CA on appeal from the judgment of Mr. Justice Orr before the MR (Lord Denning) Megan LJ; Stephenson LJ. 3rd February 1972.

**THE MASTER OF THE ROLLS**:

1. This case started off as an arbitration, but has finished up as a full-scale action. It concerns the effect of devaluation on a contract of sale and, in particular, on a letter of credit which was given for the price.

2. There are two contracts of sale here. One is dated 12th July, 1967, the other 13th July, 1967. The sellers were coffee producers in Kenya called W.J. Alan & Co. Ltd. of Nairobi. The buyers were an Egyptian State Trading Company with offices in many countries, but, in this case, the transaction was conducted by the office at Dar Es Salaam, Tanzania. The sales were negotiated by brokers in Nairobi. Each contract was for the sale of 250 tons of coffee. The price was 262 shillings a cwt. At that time the Kenya shilling and the sterling shilling were of equal value. So it did not seem to matter whether the currency of account was Kenyan currency or sterling currency. The material terms were:

   *First Contract for 250 tons of coffee*
   *Nairobi, 12th July, 1967*
   *No. 3445*
   *Sellers: Messrs. W.J. Alan & Co. Ltd., Nairobi.*
   *Buyers: Messrs. El Nasr Export & Import Co., Dar Es Salaam.*
   *Quantity: 250 tons.*
   *Price: Shs. 262/- (two hundred sixty two) per cwt. of 112 lbs. nett F.O.B. MOMBASA.*
   *Shipment From Mombasa: During September 1967/October 1967 at Sellers' Option, but sellers agree to co-operate with buyers to ship in accordance with their instructions if possible.*
   *Payment: By confirmed, irrevocable letter of credit to be opened at sight one month prior to shipment as stipulated in this contract.*
   *Special Conditions: Destination and shipping instructions to be declared by 15 days prior to shipment.*
   *This contract is made under the terms and conditions of the London Coffee Trade Association.*
   *It was signed by the brokers and by the sellers and buyers.*
   *Second Contract for another 250 tons of Coffee*
   *This was in exactly the same form and language, but the date was "Nairobi, 13th July, 1967". The number was 3447. The shipment was "During October/November, 1967 at sellers' option".*

   The terms and conditions of the London Coffee Trade Federation contained these stipulations:

   *"Payment*
   *28. Payment shall be made at the time stipulated and the buyers must always take up the documents when in conformity with the conditions of the contract. The documents shall include the complete set of clean "on board" or "shipped" bills of lading.....*
   *29. The property in the coffee remains in the sellers until it has been paid for, in full, in accordance with the contract, even if the sellers have already parted with the goods or with the documents which represent them.*

   *OPENING OF CREDIT*
   *30(a) If payment is to be made by means of a Letter of Credit, the credit shall be opened in strict conformity with the terms of the contract (by cable or by air mail) in time to enable the beneficiary to utilise it from the first day of the period stipulated for shipment.*
   *(b) In all cases the validity of letters of credit must exceed by at least 15 days the ultimate date stipulated for shipment".*

3. There was also a clause providing for any dispute to be determined by arbitration in London, and for the contract to be interpreted according to the law in force in England.

4. In addition, the Central Bank of Kenya Act 1966 contained these provisions:
   19. The unit of currency of Kenya shall be the Kenya shilling which shall be divided into one-hundred cents.
   21. All monetary obligations or transactions entered into or made in Kenya shall be deemed to be expressed and recorded, and shall be settled in Kenya currency unless otherwise provided for by law or agreed upon between the parties. The Schedule said "shilling" (or its abbreviated form "sh". means the Kenya shilling.

**THE LETTER OF CREDIT**

5. The letter of credit is of the first importance. It was as follows:
   *"THE NATIONAL BANK OF COMMERCE, TANZANIA, Dar-es-Salaam.*
   *20th September, 1967*
   *To: W.J. Alan & Co. Ltd., P.O. Box 1979, Nairobi.*
   *Dear Sirs,*
   *1. We request reference to telegraphic advice (14th September) of the transfer of letter of credit to you under instructions from M/s El Nasr Export & Import Co., of Dar-es-Salaam who are the original beneficiaries of an irrevocable transferable Letter of Credit established by a Bank in Madrid.*
   *2. We have now received a mail confirmation of this credit and we quote below the terms of the Letter of Credit.*
   *"By order of M/s El Nasr Export & Import Co., of P.O. Box 2281, Dar-es-Salaam and for their account we transfer an irrevocable documentary credit established in their favour by Banco Experior de Espana, Madrid,*

*being their reference No. Credito 282539/S up to an amount of £131,000 (Sterling one-hundred thirty-one thousand pounds) valid until 5th October, 1967, inclosuve at sight against delivery of the following documents:*

1. *Commercial Invoice issued to the name of El Nasr;*
2. *Full set of Bill of Lading issued to Conisaria General de de Abastecimientos y Transportes, etc.*
3. *Certificate of quality;*
4. *Certificate of origin;*
5. *Certificate phitosanitary.*
6. *Certificate issued at the shipping port for account of the beneficiaries stating weight and quality of the goods.*
7. *Copy cable to be sent to El Nasr, Dar-es-Salaam for insurance purpose stating number of bags and weight of the shipped coffee relating to:*
6. *500 long tons De Cafe Robusta FAQ de Tanzania (packed in bags, etc.) at the price of Sterling 262/- for long ton FOB Shipment in September on the vessel Vinland Saga Mombasa and/or Dar-es-Salaam to Barcelona. Payments on account for partial shipment may yet be admitted".*

*Please note that any charges arising out of this transaction are for account of beneficiary. Insurance covered by buyers.*

*The original credit advised to El Nasr bears our confirmation as per instructions of our Madrid correspondents.*

*Yours faithfully,*
*THE NATIONAL BANK OF COMMERCE,*
*TANZANIA".*

7. It is quite plain that that credit did not conform to the original contracts of sale in many respects. In particular:-
   1. It was for 500 tons, instead of two separate parcels of 250 tons each;
   2. It was for shipment in September by the vessel Vinland Saga instead of the first 250 tons Sept./Oct. 1967, and the second 250 tons Oct./Nov. 1967.
   3. It was for payment in Sterling, and not in Kenyan Shillings.
   4. It was not available from the first day of the shipment period.
   5. It was only valid until 5th October, 1967, instead of 15th October, 1967 (per first contract) and 15th December, 1967 (per second contract).

