MeesPierson NV v Bay Pacific (S) Pte Ltd and Others
[2000] SGHC 168

Case Number : Suit 1675/1999

Decision Date : 14 August 2000

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Muthu Arusu and Ang Wee Tiong (Allen & Gledhill) for the plaintiffs; L Devadason and Mahtani Bhagwandas (Mahtani & Co) for the defendants

Parties : MeesPierson NV — Bay Pacific (S) Pte Ltd

Banking – Letters of credit – Documents with defects – Whether presenter of documents presenting them with knowledge of defects

Banking – Letters of credit – Forged health certificate – Whether documents can be rejected if known at time of presentment to be forged

Civil Procedure – Costs – Defendant not involved in transaction at all, but having to defend action – Whether costs to be awarded on indemnity basis

Restitution – Mistake – Mistake of fact – Letters of credit – Forged document – Bank alleging payment made under mistake of fact – Presenter of documents innocent of fraud – Whether moneys bank can claim restitution of moneys paid

: The plaintiffs herein (`MP Bank`) are a bank incorporated in the Netherlands. MP Bank has a branch in Singapore. The first defendants are a trading company in Singapore. The second and third defendants are the two directors of the first defendants. The second defendant (`Mrs Rehman`) is the managing director of the first defendants.

On 28 November 1995, the Industrial & Commercial Bank of Vietnam (`Vietincombank`) issued an irrevocable letter of credit (`the Vietnam credit`) in favour of the first defendants for US$497,420 to cover the sale by the first defendants of 1,870 metric tons of Indian wheat flour to Bin Thuan Production Trade Import Export Co in Vietnam. The first defendants were advised of the Vietnam credit by Standard Chartered Bank in Singapore. The first defendants approached MP Bank, their regular banker, to add its confirmation to the Vietnam credit. MP Bank on 23 January 1996 informed the first defendants that at the request of Vietincombank and of the first defendants they had added their confirmation to the Vietnam credit.

The Vietnam credit was subject to the Uniform Customs and Practice for Documentary Credits (`UCP 500`) and contained, inter alia, the following terms:

> *: 41D / Available With ... By ... :Confirming Bank By Acceptance*
>
> *...*
>
> *: 42C / Drafts at ... :180 Days After B/L Date For100 Percents Of Invoice Value*
>
> *...*
>
> *: 44A / Load/Dispatch/In Charge:Any Port In India*

: 44B / For transportation to:Ho Chi Minh City Port, Vietnam

...

: 46A / Documents required:

...

02 3/3 Set of Clean on Board Ocean Bill of Lading Made Out to Order Vietincombank, Binhthuan Branch, Marked `Freight Prepaid` and Notify Applicant.

...

07 Certificate of Food Sanitation issued by Government Health Organisation must be presented for acceptance.

By amendments made to the letter of credit, the expiry date of the letter of credit was extended to 13 February 1996 and the latest shipment date was extended to 22 January 1996. An amendment on 23 December 1995 also provided:

79 / Narrative:

1 / The clause: available with confirming bank by acceptance. Now to read as: Available with confirming bank by negotiation.

...

4 / The clause: Certification of Food Sanitation issued by Government Health Organization must be presented for acceptance. Now amended to read as: Certificate of Health must be presented for negotiation.

Vietincombank notified the first defendants of all these amendments through MP Bank.

The first defendants sourced the goods stipulated under the credit from a supplier in Mumbai called Navcom Oil Products Ltd (`Navcom`). To pay Navcom, the first defendants requested MP Bank to issue an irrevocable letter of credit (`the Mumbai credit`) to Navcom on a back-to-back basis with the Vietnam credit. The Mumbai credit was advised to Navcom through the State Bank of India on 3 January 1996 and was available for negotiation with any bank. The documents required under the Mumbai credit (save for the bills of lading and the beneficaries draft), mirrored the requirements of the Vietnam credit.

Amongst the documents required for the negotiation of the Mumbai credit were a full set of original

clean on board bills of lading (to be made out to the order of MP Bank), photo-copies of health and various other certificates (the originals of which were required under the Vietnam credit) and a courier receipt evidencing the despatch by Navcom of the said originals to the first defendants. The bills of lading that were produced to negotiate the Mumbai credit were dated 22 January 1996, the last date allowed for the shipment under the Mumbai credit. The Health Certificate that was produced was addressed to Navcom. The negotiation bank was required, under the Mumbai credit, to despatch all documents received under the Mumbai credit to MP Bank in one lot by courier. No problems were encountered in the negotiation of the Mumbai credit.

On 12 February 1996, under cover of an application dated 22 January 1996 signed by Mrs Rehman, the first defendants applied to MP Bank to negotiate the Vietnam credit. Amongst the documents attached were switched bills of lading (to comply with the terms of the Vietnam credit under which the bills of lading were to be made out to the order of Vietincombank), the original of the Health Certificate addressed to Navcom referred to above, and a bill of exchange drawn by the first defendants upon Vietincombank for US$547,162 payable 180 days after the bill of lading date to the order of MP Bank.

