Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank
[2002] SGHC 54

Case Number : Suit 433/2001, RA 169/2001

Decision Date : 25 March 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : David Morais and Tito Shane Isaac (Tito Isaac & Co) for the Appellants/Plaintiffs; Toh Kian Sing and Steven Lau (Rajah & Tann) for the Respondents/Defendants

Parties : Beam Technology (Mfg) Pte Ltd — Standard Chartered Bank

Banking – Letters of credit – Confirming bank – Rights and obligations – Beneficiaries of letter of credit presenting documents for payment – Confirming bank notifying beneficiaries of discrepancies – Confirming bank subsequently rejecting documents on discovery of false document – Rejection within seven-day period – Beneficiaries not party to fraud – Whether confirming bank can to refuse payment under letter of credit – Relevant time of knowledge of fraud – Whether general nullity exception recognised

Judgment

GROUNDS OF DECISION

1. The factual background is not in dispute and is reasonably straightforward. The plaintiffs are a company incorporated in Singapore and were the beneficiaries under a letter of credit (no. 073001005900) for US$277,500.00 issued by PT Bank Universal HO Jakarta on behalf of the plaintiffs' buyers in Jakarta. The defendants are a bank incorporated in the United Kingdom with a registered branch in Singapore situated at 6 Battery Road and various offices, one of which was at Tampines. They were the confirming bank. Their buyers notified the plaintiffs that the freight forwarders were to be a company called "Link Express (S) Pte Ltd. On 14 July 2000 the plaintiffs presented the documents required under the terms of the letters of credit. One of the documents required under the letters of credit was described as "Full set of cleared air waybill marked freight collect made out to order of Pt Bank Universal H.O. Jarkarta" (sic). This was amended on 12 July 2000 to read "Full set clean air waybill…". On 17 July 2000 the defendants notified the plaintiffs that there were discrepancies in the documents. In the meantime, the defendants discovered that the air waybill was a "fabricated document". It is common ground that this "air waybill" was "issued" by a phantom company in that there was no company known as "Link Express (S) Pte Ltd". The defendants' manager Lim Poh Ann notified the Plaintiffs by telephone on 19 July of this discovery and in the evening the documents were returned to the plaintiffs without payment on account of the false document. One Raymond Koh from the plaintiffs' office informed the defendants that they would be presenting the documents again for clearance. The defendants replied by letter on 27 July to say that in view of the events transpiring, the defendants would not accept any further presentation of the documents. This led to the present action, and the defendants' application for a determination under O 14 r 12.

2. The point of law submitted for the court's determination under O 14 r 12 was:

> "Whether the defendants as a confirming bank of the letter of credit No. 073001005900 was entitled not to make payment under the said letter of credit because an air waybill No. 618-63187228 purportedly issued by a freight forwarding company called Link Express (S) Pte Ltd, which was one of the documents required to be presented and was in fact presented by the plaintiffs

> under the letter of credit, was a forgery known to the defendants. Solely for the purpose of this application, it shall be assumed that the forgery was not carried out by the plaintiffs."

3. Counsel for the plaintiffs had conceded at the hearing below that the said air waybill, which is a written notice of receipt of cargo laden on board the flight described on the waybill, was a forgery. Thus, the point of law was uncomplicated by the necessity to make assumptions of facts. However, to better understand the issues it will be useful to know what was nature of the "forgery" (the term adopted by both counsel) in this case. The air waybill in question appears to have been issued by a company called Link Express (S) Pte Ltd. But this company did not exist. The goods on the air waybill were described as having been loaded on board a Singapore Airline flight SQ 162/13 but the airport authorities informed the defendants that no such cargo was in fact loaded on board that flight. Furthermore, the particulars of this air waybill in question as well as the flight number were identical to another air waybill presented in an entirely different case, and which also proved to be false. I pause to mention that a document may be false without being a forgery although every forgery must necessarily be false insofar as that is taken to mean that it is not the true document. There is also a distinction, in my view, between a fictitious document created by an existing entity and a document purportedly created by a non-existing entity. In the case of the former, the fictitious document may in certain circumstances be given legal effect; for instance, where a case is made out on estoppel. In the latter case, a document "created" by a non-existing entity is every bit a ghost as its "creator" with neither substance nor shadow. In the present case both counsel chose to regard the fictitious waybill as a forgery, and for my part, in the context of the facts and circumstances, a forgery and a false document created by a non-existing company are but branches of the same stem of the genus *fraud*. The contentious point in this case concerns the question whether the discovery of such fraud ought to be ignored if it was not a fraud by the beneficiary under letters of credit governed by UCP 500.

