[2000] QSC 421

THE SUPREME COURT

OF QUEENSLAND

CIVIL JURISDICTION No. 10680 of 1996

BETWEEN:

DOWNS INVESTMENTS PTY LTD (ACN 010 729 567) (in voluntary liquidation) (formerly known as WANLESS METAL INDUSTRIES PTY LTD)

Plaintiff

AND:

PERWAJA STEEL SDN BHD

Defendant

REASONS FOR JUDGMENT
B.W. Ambrose J.
Delivered the Seventeenth day of November 2000

CATCHWORDS: CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS- What constitutes breach of an essential term of an international contract for sale of goods.

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON PERFORMANCE – REPUDIATION – GENERAL PRINICPLES – effect of oral agreement before execution of a partly written contract not to insist on performance of a written term.

SALE OF GOODS – REMEDIES FOR BREACH OF CONTRACT – MEASURE OF DAMAGES – *Sale Of Goods (Vienna Convention) Act* 1986 (Qld) - Principles of assessment of damage for contract wrongly repudiated by purchaser.

Appearances: Mr. H. Fraser QC with Mr. D.O'Brien of counsel for the plaintiff
Miss E.M. O'Reilly with Mr. D. Kelly of counsel for the defendant

Solicitors: Hopgood Ganim Lawyers for the plaintiff
Freehill Hollingdale and Page for the defendant

Hearing Dates: 29,30,31 May and 1,5,6 June 2000

[1] The Plaintiff continues this action commenced by WANLESS METAL INDUSTRIES PTY LTD ("Wanless") to enforce its rights against PERWAJA STEEL SDN BHD ("Perwaja") under a contract between Wanless and Perwaja dated 7 May 1996 under which Wanless agreed to supply approximately 30,000 metric tonnes plus/minus ten per cent of scrap steel at the price of US$164 per metric tonne C.N. F.F.O. Kemaman Malaysia. Within that range the seller had the option to select the metric tonnage to be supplied and the quantity actually supplied was to be determined by a draft survey at the load port (or ports presumably) by a nominated company (or equivalent).

[2] That contract also provided terms for the discharge of the scrap steel at Kemaman Malaysia.

[3] The contract provided that Perwaja would make payment for the material delivered in the following terms:-

> "PAYMENT
>
> By irrevocable Letter of Credit from A1 Bank in our favour payable, at sight, for 100% of the invoice value. The L/C is to be established, by 1 July. Such L/C shall be forwarded to Bank of New Zealand, Level 7, Central Plaza One, 345 Queen Street, Brisbane, QLD 4000, Australia, Fax No. 617-221 19271 and telex No. AA123240 (Contact Person – Mr David Evans). Usance charges, if applicable, shall be to the account of the buyer.
>
> Each L/C shall allow for:-
>
> 1. Telegraphically Transferred Reimbursement;
>
> 2. Transhipment Not Permitted;
>
> 3. No further Re-Confirmation Charges Payable by Buyer;
>
> 4. Charter Party Bill of Lading Acceptable;
>
> 5. All Bank Charges Outside Australia be to the Account of the Buyer;
>
> 6. Shipment From Any Australian Ports.
>
> DOCUMENTATION
>
> 1. Signed Commercial Invoice(s) in Triplicate;
>
> 2. Full Set Clean On Board Bill Of Lading Marked "Freight Prepaid";
>
> 3. Certificate of Origin; By Griffith Australia.

4. Certificate of Draft Survey; By Griffith Australia.

5. Certificate of Quality Inspection; By Griffith Australia."

It is unnecessary to refer to other terms relating to the characteristics of the letter or letters of credit.

[4] With respect to disputes it was provided that "if both parties contracting hereto are unable to settle any differences arising herefrom such dispute shall be settled by the laws prevailing in Brisbane, Australia.

[5] With respect to shipment the contract provided –

> "SHIPMENT
>
> From any Australian ports during July 1996.
>
> Shipment shall be made in a suitable and seaworthy vessel conforming to Lloyds 10A1 or equivalent capable of carrying cargo and discharging with its own integral cranes. Seller to arrange with ship owners/agent to permit use of buyer's magnets/grabs on ship's cranes for discharging cargo. Such cranes to be minimum 25M/T capacity.
>
> Vessel details and description to be submitted to Buyer for their approval prior to charter party acceptance. Vessel will be single deck configuration and max. 20 years old. 'Over age' Insurance for vessel over 15 years old, if applicable, to be for Sellers Account."

[6] With respect to the notice of departure/arrival the contract provided –

> "NOTICE OF DEPARTURE/ARRIVAL
>
> Seller to advise Buyer of nominated vessel and departure and progressive advice of voyage by fax immediately on departure of vessel – including ETA Kemaman."

[7] Mr Anderson gave evidence that the terms of the contract were negotiated between him and the purchasing officer of Perwaja, Rohani Basir. It was a standard form contract which had been used on previous occasions when Wanless sold scrap metal to Perwaja. In the course of those negotiations there was discussion about the nature of the vessel to be used and according to Mr Anderson. Ms Basir said in effect that Wanless had made so many shipments previously that it knew the nature of the vessel Perwaja wanted and it was unnecessary for Wanless to worry about submitting to Perwaja for its approval vessel details prior to Wanless chartering an appropriate vessel to deliver the scrap metal under the contract.

[8] After the contract had been signed by and on behalf of Wanless and Perwaja, Wanless's business management, rights, and obligations were acquired by the plaintiff. It is not in contest that the plaintiff in this case may enforce against

Perwaja any rights which Wanless may have had against it as a result of any breach of contract on its part.

[9] Shortly before the alleged breach by Perwaja of its contract with Wanless the structure and management of Perwaja was changed.

[10] However at the time both of the making of the contract and its alleged breach by Perwaja, Mr Anderson was the manager of Wanless.