On 14 February 1996, MP Bank notified the first defendants that the Health Certificate was discrepant in that it was addressed to Navcom. There was a note in MP Bank`s records that the Health Certificate was taken back on 15 February 1996 and returned the same day. The Health Certificate when re-submitted had the reference to Navcom blancoed out. MP Bank found the re-submitted Health Certificate satisfactory and accepted the documents. It then discounted the bill of exchange (without recourse) and the discounted proceeds of US$525,164.52 were credited into the first defendants` account with them. From those proceeds MP Bank debited a sum of US$422,889.14 in settlement of the amount due from the first defendants to MP Bank under the Mumbai credit and a further sum of US$87,941.27 in repayment of a freight loan that MP Bank had extended to the first defendants for the shipment. MP Bank couriered the relevant documents to Vietincombank and sought confirmation that it would be reimbursed on maturity of the draft.

The documents were received by Vietincombank on 17 February 1996. On 4 March 1996, the Bin Thuan branch of Vietincombank replied that as two items (not related to the Health Certificate or the date of the bill of lading) were discrepant they could not accept the documents. MP Bank disputed the claim of discrepancies and maintained that Vietincombank was, in any event, precluded from claiming the alleged discrepancies as they had failed to give notice of the rejection timeously under arts 13 and 14 of UCP 500. In the correspondence thereafter MP Bank in a letter dated 28 May 1996 pointed out that it (MP Bank) had added its confirmation to the credit at the request of Vietincombank. Vietincombank did not, at that stage, dispute this assertion; it was on 2 July 1996, some four months after having first refused the documents on the grounds of discrepancies, that Vietincombank took the position that the Vietnam credit was not available for negotiation/acceptance by MP Bank and that the only bank in Singapore authorised to deal with the credit was the Standard Chartered Bank.

The reason for Vietincombank`s reluctance to honour the Vietnam credit probably stemmed, inter alia, from the fact that the vessel on which the wheat flour was loaded never reached Ho Chi Minh City. MP Bank, in March 1997, sent two of its officers to Ho Chi Minh City to meet with officers of Vietincombank to discuss the matter. Mrs Rehman, at the invitation of MP Bank, attended the meeting. Representatives of the buyer and representatives of the insurers of the cargo were also at the meeting. Mrs Rehman told the court that at that meeting allegations were made by the Vietnamese buyer that the cargo had not been loaded on the ship at all. It was also alleged that the bills of lading had been antedated. Mrs Rehman said that this was the first time that she had heard these allegations. She did not, however, pay much heed to these allegations as no evidence was

produced to substantiate what was said.

As Vietincombank would not honour the credit, MP Bank commenced legal action in Singapore (Suit 2074/96) against Vietincombank. However, in August 1998, in the course of the hearing before Chao Hick Tin J (as he then was), MP Bank applied for and obtained leave to discontinue the action. No evidence was led before me to explain why the suit was discontinued. The absence of an explanation does not affect the merits of MP Bank`s claims against the defendants herein, but an explanation, if offered, could have gone some way towards meeting the defendants` submission that MP Bank, in not pursuing their claim against Vietincombank, were the authors of their own misfortune.

The claims of fraud/forgery

In the course of the proceedings against Vietincombank and as a result of their own investigations, MP Bank discovered that:

(a) the Health Certificate which purported to emanate from the Municipal Corporation of Greater Bombay was in fact not issued by that Corporation; and

(b) the bill of lading was dated 22 January 1996 when, in truth, the loading of the cargo commenced only on 4 February 1996 and was not completed till 11 February 1996.

It was MP Bank`s case in the present proceedings that the first defendants knew, at the time they presented the documents to MP Bank, that the two documents listed above contained material misrepresentations of fact. The claim against the second and third defendants was on the basis that they were joint tortfeasors with the first defendants in the alleged misrepresentation.

In the alternative, MP Bank claimed that it was an implied term of the contract between the first defendants and MP Bank that the documents would not, to the first defendants` knowledge, contain any material representations of fact which were false. Further, or in the alternative, MP Bank claimed that the sum of US$525,164.52 was paid by them and received by the first defendants under a mistake of fact, namely:

(a) that the cargo was shipped under the bill of lading on 22 January 1996; and

(b) that the Health Certificate was issued by the Municipal Corporation of Greater Bombay.

and in the premises the first defendants received and held the said sums to the use of MP Bank.

In their defence, the defendants had denied that the bill of lading had been antedated and that the Health Certificate was a forgery. In court, however, Mrs Rehman accepted these claims. When asked why, in the defence filed, the claims of fraud and forgery had been denied, Mrs Rehman explained that, at the stage the defence was filed, the defendants had no reason to believe that there was anything improper about the documentation but, having now had the benefit of sighting the `dock challans` and hearing the testimoneys of Captain Panicker (who had investigated the load date of the cargo), and Dr (Mrs) Alka Shyam Karande (from the Municipal Corporation of Greater Bombay), she accepted that the two documents were defective. Mrs Rehman told the court that at the relevant time she had no reason whatsoever to suspect that there was anything amiss in the documents that Navcom had utilised in negotiating the Mumbai credit and which the first defendants were in turn relying on to negotiate the Vietnam credit.

It was apparent, when Mrs Rehman was testifying, that she was not the person in the first defendants` office who had handled the documentation in respect of the Vietnam and Mumbai credits. On being questioned, she confirmed that there was a document officer employed by the first defendants whose sole responsibility was to attend to the documentation. The document officer, at that time, was one Edwin Tan. This was borne out by the fact that in the correspondence and notes of MP Bank the references were to Edwin Tan.