**THE FIRST SHIPMENT**

8. Nevertheless, although the letter of credit did not conform to the contract of sale, the sellers were content to draw on it and make use of it. On 19th September, 1967, they shipped on the Vinland Saga at Mobasa 88 tons of coffee, and on 20th September another 191 tons of coffee on the same ship, making 279 tons for carriage to Barcelona. That was presumably 250 tons under the first contract and 29 tons under the second contract. They invoiced this coffee to El Nasr. The first invoice was dated 20th September 1967, for Kenyan Shs. 401,283.75 converted to Sterling , £23.044 3s. 9d. The second invoice was dated 27th September 1967, for Sterling £50,057 15s. 10d. The sellers sent the documents to their bank, the Ottoman Bank in Nairobi. The Ottoman Bank sent them to the buyers' bank, The National Bank of Commerce, Tanzania. They noted some discrepancies, but, on receiving the necessary indemnity from the sellers, the Tanzanian Bank paid the amount in sterling to the sellers' bank, Nairobi, where it was credited in Kenyan shillings. At this time Kenyan shillings were worth the same as sterling shillings - so the currency did not matter.

**THE SECOND SHIPMENT**

9. The letter of credit, as originally issued, was only valid until 5th October, 1967, and only for the one vessel — the Vinland Saga. So it was not available for the second shipment unless extended in date and to another vessel. (This shipment was to be for the outstanding 221 tons in the second contract). There were many cables passing between 8th October 1967, and 10th November, 1967, between the sellers and the buyers, and the various banks. As a result, the credit was extended up to 25th November, 1967, for shipment by the Maria Teresa.

10. On 16th November 1967, the sellers shipped 221 tons of coffee at Mombasa on the Maria Teresa. A Bill of Lading was issued for it. All the documents were prepared for presentation. The sellers made out an invoice No. 28, dated 18th November, 1967, for the 221 tons at a price in sterling of £57,877 15s. 9d. They headed it:
    *"Drawn under Banco Exterior de Espana, Madrid, Irrevocable Letter of Credit No. 282539/5".*

11. But then, before they sent the documents to the bank, they heard that sterling had been devalued. They waited to see if Kenyan currency would also be devalued. It was not. So they took the invoice which had been prepared, and inserted in it these words:
    *"Part payment of balance due - Contract No. 3447 of 13/7/'67".*

12. The sellers handed the invoice, containing those words with the shipping documents and a draft payable at sight to their own bank in Nairobi. That bank sent them to the buyers' bank in Dares-Salaam. The buyers' bank refused to accept the draft so long as the invoice contained those words: "Part payment of balance due contract No. 3447 of 13/7/'67". So the sellers made out a revised invoice omitting those words: and on 18th November, 1967, sent it to their bankers, together with a sight draft in sterling. Their bankers collected the amount in sterling of £57,877 15s. 9d. But that sterling was at the time (owing to devaluation of sterling) only worth Shs. 987,734.50 in Kenyan currency. The sellers claimed that they ought to be paid an extra Shs. 165,530.45, because they said that the contract of sale was in Kenyan currency of Shs. 262 a ton.

**CURRENCY OF ACCOUNT**

13. An important question is: What was the money of account? as distinct from the money of payment? I explained the difference between them in the recent case of ***Woodhouse v. Nigerian Foods*** [1971] 2 W.L.R. 272 at page 295. At the time when the contracts of sale were made it did not matter what was the money of account: because Kenyan shillings and sterling shillings were worth the same. But on and after 18th November 1967, it did matter. The sellers say that the money of account was Kenyan shillings and that they are, therefore, entitled to the price as measured in Kenyan currency, and not in sterlings whereas, the buyers say that the money of account was sterling from the beginning.

14. We were referred to the leading cases on this subject, such as Bonython ( [1951] A.C. 201 ); ***National Bank of Australia*** ( [1952] A.C. 493 ); and ***National Mutual Life Association of Australia*** ( [1956] A.C. 369 ): to which I would add the valuable discussion in the latest (3rd edition) of Dr. Mann's book "The Legal Aspects of Money" at pages 217 to 228.

15. Sufficient for present purposes to say that we must apply the proper law of the contract - in this case English law — and then, as matter of construction, decide what was the currency of account. Mr. Stamler submitted that the currency of account was sterling. He stressed the many points connecting the contract with England, and with sterling, referring us to an affidavit of the Manager of the buyers. But I find myself in entire agreement with the Judge. The contract was made in Kenya, the sellers were in Kenya, the delivery and shipment were to be in Kenya, and by the law of Kenya all transactions entered into in Kenya were to be in Kenyan currency. Then there is the decisive point that the Price is stated "Shs. 262/- per Cwt". That way of writing shillings is the clearest indication possible that the money of account was Kenyan: just as £N was in ***Woodhouse v Nigerian Foods*** [1971] 2 W.L.R. 272 at page 277.

16. Mr. Stamler made some reference to subsequent conduct — but when the contract is clear and unambiguous, it would not be right to let it be influenced by subsequent conduct. That may go to variation of the contract, or to waiver, but not to its initial construction: see ***Ottoman Bank v. Chakarian*** ( [1938] A.C. 260 ) at page 272; ***Whitworth Street Estates v. Miller*** ( [1970] A.C. 583 ).

17. If I am right in holding that the money of account was Kenyan currency, then, in order to conform with the contract, the Letter of Credit should, I imagine, have been expressed in Kenyan shillings and confirmed by a bank in Kenya. But that was not done. It was expressed in sterling. What is the consequence?

**THE ISSUES**

18. The buyers say that the sterling credit was decisive: because, at the time it was given and accepted, it amounted to payment of the price. Alternatively they say that the money of account was varied by agreement, or that the sellers waived payment in Kenyan currency and accepted sterling instead.

19. The first point, whether the Letter of Credit amounted to payment, is of much importance: but it does not arise if the second point is good, we are all agreed that the second point is good. So it is not strictly necessary to go into the first point. But both Counsel have done much research on it. They presented their arguments in full before us and with great ability. They invited us to express our views, whatever the outcome. I propose to do so. In any case, the discussions have helped me in coming to a decision. And I think it would be a pity if the work of Counsel were lost and forgotten. There is a good precedent, too. In the ***Hedley Byrne*** case ( [1964] A.C. 465 ), it was unnecessary for the House to consider whether there was a duty to use care in making statements: but they did so. So I will try, albeit on a lower level, to do likewise.

