



[2014] UKPC 10

Privy Council Appeal No 0034 of 2013

JUDGMENT

Den Danske Bank A/S and others (Respondents) v Surinam Shipping Ltd (Appellant)

From the Supreme Court of Mauritius

before

Lord Mance

Lord Kerr

Lord Wilson

Lord Toulson

Sir Bernard Rix

JUDGMENT DELIVERED BY

Lord Toulson

ON

16 April 2014

Heard on 29 January 2014

Appellant

Shadmeene Mootien-Rogbeer

Den Danske Bank A/S

Rishi Pursem SC

Nadeem Lallmamode

(Instructed by Fladgate LLP)

Mauritiu
Commercial
Ltd
Patrice Dog
Spéville S
(Instructed by
Laphorn

LORD TOULSON:

1.

The appellant is a Mauritian company. The respondent is a Danish bank. The dispute concerns a letter of credit issued in relation to the sale of a vessel by the appellant to a Danish company, Mecofish Ltd, which was acting as an intermediary for a Spanish company. The letter of credit involved three banks. It was issued by a Spanish bank, Banco de Galicia, in favour of Mecofish and was confirmed by the respondent. The third bank involved was the Mauritius Commercial Bank Ltd ("MCB"). There is controversy about the role of MCB.

2.

The letter of credit provided for successive payments of USD 140,000 and 75,000. The first tranche was paid after some delay relating to the presentation of documents. The second was not paid and the appellant, as transferee of the letter of credit, sued MCB in the Supreme Court of Mauritius for USD\$75,000 alleged to be due under it. MCB pleaded in its defence that it had acted only as a "post office box" under instructions from the respondent or, in other words, that its role was limited to that of an advising bank. MCB applied for the claim to be struck out but its application was dismissed and the matter proceeded to a trial. For reasons which are unclear, the appellant did not amend its claim to join the respondent as a defendant, but the respondent was made a third party. In its amended defence the respondent asserted that the appellant had failed to present documents compliant with the conditions of the letter of credit prior to its expiry, and it denied the paragraphs of the appellant's pleading which alleged that MCB was liable to the appellant.

3.

The issues at the trial were whether MCB was merely an advising bank (as MCB contended) or had undertaken responsibility to the appellant for payment of the letter of credit (as the appellant contended), and whether the appellant had fulfilled the conditions of the letter of credit. The trial judge decided both issues in favour of the appellant. She gave judgment for the appellant on the claim and ordered the respondent to indemnify MCB.

4.

The respondent appealed. MCB did not serve a notice of appeal, but it was represented on the appeal by counsel who argued in support of the appeal of the respondent. The Court of Appeal (Matadeen Ag CJ and Peeroo Ag SPJ) held that the role of MCB was purely that of an advising bank. It accordingly allowed the appeal and set aside the judgment in favour of the appellant. In view of its conclusion about the role of MCB, the court did not deal with the question whether the appellant had complied with the conditions of the letter of credit.

5.

The appellant's notice of appeal contains a number of grounds but they raise essentially two issues: whether MCB ever accepted personal responsibility to the appellant for making payments under the letter of credit, and whether it was open to the respondent to dispute that issue before the Court of Appeal. It is convenient to consider the points in that order, although success for the appellant on either would make the other superfluous. There was no argument before the Board on the point left undecided by the Court of Appeal about whether the appellant had made due presentation of the documents required under the letter of credit. On the documents before the Board the underlying facts appear to have been not entirely clear and there are a number of gaps in the story, but it is unnecessary to explore those matters for present purposes.

Role of MCB

6.

On 5 September 1996 the respondent sent MCB a message in the following terms:

"Please be informed Banco de Galicia, Vigo, Spain has issued a irrevocable and partly transferrable documentary credit, their ref no 8901/DCRE36596, in favour of Mecofish Ltd ...

the credit which is confirmed by our bank.

At the request of Mecofish Ltd we hereby transfer the above credit . . . in favour of Surinam Shipping Ltd . . .

as follows:

Amount:

USD\$140,000 as under B)

USD\$75,000 as under D)

Date and place of expiry: 30.11.1996 in Denmark for presentation of documents, 15.10.1996 for shipment. This credit is available at the counters of Den Danske Bank, Copenhagen as follows:

B) USD\$140,000 against the following documents:

Signed commercial invoice in triplicate evidencing the full credit amount, and the amount payable now: USD\$140,000 and also stipulating the particulars of the vessel M4/V Sabena Star . . .

Protocol of delivery and acceptance signed by representatives of Campopesca and Mecofish Ltd.

Port clearance from the port trust in Bombay or other authority to the effect that the vessel has left Bombay bound for Vigo, Spain, legalised by the Panamanian Consulate, or other authority. . . .

Declaration from the Panamanian Register confirming that there are no mortgages registered and that all taxes, etc have been paid and application to delete the vessel or change the ownership has been filed with the Register, and that they will issue the official certificate before 30 November 1996.

