when the advisor sends it. The advisor has separate duties from those of an issuer, namely to accurately advise and to exercise reasonable care in authenticating the message transmitted to it. This duty, however, is owed to the beneficiary. While it is possible to describe the relationship between banks as one of "agency" in the very loose and imprecise sense of a person who acts in concert with another for a common end and some bankers so characterise their relationships, the description is imprecise and inaccurate in the strict sense [**footnote 18**].

184 Footnotes 16 and 18, respectively, read:

> 16 Often this notion is added by bankers who loosely and without any legal training will use this term. When questioned, however, whether the incidentals of agency are present in this relationship, they answer negatively.
>
> …
>
> 18 Courts sometimes characterise this relationship as one of "agency" without much analysis. *Sound of Market Street Inc v Continental Bank* 819 F.2d 384, 388 (3rd Cir 1987)… (citing *Bamberger Polymers Intercontinental Corp v Citibank NA* 477 N.Y.S.2d 931, 933 (1983) (advising bank and paying bank acts as issuer's agent). … Some texts for bankers also describe the relationship as one of agency. See Dolan, The Law of Letters of Credit (rev ed. 2003) at App.C-23 stating "[t]he UCP fashions a role for the nominating bank that surely resembles that of an agent for the issuer"., and noting [UCP500 Article 14(b) and (d)(i)] refer to the nominated bank's activity for the issuer and the confirming bank as one of acting on their behalf". See also, *Gutteridge & Megrah's Law of Banker's Commercial Credits* (8th ed 2001), at 87 stating "[a]s between the issuing bank and the intermediary bank the relationship is, unless otherwise, agreed that of principal and agent [case cites omitted]…

185 I would agree with *Byrne* that an advising bank is not an agent of the issuing bank simply because it advises the credit at the request of the issuing bank. There is no reason why the advising bank in advising the credit is doing it as the agent of the issuing bank since it can do so as a principal. It is not necessary to resort to agency reasoning to describe or determine their relationship.

Is a nominated bank an agent of the issuing bank?

186 At MJ [72]–[73], the Analysis refers to cases and academic authorities for the proposition that in the context of a letter of credit incorporating UCP 600, the relationship between an issuing bank and a nominated bank is that of agency by reason of the authority that the issuing bank confers upon the nominated bank. The Analysis refers to, *inter alia*, (a) a passage from *Dolan* on the dynamics of agency between the issuing bank and the nominated bank, and also (b) a passage from the authors of *Jack* which states that in the context of UCP 600 the agency relationship binds the issuing bank when the nominated bank accepts documents presented by the beneficiary regardless of whether the documents are in actual compliance with the credit. These statements refer to specific acts under UCP 600 (or corresponding articles in UCP 500), and not to general agency

187 However, *Byrne* holds a different view. At p 181 at para 25, he comments:

> [25] *Under standard international letter of credit practice, nomination does not confer a general agency status on the nominated bank with respect to the issuer or confirmer even if it elects to act pursuant to the nomination* ***unless otherwise expressly provided***. While the UCP is not law and cannot mandate a characterisation of a relationship, it should be persuasive in its treatment of a relationship where the legal characterisation of a relationship depends on the intention of the parties and is not simply imposed as a matter of law or policy. Under the UCP, a nominated bank is independent of the applicant, the issuer, confirmer or another nominated bank. It acts, if it acts, on its own behalf. **While it is possible to describe the relationship between the banks as one of "agency" in the very loose and imprecise sense of a person who acts in concert with another for a common end**, and some bankers so characterise their relationships, this description is imprecise and inaccurate in the strict sense [footnote 29]. **Banks nominated to act under a credit do not do so as an agent of the bank nominating them nor as an**

> **agent of the applicant.** Even though there may be a correspondent relationship pre-existing between the banks, the correspondent is not obligated to act pursuant to the nomination. If it does act, its actions are for its own account and do not bind the nominating bank unless some special and unusual arrangement has been made or stated in the credit.
>
> [emphasis added in italics and bold italics]

The words "unless otherwise provided" in line 3 of the quoted passage is a reference to Art 12(a) (see SJ [239] for text). Footnote 29 to para 25 reads:

> Courts sometimes characterise this relationship as one of "agency" without much analysis. *Sound of Market Street Inc v Continental Bank Intern.,* 819 F.2d 384, 388 (3rd Cir 1987) (citing *Bambeger Polymers Intercontinental Corp v Citibank NA* 477 N.Y.S.2d 931, 933 (1983) (advising bank and paying bank acts as issuer's agent. U.S. Rev. UCC Article 5-107, Official Comment 4 provides "[i]n rare cases the [nominated] person might actually be an agent of the issuer…." Some texts for bankers also describe the relationship as one of agency. See Dolan, The Law of Letters of Credit (Rev ed. 2003) at App.C-23 stating that "[t]he UCP fashions a role for the nominating bank that surely **resembles** that of an agent for the issuer.'" and noting [UCP500 Article 14(b) and (d)(i)] refer to the nominated bank's activity for the issuer and the confirming bank as one of acting on their behalf". See also, *Gutteridge & Megrah's Law of Banker's Commercial Credits* (8th ed 2001), at 87 stating "[a]s between the issuing bank and the intermediary bank the relationship is, unless otherwise, agreed that of principal and agent [case cites omitted]… (emphasis added)

188 The Analysis (at MJ [73]) quotes a passage from *Dolan* which begins with "[t]he payer ***is best seen*** as an agent of the issuer whose acts of honor or dishonor bind the issuer". This statement is consistent with his statement made ten years later, cited in footnote 29 above. However, in the second sentence which begins with "[w]hen the payer seeks funds from the issuer…", *Dolan* goes on to say that if the documents are defective, the issuer may dishonor with impunity, and the payer must either look to the seller [citing *inter alia* Article 11(d) of UCP 400] or bear the loss." Further the last sentence in this passage states "[i]n short, the payer is the issuer's agent; if the payer stumbles,

the issuer is bound. Thus, if the payer either pays or accepts, the issuer has no defense [*sic*] against the seller."

189 In my view, *Dolan*'s statements merely describe the operation of the relevant clauses in UCP 600 applicable to the situations described in the passage. The relevant clauses form part of the contract between the parties to the Letter of Credit. The rights and obligations of a nominated bank and the issuing bank are governed by and flow from the articles set out in UCP 600. The articles operate as contractual provisions between the parties to the letter of credit which has incorporated them. The articles make no mention of agency, and it is suggested that agency reasoning is not necessary to their operation as contractual provisions.

190 These comments apply to the passage from *Jack* which express a similar view (see MJ [53]):

> The nominated bank can be regarded as acting as the issuing bank's agent for receipt of the documents. This may be important because if the documents were presented to the nominated bank close to the expiry of the credit then it may be too late to make a second presentation.

Furthermore, both authors merely refer to the relationship between the paying bank/issuing bank and the nominated bank/issuing bank in these contractual situations as analogous to that of an agency relationship. Neither author asserts categorically that an agency relationship arises between a nominated bank and the issuing bank under a letter of credit.