**THE MEANING OF THE COMMERCIAL TERMS**

20. In any consideration of letters of credit, it is important to know the meaning of the terms used by commercial men. I can do this best by explaining the course of business here. This is a typical case of the use of commercial letters of credit. Here we have a seller of Coffee in Kenya. He sells it to a buyer in Tanzania. That buyer resells it to a second buyer in Spain.

21. The Kenyan seller is not willing to part with the goods or the documents relating to them unless he is assured of payment. So, he stipulates with his Tanzanian buyer that payment is to be made by *"confirmed irrevocable letter of credit"*: see ***Trans Trust SPRL v. Danubian Trading Co.*** [1952] 2 Q.B. 297 /304. That means that the Tanzanian buyer must establish in favour of the Kenyan seller a Letter of Credit by which a banker promises to pay the price - or to accept drafts for the price — in exchange for the shipping documents relating to the goods, i.e. the Bill of Lading, Invoice and so forth. The Letter of Credit must, of course, be *"irrevocable"*. A *"recovable*" Letter of Credit is not of much use to the seller, because the banker, on the buyer's instructions, might then revoke it at any time. The Letter of Credit must, in addition, be *"confirmed"*. That is to say, it must be confirmed by a banker who is readily accessible to the seller (e.g. in Nairobi or Dar-es-Salaam): because the seller wants to be able to go to such a banker and get payment against documents. The seller may stipulate for payment in cash or by drafts accepted by the confirming banker. Such drafts may be "*at sight"*, that is, payable on demand, or after a fixed period, such as ninety days after sight.

22. The Tanzanian buyer did not himself go to his own banker to establish the credit. He resold the coffee to a Spanish buyer and stipulated that the Spanish buyer should establish a "transferable" letter of credit in his favour. The intention of the Tanzanian buyer was, of course, to transfer so much of it as was necessary to meet his obligations to the Kenyan seller. The Spanish buyer then went to his bank in Madrid and asked them to issue a transferable irrevocable letter of credit in favour of the Tanzanian buyer. The Madrid Bank would, of course,

insist on the Spanish buyer providing them with the necessary funds or otherwise giving them security to back the credit. On being so satisfied, the Madrid Bank issued their own transferable irrevocable letter of credit in favour of the Tanzanian buyer. The Madrid Bank were the "issuing bank" and, by issuing the Letter of Credit, they gave their own promise to honour it in exchange for documents in accordance with its terms.

23. The Tanzanian buyer, armed with that credit from the Madrid bank, went to his own bank in Dar-es-Salaam and told them that he wanted to "transfer" to the Kenyan seller so much of it as was necessary to meet his obligations to the Kenyan seller. He also asked them to "confirm" it; that is to say, to add to it (in addition to the promise of the Madrid bank) a promise on their own account that they would honour it on presentation of the documents. The Tanzanian bank would, of course, require the Madrid Bank to put them in funds or otherwise satisfy them that their "confirmation" would be backed by the Madrid bank.

24. The Tanzanian Bank then issued their confirmation to the Kenyan seller. They were the "confirming" bank. By it they promised to pay the Kenyan seller the price of the goods against delivery of documents in accordance with the terms set out therein. The payment was to be cash or by drafts payable at sight.

25. These promises by the issuing banker and by theconfirming banker are, of course, enforceable against the bank by the seller.

26. It turned out, however, that the credit (as issued by the Madrid Bank and confirmed by the Tanzanian Bank) was not in conformity with the contract of sale made by the Kenyan sellers with the Tanzanian buyers. It was a "non-conforming" credit. It did not fully conform in regard to the first shipment. But the sellers shipped 279 tons, presented the documents to the "confirming bank" and obtained payment in sterling. The letter of credit did not conform at all in regard to the second shipment. It did not, for instance, conform as to the date of shipment or the name of the vessel. Nor was it expressed in Kenyan currency (which was the currency in the contract of sale). It was expressed in Sterling. In consequence, arrangements were made so as to get over the non-conformity. All concerned agreed in the arrangements. The date of the shipment was extended: and another vessel was named. But no one asked for the currency to be altered so as to conform. The price stated in the credit was expressed in sterling and remained in sterling throughout. The Kenyan sellers shipped the goods in that knowledge, and obtained the documents relating to them. All this was done before sterling was devalued.

27. But, before the Kenyan sellers presented the documents for the second shipment to the confirming bank, sterling was devalued. The Kenyan sellers then presented the documents to the confirming bank and obtained payment in sterling in accordance with the credit. Now they claim to be entitled to more. They say that they were and are entitled to have the price measured in Kenyan currency: that the proceeds of the credit go in reduction of that price: but do not discharge it altogether: and that they are entitled to the balance.

**THE EFFECT OF A LETTER OF CREDIT**

28. When an irrevocable Letter of Credit is issued by one bank and confirmed by another, it may be a "conforming" credit; that is, one which conforms exactly to the contract of sale: or it may be a "non-conforming" credit; that is, one which does not conform exactly to the contract of sale, but is afterwards modified or accepted as being satisfactory to all concerned. It then becomes equivalent to a "conforming credit". In any such case the question arises whether the credit is to be regarded as absolute payment of the price, or as conditional payment of it, or as no payment at all but only a means by which payment may be obtained; i.e. as collateral security.

29. This must be a matter of the true construction of the contract: but, in order to construe it, it is important to bear in mind what the consequences are in each case.

**ABSOLUTE PAYMENT**

30. If the letter of credit is absolute payment of the price, the consequences are these: The seller can only look to the banker for payment. He can in no circumstances look to the buyer. The seller must present the documents to the banker and get payment from him in cash or get him to accept sight or time drafts. If the banker does not take up the documents, the seller will retain them, resell and sue the banker for damages. If the banker takes up the documents in exchange for time drafts, and the banker afterwards becomes insolvent, the seller must prove in the liquidation. He cannot sue the buyer.

31. There is an observation in the High Court of Australia which suggests that a confirmed irrevocable Letter of Credit may amount to absolute payment. In ***Saffron v. Societe Miniere Cafrika*** (1958) 100 C.L.R. at page 243, the High Court said that: "*a provision for payment by irrevocable and confirmed letter of credit.....might not unreasonably be regarded as a stipulation for the liability of the confirming bank in place of that of the buyer*". And in ***Soproma S.p.A v. Marine & Animal By-Products Corp.[***1966] 1 Lloyd's Rep. 367 at page 386, Mr Justice McNair said: "*Under this form of contract, as it seems to me, the buyer performs his obligation as to payment if he provides for the sellers a reliable and solvent paymaster*".

