

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2010-CP-32-05481

RECEIVED

APR 23 2012

S.C. Supreme Court

Hook Point, LLC,

Respondent

v.

Branch Banking and Trust Company, First
Reliance Bank, and Allan Risinger,

Defendants,

Of Whom Branch Banking and Trust
Company is,

Appellant.

Motion for Clarification

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Appellant, Branch Banking and Trust Company, ("BB&T") moves the court for an order clarifying the impact of its April 11 decision and thereby resolving a dispute between BB&T and defendant First Reliance Bank concerning the effect of the decision.

Background

The action giving rise to the appeal arose from a real estate development loan made by BB&T to respondent Hook Point, LLC ("Hook Point") that closed in November 2007. (ROA, pp.81-118). Among the documents required for the closing of the loan was a letter of credit in the amount of \$1,500,000 issued by defendant First Reliance Bank to Hook Point in favor of

BB&T. (ROA, pp. 98-99). In December 2010 BB&T submitted a demand to First Reliance for the full amount of the letter of credit. (ROA, p. 100-102). Hook Point then filed the underlying action (ROA, pp. 18-27) and obtained a preliminary injunction preventing payment of the full amount of the letter of credit. (ROA, pp. 8-17). BB&T appealed the order granting the preliminary injunction and on April 11, 2012 this court issued its decision reversing the lower court order granting the preliminary injunction.

On April 12, 2012, the day after this court's decision was filed, BB&T wrote First Reliance renewing its demand for payment under the letter of credit. Exhibit A. The demand specifically requested payment of the remaining balance of the letter of credit.¹ By letter dated April 19, 2012 First Reliance has refused the BB&T draft and declared that it has no further obligation on the letter of credit. Exhibit B.

Argument and Request for Relief

In its April 11 decision this court held that as a matter of law the preliminary injunction should never have been issued. The decision recognized that there are circumstances when payment of a letter of credit should be enjoined - the "fraud in the transaction" exception - but stressed that the exception must be very narrowly construed or the purposes of letters of credit would be frustrated. The holding was crystal clear: First Reliance should have paid the letter of credit in December 2010 when BB&T made its initial demand.

By its April 19 letter refusing to pay the balance remaining on the letter of credit First Reliance seeks to take advantage again of the preliminary injunction even after it has been resoundingly rejected by this court. The "reasoning" of the April 19 letter is that BB&T somehow waived its rights under the letter of credit by drawing the interest payments as

¹ The order that granted the injunction had allowed BB&T to submit draw requests for interest and BB&T has been paid \$531,832.58 through a series of requests for interest during the pendency of the appeal. The remaining balance is \$968,167.42.

permitted by the injunction. That waiver argument is made despite the fact that the letter of credit itself allows partial draws (ROA p.48) and despite that fact that BB&T appealed the order granting the preliminary injunction and argued consistently that it should have been paid in full in December 2010.

The position taken by First Reliance is especially disturbing given the fact that the issue was discussed during oral argument in the context of questions regarding the effect of the expiration date of the letter of credit having passed during the appeal. The discussion during the argument was that BB&T's rights were fixed at the time it made its initial demand for payment, and that the fact that the injunction prevented payment before the expiration date did not affect those rights. Under these circumstances the refusal by First Reliance to honor its obligations goes well beyond advocacy of a disputed legal position and approaches disrespect for the authority of this court.

Conclusion

BB&T is aware that it is seeking extraordinary relief in this motion, but it believes that such relief is justified. In its April 11 opinion this court strongly vindicated the crucial role of letters of credit to commerce and emphasized the importance of certainty and speed of payment if letters of credit are to perform that role. The dishonor by First Reliance flies in the face of the opinion and its rationale. We respectfully submit that BB&T should not have to wait even longer to obtain the payment that should have been made sixteen months ago.



Frank R. Ellerbe, III
Wilson W. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Appellant

April 23, 2012



April 12, 2012

309 Columbia Avenue
Lexington, SC 29072
(803) 359-5111
Fax (803) 359-6683

BY HAND DELIVERY

Mr. Richard McIntyre
Market President- Lexington
First Reliance Bank
801 North Lake Drive
Lexington, SC 29072

Re: First Reliance Irrevocable Letter of Credit No. 970001231

Dear Richard:

Enclosed please find the following documents to substantiate the sight draw and demand by Branch Banking and Trust Company ("BB&T") on First Reliance Bank for the remaining balance under your Irrevocable Letter of Credit No. 970001231 (the "Letter of Credit"):

1. Copies of the Sight Draw, the First Reliance Letter of Credit dated as of November 6, 2007 (the "11/06/2007 Letter of Credit") and notarized statement from a BB&T officer at that time delivered to you as of December 21, 2010 (collectively the "Original Draw Request");
2. A copy of your acknowledgement of receipt of the Original Draw Request dated as December 22, 2010;
3. The original of the Letter of Credit; and
4. A copy of the South Carolina Supreme Court's Opinion No. 27115 in which the Court reversed Judge Keesley's Order Granting Preliminary Injunction dated January 7, 2011 and entered January 12, 2011 (the "Injunction").

The Original Draw Request was timely made prior to the expiry date of the 11/06/2007 Letter of Credit and met all the specific requirements for a draw as set forth therein. As such, the Original Draw Request would have been honored by First Reliance Bank but for the Injunction. The South Carolina Supreme Court has now reversed the order granting the Injunction as being granted in error. Therefore, BB&T demands payment by First Reliance of the remaining balance of the Letter of Credit in accordance with its terms. We appreciate your attention to this matter.

