A **NEC Hong Kong Ltd** Plaintiff

and

Industrial and Commercial Bank of China & Another Defendants

B

(Court of First Instance)
(Commercial Action No 60 of 2000)

C

Stone J
15–18, 21–22 November, 20 December 2005, 11 January and 17 February 2006

D *Commercial law — letter of credit — whether discrepant presentation — whether immaterial error — whether documentary fraud*

商業法──信用證──所呈示的文件是否有不相符之處──所涉錯誤是否無關重要──是否有藉文件進行詐騙的行為

E In 1998, P sold 750 computers and for payment letters of credit were issued with P as beneficiary. The computers were shipped in batches to "Fortune System", a collecting agent in Hong Kong, for onward transmission to the Mainland. The documents to be presented under the letters of credit included cargo receipts issued and signed by
F authorised persons of Fortune System. In preparing the documents for presentation, P noticed that for some of the cargo receipts the letter of credit numbers had been switched, and so related to the wrong batch of goods. Fortune System authorised P to make a "Fortune Co"
G company chop and correct the error. An employee of P then made the amendments, applying a small round "Fortune System" chop to the top of the cargo receipts. B did not accept the documents when presented, alleging there were discrepancies, including that for the rectangular signature chops at the bottom of the cargo receipts, the
H letter "s" at the end of the word "Systems" had been tippexed out such that the signature chop was consistent with the heading of the cargo receipts of "Fortune System". P then brought proceedings. At trial, B argued that the presentation of the documents was discrepant as the "s" correction had to be authenticated by independent signature;
I and that P should have made clear to B that one of its employees corrected the letter of credit numbers, and provided evidence that it was authorised to do so and the failure to do so amounted to documentary fraud which misled B.

Held, finding for P, that:

J (1) The presentation of the documents was not discrepant. First, the existence of the now-excised "s" at the end of the word "system" was an immaterial error. The doctrine of strict compliance did

not extend to the dotting of "i's" and the crossing of "t's", or to obvious typographical errors either in the credit or in the documents. (*Hing Yip Hing Fat Co Ltd v Daiwa Bank* [1991] 2 HKLR 35 applied). (See pp.662H–I, 663H–664B.)

(2) Second, even if authentication for the correction was required, the signature within the rectangular signature chop "D Wong", by which the signatory intended to sign on behalf of "Fortune System" served as sufficient authentication. The deletion of the "s" did not require separate authentication. (See pp.662J–663F.)

(3) There was no documentary fraud. There could be no question of fraud or forgery given that P had been specifically authorised to make the chop and apply it after the switched letter of credit numbers had been corrected. The identity of the human agency effecting the amendment mattered little. There was no reason why B had to be put on notice of the identity of the agency effecting the amendment, and of the authority so to amend (*United City Merchants (Investments) Ltd & Another v Royal Bank of Canada & Vitrorefuerzos SA & Another (Third Parties)* [1983] AC 168 considered). (See pp.667D–668H.)

(4) Finally P's subsidiary argument that B's rejection of the documents, which took five days, did not come within a "reasonable time" under art.13(b) of the UCP 500 and "without delay but no later than the close of the seventh banking day following the receipt of the documents" under art.14(d)(i) was rejected on the facts. The preclusionary operation of art.14(e), where if an issuing bank and/or confirming bank "fails to act in accordance with the provisions of this article" it was prevented from claiming the documents were not in compliance, was limited solely to a breach of art.14 itself. Thus, the only timing issue here that could trigger the preclusionary effect of art.14 was a breach of art.14(1)(d) (*Koninklijke Sphinx v Rabobank Nederland* (unrep., HCCL No 188 of 1997) followed). (See pp.663H–666D.)

Action

This was a letter of credit case in which the plaintiff sued the first defendant-bank for payment under two letters of credit. The second defendant counterclaimed against the plaintiff for breach of the underlying contract. The facts are set out in the judgment.

Mr Jat Sew Tong SC and Mr Bernard Man, instructed by Hastings & Co, for the plaintiff.

Ms Janine Cheung, instructed by Livasiri & Co, for the first defendant.

Mr Chan Chi Hung SC and Mr Jose-Antonio Maurellet, instructed by William KW Leung & Co, for the second defendant.

Cases cited in the judgment

H (Minors) (Sexual Abuse: Standard of Proof), Re [1996] AC 563, [1996] 2 WLR 8, [1996] 1 All ER 1

A **Hing Yip Hing Fat Co Ltd v Daiwa Bank [1991] 2 HKLR 35, [1991] 1 HKC 383**

HKSAR v Lee Ming Tee & Securities and Futures Commission (Intervener) (2003) 6 HKCFAR 336, [2004] 1 HKLRD 513

Koninklijke Sphinx BV v Rabobank Nederland (unrep., HCCL
B **No 188 of 1997)**

United City Merchants (Investments) Ltd & Another v Royal Bank of Canada & Vitrorefuerzos SA & Another (Third Parties) [1983] AC 168, [1982] 2 WLR 1039, [1982] 2 All ER 720, [1982] 2 Lloyd's Rep 1

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Other materials mentioned in the judgment

ICC Uniform Customs and Practices for Documentary Credits (1993 Revision) arts.13, 13(b), 14, 14(d), 14(d)(i), 14(e)

International Chamber of Commerce, *DC Insight*, Vol.4 No 4

D **Travis, Joyce, *International Standard Banking Practice for the Examination of Documents Under Documentary Credits* (2003) paras.9, 12**

Stone J

This action

E

1. This is a letter of credit case which has become procedurally more complex than is usual by reason of allegations of fraud made by the applicant for the credit, and by reason of the joinder of such applicant (which in separate proceedings had obtained injunctive relief preventing
F **application for payment under the credit) to the existing letter of credit action.**

2. Accordingly the broad shape of the present action, is thus: The present plaintiff, NEC Hong Kong Ltd (NEC) sues the first defendant herein, Industrial and Commercial Bank of China (ICBC) for payment
G **under two letters of credit which were issued by the bank upon the application of the second defendant, Gaoming Light Industrial Products Import and Export Co of Guangdong (Gaoming), and which had named NEC as beneficiary thereunder.**

3. NEC, the present plaintiff, asserts no cause of action
H **against Gaoming; however, Gaoming seeks relief against NEC by counterclaiming for, *inter alia*, damages for breach of an underlying sales contract said to have been entered into between NEC and Gaoming, and for injunctive relief requiring NEC to withdraw its claim for payment under the two letters of credit in question.**

4. The hearing of this action has attracted the usual expansive
I **amounts of paper and is larded with evidential detail. At bottom, however, the case is relatively straightforward notwithstanding numerous complications, both as to fact and law, which variously have been introduced.**

J

The factual background

5. At the outset it may assist to outline the factual situation.

6. NEC is a seller of computers which, I apprehend, were manufactured by its Japanese parent.

7. The computers at issue in this case were 750 notebook computers which, so NEC maintains, were the subject of sale to a mainland Chinese company known as 3E (or Sanli) Technology Development Co Ltd. Henceforth I shall refer to this entity as "3E".

8. 3E was an authorized distributor of NEC computers in China but, says NEC, 3E was a company which did not have the facility to apply for a letter of credit under the foreign exchange control regime in China as then existed; accordingly, Gaoming, which did have such facility, was asked by 3E to make application to ICBC on its behalf for the relevant letters of credit.

9. I pause to note that Gaoming disputes this, and asserts that Gaoming itself was the direct purchaser of these computers from NEC in addition to being the undisputed applicant for the credits. This is a matter which in due course will require factual determination; for the present, however, this aspect represents no more than a diversion from the broad narrative.

10. In any event, whomever be the true identity of the buyer, on the evidence it appears that these notebook computers were to be delivered to 3E in late July 1998, but that NEC would give 60 days' credit, with the result that payment was to be made by letter of credit in late September 1998.

11. In order to give effect to this payment structure, the relevant cargo receipts were to be dated late September 1998, and the documents to be presented under the relevant letters of credit, including such cargo receipts, were to be presented for payment within seven days of the date of these cargo receipts.

12. It is undisputed that the 750 notebook computers, which in fact were sent in two shipments by NEC, were to be collected in Hong Kong, for onward transmission to the mainland, by an entity called "Fortune System" (or "Fortune Systems"), which was an importing agent, and which at all material times was a sole proprietorship owned by one Mr Danny Wong Yee Leung.