191 At para 6 on p 552 (see SJ [201] for text), *Byrne* reiterates his view that the nominated bank is not an agent of the issuing bank. In commenting on the

phrase "acting on… behalf" of the issuer or confirmer which was found in UCP 500, but omitted in UCP 600, *Byrne* comments at footnote 5:

> 5. **It is an odd phrase since nominated banks do not act on behalf of anyone but themselves and cannot bind the issuer or the confirmer whatever they may do or undertake themselves.** They cannot bind the issuer or the confirmer which make separate determinations for themselves as to whether the documents comply. The only exception, their ability to bind the issuer or confirmer where the commercial invoice is for an amount in excess of that available on the credit but the amount is within the amount available) which is contained in UCP600 Article 18(b)(Commercial Invoice) proves the rule because it had to be expressly stated. It is common in some legal circles to assume that an agency relationship exists with respect to nominated banks and this notion is not helped by LC bankers who may have had business law courses freely throw around legal terms without fully grasping their significance or application to the facts. **If a nominated bank is an agent, one would have to ask: who is the principal. At least with respect to a nominated negotiating bank, a persuasive argument can be made that it is the agent of the beneficiary. Of course, the opposite argument can also be maintained with respect to being the agent of the issuer. As a result, if the negotiating bank is an agent, it is highly conflicted. In reality, it is an agent of neither but acts on its own when it acts pursuant to its nomination.**
>
> [emphasis added]

192 The omission of the phrase "acting on ... behalf" by the drafting committee of UCP 600 may indicate its desire to state its neutrality on the issue or it may be to dispel any perception or thought that a nominated bank acts *on behalf* of the confirmer or the issuer in a letter of credit. In the above passage, *Byrne* discusses the position of a nominated bank and a negotiating bank. His remarks apply equally to a confirming bank. It is suggested that a confirming bank which adds its confirmation to the credit at the request of the issuing bank acts for its own account and not on behalf of the issuing bank. It

is not necessary to employ agency reasoning to describe their legal relationship.

What is the scope of the agency (assuming it exists)?

193 The Analysis finds that the scope of the agency of the nominated bank is to receive the beneficiary's documents (see MJ [80]), finding support from a passage in *Jack* at para 6.17 (see MJ [74] which says that a letter of credit "invites and authorises the nominated bank to receive and examine documents and to honour or negotiate, as the case may be." In using the phrase, "as the case may be", *Jack* appears to view these three acts as distinct mandates, each independent of the others, so that, if the nominated bank does any one of those acts, it has transacted with the beneficiary on behalf of the issuing bank to that extent and is the agent of the issuing bank to the extent of the authority granted (see MJ [72]).

194 On this basis, Bank of India would become or constitute an agent of Indian Bank when it received GRIPT's documents presented pursuant to the Letter of Credit as this appears to be also the scope of the agency on the facts of the present case. The Analysis also finds that this agency, albeit limited in scope, implies that Bank of India would have two duties to perform, namely:

(a) to inform Indian Bank that there was a complying presentation under the Letter of Credit, and

(b) to forward the documents to Indian Bank.

In other words, upon receipt of the documents, *etc*, Bank of India had a duty to inform Indian Bank whether or not there was a complying presentation and/or

to forward the documents to Indian Bank, failing which Bank of India would be in breach of its transmission duty, and be liable for any loss suffered by Indian Bank.

195 I am unable to agree with this analysis for the reasons given below.

Receiving and examining documents

196 The Letter of Credit is an acceptance credit. Therefore, Indian Bank is not inviting or authorising (to use *Jack*'s formulation) Bank of India only to receive the documents, although it must receive the documents as a physical act if it were to act on the invitation or authorisation. Indian Bank is inviting or authorising the nominated to accept the presentation and "honour" (by accepting) the draft drawn by GRIPT under the Letter of Credit and to pay at maturity. However, in order to decide whether to accept (or to reject) the presentation, Bank of India has first to examine the documents for compliance with the terms of the credit. The standard for examination of documents is set out in Art 14, sub-articles (a) and (b) of which, state as follows:

> a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.
>
> b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.

197 Under these two sub-articles, a nominated bank acting on its nomination must examine a presentation for compliance within five days. If it

determines that the presentation is complying, it may decide to honour or negotiate, in which event, it must forward the documents as provided under Art 15(c). If the nominated bank decides not to honour or negotiate, Art 15(c) does not require it to forward the documents to the confirming bank or the issuing bank.

198 Under Art 12(a), unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary.

199 Hence, the finding that Bank of India's acceptance of Indian Bank's mandate to receive the documents, together with the act of receiving them, does not create an agency relationship if Bank of India does not act on its nomination, and were to return the documents to GRIPT or to hold them on GRIPT's behalf (which was in fact what happened in this case). In any case, receiving the documents was only one constituent of Indian Bank's mandate. With reference to the act of receiving, it has been pointed out that since "receiving" must precede examination, the word "receipt" can be deleted from Art 12(c), without affecting its efficacy or operation.

200 Moreover, a nominated bank can receive and examine documents without having acted pursuant to its nomination because Art 12(c) provides as follows:

> c. Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation.

201 *Byrne* explains the position of a nominated bank at para 6b on p 552:

> **6b. Nominated Bank Acting on Its Nomination.** UCP600 Article 14(a) abandons the odd phrase that appeared in UCP500 (1993) Article 13(b) … and 14(b) (Discrepant Documents and Notice) regarding a nominated bank acting on… behalf of" of the issuer or confirmer. UCP600 replaces the expression with the phrase "a nominated bank acting on its nomination" which however rarely this provision may actually apply to such a bank is not incomprehensible [**footnote 6**]. The nomination is an "invitation" to act, so that it makes sense to speak about a duty of a nominated bank acting on its nomination. **However, the question remains whether a nominated bank acting on its nomination is required to examine documents for compliance**. As will be discussed later with respect to issuers and confirming banks, what is meant is the standard by which the issuer's or confirmer's obligation to reimburse the nominated bank is measured. In most cases, where the documents fail to comply or the presentation is not timely, nominated banks do not act on their nomination. They merely forward the documents. As a result, the application of this rule to a nominated bank is only in the situation where the nominated has erred in its examinations. The Drafters' Commentary 62 suggests that a bank "acts on its nomination" either by expressly agreeing to do so in advance as indicated in UCP600 Article 12(a) (Nomination) or "by examining the presentation for compliance with the documentary credit, and in most countries, charging a fee." **This statement, however, is incorrect. A nominated bank can receive and examine documents without having acted pursuant to its nomination as is recognised in UCP600 Article 12(b) (Nomination)** which states that "receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make the nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation. [Original emphasis added] **If a non-confirming nominated bank can examine presented documents without being obligated pursuant to its obligation, it can charge a fee for doing so such as an examination fee.** This service can be of value to the beneficiary and save it time and trouble and enable it to avoid the expense of retaining documentary credit specialists on its staff. While the nominated bank would be well advised to express the limitations of its actions, **such an action without more does not constitute acting pursuant to its nomination**.
>
> [emphasis added]

Terms of the Letter of Credit

202 Since the rights and obligations of an issuing bank *vis-à-vis* a nominated bank are to be found in the letter of credit, I turn now to the Letter of Credit (which incorporates UCP 600) to determine the extent of the mandate given by Indian Bank to Bank of India, *ie*, the scope of the agency (if it is constituted by the conduct of Bank of India).