[11] At the time of the making of the contract Rohani Basir and Wan Ghani, the then managing director of Perwaja were the officers of Perwaja authorised to negotiate the terms of and execute the contract in issue. However, at the time of the alleged breach of that contract by Perwaja towards the end of July and early August 1996 both Rohani Basir and Wan Ghani had been removed from their former positions of authority with Perwaja in the course of the alteration in its management structure. After that restructuring exercise the new management team involved Mr Yunus and Datuk Abu. The case for the defendant was that under the new management structure a letter of credit could not be provided without the permission of an executive committee which had been established as part of the change of the management structure of Perwaja.

[12] This newly appointed executive committee of Perwaja comprised a number of persons only one of whom was Datuk Abu and on defendant's case he did not have the authority of Perwaja to issue letters of credit as had Wan Ghani.

[13] I will later analyse in more detail the events which led to the failure/refusal of Perwaja to issue a letter of credit to cover the contract price which it had agreed to pay prior to Wanless commencing to load the vessel it had chartered to deliver the scrap metal to Kemaman during the month of August 1996.

[14] Essentially it is the case for Perwaja that under its new management structure, where the authority of Datuk Abu - who replaced Wan Ghani – was less than that of Wan Ghani, it was obliged to obtain permission from an executive committee before it could provide a letter of credit. In declining to make any effort really to have issued a letter of credit in a timely way Wanless contends that Perwaja repudiated its contractual obligations – albeit that those obligations resulted from the contract negotiated and signed by authorised officers of Perwaja prior to the change in its management structure. Eventually on 5 August 1996 the Malaysian lawyers of Wanless advised Perwaja that if a letter of credit for the full contract price was not established by close of business on 7 August 1996 Wanless would treat Perwaja as having repudiated the contract because Wanless had already chartered a vessel which was standing by an Australian port to commence loading the scrap steel for delivery to Perwaja . On 8 August 1996 the lawyers for Wanless advised Perwaja that in the event that the letter of credit did not issue Wanless would take steps to cancel the charter of the vessel it had chartered to deliver the material to Perwaja and then dispose of the scrap steel it was holding to fulfil its contract and claim from Perwaja damages for loss sustained. Perwaja replied that it was "still studying the matter" and indeed on 8 August 1996 Perwaja's lawyers advised that they were unable to obtain any positive instructions from Perwaja and that they understood "that the Board is meeting sometime later this month". By its solicitor's letter to Perwaja of 9 August 1996, Wanless purported to accept

Perwaja's repudiation of its contractual obligations by its refusal/failure to have issued a letter of credit.

[15] Wanless' agent in Malaysia was Mr Teo. He attended discussions with Mr Yunus and others between Mr Anderson and Mr Yunus and Datuk Abu.

[16] At the stage of Perwaja's alleged wrongful repudiation of the contract in August 1996 the international price for the sale of that material had dropped by US$20.50 per tonne. So had in fact Perwaja accepted the scrap steel at the contract price fixed in May, because of the drop in market value occurring over a period of about two months it would have had to pay US$705,000.00 in excess of the then current market value. It emerged in the evidence that some members of the executive committee which declined to permit the issue of the letter of credit requested by Wanless expressed the view that Perwaja at that time had an excess supply of scrap metal of the sort that it had agreed to purchase from Wanless in May-June 1996.

[17] Stated shortly the case for Wanless is that it suffered a significant loss on the resale of the 30,000 metric tonnes of scrap steel it was ready, willing and able to ship to Perwaja pursuant to the contract and a further sum of $343,163.47 arising from the necessity to sub-charter the vessel chartered to deliver the material to Perwaja.

[18] Wanless claims that Perwaja repudiated the contract because it failed and indeed refused to provide a letter of credit as required by the contract and that it accepted that repudiation reserving its rights to recover its resulting loss.

[19] It is the case for Wanless that the legislation relevant to determine the dispute between Wanless and Perwaja is the *Sale Of Goods (Vienna Convention) Act* 1986 (Qld).

[20] It is the case for Wanless that Perwaja's failure to establish a letter of credit to cover the cost of the scrap metal under the contract before 9 August 1996 also amounted to a fundamental breach of the contract entitling Wanless to terminate it and recover its resulting loss. The provision of the letter of credit in the circumstances was an essential security for payment of the contract price by Perwaja when the scrap metal arrived at Kemaman by which time Wanless would have incurred significant costs. Obviously the obtaining of a letter of credit before loading commenced in Australia was designed to avoid any attempt by Perwaja to "renegotiate" its contractual obligations in circumstances in which Wanless would find itself in an impossible negotiating position.

[21] For Perwaja a number of quite disparate matters were canvassed to demonstrate among other things that Wanless was in fact in breach of its contractual obligations under the contract, and that in any event it was not ready, willing and able to deliver scrap steel pursuant to the contract either at the time it chartered the vessel to make delivery of it to Perwaja or having done that when it sought from Perwaja in early August 1996 a letter of credit pursuant to the terms of the contract.

[22] For Perwaja a number of matters said upon its proper construction to amount to a breach by Wanless of the contract of 7 May 1996, were raised and argued. I will deal with them however in the course of analysing the evidence called by and the case advanced for Wanless. A variety of matters said to constitute a repudiation by

Wanless of its obligations under the contract, included its failure to or its intimation of its unwillingness to comply with obligations within various periods of time specified in the contract. It is the case for Wanless that it was agreed between Wanless and Perwaja to make the various variations about which Mr Anderson gave evidence and that case appears on its face to be supported unequivocally by contemporaneous correspondence passing between Wanless and Perwaja prior to the restructuring of the management of that company to which I have referred. Indeed it was within days of the change in the management structure of Perwaja that the first hint was given of any difficulty that might arise in obtaining the letter of credit for which the contract provided. Many of the matters vigorously argued on behalf of Perwaja seem to be based upon inferences sought to be drawn from documents discovered by Wanless to Perwaja long after Wanless instituted its proceedings against Perwaja in 1996 within four months of the refusal/failure of Perwaja to provide a letter of credit by 9 August 1996 and the almost immediate efforts made by Wanless to sub-charter the vessel chartered to deliver that material to Perwaja and to then resell the scrap steel held to meet its contractual obligations to Perwaja – some in Asia and some in Australia. Wanless found it necessary to charter another vessel of lesser capacity and draught than the one it had sub-chartered which was suitable to make delivery of 25,100 tonnes of scrap metal sold to another purchaser for delivery in another Asian port.