13. It further is undisputed that two letters of credit were issued, upon the application of Gaoming, by ICBC, with NEC named as beneficiary thereunder: L/C number LC45598118 in the amount of US$507,000 was issued on 20 July 1998, and LC45598117 in the amount of US$531,000 was issued on 21 July 1998.

14. In each instance one of the documents required to be presented under these credits was stated to be:

> Cargo receipt issued and signed by the authorized person(s) of "Fortune System" certifying that the goods have been received in good order and condition upon trust for account and/or on behalf of the Industrial and Commercial Bank of China Foshan branch stating the value and quantity of the goods and mentioning this credit number.

15. It is at this juncture that the evidential picture becomes a little murky. I deal in more detail with the respective accounts of what happened later in this judgment, with particular reference to the efforts by NEC to ensure with Mr Danny Wong that correct versions of the cargo receipts were put in place, an account which is disputed by Mr Wong.

16. For present purposes suffice it to say that it is NEC's case, albeit strongly disputed by Mr Wong of Fortune System, that on 28 July 1998 the first batch of notebook computers, a total of 600 units, was delivered by NEC's delivery contractor, Tung Hing Transportation Company Ltd (Tung Hing) to a warehouse to which it had been directed by Fortune System, the address of which was Room 505, 5/F Block A, MP Industrial Centre, Ka Yip Street, No 18, Chai Wan. In exchange for such delivery, stamped and signed cargo receipts were obtained from a Chinese male who had appeared on site to receive these goods; in fact, the evidence from Tung Hing was that it had taken its workers nearly one hour to deliver all the goods in this batch from the truck into the warehouse.

17. NEC asserts that this first delivery was followed — an assertion once more disputed by Mr Wong of Fortune System — by the delivery of the remaining batch of notebook computers, 150 units, which on this occasion were delivered by Tung Hing on 31 July 1998 to the registered office address of Fortune System at Room 1014, Paramount Building, 14 Ka Yip Street, Chai Wan; once again a stamped and signed cargo receipt was returned by Tung Hing to NEC consequent upon such delivery.

18. It is unclear, on the evidence, precisely where these computers ultimately went, although it is said by NEC that its purchaser, 3E, acknowledged receipt thereof but ultimately had insufficient funds to pay for these goods.

19. Be that as it may. From NEC's viewpoint it had complied with its bargain with 3E and the delivery instructions pursuant thereto, and on 29 September 1998 the Bank of China, as advising bank under the credits, couriered the documents required under the two L/C's to ICBC. These documents reached ICBC on 1 October 1998.

20. However, notwithstanding presentation of the required documents, on 9 October 1998 ICBC refused payment under the credits on the ground of alleged discrepancies. It appears that on 5 October 1998 the bank had inquired of Gaoming as to whether it would waive the alleged discrepancies, and on 7 October 1998 Gaoming had responded that it would not do so.

21. The evidence from NEC is that Mr Got of NEC then telephoned 3E, the ostensible purchaser of the goods, which confirmed that the computers in fact had been received. Thereafter, Mr Got and Mr Raymond Wong had travelled to Guangzhou in order to speak to Mr Han of 3E about the non-payment problem, but the matter had remained unresolved.

22. No payment was forthcoming from 3E despite Mr Han's promise to do so, in a telephone call to Raymond Wong of NEC of 27 October 1998, and a letter dated 3 November 1998 from Mr Han to NEC promising payment.

Consequential litigation

23. Against this backdrop NEC pursued ICBC for payment under the letters of credit.

24. This dispute between issuing bank and beneficiary was submitted to the international body known as DOCDEX (Documentary Instruments Dispute Resolution Expertise) of the ICC for resolution, and on 21 December 1999 DOCDEX rendered an advisory opinion in support of NEC.

25. Nevertheless, ICBC maintained its refusal to pay under the credit on the basis that the presentation was discrepant.

26. Against this backdrop, NEC issued proceedings against ICBC on 24 January 2000 in HCA No 855 of 2000, which case subsequently was transferred to the Commercial List and became HCCL No 60 of 2000.

27. In the meantime Gaoming, the applicant for the credit in question, itself had issued proceedings against NEC in HCA No 3629 of 2000, and in those proceedings successfully had obtained interlocutory injunctive relief enjoining NEC from applying for payment under the credit.

28. Procedurally, that which appears to have happened was that on 26 May 2000 Gaoming made successful application before a Master to intervene in the NEC action against the bank, that is, in HCA No 855 of 2000, and to be joined as second defendant therein. An appeal against this joinder decision was mounted by NEC, which appeal was dismissed by Suffiad J on 8 June 2000.

29. The position therefore was that there were parallel High Court actions in place arising from these events.

30. On 20 June 2000, this Court approved an application for transfer of these two cases to the Commercial List, and directions were made that the actions be heard in the form as now constituted by HCCL No 60 of 2000.

31. At the same time NEC undertook to take no further steps to draw down under the ICBC credits numbered 45598117/118, thus obviating the necessity formally to continue the injunctive relief currently in place, at Gaoming's behest, against NEC.

32. This, then, constitutes the somewhat tangled factual background to the proceedings presently the subject of this judgment.

The evidence

33. For the plaintiff, NEC, six witnesses gave *viva voce* evidence: Mr Robert Got, Mr Raymond Wong, Ms Sylvia Fu and Mr PY Leung,

all of whom were employees of NEC at the material time, and whom had been involved with the sale and shipment of the computers, and its aftermath, together with Mr Poon Koo Fai and Mr Ma Hok Ying, both of Tung Hing, which was the transportation company charged with delivery, in two tranches, of the 750 notebook computers to Fortune System.

34. The second defendant, Gaoming, called three witnesses, namely Mr Danny Wong Yee Leung, the sole proprietor of Fortune System, Madam Tao Yu Hui, at the time a manager in the No 2 business department of Gaoming, and Mr William Leung, the solicitor instructed by Gaoming in this litigation, whose evidence dealt with the provenance of a significant alteration within Gaoming's pleaded case.

35. For the first defendant-bank, ICBC, one witness only was called, that is, Mr Pan Feng, now Deputy Manager in the International Business Department of ICBC (Foshan branch), and at the time a clerk in the Bills Section of the International Business Department of ICBC.

The issues

36. Despite the profusion of detail in this case, at bottom there are three major issues for decision:

First, the issue of fraud, which has occupied a significant proportion of this case. Shortly put, did NEC attempt to defraud the bank and/or Gaoming?

This issue involves the primary factual — and hotly disputed — consideration of whether NEC indeed delivered, via the agency of Tung Hing, the 750 notebook computers to Fortune System, which in turn involves consideration of the allegation advanced by Gaoming, with which argument ICBC specifically allies itself, that NEC had forged the relevant cargo receipts.

Second, was the presentation of documents under the letters of credit issued by ICBC discrepant?

A subset within this issue is if the documents in fact were discrepant, whether the bank had taken too long to reject the documents?

Third, did NEC have a contractual relationship with Gaoming, and, if so, does Gaoming succeed in its pleaded counterclaim against NEC for what is alleged to represent a loss of profit on projected subsale?

I deal with these issues in turn.

Fraud/forgery

37. Although the aspect of fraud/forgery has loomed large in this case, particularly at the outset, by the time of final submissions Mr Chan SC, for the second defendant, acknowledged that the issue of fraud on the part of NEC, which is bound up with the factual issue

of whether there was in fact delivery of these goods, was "not my strongest point". In my view he was correct to make that concession.

38. In considering the issue of fraud, I bear in mind also that this is a serious allegation, with consequent implications in terms of discharging the burden of proof upon the party so alleging — in this case, of course, Gaoming. In *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, the House of Lords reiterated that in a civil case an allegation of misconduct of this nature must be proved with evidence of commensurate cogency, whilst in *HKSAR v Lee Ming Tee & Securities and Futures Commission (Intervener)* (2003) 6 HKCFAR 336, at para.72, Sir Anthony Mason NPJ referred to the need for a disciplined approach to the drawing of inferences, and in particular that inferences of fraud or serious misconduct were to be drawn *only* where such inferences are compelling.