203 In this context, the material terms of the Letter of Credit were:

> **(a) "Available with... Bank of India "BY ACCEPTANCE. Drafts at 180 DAYS FROM DATE OF L/C. Drawee – BANK OF INDIA SINGAPORE", and**
>
> **(b) Bank of India "CAN DISCOUNT BENEFICIARY'S DRAFT AT BENEFICIARY'S COSTS AND EXPENSE".**

The mandate or instructions of Indian Bank were clear — Bank of India was nominated, *ie*, invited or authorised, to accept, *ie*, to honour (as defined in Art 2)the 180-day draft drawn by GRIPT on Bank of India, Singapore, and to pay at maturity, and also to discount GRIPT's draft at GRIPT's cost and expense.

204 The term "honour" is defined in Art 2 to mean, in the case of an acceptance credit,

> c. to accept a bill of exchange ("draft") drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

205 The term "negotiation" is defined in Art 2 to mean:

> …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.

206 *Byrne* gives the term "discount" the following meaning at p 1443:

> With respect to letters of credit, the cashing of the amount due after the *presentation of documents* but prior to the maturity of the obligation, either with respect to the *accepted draft* …. The term is not used in UCP600 although it includes "prepay" or "purchase".

Presentation of documents by GRIPT under the Letter of Credit

207 When GRIPT (through Standard Chartered Bank) presented the documents to Bank of India on 16 March 2012, the covering letter read:

> **THE DOCUMENTS DETAILED ABOVE ARE ENCLOSED FOR YOUR NEGOTIATION IN ACCORDANCE WITH THE INSTRUCTIONS BELOW.**

208 It can be seen from the words of delivery of the documents, that GRIPT did not present the documents for acceptance or for discounting, but for negotiation (see definition at SJ [205]).

209 In the present case, it is not disputed that Bank of India did not accept or discount (as it was not requested to do either act), although, as found by the Judge, the parties had used the word "discount" and "discounting" on multiple occasions (see GD [65]).

210 With respect to GRIPT's request to Bank of India to negotiate, when GRIPT sued Bank of India for breach of contract, it had alleged in its Statement of Claim that Bank of India had orally agreed "to confirm, honour or negotiate the credit" (see GD [17]). The Judge found that as a fact that Bank of India did not wish to entertain further letter of credit transactions with GRIPT until it had opened a current account with Bank of India. GRIPT did not open a current account with Bank of India even though it had tried to do so up to 16 April 2012. The Judge found that for this and another reason, Bank of

India did not agree to confirm, honour or negotiate the credit, and did not negotiate the credit, and accordingly dismissed GRIPT's claim. The finding of the Judge was that until GRIPT opened a current account with it Bank of India was not prepared to negotiate the documents. The majority judgment affirms this decision (at MJ [135]).

211 In the circumstances, the Judge found that Bank of India did not act on its nomination, *ie*, did not act on the invitation of Indian Bank to accept or discount or honour any draft drawn by GRIPT under the Letter of Credit. Bank of India did not perform any of the acts "mandated" by Indian Bank under the Letter of Credit. Accordingly, even assuming that Bank of India was invited or authorised to perform the acts on behalf of Indian Bank, no agency relationship would have arisen, on the basis of the Analysis's propositions at MJ [69]-[75].

Indian Bank's counterclaim against Bank of India

212 As Indian Bank issued the Letter of Credit, it would have known its contents. But, at paras 9,10 and 13 of its Defence and Counterclaim ("D&C"), Indian Bank pleaded as follows:

> 9 [Indian Bank] pleads that by the L/C [Indian Bank] contracted with [Bank of India] and/or authorised/requested [Bank of India] to act as [Indian Bank's] agent to:
>
> (a) confirm the L/C;
>
> (b) honour the draft accompanying a complying presentation under the L/C available by acceptance ["BOI'sObligations"]
>
> 10 [Indian Bank] pleads that [Bank of India] owed [Indian Bank], inter alia, the following express or implied duties under the L/C:

> (a) to act in terms of the L/C and not to exceed [its] authority;
>
> (b) to carry out [BOI's Obligations] with reasonable dispatch and if [it] cannot or will not carry out its obligation(s) when instructed or within a reasonable time, to inform [Indian Bank];
>
> (c) to exercise skill, care and diligence in the performance of [BOI's Obligations] as is usually and necessary in or for the ordinary and proper conduct of letter of credit business.
>
> ….
>
> 13 Further or in the alternative, insofar as [Bank of India] remained as the confirming bank and/or the nominated bank under the L/C to accept the draft, [Indian Bank] pleads that [Bank of India] in breach of the L/C or its duties to [Indian Bank] failed, within 5 banking days of 16 March 2012 or at all, to:
>
> > (a) examine the documents [Bank of India] purported received to determine on the basis of the documents alone whether or not the documents appear on their face to constitute a complying presentation;
> >
> > (b) honour the L/C;
> >
> > (c) forward the documents determined to be a complying presentation to [Indian Bank].

213 In the above pleading, Indian Bank averred that, "by the Indian L/C", it "contracted with Bank of India and/or authorised/requested Bank of India to act as its agent to confirm the L/C and honour the draft accompanying a complying presentation under the L/C available by acceptance (defined collectively as "BOI's Obligations"), and also the alleged express and implied duties alleged at paras 10 and 13 of the D&C. In other words, Indian Bank pleaded that the Letter of Credit was itself an agency contract.

214 It may be noted that Indian Bank pleaded as a cause of action that it had also authorised/requested Bank of India to confirm the Letter of Credit. No evidence was adduced of such authorisation or request. The claim was

pleaded to ride on or take advantage of GRIPT's claim for damages against Bank of India for breach of an oral agreement "to *confirm,* honour or negotiate" the Letter of Credit (see GD [5] and [17]). As mentioned earlier, GRIPT's claim against Bank of India was dismissed, and consequently, the duties alleged at paras 10 and 13 of the D&C also dropped by the wayside.

215 However, at para 13 of the D&C, Indian Bank pleaded, further and in the alternative, that as the nominated bank under the Letter of Credit to accept the draft, Bank of India, in breach of the Letter of Credit or its duties to Indian Bank failed, within 5 banking days of 16 March 2012 or at all, to (a) examine the documents Bank of India, (b) honour the Letter of Credit and (c) forward the documents determined to be a complying presentation to Indian Bank.

216 The Judge, correctly, in my view, dismissed Indian Bank's counterclaim on the ground that Bank of India, on the evidence, did not act on its nomination, that is to say, did not act on Indian Bank's invitation or authorisation of Indian Bank to accept GRIPT's draft. Consequently, the duties alleged at paras 13(a)–(c) of the D&C also dropped by the wayside.

217 At GD [95], the Judge held:

> 95 This brings me to consider [Indian Bank's] counterclaim against [Bank of India]. In so far as [Indian Bank's] counterclaim was premised upon [Bank of India] having agreed to act on its nomination, it was untenable. As I have found at [17] to [70] above, [Bank of India] did not agree to act on its nomination under the Indian Bank LC. In that event, there was no contractual relationship between [Bank of India] and [Indian Bank] under the Indian Bank LC.

218 As mentioned earlier, GRIPT did not even present the documents to Bank of India for acceptance but for negotiation.

219 It follows that, on the Judge's finding that Bank of India did not act on the mandate given by Indian Bank, and therefore, no agency relationship would have arisen.