Sincerely,

J. Allan Risinger
Senior Vice President

April 12, 2012
Page 2

cc: S. Jahue Moore, Esquire
William P. Walker, Jr., Esquire
Frank R. Ellerbe, III, Esquire

BB&T

Branch Banking and Trust Company

308 Columbia Avenue
Lexington, SC 29072
(803) 359-5111
Fax (803) 359-6883

December 21, 2010

BY HAND DELIVERY

Mr. Richard McIntyre
Market President- Lexington
First Reliance Bank
801 North Lake Drive
Lexington, SC 29072

Re: First Reliance Irrevocable Letter of Credit No. 970001231

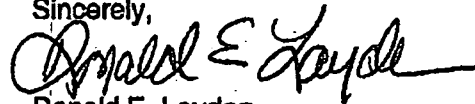
Dear Richard:

Enclosed please find the following documents to substantiate the sight draw and immediate demand by Branch Banking and Trust Company ("BB&T") on First Reliance Bank for \$1,500,000.00 evidenced by your Irrevocable Letter of Credit No. 970001231 ("Letter of Credit"):

1. The Sight Draw as required by the Letter of Credit;
2. The original Letter of Credit; and
3. A notarized statement from a BB&T officer that (a) Hook Point, LLC ("Borrower") has failed to perform its obligations under the Loan Agreement and Promissory Note dated November 16, 2007, (b) the draw amount does not exceed the obligations of Borrower to BB&T and (c) as signor, I have authority to act for BB&T as it relates to the Letter of Credit.

As these documents meet the specific requirements of the Letter of Credit, BB&T expects immediate payment by First Reliance in accordance with the Letter of Credit. We appreciate your prompt and immediate attention to this matter.

Sincerely,



Donald E. Layden
Senior Vice President
Area Executive

cc: Mr. Ronald J. Vaughn
R. William Metzger, Jr., Esquire

BB&T

Branch Banking and Trust Company

DRAWN UNDER First Reliance Bank 309 Columbia Avenue
IRREVOCABLE LETTER OF CREDIT No. 970001231 Lexington, SC 29072
DATED 11-16-2007 Tel: (803) 359-5111
Fax: (803) 359-6663

Date: December 21, 2010

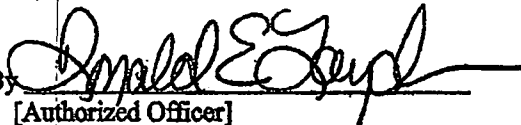
At sight

Attention: Mr. Richard McIntyre
Market President- Lexington
First Reliance Bank
801 North Lake Drive
Lexington, SC 29072

YOU, FIRST RELIANCE BANK, are directed to pay to the order of BRANCH BANKING AND TRUST COMPANY, a North Carolina Bank Corporation, 309 Columbia Avenue, Lexington, SC 29072 the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100ths DOLLARS (\$1,500,000.00) FOR VALUE RECEIVED AND CHARGE TO ACCOUNT OF IRREVOCABLE LETTER OF CREDIT NO. 970001231.

WIRE DRAFT DIRECTLY TO BRANCH BANKING AND TRUST COMPANY ACCOUNT #0005221067241 ABA #05320 1607 ON OR BEFORE DECEMBER 21, 2010

BRANCH BANKING AND TRUST
COMPANY, a North Carolina
Bank Corporation

By 
[Authorized Officer]

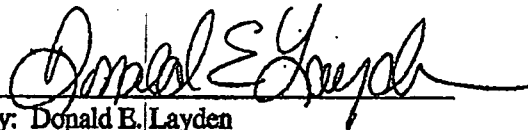
STATEMENT OF AUTHORIZED OFFICER OF
BRANCH BANKING & TRUST COMPANY,
A North Carolina Bank Corporation

PERSONALLY appeared before me, Donald E. Layden, who, being duly sworn, says:

1. That Donald E. Layden is an officer of Branch Banking & Trust Company, a North Carolina Bank Corporation (the "Beneficiary") having authority to act for the Beneficiary with regard to the First Reliance Bank Irrevocable Letter of Credit No. 970001231 dated 11-16-2007 (the "Letter of Credit").


2. That Hook Point, LLC has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007 executed by and between Hook Point, LLC as Borrower and Branch Banking and Trust Company as Lender (the "Obligations").

3. That the amount of the draft on the Letter of Credit does not exceed the amount due the Beneficiary under the Obligations.



By: Donald E. Layden
Title: Senior Vice President
of Branch Banking & Trust Company

SWORN TO and subscribed before me
this 27th day of December, 2010.


Notary Public for
My Commission Expires: 6/11/19



000000000970001281%1470%11620076000000001000628

FIRST RELIANCE BANK

IRREVOCABLE LETTER OF CREDIT

Borrower: Kick Point LLC
111 East Main St B
Lenoir, NC 28072

Lender: First Reliance Bank
Lenoir, NC 28072
601 N Lake Drive
Lenoir, NC 28072

Beneficiary: Branch Banking & Trust Company, a North Carolina Bank Corporation
309 Columbia Avenue
Lenoir, NC 28072

NO.: 970001231

EXPIRATION DATE. This letter of credit shall expire upon the earlier of the close of business on 02-13-2014 and all drafts and accompanying statements or documents must be presented to Lender on or before that time, or the day that Lender honors a draw under which the full amount of this Letter of Credit has been drawn (the "Expiration Date").

AMOUNT OF CREDIT. Lender hereby establishes at the request and for the account of Borrower, an Irrevocable Letter of Credit in favor of Beneficiary for a sum of One Million Five Hundred Thousand & 00/100 Dollars (\$1,500,000.00) (the "Letter of Credit"). These funds shall be made available to Beneficiary upon Lender's receipt from Beneficiary of eight drafts drawn on Lender at Lender's address listed above (or other such address that Lender may provide Beneficiary in writing) during regular business hours and accompanied by the signed written statements or documents indicated below.