39. In order to understand how the fraud/forgery issue arose, it is necessary to say something about the evidence as it pertains to the detailed circumstances of this case.

40. The evidence of NEC was to the effect that after entering into the agreement to sell these notebook computers to 3E, and having been apprised that delivery thereof was to take place through the entity known as Fortune System, a sole proprietorship owned by Mr Danny Wong (who was an ex-employee of NEC) that NEC had liaised with Mr Danny Wong of Fortune System as to the precise terms of the relevant cargo receipts; it was, of course, necessary to attain this degree of precision because under the terms of the documentary credits issued by ICBC, of which NEC was beneficiary, a "cargo receipt issued and signed by the authorised person(s) of "Fortune System" was a required document for presentation under these credits in order that NEC would be able to obtain payment thereunder.

41. The particular manner in which this occurred was as follows.

42. Mr Raymond Wong of NEC told the court that on 27 July 1998 he had telephoned Mr Danny Wong and had informed him that the computers referable to L/C 117 and part of the goods under L/C 118 were ready for delivery on 28 July 1998, and that he had asked Mr Wong to prepare the relevant cargo receipts and to fax them to NEC in order to ensure that the particulars thereon were in order.

43. The further evidence of NEC was that — as indeed Mr Danny Wong accepted — at or about 6:22 pm on 27 July 1998 drafts of the two cargo receipts referable to the first delivery, namely CR1 and CR2, were faxed by Mr Danny Wong to Mr Raymond Wong, who then had passed them on to Ms Sylvia Fu for checking; the signature of Mr Danny Wong appears as "Wong Yee Leung" on these drafts.

44. Ms Fu stated in evidence that she had noted certain mistakes on these drafts, and had effected handwritten corrections before faxing the drafts back to Danny Wong for formal correction. She said that she also had telephoned Danny Wong and had explained these corrections to him, and further had told him that she was faxing to

him the correct version of the cargo receipts; in response Danny Wong had promised that he would correct the mistakes and in turn that he would send the corrected cargo receipts back to NEC.

45. Ms Fu stated that at around 1:07 pm on the following day, that is, 28 July 1998, the two corrected cargo receipts had been received by fax from Danny Wong; all the errors appeared to have been rectified, although on the drafts as corrected the signature of Danny Wong appeared as "D Wong". For her part Ms Fu said that she had called her former colleague Danny Wong and had told him that the revised drafts were in order, and that the relevant goods would be delivered that afternoon.

46. As to the delivery arrangements, Mr Raymond Wong of NEC, who also was a former colleague of Danny Wong, stated that he had received from Danny Wong a faxed delivery address advising as to where the goods were to be delivered. The address which was given on this fax was the MP Industrial Centre. Mr Raymond Wong further said that upon receipt of this fax he had called Danny Wong and had asked for details of the contact person, and that Mr Wong had responded that the contact person was someone named "Law" (or "Lo"); accordingly Mr Raymond Wong had written down this name and the relevant telephone number on this fax, before passing this fax on to Ms Fu.

47. The evidence is that in 1998 the only employee of Fortune System was a Mr Law, also known as Roger.

48. Ms Fu then had faxed both the delivery address fax and the corrected draft cargo receipts to Mr PY Leung of NEC Logistics for him to arrange for delivery of the first batch of 600 notebook computers, which were delivered on 28 July 1998 by NEC's delivery contractor, Tung Hing, to the MP Industrial Centre address; in fact, together with the delivery of this first tranche of 600 computers, this delivery contained two other deliveries which did not comprise part of this order but which were relevant to previous orders that NEC had had with 3E.

49. Whilst initially disputed, it appears now to be accepted on behalf of Gaoming that this first delivery of 600 computers indeed *was* delivered as NEC maintains. Nor was it suggested to Mr Poon Koo Fai of Tung Hing, who had been responsible for this first delivery, that Mr Poon had not collected the original cargo receipts, CR1 and CR2, from the person who had received these computers at the MP Industrial Centre, nor that Mr Poon, as he stated, had not secured the signature on the original delivery orders of the person so receiving these computers.

50. Although there is no necessity to make a specific finding on the point, given that I accept that delivery of these computers indeed was made by NEC to Fortune System, in the circumstances as revealed on the evidence it seems highly probable that this person was Mr Roger Law, Mr Danny Wong's employee at Fortune System.

51. A similar delivery pattern prevailed with the remaining shipment of 150 computers, although in this regard there was a difference in terms of the delivery address.

52. Mr Raymond Wong stated that on 30 July 1998 he again had telephoned Mr Danny Wong to inform him that the remaining goods under L/C 118 were ready for delivery on 31 July 1998, and in like manner had asked Danny Wong to prepare the relevant cargo receipt and to fax this to NEC for checking. At around 5:00 pm on the same day Ms Sylvia Fu had received a fax draft of CR 3 from Mr Danny Wong, and on this occasion no correction had been required. Once again, therefore, Ms Fu had adopted her previous practice and had faxed the draft cargo receipt to Mr PY Leung to arrange delivery.

53. On this occasion, however, Mr Raymond Wong had been told by Danny Wong that these remaining goods should be delivered to the office address of Fortune System, namely Paramount Building, which information Mr Raymond Wong wrote down in Chinese at the head of the handwritten document he had prepared; this document also detailed the particulars of the 150 notebook computers to be delivered.

54. Once again, Ms Fu had prepared the relevant delivery orders referable to this second batch of goods, together with another delivery order for a separate NEC delivery to 3E, and after approval had passed these delivery orders to Mr PY Leung of the NEC logistics section; once again Tung Hing had been engaged to deliver this batch of goods, and once again signed delivery orders were obtained acknowledging receipt of these goods.

55. As to the place of delivery of this second shipment, I have no difficulty in concluding, on the balance of probabilities, that these computers were delivered by Tung Hing to the Paramount Building address of Fortune System. This was a far smaller quantity of goods, certainly less significant than the entire lorry load which had been required for the first tranche, and given the evidence that NEC Logistics arranged in the region of 20–30 deliveries per day, and given that the events in question took place eight years ago, I do not find it surprising that none of the witnesses apparently now has a recollection of this particular delivery. Accordingly in this instance NEC placed reliance solely upon the contemporaneous documents still available; in this context Mr Raymond Wong's handwritten document bears at its head the relevant address in Chinese characters.

56. On the day following this second delivery, that is, 1 August 1998, Tung Hing's staff had returned to NEC Logistics a copy of each of the two signed delivery orders, and also, and most importantly, the original of CR 3.

57. Ms Fu says that on 3 August 1998 she had received into her possession the three original cargo receipts, duly signed, from NEC Logistics, but, and crucially as matters were to develop in this case, she did not double-check these originals, since earlier she had perused the correct draft versions sent by fax by Danny Wong. Upon receiving

A the original cargo receipts Ms Fu made an entry in her working diary in order that she would remember to ensure that these documents were to be presented, pursuant to the credits, on 24 September 1998.

58. However, Ms Fu stated that on 17 August 1998, when she had taken out these documents in order to prepare for presentation to the B bank, she had discovered that the originals of these cargo receipts were *not* in terms of the agreed faxed copies in that the respective L/C numbers thereon had been switched, with the result that in each instance the L/C number related to the wrong batch of goods.

59. This discovery then set off a chain of events of both factual C and legal significance in this case.

60. NEC's evidence is that Ms Fu informed Mr Raymond Wong of the problem, and that Raymond Wong then had called the office of Fortune System and had spoken to Roger Law, who said that Danny Wong was not in the office, and suggested that Raymond D Wong call Danny Wong's mobile number and speak directly to him about the problem.

61. In the event, Danny Wong could not be contacted, but on the following day Mr Raymond Wong was able to speak with him on his mobile phone. Mr Raymond Wong says that in this conversation E he had notified Mr Danny Wong of the mistakes in the cargo receipts, but that Mr Danny Wong said that he was in China, that he had not brought the company chop with him, and that there was no other chop at the office of Fortune System in Hong Kong and that no-one in the Hong Kong office could do the necessary amendments.

F 62. It is Mr Raymond Wong's evidence that Mr Danny Wong then suggested that NEC could make a company chop of "Fortune System" and correct the mistakes on the face of the cargo receipts.