Mr. Justice McNair did not however, have all the arguments before him.

32. In my opinion a letter of credit is not to be regarded as absolute payment, unless the seller stipulates, expressly or impliedly, that it should be so. He may do it impliedly if he stipulates for the credit to be issued by a particular banker in such circumstances that it is to be inferred that the seller looks to that particular banker to the exclusion of the buyer. There are some cases in the United States which are to be explained in this way, such as ***Vivacqua Irmaos, S.A. v. Hickerson*** (1939) 190 Southern Reporter 197; ***Ornstein v. Hickerson*** (1941) 40 Federal Supplement

page 305. And in the ***Soproma Case*** [1966] 1 Lloyds; there was a stipulation for a particular banker, which may account for Mr. Justice McNair's observation.

**CONDITIONAL PAYMENT**

33. If the letter of credit is conditional payment of the price, the consequences are these: The seller looks in the first instance to the banker for payment: but, if the banker does not meet his obligations when the time comes for him to do so, the seller can have recourse to the buyer. The seller must present the documents to the banker. One of two things may then happen:
    (1) The Banker may fail or refuse to pay or accept drafts in exchange for the documents. The seller then, of course, does not hand over the documents. He retains dominion over the goods. He can resell them and claim damages from the buyer. He can also sue the banker for not honouring the credit: see ***Urquhart Lindsay & Co. v. Eastern Bank Ltd.*** [1922] 1 K.B. 319. But he cannot, of course, get damages twice over.
    (2) The bank may accept time drafts in exchange for the documents, but may fail to honour the drafts when the time comes. In that case the banker will have the documents and will usually have passed them on to the buyer, who will have paid the bank for them. The seller can then sue the banker on the drafts: or if the banker fails or is insolvent, the seller can sue the buyer. The banker's drafts are like any ordinary payment for goods by a bill of exchange. They are conditional payment, but not absolute payment. It may mean that the buyer (if he has already paid the bank) will have to pay twice over. So be it. He ought to have made sure that he employed a "*reliable and solvent paymaster*".

34. There are several cases which show that in the ordinary way a letter of credit is conditional and not absolute payment. But, as Mr. Tapp properly observed, they are all concerned with time drafts. Thus in New Zealand ***Hindley v. Tothill*** [1894] 13 NZLR 13 at page 23, the Court of Appeal said that the seller had the liability *"of the bank in the first instance, and on the bank's default, that of the defendants (the buyers)"*. In the ***United States Greenough v. Munroe*** (1931) 53 Fed. Reports. 2nd Ser. 362 at page 365, the United States Court of Appeal for the 2nd Circuit (New York) said that:

    *"the authorities favour the view that there is no presumption that the seller takes a draft drawn under a letter of credit in absolute payment of the buyers' obligation to pay for the merchandise: hence upon default by the bank upon its draft, the seller may look to the buyer"*.

35. Finally in England in ***Newman Industries Ltd V. Indo-British Industries Ltd.*** [1956] 2 Lloyd's Rep. 219 at page 236, Lord Justice Sellers said in regard to a time draft:

    *"I do not think there is any evidence to establish, or any inference to be drawn, that the draft under the letter of credit was to be taken in absolute payment. I see no reason why the plaintiffs should not look to the defendants as buyers, for payment"*.

36. Many of the textbooks treat a letter of credit as conditional payment. Thus Professor Davis in 1953 said that:

    *"such authority as there is supports the view that the letter of credit constitutes conditional, and not absolute, payment. Therefore, should the issuing bank fail to honour the seller's drafts, drawn in conformity with the terms of the letter of credit, the rights of the seller against the buyer will revive",*

    see his book on commercial credit, 2nd edition (1953) at page 46; 3rd edition (1963) at page 48; Mcgrath in the 4th edition of Gutteridge (1968) pages 29 to 33; and in 7th edition of Paget (1966) page 620-2 is to the same effect.

**NO PAYMENT AT ALL**

37. If the letter of credit is no payment at all, but only a means by which payment may be obtained, i.e. if it is only collateral security, the consequences are these: The seller ought to present the documents to the banker. If the seller does not do so, he will be guilty of laches in enforcing his security and the buyer will be discharged — see ***Peacock v. Purcell*** (1863) 14 CB., NS. 728.

38. But if on presentation the banker fails or refuses to take up the documents, then (if the letter of credit is only collateral security) the seller will be entitled to take the documents round to the buyer (or send them to him) and demand that he take them up and pay the price. This situation finds no place in any of the authorities. There is a statement in an old case in ***Pennsylvanian Bell v. Mors*** (1839) 5 Wharton 189 at page 203, when it was said that

    *"a credit with a banker is not payment, but a means of payment, more or less secure according to the solidity of the depositary; and the greater or less certainty of the security cannot affect the question of its character: it is but a security still*".

39. That statement was quoted with approval by Finckalstein in 1930. (Commercial Letters of Credit) at page 156, who says that the seller "*desires additional security without the surrender of anyrights that he may have against the buyer*". But the complete answer was given by Mr. Justice McNair in ***Soproma S.p.A. v. Marine & Animal By-Products Corporation*** [1966] 1 Lloyd's Rep. 367 at page 386;

    *"It seems to me to be quite inconsistent with the express terms of a contract such as this to hold that the sellers have an alternative right to obtain payment from the buyers by presenting the documents direct to the buyers. Assuming that a letter of credit has been opened by the buyer (for the opening of which the buyer would normally be required to provide the bank either with cash or some form of authority) could the seller at his option disregard the contractual letter of credit and present the documents direct to the buyer? As it seems to me, the answer must be plainly in the negative"*.

**CONCLUSION AS TO PAYMENT**

40. As a result of this analysis, I am of the opinion that in the ordinary way, when the contract of sale stipulates for payment to be made by confirmed irrevocable letter of credit, then, when the letter of credit is issued and accepted by the seller, it operates as conditional payment of the price. It does not operate as absolute payment.

41. It is analogous to the case where under a contract of sale, the buyer gives a bill of exchange or a cheque for the price. It is presumed to be given, not as absolute payment, nor as collateral security, but as conditional payment. If the letter of credit is honoured by the bank when the documents are presented to it, the debt is discharged. If it is not honoured, the debt is not discharged: and the seller has a remedy in damages against both banker and buyer.