Edwin Tan (`Tan`) was not listed as a witness. Mrs Rehman told the court that Tan had left the employ of the first defendants some years back and that she had difficulty locating him. On being cross-examined, she told the court that she had, in the week before the hearing commenced, managed to locate Tan. She had not, however, asked him to come to court to testify. When asked why she had not asked Tan to testify, Mrs Rehman`s response was that it was pointless to call Tan as a witness because Tan had told her that as the transaction happened so long ago he could not remember anything.

Counsel for the defendants, Mr Devadason, appeared unaware that Mrs Rehman had managed to contact Tan. He made an oral application for a subpoena to be issued for Tan`s attendance. Counsel for MP Bank, Mr Muthu Arusu, objected on the grounds that the defendants had had ample opportunity to consider who their witnesses were going to be and that, in any event, it was Mrs Rehman`s own evidence that Tan could not remember anything. I felt that this was a proper case to allow the defendants to call the additional witness. Based on the fact that Tan could not remember details, Mrs Rehman had concluded, without consulting her solicitors, that it was pointless to call him. In a case of this nature where fraud of such a serious nature was being alleged, the very fact that the officer who handled the actual documentation could not remember the transaction could (if believed) be a relevant consideration in deciding whether the transaction was indeed a routine (non-fraudulent) one as claimed by the defendants. I therefore allowed the application.

As it turned out, the effect of Tan`s evidence was to support much of what Mrs Rehman had said. He confirmed that he was, at that time, the only person in the first defendants` employ who dealt with the banks on the documentation involved in the documentary credits. He said that as document officer he handled such a large volume of routine shipping documents that he had no recollection of the details of any particular transaction. When shown the documents in this case, Tan said that he was the one responsible for the documentation. Tan was emphatic that he would not knowingly be party to anyone antedating documents or anyone, other than the issuer of a document, modifying a document. Although he had no recollection of the matter, he told the court that if MP Bank had, on 14 February 1996, told him that they wanted the addressee in the Health Certificate deleted, he would have communicated that request to the supplier and it was possible that a certificate with the addressee deleted had been sent to him by the supplier in time for him to have submitted it to MP Bank on 15 February 1996.

Under cross-examination, Tan agreed that it was not his role to procure switched bills of lading. That, he said, would be done by the traders employed by the first defendants or by Pegasus High Seas Pte Ltd, a firm of shipping agents (in which Mrs Rehman had an equity interest) operating from the same premises as the first defendants. Tan agreed that to obtain switched bills of lading either the original bills of lading would have to be surrendered to the shipping agent or an indemnity would have to be given but he could not now remember how the switched bills of lading in this case were obtained. It is relevant to note that although it was the evidence of Tan that he was the only person in the first defendant company who handled documentation and liaised with MP Bank at the relevant time, it was not suggested to Tan that he knew or ought to have known about the defects in the two documents. Neither was it suggested to him that any of the documentation in this case was handled by the second or third defendants. Given the extent of Tan`s involvement in the negotiation of the Vietnam

credit, it would be difficult for the defendants to perpetrate a deliberate deception of MP Bank without Tan`s complicity. Having seen and heard Tan in the witness box, I formed the view that he was not the sort of person who would aid any such deception.

The evidence adduced before me to show that the bills of lading were antedated and that the Health Certificate was a forgery was abundant. Even Mrs Rehman was satisfied with that evidence. That, however, is not a critical issue of fact in this case. The critical issue is whether the defendants knew about the defects in the two documents at the time the documents were submitted to MP Bank. Mrs Rehman was emphatic that she did not know and that had she known she would not have made use of the defective documents to negotiate the Vietnam credit. MP Bank could adduce no direct evidence to implicate the defendants with knowledge of the fraud and forgery. What MP Bank relied on was circumstantial evidence.

Whilst a court can and often does infer, from the surrounding circumstances, that the party presenting the documents did so with knowledge that the documents were fraudulent or forged, a court will do so only when such inference is obvious and compelling. The circumstances highlighted by MP Bank, such as -

(a) the difficulty in obtaining from India the Health Certificate with the name of the addressee deleted in so short a time;

(b) the fact that it would be highly unlikely that, if indeed another copy of the Health Certificate had been couriered down from Mumbai, it would (merely) have the deletions blancoed out;

(c) the likelihood that, although Tan was in charge of the documentation, he would have referred this particular transaction to Mrs Rehman given the fact that MP Bank had rejected documents at a stage when the Vietnam credit had expired;

(d) the fact that Navcom had supplied the goods on an FAS basis and hence was not, in law, obliged to arrange for the shipment;

(e) the fact that the invoice for the freight charges was submitted by Pegasus High Seas Ltd suggesting that the vessel had been fixed by Pegasus and not Navcom and, if that was so, the first defendants would have known of the actual date of loading since there would have been direct liaison with the carriers/shipping agents; and

(f) the lack of an explanation as to how the switched bill of lading was obtained.

were not, in my view, sufficiently compelling for me to come to the conclusion that the defendants were or should have been put on notice that there was a fraud involved.