63. Mr Raymond Wong indicated that he would consider this idea, and that he would call Mr Danny Wong back on the following G Monday, that is, 21 September 1998, after he had discussed the issue with his senior at NEC.

64. The evidence from NEC is that Mr Raymond Wong did discuss the problem with his senior colleague, Mr Got, who said that if Mr Danny Wong had authorised NEC to make the corrections, H Mr Raymond Wong could follow this suggestion as to how to solve the problem.

65. Accordingly, on Monday, 21 September 1998, Mr Raymond Wong said that he again spoke to Danny Wong on his mobile telephone, and the latter indicated that he would not be returning I to Hong Kong for a few days. In the circumstances, said Mr Raymond Wong, after once more consulting Mr Got he had decided to follow Danny Wong's suggestion. He and Ms Fu went to order a "Fortune System" chop, and with the aid of this small round chop — which has been produced as an exhibit to this Court — the inverted L/C J numbers were corrected and the amendment "chopped" on the cargo receipts.

66. The foregoing summarises the essential elements of the evidence on behalf of NEC in so far as it relates to the events leading up to the presentation of documents required under the letters of credit issued by ICBC.

67. The contrary evidence led on behalf of Gaoming, the second defendant, revolved solely around, and depended solely upon, the credit worthiness of Mr Danny Wong of Fortune System, whose version of events provides the sole justification for the allegations of fraud and forgery publicly levelled in this trial at NEC witnesses, and in particular at Mr Raymond Wong.

68. Mr Danny Wong's version of events is in stark relief to that of NEC, and is in short compass.

69. Mr Danny Wong told this Court that after he had faxed the first draft of the cargo receipts to NEC that the "corrected" version of these draft cargo receipts never had been faxed back to him by Ms Fu, that Ms Fu never had talked to him and never had requested that he make the amendments indicated on the drafts, and indeed that after faxing the original draft he had heard nothing more about this matter from NEC, or from Ms Fu, and that he had had no further contact whatever with NEC in terms of this shipment of 750 notebook computers.

70. Further, Mr Danny Wong denied that Fortune System ever had taken delivery of the two tranches of computers, whether at the MP Industrial Building or at the Fortune System office at Paramount Building, and equally denied speaking to Raymond Wong of NEC on his mobile phone whilst he was in China in terms of the creation by NEC of a Fortune System chop which then could be applied to the erroneous cargo receipts in order to render them compliant with the ICBC documentary credit requirements.

71. In short, the evidence of Mr Danny Wong invited the Court to believe his account of events and to characterise as wholly untruthful the contrary evidence of the NEC and of the Tung Hing witnesses.

72. I decline this invitation as firmly as I may.

73. I accept the evidence of the NEC and the Tung Hing witnesses as evidence of truth.

74. I find as a fact that the preparation for, and the delivery of, these shipments of notebook computers took place precisely in the manner as outlined in the detailed and cogent evidence of Mr Raymond Wong, Ms Sylvia Fu, Mr PY Leung and Mr Poon Koo Fai.

75. I further find as a fact that the cargo receipts were *not* forged by NEC, as Gaoming had claimed, that the manner in which the drafts of the cargo receipts were approved was precisely as outlined by Ms Fu and by Mr Raymond Wong, and that the two tranches of computers were delivered against CR 1, CR 2 and CR 3, which documents in turn duly were delivered back by Tung Hing to Ms Fu.

76. As to the signatures on those cargo receipts, although strictly it is unnecessary so to do, I find on the balance of probabilities that

these signatures were placed thereon on behalf of Fortune System and were written by Mr Roger Law, the then employee of Fortune System who has *not* been called to give evidence in this case.

77. I further find as a fact that after the discovery by Ms Fu of the numerical errors in the original cargo receipts, that Mr Raymond Wong had had the telephone conversations which he described with Danny Wong, and I further find that Mr Danny Wong indeed had authorised Mr Raymond Wong to make the substitute "Fortune System" chop and to make the requisite alteration to the error on the face of the cargo receipts.

78. The conclusion of this Court, therefore, is that the allegations of fraud and forgery raised against NEC are, and were, risible.

79. It is fair to say that during this trial these fraud allegations came to present somewhat of a moving target, but for the avoidance of doubt I unequivocally reject the case (if indeed such continues to represent Gaoming's argument) that the amended draft cargo receipts were forged by Mr Raymond Wong and handed to Ms Fu; equally I reject the allegation that the faxed delivery address of the MP Industrial Building did not originate from Fortune System but, to the contrary, was a forgery instigated by Mr Raymond Wong in order to perpetrate a fraud in order to steal the goods in question. I reject also the suggestion that it was Mr Raymond Wong who had sent an imposter to the MP Industrial Centre address in order to impersonate someone from Fortune System, and thus to misappropriate these computers.

80. In my judgment Gaoming's submission that, in effect, there was a conspiracy within NEC involving Mr Got, Mr Raymond Wong and Ms Fu to purloin these shipments of computers is utterly groundless, and in my view is not an argument which should have been pursued.

81. I found Mr Danny Wong to be an unimpressive and egregious witness, and I found his evidence, and the implication of fraud/forgery sought to be derived therefrom, to be manifestly unsupportable against the backdrop of the contemporaneous and obviously genuine documentation relied upon by NEC.

82. In coming to this conclusion, I bear in mind also the late amendment, by way of re-amended reply to the plaintiff's defence to the second defendant's counter-claim, which amendment served substantially to change the earlier version of events which clearly had been pleaded on the instructions of Danny Wong, and which sought to retract earlier admissions to the effect that Danny Wong indeed did accede to the NEC request and had made the necessary corrections to the three draft cargo receipts, and thereafter had returned the same by fax to NEC.

83. In this connection Mr William Leung, the solicitor of the second defendant, was called to give evidence as to the reason for this manifest change of position. I regret to observe that I found his evidence to be of little assistance, and to be wholly unconvincing.

I gave no weight to it, not least because it appeared to be Mr Leung's position that it was his assistant, Mr Marc Lee, who exclusively had been responsible for the original pleading which had been done on the instructions of Mr Danny Wong, and that he, Mr Leung, had had no direct knowledge of that which had transpired.

84. For reasons which were not clear Mr Leung appeared not to have checked the position with Mr Lee, contenting himself in evidence with a surmise that no instructions were taken when the admissions were drafted, and the further surmise that his firm had not proffered the pleading to his client for approval prior to filing. In cross-examination, Mr Leung was constrained to accept that the admissions (as to pleas of oral communication with NEC and continued custody of the draft cargo receipts by Danny Wong) could not have been drafted solely on the basis of documents, and he then resorted to the speculative position that his assistant must have drafted his client's pleading on the basis of the other side's affirmation — which in itself could not be tenable because in the affirmations of Mr Murooka there was no reference to any such matters, nor could there have been as NEC could not have known about matters which were particularly within the personal knowledge of Danny Wong.

85. Significantly, in responding to questions from the Court, Mr Leung was driven to accept that his assistant probably had taken instructions from Danny Wong, but he was not able to explain why these admissions had not been withdrawn at the time of Mr Danny Wong's first witness statement, which had been prepared in December 2001.

86. It further transpired that the assistant solicitor who actually had been dealing with Mr Danny Wong was still with Mr Leung's firm — Mr Chan SC had even informed the Court that he was considering calling him — but in the event this did not occur, which struck me at the time as a most unsatisfactory state of affairs.

87. In these unfortunate circumstances it is hard to avoid the conclusion that Mr Jat has pressed on the Court, namely that the case now put forward by Mr Danny Wong was no more than a recent fabrication, and that in so far as his evidence conflicted with that of the NEC witnesses, the evidence of the latter is wholly to be preferred.

88. I agree. Unhappily I have concluded that this amendment was entirely self-serving and was effected to reflect the changed case that Danny Wong, and Gaoming, on reflection now wished to put forward, and that no good reason has been advanced as to why there should have been a change of instruction upon such a fundamental matter within the context of the serious allegation of fraud/forgery.

89. It follows from the foregoing that the case advanced by Gaoming as to fraud/forgery is rejected. Gaoming has not come close to discharging the burden of proof on this issue; indeed, as I have earlier observed, on this evidence this fraud case should not have been advanced.