4. Strictly for convenience, however, I shall refer to the air waybill in question as the *forgery* since both parties had been using that description although technically, it is more a fictitious document than a forged document. Generally, a confirming bank is under a legal obligation to effect payment when the requisite documents are presented. The law does not require the bank to verify the authenticity of the documents themselves, for they need only look at the face value of the documents. At one end of the spectrum, are obvious situations, where for example, a piece of blank paper is presented. In such a case, no one expects the bank to be obliged to act on it or accept it. I need not expound the duty of the bank at the other end of the spectrum where the true document was presented. Where the document appears on the face of the paper to be that described in the letter of credit it will have the force of compulsion on the bank to pay, subject to the right to ask that any discrepancy in the particulars be corrected. But that is a separate defence that is not the subject matter of this application and in respect of which different considerations and principles apply. In this application, counsel for the plaintiff raised several broad arguments.

5. First, he submitted that the assistant registrar was not entitled to break down the question of law as originally framed and rephrase the question into three separate questions. To be precise, the assistant registrar prefaced the three questions as follows: "The following 3 issues of law were before the court today in this application". She then set out the three questions as follows:

> "(a) First – with regard to the notice of discrepancies issued by defendant on 17 July 2001 – *whether the notice of discrepancies issued by the defendants on 17 July 2001 stops them from relying on the fraud exception if they subsequently discover fraud/ forgery, and whether the defendants are bound to rely only on the discrepancies stated in that notice, as the basis for withholding payment*

and rejecting the L/C documents.

(b) Second – with regard to the nullity issue – *whether forgery of one of the documents, namely, the airway bill in the present case, falls within the fraud exception, or whether it falls within a so-called "nullity argument" not covered by the fraud exception.*

(c) Third – *whether the fraud exception extends to allow a Confirming Bank to withhold payment to the beneficiary under an L/C, when the Bank discovers, before payment has been made to the beneficiary, that there has been forgery/fraud by a third party, although the beneficiary is not a party to the forgery/fraud.*"

6. As a general rule, the court is only obliged to consider the question of law as framed by the applicant and not to frame a new one, or rephrase the old, so that a completely new question calls to be answered. But that is only a general rule. In this case, I see the three questions above as nothing more than her way of analysing the original question. Even if she had not set them out in the manner that she did, the assistant registrar would still have to consider these necessary and implicit sub-questions in turn for they are inherent parts of the same question. The first question of the assistant registrar, for example, is clearly implicit in the original question and would have to be considered as an obvious preliminary point, bearing in mind the undisputed facts that the rejection was made after the list of discrepancies had been given to the plaintiffs. The court need only satisfy itself that the original question is sufficiently broad to take the sub-questions into account. In this case I am of the view that it is and that the assistant registrar was correct in analysing the question as she did.

7. Mr. Morais submitted on behalf of the plaintiffs that the relevant time of knowledge of fraud is the time when the documents were presented for the purposes of the fraud exception, citing the judgment of Staughton LJ *in Group Josi v Walbrook Insurance* [1996] 1 WLR 1152 at 1161:

> "…it is nothing to point that at the time of the trial the beneficiary knows, and the bank knows, that the documents presented under the letter of credit were not truthful in a material respect. It is the time of presentation that is critical".