More importantly, I found Mrs Rehman to be a credible witness. I find that, in the circumstances of this case, although this was an FAS transaction, the shipping arrangements and the relevant documentation were all undertaken by Navcom as suppliers of the goods and not as agents of the first defendants. I accept the evidence of MP Bank that when the documents were presented to MP Bank they were presented by the first defendants in the bona fide belief that they were in order. I am satisfied that Mrs Rehman, at the material time, did not know or even suspect that there were any defects in the two documents. She and the first defendants were, to that extent, as much misled by the documents as MP Bank was.

Inasmuch as it was important for the first defendants to obtain a bill of lading showing that the goods

had been loaded on or before 22 January 1996 for the purpose of negotiating the Vietnam credit, it was equally important for Navcom to have procured such a bill of lading in order to negotiate the Mumbai credit. Mr Arusu acknowledged this fact and presented his case on the basis that as both Navcom and the first defendants had every intention of shipping the goods to the Vietnamese buyer, they would not have considered the antedating of the bills of lading as being dishonest. I cannot accept this submission. It does not follow that because the antedating of the bills of lading by a party such as Navcom also benefited the first defendants, the first defendants must be party to that antedating or know of the antedating.

As the first defendants did not know that there were any defects in the two documents at the time they negotiated the letter of credit, the first defendants could not have committed the tort of misrepresentation alleged against them. MP Bank`s claim against the first defendants under this head must therefore fail. The only basis of the claim against Mrs Rehman was that since, as the managing director of the first defendants, she was intimately involved in the transaction, she must have directed or procured the first defendants to commit the tort. As the first defendants committed no such tort, the question of the second defendant being liable as a joint tortfeasor simply does not arise. The claim that it was an implied term of the contract between MP Bank and the first defendants that the documents would not, to the first defendants` knowledge, contain any material misrepresentation of fact, would, by the same token, also fail.

Insofar as the third defendant was concerned, there was no evidence at all before me of his having been in any way involved in this transaction. The third defendant was the husband of Mrs Rehman. He had his own business interests to look after. Although he was a director of the first defendants, he was not involved in its day-to-day business. According to Mrs Rehman, he hardly ever stepped into the office of the first defendants. MP Bank decided, just before the third defendant gave evidence to apply for leave to withdraw their claim against the third defendant. I granted the leave but in view of the fact that MP Bank had been somewhat over-zealous in making these very serious allegations of fraud and forgery against the third defendant, I ordered that MP Bank pay costs to the third defendant on an indemnity basis. It now remains for me to consider MP Bank`s claim for restitution on the basis of moneys paid to the first defendant under a mistake of fact.

Recovery on grounds of mistake of fact

At the time it discounted the draft, MP Bank was under the impression:

(a) that the goods had in fact been loaded on board the PT Samudra Samrat on 22 January 1996 as stated on the bill of lading; and

(b) that the Health Certificate tendered was a genuine certificate emanating from the Municipal Corporation of Greater Bombay.

Mr Arusu relied only on the fact that the Health Certificate turned out to be a forgery to support MP Bank`s claim based on mistake of fact. Mr Arusu submitted that had MP Bank known, at the time the documents were presented, that the Health Certificate was a forgery, MP Bank would have been entitled to refuse and would have refused payment regardless of whether the first defendants were or were not privy to the forgery. On that premise, Mr Arusu submitted that MP Bank was entitled to succeed in its claim for restitution as the moneys had been paid out to the first defendants under a mistake of fact. I will first consider that premise in the light of my finding that the defendants were unaware of the forgery and did not in any way assist in the fraud.

In **United City Merchants (Investments) Ltd & Anor v Royal Bank of Canada & Ors** [1983] 1 AC 168, the goods involved were loaded on board the ship a day later than the last date specified in the letter of credit but, unknown to the sellers, the loading brokers fraudulently entered the earlier date as the date of shipment on the bill of lading. The confirming bank, aware of this antedating, rejected the documents. The seller sued the bank. The bank argued that if the documents presented, although conforming on their face with the terms of the credit, nevertheless contained some statement of material fact that was not accurate - a submission which Lord Diplock termed the ` ***broad proposition*** ` - the bank was not under any obligation to pay under the credit regardless of whether the sellers were party to the fraud or not. The trial judge, Mocatta J, rejected this broad proposition. Relying on the principle ***ex turpi causa non oritur actio*** , Mocatta J held that only when there was personal fraud or unscrupulous conduct by the seller would a bank be entitled to refuse payment against apparently conforming documents. As the seller did not know of the antedating when he presented the documents, Mocatta J held that the bank was under an obligation to pay. The bank appealed.

The Court of Appeal took a different approach. The Court of Appeal saw no reason why, if a document forged by a person other than the beneficiary would entitle the bank to refuse payment, a document falsified by a person other than the beneficiary, should not have the same consequence. The effect of the Court of Appeal`s decision was to entitle banks to reject documents not only where the beneficiary was a party to the fraud but also where the document was false to the knowledge of any person issuing the document and intended by that person to deceive persons into whose hands the document might come.