[23] I propose to analyse the evidence and the legal conclusions to be drawn from it under six headings.

(1) The terms of the written contract dated 7 May 1996 as varied to 9 August 1996 when Wanless purported to avoid it on the ground of Perwaja's repudiation.

(2) The extent to which Perwaja and/or Wanless had breached any essential term or terms of it at the time of the purported avoidance by Wanless.

(3) Whether Wanless was entitled to avoid the contract and recover from Perwaja the losses claimed on the ground of Perwaja's repudiation and/or non-compliance with an essential term of that contract.

(4) Whether Wanless was ready, willing and able to perform its obligations under the contract at material times prior to it purporting to avoid it.

(5) Whether Wanless is entitled to damages against Perwaja.

(6) If so, the quantum of any damage to which it is entitled.

[24] I will indicate at the outset that I found no reason to question the reliability of either Mr Anderson or Mr Teo whose evidence was either supported by or consistent with contemporaneous notes and correspondence. I found the evidence of Datuk Abu and Mr Yunus in many respects consistent with and supportive of that of Anderson and Teo. To the extent of any inconsistency in the evidence on matters of substance I prefer the evidence of Anderson and Teo to that of Datuk Abu and Yunus.

(1) TERMS OF WRITTEN CONTRACT OF 7 MAY 1996 AS VARIED TO 9 AUGUST 1996

[25] I accept the evidence of Neil Anderson, the purchasing officer of Wanless that he negotiated a contract with Rohani Basir in Brisbane in April/May 1996. Wanless had sold scrap steel to Perwaja on many occasions over the years preceding 1996. Wanless had a standard form of written contract which had been used on those previous occasions. Anderson and Basir went through the standard form of contract and discussed the various terms appropriate to the contract under negotiation. Various particulars were inserted. When the clause "SHIPMENT" was reached Basir told Anderson that that was not a clause that Wanless need comply with. She said that Wanless and Perwaja had done business on a number of occasions and that Wanless knew Perwaja's requirements with respect to the standard of ship which was to be used to carry the scrap metal to Kemaman. Anderson gave evidence that between 1989 and May 1996 Wanless had made at least fifteen shipments of scrap metal to Perwaja. According to Mr Anderson over the last few years before the contract in issue was negotiated there had been occasions when the formal approval of Perwaja prior to effecting a charter party had not been obtained. He said that he did not remember ever having received any complaint from Perwaja concerning his failure to get formal approval in accordance with the "Shipment" clause. Anderson said that he had observed the ships Wanless had chartered discharging scrap metal at the Kemaman port using their own shipboard cranes.

[26] I infer from the material generally that the written pro-forma contract was signed by Anderson and given and/or forwarded to Basir about the date which it bears – 7 May 1996. In any event it appears from the material that a copy executed by Wan Ghani and bearing Anderson's signature was returned by fax under the hand of Basir on 21 May 1996.

[27] On the same day that the written contract executed on behalf of Perwaja was faxed to Wanless there was another letter from Perwaja dated 21 May 1996 faxed for the attention of Anderson. It referred to a telephone discussion between the Assistant General Manager of Group Purchasing of Perwaja and Anderson and reads, inter alia, as follows:-

> "As on normal practice Perwaja does not establish L/C for more than a month for scrap shipments. Hence your requirement for having L/C validity for two months means Wanless will have to bear charges for the additional month.
>
> We will establish L/C as per your request, i.e. from 8/6/96 valid for two months. We will advise you of the charges."

[28] On 3 June 1996 Wanless faxed to Perwaja a letter in these terms:-

> "REF – JULY SHIPMENT
>
> The contract calls for the L/C to be issued at the end of this week. In view of the expense involved for us we have decided to delay the

issue until July on upon nomination of the performing vessel. We trust that this arrangement is also suitable to yourselves. - - "

[29] It is interesting to note that on 10 July 1996 Edward Teo, Wanless' agent faxed to Wanless a letter in the following terms:-

"(1) Appointment with Ghani is 4.30 pm (Asian time) tomorrow. Suggest you fax reply to Rohani at 4.00 pm ie 2.00 pm your time. I will see Ghani first and then Rohani. Meanwhile send me a copy of your reply for me to discuss with Ghani.

(2) Have you put in writing that Perwaja has agreed on an August shipment, instead of July? If not, please do so. We do not want problems with the new management.

(3) Paul - - "

[30] In fact on 2 July 1996 Wanless had faxed a letter to Basir of Perwaja in these terms:-

"REF – OUR CONTRACT 96/79
Your purchase order PO/KL3/12811

We refer to our various discussions regarding the timing of the shipment of the above cargo and now confirm our request for a deferment from July to August 1996.

Our request results from the continued slump in the availability of scrap in Australia and a major mechanical breakdown in our processing plant in Brisbane. Please be assured of our best efforts to improve the situation and ship as early as possible."

[31] There was in fact a meeting between Wan Ghani and Anderson during Wan Ghani's visit to Australia in which Wan Ghani agreed to Anderson's proposal. Early in July 1996 Anderson made contact with the shipbroker normally used by Wanless, one Christopher McKey and requested that he arrange for the charter of a suitable vessel to convey the scrap metal from Australia to Kemaman. The faxed message to McKey is to be found in Exhibit 1 Part C document 15 and the vessel required was one to ship 30,000 tonnes plus or minus 10%. It lists a number of possible places for shipment of a total of 30,000 or 31,000 or 33,000 tonnes of scrap metal. On 13 July 1996 McKey sent a telex to Wanless with regard to the chartering of a suitable ship for the carriage of the material to Kemaman at the end of August. On 18 July 1996 McKey advised Wanless of the availability of a number of suitable ships including the "MV Dooyang Winner".

