IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA

AD – 2022

CORAM: *B. ACKAH-YENSU, J.A. (PRESIDING)*

S. BERNASKO ESSAH. J.A.

GEORGE KOOMSON, J.A.

CIVIL APPEAL NO.: H1/03/2022

DATED: 28TH JULY, 2022

SARAGO GHANA LIMITED - PLAINTIFF/RESPONDENT

(H/NO. C 18, SALAMANDER STREET

LASHIBI, ACCRA

VRS

FBN BANK GHANA LIMITED - DEFENDANT/APPELLANT

(ADJACENT GOLDEN TULIP, ACCRA)

JUDGMENT

ACKAH-YENSU, JA

INTRODUCTION

The key issue for determination in this appeal is whether or not the Defendant/Appellant duly established the Letters of Credit as requested by the Plaintiff/Respondent so as to justify the payment by the Plaintiff/Respondent of all the fees charged them for the purported establishment of the said Letters of Credit. For ease of reference, we shall refer to the parties by their designations at the trial court.

BACKGROUND FACTS

In the High Court (Commercial Division) Accra, the Plaintiff took out a writ of summons against the Defendant for the following reliefs:

> *"i. Recovery of the sum of Three Hundred and Seventy-Five Thousand One Hundred and Eleven Ghana Cedis, Thirteen Pesewas (GH¢375,111.12) being the commitment fee, processing fee, commission and cancellation fees for the Letters of Credit.*

ii. Interest on the said amount at the Defendant's lending rate with effect from 24th December 2014 until date of final payment.

iii. General Damages.

iv. Costs.

v. Any other relief that the Honourable court deems fit."

In their Amended Statement of Claim, the Plaintiff averred that in December 2014, they applied for an import finance facility in the form of Letters of Credit of Fourteen Million Ghana Cedis (GH¢14,000,000.00) ("*the facility*") from the Defendant Bank to finance the importation of sugar for its business. The Defendant Bank approved the facility by letter dated 15th December 2014 in which letter the Bank set out the terms and conditions for the grant of the facility.

By the terms of the offer letter and facility agreement, it was agreed that the Defendant would charge a commitment fee and processing fee of 1% each on the amount of the facility to be paid at the time of initial disbursement of the facility. It was also agreed that a commission of 0.50% would be paid on the establishment of Letters of Credit in favour of the Plaintiff. The Defendant Bank however failed to provide the finance facility required. Consequently, no funds were credited to Plaintiff's account for drawdown. The Defendant Bank also failed to establish the Letters of Credit that would have enabled the Plaintiff to undertake the importation of the sugar.

The Plaintiff averred that notwithstanding the failure of the Defendant to discharge its obligations under the transaction, they debited the Plaintiff's account with an amount of Three Hundred and Seventy-Four Thousand, Four Hundred and Fifty-Three Ghana Cedis, Thirteen Pesewas (GH¢374,453.13) on the 24th of December 2014, as processing fee, commitment fee and commission for the Letters of Credit. An amount of Six Hundred and Fifty-Eight Ghana Cedis (GH¢658.00) was also debited from its accounts by the Defendant as cancellation charge.

After the Defendant Bank refused/failed to reverse the charges as demanded by Plaintiff, the Plaintiff wrote to the Defendant to cancel the Letters of Credit. Plaintiff averred that the Defendant's assertion that they had established the Letters of Credit was wholly untrue. That, Defendant was unable to procure a confirmation for its Letters of Credit by an international bank as required by the custom of the trade and international banking.

In their Statement of Defence, the Defendant contested the Plaintiff's claim. They pleaded that the processing and commitment fees were fees paid by customers in order to avail a facility from a bank and that was a standard practice in the banking industry. That, the establishment of the Letters of Credit was the first step towards the utilization of the import finance facility for the importation of the sugar. Defendant contended that it duly established the Letters of Credit on 29th December 2014 on behalf of the Plaintiff in favour of 5 Stone Commodities Inc. (Beneficiary/Supplier) for the sum of US$5,812,500.00 in line with the terms of the offer letter. The established Letters of Credit was however not confirmed by its correspondent bank because the beneficiary/supplier could not meet the due diligence requirements of the correspondent bank hence the Letters of Credit was not advised to the beneficiary. This was brought to the attention of the Plaintiff and

consequently, on 21st January 2015, the Plaintiff wrote to the Defendant Bank to terminate/cancel the Letters of Credit.