VARIATION OR WAIVER

42. All that I have said so far relates to a "conforming" letter of credit; that is, one which is in accordance with the stipulations in the contract of sale. But in many cases – and our present case is one - the letter of credit does not conform. Then negotiations may take place as a result of which the letter of credit is modified so as to be satisfactory to the seller. Alternatively, the seller may be content to accept the letter of credit as satisfactory, as it is. without modification. Once this happens, then the letter of credit is to be regarded as if it were a conforming letter of credit. It will rank accordingly as conditional payment.

43. There are two cases on this subject. One is ***Panoutsos v. Raymond Hadley Corporation of New York*** [1917] 2 K.B. 273, but the facts are only to be found fully set out in 22 Commercial Cases 207. The other is ***Enrico Trust v. Fisher*** ( [1960] 2 Lloyds 340 ). In each of those cases the letter of credit did not conform to the contract of sale. In each case the non-conformity was in that it was not a confirmed credit. But the sellers took no objection to the letter of credit on that score. On the contrary, they asked for the latter of credit to be extended; and it was extended. In each case the sellers sought afterwards to cancel the contract on the ground that the letter of credit was not in conformity with the contract. In each case the Court held that they could not do so.

44. What is the true basis of those decisions? Is it a variation of the original contract? or a waiver of the strict rights thereunder? or a promissory estoppel precluding the seller from insisting on his strict rights? or what else?

45. In ***Enrico Trust,*** Mr. Justice Diplock said it was a "*classic case of waiver*". I agree with him. It is an instance of the general principle which was first enunciated by Lord Cairns, Lord Chancellor, in ***Hughes v. Metropolitan Railway Co.*** [1877] 2 A.C. 439, and rescued from oblivion by ***Central London Property Trust Ltd. v. High Trees House, Ltd.*** [1947] K.B. 130. The principle is much wider than waiver itself: but waiver is a good instance of its application.

46. The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so - see ***Plasticmoda Soc. per Azioni v. Davidsons Manchester Ltd.*** [1952] 1 Lloyd 527 , 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them.

47. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them — ***Tool Metal Manufacturing Co. v. Tungsten Electric Co.*** [1955] 1 W.L.R. 761 . But there are cases where no withdrawal is possible. It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

48. Instances of these principles are ready to hand in contracts for the sale of goods. A seller may, by his conduct, lead the buyer to believe that he is not insisting on the stipulated time for exercising an option - ***Bruner v. Moore*** [1904] 1 Ch. 305. A buyer may, by requesting delivery, lead the seller to believe that he is not insisting on the contractual time for delivery - ***Charles Rickards Ltd. v. Oppenheim*** [1950] 1 K.B. 616 , 612. A seller may, by his conduct, lead the buyer to believe that he will not insist on a confirmed letter of credit: ***Plasticmoda*** ( [1952] 1 Lloyds 527 ) but will accept an unconfirmed one instead - ***Panoutsos v. Raymond Hadley Corporation of New York*** [1917] 2 K.B. 273: ***Enrico Trust v. Fisher*** ( [1960] 2 Lloyd 340 ). A seller may accept a less sum for his goods than the contracted price, thus inducing him to believe that he will not enforce payment of the balance - ***Central London Property Trust Ltd. v. High Trees House Ltd.*** ( [1947[ 1 K.B. 150 ); ***D. & C. Bulders v. Rees*** [1966] 2 Q.B. 617 . In none of these cases does the party who acts on the belief suffer any detriment. It is not a detriment, but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it.

49. The Judge rejected this doctrine because, he said, "*there is no evidence of the buyers having acted to their detriment*". I know that it has been suggested in some quarters that there must be detriment. But I can find no support for it in the authorities cited by the Judge. The nearest approach to it is the statement of Viscount Simonds in the ***Tool Metal case*** ( [1955] 1 WLR 761) that the other must have been led "*to alter his position*", which was adopted by Lord Hodson in ***Emmanuel Ayodeji Ajayi v. R. T. Briscoe (Nigeria) Ltd. ([***1964] 1 W.L.R. 1326 at page 1330 ). But that only means that he must have been led to act differently from what he otherwise would have done. And, if you study the cases in which the doctrine has been applied, you will see that all that is required is

that the one should have "*acted on the belief induced by the other party*". That is how Lord Cohen put it in the ***Tool Metal Case*** ...[1955] 1 WLR 761 at page 799), and is how I would put it myself.

50. The Judge also rejected the doctrine because of something which was said in the recent case of ***Woodhouse & Ors. v. Nigerian Produce Marketing Board*** ( [1971] 2 W.L.R. 272) about estoppel: but no question of waiver arose there: no question of letters of credit; or anything of that kind. It has no application here and neither Counsel relied in any way upon it before us.

**CONCLUSION**

51. Applying the principle here, it seems to me that the sellers, by their conduct, waived the right to have payment by means of a letter of credit in Kenyan currency and accepted instead a letter of credit in sterling. It was, when given, conditional payment: with the result that, on being duly honoured (as it was) the payment was no longer conditional. It became absolute, and dated back to the time when the letter of credit was given and acted upon. The sellers have, therefore, received payment of the price and cannot recover more.

52. I would pay tribute to the judgment of the Judge - with which in great part I entirely agree. I only differ from him on the ground of variation or waiver, which does not appear to have been argued before him as fully as before us,

53. I would, therefore, allow this appeal and enter judgment for the defendants.

**LORD JUSTICE MEGAW:**

54. The sellers, W.J. Alan & Co. Ltd., are merchants in Nairobi, and the buyers El Nasr Export & Import Company are an Egyptian state trading company. The sellers and the buyers, the latter through their Dar-es-Salaam branch, made two contracts on 12th and 13th July 1967, for the sale of coffee, F.O.B. Mombasa. The first contract was for 250 tons, with shipment date September/October 1967. The second contract, out of which the present dispute arises, was for a further 250 tons, with shipment date October/November 1967. Apart from the different shipment dates, the two contracts were in identical terms.

55. The price clause in each contract was: *"Price: Shs. 262/- (two hundred and sixty two) per cwt. of 112 lbs. nett F.O.B. Mombasa*".

56. The payment clause read: *"Payment: By confirmed, irrevocable letter of credit to be opened at sight one month prior to shipment as stipuled in this contract*".

57. It was provided in each contract that it was made under the terms and conditions of the London Coffee Trade Association. There is no doubt but that the proper law of the contracts was English law. The Association's conditions expressly provided that English law should govern.