WARNING TO BENEFICIARY: PLEASE EXAMINE THIS LETTER OF CREDIT AT ONCE IF YOU FEEL UNABLE TO MEET ANY OF ITS REQUIREMENTS, EITHER SINGLY OR TOGETHER. YOU SHOULD CONTACT BORROWER IMMEDIATELY TO SEE IF THE LETTER OF CREDIT CAN BE AMENDED. OTHERWISE, YOU WILL RISK LOSING PAYMENT UNDER THIS LETTER OF CREDIT FOR FAILURE TO COMPLY STRICTLY WITH ITS TERMS AS WRITTEN.

DRAFT TERMS AND CONDITIONS. Lender shall honor drafts submitted by Beneficiary under the following terms and conditions: **DRAFT MUST BE ACCOMPANIED BY:** 1) The original letter of credit, 2) A note, even statement by the Beneficiary, or an officer thereof, that a) The Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 18, 2007, executed by and between Kick Point, LLC as Borrower and Branch Banking & Trust Company as Lender b) This amount of this draft does not exceed the amount due to the Beneficiary under the obligations; and c) The signer has the authority to act for the Beneficiary with respect to the Letter of Credit. All drafts must be wired directly into the Beneficiary's account at BBAT in the amount \$9006221087241 ABA #068201607.

Upon Lender's honor of such drafts, Lender shall be fully discharged of Lender's obligations under this Letter of Credit and shall not be obligated to make any further payments under this Letter of Credit once the full amount of credit available under this Letter of Credit has been drawn.

Beneficiary shall have no recourse against Lender for any amount paid under this Letter of Credit unless Lender has honored any draft or other document which complies strictly with this Letter of Credit and which on its face appears otherwise in order that which is signed, issued, or presented by a party or under the name of a party purporting to act for Beneficiary, purporting to draw through Beneficiary, or posting as Beneficiary without Beneficiary's authorization. By posting an account demanded in connection with this Letter of Credit, Lender makes no representation as to the correctness of the amount demanded and Lender shall not be liable to Beneficiary, or any other person, for any amount paid or deposited for any reason whatsoever, including, without limitation, any non-compliance by Beneficiary of the proceeds of such payment. By presenting upon Lender or a continuing bank, Beneficiary certifies that Beneficiary has not and will not present upon the draft, unless and until Beneficiary makes with Lender any funds received by Beneficiary in excess of the Letter of Credit's maximum drawing amount.

USE RESTRICTIONS. All drafts must be marked **"DRAWN UNDER FIRST RELIANCE BANK IRREVOCABLE LETTER OF CREDIT NO. 970001231 DATED 11-18-2007,"** and the amount of each draft shall be marked on the draft. Only Beneficiary or Beneficiary's transferee may complete a draft and accompanying statements or documents required by this Letter of Credit and make a draw under this Letter of Credit. This original Letter of Credit must accompany any draft drawn hereunder.

Partial draws are permitted under this Letter of Credit. Lender's honor of a partial draw shall correspondingly reduce the amount of credit available under this Letter of Credit. Following a partial draw, Lender shall return this original Letter of Credit to Beneficiary with this partial draw noted thereon in the alternative, and in its sole discretion, Lender may issue a substitute Letter of Credit to Beneficiary in the amount shown above, less any partial draws.

PERMITTED TRANSFERREES. This Letter of Credit may be transferred by Beneficiary upon prior written notice to Lender of the transfer. The transferee shall be deemed the new Beneficiary of this Letter of Credit and the documents of the transferee, including drafts required under this Letter of Credit, will be processed by Lender (or any intermediary) without the original Beneficiary's intervention and without any further obligation of Lender to the original Beneficiary.

TRANSFERREES REQUIRED DOCUMENTS. When the presenter is a permitted transferee under the "Permitted Transferees" paragraph above (the "Permitted Transferee"), the documents required for a draw shall include all documents required elsewhere in this Letter of Credit, except that such documents may be in the name of and executed by either the original Beneficiary or the presenter permitted by the "Permitted Transferees" paragraph above.

COMPLIANCE BURDEN. Lender is not responsible for any impossibility or other difficulty in achieving strict compliance with the requirements of this Letter of Credit precisely as written. Beneficiary understands and acknowledges: (i) that unless and until the present wording of this Letter of Credit is amended with Lender's prior written consent, the burden of complying strictly with such wording remains solely upon Beneficiary, and (ii) that Lender is relying upon the lack of such amendment as compliance with Beneficiary's intent and continued approval of such wording.

NON-REVERSIBILITY. If any aspect of this Letter of Credit is ever declared unenforceable for any reason by any court or governmental body having jurisdiction, Lender's entire obligation under this Letter of Credit shall be deemed null and void ab initio, and both Lender and Beneficiary shall be restored to the position each would have occupied with all rights available as though this Letter of Credit had never occurred. This non-reversibility provision shall override all other provisions in this Letter of Credit, no matter where such provision appears within this Letter of Credit.

GOVERNING LAW. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of North Carolina without regard to its conflicts of law provisions, and except to the extent such laws are inconsistent with the 2006 Revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, ICC Publication No. 600. This Agreement has been accepted by Lender in the State of South Carolina.

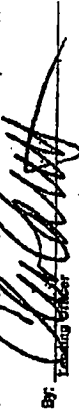
EXPIRATION. Lender hereby agrees with Beneficiary that drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to Lender on or before the Expiration Date unless otherwise provided for above.