Defendant contended further that by accepting the terms as contained in the offer letter, the Defendant had to process the credit request of the Plaintiff after which it would commit funds, which had other alternative uses, to meet the Plaintiff's request. That, the Defendant had fully discharged their obligations under the transaction and hence was entitled to the processing, commitment and the Letters of Credit establishment fees in line with the terms of the offer letter. The non-confirmation of the Letters of Credit by the correspondent bank cannot be attributed to the Defendant since the supplier/beneficiary could not meet the requirements of the confirming bank, a fact which was made known to the Plaintiff.

The Defendant also contended that the amounts debited on the Plaintiff's account were just and legitimate charges which the Defendant was entitled to in accordance with the terms of the Offer letter, and at no time did the Defendant unjustly enrich itself at the expense of the Plaintiff.

At the close of hearing, the trial court in its judgment dated 26th February 2021, directed the Defendant Bank to refund the commitment fee, notwithstanding the finding by the said Court that the Defendant Bank duly established the Letters of Credit in favour of the Plaintiff. The trial Judge posited that the Defendant Bank did not deserve to be paid the Commitment fees charged and hence ordered as follows:

"The Defendant is only entitled to the fees for establishing the L.C. being;

(a) Processing fee – 1.00% of the approved amount; and

(b) L.C. establishment – 0.50% of the L.C. amount".

The rest of the fees deducted were not properly earned together with the cancellation and same are to be refunded to the Plaintiff with interest thereon from 21st February 2015 when the L.C. was cancelled to the date of final payment.

The Court awards General damages of GH¢15,000.00 for the Plaintiff with cost of GH ¢10,000.00 for the Plaintiffs.

The Defendant is also entitled to cost of GH¢10,000.00"

It is from this judgment the Defendant has appealed to this Court by Notice filed on 27th April 2021 in which the following grounds of appeal have been set out:

"(a) The judgment is against the weight of evidence.

(b) The learned trial Judge erred when she held that even though the Defendant/ Appellant Bank established the Letters of Credit (LC), the Plaintiff/Respondent Company is entitled to part of the reliefs sought because the corresponding Bank declined to confirm the established L.C.

(c) Further grounds of appeal to be filed upon receipt of the Record of Appeal".

We need to state that no additional ground of appeal had been filed nor argued at the time this appeal was heard and reserved for judgment.

THE APPEAL

In their written submission, the Defendant's Counsel argued both grounds (a) and (b) together which we shall also consider compositely.

The said ground (a) is formulated thus: "**The judgment of the Court below is against the weight of the evidence**". The settled law is that this ground is an invitation to this Court (which is in much the same position as the trial court), to re-evaluate the totality of the evidence on record in order to arrive at our own conclusions as to whether or not the findings and conclusions of the trial court are supportable from the evidence adduced, or that they are perverse and inconsistent with the drift of the evidence. This approach is in accord with our power of rehearing pursuant to Rule 8(1) of the Court of Appeal Rules, C.I. 19.

In the exercise of our power, we shall also discuss ground (b) which is implicitly a complain about the improper evaluation of the evidence by the trial court. The Defendant herein has a corresponding duty to point out pieces of evidence which have either been improperly evaluated or not evaluated at all, which if properly done no court or tribunal properly instructing itself would have arrived at the same conclusion.

In their written submission, the Defendant assails the trial Court's finding against them thus:

"There is no gainsaying that if the Defendant Bank has performed its obligations under the facility agreement executed, it is entitled to recover its full cost incurred for the services rendered in accordance with the agreement reached. However, is that what indeed occurred in the situation from a practical point of view? This Court does not think so because regardless of the fact that the L.C. was established, the fact remains that there were glitches which resulted in the Plaintiff herein not getting the benefit of the service and having to cancel that particular L.C. in the long run because the partner/corresponding Bank of the Defendant declined to confirm same and the Defendant in the candid opinion of this Court ought not to benefit fully for that".

