Standard Chartered Bank v Korea Exchange Bank
[2005] SGHC 71

Case Number : Suit 162/2004, SIC 6874/2004

Decision Date : 14 April 2005

Tribunal/Court : High Court

Coram : Andrew Ang JC

Counsel Name(s) : Toh Kian Sing and Ian Teo (Rajah and Tann) for the respondent / plaintiff; Chew Kei-Jin (Tan Rajah and Cheah) for the applicant / defendant

Parties : Standard Chartered Bank — Korea Exchange Bank

Contract – Contractual terms – Rules of construction – Respondent obtained summary judgment against applicant for wrongful rejection of documents presented to them for payment – Applicant appealed against summary judgment – Issue of construction of letters of credit and relevant documents – When extrinsic evidence may be adduced to determine meaning and interpretation of a document or provisions within a document – When evidence of custom in a trade may be adduced to assist in construction of a contract – Whether words used in documents had particular meaning distinct from their ordinary meaning – Whether there was reliance on a particular custom

Evidence – Witnesses – Competency – Applicant sought to adduce affidavits of two expert witnesses – Singapore law as governing law – Witnesses not qualified in Singapore law – Whether witnesses qualified to give evidence which were submissions in disguise

Statutory Interpretation – Construction of statute – Construction of Arts 13 and 14 of the Uniform Customs and Practice for Documentary Credits 1993 (International Chamber of Commerce Publication No 500) – Singapore law as governing law – When decisions of foreign courts may be relevant

14 April 2005

Andrew Ang JC:

1 In Summons in Chambers No 3997 of 2004, Standard Chartered Bank (the respondent/plaintiff) obtained summary judgment against Korea Exchange Bank (the applicant/defendant) for wrongful rejection of documents presented to them for payment as the issuing bank of two letters of credit ("LCs"). The applicant appealed against the summary judgment.

2 In an endeavour to enhance its chances of success in setting aside the summary judgment at the appeal, the applicant sought leave of this court to introduce two affidavits, one from an American law professor and the other from a retired legal counsel, both of whom the applicant held out to be experts.

3 The application was opposed by the respondent who maintained:

(a) that neither of them could claim to have been a banker and in any case neither of them professed to give evidence on international standard banking practice;

(b) that the evidence of both of them on conformity of the documents presented under the LCs concerned a question of construction of the LC terms, the documents presented and certain articles of the Uniform Customs and Practice for Documentary Credits 1993 (International Chamber of Commerce Publication No 500) ("UCP 500") as to which the evidence of the witnesses is of no value.

4 It was not disputed that a judge in chambers hearing an appeal against a registrar's decision granting summary judgment is not bound by the conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489. It was held by the Court of Appeal in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233 at [38]:

> A judge-in-chambers who hears an appeal from the registrar is entitled to treat the matter as though it came before him for the first time. The judge-in-chambers in effect exercises confirmatory jurisdiction. The judge's discretion is in no way fettered by the decision below, and he is free to allow the admission of fresh evidence in the absence of contrary reasons.

The question therefore was whether there were contrary reasons. The answer to that question involved first going into the factual background of the case and the steps taken by the applicant in the conduct of its defence.

The factual background

5 The applicant is the issuing bank of two LCs. The LCs called for copies of the seller's commercial invoice, copies of the Independent Inspector's Quantity Report at Loadport, copies of the seller's Authorisation for Release of Product to Petaco ("Seller's Authorisation for Release") and photocopies of the relevant bills of lading (collectively "the LC Documents").

6 The LCs are expressly subject to UCP 500. The respondent, as negotiating and confirming bank, negotiated and gave value for the LC Documents presented by the beneficiary under each of the LCs. The respondent negotiated the LCs for sums of US$1,021,641.66 and US$939,789.01. On 16 December 2003, the respondent presented the LC Documents to the applicant.