220 The majority judgment affirms the Judge's decision (see MJ [154]), However, the majority judges' affirmation of the Judge's decision appears to have been based on Indian Bank's claim being for an indemnity, which was misconceived, not because they accepted the Judge's finding that Bank of India did not act on its nomination, and consequently, there was no contractual relationship between Bank of India and Indian Bank under the Letter of Credit. It is suggested that, on the basis of the Analysis and the finding set out at SJ [160(b) and (c)], the majority judges' affirmation on this basis contradicts, and implicitly reverses, the Judge's finding that Bank of India did not act on its nomination.

221 If this is the consequence, I agree with the Judge's decision and disagree with the majority judgment on this issue.

Purposive interpretation of Art 15(c)

222 The majority judges have decided that Art 15(c) must be given a purposive interpretation. Article 15 applies to a nominated bank, a confirming bank (which may be the nominated bank where it is invited to confirm, and it confirms) and the issuing bank. The article applies as a contractual provision by its incorporation into the Letter of Credit. It is not clear why an agency relationship is necessary or assists in the interpretation of Art 15(c).

223 It is also convenient at this juncture to reiterate that UCP 600 provides a code of rules to govern the operation of documentary letters of credit which

incorporate UCP 600. The articles set out the rights and obligations of the parties (normally, sellers and buyers of goods for shipment from one country to another) and banks involved in the cross-border transaction. One article may provide, *eg*, if the nominated bank does or fails to do act A, the issuing bank is bound by the nominated bank's action or omission, or *eg*, fails to return the documents to the presenter after rejecting them for discrepancies. Another article may provide that even if the nominated bank does act A, eg, accepts discrepant documents, the issuing bank is not bound and may reject the documents. These articles operate contractually between the participants involved. It is not necessary to use agency reasoning to explain why the issuing bank is or is not bound the acts or omissions of the nominated bank (see SJ [189] above).

224 Nevertheless, by applying a purposive interpretation of Art 15(c), the majority judges find that when a nominated bank determines the presentation is complying, it must forward the documents, "whatever course it should decide to take in relation to the credit by virtue of its having accepted its nomination.", that is to say, whether or not the nominated honours or negotiates: (see MJ [101]).

225 I am unable to agree with the majority judges' approach.

226 It is suggested that before a court is justified in applying a purposive interpretation to a clause in a contract or a rule (UCP 600 is a code of rules) as a purpose intended by the parties, the court must identify the intended purpose that should have been, but is not, stated in the contract or the rule. The majority judgment finds the unstated purpose in a complicated analysis at MJ [94]-[103]. The unstated purpose in Art 15(c) is said to be "the foundation on

which the article rests" and is consistent with "the expectation of the market" (see MJ [100])

227 The Analysis is complicated. Four approaches can be discerned, or appear to have been used, for this purpose. They are discussed below, assuming that they are correctly identified.

(1) Market expectation

228 The first approach relies on "the expectations underlying the UCP 600" (see MJ [99]). These expectations appear to be (a) the expectation described at MJ [94(d)] (which I will refer to as the *Byrne Expectation*") and (b) the expected banking practice that was mentioned at MJ [102] and approved in *Fortis v IOB* HC (which I will refer to as the "*Fortis Expectation*"). The phrase "expectation of the market" (see MJ [100]) appears to be used to describe either one or both expectations.

229 At MJ [102], the majority judges place greater emphasis on the *Byrne Expectation* than the *Fortis Expectation* in stating that:

> *Byrne* emphasises the commercial expectations of the parties to a letter of credit transaction: **even if a nominated bank elects not to act pursuant to its nomination, it will forward the documents to the issuing bank** (see [94(d)] above).
>
> [emphasis added]

and that:

> this expectation is strengthened where the nominated bank having accepted the nomination, determines compliance but thereafter decides not to pay or negotiate the credit because it has in such circumstances modified the legal position of the issuing bank in relation to the beneficiary.

230 Because the *Byrne Expectation* is strengthened in such circumstances, it also strengthens the need for a purposive interpretation of Art 15(c), just as the *Fortis Expectation* strengthened the purposive interpretation of Art 16(c) in *Fortis Bank v IOB* HC.

(2) Meaning of "honours" or "negotiates" Art 15(c)

231 The second approach is set out at MJ [101] where the reasoning seems to be as follows:

(a) The nominated bank acted on its nomination and thereby became an agent of the issuing bank.

(b) "Viewed in this light, the phrase "honours or negotiates" in Article 15(c) must be understood and read purposively to refer to the decision of a nominated bank to act pursuant to its nomination by accepting the presentation of documents", that is to say, either (i) a nominated bank which has accepted the documents must honour or negotiate; or (ii) accepting the nomination amounts to agreeing to honour or negotiate.

(c) It follows that, having accepted the nomination (and thereby became an agent), the nominated bank after examining the documents and finding them complying after determining the documents to be complying, must forward the documents to the issuing bank, "whatever course it should decide to take in relation to the credit", that is to say, even if it does not agree to honour or negotiate.

232 This approach does not address the unstated purpose. A purpose is a goal or an objective to be achieved. Forwarding documents is merely a physical act to give effect to the purpose, whatever it may be. The argument here seems to be that the nominated bank has breached its duty to honour or negotiate, and therefore it must forward the documents as required by Art 15(c). The nominated bank cannot avoid the operation of Art 15(c) by wrongfully refusing to honour or negotiate.

(3) Protecting the issuing bank

233 However, there is one purpose which is clearly identified at MJ [98]. Here, the reasoning is as follows:

> (a) The "timeous forwarding of documents contemplated by Art 15(c) also has the additional goal of protecting an issuing bank from acting to its detriment, such as by inadvertently releasing security after enough time has passed following the expiry of the credit."
>
> (b) If a nominated bank has no obligation to forward the documents when it does not honour or negotiate, then it "can hold on to the documents indefinitely without forwarding it to the issuing bank" (see MJ [103]).
>
> (c) If the nominated bank does that, any secured issuing bank will not be protected by Art 15(c), since "it is conceivable that an issuing bank might act to its detriment and suffer loss in this way [*ie*, by inadvertently releasing the security], by acting on the premise that it has no liability because there has been no compliant presentation.": (see MJ [99]).

(d) Accordingly, in order to give effect to the "additional goal" (or purpose) of Art 15(c) in protecting any secured issuing bank from acting to its detriment, Art 15(c) has to be interpreted to give effect to this purpose so as to prevent the secured issuing bank from releasing the security, in the event that the nominated bank does not forward the documents timeously.

(4) Implying a term into UCP 600

234 To supplement the first three approaches, the majority judges find no difficulty in implying a term to this effect were it necessary to do so, as it is (at MJ [103]):

> … completely untenable to argue that the nominated bank can hold on to the documents indefinitely without forwarding it to the issuing bank after it has decided not to honour or negotiate the credit. For this reason, the touchstone of necessity for the implication of a term under Singapore law (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [101]) has been satisfied. …

My approach

235 I am unable to agree with all the four approaches examined above for the reasons given below.

Purposive interpretation of Art 15(c) is inappropriate

236 First, it is suggested that the meaning of Art 15(c) is clear when read in the context of the whole article, when its purpose becomes apparent. Article 15 provides:

> Complying Presentation

> a. When an issuing bank determines that a presentation is complying, it must honour.
>
> b. When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank.
>
> c. When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.

237 When a issuing bank or a confirming bank determines that a presentation is complying must honour, or honour or negotiate, as the case may be, because both are irrevocably bound to honour if there is a complying presentation, as provided under Arts 7 and 8, respectively.