It is Defendant's Counsel's submission that the trial Court's decision that the established Letters of Credit created by the Defendant Bank was subject to confirmation by a correspondent bank hence the Defendant Bank was not entitled to some of the fees earned, is not supported by the Facility Agreement executed between the parties and the case put forward by the Plaintiff itself.

What clearly emerges for determination in the instant appeal is the issue as to what constitutes the establishment of Letters of Credit. In the accepted industry practice, Letters of Credit are most common in international transactions where buyers and sellers may not know each other well or laws and conventions may make certain transactions difficult. A letter of credit facility is a line of credit taken by a business entity. As with all credit facilities the payment terms, conditions and restrictions for the letter of credit line of credit are varied and negotiated between a bank and the borrower.

The Letter of Credit has been defined by the Bank of Ghana, the central statutory regulatory institution as "*an agreement between the buyer/importer and the seller/exporter that when the buyer received the goods will be able to remit the funds to the seller. This form of payment is used to give protection to exporters/seller and importers/importer against buyer/seller risk and country risk*" (boaghana.com).

In the case of **Nyai Trading Enterprise Ltd. v HFC Bank (Ghana) Ltd. [2020] DLCA 8264,** this Court explained letters of credit thus:

> *"A letter of credit is in essence a series of contracts involving the buyer, one or more banks and the seller. The pattern of operations may work in this way:*
>
> *The buyer being the Respondent instructs its bank to open a credit in his favour for the amount of the purchase price. The buyer must open credit which conforms to the specifications spelled out in the sale contract. The issuing Bank, here the Appellant, will then correspond with a bank within the seller's jurisdiction which will either advise the seller of the opening of the credit in its favour, or confirm the credit opened by the issuing bank adding its own direct undertaking to pay the purchase price. At this stage the advising or confirming bank will send the letter of credit to the seller – the beneficiary under the credit – containing a list of documents to be presented in order to obtain release of the money. When the seller then receives the letters then the documents are released to the buyer's bank. The buyer's bank will only hand over the shipping documents to the buyer only when payment had been made and the acceptance of the documents concludes the contract.*

A letter of credit is thus a written agreement between a seller, buyer and banks regarding terms and conditions of payment for goods or services. Banks act as third-party intermediaries for the sale and guarantee to make payment in the instance that the buyer defaults. The primary purpose of a letter of credit is to guarantee payment. Although the conditions of a letter of credit may vary based on the buyer's situation and the bank's regulations, Letters of Credit essentially allow the buyer to capitalize on the bank's credit instead of relying on its own. The seller is assured that if the buyer does not come through with the funds, the bank will. This assurance is vital for establishing business relationships.

In an article titled: '**The Role of Letters of Credit in Payment Transactions"**, **98 Mich. L. REV. 2494 (2000)** (available at https://scholarship.law.columbia.edu/faculty_scholarship/454) by Ronald J. Mann, he sought to illuminate the basic Letters of Credit transaction. He states that the letter of credit transaction has two sides; an import side (the buyer) and an export side (the seller). Both sides ordinarily have a bank, which makes a total of four parties to the transaction. The bank on the import, or buyer's side of the transaction normally issues the letter of credit, which obligates the bank to pay the purchase price upon the receipt of specified documents. Letters of credit rules typically describe the importer as the applicant, and the applicant's bank as the issuing bank or the issuer of the letter of credit.

Therefore, central to the letter of credit transaction is the concept of independence: the bank's obligation on the letter of credit is completely separate from any of the contractual obligations of the underlying transaction, either the obligation of the buyer to pay the seller under ordinary principles that govern sales transactions, or any obligation that the

buyer might have under an agreement or common law principles to reimburse the bank for payments made on its behalf under the letter of credit. The bank's obligation depends entirely on the beneficiary's presentation of documents that conform to the requirements of the letter of credit. Indeed, the rules governing letters of credit so thoroughly separate the bank's obligation to pay from ordinary principles of contract law. To use Roy Goodes' apt term in his paper: "***Abstract Payment Undertakings*" in ESSAYS FOR PATRICK ATIYAH 209, 209-13 (Peter Cane & Jane Stapleton eds.,** 1991), a letter of credit is an *"abstract payment undertaking"* – an enforceable undertaking to make payment wholly abstracted from the underlying transaction.