7 However, the applicant sent two refusal notices in respect of the LCs to the respondent on 26 December 2003. For both LCs, the respondent refused the LC Documents on the following grounds:

(a) The amount was overdrawn. (The applicant's position was that the amounts claimed by the respondent were both more than the specified US$800,000 +/− 10% tolerance for each LC. The respondent on the other hand contended that the US$800,000 +/− 10% tolerance limit was overridden by an express provision in the LCs that the amount payable under the LCs could fluctuate without further amendment to the LCs. This provision was accounted for by the fact that the price of gas oil sold under the LCs was pegged to a fluctuating price index. What was in issue was a question of construction, *viz* which of the two provisions ought to prevail.)

(b) The product description on the Seller's Authorisation for Release differed from that in the LCs, *ie*:

> gas oil

instead of:

> gas oil
>
> Origin: Japan.

(c) The product description on the invoice differed from that in the LCs, *ie*:

gas oil

Origin: Japan

instead of:

Origin: Japan

Gas Oil.

Therefore the first issue in the case ("the First Issue") is whether the LC Documents were discrepant. This is a question of construction of the LCs and of the LC Documents.

8 The applicant replied on 29 December 2003, refuting all the discrepancies alleged in the refusal notices. Nonetheless, in order to answer one alleged discrepancy raised in relation to one of the LC Documents, *viz* the Seller's Authorisation for Release, the respondent re-presented the LC Documents to the applicant. The re-presented copies of the Seller's Authorisation for Release were amended to remove the said alleged discrepancy. The applicant did not refuse or give any refusal notice in respect of the LC Documents as re-presented on 29 December 2003. The issue arising from this ("the Second Issue") is whether or not the respondent was obliged to issue fresh notices of refusal in respect of the amounts claimed, failing which the respondent was, under Arts 13 and 14 of UCP 500 deemed to have accepted the LC Documents and therefore obliged to make payment thereon. This involved a construction of Arts 13 and 14 of UCP 500.

Steps taken by the applicant

9 The application for summary judgment was filed on 22 July 2004 with two supporting affidavits, including one by Gary Collyer who is the Technical Adviser of the International Chamber of Commerce Banking Commission, the body responsible for the drafting of UCP 500.

10 On 19 August 2004, the applicant filed the following show cause affidavits, which included an affidavit from Chang-Soon Thomas Song ("Song"), who is an employee of the respondent. From the first affidavit of Song, it appeared that he was put forward as an expert witness on behalf of the applicant. He gave his personal views to justify the applicant's rejection of the documents.

11 In its reply affidavit filed on 14 September 2004, the respondent objected to Song's evidence in so far as it purported to be expert evidence. Accordingly, the applicant was aware of the respondent's objection to Song's first affidavit from as early as 14 September 2004.

12 The respondent's application was heard and determined only on 7 October 2004, *ie*, nearly three months after the application was filed on 22 July 2004. At no time in between did the applicant indicate its intention to file an expert affidavit or that it had difficulty locating an expert. This was despite its knowledge from 22 July 2004 that the respondent had filed the affidavit of Gary Collyer.

13 The applicant appealed against the summary judgment and filed its Notice of Appeal on 20 October 2004. It was only in a fax to the Registrar dated 12 November 2004 that the applicant indicated for the first time its intention to file further affidavits for purposes of the appeal before a judge in chambers. It took the applicant more than one month after that letter and two months after the Notice of Appeal to file the subject application.

14 On 15 December 2004, the applicant filed the following affidavits:

(a) the affidavit of Paul S Turner enclosing his report as an expert;

(b) the affidavit of Boris Kozolchyk enclosing his report as an expert; and

(c) the affidavit of Moiz Haider Sithawalla ("Sithawalla"), the solicitor acting for the applicant, in support of the subject application.

15 At para 4(x) of the affidavit of Sithawalla, he stated that:

> The Defendant at the time of the hearing of the Plaintiff's Summary Judgment application had not been able to obtain their own expert evidence on the issues in dispute as set out above.

The respondent's solicitors, in a fax dated 28 December 2004, wrote to the applicant's solicitors to seek details on the alleged attempts to obtain experts in time for the hearing of the application for summary judgment.