238 Reading Arts 8 and 15(b) together, when a confirming bank determines that a presentation is complying, it must honour or negotiate and must forward the documents to the issuing bank.

239 When a nominated bank determines that a presentation is complying, it is under no obligation to honour or negotiate, unless it has expressly agreed to do so and the agreement is communicated to the beneficiary. Article 12 provides:

> Nomination
>
> a. Unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary.
>
> c. Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or

In Art 12(c), since "receipt" precedes examination, its omission would make no difference to the operation of Art 12(c).

240 Reading Arts 12(a) and (c) and 15(c), when a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or the issuing bank. Absent an express agreement to the contrary, where the nominated bank does not honour or negotiate, Art 15(c) does not require it to forward the documents to the confirming bank or the issuing bank.

241 In this connection, *Byrne* comments at p 714:

> **Moreover, strictly speaking, there is no legal obligation for a nominated bank to forward the documents to anyone even if it has acted pursuant to its nomination** However, what is meant is that its ability to be **reimbursed** is conditioned on so forwarding them. It is also expected that even if a nominated bank elects not to act pursuant to its nomination, it will forward the documents to the issuer or confirmer. (emphasis added).

242 *Byrne* makes two points in this passage: (a) a nominated bank does not have forward the documents to anyone, even if it has acted pursuant to its nomination, but will do so if it wishes to be reimbursed, and (b) even if the nominated bank elects not to act on its nomination, it is expected to forward the documents to the issuer or the confirmer (the *Byrne Expectation*).

243 The absence of an obligation of a nominated bank to forward the documents where it does not honour or negotiate is also made clear by the UCP 600 Drafting Group ("Drafting Group") which comments at p 70 of *Commentary on UCP 600*:

> Sub-article (c) addresses a nominated bank's obligation**. This obligation is subject to the extent to which a nominated**

> **bank has agreed to act in accordance with its nomination, as expressed in a separate communication to the beneficiary.** When it has determined that as presentation is complying and honours or negotiates, it has an obligation to forward the documents to the confirming bank or the issuing bank.
>
> The reference to the forwarding of documents was seen as a critical issue for a number of ICC national committees, who commented that the nominated banks did not release the documents immediately, even in cases where the nominated banks have been released.
>
> [emphasis added]

The words in bold refer to Art 12(a).

244 The Drafting Group commented that the reference to forwarding of documents was critical, yet it chose not to draft Art 15(c) to express the purpose that the majority judgment finds not to have been expressed therein. If the purpose of Art 15(c) were that as envisaged by the majority judges, the Drafting Group would have no difficulty in drafting Art 15(c) to read

> When a nominated bank determines that a presentation is complying, it must forward the documents to the confirming bank or issuing bank.

245 The majority judgment has effectively redrafted Art 15(c) to provide:

> When a nominated bank determines that a presentation is complying and honours and negotiates, or does not honour or negotiate, it must forward the documents to the confirming bank or issuing bank.

(1) Market expectation

246 Second, the phrase "market expectation" appears to be used in the Analysis to refer to both the *Byrne Expectation* and the *Fortis Expectation* (see SJ [229]) as if they were expectations of the same kind. The *Byrne Expectation* refers to:

> the commercial expectations of the parties to a letter of credit transaction: even if a nominated bank elects not to act pursuant to its nomination, it will forward the documents to the issuing bank" (see MJ [94(d)]).

247 In contrast, the *Fortis Expectation* is referred to in *Fortis Bank v IOB* CA at [35] as follows:

> It seems... indisputable that the practice of bankers and international traders is that, on rejection, the issuing bank must hold the documents in accordance with the instructions of the presenter or return them promptly and without delay.

248 The difference between the two expectations is that the *Byrne Expectation* is predicated on the nominated bank having *no legal obligation* to forward the documents under Art 15(c), whereas the *Fortis Expectation* is predicated upon the issuing bank having a legal obligation to return the rejected documents since it has given a return notice under Art 16(c)(iii)(c). The giving of the return notice results in a legal obligation to return, not by implication of a term, but as a matter of construction. The distinction is important. The *Byrne Expectation* refers to the commercial practice to do something which is not required under UCP 600, whereas the *Fortis Expectation* refers to the banking practice that the issuing bank in those circumstances is obliged under UCP 600 to do something, in that case to return the rejected documents promptly. This is clearly stated in *Fortis v IOB* CA at [29], where the Court of Appeal said:

> 29 Courts must therefore interpret it [UCP 600] 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.

249 It is suggested that the *Fortis* Expectation is not applicable to Art 15(c) where the nominated bank does not honour or negotiate, and that the *Byrne*

Expectation is applicable *precisely* because there is no legal obligation to forward the documents.

250 In relation to the operational efficacy of the *Byrne Expectation*, it may be recalled that on 12 July 2012, Bank of India's solicitors wrote to GRIPT's solicitors, *inter alia*:

> 6. On 9 April 2012, our clients informed your clients that our clients were unable to open the CD account based on their revised format and that your clients should execute all our clients' CD account opening forms without any changes being made.
>
> 7. Your clients then instructed our clients to present the document to Indian Bank for acceptance purely on **a collection basis** as your client's agent. …
>
> [emphasis added]

251 GRIPT denied para 7 of the letter at para 23 of its Reply to Defence of 1st Defendant [Bank of India] (Amendment No 1) dated 26 February 2012.

252 Indian Bank, in its Defence to 1st Defendant's Statement of Claim dated 15 March 2013, pleaded at para 12(b) that the documents were received by Bank of India as collecting bank for GRIPT (*ie*, there was no presentation to Bank of India *qua* nominated bank).

253 The Judge did not appear to have made a finding on this averment. Before us, Indian Bank raised the same defence as a ground of appeal. At MJ [31(b)], the majority judgment rejects the argument on the ground that GRIPT (through Standard Chartered Bank) had already presented the documents to Indian Bank (MJ [66] above).

254 The rejection of Indian Bank's argument means that the majority judgments accepts that Bank of India did forward the documents to Indian Bank for collection *on behalf of* GRIPT - stated in its letter dated 12 July 2012. The documents were sent for collection as the GRIPT's draft for US$9,993,239.54 was drawn on Bank of India as the drawee bank (as required by the Letter of Credit) payable to the order of GRIPT.

255 Bank of India's position is consistent with para 7 of its written case in CA 158/2014 dated 6 April 2012 which argues that B12 of the International Standard Bank Practice for the Examination of Documents under UCP 600 ("ISBP") permits it to do so. B12 provides:

> Where a credit is available by acceptance with
>
> a. a nominated bank, and the draft is to be drawn on that nominated bank (which is not a confirming bank), and it decides not to act on its nomination, the beneficiary may choose to:
>
> …
>
> **iii request that the presentation be forwarded to the issuing bank in the form as presented with or without a draft drawn on the issuing bank.**
>
> [emphasis added]

256 It may be recalled that by the time Bank of India decided to terminate the discussions on whether or not to negotiate the documents, it was too late for GRIPT to make a fresh presentation to Indian Bank. The Judge was aware of this point. At GD [82], he cited the following passage from *Jack*:

> *If the credit is expressed to be available with a bank other than the issuing bank – such a bank being a 'nominated bank' in the terminology of the UCP – then the seller may present the documents to that bank instead of the issuing bank.* Suppose that the nominated bank refuses documents which conform to the terms of the credit and are presented within time. If, but only if, the nominated bank has confirmed the credit then the