I shall leave this argument to the last. Counsel also relied on *U.C.M. v Royal Bank of Canada* [1983] 1 AC 168 for the proposition that a defendant is not entitled to raise the fraud exception where the beneficiary is an innocent party. Mr. Toh, counsel for the defendants rightly pointed out that Lord Diplock, upon whose judgment reliance was placed by counsel for the plaintiffs, made clear that his opinion does not cover a situation involving forgery by a third party. He said at p188: "I would prefer to leave open the question of the rights of an innocent seller/beneficiary against the confirming bank when a document presented by him is a nullity because unknown to him it was forged by some third party." On this point, the decision of Waller J in *Turkiye v Is Bankasi v Bank Of China* [1996] 2 Lloyd's Rep 611 is of little assistance to the plaintiffs who rely on that part that says that it is not for the bank to make its own inquiries about the allegations of fraud made by one party against the other since that is a general statement of established law. The more cogent issue, that is, the nullity issue, in the present case lies in deeper substrata. That issue was the central one in the unreported Court Of Appeal decision in *Montrod v Grundkotter Fleischvertriebs GmbH* in England. The main judgment was delivered on 20 December 2001 by Potter LJ with which Thorpe LJ and Sir Martin Nourse concurred. The plaintiffs' counsel submitted that the gap left by Lord Diplock in the *U.C.M.* case was directly addressed in the judgment of Potter LJ. The *Montrod* decision was brought to my attention midway in the course of the appeal.

8. In *Montrod*, the facts were found to be as follows for the purposes of determining the legal issue. Grundkotter were experienced meat traders but this was the first time they had actually carried out a letters of credit transaction. They entered into a contract to sell frozen pork to Ballaris (described by the first instance judge as "an uncertain entity") who had an address in Moscow and to which the meat was delivered. Ballaris was unable to obtain bank credit to pay for the meat so they approached an English finance and investment company, namely Montrod who through the Fibi Bank requested the Standard Chartered Bank to open letters of credit in favour of Grundkotter. One of the documents required under the terms of the letters of credit was a certificate of inspection signed by Montrod. Montrod had no intention of inspecting the goods but inserted this requirement as a precaution so that the credit would not be operative if they withheld their signature. Unfortunately, Grundkotter was misled into believing that Montrod had authorised them to sign the certificate. To that end, Grundkotter even received a Montrod company stamp through the mail. Unknown to Grundkotter, Ballaris was not authorised to speak on behalf of Montrod. On the basis of the documents thus appearing to conform to the letters of credit payment was eventually paid. The first instance judge struck out Montrod's claim that Standard Chartered Bank was not entitled to pay out in view of the fraudulently signed certificate of inspection. Judgment was also given to Standard Chartered to recover from Fibi Bank who was, in turn, given judgment to recover from Montrod. The fundamental issue before the Court of Appeal was whether the fraud exception in letters of credit cases should be extended to cover a 'nullity'. This nullity exception (or extension) was proposed in the following terms:

> "If, by the time of full payment (or the time when a bank irrevocably commits itself to a third party who has taken in good faith, if earlier) the only reasonable inference is that one (or more) of the documents[…] presented under the credit is not what it appears on the face of it to be, but is a nullity, then the bank is not obliged to make payment under the credit."

9. Neither the first instance judge nor the Court Of Appeal was impressed by the nullity argument made on behalf of Montrod. Potter LJ was content to agree with Judge Raymond Jack QC that it is desirable that the fraud exception to the autonomy principle under Article 3 of UCP 500 be "restricted fraud or knowledge of fraud on the part of the beneficiary or other party seeking payment". On a narrow reading of the rationale for rejecting Montrod's arguments, Potter LJ was of the opinion that in a multipartite transaction there should be no difference between a seller who was led to believe that he had authority to create a certificate of inspection for the purpose of triggering payment, and one where the seller receives from a third party a document regular on its face but which, unknown to him, was created without authority. The wider scope of the *Montrod* decision at the appellate stage was based on policy grounds. This can be gleaned from 58 of Potter LJ's judgment where the Lord Justice of Appeal said:

> "[T]here are sound policy reasons for not extending the law by creation of a general nullity exception. Most documentary credits issued in the United Kingdom incorporate the UCP by reference. Various revisions of the UCP have been widely adopted in the USA and by United Kingdom and Commonwealth banks. They are intended to embody international banking practice and to create certainty in an area of law where the need for certainty and precision are paramount. The creation of a general nullity exception, the formulation of which does not seem to me susceptible of precision, involves making undesirable inroads into the principles of autonomy and negotiability universally recognised in relation to letter of credit transactions." Potter LJ continued in the same paragraph of that judgment to say, "If a general nullity exception were to be introduced as part of English law it would place banks in a further dilemma as to the necessity to investigate facts which they are not competent to do and from which UCP 500 is

> plainly concerned to exempt them. Further such an exception would be likely to act unfairly upon beneficiaries participating in a chain of contracts in cases where their good faith is not in question. Such a development would thus undermine the system of financing international trade by means of documentary credits."

10. Before me, Mr. Toh made two broad arguments in reply. First, he says that that case must be restricted to the narrow *ratio decidendi* that "a document which is a nullity because it was issued by the beneficiary himself without authority does not relieve an issuing bank of its duty to pay under the letter of credit". I accept that the true *ratio decidendi* could not have been more accurately phrased than that. However, in view of its important commercial significance *Montrod* must be read carefully, beyond the narrow confines of its heart and I shall revert to this point shortly. Secondly, Mr. Toh argued that there are several crucial differences of facts between the two cases. The *Montrod* case, he submitted, concerned an unauthorised document whereas the present case concerns a forgery. Furthermore, the former concerned an inspection certificate whereas the latter concerned a waybill. He also argued that the *Montrod* decision applies only to issuing banks whereas the respondents were a confirming bank. Factually that may be correct, but the issue as proposed to be decided by counsel in that case (as it was set out by Potter LJ at 23) and the decision of the court itself, it does not appear that such distinctions had been considered and I do not think that these distinctions are sufficiently material. A reading of Articles 13 and 14 of UCP 500 suggests that these are indeed not relevant distinctions.

11. Article 14b merits closer study. It expressly applies to the issuing bank as well as the confirming bank. Article 14b sets out a corresponding pair of important obligation and right of the bank. It says: "Upon receipt of the documents the Issuing Band and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine *on the basis of the documents alone* whether or not they appear on the face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of Credit, such banks may refuse to take up the documents" (emphasis mine). The question is whether the right of refusal may be determined *only* "on the basis of the documents alone". If that is the case, then I think that there is no basis for the defendants here to refuse the waybill. I accept that the provisions of UCP 500 ought to be read with as little variation as possible from its literal meaning because the core of its purpose is commercial expediency that covers the thousands of transactions that are made and performed daily under its terms. But can it said that if the bank *knows* a document to be false although the document itself does not seem so by reason of, say a well done forgery?

12. On the broad principle, I am in full agreement with the judgment of Potter LJ in respect of the recognition of a nullity exception after the period of seven days from which the bank is entitled to reject a document. So, in the present case before me the question remains as to whether the defendants had knowledge of the forgery at the time of the presentation of the documents, and implicitly, whether the obligation of the bank to examine a document on the face of it necessarily covers a situation where the document appears proper *on the face of it* but which the bank knows or has sound reason to believe is not the required document *in fact*? Counsel for the plaintiffs submitted that the assistant registrar was wrong to rely on *Mees Pierson NV v Bay Pacific* [2000] 4 SLR 393 when she applied the fraud exception to the plaintiffs who were an innocent party. His arguments are set out fully in his Amended Written Submissions but I need not refer to them in detail here because I am of the view that the point made there is not the direct point in issue here. The present case does not concern the rights or obligations of the plaintiffs who for the purposes of this application are assumed to be innocent. To the question in the present case as to whether the defendants were obliged to accept a document, which they know in fact to be false, one may well ask what is the difference between a bank officer staring at a blank piece of paper and one that she *knows* to be

false? I think that there is none. In the latter situation, if the bank is wrong and the document turns out to be genuine it will have to bear the consequences for wrongfully rejecting it. In this case, there was no dispute that the document was false.