16 The applicant's solicitors responded on 5 January 2005 stating, *inter alia*, that Song's affidavit could not be adduced as expert evidence by reason of his employment with the applicant. It was also stated that the applicant decided to defend the application for summary judgment at first instance on the two affidavits filed by its employees.

17 On the above facts, it was urged upon the court by the respondent that the applicant's conduct did not warrant the court exercising its discretion in the applicant's favour. Respondent's counsel argued that from the applicant's solicitors' fax of 5 January 2005, it was clear that the applicant had made the decision to proceed to defend the application for summary judgment without expert opinion. This was despite the applicant knowing, as far back as 22 July 2004, that the respondent had adduced expert evidence.

18 It was further argued on behalf of the respondent as follows:

(a) It was not the applicant's case that it had experienced difficulties locating suitable experts.

(b) There was at best a vague allusion to lateness in locating experts. If that was the true reason, the applicant could have applied for an extension of time to file the affidavits. No extension for this purpose was sought by the applicant. The applicant simply took a tactical decision not to introduce expert evidence and to rely instead on its employee's evidence even though the applicant knew it would be disregarded by the courts.

(c) The applicant's attitude was clear, *ie*, to defend the application for summary judgment without expert evidence and, only if it failed, to adduce expert evidence before the judge in chambers. This deliberate tactical decision ran contrary to O 14 rr 4(2) and 4(8) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) which clearly stipulate that the show cause affidavits filed by the respondent faced with an O 14 application must contain all necessary evidence.

19 Given that the applicant had taken its stand on the evidence as it stood before the assistant registrar, in the exercise of my discretion I refused leave to adduce further evidence. I had regard to

Singapore Civil Procedure 2003 (Sweet & Maxwell Asia, 2003) at para 56/1/3 where it is stated:

> It is common practice for the judge in chambers, subject of course to the question of costs, to admit further or additional evidence by affidavit to that which was before the registrar; but if a party has taken his stand on the evidence as it stood before the registrar, the judge in chambers may in his discretion, by analogy with the practice in the Court of Appeal, refuse to allow him to adduce further evidence (*Krakauer v. Katz* [1954] 1 W.L.R. 278; [1954] 1 All E.R. 244, CA).

That, however, was not the only basis for my decision. The other ground was that, in my view, the evidence of the two experts was not relevant in the circumstances. (Although I was aware that the respondent had also tendered the opinion of an expert at the hearing before the Registrar, that was no reason for me to admit the evidence of the applicant's experts. It is always open to the applicant, at the hearing of the appeal against summary judgment, to raise objections to the respondent's expert evidence as appropriate.)

The construction of the documentary credit

20 When a contract is in writing and its meaning is clear, the basic rule is that no extrinsic evidence may be adduced to modify the meaning of the words used. In this context, it is said that the construction of a document is a question of law. The court does not take into account the evidence of witnesses in determining the meaning and interpretation of a document or provisions within a document: see *Mount Elizabeth Health Centre Pte Ltd v Mount Elizabeth Hospital Ltd* [1993] 1 SLR 1021. Evidence, however, may be adduced to show that certain words used in the contract have a particular meaning distinct from their ordinary meaning. Where the meaning is unclear, evidence of the circumstances surrounding the making of the contract (but not of the negotiations) may be adduced as an aid to interpretation of the written words.

21 In a commercial context, evidence of custom in the trade may be adduced to assist in the construction of a contract. As explained in *Documentary Credits* by Raymond Jack, Ali Malek and David Quest (Butterworths, 3rd Ed, 2001) at para 1.20:

> In a commercial context the parties may be presumed to contract in accordance with any custom or usage of the particular trade. Evidence of custom in the trade is admissible to explain the terms used in the contract, and also to clarify ambiguities and to establish matters on which the contract is silent. In cases involving documentary credits it was common for the court to hear evidence from bankers of appropriate experience as to what customary banking practice is in the circumstances arising in the case. The evidence on each side may not conflict, in which case it will be accepted by the court. Or the court may reject the evidence on one side. Or it may find that there is no established customary practice.