90. Accordingly, the "pure" letter of credit element of this case dealing with the alleged documentary discrepancies now can be considered on its own merits, untrammelled by any consideration/finding of fraud.

Documentary discrepancies

91. I have earlier touched briefly on the facts relevant to this aspect of the case.

92. It is undisputed that on 29 September 1998 the Bank of China couriered the documents required under the two documentary credits to ICBC at Foshan; delivery was effected on 2 October 1998, albeit the Foshan branch of ICBC was closed between 1–4 October 1998 for the National Day holiday.

93. The evidence of the bank, which in this regard I accept, is that the documents had reached the Inward Bills Department of ICBC on 5 September 1998, that is, the first business day after the holidays, and on that day ICBC had identified certain alleged discrepancies within the documentary presentation, and had inquired of the applicant for the credit, Gaoming, as to whether it would be willing to waive these discrepancies.

94. Gaoming had declined this request. In evidence Madam Tao Yu Hui, who was the officer called on behalf of Gaoming (and who at the time had assisted the then legal representative of that company, Madam Yan), stated that Gaoming wished to use the alleged discrepancies as a "buffer" in order to give them the opportunity to investigate what had happened to the shipment of computers which Danny Wong had informed them had not been delivered. Madam Tao stated that "we doubted about the cargo receipts submitted by NEC" and that "at the beginning when we asked the bank not to pay, we based on the ground of discrepancies", and that in the circumstances Gaoming was "pleased" that there were discrepancies discovered in the documents.

95. As a matter of history, Gaoming replied to ICBC that they would not accept the documents on 7 October 1998, which was the date of the expiry of the two letters of credit.

96. On 10 October 1998, the ICBC notified the Bank of China by SWIFT that the documents were rejected.

97. On 4 November, notwithstanding the expiry of the two letters of credit, NEC re-presented the documents to ICBC. Once again payment was refused upon the ground of discrepancies.

98. Thereafter correspondence ensued between the advising bank and ICBC wherein payment was demanded and refused, and on 20 August 1999 NEC lodged a request to the ICC for a DOCDEX decision in relation to this dispute. DOCDEX decisions, which are made by three experts and are scrutinised by the technical adviser of

the ICC Banking Commission, are not binding upon the parties unless otherwise agreed.

99. After DOCDEX had rendered its decision in favour of the plaintiff, on 16 December 1999 Gaoming sought and obtained from a PRC court an order "freezing" the liability of ICBC to pay NEC under the credits. This order of the PRC court was discharged in late May 2000.

100. As the history of this litigation shows, Gaoming subsequently issued its Hong Kong proceedings seeking an injunction restraining NEC from attempting to obtain payment under the credits, which resulted in NEC on 9 October 2000 giving an undertaking not to draw down on the credits pending trial.

101. These, then, are the background facts relevant to the current dispute between the plaintiff and the first defendant bank, ICBC.

102. The present debate thus is in two main parts: first, is the bank correct in asserting discrepant presentation?; and second, and if so, did the bank take too long to notify the plaintiff of this position, and is the bank thus precluded under art.14(d) of the UCP 500 from placing reliance upon the discrepancies notified to the advising bank, Bank of China (HK), on 9 October 1998?

103. In addition, Ms Janine Cheung for the first defendant mounted two discrete subsidiary arguments, without prejudice to the discrepancies submission, namely that on the plaintiff's own case this was an instance of "documentary fraud", and second, that in the circumstances the cargo receipts in question should be characterised as a "nullity".

104. On behalf of her client Ms Cheung aligned herself, also, with the submissions on behalf of the second defendant as to the non-delivery/fraud element of the case, submissions which, of course, this Court now has specifically rejected. This stance, no doubt taken on instructions, provided further impetus for the view I have formed to the effect that the bank in this case has been acting less than independently, and that throughout it has had its eye firmly fixed upon what it perceived to be the best interests of its client, Gaoming — which, as the history demonstrates, clearly was desperate to prevent payment out under the documentary credits which it had put in place. In a sense, therefore, I have some sympathy with Mr Jat's contention that the "discrepancies" argument essentially formed a secondary string to ICBC's bow, given the bank's specific adoption of the submission that NEC had been guilty of fraud and/or of forgery.

105. As to the discrepancies argument in itself, at the outset it is noteworthy that the Bank's current position differs markedly from that which it had maintained up until its closing submissions in this trial.

106. By its SWIFT refusal notices in like form dated 9 October 1998, a total of no less than six discrepancies were relied upon, and indeed this list was pleaded in full in the Bank's defence in NEC's action against ICBC for payment under the credits.

A 107. In the event, in her closing submissions at this trial Ms Cheung for the Bank saw fit to rely upon one discrepancy only, which was the third in the rejection notice, and which reads:

> THE CHOP OF FORTUNE SYSTEM IN CARGO RECEIPT
B SHOWING DELETION WITHOUT AUTHENTICATION

108. The discrepancies alleged appear on cargo receipts NEC980727A and 727B [Exhs.P1A and 1B] which cover the first batch of computers delivered on 28 July 1998, although they refer to goods under both
C L/C 8117 and 8118.

109. It is not now in dispute that alterations were made to the cargo receipts by using "tippex" or a similar product. The cargo receipts bear the title "FORTUNE SYSTEM" at their head, and at the foot appears a "signature chop" consisting of a square logo, Chinese
D characters with thereunder the English appellation "FORTUNE SYSTEM", and underneath a signature "D Wong" on a dotted line over the words "GENERAL MANAGER".

110. The current dispute focuses upon the word "SYSTEM" in the chop, because quite obviously in each of these instances the
E word previously had been "SYSTEMS, and somebody clearly has "tippexed" out the "S" at the end of the word, no doubt because, absent such amendment, each of these cargo receipts would have been headed "FORTUNE SYSTEM", but the signature chop would have contained a discrepant name, that is, "SYSTEMS".

F 111. On behalf of ICBC, Ms Cheung says that these alterations to these two cargo receipts were made without authentication by independent signature, and that there is no indication that the amendment to the square chop at the bottom of the documents is linked to the small round chop affixed to the top part of each of
G these documents, which chop purported to verify the change in the inverted LC numbers (and which, it is common ground, was put there by Raymond Wong, after, as I have now found as a fact, a telephone conversation with Danny Wong authorising the affixing of such a chop).

H 112. In her argument Ms Cheung prayed in aid art.13 of the UCP 500 which refers to the requirement that "compliance of documents [with the terms of the Credit] shall be determined by international standard banking practice".

113. She also drew the Court's attention to paras.9 and 12 of
I the *International Standard Banking Practice for the Examination of Documents Under Documentary Credits* (ISBP). Paragraph 9 reads as follows:

> Corrections or alterations of information or data in documents, other than documents created by the beneficiary, must appear to be
J authenticated by the party who issued the document or by a party authorized by the issuer to do so. The authentication must show by whom the authentication has been made and include that party's

> signature or initials. If the authentication appears to have been made by a party other than the issuer of the document, the authentication must clearly show in which capacity that party has authenticated the correction or alteration.

Paragraph 12 reads:

> Where a document contains more than one correction or alteration, either each correction must be authenticated separately or one authentication must be linked to all corrections in an appropriate way. For example, if the document shows three corrections numbered 1, 2 and 3, one statement such as "Correction numbers 1, 2 and 3 above authorised by XXX" or similar, will satisfy the requirement for authentication.

114. Additionally, she cited an ICC publication called *DC Insight*, (Volume 4, No 4), wherein in response to a query on the necessity of authenticating documents issued by a party other than the beneficiary, the ICC Banking Commission noted:

> These documents must be corrected by the issuer and clearly show who has made the correction. If the correction is made by someone other than the issuer (ie agent), then this must be annotated with a declaration of the capacity of the person making the correction, in relation to the issuer. It will not be the responsibility of the banks to ascertain whether or not the person(s) was authorised to make the correction on behalf of the issuer.

115. The response to this argument of Mr Jat SC for the plaintiff was robust. He noted that this ground applied only to two of the three cargo receipts, and submitted that this argument was bad for two reasons.