[32] On 18 July 1996 Wanless sent to Basir of Perwaja a fax in the following terms:-

"REF: AUGUST SHIPMENT

Please find below our proposed loading schedule –

> Bell Bay 19/8 to 23/8
> Brisbane 27/8 to 31/8
> Gladstone 1/9 to 4/9
> Townsville 6/9/ to 10/9
> ETA Kemaman 22/9
>
> Accordingly we would request your opening the Letter of Credit for 30,000 tonne +/- 10% with the following dates -
>
> Issue – 1st August
> Expiry – 30th September
> Latest shipment – 29th September
>
> We understand that we will have to accept the cost for the extra 30 days on the L/C. Please advise amount.
>
> Kind regards,
> Neil Anderson
>
> PS. Please remember also for L/C:
>
> 1. SHIPMENT FROM AUSTRALIAN PORTS
> 2. Cert of origin from Griffith or equiv."

[33] Basir replied to that letter as assistant manager of the bulk purchase division on 22 July 1996. The reply reads as follows:-

> "We refer to your fax dated 18th July 1996.
>
> We will establish L/C as per your request once you have confirmed the vessel of this contract. Thank you and regards."

[34] A copy of that letter was faxed to Mr Edward Teo who at that stage was the agent for Wanless in Kuala Lumpur.

[35] I infer that it was subsequent to the undertaking of Basir to establish the letter of credit upon confirmation of Wanless of the vessel to be used to transfer all the scrap metal and before 26 July 1996 that Anderson and Teo became aware of the change in attitude of Perwaja towards fulfilling the contract subsequent to the change in its management structure because it was on that date that Anderson faxed to Teo in Kuala Lumpur copies of the contract, purchase order, documentation and other material to which I have referred -–particularly relating to the opening of the letter of credit.

[36] By that time Wanless had agreed to charter the vessel "Dooyang Winner" and the owner was unwilling to cancel that agreement. Anderson then advised Teo that he could be in Kuala Lumpur within days if necessary. He advised that the "Dooyang Winner" was already en route to the first Australian loading port – Bell Bay and was to commence loading on 8 August 1996. That fax was sent on 27 July 1996.

[37] On 31 July 1996 Wanless advised Perwaja through its executive chairman (whom I infer had recently taken up that position) in the following terms:-

> "REF – OUR CONTRACT NO. 96/79
> Your Purex Order No. PO-KL3-12811
>
> We refer to our fax exchanges of 18 and 22 July and to our recent discussions and now confirm details of the vessel for the above contract -
>
> Vessel Name: MV Dooyang Winner
> SINGLE DECK BULK CARRIER built 1986
> 40016M/TDWT on 11.035m draft
> 190m LOA, 29.6M beam
> 5 hatches 5 hulls 4 x 30T cranes
> Korean flag
>
> LOADING PROGRAMME – Bell Bay 8-11 Aug
> Brisbane 15-20 Aug
> Gladstone 21-22 Aug
> Townsville 25-29 Aug
> ETA Kemaman 10 Sept

[38] It was prior to 10 July 1996 that Wanless' agent in Kuala Lumpur had learnt through newspaper articles that the management structure of Perwaja was to be changed. He later learned that Wan Ghani had resigned as managing director of Perwaja and a new management structure had been set up. It was on about 24 July 1996 that Teo called upon Mr Yunus to congratulate him and mentioned in the course of that discussion "whether everything was okay" with respect to the outstanding contract. He said something to the effect "we have got an outstanding shipment. Is everything okay with the shipment on your end?" Mr Yunus however replied that he had no idea of the existence of such a contract and was surprised to hear of one.

[39] Mr Yunus arranged to see Mr Teo on 26 July. In the meantime of course Mr Teo had been in contact with Mr Anderson at Wanless and when he spoke to Mr Yunus on 26 July he handed him copies of the contract, purchase order and other correspondence to which I have referred. He informed Mr Yunus that the shipment "was so to speak actually on the way". Mr Yunus effected surprise at this information. He said to Teo, "Eddie I really don't have any idea of this matter. Nobody told me about this" and made it a point to inform Teo that Rohani Basir who had hitherto been in charge of this particular contract did not tell him about it. He advised Mr Teo that Rohani Basir had been transferred out of the purchasing department and that she was now working in the office of the Chairman – Datuk Abu. When he and Anderson visited the new chairman he saw that Rohani Basir was indeed sitting outside his office.

[40] It was on 29 or 30 July that Anderson and Teo together visited Datuk Abu. On that occasion they first went to the office of Mr Yunus. There was discussion of the signed contract, purchase order and other correspondence to which I have referred but Mr Yunus kept reiterating that he had no knowledge of this particular contract –

in spite of the fact that Mr Teo had given him a copy of it and all relevant material some days before.

[41] In any event Mr Yunus conducted Anderson and Teo to the office of Datuk Abu. Mr Anderson again produced all the documentary evidence to which I have referred. Datuk Abu said that he was very sorry that this was not part of the handover notes between the previous management and that which he headed and that had he known that there was this outstanding contract he would have asked the officials from the Ministry of Finance to issue the letter of credit. He then discussed the changes in the management structure and said that he would have to go to an "executive committee" that was now running the company to ask for permission for the issue of the letter of credit. This executive committee comprised Datuk Abu and his brother, a representative from the Ministry of Finance and a chartered accountant.

[42] Anderson told Datuk Abu that they had already committed and arranged for a ship to perform the contract and that it was not possible for them to cancel that charter. He advised that if the letter of credit did not issue Wanless would suffer very significant loss. To this Datuk Abu responded:-

> "Since you have already committed to a vessel perhaps you could ship the cargo first and we will pay you later or alternatively sell the shipment to another company."

He added:-

> "If you do it this way in future Perwaja will buy scrap metal from you under the new management."

[43] Mr Anderson said that he was sorry that he could not accede to that request having regard to the drop in prices that had occurred since the contract was made.

[44] Datuk Abu said that he would like very much to help but it would be difficult and suggested that they come back and see him later because the decision was not his to make; the decision had to be made by the committee.

[45] At that stage Anderson indicated that he was prepared to give a discount and a mention was made of $5.00 a tonne. Datuk Abu was non-committal on that suggestion.