It is important to note that "where there is no reliance on a particular custom, evidence of banking practice is not admissible to explain the ordinary terms of the credit or of [UCP 500]": *Documentary Credits* at para 1.21.

22 In *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36 where expert evidence had been adduced and relied on to explain the purpose and effect of Art 16 of UCP 500, Sir Christopher Staughton stated (at 39) as follows:

> It is no part of the function of an expert witness, or for that matter of any other witness,

to state his views on the meaning of ordinary English words in a written contract, unless it is sought to prove some custom which is pleaded and can be supported by appropriate evidence. Expert witnesses are nevertheless often called for that purpose; in our view that is simply a waste of money.

23 The First Issue relates to conformity of the LC Documents with the terms of the credit. It is strictly a question of construction of the LCs and the LC Documents. As noted above, in the absence of any reliance upon a particular custom, no evidence of banking practice is admissible. Neither has there been any suggestion that the words used in the LCs or the LC Documents have a particular meaning distinct from their ordinary meaning.

24 As earlier noted, the Second Issue is again purely a question of construction, the determination of which is governed by Singapore law. It is recognised that applying different governing laws, the courts of different countries may differ in this interpretation of the articles of UCP 500. With a view to some uniformity of application of the Articles, it may be that the courts of one country may have regard to how the courts of another country have applied the like provisions. To that extent, such decisions of foreign courts may be relevant.

The experts and their evidence

25 I turn now to the qualifications of the two experts and the relevance of their evidence.

Mr Paul S Turner

26 Mr Paul S Turner is a retired assistant general counsel of an oil trading company in which capacity he has advised the company on financial and banking legal matters for about 20 years. Although he has written books on LCs and has been actively involved in the American Bar Association amongst others, all these had to do with US law and, in particular, the Uniform Commercial Code. It does not appear that he has had practical experience as a banker dealing with trade finance. In any event, no reliance having been placed by either party on any custom, evidence on banking practice would be irrelevant.

27 Mr Turner admits that he has no expertise in banking law and practice in Korea or Singapore. The governing law in the contract between the applicant (as issuing bank of the LCs) and the respondent (as confirming/negotiating bank) is Singapore law: see *Bank of Credit & Commerce Hong Kong Ltd v Sonali Bank* [1995] 1 Lloyd's Rep 227; *Kredietbank NV v Sinotani Pacific Pte Ltd* [1999] 3 SLR 288.

28 Mr Turner is US trained and is not qualified in Singapore law. He has not sought to give evidence on the decisions of foreign courts (from jurisdictions in which he is competent to practice) interpreting Arts 13 and 14 of UCP 500. In short, his evidence is little more than submissions in disguise and is inadmissible. The submissions would more appropriately be made by counsel for the applicant.

Prof Boris Kozolchyk

29 Prof Boris Kozolchyk is also legally trained and is a distinguished academic, having held various training positions in universities in the US and abroad. In 1989, he was a representative of the then US Council for International Banking in the drafting of UCP 500 at the International Chamber of

Commerce. He was also a US delegate to the United Nations Commission on International Trade Law (UNCITRAL) and one of the draftsmen of the United Nations Convention on Independent Guarantees and standby LCs.

30 Apart from the above, he has also participated in the drafting of Art 5 of the Uniform Commercial Code of the US relating to LC law. He is a prolific writer, having written largely on commercial LCs in the Americas and related topics.

31 Despite his very impressive credentials, I was of the view that his evidence was not admissible. The governing law of the contract is Singapore law, in which he is not qualified; his evidence, being essentially submissions on the legal issues in the dispute, would be of no assistance.

Conclusion

32 For the foregoing reasons, I declined to exercise my discretion in favour of allowing admission of the further evidence. Accordingly, I dismissed the application with costs.

Application dismissed.