Dated: November 16, 2007

LENDER:

FIRST RELIANCE BANK

(Note: In order to be valid, this Letter of Credit requires dual officer signatures, one of which at the SVP level or higher)

By: 
T. Alan White

11/13

Loan No: 970D91281

**IRREVOCABLE LETTER OF CREDIT
(Continued)**

By: 
Senior Vice President

ENDORSEMENT OF DRAFTS DRAWING

Date	Mandated By	Amount in Words	Amount in Figures

UNION TRUST COMPANY, New York, New York. Equal Housing Opportunity. No. 1294. 2008. All Rights Reserved. - NO UNLAWFUL DISCRIMINATION. 10/2008 10/04



December 22, 2010

BY HAND DELIVERY

Mr. Donald E. Layden
Senior Vice President, Area Executive
Branch Banking and Trust Company
309 Columbia Avenue
Lexington, SC 29072

Re: First Reliance Irrevocable Letter of Credit No. 97001231

Dear Don:

I acknowledge the receipt of the Site Draft from BB&T in regards to the Irrevocable Letter of Credit No. 970001231. First Reliance Bank, as provided by code, will take the appropriate time allowed, up to five business days, to review and verify these documents presented and shall act in the appropriate manner.

Sincerely

A handwritten signature in black ink that reads "Richard N. McIntyre". The signature is written in a cursive style.

Richard N. McIntyre
Senior Vice President

cc: S. Jahue Moore
Albert J. Dooley, Jr.
Thomas H. Wingard
Clifford C. Wingard
Ronald J. Vaughn





IRREVOCABLE LETTER OF CREDIT

Borrower: Hook Point LLC
PO Box 1594
Lexington, SC 29071-1594

Lender: First Reliance Bank
Lexington
801 N Lake Drive
Lexington, SC 29072

Beneficiary: Branch Banking & Trust Company
309 Columbia Ave
Lexington, SC 29072

NO.: 970001231

EXPIRATION DATE. This letter of credit shall expire upon the earlier of the close of business on 02-13-2012 and all drafts and accompanying statements or documents must be presented to Lender on or before that time, or the day that Lender honors a draw under which the full amount of this Letter of Credit has been drawn (the "Expiration Date").

AMOUNT OF CREDIT. Lender hereby establishes at the request and for the account of Borrower, an Irrevocable Letter of Credit in favor of Beneficiary for a sum of One Million Four Hundred Thirty Thousand & 00/100 Dollars (\$1,430,000.00) (the "Letter of Credit"). These funds shall be made available to Beneficiary upon Lender's receipt from Beneficiary of sight drafts drawn on Lender at Lender's address indicated above (or other such address that Lender may provide Beneficiary in writing) during regular business hours and accompanied by the signed written statements or documents indicated below.

WARNING TO BENEFICIARY: PLEASE EXAMINE THIS LETTER OF CREDIT AT ONCE. IF YOU FEEL UNABLE TO MEET ANY OF ITS REQUIREMENTS, EITHER SINGLY OR TOGETHER, YOU SHOULD CONTACT BORROWER IMMEDIATELY TO SEE IF THE LETTER OF CREDIT CAN BE AMENDED. OTHERWISE, YOU WILL RISK LOSING PAYMENT UNDER THIS LETTER OF CREDIT FOR FAILURE TO COMPLY STRICTLY WITH ITS TERMS AS WRITTEN.

DRAFT TERMS AND CONDITIONS. Lender shall honor drafts submitted by Beneficiary under the following terms and conditions: **DRAFT MUST BE ACCOMPANIED BY:** 1) The original letter of credit. 2) A notarized, sworn statement by the Beneficiary, or an officer thereof, that: a) The Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007, executed by and between Hook Point, LLC as Borrower and Branch Banking & Trust Company as Lender b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligations; and; c) The signor has the authority to act for the Beneficiary with regard to the Letter of Credit. All drafts must be wired directly into the Beneficiary's account at BB&T into account #0005221067241 ABA #053201607.

Upon Lender's honor of such drafts, Lender shall be fully discharged of Lender's obligations under this Letter of Credit and shall not be obligated to make any further payments under this Letter of Credit once the full amount of credit available under this Letter of Credit has been drawn.

Beneficiary shall have no recourse against Lender for any amount paid under this Letter of Credit once Lender has honored any draft or other document which complies strictly with this Letter of Credit, and which on its face appears otherwise in order but which is signed, issued, or presented by a party or under the name of a party purporting to act for Beneficiary, purporting to claim through Beneficiary, or posing as Beneficiary without Beneficiary's authorization. By paying an amount demanded in accordance with this Letter of Credit, Lender makes no representation as to the correctness of the amount demanded and Lender shall not be liable to Beneficiary, or any other person, for any amount paid or disbursed for any reason whatsoever, including, without limitation, any nonapplication or misapplication by Beneficiary of the proceeds of such payment. By presenting upon Lender or a confirming bank, Beneficiary certifies that Beneficiary has not and will not present upon the other, unless and until Beneficiary meets with dishonor. Beneficiary promises to return to Lender any funds received by Beneficiary in excess of the Letter of Credit's maximum drawing amount.

USE RESTRICTIONS. All drafts must be marked "DRAWN UNDER First Reliance Bank IRREVOCABLE LETTER OF CREDIT NO. 970001231 DATED 02-11-2011," and the amount of each draft shall be marked on the draft. Only Beneficiary or Beneficiary's transferee may complete a draft and accompanying statements or documents required by this Letter of Credit and make a draw under this Letter of Credit. This original Letter of Credit must accompany any draft drawn hereunder.