> seller has an action against it to enforce the credit. But the seller can also sue the issuing bank without the need to present the documents again. *The issuing bank's undertaking under Article 7 is to honour the credit if documents are presented either to the nominated bank or to the issuing bank. The nominated bank can be regarded as acting as the issuing bank's agent for receipt of the documents. This may be important because if the documents were presented to the nominated bank close to the expiry of the credit then it may be too late to make a second presentation. …*
>
> [emphasis added]

As the Judge said at GD [85]:

> It is also pertinent to note that under UCP 600, there can only be one presentation of documents under the letter of credit; this will either be to the Nominated Bank or the Issuing Bank. …

(2) Meaning of "honours" or "negotiates" Art 15(c)

257 Second, it is suggested that the meaning of the phrase "honours or negotiates" given by the majority judgment is premised on a nominated bank having acted on its nomination by accepting the beneficiary's draft, but failing to honour or negotiate. However, in the present case Bank of India did not honour or negotiate after examining the presentation and determining it to be complying because GRIPT did not satisfy Bank of India's condition that it must first open a current account with it.

258 Article 12(a) provides that "[u]nless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary." In the present case, there was no exception. Moreover, under Art 12(c), a nominated bank can receive and examine documents without having acted pursuant to its nomination.

259 Accordingly, the purposive interpretation set out in the Analysis is not supported by the facts in this case or the relevant articles in UCP 600.

(3) Protecting a secured issuing bank

260 Third, it is suggested that the statement of the majority judgment (at MJ [98]) that the timeous forwarding of documents has the additional goal of protecting the issuing bank is questionable. It is suggested that there is no such additional goal. The premise of this statement is that Art 15(c) is intended to be a loss-avoidance or preventive provision. It is suggested that it is not so. Article 15 was not drafted for that purpose in mind as the issuing bank, whether secured or otherwise, is always entitled to seek reimbursement from the applicant for honouring the credit.

261 The point that an issuing bank may release security "inadvertently" is commercially unreal. In the present case, Indian Bank was holding a cash security to secure an exposure under the Letter of Credit of close to US$10 million. There is no evidence as to what the actual sum was but assume it was 50% of the credit amount, *ie*, US$5 million. There would be no reason for Indian Bank to release US$5 million to Varun unless Varun asked for it. And if Varun were to ask for it, the release would not have been inadvertent. If Indian Bank had released the documents without conducting proper checks, it would be negligent. As a matter of commercial prudence, Indian Bank would be expected to first check whether or not Varun is entitled to the release of the security. Such a check would involve finding out whether a complying presentation had been made prior to the expiry of the credit.

262 If the protection of a secured issuing bank is an additional goal of Art 15(c), then, there has to be a primary goal, and logically, that would be to

protect an unsecured issuing bank from the default of the nominated bank in forwarding the documents promptly. It is suggested that this is also not the objective of Art 15(c) from the commentary given by the Drafting Group on Art 15(c) (see SJ [275]) According to the Drafting Group, it appears to be to address the problem of nominated banks failing to release the documents immediately, even in cases where the nominated bank had been reimbursed. It is not clear what these situations were that caused concern. In the present case, reimbursement did not arise because Bank of India did not honour or negotiate. In any event, the Drafting Group was aware of the nature of the complaints, and yet drafted Art 15(c) to require only a nominated bank which honours or negotiates to forward the documents (see SJ [243]).

(4) Implying a term into the UCP

263 Fourth, it is suggested that the test of necessity for implying a term into a contract is not satisfied. There is no necessity because the *Byrne Expectation* renders unnecessary the need for such an implication. The *Byrne Expectation* was fulfilled as India forwarded the documents to Indian Bank, albeit with some delay arising from its discussions with GRIPT to negotiate the documents (which Bank of India was invited or authorised to do under the Letter of Credit).

264 Further, it is suggested that this court, as the apex court, should act with restraint, if at all, in implying, a term into UCP 600. This point was considered by the English Court of Appeal in *Fortis v IOB* CA at 302 at [55] which is reproduced below.

> (h) Implication of a term into the UCP?
>
> [55] The judge was prepared to hold, in the event that he was wrong about the construction of art 16, that a term should be

> implied into the UCP. In the *Seaconsar Far East case* [1993] 1 Lloyd's Rep 236, this court implied a term into the UCP, as did Hirst J in *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587, following an earlier decision of Gatehouse J in *Co-operative Centrale Raiffeisen-Boereleenbank BA (Rabobank Nederland) v Sumitomo Bank Ltd, The Royan* [1987] 1 Lloyd's Rep 345. In the light of my views on the construction of art 16, it is not necessary to express a view on whether a term can be implied into the UCP, to the extent that a question of implication is different to a question of construction: see the opinion of the Privy Council delivered by Lord Hoffmann in *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [16]–[27], [2009] 2 All ER (Comm) 1 at [16]–[27], [2009] 1 WLR 1988. Whether a term can be implied into the UCP was not an issue specifically considered in the cases to which I have referred. It is not necessary to reach a concluded view in this case on this issue, though in my view there would be real difficulties in using a rule of national law as to the implication of terms (if distinct from a method of construction) to write an obligation into the UCP.,

265 It may not be wise for national courts to act as super-drafters of the UCP. The court will no longer be construing the UCP but reconstructing it to meet its own understanding of the purpose of the particular article. It is suggested that this is not the business of the courts to cause a regime change in the law and practice of letters of credit under the UCP. It is suggested that if there is a lacuna in UCP 600, the lacuna should be filled by express contractual terms or by revising UCP 600.

Miscellaneous matters

Byrne's commentary on Art 15

266 At MJ [94]-[96], the Analysis refers to *Byrne* at pp 713 – 714 to make the point that when the nominated bank determines that the documents comply, and honour or negotiates, it must forward the documents "promptly within the normal cycle of operations" which means no later than the end of the next banking day after the determination has been made unless there is

compelling reason for any delay", and that a purposive interpretation corresponds to this conclusion. *Byrne's* commentary at pp 713–714 reads:

> UCP 600 Article 15 must be read in the context of UCP 600 Article 12(a) (Nomination) which provides that a nominated bank has no obligation to act pursuant to its nomination unless it agrees to do so. UCP Article 15(c) provides that a nominated bank that determines that a presentation is complying and that honors or negotiates pursuant to its nomination **"must forward the documents"** to the issuer or the confirmer. The assumption on which it is predicated is not a review of the documents but a decision to act pursuant to its nomination **and either pay or negotiate**. The subarticle refers generically to "nominated banks" without distinguishing confirming banks and what it says, while applicable in part to confirming banks, is incomplete with respect to them. **Moreover, strictly speaking, there is no legal obligation for a nominated bank to forward the documents to anyone even if it has acted pursuant to its nomination.** However what is meant is that its ability to be reimbursed is conditioned on so forwarding them. It is also expected that even if a nominated bank elects not to act pursuant to its nomination, it will forward the documents to the issuer or confirmer.
>
> [emphasis added]

267 In the above passage, *Byrne* states that, strictly speaking, a nominated bank has no legal obligation to forward the documents to anyone even if it has acted pursuant to its nomination, but that if it does not forward the documents, it will not be reimbursed. This is, of course, a logical fact. The majority judgment (see MJ [98]) considers this observation "a purely theoretical point" because a nominated bank would not negotiate the documents and make payment except with the expectation of reimbursement. Since this expectation is a practical reality, the Analysis holds that in keeping with this practical reality, the mandatory language, namely, **"must forward"**, in Art 15(c) must be taken to mean what it says.