116. First, that the existence of the now-excised "S" at the end of the word "SYSTEM" was plainly an immaterial error which would not make the document discrepant. In this regard he cited the decision of Kaplan J in *Hing Yip Hing Fat Co Ltd v Daiwa Bank* [1991] 2 HKLR 35 at pp.44G–45B, wherein the Court noted that the doctrine of strict compliance does not extend to the dotting of "i's" and the crossing of "t's", or to obvious typographical errors either in the credit or in the documents, with the result that in that case it was held that the difference between "Industries" and "Industrial" in the applicant's name was an obvious "typo" and was immaterial.

117. Second, Mr Jat argued that even if authentication was required, ICBC's contention was "fundamentally flawed" in assuming that the signature within the rectangular chop — "D Wong" — could not serve as sufficient authentication for the deletion of the "S" in "SYSTEMS".

A 118. In my view, Mr Jat's arguments are well founded and are correct.

119. The contractual requirement within the L/Cs' in question was that the cargo receipts had to be "issued and signed by authorised person(s) of Fortune System", and in the circumstances I agree with B the contention of NEC that whether the presentation was discrepant in the manner now contended by ICBC must depend upon whether the cargo receipts thus presented may properly be said to fall within this rubric.

120. No point is taken by ICBC in terms of CR No 3 [Exh.P 1C] C (notwithstanding that in the original of this document there also is faint evidence of a like excision), but nevertheless it is fair to say that upon looking at the three cargo receipts there can be no reasonable doubt but that these three documents were issued by the same issuer, that is "FORTUNE SYSTEM", and that the authorised signature D within the rectangular chop clearly was intended to be signed on behalf of "FORTUNE SYSTEM".

121. Accordingly, if, as Mr Jat suggests obviously is the case on the face of the cargo receipts, the signatory intended to sign on behalf of "FORTUNE SYSTEM", I fail to see why such single E authorised signature now should be castigated as insufficient; the authorised signature appears within the confines of the rectangular chop, and I do not consider that the deletion of the "S" required separate authentication.

122. As to the provenance of the signature itself, in the F circumstances it seems to me not greatly to matter whether this was done by Danny Wong, or by Roger Law on Danny Wong's instructions or with his authority. In the event, it seems more likely than not that it was signed by Roger Law, although it remains possible that it was Danny Wong, whom I did not believe when he said in evidence that G he had never signed his name in that fashion; indeed the evidence of Raymond Wong and Sylvia Fu, his erstwhile colleagues, which I accept, was that on past occasions they had seen the signature of Danny Wong in this form.

123. Nor do I accept the argument launched by Ms Cheung on H the basis of the ISBP. Mr Jat has pointed out that the ISBP did not represent international banking practice in 1998 — in fact the ISBP was approved by the Banking Commission of the ICC only in 2002 — and he further submits, in my view correctly, that the *DC Insight* commentary as to the authentication of corrections must of necessity I be referring to *material* corrections, and further that this commentary had been placed before the DOCDEX panel and must have been taken into account when that panel opined that the authorised signature within the chop constituted sufficient authentication.

124. For the avoidance of doubt I reiterate that I also agree J with, and accept, NEC's contention that in any event the existence of an "S" within the name, even if unexcised, was no more than an immaterial error which of itself, even if uncorrected, would not have

rendered the documents discrepant. Accordingly, if this be right, NEC cannot be the worse off if, as is the case, the "S" has been "tippexed" out.

125. It follows from the foregoing, therefore, that I am against ICBC in terms of the "pure discrepancy" argument, and I hold that the documentary presentation in this case was *not* discrepant.

126. This primary conclusion renders otiose Mr Jat's subsidiary argument, namely, that if, which is denied, there was a discrepant presentation, then in any event the rejection of the documents did not come within a "reasonable time" within the terms of art.13(b) of the UCP 500 and "without delay" under art.14(d)(i). However, if I be wrong in my primary view, I now briefly advert to this aspect.

127. Mr Jat submitted that the presentation in this case consisted of checking 11 pages of documents presented under two three-page L/Cs', and that in the circumstances the decision to reject and to notify NEC could not reasonably have taken five days, that is, from 5 October 1998 to 9 October 1998.

128. He submitted that ICBC had showed no sense of urgency given that the credits were due to expire on 7 October 1998, and in fact had only notified NEC of their decision to reject on 9 October 1998 when it was too late to re-present.

129. Mr Jat argued that NEC had negotiated the documents on 28 September 1998, well before the deadline of 7 October 1998, and that it was solely because ICBC was closed for the National Day holiday that the documents did not arrive in the relevant Bills Department until 5 October 1998. In no sense, he said, were these documents complex, and indeed the evidence is that Mr Pan and his fellow clerk had been able to identify the alleged discrepancies that ultimately were relied upon to reject the documents on the same day as they had received the documents, that is, 5 October 1998, and thereafter had contacted Gaoming.

130. Accordingly, given that the "discrepancies" had been identified on the same day as receipt, it was by no means clear, said Mr Jat, why or how it had taken the Supervisor and Deputy Manager (neither of whom were called to give evidence) from 5 October to 8 October 1998 to decide to reject the documents, and why NEC had been notified of rejection only on 9 October 1999, two days after the expiry of the credit. In the circumstances, he suggested, it was difficult to avoid the inference that Gaoming had requested the bank to hold things up; plainly it was unreasonable for Gaoming to be given two days to make its decision as to waiver regardless of the circumstances, and in particular the date of expiry of the credit.

131. Lastly, Mr Jat argued that if the decision to reject had been made on 8 October 1998, there was no reason why notice of rejection could not have been given on the same day, and that in leaving the notification to the following day, that is, 9 October 1998, ICBC had failed to discharge its "without delay" obligation under art.14(b).

132. To these submissions Ms Cheung strongly demurred. She maintained that in this regard NEC's argument was misconceived, and that by leaving it to the "last moment" to present, NEC effectively had chosen to run the risk of leaving itself no time to correct any discrepant documents.

133. She further submitted that having regard to the fact that the documents had arrived over the National Day holiday weekend, and taking into consideration all the circumstances of the case, the decision-making process had been conducted within a reasonable period of time. In this connection she referred to the evidence of Mr Pan of ICBC regarding the process within that institution in terms of documentary checking, and in particular that in normal cases the relevant bills checking unit would usually take three days after the date of receipt to come to an acceptance/rejection decision; in the instant case the evidence was that the particular checking unit was short of manpower and that the workload was almost double after the holiday, and that in any event the applicant, Gaoming, had been given the standard period of two days to consider the position.

134. In the event, said Ms Cheung, the decision to reject came but three days after receipt of the documents, the Deputy Manager having come to a decision to reject the presentation on the afternoon of 8 October 1998; Mr Pan duly was notified on that afternoon, and had issued a SWIFT to this effect on 9 October 1998, and thus that there had been no relevant delay between the decision to reject and the advice of that decision.

135. Nor, she said, was there any evidence whatever supporting the "innuendo" that the bank had been privy to delay in this matter at the instance of Gaoming, and she asked the Court to accept the evidence of Mr Pan to the effect that the Foshan branch of ICBC conducted its own decision-making process independently of Gaoming. Further, she submitted that NEC had not challenged the bank's evidence as to the checking process, the different staff, and the several layers of command through which the papers would have to pass, nor had there been any challenge to the usual length of time that the Bank had needed to come to a decision, which had come but three days after the day of receipt, with notification one day later, so that in terms of the bank's standard practice there had been no departure therefrom.

136. In my judgment, Mr Jat, having succeeded in his primary argument as to non-discrepant presentation, has not made out his "back up" position as to delay. Had it been relevant (which, in light of my earlier conclusion, it is not) as a matter of fact I should *not* have found, on the evidence before me, that in this case the bank had fallen foul of arts.13(b) and 14(d)(i) of the UCP 500.

137. Were I to be wrong in this secondary conclusion, and had the bank been in breach of these Articles (which in my view it is not), I also would have reaffirmed the view expressed by this Court in the earlier decision of *Koninklijke Sphinx BV v Rabobank Nederland*

(unrep., HCCL No 188 of 1997), in which (at paras.40–43) this Court concluded that, as a matter of construction, the preclusionary operation of art.14(e) — namely, "fails to act in accordance with the provisions of this Article" — is limited solely to breach of art.14 itself, and thus that the only timing issue that could trigger the preclusionary effect of art.14 is the failure to give notice of a decision to reject presentation in accordance with art.14(d)(i), that is, "without delay but no later than the close of the seventh banking day following the day of receipt of the documents". Whilst the decision in this case has been overturned on appeal on the facts — see CACV No 161 of 2004 — the holding on this specific point was not adverted to by the appellate court, and appears unaffected by the judgment in that appeal.