[46] Mr Teo and Mr Anderson went back to Perwaja on 31 July where they met Mr Yunus who once again took them to Datuk Abu who informed them that he had not been able to get the committee to approve the letter of credit but he might still be able to help and suggested that Teo telephone him on Friday, 2 August 1996. He said there was going to be a meeting of the management committee and he would bring the matter up again and inform Mr Teo of the result. Anderson and Teo again pointed out that the vessel had been chartered and that Wanless stood to suffer significant losses if the letter of credit did not issue.

[47] Nothing had emerged to allay the fears of Anderson and Teo as to the non-establishment of the letter of credit and they went immediately to obtain legal advice in Malaysia.

[48] On the evening of 2 August 1996 Teo did make contact with Datuk Abu who informed him that he had brought the matter to the attention of the executive committee and one of the committee members objected that the committee could not proceed with the issuing of a letter of credit because the contract had not been made during the tenure of office of the present management. Datuk Abu informed Teo that he would "try again" on 22 August when the Board next met.

[49] It is clear that the written contract bearing date 7 May 1996 was executed by the parties to it by 21 May 1996. It is clear that they did not intend that it contain all the terms of the contractual arrangement between them prior to Wanless' delivery of scrap metal to Kemaman or details of ports and times of loading, Letters of Credit, etc. Obviously there were the expected discussions of such matters and variations of proposed arrangements from time to time recorded by and large in correspondence passing contemporaneously between the parties. Thus when the executed contract was returned to Wanless it was obviously agreed between the parties that a letter of credit extending for two months rather than one month would be given and that Wanless would meet the extra charges involved.

[50] Initially it was agreed that the letter of credit would be established from 8 June 1996 and be valid for two months. However on 3 June it was decided to delay the issue of the letter of credit until July 1996 upon Wanless nominating the "performing vessel".

[51] There was a subsequent variation of the agreement so that the shipment of the scrap metal would be deferred from July to August 1996. This occurred in July 1996. Eventually it was proposed that the material would be loaded at four Australian ports and shipped to Kemaman with an estimated time of arrival of 22 September 1996. Wanless asked that Perwaja open a letter of credit for 30,000 tonnes +/- 10% to be issued on 1 August and expire on 30 September 1996 on the basis that the latest shipment would be 29 September 1996. As late as 22 July 1996 Perwaja agreed to establish the letter of credit as requested once advised of the name of the vessel to be chartered to ship the material to Kemaman. Such information was necessary of course for the establishment of the letter of credit. On 31 July 1996 Wanless advised Perwaja that the vessel selected to ship the material was the "Dooyang Winner" which conformed in all respects with the requirements of the "Shipment" clause.

[52] It was contended strenuously on behalf of Perwaja that the written contract and particularly the "shipment" clause could not stand with the oral "understanding" reached between Anderson and Basir, that it was unnecessary for Wanless to obtain approval of Perwaja of a vessel prior to Wanless chartering it to carry the material to Kemaman. As I understood the contention the arrangement or understanding reached between Anderson and Basir on this point was reached before the written contract had been signed by each of the parties to it.

[53] In my view this is a rather unmeritorious argument. It is clear from the terms of correspondence – and particularly the letter from Perwaja dated 22 July 1996 - that Perwaja did not at that stage require submission of the name of the vessel to be chartered for its approval. Unsurprisingly the letter of that date written by Basir is consistent with the discussion Anderson said he had with her. I have no reason to doubt the terms of such a discussion were as Anderson gave in evidence. Indeed

the letter under the hand of Basir to which I have referred is entirely consistent with such an attitude.

[54] This matter was strenuously argued with a view to demonstrating that Wanless was in fundamental breach of the shipment clause at the time it chartered the Dooyan Winner because it had done so without first obtaining approval from Perwaja.

[55] In my view even if such a technical argument were available, Perwaja would clearly be estopped from treating Wanless' failure to get approval from Perwaja before chartering the vessel as a material breach of contract in the light of the undertaking or arrangement made between Wanless through Anderson and Perwaja through Basir on the effect to be given to the shipment clause.

[56] Certainly on the material Perwaja was aware of all relevant particulars of the "Dooyang Winner" by 31 July 1996 and made no suggestion at any relevant time that the chartered vessel did not meet with its approval. Indeed during the following week consideration was given by the executive committee of Perwaja to whether it would in fact have the required Letter of Credit issued. It is nowhere suggested that it gave any consideration to the fact that the vessel had been chartered by Wanless without the prior approval of Perwaja much less did it purport to repudiate its obligation to establish a letter of credit upon this ground.

(1) TERMS OF CONTRACT BETWEEN WANLESS AND PERWAJA

[57] Having regard to the evidence called at the trial supplemented and confirmed in my view by the contemporaneous correspondence between Wanless and Perwaja the following were the terms of the contract between the parties as at 9 August 1996 material to the issues canvassed in this case:-

1. Wanless would ship to Perwaja 30,000 metric tonne of scrap steel +/- 10% at the price of US$164.00 per metric tonne CNFFO Kemaman, Malaysia.

2. Payment for that material would be made by Perwaja by irrevocable letter of credit in accord with the letter from Wanless to Perwaja of 18 July 1996.

3. The letter of credit was to be for 60 days instead of 30. Wanless was to pay for the cost of the extra 30 days on the letter of credit.

4. Perwaja agreed that the letter of credit would be established upon Wanless providing details of the vessel chartered to ship the material to Kemaman.

(2) EXTENT TO WHICH PERWAJA AND/OR WANLESS HAD BREACHED ANY ESSENTIAL TERMS OF THE CONTRACT AS VARIED PRIOR TO 9 AUGUST 1996

[58] Because the parties to the contract agreed that the law applying in Brisbane would define their contractual obligations, the *Sale of Goods (Vienna Convention) Act* 1968 (Qld) requires the application of the *United Nations Convention on Contracts for the International Sale of Goods* 1980 to this contract.

[59] Article 64 of the Convention provides –

> "(1) The seller may declare the contract avoided –
>
> (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
>
> (b) if the buyer does not within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63 perform his obligations to pay the price or take delivery of the goods or if he declares that he will not do so within the period so fixed
>
> 'fundamental breach' is defined in article 25 of the Convention to mean a breach "that results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

[60] Article 72 provides –

> "(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract the other party may declare the contract avoided.
>
> (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
>
> (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations."