268 What does the language mean? If it means that it must forward, as a practical matter, in order to be reimbursed, then it means what it says. But, if the mandatory language means that the nominated bank has a legal obligation to forward the documents, then, it is suggested, the language does not necessarily mean what it says. It is suggested that *Byrne's* observation is simply a restatement of Art 7(c) (in the case of an issuing bank) which provides that 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, and Art 8(c) (in the case of a confirming bank) which provides that confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and **forwarded** the documents to the confirming bank. It follows as a matter of fact, that if the nominated bank does not forward the documents to the issuing bank or the confirming bank, as the case may be, it will not get reimbursed by either of them, as the case may be. It may be observed that if the nominated bank does not forward the documents to the issuing bank for payment, the issuing bank does not have to pay, and may not have to pay at all if the documents are never presented. Hence, it seems ironical for the issuing bank to take a position that is contrary to its own interest, ie, that the prompt forwarding of documents is a legal obligation which the nominated bank must observe so that the issuing bank becomes obliged to pay when otherwise it would not have to do so.

269 It is suggested that *Byrne* is not making a purely theoretical point. If, for example, Bank of India, in the present case, had discounted GRIPT's draft and paid GRIPT US$9,890,408.63, it would have a compelling commercial reason to forward the documents to Indian Bank in order to obtain payment of S$9,993,239.54 on the maturity date of the draft. Bank of India would not

need a contractual provision, such as Art 15(c), to motivate it to do so. Bank of India's self-interest (including the need of its officers to perform their duty as employees) provides a better incentive or a better motivating force than a contractual obligation for such a commercial purpose. Hence, the words "must forward" may not be intended to impose a legal obligation, but merely to describe the natural process expected of the nominated bank of transmitting documents to the next bank in the chain. This point is discussed immediately below.

270 *Byrne* restates the proposition at para 24 at p 716 as follows:

> a. When a nominated bank determines that documents comply….
>
> Ii A bank that takes up the presentation must forward the documents promptly unless it refuses them or refuses to take them up, whether or not it elects to act pursuant to its nomination.

271 It should also be noted that there is not suggestion in *Byrne* that the mandatory language "must forward" prescribe, or was intended to prescribe, a legal obligation on the nominated bank to forward the document, the breach of which would, or could, give rise to a claim for damages, or even the rejection of complying documents on the ground of delayed transmission. In fact, *Byrne* says the opposite, *ie*, there is no legal obligation for a nominated bank to forward the documents to anyone even if it has acted pursuant to its nomination. The word "must" is used in many articles of UCP 600 and does not always or necessarily connote a contractual obligation. For example, Art 14(a) provides:

> A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank **must examine** a presentation to determine, on the basis of the documents

> alone, whether or not the documents appear on their face to constitute a complying presentation.

272 *Byrne*'s commentary on the meaning of the words "must examine", in relation to an issuer and confirmer, are set out at para 7 at p 553 as follows:

> UCP600 Article 14(a) states that an issuer, any confirmer and any nominated bank that acts pursuant to its nomination, "must" examine a presentation to determine compliance. **Strictly speaking, this formula, while hallowed by time is not correct.** The obligation of the issuer and the confirmer to be beneficiary and of the issuer to the confirmer turns on the question of whether or not the documents comply with the terms and conditions of the credit. Moreover, if an issue or confirmer do not examine documents and do not timely refuse them for a valid reason, they are precluded from refusing under UCP600 Article 16(f)…There is no obligation to examine documents although most banks do so. Whether they examine the documents or not, the only question to be asked is whether the documents comply. If they do, then the issuer and confirmed are obligated to honour or reimburse and nominated banks are entitled to be reimbursed.
>
> [emphasis added]

Meaning of "prompt" forwarding

273 At MJ [95]–[97], the Analysis endorses a passage from *Byrne* (at pp 714-715) that the nominated bank must forward the documents by the end of the next banking day after it has determined that the documents are complying, unless there is a compelling reason for any delay ("*Byrne* formula"). The Analysis next says that "our purposive interpretation of Article 15(c) broadly corresponds with this conclusion." At [97], the Analysis says that "there is consistency in the approach proposed in *Byrne* and that taken by Hamblen J in *Fortis v IOB* HC albeit in a slightly different context."

274 It is suggested that while there is consistency in the requirement of prompt forwarding, there is no consistency as to the timing. The "reasonable

promptness" test endorsed in *Fortis v IOB* is very different from the *Byrne* formula. What is reasonable must depend on the circumstances of the case. In *Hick*, Lord Herschell LC said at 29:

> … there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances… the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist.

275 The *Byrne* formula says "promptly …and by the next banking day after the determination." The timing is fixed and is short, as the maximum period for examining the documents is five days. Forwarding must be done, at the latest, by the eighth day if there are two intervening non-banking days. The passage in *Byrne* that sets out the *Byrne* formula reads (at MJ [95]):

> **When Documents Must Be Forwarded.** UCP 15(c) indicates that when a nominated bank determines that documents comply, it must forward them. However, like other subarticles in this article it does not indicate when 'when' is. The Drafters' Commentary at 70 indicates that **the revision attempted to address concerns expressed by ICC National Committees of a failure on the part of nominated banks to release documents immediately or even after the bank had been reimbursed. If the rule addresses this problem, the response must be hidden** in the word "when". The same analysis that applied to the prior subarticles should be applied here; that is, promptly within the normal cycle of operations and by the end of the next banking day after the determination has been made unless there is a compelling reason for any delay.
>
> [emphasis added]

276 *Byrne* is saying in this passage is that the word "when" in Art 15(a), (b) and (c) is not defined. However, since the Drafters' Commentary at p 70 has referred to concerns expressed by ICC National Committees of **a failure on the part of nominated banks to release documents immediately or even after the bank had been reimbursed***:* (see SJ [243] above)*, Byrne* suggests "**[i]f the rule addresses this problem",** then the word "when" in Art 15(c)

should have the meaning of "when" in Art 15(a) and (b). *Byrne* uses the conjunctive "[i]f", because he was merely suggesting a possible source of its meaning.