The bank on the export, or seller's side plays a different role. The seller expects to receive the funds offered by the letter of credit as payment for the anticipated shipment and is thus identified as the *"beneficiary"* of the letter of credit. Because the beneficiary and applicant ordinarily are in different countries, the beneficiary often has its own bank to help process the letter of credit when it is issued by the applicant's bank overseas and then forwards the documents that seek payment from the issuer when the seller ships the goods. The beneficiary's bank ordinarily assumes one of two roles. If it only *"advises"* the beneficiary of the issuance of the letter of credit, it just processes the documents and has no direct liability on the letter of credit. Alternatively, it might *"confirm"* the letter of credit, in which case the beneficiary's bank directly obligates itself on the letter of credit, pays the beneficiary directly, and then forwards the documents to the issue for reimbursement.

In an article by John F. Dolan titled "**The Correspondent Bank in the Letter-Of-Credit Transaction"** (109 Banking L. J. 396 (1992)), the author states that a simple letter of credit

transaction is triangular: (1) a sales contract between the seller and the buyer, (2) an application agreement between the buyer and its bank (the issuer), and (3) a letter of credit issued by the bank in favour of the seller. However, in international practice, the transaction is usually rectangular, for a fourth party, the correspondent bank enters the transaction between the issuer and the seller. The correspondent plays any number of roles and performs functions that enhance the efficiency of the transaction.

As aforesaid, a beneficiary bank is the receiving bank where the seller has an account. Correspondent banks and intermediary banks both serve as third-party banks and are used by beneficiary banks to facilitate international fund transfer and transaction settlements. In both cases the issuing bank (where the buyer has an account) would use a correspondent or intermediary bank to complete the process of moving funds from the issuing bank to the beneficiary bank. Correspondent banks, depending on where in the world the account holder is from, may be either distinct from intermediary banks, or they can be a type of intermediary bank – indistinguishable from intermediary banks. A correspondent bank thus provides services on behalf of another bank, serving the role of a middleman between the issuing bank and the receiving bank. Domestic banks often use correspondent banks as their agent abroad to finish transactions that either start or end in foreign nations.

Correspondent banking has been defined in the European Central Bank (ECB), Ninth Survey on correspondent banking in euro February 2015 (www.ecb.europa.eu/pup/pdf/other/surveycorrespondent_bankingineuro201502.en.pdf) as *"agreements or contractual relationships between banks to provide payment services for each other"*. A more detailed definition by the Wolfsberg Group (an association of 13 global banks which aim to

develop guidance and frameworks for the management of financial crime risks with respect to KYC, AML and CFT policies) established that *"Correspondent Banking is the provision of a current or other liability account, and related services, to another financial institution, including affiliates, used for the execution of third-party payments and trade finance, as well as its own cash clearing, liquidity management and short-term borrowing or investment needs in a particular currency".*

Both definitions highlight the main components of corresponding banking: a bilateral agreement between two banks by which one of them provides services to the other, the opening of accounts (by the respondent in the books of the correspondent) for the provision of services and the importance of payment services as a core function of correspondent banking. As the ECB definition highlights, these relationships are frequently reciprocal, in that each institution provides services to the other, normally in different currencies.

The trial court made a finding that even though Letters of Credit were established by the Defendant Bank, the Plaintiff did not get their full benefit because they were not confirmed by the correspondent bank. In the "*Request for Credit Facility"* letter, Exhibit "1" (page 19 of Record of Appeal), the Defendant Bank required as part of the conditions precedent to drawdown, that the Plaintiff authorize the Bank to open a Debit Servicing Reserve Account (DSRA) for the build-up and application of funds; see paragraph 1.6. Paragraph 1.7(v) of the said exhibit indicates that one of the conditions precedent to drawdown was to customer's written undertaking to *"Allow the bank to apply funds in DSRA in sourcing FX on an ongoing basis (based on a prior agreed rate) towards building funds "for confirmation of LC".*

Again, paragraph 30 of Exhibit "1" states that: *"At maturity of LC, funds in the DSRA are applied to confirm the LC. Where there is any shortfall, the IFF line is disbursed for 30 days"*. These conditions were repeated in the Facility Agreement (Exhibit "B") (page 42 of Record of Appeal). It is therefore obvious that between the Parties, there existed an intention for Letters of Credit to be established by the Defendant Bank, which would be confirmed to give efficacy to the Plaintiff's transaction of importing sugar. From the discussion of the role of a respondent bank above, the role of a correspondent bank is a matter of custom and usage and not a term or condition in the contract between the parties herein. Clearly Deutsche Bank as the correspondent bank in this case, was providing services for the Defendant Bank and not for the Plaintiff.