The House of Lords, in an unanimous opinion delivered by Lord Diplock, overruled the Court of Appeal and upheld the decision of Mocatta J. Lord Diplock summarised the general principles applicable to the contract between the confirming bank and the seller as follows:

> *Again, it is trite law that ... the seller and the confirming bank, `deal in documents and not in goods,` as article 8 of the Uniform Customs puts it. If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents ... committed a breach of his contract with the buyer ... that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price.*

He then went on to say that to this general statement of principle there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Lord Diplock considered the exception for fraud on the part of the seller seeking to avail himself of the credit as a clear application of the ***maxim ex turpi causa non oritur actio*** and that since the seller was unaware of the inaccuracy of the date on the bill of lading that case did not fall within the fraud exception. In rejecting the `broad proposition`, Lord Diplock said:

> *My Lords, the more closely this bold proposition is subjected to legal analysis, the more implausible it becomes; to assent to it would, in my view, undermine the whole system of financing international trade by means of documentary credits.*

In this passage, Lord Diplock was implicitly emphasising that there has to be some culpability on the part of the seller before the confirming bank becomes entitled to reject a document that contains a statement of material fact that is inaccurate but which, on its face, conforms to the credit.

Up to this point the decision of the House of Lords appears to be in favour of the defendants in the instant case. The first defendants were, at the time they presented the documents, unaware that the Health Certificate was a forgery (or that the bills of lading were antedated). They therefore did not fall within what Lord Diplock called `the one established exception` to the principle that the bank deals only in documents. But the document that the court was considering in the ***United City Merchants*** case - an antedated bill of lading - was not a forged document. The premise on which the Court of Appeal had reached its decision was that a confirming bank could refuse to pay against a document that it knew to be forged even if the seller was innocent of the forgery. As the bill of lading that the House of Lords was considering was not a forged document it was not necessary for the House of Lords to express a definitive view on that premise and the House of Lords chose not to do so. The fact that the House of Lords had left the issue relating to a document that was a nullity open is, no doubt, the reason why Mr Arusu, in his submissions under this head of claim, relied, not on the antedated bill of lading which, although antedated, was not a forgery, but on the forged Health Certificate.

Mr Arusu`s position was that no rights can flow and no entitlements can arise out of forged and null documents. On that basis he urged the court not to apply the limited fraud exception enunciated in United City Merchants to a situation where forged documents were involved. In support of his submission, Mr Arusu relied on the case of **Lambias (Importers & Exporters) Co Pte Ltd v Hongkong & Shanghai Banking Corporation** [1993] 2 SLR 751 . Mr Arusu submitted that Goh Phai Cheng JC in ***Lambias*** had decided that a forged document is a document that was a nullity ab initio and that the bank was entitled to reject it even if the seller was not a party to the forgery.

In that case, the plaintiff, (`Lambias`), had entered into an agreement with a Hong Kong company for the sale of 50,000 copies each of two school textbooks. The price quoted by Lambias for the books was S$190,000 but the Hong Kong company opened a letter of credit in favour of Lambias for the sum of S$2.1m on the understanding that Lambias, after negotiating the credit, was to keep S$500,000 for itself and remit the balance to a specified account in Hong Kong for use by the Hong Kong company to pay commissions to the ultimate purchasers of the books who were in China. The credit, opened by the Kowloon Branch of the Hongkong & Shanghai Banking Corporation (`HSBC`) stipulated, inter alia, that for negotiation Lambias needed to produce a Quality and Weight Inspection Certificate (`QWI`) issued and signed by the applicants for the credit certifying that the applicants had inspected the merchandise and found it satisfactory. QWI was also to be countersigned by one Yau Tin Sang (`Yau`) in the presence of an executive of the Singapore Branch of HSBC.

One day prior to the day that documents required for the negotiation of the credit were submitted for negotiation, one Simon Ng of Lambias brought a person whom he introduced as `Yau` to the Singapore Branch of HSBC and, after showing a bank officer the letter of credit and QWI, requested the officer to witness Yau`s signature. The bank officer asked Yau for proof of his identity and, after inspecting the Certificate of Identity produced by Yau, witnessed the signature of Yau on QWI. After Yau and Simon Ng left, when the officer looked through the bank`s file on the transaction, he saw that the photograph on a copy of the Certificate of Identity of Yau that was in the file was not that of the `Yau` whose signature on QWI he had just witnessed. Alarmed, the officer immediately informed the police and the bankers of Lambias (Overseas Union Bank) of what he had noted. The police told him to lodge a report as soon as QWI was presented to the Bank. The next day Overseas

Union Bank forwarded the documents required for the negotiation of the credit to HSBC. Upon receipt of the documents the officer, in compliance with the request of the police, lodged a police report. The next day when Simon Ng was at the bank to discuss certain discrepancies in the documents, Simon Ng was arrested.

HSBC refused to honour the credit. Lambias sued them. In its defence, HSBC relied not only on the fact that the wrong `Yau` had signed QWI but also that in other respects too QWI did not conform with the requirements of the credit. Lambias did not dispute that an imposter had signed QWI but it was submitted, on behalf of Lambias, that as HSBC had verified the signature, the fact that the wrong `Yau` had signed it was not a material factor. Lambias took the position that they too had been misled into believing that the person Simon Ng took to the bank was the real Yau.

Amongst the issues for the determination of the learned judicial commissioner in respect of QWI were:

(a) Did QWI, on its face, comply with the requirements of the credit?

(b) As the signature of Yau on QWI was a forgery, did the case fall within the fraud exception thereby enabling HSBC to refuse payment under the credit?

In dealing with issue (a), the learned judicial commissioner found that QWI did not comply with the credit on a number of matters amongst which was the fact that QWI was issued and signed by Lambias and not by the applicants of the credit. He therefore held that QWI was a discrepant document and went on to say that even if the requirement for countersigning by Yau was met that would not have remedied the discrepancies. I would note that this finding alone was sufficient to give judgment for HSBC.