277 *Byrne*'s analysis of the meaning of "when" in Art 15(a) and (b) is found at para 10 on p 712 which reads:

> **10. "When".** UCP600 Article 15 begins each of its subarticles [*ie*, Art 15(a),(b) and (c)] but does not indicate "when" is. UCP600 Draft Article 21 (Compliant Documents) v.2.0 (March 2005) used the phrase "at the time" which was replaced by "when" in the November 2005 Draft as UCP600 Draft Article 15 (v.3.0). Neither term provides for any indication how quickly a bank must act. To some extent, "when" it is due depends on whether the undertaking is to pay on presentation or over a period of time. In either event, payment should be made when it is due. Because the bank has decided to honor**, the practical question is one of lost interest.** Nonetheless, a bank should not unduly delay payment. Although the Drafters' Commentary describes this word as "the essential word" of these subarticles, the UCP fails to provide any guidance as to how it is to be interpreted. The Drafters' Commentary suggests that this term should be understood as "necessary" in the light of the removal of the "reasonable time" provisions of UCP500 (1993) Article 13(b) (Standard for Examination of Documents) and the insertion of the formula "a maximum of five banking days" in UCP600 Article 14(b) Standard for Examination of Documents). This statement contains the suggestion that UCP600 Article 15 would require a bank to act to honor or negotiate, as the case may be, when the determination that the documents comply is made even if the five-day period had not expired. As to "when" the bank must have acted, the suggestion made in the Drafters' Commentary is that it should no later than the next banking day.
>
> [emphasis added]

278 *Byrne* refers to lost interest if the bank delays payment if it has decided to honour, *ie*, pay. Interest is lost to the presenter if it is not paid when due, and therefore it ought to pay interest if it does not pay when due. *Byrne* restates this point at para 24(b) on p 716 as follows:

> **b. Where the credit is payable at sight, honor or reimbursement is due by the close of the next banking day following the determination that the documents comply unless extraordinary circumstances intervene in which case the bank is obligated to pay interest. Where it is not payable at sight, the same rule applies on the banking day of maturity.**
>
> [emphasis in original]

279 It is suggested that *Byrne*'s statement is predicated on the nominated bank (including a confirming bank which is a nominated bank) being under no obligation to forward the documents. Otherwise, it can lead to absurd commercial results. For example, if the *Byrne* formula is applied in the context of the present case, Bank of India would have been in breach of duty to Indian Bank even before the expiry of the validity date of the Letter of Credit. Here, the expiry date for presentation of documents was 25 March 2012. The documents were presented to Bank of India on 16 March 2012, including a draft for US$9,993,239.54 maturing on 22 August 2012. Even if Bank of India utilised the maximum five days to examine the documents and found them complying on 21 March 2012 and decided to honour or negotiate GRIPT's draft, it must forward the documents to Indian Bank by *22 March 2012,* three days before the *before the expiry of the Letter of Credit for presentation. Otherwise,* it could be held liable to pay damages for any loss suffered by Indian Bank.

280 This result does not seem to achieve any discernible commercial objective. It makes even less commercial sense if the other facts in this case factored into the analysis, *ie*, (a) the maturity date of GRIPT's draft was four months away, and (b) the documents presented under the Letter of Credit had no commercial value since it did not include the original bill of lading.

281 If the *Byrne* formula is intended to fix the requirement of "promptly" for the purpose of forwarding documents, it leads to commercially unreasonable results. It is suggested that that is not the intention of the *Byrne* formula. In any event, requirement of reasonable promptness applied in *Fortis v IOB* makes better commercial sense as what has to be done "promptly" must depend on the circumstances of the case.

Any claim by Indian Bank against Bank of India for breach of duty was bound to fail

282 Finally, even if Indian Bank had brought a claim for damages for breach of contract, *ie*, breach of Art 15(c), against Bank of India for failing to forward the documents "promptly", whether it be the next banking day (the *Byrne* formula) or with reasonable promptness (the *Fortis v IOB* standard), it would have failed for the reason given by JC Lee (that Bank of India had not acted on its nomination) and/or the reasons given in this judgment.

283 Bank of India forwarded the documents at the request of GRIPT, *ie*, on behalf of GRIPT to Indian Bank on 18 April 2012. Indian Bank rejected the documents on the grounds of late negotiation and expiry of the Letter of Credit. The rejection on these grounds was wrongful. A wrongful rejection has no legal effect. Indian Bank cannot now say that it did not receive the documents which it had wrongfully rejected. Furthermore, not having rejected them of the ground of breach of duty to forward promptly, Indian Bank cannot now say that the documents were not forwarded with reasonable promptness. It is suggested that Indian Bank never had contemplated that the documents were not forwarded to it with reasonable promptness since it has not even pleaded it explicitly in its counterclaim.

284 Finally, and in any event, Indian Bank could never have proved any loss as it was holding a cash security on 18 April 2012. If Indian Bank, after receiving the documents from Bank of India on 18 April 2012, had tendered the documents to Varun, these proceedings would not have been necessary, as Varun was not in a position to reject them on the ground that Indian Bank was in breach of contract in failing to tender them with reasonable promptness. Even if Indian Bank had released the cash security before 18 April 2012 (which it had not, as otherwise it would have pleaded it by way of defence), it would only have lost the security through its own fault but not the right to be reimbursed by Varun, as the applicant of the credit, for honouring the credit. There was never any question of any loss caused to Indian Bank by Bank of India in delivering the documents on 18 April 2012.

The common law duty to forward: nominated bank as agent

285 At [104]–[110], the Analysis discusses, for the sake of completeness, the common law duties of the nominated bank as an agent of the issuing bank, and concludes that the agent has the following duties:

> (a) When an agent is in possession of documents for his principal, he is under an obligation not to deal with those documents in such a way as would cause harm or loss to his principal.
>
> (b) The duty to inform and provide information to his principal of any matter which affects the principal's interest.
>
> (c) The duty to perform an act within a reasonable where it has an obligation to perform that act, and no time is stipulated for performance.

286 These are uncontroversial propositions where the scope of the agency would include such duties. It is not in every case of agency, including the instant case, that there is a duty to inform. It is not necessary to decide whether there is a duty to inform under the Letter of Credit, or whether the duty had been breached by Bank of India, or what would be the consequence of a breach. As a matter of fact, Indian Bank was informed on 18 April 2012 when it received the documents.

287 In the present case, the legal relationship between of Bank of India as the nominated bank and Indian Bank as the issuing bank is determined by the terms of the Letter of Credit and UCP 600. Whatever rights and obligations of the two banks, *inter se*, are found within the four corners of these two documents. There are no additional duties that Bank of India had to perform, at common law or otherwise which are inconsistent with these contractual rights and obligations. The duty, if any, as to when and when not to forward the documents is expressly provided for in Art 15(c). It is not permissible to imply a common law duty, whether in agency law or otherwise, and superimpose it on Art 15(c) or to run parallel with it. The obligations, if any, of Bank of India are set out in Art 15(c) and not under the common law.

The Letter of Credit was not a normal trade credit.

288 The concluding comments in this judgment relate to the true nature of the credit in the present case. The Letter of Credit was not an ordinary commercial letter of credit because the documents required for presentation were (i) an original signed commercial invoice; (ii) a photocopy of the original ocean bill of lading duly signed by the shipping agent; (iii) one copy of the beneficiary certificate. Moreover, all discrepancies were acceptable, with the

exception that the invoice value drawn should not exceed the maximum value and the validity period of the credit has not expired.

289 As original bills of lading were required for acceptance or payment by Indian Bank, the Letter of Credit was merely a mechanism to effect payment of a large sum of money to GRIPT. This was the sole function of the Letter of Credit. Accordingly, the time for forwarding the documents was irrelevant so long as they were forwarded since any time the documents were delivered GRIPT would be entitled to payment at the date of maturity of the draft. Even if the documents were delivered after the maturity date of the draft, the only party whose commercial interest would have been adversely affected would be GRIPT, as it would have lost the use of the funds. The documents were so forwarded on 18 April 2012, long before GRIPT's draft was due for payment.

Conclusion

290 For all the above reasons, even if Indian Bank had claimed damages against Bank of India for breach of duty, the claim was bound to fail.

Chan Sek Keong
Senior Judge

Winston Kwek, Winston Wong and Max Lim (Rajah & Tann Singapore LLP) for the appellant in CA 156/2014 and the 1st respondent in CA 158/2014;
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