From the evidence on record (page 25 of Record of Appeal), the Defendant Bank, on 29th December 2014, sent a SWIFT message to the Correspondent Bank, (Exhibit "3") portions of which read as follows:

"Sender: *INCEGHACXXX*

INTERNATIONAL COMMERCIAL BANK LTD.

(AKA FBN BANK)

ACCRA GH.

Receiver: *DEUTGB2LXXX*

DEUTSCHE BANK AG

LONDON GB

Applicant: *SARAGO LIMITED*

SALAMANDA STREET, COMMUNITY 18

LASHIBI TEMA

GHANA

Beneficiary: *5 STONE COMMODITIES INC*

60 STATES STREET, SUITE NO. 700

2027 N.E. 121 STREET ROAD – NORTH

MIAMI, FL, USA

Current code: Amount

Currency: *USD (US DOLLAR)*

Amount: *5,812,500.00*

Available with: *DEUTGB2L*

DEUTSCE BANK AG

LONDON GB

BYDEF.PAYMENT"

Lines 49 and 72 of the message indicated thus:

"Confirmation instructions:

CONFIRM

Sender to receiver information

KINDLY CONFIRM THIS LC AGAINST AN IRU ISSUED TO FBNIGB2L TO YOUR GOOD BANK".

These instructions are contrary to the Defendant's argument that the creation of Letters of Credit intended under the Facility Agreement was not subject to confirmation by a correspondent Bank from its own instructions to the correspondent bank as indicated in lines 49 and 72 of Exhibit "3" above.

The correspondent bank herein communicated to the Defendant Bank as shown in Exhibit "4" (page 30 of Record of Appeal) on the status of the Letters of Credit on 2nd January 2015. The message stated *inter alia* as follows:

"AS PER FIELD 72 OF A/MLC, THIS LC IS TO BE CONFIRMED UPON RECEIPT OF IRU ISSUED BY FBNIGB21. TILL DATE WE HAVE NOT RECEIVED IRU FROM FBNIGBL. PLEASE CHECK AND URGENTLY CONFIRM.

MEANWHILE AIM LC REMAINS UNADVISE AT OUR COUNTER AT YOUR RISK AND RESPONSIBILITY"

The correspondent bank sent another message to the Defendant Bank indicating its decision not to advise the Letters of Credit. The relevant portion reads as follows:

"PLEASE NOTE THAT AS PER ARTICLE 9 OF UCP 600, WE ELECT NOT TO ADVICE THE LC. THEREFORE, WE TREAT THIS LC AS NULL AND VOID AND CLOSE OUR FILES".

In his written submission, Counsel for the Plaintiff reproduced the various stages of a letter of credit transaction as discussed in Schmitthoff's **"Export Trade, The Law and practice of International Trade"** at page 169 as follows:

"(a) The exporter and the overseas buyer agree in the contract of sale that payment shall be made under a letter of credit.

(b) The overseas buyer (acting as "applicant for the credit") instructs a bank at his place of business (known as the "issuing bank") to open a letter of credit for the United Kingdom exporter (known as the "beneficiary") on the terms specified by the buyer in his instructions to the issuing bank.

(c) *The issuing bank arranges with a bank at the locality of the exporter (known as the "advising bank") to negotiate, accept or pay the exporter's draft upon delivery of the transport documents by the seller.*

(d) *The advising bank informs the exporter that it will negotiate, accept or pay his draft upon delivery of the transport documents. The advising bank may do so without its own engagement, or it may confirm the credit opened by the issuing bank".*