In relation to issue (b), Lambias, relying on the decision of the House of Lords in ***United City Merchants*** had argued that, as they were themselves misled by Yau, HSBC could not invoke the fraud exception. The learned judicial commissioner noted that the House of Lords had left open the question of the rights of an innocent seller where the document had been forged by a third party. He also noted that the document involved in the ***United City Merchants*** case was not a document that was a nullity and said that for these reasons the decision in ***United City Merchants*** was not relevant to the issues before him. The learned judicial commissioner then went on to say:

> *In the present case, the QWI certificate cannot be said to be anything but a nullity. First, it was issued by the beneficiary instead of the applicant as required by the letter of credit. Secondly, it failed to state the necessary particulars to relate it to the goods which were the subject of the letter of credit. Thirdly, it failed to contain the necessary statement as to the quality or weight of the goods ostensibly inspected, and most important of all, it had been counter-signed by an imposter and not by Yau Tin Sang.* ***All these elements taken together make the QWI certificate a nullity ab initio. There is no question of the certificate having been accepted by any party as a valid document****. [Emphasis added.]*

It is the above passage, in particular the last two sentences, that Mr Arusu relies on in support of his submission.

Although those sentences in that paragraph, by themselves, support Mr Arusu`s submission, it was the totality of the four elements he listed in the said paragraph that led the learned judicial commissioner to the conclusion that QWI could not be accepted as a valid document for the

negotiation of the credit. The learned judicial commissioner was obviously troubled by the conduct of Lambias. At p 764H of the judgment he says:

> *To state the proposition in its proper terms, I think this case determines that where the fraud or forgery perpetrated is such as to render a document required under a letter of credit a nullity,* ***and where the seller/beneficiary, while neither a direct nor deliberate perpetrator of the fraud or forgery, was nonetheless in some way clearly responsible for the turn of events that led to the perpetration of the fraud or forgery****, and where no money has been paid out under the credit, there is no obligation on the part of the issuing bank or its agent to make any payment under the credit.*

and again at p 765H:

> *... I think that a decision in the plaintiffs` favour in this case would similarly undermine another fundamental principle in documentary credits, namely, where the financing of international trade and commerce is to be carried out by means of documentary credits, then* ***there must be care and circumspection taken in the tender of documents by a beneficiary. The law cannot condone actions which, although not amounting to fraud per se, are of such recklessness and haste that the documents produced as a result are clearly not in conformity with the requirements of the credit****. The plaintiffs in the present case are not guilty of fraud, but they were unknowingly responsible for having aided in the perpetration of the fraud. In such a case where the fraud was discovered even before all other documents were tendered, I think it is right and proper that the plaintiffs should not be permitted to claim under the letter of credit. [Emphasis added.]*

I would further note that Lambias had even collaborated with the Hong Kong buyer in grossly inflating the value of the goods. This would mean that the goods, which are part of the security on which the letter of credit was issued, were worth only a fraction of the amount stipulated in the credit. This too must have troubled the learned judicial commissioner.

Reading the judgment as a whole, I do not think that it can be said that the learned judicial commissioner decided the case on the broad proposition canvassed by Mr Arusu. It seems to me that the basis of the decision in ***Lambias*** was narrower than that: although he had reservations about the conduct of Lambias, the learned judicial commissioner appears to have rejected Lambias` claim mainly because of discrepancies.

The underlying principle in commercial credits is that the bank deals in documents not goods. The commercial purpose for this principle is to give the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment. This proposition is authoritatively stated by Lord Diplock in ***United City Merchants*** at p 184E:

> *It has, so far as I know, never been disputed that as between confirming bank and issuing bank and as between issuing bank and the buyer the contractual duty of each bank under a confirmed irrevocable credit is to examine with reasonable care all documents presented in order to ascertain that they appear* ***on their face*** *to be in accordance with the terms and conditions of the credit, and, if they do so appear, to pay to the seller/beneficiary by whom the*

> *documents have been presented the sum stipulated by the credit, or to accept or negotiate without recourse to drawer drafts drawn by the seller/beneficiary if the credit so provides. It is so stated in the latest edition of the Uniform Customs. It is equally clear law, and is so provided by article 9 of the Uniform Customs, [art 17 in UCP 500] that confirming banks and issuing banks assume no liability or responsibility to one another or to the buyer ` **for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents**. ` This is well illustrated by the Privy Council case of **Gian Singh & Co Ltd v Banque de l`Indochine** [1974] 1 WLR 1234, where the customer was held liable to reimburse the issuing bank for honouring a documentary credit upon presentation of an apparently conforming document which was an ingenious forgery, **a fact that the bank had not been negligent in failing to detect upon examination of the document**. [Emphasis added.]*

A document that is false and even a document that is forged falls within this scheme of things. So long as the document tendered, on its face, complies with the requirements of the credit, the confirming bank is entitled to make payment under the credit and obtain reimbursement from the issuing bank which in turn is entitled to obtain reimbursement from the applicant for the credit. But does a confirming bank, where it knows that a document tendered by the seller (albeit innocently) is forged, have the option of rejecting the document?