[61] Repudiation involves conduct on the part of one party to the contract which when viewed objectively is such "as to convey to a reasonable person in the situation of the other party repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it". See *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 per Deane and Dawson JJ.

[62] The refusal to establish a timely letter of credit was clearly a fundamental breach within the meaning of Article 25 and Article 64(1)(a) of the Convention. I refer to Honnold, *Uniform Law for International Sales under the United Nations Convention* 2nd ed at 510, 511 and *Helen Kaminiski Pty Ltd v Marketing Products Inc* (US Dist CT 21 July 1997 per Cote J). Such a failure would also justify termination at common law – see *Trans Trust SPRL v Danubien Trading Company Ltd* [1952] 2 QB 297 per Lord Denning at 305.

[63] Article 54 of the Convention provides –

> "The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made."

Failure to establish a letter of credit in the circumstances of this case was a failure by Perwaja to meet its "obligation to pay the price" of the goods under the contract of sale.

[64] In my view there is no evidence that Wanless breached any term of the agreement as varied whether that term be described as essential or otherwise. To the extent to which Wanless did not comply strictly with the obligations imposed in the written contract bearing date 7 May 1996 such non-compliance resulted from agreed variations of the sort one would expect to be made between Wanless and Perwaja having regard to the nature of the contract in the light of the long history of commercial dealings between them.

[65] There was never any suggestion made by Perwaja that Wanless was in breach of any term of the contractual arrangements with it prior to the change in the management structure and the replacement of Wan Ghani by Datuk Abu and the executive committee to which I have referred or indeed perhaps more importantly prior to Wanless commencing this action against Perwaja for damages towards the end of 1996.

[66] In my view to the extent that there was arguably any technical breach of the shipment clause by Wanless in failing to get the approval of Perwaja prior to chartering the "Dooyang Winner" that was certainly not a breach of any essential term and could not conceivably be relied upon by Perwaja as a justification for refusing to issue the letter of credit by 9 August 1996. Indeed it was never suggested that it could be so relied upon prior to institution of proceedings by Wanless.

[67] In my view the refusal by Perwaja to establish the letter of credit at a time when the "Dooyang Winner" was standing by at Bells Bay in Tasmania to commence loading the scrap steel so that it might complete its loading programme either as advised on 18 July 1996 or as subsequently advised on 31 July 1996 was a clear breach by Perwaja of an essential term of the contract as varied.

[68] The excuse advanced on behalf of Perwaja for failing to meet its contractual obligation to supply the letter of credit, as it had promised to do on 22 July 1996, that a change of management structure in Perwaja required that an executive management committee approve the issue of letter of credit and that that committee refused to do so, in my view, is at law no excuse at all. Obviously Perwaja, whatever changes were made in its management structure or internal arrangements for meeting its financial obligations whilst bound by the contract it had made with Wanless through its authorised officers, was obliged to perform its contractual obligation to procure the issue of a letter of credit as its former authorised officer had undertaken to do.

[69] Indeed reference to the minutes of a meeting of the executive committee on 2 August 1996 indicates that the meeting noted that:-

"(a) The group records an oversupply in materials, eg –

1. Scrap in terms of quantities can last eight (8) months."

In the meeting it was decided –

"(c) Wanless Metal Industries PRE Ltd

The management is authorised to renegotiate and recommend appropriate action in relation to the supply of scrap initiated on 22 July 1996."

I infer that the "initiation" on 22 July 1996 refers to the letter of that date in which Basir undertook to supply a letter of credit requested by Wanless on 18 July to the terms of which request I have already referred.

[70] I have already indicated that Datuk Abu told Mr Teo on the evening of 2 August 1996 that one of the committee members had objected to the contract because it had not been "formalised" during the tenure of office of the current management committee.

[71] It is possible, if indeed not likely, that members of the committee in declining to meet the contractual obligations of Perwaja to provide the letter of credit to meet the cost of the scrap steel that was awaiting shipment to Kemaman from Australia were conscious of the fact that the contract price for that scrap steel was US$705,000.00 in excess of its then current market value.

3. WAS WANLESS ENTITLED TO END THE CONTRACT WITH PERWAJA AND RECOVER DAMAGES ON THE GROUND OF PERWAJA'S REPUDIATION AND/OR NON-COMPLIANCE WITH AN ESSENTIAL TERM OF THE CONTRACT

[72] Whatever may be the explanation for the avowal of Mr Yunus that he had no knowledge of the contract between Perwaja and Wanless there is no doubt that on 24 July 1996 Mr Teo advised him of its existence. On 26 July 1996 Mr Teo handed to Mr Yunus copies of all documents, purchase orders, etc relating to that contract. He was then also advised that the shipment of the scrap steel the subject of the contract "was so to speak actually on the way".

[73] Thereafter in my view the evidence indicates a simple procrastination on the part of Perwaja to meet its contractual obligation. There is nothing in the evidence to suggest that the appropriate arrangements for the issue of the letter of credit could not have been made within a day or so. Indeed, Rohani Basir had undertaken to do that "once you have confirmed the vessel of this contract".

[74] In my view the most likely explanation for the refusal of Perwaja to issue the letter of credit without delay was the resolution of the executive committee on 2 August 1996 that the management be authorised "to renegotiate and recommend appropriate action in relation to the supply of scrap" by Wanless.

[75] In my view Perwaja by the officers who succeeded Rohani Basir and Wan Ghani in its management clearly evinced an intention not to meet Perwaja's contractual obligation. It is clear when one reads the "PAYMENT" clause and the letter from Wanless to Perwaja of 18 July 1996 that the provision of the letter of credit prior to the commencement of loading of the shipment to Perwaja of scrap metal was an essential term of contract. It is clear in my view that Perwaja indicated that it did not intend to comply with that requirement. It is equally clear from the resolution of the committee meeting of 2 August 1996 that Perwaja proposed instead of meeting its contractual obligations with Wanless to embark upon a "renegotiation" of that contract – presumably in the light of the fall in the current market value of scrap steel.