13. In my view, the defendants erroneously assumed that because forgery was involved the case must be classified as a case under the "fraud exception" in the broad sense and thus the passages of the authorities they presented to me were of little assistance. The facts here are narrower and much more straightforward. Where a confirming bank says, "this is not one of the documents" they are refusing payment because the requisite documents have not been presented. While it is the bank's prerogative to accept or reject any document presented to them it will have to bear the consequences of its judgment. If it turns out that the document is a requisite and proper document the bank will have no defence to a suit for wrongful rejection. The purity of the basic principle so often repeated, in the *Turkiye v Is Bankasi v Bank Of China*, for example, is not tarnished in any way by this approach since it was designed in large part to absolve the bank from having any responsibility in verifying the genuineness of commercial documents. It would be too onerous to impose such a duty on the bank because it will require the bank to take incommodious steps to process heaps of documents on a daily basis. That would be undoubtedly lumbersome and commercially inexpedient. The circumstances of the case before me is therefore different from that of *Montrod's* which concerns situations arising after the seven day period for the bank to decide whether to accept or reject documents presented. If the bank knows or believes at that stage, that is, during the seven day period that a document in their hands is not a requisite document - for whatever reason, be it forgery or something else - it will not be right to expect the bank to act on it as if it was a true document. Ordinarily, from the moment the iniquity of forgery is discovered time and motion are frozen so far as the law is concerned. Nothing more must be done to give effect to that forgery. It becomes utterly inert. The rights of the innocent are preserved but only in so far as they do not require an act to be done on the basis of any entitlement that is premised on the validity of the document in question. I cannot see how, in those circumstances, a court can justify a direction to the bank to ignore the forgery and accept it as if it were a true and proper document; thereby giving weight to an otherwise weightless paper, and value to an otherwise valueless paper. The spread of fraud must stop when the tocsin is sounded; but when is it too late to sound the alarm? I am of the view that in the context of UCP 500 the end of the seven day period under Article 13b marks that point. The ordinary position that I referred to may (and has in the case of UCP 500) be changed by agreement between the parties, but any alteration or deviation must be applied strictly to the letter. The legal position that I expounded above may be summarized as follows. As a matter of law and policy fraud must be given no room to express itself. Therefore, the moment fraud is discovered nothing more must be done to give it any effect. In certain circumstances, however, parties may, by contract, agree that the obligations as between themselves should not be affected by a fraud (which neither is a party to). In such cases of which the UCP 500 is a fine example, the courts will respect their intention. The articles of the UCP 500, however, apply only insofar as the fraud was discovered after the bank had accepted all the documents. The UCP 500 does not provide that a bank is obliged to accept a fraudulent document notwithstanding that the time (seven days) for it to reject them had not expired.

14. I shall now address the plaintiffs' subsidiary contention that the defendants were only entitled to serve a single notice under Article 14 and that the knowledge of forgery must be knowledge at the time of presentation only. The time of presentation, in this sense, is not a fixed hour. In the circumstances of this case, in order that they may rely on the forgery as a ground for rejecting the waybill, the defendants must have knowledge of the forgery before the documents had been accepted and within the seven days under Article 13b of UCP 500. On the affidavits and the submission of the plaintiffs' counsel, it is accepted that the forgery came to the defendants' knowledge before they had accepted the documents. For the avoidance of doubt, I will hold that although the documents were returned for the rectification of other discrepancies, until that has been

done and the documents returned to the defendants the documents cannot be regarded as having been accepted. Counsel for the plaintiffs, relying on Article 14(e) of UCP 500, submitted that the defendants were not entitled to serve more than one notice of discrepancy. Various other miscellaneous points were raised as "subsidiary issues" on behalf of the plaintiffs but in my view they are either subsumed in the main issues or have no bearing on the merits of the present case. For instance, counsel for the plaintiff asked whether a notice of rejection may be given by telecommunications under Article 14. That is answered directly and affirmatively in Article 14d((i).

15. I will like to conclude by expressing my sympathy for the situation the plaintiffs have found themselves but, for the reasons that I have expressed above, and notwithstanding the tremendous effort made on their behalf by their solicitors, I am unable to find in their favour. The plaintiffs' appeal is therefore dismissed. Costs of the appeal shall be taxed if not agreed between the parties.

Sgd:

Choo Han Teck
Judicial Commissioner