Partial draws are permitted under this Letter of Credit. Lender's honor of a partial draw shall correspondingly reduce the amount of credit available under this Letter of Credit. Following a partial draw, Lender shall return this original Letter of Credit to Beneficiary with the partial draw noted hereon; in the alternative, and in its sole discretion, Lender may issue a substitute Letter of Credit to Beneficiary in the amount shown above, less any partial draw(s).

PERMITTED TRANSFEREES. This Letter of Credit may be transferred by Beneficiary upon prior written notice to Lender of the transfer. The transferee shall be deemed the new Beneficiary of this Letter of Credit and the documents of the transferee, including drafts required under this Letter of Credit, will be processed by Lender (or any intermediary) without the original Beneficiary's intervention and without any further obligation of Lender to the original Beneficiary.

TRANSFEREES REQUIRED DOCUMENTS. When the presenter is a permitted transferee under the "Permitted Transferees" paragraph above (the "Permitted Transferee"), the documents required for a draw shall include all documents required elsewhere in this Letter of Credit, except that such documents may be in the name of and executed by either the original Beneficiary or the presenter permitted by the "Permitted Transferees" paragraph above.

COMPLIANCE BURDEN. Lender is not responsible for any impossibility or other difficulty in achieving strict compliance with the requirements of this Letter of Credit precisely as written. Beneficiary understands and acknowledges: (i) that unless and until the present wording of this Letter of Credit is amended with Lender's prior written consent, the burden of complying strictly with such wording remains solely upon Beneficiary, and (ii) that Lender is relying upon the lack of such amendment as constituting Beneficiary's initial and continued approval of such wording.

NON-SEVERABILITY. If any aspect of this Letter of Credit is ever declared unenforceable for any reason by any court or governmental body having jurisdiction, Lender's entire engagement under this Letter of Credit shall be deemed null and void ab initio, and both Lender and Beneficiary shall be restored to the position each would have occupied with all rights available as though this Letter of Credit had never occurred. This non-severability provision shall override all other provisions in this Letter of Credit, no matter where such provision appears within this Letter of Credit.

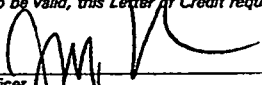
GOVERNING LAW. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of South Carolina without regard to its conflicts of law provisions, and except to the extent such laws are inconsistent with the 2007 Revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, ICC Publication No. 600. This Agreement has been accepted by Lender in the State of South Carolina.


EXPIRATION. Lender hereby agrees with Beneficiary that drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to Lender on or before the Expiration Date unless otherwise provided for above.

Dated: February 11, 2011

LENDER:

FIRST RELIANCE BANK
(Note: in order to be valid, this Letter of Credit requires dual officer signatures, one of which at the SVP level or higher)

By: 
Lending Officer

By: 
Senior Vice President

IRREVOCABLE LETTER OF CREDIT
(Continued)

Loan No: 970001231

Page 2

ENDORSEMENT OF DRAFTS DRAWN:

Date	Negotiated By	Amount In Words	Amount In Figures
2-18-11	BB&T	Fifty Six Thousand Two Hundred Thirty-Four $\frac{68}{100}$	\$ 56,234.68
3-23-11	BB&T	Thirty Two Thousand Three Hundred Fourteen $\frac{13}{100}$	\$ 32,314.12
4-20-11	BB&T	Thirty Four Thousand Five Hundred Forty Two $\frac{68}{100}$	34,542.6
5-20-11	BB&T	Thirty Three Thousand Four Hundred Twenty Eight $\frac{40}{100}$	33,428.4
6-21-11	BB&T	Thirty Four Thousand Five Hundred Forty two $\frac{68}{100}$	34,542.6
7-21-11	BB&T	Thirty Three Thousand Four Hundred Twenty Eight $\frac{40}{100}$	33,428.4
8-20-11	BB&T	Thirty Four Thousand Five Hundred Forty-Two $\frac{68}{100}$	34,542.6
9-20-11	BB&T	Thirty Four Thousand Five Hundred Forty-Two $\frac{68}{100}$	34,542.6
10-24-11	BB&T	Thirty Three Thousand Four Hundred Twenty-Eight $\frac{40}{100}$	33,428.4
11-21-11	BB&T	Thirty Four Thousand Five Hundred Forty Two $\frac{68}{100}$	34,542.6
12-21-11	BB&T	Thirty Three Thousand Four Hundred Twenty-eight $\frac{40}{100}$	33,428.4
1-23-12	BB&T	Thirty Six Thousand Seven Hundred Seventy ONE $\frac{24}{100}$	36,771.
2-17-12	BB&T	Thirty Thousand Eighty Five AND $\frac{50}{100}$	30,085.5

LASER PRO Lending, Inc. 6.28.00.002 Corp. Member National Automated Clearing House Association, Inc. 1997, 2011. All Rights Reserved. SC LSCHELFUNCLCLOC/FC 10-18344 PB-20

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Hook Point, LLC, Respondent,

v.

Branch Banking and Trust Company, First
Reliance Bank, and Allan Risinger,
Defendants,

Of Whom Branch Banking and Trust
Company is, Appellant.

Appeal from Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 27115
Heard March 21, 2012 – Filed April 11, 2012

REVERSED

Frank R. Ellerbe, III, and Wilson W.
McDonald, both of Robinson, McFadden &
Moore, of Columbia, for Appellant.

Frederick A. Gertz, of Gertz & Moore, of
Columbia, Thornwell F. Sowell and David C.
Dick, both of Sowell, Gray, Stepp & Laffitte,
of Columbia, for Respondent.