138. It follows, therefore, that unless ICBC could be said to be in breach of the provisions of art.14(d)(i) in this case, which I have indicated does not represent my view, art.14(e) would not come into play in any event. In this regard whilst I appreciate (and have some sympathy with) Mr Jat's submission that if this view be correct then failure to comply with art.13(b) would have no consequence, "no matter how gross", nevertheless as a matter of pure construction of the Articles in question this is the view which this Court continues to hold.

139. Finally under the "discrepant presentation" head, I turn to Ms Cheung's subsidiary arguments relating to "documentary fraud" and the "nullity" argument. I can dispose of both points shortly.

140. I take the "nullity" issue first, and I do so only out of an abundance of caution: this point found its way into Ms Cheung's opening, but did not reappear in her closing submissions.

141. The point pressed upon the Court, at the outset at least, was that the cargo receipts in question are a "nullity" on the basis that NEC's admission that the alterations to the L/C numbers were made and "authenticated" by a Fortune System chop commissioned by them "renders the Cargo Receipts void *ab initio*".

142. I had difficulty in grasping this concept within the context of a letter of credit debate; indeed, as I have indicated, although this line of argument raised its head at the beginning of the trial, it appears not to have survived mature reflection, and I mention the point only to reject it.

143. Ms Cheung's second subsidiary issue, that of "documentary fraud", appears the more durable, and was repeated in her closing argument.

144. In essence, she submitted that even *if*, which was disputed by ICBC, this Court were to find (as it now has) that the staff of NEC in fact had obtained the required authorisation to rectify the discrepant cargo receipts, the manner in which the alterations were authenticated was misleading to her client in that NEC's role (in effect, as Fortune System's agent) was concealed.

145. She argued that in a case such as the present, wherein the beneficiary admits that alterations made to a presented document

were in fact made by the beneficiary, the bank must receive from the beneficiary evidence of proper authorisation, and "at the very least" NEC should have made it clear to ICBC that the corrections as made, together with the use of the verifying Fortune System circular chop (which Raymond Wong accepts that he had made and applied after conferring with Danny Wong) had been effected with proper authorisation. As things stood, however, said Ms Cheung, NEC's omission to do this had had the effect of concealing from the bank that an issue of authorisation had been involved, and consequently that the alterations as made were a misrepresentation to the third party bank that the corrections to the L/C numbers on the face of the cargo receipts were made by Fortune System, when in fact they had been made by NEC.

146. Thus, the argument continued, the fact that NEC knowingly had presented documents containing "materially misleading" particulars in order to obtain payment amounted to "documentary fraud" which had had the effect of misleading the bank upon presentation, and that in the circumstances NEC did not deserve the protection of the court. In this connection Ms Cheung cited, *inter alia*, the well-known passage from the speech of Lord Diplock in *United City Merchants (Investments) Ltd & Another v Royal Bank of Canada & Vitrorefuerzos SA & Another (Third Parties)* [1983] AC 168 at p.183:

> To this general statement of principle [if presented with conforming documents the bank is under a contractual obligation to the seller to honour the credit] as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue … The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur action*, if plain English is to be preferred, "fraud unravels all". The courts will not allow their process to be used by a dishonest person to carry out a fraud.

147. On behalf of NEC Mr Jat did not demur at the principle; he simply asserted that in these circumstances plainly it was of no application. He also said that since this "new ground" of documentary fraud neither had been pleaded nor raised in opening that it was now not open to be taken on behalf of NEC.

148. As to the latter submission, Mr Jat is correct, but nevertheless in the circumstances I am not minded to preclude the bank from taking the point, which emerged entirely within the evidence and the factual matrix with which the Court presently is seized; whilst Mr Jat protested to the contrary, I do not consider that there is irremediable prejudice to NEC if this argument now is to be pursued. Had I considered (which I do *not*) that Mr Raymond Wong and Ms Sylvia Fu were dishonest,

and had been lying in their account of events, I think it unlikely that a "pleading point" would have been decisive of this argument. So I reject the plaintiff's contention that the point should not now be before the Court at all.

149. However, on the substantive issue I agree with Mr Jat's submission.

150. If, as this Court now has found, Raymond Wong indeed duly *was* authorised by Danny Wong to make the "Fortune System" chop, and thereafter had used that chop to make the corrections to the reversed L/C numbers as they had appeared on the face of the cargo receipts, I fail to grasp how, on the facts as found, it may be said that there existed the element of fraud for which Ms Cheung now contends.

151. There can be no question of dishonesty or deliberate concealment given that Mr Raymond Wong/Ms Fu had been authorised by Danny Wong to do what they had done, and in light of this authorisation I can see no difference of substance between the NEC employees doing what they did with the consent of Mr Danny Wong, and the situation which would have pertained, for example, had the like exercise been done by Roger Law, Danny Wong's employee, who at the time apparently had been in the Fortune System office in Hong Kong.

152. Given that which has been found factually to have occurred in this case, the application of the chop and the making of the corrections to the L/C numbers were, in effect, done by Fortune System through the agency of the NEC staff who were specifically authorised to act as they did, and the identity of the human agency effecting the amendment — whether it be Raymond Wong or Ms Fu or Roger Law — seems to me to matter little given the existence of a genuine authority to do what in fact was done.

153. Viewed in this light, therefore, I fail to see why ICBC as the issuing bank should maintain that it should have been placed on notice of the identity of the agency effecting the amendment, and of the source of the authority so to amend, and I reject this contention. NEC did not make the alteration in its own name, nor did it seek to do so.

154. The bank deals solely in documents. On the face of those documents there was compliance with the terms of the credit, and that, in my judgment, is the end of this particular story. No case of forgery or fraud has been made out, the alleged "discrepancies" (of which but one now is pursued and which on ICBC's case were perceived as a "buffer"), in my judgment are invalid, and I am able to discern no reason why NEC, whose present action lies solely upon the documentary credits, should not receive payment thereunder.

155. Accordingly, the claim by NEC against ICBC must succeed, and judgment is to be entered in favour of the plaintiff against the first defendant in terms of the sums claimed.

A ***Gaoming's "counter-claim"***

156. The third and final issue in this case is that of Gaoming's "counter-claim" against NEC, wherein Gaoming seeks damages for breach of contracts of sale said to have been made with NEC, together with injunctive relief pursuant to the letters of credit and also, by late reamendment, a claim in unjust enrichment (although this latter claim ultimately was not pursued).

B

157. It is important to bear in mind that, on NEC's case against ICBC (no claim is advanced against Gaoming), there is no necessity for this Court to come to a view as to the identity of the contractual buyer of these computers; provided that the cargo receipts evidencing delivery are both genuine and non-discrepant (which now I have found to be the case) no issue arises.

C

158. In contrast, Gaoming's claim against NEC is premised upon there being a contract of sale between NEC and Gaoming, and in the circumstance of this case a finding on the issue is necessary, although in light of the prior finding as to the fact of delivery of these goods to Fortune System, such a determination becomes of little practical relevance; as Mr Chan SC for Gaoming correctly accepted, if and in so far as delivery was made to Fortune System, Gaoming is not in a position to maintain a case in contract for loss of profit against NEC based upon alleged non-delivery.

D

E

159. On the issue of whether Gaoming was a contracting party with NEC, I have concluded that it was not, and that the true contract of sale was between NEC and 3E. In my view the "contracts" that were signed between NEC and Gaoming plainly were signed as a matter of formality in order to satisy the Mainland requirements for the opening of the L/C by Gaoming.

F

160. On this issue I again accept the evidence on behalf of NEC, and prefer that to the evidence of Madam Tao, who was called on behalf of Gaoming. In declining to accept Madam Tao's evidence, I bear in mind that she had no contemporaneous personal knowledge of, or involvement in, the alleged negotiation and conclusion of any "sale contract" between NEC and Gaoming. As Mr Jat pointed out, her evidence as to the "negotiations" between Gaoming and NEC was solely based upon an assertion in the witness box, not reflected in her prior witness statement, that Madam Yan of Gaoming had told her that there were such negotiations.