Lord Diplock, in ***United City Merchants*** envisaged that such an option may well exist. At p 186C of the report he said:

> ***The legal justification for the existence of such an independently exercisable option, it is suggested, lies in the bank`s own interest in the goods to which the documents relate, as security for the advance made by the bank to the buyer, when it pays the seller under the documentary credit**. But if this were so, the answer to the question: `to what must the misstatement in the documents be material?` should be: `material to the price which the goods to which the documents relate would fetch on sale if, failing reimbursement by the buyer, the bank should be driven to realise its security. [Emphasis added.]*

Lord Diplock, however, did not pursue this enquiry as the antedating of the bill of lading in ***United City Merchants*** did not affect its validity. His suggestion, however, was in tune with views expressed by the Court of Appeal on this issue.

When a confirming bank makes a payment out under a commercial credit, the bank holds the documents as security for the payment. However, if the bills of lading are forged and therefore a nullity, the bank would not have any security. To require the bank to make payment when the bank knows that the bills of lading are a nullity is to require the bank to knowingly forgo its security. That would be tantamount to requiring the bank to honour the credit on terms less favourable to the bank than that envisaged under the credit arrangement. This difficulty featured strongly in the judgments of the Court of Appeal in the ***United City Merchants*** case (see in [1982] 1 QB 208). At the Court of Appeal, Ackner LJ addressing this point said at p 246G:

> *If the **signature on the bill of lading had been forged**, a fact of which the sellers were ex hypothesi ignorant, but of which the bank was aware when the document was presented, I can see no valid basis upon which the bank would be entitled to take up the drafts and debit their customer. Mr Hirst was virtually obliged to accept this. A banker cannot be compelled to honour a credit unless*

> *all the conditions precedent have been performed, and he ought not to be under an obligation to accept or pay against documents which he knows to be waste paper.* ***To hold otherwise would be to deprive the banker of that security for his advances, which is a cardinal feature of the process of financing carried out by means of the credit****. [Emphasis added.]*

and Griffiths LJ said at p 254B:

> *What is the position if the bank is presented with documents that appear on their face to be in order but which the bank knows to be forgeries?* ***The bank takes the documents as its security for payment****. It is not obliged to take worthless documents. If the bank knows that the documents are forgeries it must refuse to accept them:* ***Edward Owen Engineering Ltd v Barclays Bank International Ltd*** *(Unreported) , October 3, 1972. It may be that the party presenting the documents has himself been duped by the forger and believes the documents to be genuine but that surely cannot affect the bank`s right to refuse to accept the forgeries.* ***The identity of the forger is immaterial. It is the fact that the documents are worthless that matters to the bank****. [Emphasis added.]*

These pronouncements by the Court of Appeal on the need to preserve the bank`s security interest in the documents were not overruled by the House of Lords. As noted earlier Lord Diplock recognised that the bank may well be entitled to reject a forged document if its security interests are adversely affected.

The above approach may be a way of resolving the matter where the document that is forged is a document, such as a bill of lading, which affects the bank`s security interest; but, as in the ***United City Merchants*** case, the document in this case was not a forged bill of lading. The document in this case was a forged Health Certificate. Such a certificate is not a document of title and it cannot be so readily concluded that a forged Health Certificate would affect the bank`s security interest.

Would the bank have had to honour the credit if the bank knew, at the time it received the Health Certificate, that the Health Certificate was forged? On the premise adopted by the Court of Appeal (which the House of Lords did not reject), as the Health Certificate was a forgery and therefore a nullity, the bank (if it knew of the forgery), would have been under no obligation to accept the document. I see merit in that approach. Quite apart from questions relating to the security interests of the bank, if the document tendered by the seller is a nullity, that document would have no legal effect. There would therefore be a failure by the seller to tender a document (in this case the Health Certificate) called for under the credit. That being so, the tender would be an incomplete tender. Viewed this way, the question of whether the forged document was an apparently conforming document would simply not arise. Had MP Bank known of the forgery at that time it could have refused payment on the grounds that the documents tendered by the first defendants, were not complete.

That, however, is a situation that did not arise in this case. MP Bank, at that time, did not know about the forgery and the factual position was that MP Bank accepted the documents and paid the first defendants. Having accepted the documents and having made payment under the credit, is MP Bank now entitled to restitution on the grounds that the payment was made under a mistake of fact?

Restitution

The underlying rationale for payments by letters of credit is to provide a certain and secure means of payment to a seller of goods. In the absence of any fraud on the part of the seller, to allow a bank to recover moneys already paid on the grounds of a mistake of fact would subvert this rationale. As the letter of credit in this case is governed by UCP 500, it would be relevant to see what assistance UCP 500 can give.

Under art 14(d) of UCP 500, it is incumbent on the confirming bank to give to the seller notice of rejection of documents by the close of the seventh banking day following the date of receipt of the documents. No such notice was given in this case. And art 14(e) provides:

> *If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any,* ***shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the credit****. [Emphasis added.]*

In view of art 14(e), the contractual position under UCP 500 appears to be that if a confirming bank has not given notice of rejection within the stipulated period, the bank is precluded from claiming that the documents are not in compliance with the credit. I find support for that view in para 5.73 of ***Raymond Jack on Documentary Credits*** . In that paragraph Raymond Jack states:

> *Where the Uniform Customs apply, Article 14.e will bar any claim that the documents do not comply with the credit by an issuing bank which has not given notice of rejection of the documents and otherwise followed the requirements of the Article. Such a bank would be unable therefore to put forward a claim based on mistake of fact. The Article now places a confirming bank under the same duty in its handling of the documents and it will also be barred by the Article.* `

As MP Bank had accepted and made payment to the first defendants, it is not now open to them, in the absence of any fraudulent conduct by the first defendants, to claim restitution.