JUSTICE PLEICONES: Respondent Hook Point, LLC (Hook Point) was granted a preliminary injunction preventing Appellant Branch Banking and Trust Company (BB&T) from drawing on, and defendant First Reliance Bank (First Reliance) from honoring, a \$1.5 million letter of credit. BB&T appeals. We reverse.

FACTS

In late 2007, Hook Point sought a loan from BB&T for the purpose of developing a subdivision on property Hook Point owned on Lake Murray called Panama Pointe. BB&T issued a commitment letter to Hook Point in September 2007 indicating that it would loan the company \$5.1 million and establish a \$2 million line of credit to enable Hook Point to develop the subdivision. Security for the loan included a first mortgage on the Panama Pointe property, personal guarantees of Hook Point's four principals, and a \$1.5 million standby letter of credit issued by First Reliance in favor of BB&T.

Hook Point applied to and obtained a letter of credit (LC) from First Reliance that named BB&T as beneficiary.^[1] The LC was secured by a cash deposit at First Reliance of approximately \$310,000, several real properties owned by a Hook Point affiliate, and personal guarantees of the Hook Point principals. Under the terms of the LC, BB&T was permitted to make draws upon presentation of a draft accompanied by

- 1) The original letter of credit.
- 2) A notarized, sworn statement by the Beneficiary, or an officer thereof, that:
 - a) The Borrower has failed to perform its obligations to the Beneficiary under the Loan Agreement and Promissory Note dated November 16, 2007, executed by and between [Hook Point and BB&T]
 - b) The amount of the draft does not exceed the amount due to the Beneficiary under the obligations; and; [sic] c) The signer has the authority to act for the Beneficiary with regard to the Letter of Credit.

The loan from BB&T to Hook Point was finalized in a loan agreement on the same day the LC was issued. Hook Point proceeded to complete infrastructure work in the development and began construction on the first home before determining that market conditions had become unfavorable to the project as originally contemplated. Hook Point defaulted on the Loan Agreement and related notes and loan documents by, among other things, failing to pay property taxes, to make interest payments due under the notes, or to pay the principal due under one note. BB&T gave Hook Point notice of default in September 2010 and accelerated the loans under the terms of the Loan Agreement on December 21, 2010. On the same day, BB&T tendered a demand letter to First Reliance, seeking to draw the full amount of the LC.

On December 23, Hook Point filed suit alleging several causes of action against BB&T, including for fraudulent misrepresentation by which BB&T induced Hook Point to enter the loan agreement. Hook Point admitted to being \$70,000 in arrears on interest but argued that the terms of the agreement did not permit BB&T to draw the full amount of the LC if that exceeded the amount of interest due. It also sought an ex parte temporary restraining order preventing First Reliance from honoring a draft on the LC by BB&T, which the court granted. After a hearing, the court also granted a preliminary injunction against drafts on or honor of the LC beyond amounts of accrued interest, requiring extension of the LC for one year, and requiring Hook Point to post a \$50,000 bond with the court. This appeal followed, and the case was transferred to this Court pursuant to Rule 204(b), SCACR.

ISSUE

Did the circuit court err when it granted a preliminary injunction?

STANDARD OF REVIEW

The grant of an injunction is reviewed for abuse of discretion. Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005).

DISCUSSION

BB&T contends that the circuit court erred when it granted the preliminary injunction. We agree.

"A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

On the second element, likelihood of success on the merits, BB&T argues that the grounds for refusing to honor a letter of credit are exceedingly narrow and that Hook Point has failed to show it is likely to succeed on the merits under that standard. Thus, BB&T argues that the circuit court erred when it found that Hook Point had sufficiently established this element. We agree.

A letter of credit is a financial instrument designed to reduce the need for counterparties in a transaction to trust one another by adding an intermediary bank to the transaction. This intermediary bank extends credit to one party (typically the buyer in a sales transaction[2]) so that the other need not do so. In a sales transaction, the letter of credit typically requires a seller to represent that he has shipped goods under a sales contract and to document this representation with a bill of lading in order to draw on the LC provided by the buyer. This arrangement entails risk to the buyer, who is vulnerable to loss should the seller present fraudulent documents or deliberately ship nonconforming goods. Nevertheless, the usefulness of a letter of credit depends on its being the virtual equivalent of cash. The judicial doctrine that has developed around letters of credit reflects courts' understanding of this background and the importance to commerce of respecting the terms of this financial instrument so that it remains available as a reliable means of shifting financial risk.

Specifically, this understanding is embodied in the independence principle, under which courts recognize that the obligations created in the letter of credit are independent of the obligations of the underlying contract. See, e.g., Intraworld Industries, Inc. v. Girard Trust Bank, 461 Pa. 343, 357, 336 A.2d 316, 323 (Pa. 1975) ("The primary purpose of a letter of credit is to provide assurance to the seller of goods . . . of prompt payment upon presentation of documents. A seller who would otherwise have only the solvency and good faith of his buyer as assurance of payment may, with a letter of credit, rely on the full responsibility of a bank. Promptness is assured by the engagement of the bank to honor drafts upon the presentation of documents. The great utility of letters of credit flows from the independence of the issuer-bank's engagement from the underlying contract between beneficiary and customer. Long-standing case law has established that, unless otherwise

agreed, the issuer deals only in documents. If the documents presented conform to the requirements of the credit, the issuer may and must honor demands for payment, regardless of whether the goods conform to the underlying contract between beneficiary and customer.”); Itek Corp. v. First Nat’l Bank of Boston, 730 F.2d 19 (1st Cir. 1984) (Breyer, J.) (“Parties to a contract may use a letter of credit in order to make certain that contractual disputes wend their way towards resolution with money in the beneficiary’s pocket rather than in the pocket of the contracting party. Thus, courts typically have asserted that such letters of credit are ‘independent’ of the underlying contract. . . . And they have recognized that examining the rights and wrongs of a contract dispute to determine whether a letter of credit should be paid risks depriving its beneficiary of the very advantage for which he bargained, namely that the dispute would be resolved while he is in possession of the money.” (citations omitted)); Roger J. Johns and Mark S. Blodgett, Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality As Exceptions to the Independence Principle of Letters of Credit and Bank Guarantees, 31 N. Ill. U. L. Rev. 297, 309 (2011) (“[T]he common concern among all stakeholders is that as the ease with which letters of credit . . . can be enjoined increases their commercial utility decreases.”).