[76] On 5 August 1996 the solicitors for Wanless in Malaysia sent a letter to Perwaja complaining of its failure to establish a letter of credit as requested –as it had undertaken to do on 22 July 1996. It advised that the vessel chartered by Wanless would commence to load the scrap steel under its contract with Perwaja on 8 August 1996. It requested that the letter of credit be established by close of business on 7 August 1996. It advised that should Perwaja fail to establish a letter of credit by that date then Wanless would treat Perwaja as having repudiated the agreement and would then take steps to dispose of the scrap steel, cancel the vessel charter if possible and then seek to recover damages from Perwaja.

[77] At the same time Wanless commenced to make inquiries about other possible purchasers of the scrap steel that was it was holding to fulfil its contract with Perwaja.

[78] On 7 August 1996 Perwaja's legal representatives replied to the letter of 5 August 1996 advising that Perwaja's new management was "still studying this matter".

[79] On 8 August 1996 Wanless' legal representatives asked Perwaja's legal representatives "to revert by 12 noon of Friday, the 9th August 1996 as to whether your clients are prepared to honour the contract in question". Perwaja's lawyers immediately responded "unfortunately we are unable to obtain any positive instructions from the defendant Steel SDN BHD within this short time. We understand that the Board is meeting some time later this month. In the circumstances we will regret that we are unable to provide any repose to your query either way".

[80] Upon receipt of this correspondence Wanless' legal representatives replied purporting to accept Perwaja's repudiation of its contractual obligations and terminated the contract.

[81] In my judgment Wanless was entitled to avoid the contract and to recover the loss it suffered as a consequence of Perwaja's repudiation and/or non-compliance with an essential term of its contract with Wanless.

4. WHETHER WANLESS WAS READY, WILLING AND ABLE TO PERFORM ITS OBLIGATIONS AT MATERIAL TIMES PRIOR TO ITS AVOIDING THE CONTRACT

[82] Although a great deal of time was spent cross-examining Anderson as to the ability of Wanless to meet its contractual obligation I am satisfied that it was so able.

[83] Much of the examination seemed to be based upon documents that Wanless had discovered upon which Mr Anderson was cross-examined at length.

[84] The likelihood of Wanless not being able to fulfil its contractual obligations to supply 30,000 metric tonnes of scrap metal +/- 10% at the time it negotiated the chartering of a vessel to carry such steel from four ports in Australia to Kemaman in Malaysia, because it did not have enough steel to do so in my view is so remote for a scrap metal merchant with the years of experience of Wanless in selling scrap metal both within and outside Australia as to be rejected out of hand.

[85] I have no hesitation in accepting the evidence of Mr Anderson that Wanless had the capacity to comply with its contract with Perwaja and the only thing that prevented such compliance was the repudiation in essence of its contractual obligation to provide a letter of credit prior to the "Dooyang Winner" commencing to load scrap steel at Bells Bay in Tasmania. This evidence is amply supported by contemporaneous notes made by Anderson relating to the charter and by correspondence with Sims Metal as to the ability of Wanless to supply promptly in excess of 30,000 tonnes to purchasers in Korea.

[86] I am satisfied that in the months of August and September Wanless was ready, willing and able to deliver to Perwaja at Kemaman 30,000 metric tonnes +/- 10% of scrap steel in accord with its contract so that delivery would be effected before the end of September 1996.

5. WHETHER WANLESS ENTITLED TO DAMAGES AGAINST PERWAJA

[87] It is clear that the repudiation of its contractual obligation by Perwaja caused very significant loss to Wanless.

[88] Firstly it had chartered the "Dooyang Winner" for the sole purpose of meeting its contractual obligations with Perwaja. That vessel at the time Perwaja declined to provide letters of credit was in fact waiting to commence loading scrap steel at Bell Bay.

[89] As a result of Perwaja's repudiation of its contractual obligations Wanless found it necessary to sub-charter that boat which resulted in financial losses.

[90] In addition it found it necessary to sell both within Australia and outside Australia the scrap steel which it was holding to meet its contractual obligation to Perwaja. The sale outside Australia required scrap material to be unloaded in an Asian port which required a vessel with a more shallow draught than the "Dooyang Winner". Clearly, in my view, Wanless is entitled to recover against Perwaja damages which it suffered as a consequence of Perwaja's repudiation of its contractual obligation.

QUANTUM OF DAMAGE

[91] The Convention articles relevant to damages recoverable by Wanless for Perwaja's breach of contract are articles 74 and 75.

[92] Article 74 provides –

> "Damages for breach of contract by one party consist of a sum equal to the loss including loss of profit suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract in the light of the facts and matters of which he then knew or ought to have known as a possible consequence of the breach of contract."

Article 75 provides, inter alia –

> "If the contract is avoided, and if in a reasonable manner and within a reasonable time after avoidance - - the seller has resold the goods the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74."

[93] It is clear on the evidence that Wanless sold 25,100 tonnes of the metal it was holding to fulfil its contract with Perwaja to Pernas at the then market rate of US$143.50 per ton for delivery at Penang in Malaysia. It was necessary for Wanless to charter another vessel called "MV Handy Light" at approximately the same cost per tonne to ship that material as the cost of chartering the "Dooyang Winner" which was unsuitable for that port. In any event I accept that the sub-charter of the "Dooyang Winner" as soon as possible was a reasonable step to minimise the damage incurred by Wanless in having such a large vessel standing by at the expense of Wanless and not being used for the purpose of shipping its scrap steel to Perwaja.

[94] It was agreed between the parties with a view to shortening the evidence which would otherwise necessarily be called that the best estimate of the cost per ton for shipping 30,000 tonnes on the "Dooyang Winner" was $21.11 per ton. It was also agreed that the best estimate for shipping the 25,100 tonnes on the motor vessel "Handy Light" was $20.24 per ton. Had Wanless shipped 33,000 tonnes of scrap steel which according to Mr Anderson it intended and was able to do the cost per ton for the shipment upon "Dooyang Winner" would have decreased to $19.19 which was less than the cost of shipping the scrap metal to Pernas on the "MV Handy Light".