58. At the time when the contracts were made there was parity between sterling and Kenyan currency. Twenty Kenyan shillings were of identical value with one pound sterling. The dispute in this case has arisen because, while shipment of part of the coffee under the second contract was actually in process of being made, but before payment for that shipment had been made or was due, sterling was devalued, whereas Kenyan shillings were not devalued. Thereafter one pound sterling was not worth 20 Kenyan shillings, but was worth only 85.7% of 20 Kenyan shillings. It therefore becomes necessary to decide whether the money of account — that is, the currency by reference to which the amount of the contractual payment is to be calculated — is Kenyan shillings or sterling.

59. Meanwhile, before the devaluation of sterling, various relevant events had happened. The buyers, it would appear, had re-sold the coffee to sub-buyers in Spain. Those sub-buyers had established an irrevocable transferable letter of credit in favour of the buyers in a Spanish Bank in Madrid. It would seem that the credit had been established in sterling. The buyers, in purported performance of their obligations to the sellers under the contracts of 12th and 13th July, had arranged for the transfer of a part of that Madrid credit to the National Bank of Commerce, Tanzania, in Dar-es-Salaam. That bank, by letter of 20th September 1967, notified the sellers of the availability to them of that transferred letter of credit, and the Bank itself confirmed the credit. In so doing, the bank, of course, was acting on the buyers' instructions.

60. Apart from any question as to the currency in which the credit was expressed, the credit fell short in various respects of compliance with the buyers' obligations under the contracts of sale. It was established late. Each contract called for a separate letter of credit, not, as was offered, one single credit for the two contracts. The credit did not extend over the whole of the shipment periods. It stipulated for at least one certificate of quality which the contracts did not require. It might be construed as calling for the whole of the shipments under both contracts to be made by one named vessel. It is not necessary to consider these discrepancies further, because the sellers took no objection to them; though they did thereafter ask for and receive certain amendments, including an extension of date.

61. So far as concerns the currency involved, there can be no doubt whatever that the confirmed letter of credit was expressed to be in sterling and that the only obligation which it imposed upon the bank was an obligation to make payment in, and measured by, sterling. The confirming bank's letter expressly stated that the credit was "up to an amount of £131.000 (Sterling one hundred thirty one thousand pounds)". Clause 7 of the letter may not be of much significance in other respects, since it relates merely to a cable to be sent to the buyers "for insurance purposes". It is, however, of some significance, in respect of the currency question, that there is a reference in that clause, in the Spanish language, to "the price of Stg. £262 per long ton". So the contractual 262 shillings per cwt. had become, at least, for purposes of the confirmed credit, £262 per ton. So far as that transaction was

concerned, sterling was the money of account. Sterling had been made the money of account in the bank's offer of payment. That offer was made by the bank on the instructions of the buyers. It was an offer for the purpose of providing the payment, and the only payment, stipulated by the contracts of sale.

62. The sellers did not raise any complaint as to the confiration of the letter of credit in those terms. They did not complain about the currency. Instead, they at once took advantage of the confirmed credit by operating on it. By 20th September 1967, 88 tons of coffee, under the first contract, had been shipped in the "*Vinland Saga*" at Mombasa. The sellers presented documents and obtained payment from the bank. The documents included an invoice, No. 17, dated 20th September. It expressly referred to the credit. It used the words *"£262 per long ton"*. While the resulting sum was initially shown in shillings, the total was expressed as "£23064 3. 9." In other words, it was a sterling invoice. We have not seen the documents relating to payment, but it is safe to assume that the draft corresponded with the invoice total, showing pounds, shillings and pence: so that payment was by sterling draft. A further 191 tons were shipped on 20th September, further bills of lading for that quantity being issued on that date. This shipment completed the 250 tons of the first contract and also comprised 29 tons towards the fulfilment of the second contract. The invoice, No. 18, was unambiguously a sterling invoice, expressed in pounds, shillings and pence. Again, no doubt, the draft was in sterling to correspond with the invoice and the terms of the credit.

63. 221 tons still remained to be shipped under the second contract. That quantity was loaded in the "*Maria Teresa*" and bills of lading were issued on 16th November 1967. An invoice for 221 tons (Invoice No. 28) had been prepared by the sellers with the date 18th November. Once again, it was a sterling invoice: the computation was expressed as *"£262 per long ton"*: it was all in sterling: the total was £57,877 15. 9. Before the documents were presented for payment came the news of the devaluation of sterling. It was still not known if Kenyan shillings would follow sterling. The sellers, leaving the invoice in other respects as originally prepared, added the words: "*Part payment of balance due.....*" As is clear from the terms of a letter dated 22nd November from the sellers' bank in Nairobi, the Ottoman Banks to the confirming bank in Dar-es-Salaam, the sight draft which accompanied Invoice No. 28 was expressed as £57,877 15. 9. Payment in accordance with the draft was ultimately made to the sellers by the confirming bank. However, when it became known on 21st November, that the Kenyan currency was not going to be devalued, the sellers prepared a further invoice, No. 28B, in the sum of Shs. 165,530/45. This sum is the difference between the amount of Kenyan shillings referable to 221 tons at Shs.262/- per cwt. and the amount of Kenyan shillings which would have been realised in exchange for £57,877.15.9. after devaluation. Invoice No. 28B was accompanied by a sight draft, drawn, not on the confirming bank (who clearly could not be made liable to pay anything more) but on the buyers, for Shs.165,530/45. The buyers refused to accept or pay the draft on the ground that they did not owe the sellers anything. The sellers protected that refusal. Battle was joined.

64. The first issue is whether in the original contract, the contract of 13th July 1967, the money of account was initially Kenyan currency or sterling, to my mind, Mr. Justice Orr was right, for the reasons given by him, in holding that when that contract was made the money of account was Kenyan. The fact that it was expressed in a form which was appropriate for Kenyan currency and was not appropriate for sterling must outweigh, and far outweigh; the various indications relied upon by the buyers as pointing to sterling.

65. However, in my judgment the currency of account was subsequently varied from Kenyan currency to sterling. That being so, the sellers have been paid the full amount to which they are entitled and they have no valid claim against the buyers.

66. The contract of sale contained its own express provision for payment, which I have already quoted in full. I repeat the essential words: "Payment: by confirmed, irrevocable letter of credit.....". There is nothing else in the contract, at least in its express terms, which adds to, subtracts from, or qualifies that contractual provision as to payment of the price. It was the buyers' obligation to procure that a bank should offer to the sellers its confirmation of an irrevocable credit which would provide for payment of the contract price as specified in the contract of sale, against delivery to the bank of the proper documents.