Nevertheless, courts have carved out a very narrow exception to the independence principle. Aside from permitting the intermediary bank to refuse to honor forged documents presented in order to draw on the letter of credit, courts enjoin the payment of LCs for “fraud in the transaction” when “the beneficiary’s conduct has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer’s obligation would no longer be served.” Itek, 730 F.2d at 25 (internal quotation marks and citations omitted).

Put simply, the cases in which the “fraud in the transaction” exception has been applied are those in which the underlying transaction or the demand for payment is clearly a sham, and it is apparent that rigid adherence to the independence principle would facilitate what amounts to a scheme to defraud. In the case that established the fraud in the transaction exception, the beneficiary made an actual shipment so that the shipping documents were real, but substituted “rubbish” in place of salable bristles. Sztejn v. J. Henry Schroder Banking Corp., 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941). In another leading case, the beneficiary was not permitted to collect on the LC because the fall of the Iranian government so altered conditions that the contract for military equipment could not be completed, and thus there was no possibility that the original purpose of the transaction of which the LC was a part could be accomplished. In addition, no other legal recourse was available to the applicant, and the applicant had cancelled the underlying contract in compliance with its force majeure provisions, which called for cancellation of the LC upon cancellation of the underlying contract. Itek, supra.

Several other cases also illustrate the narrowness of the fraud in the transaction exception. See Intraworld Industries, Inc. v. Girard Trust Bank, 461 Pa. 343, 357, 336 A.2d 316, 361 (Pa. 1975) (“We conclude that, if the documents presented by [the beneficiary of the LC] are genuine in the sense of having some basis in fact, an injunction must be refused. . . . [N]either the trial court nor this Court may attempt to determine [the beneficiary’s] actual entitlement to payment under the lease.”); see also Roman Ceramics Corp. v. Peoples Nat. Bank, 714 F.2d 1207, 1209 (3d Cir. 1983) (permitting issuing bank to dishonor LC when it knew underlying invoice had been paid and that contrary certification was false); Dynamics Corp. of Am. v. Citizens & S. Nat. Bank, 356 F.Supp.

991, 999 (D.C. Ga. 1973) (describing court's role as limited to ensuring that the defendant could not "run off with plaintiff's money on a *pro forma* declaration which has absolutely no basis in fact"); Mid-America Tire, Inc. v. PTZ Trading Ltd., 95 Ohio 367, 392, 768 N.E.2d 619, 641 (Ohio 2002) (affirming injunction against honor of LC where defendants repeatedly lied to and misled plaintiffs about the tires available for sale in order to pressure them into making the LC available before they "could discover the truth").

The Uniform Commercial Code (UCC) incorporated this judicially developed doctrine into Article 5, the UCC formulation of the law governing letters of credit. Thus, South Carolina's adoption of the UCC incorporated into South Carolina law the same independence principle and narrow exception limiting the enjoinder of payment of LCs to instances of egregious fraud that operates to vitiate the entire transaction. In particular, UCC Article 5, S.C. Code §§ 36-5-101 through -119, governs letters of credit. S.C. Code Ann. § 36-5-109(b) (2003) sets forth the conditions under which a court may enjoin honor of a letter of credit as follows, in relevant part:

If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

...

(3) all of the conditions to entitle a person to the relief under the law of this State have been met; and

(4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud

For purposes of a preliminary injunction, subsection (3) effectively incorporates the requirements of the common law related to injunctions generally: that the movant show that irreparable harm will result and that no adequate remedy at law exists if the court refuses the injunction. Poynter Investments, supra.

Subsection (4) codifies not only the general common law requirement that the movant show a likelihood of success on the merits but also the special rule for letters of credit allowing only a narrow exception for fraud in the transaction, as discussed above. The Official Comment makes this codification explicit. [3]

In the present case, Hook Point argues that BB&T is not entitled to draw on the LC because the commitment letter described the LC as "to be used as last resort for interest carry." Hook Point also seeks to construe as fraudulent BB&T's demand on the LC. The LC, however, by its terms requires only that BB&T represent that "[t]he Borrower has failed to perform its obligations . . . under the Loan Agreement and Promissory Note" and that "[t]he amount of the draft does not exceed the amount due to the Beneficiary under the obligation." Thus, contrary to Hook Point's arguments, the plain language of the LC permitted BB&T to use it if Hook Point defaulted under any obligation of the loan agreement and note, including an acceleration clause. Furthermore, no term in the loan

agreement or note to which the LC refers limits BB&T's use of the LC to interest due. Thus, it is incontrovertible that BB&T had some basis in fact for the representations it made when it drew on the LC.

If there is any validity to Hook Point's argument that the commitment letter limited the utilization of the LC exclusively to interest, that is an ordinary contract dispute that raises no implication of fraud by BB&T sufficient to trigger the narrow fraud exception. Dynamics Corp., supra. In fact, \$500,000 had been reserved by BB&T from the original \$5.1 million loan for the purpose of drawing down interest carry. A more plausible explanation for the "last resort" language in the commitment letter is that it was intended merely as an accommodation to the principals that BB&T would not seek to draw on the LC for interest until the reserve had been exhausted. That language, whatever it meant, is a red herring in this case as the draw on the LC was sought not only to recoup interest but as a result of multiple defaults that caused BB&T to invoke the acceleration of the entire debt.