G

H

161. In fact, it is also clear that Madam Yan (who, I understand, was the Gaoming legal representative at the time of the events the subject of this case) was the person with direct personal knowledge of these matters, but despite having filed a witness statement, Madam Yan did not come to court to give evidence; in evidence Madam Tao stated that she did not know why this had occurred.

I

J

162. The evidence of the NEC witnesses, which I accept, was that NEC was selling to 3E because 3E was an NEC distributor in

China, with responsibility to pay for the goods, and that Gaoming was solely an "L/C agent". A

163. The fact that Gaoming was in the business of acting as an L/C agent seems to me to be beyond doubt; there is also before the Court an "Agreement" allegedly entered into between Gaoming and one Lam Wing Ping, whom I understand to be from a company B known as "New Harvest" (whose precise connection with 3E is unclear, although I consider it probable that it was a designated on-buyer from 3E) which recites that Gaoming was requested to apply on his behalf to NEC for two letters of credit in the sums of US$531,000 and US$507,000 (namely, the specific sums due to NEC C for these shipments of computers); para.1 of this Agreement states in terms that "Party A [Gaoming] on behalf of Party B [Lam Wing Ping] to apply for two irrevocable documentary credits..." and that "Party A's duty is to apply on behalf of Party B for the letters of credit and is not responsible for the payment". D

164. I note also that Mr Danny Wong, the key witness for Gaoming, agreed that prior to the events the subject of this case that there had been at least two occasions in 1998 when Fortune System had acted for 3E in the collection of NEC goods, with Gaoming opening the L/C for 3E, and in cross-examination at least (albeit later E sought to be retracted in re-examination) Mr Wong further accepted that in this case he had acted as 3E's agent and was not the agent of Gaoming.

165. NEC's case also is consistent with the fact that in seeking payment for these shipments of computers NEC pursued only 3E F and not Gaoming after ICBC had notified NEC of its decision to reject the documentary presentation under the credits; as a matter of historical record there is a slew of documentary exchanges between NEC and 3E in respect both of this disputed transaction and in terms of previous transactions, which demonstrate that NEC consistently had G had dealings with 3E, and that 3E indeed appeared to have indicated that they had received the computers the subject of this dispute.

166. The relevant purchase order from 3E is in evidence, and whilst the precise number of units to be purchased and the price thereof were matters subsequently determined, in my view Mr Raymond Wong H satisfactorily explained his handwritten annotations and calculations in this regard; in this context Mr Jat pointed out that the purchase order with 3E states the models to be purchased and the relevant quantities (which broadly correspond with the amounts subsequently delivered) whilst, in comparison, the "Sales Contracts" between NEC and I Gaoming are in the vaguest of terms, and state only, in each contract, that "one item of NEC Product" was to be purchased by Gaoming — in short, said Mr Jat, in my view with considerable justification, these were documents bearing all the hallmarks of contracts created to enable an L/C agent who was not the true buyer to meet the documentary J requirements for application for an L/C.

A 167. It is also pertinent to note that Mr Han of 3E has never alleged non-receipt of these goods; to the contrary, the contemporary exchanges with 3E tend to demonstrate that the goods had been delivered.

168. Given that NEC was not able to achieve payment under the B credits put in place by Gaoming, Mr Got of NEC gave evidence, which I accept, that he thereafter had telephoned Mr Han of 3E, who confirmed that 3E had received the computers, including not only those the subject of the present dispute but also the small number of others that had been sent at the same time with reference to previous C orders.

169. In this regard NEC's further evidence is that Mr Got and Mr Raymond Wong had travelled to Guangzhou to speak with Mr Han and his wife, but that no solution was found to the absence of payment, and that they simply had "prevaricated".

D 170. Thereafter no payment was forthcoming despite a promise made over the telephone by Mr Han to Mr Raymond Wong on 27 October 1998, reference to which was recorded in a fax of the same day from Mr Raymond Wong to Mr Han, and a letter from 3E dated 3 November 1998 promising payment, wherein it was stated E that:

> 3E Technology Development Co Ltd reaches an agreement with NEC Hong Kong Ltd on 3 November 1998 based on the principle of long-term cooperation and amicable negotiation between the two F parties" in which 3E "undertake to be fully responsible to NEC HK for the amount of L/C 45598117 and L/C 45598118 (US$1,038,000)" and that "We must pay the above amount to NEC HK within 10 days (by 13 November 1998)".

G 171. This is not quite the end of the matter, although in the event, of course, NEC received no payment for their goods.

172. The further evidence is that a Mr Warren Chan of NEC Guangzhou talked to Mr Han of 3E about the situation, and at that time 3E proposed that NEC should withdraw presentation of the H documents under the letters of credit in order that Gaoming, which had been the applicant under the credit, could return the money paid by 3E to Gaoming and thus that 3E correspondingly could make payment to NEC.

173. This is the background to a draft "Letter of Pledge" which I 3E gave to Mr Warren Chan of NEC Guangzhou, a document which bears the Gaoming fax header and the stamp of Gaoming, which is addressed to Mr Han of 3E, and which refers in terms to "the letters of credit issued by our company [Gaoming] on your [3E] behalf".

174. This document confirms that 3E was the buyer and that J Gaoming at least was dealing with 3E in relation to this matter. Nor does it mention that no goods were delivered; it states only that the

L/Cs' were unpaid "owing to irresistible reasons under objective circumstances", whatever that may mean.

175. I note that Gaoming's case in this regard appears, in part at least, to be that this letter of pledge was drafted by NEC, that it had never heard of 3E and had had no dealings with 3E, and in any event that it only had signed this letter out of, as Madam Tao put it, "extreme anxiety".

176. I reject this version of events. In fact, Gaoming's suggestion that the letter of pledge was a plan conceived by NEC was not put to any of the NEC witnesses in cross-examination, nor was it put that they knew of the aforesaid Mr Lam Wing Ping.

177. It strikes me that the "Letter of Pledge", whatever its provenance or intention, serves to confirm that Gaoming indeed was 3E's L/C agent and that 3E, through Fortune System, in fact had received the computers for which NEC remains unpaid.

178. On the basis of the foregoing, therefore, I have no hesitation in rejecting Gaoming's "counter-claim" against NEC. Mr Chan SC on behalf of Gaoming fairly accepted in his final submission that if the Court were to conclude that there had been delivery to Fortune System on both occasions, and if there had been authority to make the material variations to the cargo receipts then, subject always to the discrepancy argument, that NEC would succeed against ICBC, and that Gaoming's counter-claim would stand dismissed.

179. This in fact is what has happened. The Court does not profess to know the fate of the missing computers in this case, nor is it required to speculate. In all the circumstances, however, I am minded to observe in the circumstances that Gaoming's action for damages against NEC strikes me as bordering on the vexatious; in this context I am further reminded that at the stage of NEC making application for security for costs upon Gaoming's counter-claim that it was this damages claim which Mr Leung on behalf of Gaoming then appeared willing to give up if and insofar as it removed the necessity for Gaoming to furnish such security (a position that he subsequently sought to reverse), and there has been nothing in the evidence in this case which has served to change my firm view as to the manifest lack of merit of this claim.

Order

180. Consequent upon this judgment, I make the following order in the action between NEC and ICBC:

(i) Judgment is to be entered in favour of the plaintiff, NEC, against the first defendant, ICBC, in the sum of US$1,038,000;

(ii) I make an order *nisi* that interest is to run on the said principal sum at the rate of 1% over US dollar prime rate from time to time prevailing for the period from 10 October 1998 to the date

A of judgment herein, namely 17 February 2006, and thereafter upon such principal sum at the judgment rate from time to time prevailing until payment;

(iii) I make an order *nisi* that the costs of the action between the plaintiff and the first defendant be to the plaintiff, such costs to
B be taxed if not agreed.

181. As to the action between Gaoming and NEC, I make the following order:

C (i) The counter-claim by the second defendant, Gaoming, against the plaintiff, NEC is dismissed;

(ii) There is to be an order *nisi* that the costs of the action between the second defendant and the plaintiff are to be paid by the second defendant, such costs, if not agreed, to be taxed and paid on a
D common fund basis.