From Schmittof's (supra) discussion of the stages in letters of credit transactions, it is evidence that the Letters of Credit never advanced to the 3rd stage where the advising bank would inform the seller or the exporter that letters of credit had been opened in its favour. The transaction stalled after stage (b) because the Defendant Bank did not finalize the arrangement with the correspondent bank. Smittchoff's explained at page 186 of his book that "*the credit is regarded as 'opened' when the advice of the confirmation as the case may be is communicated to the beneficiary (the Seller)".* See **Bunge Corporation v Vegetable Vitamins Foods (Plc) Ltd. [1985] 11 Lloyd's Rep. 613**, in which it was opined that a credit is only "*opened*" when the advice of the opening of the letter of credit or the confirmation of the letter of credit is communicated to the beneficiary**.**

In light of the above, the argument of the Defendant Bank that the Correspondent bank did not confirm the Letters of Credit because the seller did not meet its due diligence requirement is not tenable as it is evident that the transaction did not proceed to the stage where the advising bank would inform the seller of the Letters of Credit opened in its favour and require the delivery or presentation of certain documents from him prior to payment.

As aforesaid, the learned trial Judge took the view that the Defendant Bank did not fully discharge its obligations and posited at page 9 of the Judgment (page 272 of Record of Appeal) thus:

> *"It is however interesting to note that although the Defendant claims that the inability of the corresponding bank to confirm the LC cannot be attributed to the IRY, it failed to present any documentary evidence to the court to prove same. Exhibit "3" does not show that the funds were made available to the Plaintiff or its trading partner for utilization".*

The learned trial Judge stated further at page 21 of the judgment (page 273 of Record of Appeal) that:

> *"Defendant Counsel on the other hand says that this is a lack of appreciation of how the LC works and that in the confirmation of an LC, all the bank ought to do is examine the documentations made available to it, and if the bank finds same suitable it pays, and if the bank does not, it refuses the request. So once the request is refused, how should that be viewed, is (sic) that the work is done to completion and the bank gets all its fees? Surely, that cannot be the equitable position".*

The Defendant Bank presented Exhibit "3" as evidence in support of their assertion that funds were made available for the benefit of the Plaintiffs trading partner and Exhibit "4" as evidence in support of their assertion that the established Letters of Credit was not confirmed by its correspondent bank because the beneficiary/supplier could not meet the

due diligence requirements of the correspondent bank; from the illustration above, this cannot be the true position.

CONCLUSION

In our considered opinion, the trial court did not err in its findings regarding Exhibits "3" and "4", neither was there any error in arriving at the conclusion that the Defendant Bank did not fulfil its obligation and therefore should not benefit fully. We find that the learned trial Judge's reasoning was sound and supportable from the evidence.

Before we rest this judgment, we cannot gloss over some statements made by Counsel for the Defendant/Appellant against the trial Judge, which he has acknowledged as inconsequential in the determination of the appeal and has described the said statements as "*OBITER*".

The law may have been settled especially if founded on statute. The Court is not in a position to create any new law apart from what by the principle of judicial precedent or *stare decicis* has been settled unless otherwise provided by statute or the Constitution. That, the position of the law and the language in which it is expressed by Counsel is reproduced by a Judge is conceivable. Such a situation will in no way justify an unwarranted, unethical, and unprofessional attack by an Officer of the Court on a trial Judge. The language deployed by Counsel in what he describes as obiter does not belong to this profession. Indeed it is Courts which make obiter pronouncements and not lawyers. It will appear that Counsel for the Defendant/Appellant has clearly

overestimated the quality of his submission and has resorted to applying offensive language against a Judge.

Having placed this on record, we shall refrain from any further comment on the substance of the appeal before us. Having found no merit in the grounds of appeal as articulated in the written submission, we accordingly dismiss the appeal. The appeal consequently wholly fails and is dismissed. The judgment of the trial High Court is hereby affirmed.

(SGD.)

BARBARA ACKAH-YENSU

(JUSTICE OF APPEAL)

S. R. BERNASKO ESSAH (MRS.), J.A., I agree *(SGD.)*

S. R. BERNASKO ESSAH

(JUSTICE OF APPEAL)

G. K. KOOMSON, J.A., I also agree *(SGD.)*

G. K. KOOMSON
(JUSTICE OF APPEAL)

COUNSEL:

EMMANUEL ADU WIAFE FOR DEFENDANT/APPELLANT

A. BOAMAH WITH STACY NAA DOUDUA DARKU FOR PLAINTIFF/

RESPONDENT