Indeed, Hook Point's admission that BB&T was entitled to any draw on the LC for past due interest was conclusive as to the issue whether honor of the LC should be enjoined, since BB&T's entitlement to past due interest is alone some basis in fact on which BB&T could demand payment under the LC. Moreover, the strict standard required under § 36-5-109 (b)(4) is that the alleged fraud vitiate the entire transaction, that is, it deprives Hook Point of any benefit from the transaction. In this case, there is no dispute that Hook Point received \$5.1 million from BB&T. These facts hardly parallel the receipt of "rubbish" instead of bargained-for salable bristles. See Sztejn v. J. Henry Schroder Banking Corp., supra.

Thus, there is no evidence Hook Point is more likely than not to succeed on a claim of material fraud so egregious as to vitiate the entire transaction as required under § 36-5-109(b)(4), and the circuit court failed to evaluate the evidence under the strict standard required for injunctions against the honor of LCs. Under the proper standard, it is clear that BB&T had a sufficient basis in fact upon which to demand payment under the LC. Thus, the circuit court's finding was based upon an error of law.

Because this issue is dispositive of the case, we need not address BB&T's remaining issues. Rule 220(b), SCACR; e.g., Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

CONCLUSION

The standard under which a fraud in the transaction claim must be measured when deciding whether to enjoin honor of a letter of credit requires that the beneficiary have no colorable claim or basis in fact for asserting its rights under the letter of credit. In this case BB&T has, in our view, not only a colorable claim but an undeniable basis in fact for asserting its rights under the letter of credit. Therefore, the circuit court erred when it granted the preliminary injunction. **REVERSED.**

TOAL, C.J., BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

[1] A person who applies for a letter of credit is the applicant (in this case, Hook Point).

The bank that issues the LC on behalf of the applicant is the issuer (First Reliance Bank). The entity that has the right to draw on the LC is the beneficiary (BB&T).

[2] Courts do not distinguish between types of LCs for purposes of analyzing whether a court should grant an injunction against honoring them. See New York Life Ins. Co. v. Hartford Nat'l Bank & Trust Co., 173 Conn. 492, 499-500, 378 A.2d 562, 566 (Conn. 1977).

[3] The Official Comment states:

Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section indorses articulations such as those stated in Intraworld Indus. v. Girard Trust Bank, 336 A.2d 316 (Pa. 1975), Roman Ceramics Corp. v. People's Nat. Bank, 714 F.2d 1207 (3d Cir. 1983), and similar decisions and embraces certain decisions under Section 5-114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in Ground Air Transfer v. Westate's Airlines, 899 F.2d 1269, 1272-73 (1st Cir. 1990):

We have said throughout that courts may not "normally" issue an injunction because of an important exception to the general "no injunction" rule. The exception, as we also explained in Itek, 730 F.2d at 24-25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "plainly" show that the underlying contract forbids the beneficiary to call a letter of credit, Itek, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "colorable" right to do so, id., at 25; where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," id.; see Dynamics Corp. of America, 356 F. Supp. at 999; where the beneficiary's conduct has "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served," Itek, 730 F.2d at 25 (quoting Roman Ceramics Corp. v. Peoples National Bank, 714 F.2d 1207, 1212 N.12, 1215 (3d Cir. 1983) (quoting Intraworld Indus., 336 A.2d at 324-25)); then a court may enjoin payment.

FIRST RELIANCE[®] BANK

April 19, 2012

BY HAND DELIVERY

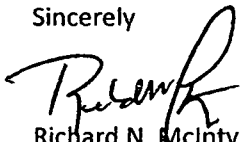
Mr. J. Allan Risinger
Senior Vice President, Area Executive
Branch Banking and Trust Company
309 Columbia Avenue
Lexington, SC 29072

Re: First Reliance Irrevocable Letter of Credit No. 97001231

Dear Allan:

The request for sight draft of the Irrevocable Letter of Credit is denied. While First Reliance understands the South Carolina Supreme Court ruling; First Reliance has met its obligations under the Letter of Credit until its expiration. It is our opinion that upon BB&T's request and acceptance of the monthly interest payments through partial draws after the Injunction was an amendment of that initial request and acknowledgment of the conditions of BB&T's commitment letter to the principals of Hook Point that the Letter of Credit was for Interest Reserve. All sight drafts submitted by BB&T for the monthly interest were paid within the terms and until it expired.

Sincerely



Richard N. McIntyre
Senior Vice President

cc: S. Jahue Moore
Hook Point, LLC.



THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2010-CP-32-05481

RECEIVED

APR 23 2012

S.C. Supreme Court

Hook Point, LLC.....Respondent,

v.

Branch Banking and Trust Company, First
Reliance Bank, and Allan Risinger.....Defendants,

Of whom Branch Banking and Trust
Company is.....Appellant.

CERTIFICATE OF SERVICE


This is to certify that I, Toni Hawkins, paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Motion for Clarification** in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in envelopes addressed as:

Thornwell F. Sowell, Esquire
David C. Dick, Esquire
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Post Office Box 11449
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P.O. Box 456
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S. Jahue Moore, Esquire
Moore, Taylor & Thomas, P.A.
Post Office Box 5709
West Columbia, SC 29171

Dated at Columbia, South Carolina, this 23rd day of April, 2012.


Toni C. Hawkins