Mr Arusu, in further submissions, advanced the argument that Article 14 of the UCP 500 relates only to the situation where there are irregularities on the face of the documents and the bank chooses to waive and/or fails to take objections. In his view, this applies equally to the paragraph of Raymond Jack`s book referred to above. Mr Arusu then goes on to make the submission that in fact a bank is ***always*** entitled to recover moneys paid under a mistake of fact and relied on the judgment of Goh Joon Seng J in **Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd & Ors** [1995] 3 SLR 863 .

In that case, the plaintiff bank`s Jakarta branch had issued a letter of credit in the amount of US$2.2m in favour of Sin Chong Hin Electric & Trading Pte Ltd, the first defendants, which related to the sale of 24 complete sets of Daihatsu diesel generators by the first defendants to a company in Indonesia. The managing director of the first defendants, who was the third defendant in the suit, subsequently arranged for the requisite documents under the letter of credit, which included a bill of lading, to be tendered to the plaintiff bank, which then negotiated a draft for the sum of $2.2m less commission. This money was initially paid into a bank account of the first defendants but was subsequently disbursed in the bank accounts of various other persons, including the second, third and

4th defendants. Upon arrival of the vessel containing the goods in Jakarta, it was discovered that the relevant containers held not diesel generators but fire bricks. A report was made to the Criminal Investigation Department of the Singapore Police Force and the plaintiff bank subsequently commenced the proceedings in question against the first defendants for money had and received on grounds of fraudulent misrepresentation and also for a declaration that the payments to the second, third and fourth defendants ought to be rescinded and set aside on the basis that these payments represented moneys belonging to the plaintiff bank.

After hearing all the evidence, the learned judge found that the whole transaction was a scheme to defraud the plaintiff bank and/or the Indonesian buyers. He then referred to the passage of Lord Diplock from the ***United City Merchants*** case set out in [para] 28 above and acknowledged the `one established exception` to the rule that banks must pay upon apparently conforming documents: ie `fraud` exception. The learned judge then referred to the following passage of Browne J from the case of **Bank Russo-Iran v Gordon, Woodroffe & Co Ltd** [1972] 116 SJ 921; ***The Times*** 4 October 1972:

> *In my judgment, if the documents are presented by the beneficiary himself, and are forged or fraudulent, the bank is entitled to refuse payment if it finds out before payment, and is entitled to recover the money as paid under a mistake of fact if it finds out after payment.*

The learned judge then went on to say:

> *Thus if the bank knows of the fraud it is entitled to refuse making payment. If it discovered the fraud after payment it may recover the money as paid under a mistake of fact.*

On the basis of the above, MP Bank (in the present case) argued that they are entitled to recover the moneys (wrongly) paid under forged documents even where the party presenting the document is innocent of the fraud. I do not believe ***Standard Chartered Bank*** `s case (or ***Bank Russo-Iran*** `s case) supports that proposition. ***Standard Chartered Bank*** `s case was clearly a case where the party who presented the documents to the bank and from whom restitution was sought was himself a fraudulent party. No doubt the plaintiff bank in that case could have brought a straightforward claim for fraud, but by so doing it would not have been able to avail itself to equity`s generous tracing rules. In the event, the learned judge held that the plaintiff bank was entitled to trace the defrauded moneys into the accounts of the second, third and fourth defendants and granted the declaration sought. That case is therefore simply authority for the proposition that where the `fraud` exception applies, it may be open to a defrauded plaintiff to recover the moneys as moneys wrongly paid out under a mistake of fact and by so doing trace the moneys into different hands.

The UCP 500 does not expressly deal with the situation where forged documents are presented under a letter of credit. However, having regard to the commercial background against which letters of credit are issued and the overall scheme of the UCP 500, I am unable to accept the proposition canvassed by MP Bank in this case that a bank is entitled to recover moneys wrongly paid out where the presenter of the documents presented such forged documents innocently. In such cases, the paying bank has other remedies available to it. If the bank is the issuing bank, it may recover the moneys from the person who gave the instructions to issue the credit. If the bank is a `nominated bank` under the UCP 500, it is entitled under art 14.a to reimbursement from the party giving it authority to pay. This is provided, of course, that the paying bank has exercised reasonable care in

examining the documents presented to it before paying out on them (art 13.a). Where a paying bank fails to exercise such care, it may be unable to claim reimbursement for moneys paid out on the forged documents, but in those cases the bank has only itself to blame. Obviously, the paying bank may also seek to recover the moneys from the perpetrator of the fraud, if he can be identified and located. Since the issue does not arise before me, I express no view on the situation where the letter of credit is not governed by the UCP 500.

For the above reasons, I dismiss with costs the claim by MP Bank. As there were complex issues in this case relating to shipping and banking law, I certify, under O 59(12), that costs be taxed on the basis of two solicitors.

Outcome:

Plaintiffs` claim dismissed.