67. The offer made by the confirming bank, as I have already said, did not comply, in several respects, with what the sellers were entitled to require. However, the only non-conforming aspect of the offer which I regard as relevant for the purposes of this appeal is the term of the offer in respect of currency. That, in my view, is not only relevant: it is vital.

68. The confirming bank's offer, made to the sellers with the knowledge of, and on the instructions of, the buyers, was an offer which involved sterling, not merely as the currency of payment, but as the currency of account, in respect of that transaction. The sellers accepted the confirming bank's offer, including its terms as to currency, by submitting invoices and drafts with the form and contents which I have already described.

69. As I see it, the necessary consequence of that offer and acceptance of a sterling credit is that the original term of the contract of sale as to the money of account was varied from Kenyan currency to sterling. The payment, and the sole payment, stipulated by the contract of sale was by the latter of credit. The buyers, through the confirming bank, had opened a letter of credit which did not conform, because it provided sterling as the money of account. The sellers accepted that offer by making use of the credit to receive payment for a part of the contractual goods. By that acceptance, as the sellers must be deemed to have known, not only did the confirming bank become irrevocably bound by the terms of the offer (and by no other terms), but so also did the buyers become

bound. Not only did they incur legal obligations as a result of the sellers' acceptance - for example, an obligation to indemnify the bank - but also the buyers could not thereafter have turned round and said to the sellers (for example, if Kenyan currency had been devalued against sterling) that the bank would thereafter pay less for the contractual goods than the promised sterling payment of £262 per ton. If the buyers could not revert unilaterally to the original currency of account, once they had offered a variation which had been accepted by conduct, neither could the sellers so revert. The contract had been varied in that respect.

70. The sellers, however, contend that they were, indeed, entitled to make use of the non-conforming letter of credit offered to them without impairing their rights for the future under the original terms of the contract, if and when they chose to revert. They seek to rely on the analogy of a sale of goods contract where the goods are deliverable by instalments, and one instalment falls short of the prescribed quality. The buyer is not obliged, even if in law he could do so, to treat the contract as repudiated. He is not, it is said, even obliged to complain. But he is in no way precluded from insisting that for future instalments of the goods the seller shall conform with the precise terms of the contract as to quality. That is not, in my opinion, a true analogy. The relevant transaction here is not one of instalments. It is a once-for-all transaction. It is the establishment of a credit which is to cover the whole of the payment for the whole of the contract. Once it has been accepted by the sellers, the bank is committed, and is committed, in accordance with its accepted terms, and no other terms. Once the credit is established and accepted it is unalterable, except with the consent of all the parties concerned, all of whose legal rights and liabilities have necessarily been affected by the establishment of the credit. Hence the sellers cannot escape from the consequences of the acceptance of the offered credit by any argument that their apparent acceptance involved merely a temporary acquiescence which they could revoke or abandon at will, or on giving notice. It was an acceptance which, once made, related to the totality of the letter of credit transaction; and the letter of credit transaction was, by the contract of sale, the one and only contractual provision for payment. When the letter of credit was accepted as a transaction in sterling as the currency of account, the price under the sale contract could not remain as Kenyan currency. For the buyers it was submitted further that, if there were not here a variation of the contract, there was at least a waiver, which the sellers could not, or did not properly revoke.

71. I do not propose to go into that submission at any length. On analysis, it covers much the same field as the question of variation. In my view, if there were no variation, the buyers would still be entitled to succeed on the ground of waiver. The relevant principle is, in my opinion, that which was stated by Lord Cairns in ***Hughes v. The Metropolitan Railway Company*** ( (1876-77) LR 2 App. Cas. 439 ), at page 448. The acceptance by the sellers of the sterling credit was, as I have said, a once-for-all acceptance. It was not a concession for a specified period of time or one which the sellers could operate as long as they chose and thereafter unilaterally abrogate: any more than the buyers would have been entitled to alter the terms of the credit or to have demanded a refund from the sellers if, after this credit had been partly used, the relative values of the currencies had changed in the opposite way.

72. We were invited to consider a large number of authorities cited from the Courts of Australia, New Zealand and the United States as well as of this country; and on the basis of those authorities to formulate propositions of general principle as to the effect upon a buyer's liability of the establishment of a confirmed letter of credit. Does the mere establishment of the credit, completed by confirmation, discharge the buyer's liability completely? Or does it discharge it provisionally, and, if so, subject to precisely what provision? With all respect, I do not think it is necessary, nor would it be helpful, to seek to formulate general principles on these fascinating topics. As became apparent from the numerous cases cited, the relevant factors, particularly as to the relevant terms of the individual sale contracts, vary so widely that it would be dangerous to state general principles, unless the statement were to be so hedged about with reservations and qualifications as to render the principles useless. However, without seeking to formulate general principles, I am satisfied that the discussion which we have heard on this topic, when it is related to the particular facts of this particular case, indicates an-other ground for deciding this appeal in favour of the buyers.

73. On the simple form of contractual provision for payment in this sale contract with which we are concerned, the sellers, in my view, have no right of requiring payment (i am not, of course, speaking of damages for breach) otherwise than in accordance with, and by means of, a confirmed irrevocable letter of credits so long, at any rate, as no default is made by the bank in its performance of the letter of credit obligations. There are cases in which a contract on its true construction imposes on the buyer a potential liability to make payment direct to the seller in certain circumstances, outside or in addition to payment by the bank under a duly established letter of credit. An example is to be found in the facts of ***Urquhart Lindsay & Co. Ltd v. Eastern Bank Ltd.*** ( [1922] 1 K.B. 318). But there is no scope for such an implication in the present contract of sale. Here the contractual obligation is *"payment by confirmed, irrevocable letter of credit...."*. If such a credit is duly established, and if payment is duly made in accordance with its terms, I see no scope for any liability on the part of the buyers to make, or on the part of the sellers to require, any other or additional payment. Here the credit was, it is true, not duly established. But the non-compliance of the credit with the contract of sale was, in my opinion, unquestionably waived, and irrevocably waived, by the sellers. On the facts of this case, then the credit which was established has to be treated as a conforming credit. On the terms of this contract of sale, there remains no obligation on the buyers to make any payment to the sellers, because they have discharged the whole of their contractual obligation as to payment when a conforming credit has been established and payment has actually been made under that credit, in accordance with its terms, to the full extent that the sellers have properly sought to draw upon it. It follows that,

even if there were no variation or relevant waiver in respect of the terms of the con-tract of sale, I should hold that the sellers' claim fails on that quite separate and independent ground.