[95] In my view the resale of the scrap to Pernas clearly satisfies the requirement of article 75. The "MV Handy Light" called at the same ports to load scrap metal as was the intention for "Dooyang Winner" except that it avoided calling at Bell Bay in Tasmania because the sale to Pernas was 5,000 tonnes less than that under the contract with Perwaja.

[96] In my view the sale to Pernas was effected within a reasonable time being within two months of Wanless' acceptance of Perwaja's repudiation of its contract. It is clear from the material that Wanless acted as quickly as possible in seeking a market for the scrap metal it had held for Perwaja because as early as 5 August 1996 (four days before it accepted Perwaja's anticipatory breach of its contractual obligations) it inquired of a metal merchant in the United States who worked for Sims Metal which used to sell scrap steel in Korea whether it was aware of any

buyers in Korea who might be interested in purchasing 33,000 tonnes of scrap metal that could be delivered promptly.

[97] In my view it is clear on the whole of the evidence that the substitute sale to Pernas on 8 October 1996 was effected within a reasonable time of the termination by Wanless of its contract with Perwaja. The sale to Pernas was at the then market value on approximately the same freight terms as had been negotiated with the owners of "Dooyang Winner" and involved a shipment to Penang also in Malaysia. The difference in freight cost on the evidence was minimal.

[98] The loss of profit incurred by Wanless as a consequence of this sale under Article 75 involves simply subtracting from the contract price for 25,100 tonnes at US$164.00 per ton, the price recovered under the Pernas contract of $143.50 per ton – i.e. $20.50 per ton which amounts to US$514,550.

[99] Wanless sold a further 5,000 tonnes to BHP by contracts made in August, September and October 1996 at a price of AU$156.75 per ton, i.e. AU$783,750.00. The unchallenged evidence of Mr Anderson is that BHP purchased the steel at a price which on its estimates would give Wanless the same net return as if it had sold the scrap steel in Asia – as it had sold the other 25,100 tonnes to Pernas in Penang. This involved the calculation of the then market rate in terms of US dollars and the costs involved in freighting the material from Australia to Malaysia, payment of commission etc. For the purpose of calculating Wanless' loss on resale of 5,000 tonnes of scrap metal to BHP one need only take the US market rate for scrap steel at that time which upon the unchallenged expert evidence of Mr Gulliver was $143.50 per metric ton. The loss therefore suffered by Wanless be calculated as follows:

5,000 tonnes x $164.00		$820,000.00
Less commission - 5,000 tonnes x US$1.00	US$ 5,000	
Freight etc – 5,000 tonnes x US$21.11	US$105,550	$110,550.00
	US$110,550	US$710,450.00
Less the US$ equivalent of AU$783.750		US$620,494.87
		US$ 89,955.13

[100] In the months of August, September and October 1996 the average exchange rate for an Australian dollar and US dollar was –

AU$1.00 = US$0.7917

Therefore, AU$783,750.00 equals US$620,494.87.

[101] Loss suffered by Wanless upon the BHP sale is US$710,450.00 less US$620,498.87. I assess therefore the loss suffered upon the BHP sales in the sum of US$89,955.13.

[102] With respect to the saving of commission on the Pernas sale it is clear that Wanless was required to pay commission to Teo at the rate of $1.00 per ton for 30,000 tonnes or part thereof which would have amounted to $25,100 on the scrap sold to Pernas. The admitted commission however payable on the Pernas sale was $9,000. No commission of course was paid on the sale to BHP. The net price paid by BHP made allowance for the commission that would have been payable. All told therefore the substitute sales involved Wanless saving commission in the sum of US$16,100 with respect to the US$25,100 sale to Pernas.

[103] It is convenient therefore to deduct the saving of US$16,100 from the loss suffered upon the sale of the 25,100 tonnes which was US$514,550. The total loss therefore suffered by Wanless on the substitute sale to Pernas was US$498,450.

[104] It is not disputed by Perwaja that Wanless suffered a net loss of US$343,163.47 as a result of chartering and rechartering the "Dooyang Winner".

[105] This loss was clearly incurred as a consequence of Perwaja's breach of its obligation to establish the appropriate letter of credit. The incurring of a loss of this kind was clearly foreseeable and Perwaja must have known that its failure to establish a letter of credit as promised would result in Wanless being left with a chartered vessel at hand which could not be used for the purpose for which it had been chartered.

[106] In my view once Wanless accepted Perwaja's repudiation of its obligations under the contract and terminated that contract it promptly took all steps reasonably necessary to mitigate the damages it suffered as a consequence of Perwaja's repudiation.

[107] Whether or not Wanless had entered into a legally binding charter party with the owners of "Dooyang Winner" by the time it notified Perwaja in writing on 26 July 1996 and again on 31 July 1996 was not investigated at any length upon trial. In any event the obligation to mitigate did not require Wanless to put at risk its commercial reputation by taking technical points to avoid its obligation under its agreement to charter a vessel when the owner accepted its intimation that it would charter the vessel and become liable under terms eventually to be formalised in the unlikely event that they had not been formalised prior to Wanless' termination of the contract on 9 August 1996. It was contended for Wanless that when placed in the impossible position in which it had been placed by Perwaja, it acted reasonably and in accord with the observation of Lord McMillan in *Banco d'Portugal v Waterlow & Sons* [1932] AC 452 at 506 –

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty."

[108] I assess the plaintiff's damages in US dollars because that is the currency in which the parties expressed their contractual obligations –

Loss of profit on the substitute Pernas sale	US$498,450.00
Loss of profit on the BHP substitute sale	US$ 89,955.13

Loss resulting from rechartering "MV Dooyang Winner"	US$343,163.47
	US$ 931,568.60
Interest at 9% from 30/9/96 to 17/11/2000 say 4.16 yrs on US$931,568.60	US$348,779.28

[109] I give judgment for the plaintiff in the sum of US$1,280,347.80

[110] I will hear argument on the questions of costs.