74. It is apparent, and indeed we have been told, that some of the arguments before Mr. Justice Orr followed a very different line in certain respects from the arguments which have been presented to us. The learned Judge, in a very lucid and careful judgment, disposed of a difficult and complex question which has not been further argued on this appeal, the parties having accepted the Judge's decision. He also dealt with the question of the original currency of account in a manner to which I should wish, respectfully, to pay tribute. Certainly no blame can attach to him because he did not, on some of the issues which have been put forward as being important in this Court, have the opportunity of considering the merits of the arguments now presented.

75. For the reasons which I have given, I am of opinion that the buyers have made all the payment which was due from them. I would allow the appeal.

**LORD JUSTICE STEPHENSON**:

76. I agree that this appeal succeeds on the second point of variation or waiver for reasons which I shall state in my own words, although they add little or nothing to what my Lords have already said.

77. The currency of account fixed by the contract of sale was clearly Kenyan shillings and not sterling. I agree with the Judge in attaching importance to the use of the abbreviation "shs" recognised as denoting Kenyan shillings by the Schedule to the Central Bank of Kenya Act, 1966. It stamps Kenya on the contract as the money of account almost as "schillings" would stamp Austria on it. Unlike the Judge, I also attach importance to the presumption created by Section 21 of the same Act, which does not seem to me to have been displaced by the agreement between buyers and sellers.

78. The letter of credit varied the currency of account in the events that happened from Kenyan shillings to pounds sterling.

79. The contract of sale provided for payment by "confirmed, irrevocable letter of credit to be opened at sight on month prior to shipment as stipulated in the contract". There was no other provision for payment in the contract. If the sellers had rejected the letter of credit it may be that the buyers would have been under an implied contractual obligation to pay the agreed price themselves and the sellers to present to the buyers the agreed documents so as to obtain payment. The bare provision of a letter of credit in conformity with the contract might not have discharged that primary liability under this contract. But the payment by the bank of the agreed price under the confirming letter of credit would have discharged the buyers' liability to pay, because there was no other obligation to pay provided by this contract.

80. Where, as here, the letter of credit by which the buyers' liability to pay was to be discharged did not conform to the contract, it only became binding on the sellers if they accepted or agreed to it. That they could do unequivocally and in full satisfaction of the buyers' liability or pro tanto and in part satisfaction if it did not conform in respect of the price including (as here) the currency of account. Alternatively, they could reject the letter of credit or insist on its amendment to conform with the sale contract. But if the sellers wanted to accept the letter of credit and payment under it without prejudice to their right to the full price (in the currency of account) from the buyers, they must say so and not allow buyers and sub-buyers, issuing and confirming banks to act upon it. Otherwise they must be taken to have accepted the letter of credit and its terms of payment in pounds sterling as the currency of account as well as the currency of payment, and to have accepted them beyond the possibility of unilateral revocation.

81. If the confirming bank had defaulted, the sellers might not have been prevented by having agreed to the letter of credit and to payment of the price by the bank from looking to the buyers either for the price agreed in the contract of sale or for damages for breach of their contractual promise to pay by letter of credit.

82. For the buyers promised to pay by letter of credit, not to -provide by a letter of credit a source of payment which did not pay. As the sellers would have agreed to payment in sterling by the bank, not by the buyers, they would perhaps have been entitled to be paid by the buyers in Kenyan shillings. But that question does not arise in this case and I agree that Kenyan currency went out of this contract in the events that happened, whatever might have been the effect on it of an event which did not happen.

83. By not objecting to the nonconforming letter of credit, by obtaining payment on it in sterling from the bank and by extending it the sellers clearly accepted and agreed to it and were treated as having done so not only by the bank but by the buyers, who may be presumed (although there was no evidence about it) to have paid charges and incurred liabilities such as a liability to indemnify the bank. The sellers never indicated any reservations about the change from Kenyan shillings to pounds sterling or asked for any adjustment, probably for the simple reason that they considered sterling as good as Kenyan shillings if not better. When after devaluation of sterling they invoiced the balance of the goods against part payment of the balance of the price and claimed the difference created by devaluation from the buyers, they were attempting to assert a liability which, whether by variation or waiver, they had allowed the buyers to alter.

84. On this point I disagree with diffidence from the learned Judge and would allow the appeal. I find it easier to differ from the Judge when I am told that it was never argued before him that the buyers' procurement of the letter of credit was a discharge of their liability to pay conditional upon payment being made to the sellers by

the bank and that he therefore considered the questions of variation and waiver on a different basis from that on which this Court has answered them.

85. I agree that there may be contracts of sale which provide for letters of credit but by their express or necessarily implied terms would leave the buyers with a residual liability to pay a difference such as this, or would absolve them from any such liability for different reasons from those on which this decision in favour of these buyers is founded. It all, or mostly, depends on the terms of the contract of sale and the facts of the case.

86. But a promise of payment like this is, in my judgment, plain: and, in the unusual course of events which have happened in this case, has been carried out leaving the buyers with no further obligations and the sellers with no further rights.

87. I agree also with the views expressed by my Lord, the Master of the Rolls, on the first point that this unconfirmed irrevocable letter of credit operated as a conditional payment of the price which, when honoured, discharged the buyers' debt to the sellers. And I agree further that this would in the ordinary way be the effect of such a letter of credit being issued and accepted by the seller in performance of a contract of sale which does not stipulate expressly or impliedly that its issue and acceptance should have a different effect. But on the second point I would leave open the question whether the action of the other party induced by the party who "waives" his contractual rights can be any alteration of his position, as my Lord has said, or must, as the Judge thought, be an alteration to his detriment, or for the worse, in some sense. In this case the buyers did, I think, contrary to the Judge's view, act to their detriment on the sellers' waiver, if that is what it was, and the contract was varied for good consideration, which may be another way of saying the same thing; so that I need not, and do not, express a concluded opinion on that controversial question.

88. Appeal in the action allowed with costs. Appeal on motion dismissed with costs. Leave to appeal to the House of Lords.

Mr. S.A. STAMLER, Q.C., & Mr. JAMES KINGHAM (instructed by Messrs. Attwater and Liell of Harlow, Essex) appeared on behalf of the Appellant s.
Mr. NORMAN TAPP, Q.C., & Mr. MICHAEL GETTLESON (instructed by Messrs. Gordon Dadds & Co.) appeared on behalf of the Respondent.