D) USD\$75,000 against the following documents:

Signed commercial invoice in triplicate evidencing the full credit amount, and the amount payable now: USD\$75,000 and also stipulating the particulars of the vessel MV Sabena Star . . .

The certificate of deletion or change of ownership to Campopesca, SA, from the Panamanian Register confirming that the vessel is free from any registered encumbrances or mortgages whatsoever.

Special conditions: documents other than the commercial invoices to be issued - to whom it may concern - and appearing only to have been signed by the parties stipulated.

Details of goods: M/V Sabena Star . . .

Invoice to evidence shipment from Bombay, India to Vigo, Spain. Invoice also to evidence date of shipment. . . .

The documents to be presented within validity date mentioned above. Art 43 does not apply to this credit. . . .

Documents to be forwarded to us in one lot by courier.

Reimbursement: upon receipt of documents at our counters in order we shall remit proceeds as per instructions received. . . .

Please advise this credit to 2 beneficiary [the appellant] without adding your confirmation. This credit is subject to UCP500 1993 rev ICC.”

On 6 September 1996 MCB forwarded the document to the appellant under cover of a letter headed “Documentary Credit No 89014/DCRE 36596 for USD 215,000 by order of Mecofish Ltd”. The letter stated:

“We annex herewith the above documentary credit established in your favour by Banco de Galicia, Vigo and advised by Den Danske Bank A/S Copenhagen.

This credit is irrevocable on the part of the issuing bank but it must be understood that neither this letter nor the attached advice conveys any engagement on our part.

We remind you that the documents should be strictly in accordance with the terms of the credit and must be consistent with each other. Should you be unable to comply with any term please urgently communicate with the applicant requesting the necessary amendment. The description of the relative goods have to correspond exactly to the description in the credit.

Will you please pay special attention to the terms and conditions underlined by ourselves and do not hesitate to contact us for guidance, if need be.”

7.

UCP 500 (or to use its full title “The Uniform Customs and Practice for Documentary Credits (1993 Revision) ICC Publication No 500”) included the following provisions:

“Article 1 - application of UCP

The Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No 500, shall apply to all Documentary Credits . . . where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit.

Article 7 - advising bank’s liability

a.

A Credit may be advised to a Beneficiary through another bank (the ‘Advising Bank’) without engagement on the part of the Advising Bank but that bank, if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the Credit which it advises. If the bank elects not to advise the Credit, it must so inform the Issuing Bank without delay.

b.

If the Advising Bank cannot establish such apparent authenticity it must inform, without delay, the bank from which the instructions appear to have been received that it has been unable to establish the authenticity of the Credit and if it elects nonetheless to advise the Credit it must inform the Beneficiary that it has not been able to establish the authenticity of the Credit.

Article 9 - liability of Issuing and Confirming banks

a.

An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with:

i)

if the Credit provides for sight payment - to pay at sight;

b.

A confirmation of an irrevocable Credit by another bank (the "Confirming Bank") upon the authorisation or request of the Issuing Bank, constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the Credit are complied with:

ii)

if the Credit provides for sight payment - to pay at sight..."

Under UCP 500 the duties of an advising bank are thus clearly defined and do not include responsibility to the beneficiary for payment of sums due under the documentary credit from the issuing or confirming bank. In the present case the letter of credit and the letter from MCB to the appellants dated 6 September 1996 made it clear that MCB's role was that of an advising bank.

8.

The trial judge said:

"In the present case the MCB took a more proactive role in the transaction. According to the letter of credit the DDB requested the MCB to advise the Credit to Beneficiary No 2 ie Surinam Shipping 'without adding your confirmation', and the MCB in turn informed Plaintiff of the letter of credit by way of letter and does mention therein that neither the credit nor the attached advice 'conveys any engagement on our part'. However it did not limit itself to checking the authenticity of the credit. It gave advice to the effect 'the description of the relative goods has to correspond exactly to the description in the credit' and urged Plaintiff to 'pay special attention to the terms and conditions' which it underlined. It further invited Plaintiff not to have any hesitation 'in contacting us for guidance, if need be'. When the DDB highlighted discrepancies in the documents, the Defendant, on 30 October 1996, wrote to Plaintiff informing it of same and stating 'we hold documents at your disposal, at your request we shall be quite prepared to contact the first beneficiary'. Subsequently the MCB was actively involved in the long exchange of correspondence between the parties communicating the DDB's demands and reservations to Plaintiff, holding the Plaintiff's documents in its possession, seeking instructions from Plaintiff and acting in accordance. Further the representative of Plaintiff testified to the effect that when the matter dragged on, the Defendant advised Plaintiff to submit all the documents under both B and D to ensure that payment would be effected.

As such it cannot be said that the MCB's participation was restricted to checking the authenticity of the credit as advising bank. Its involvement went beyond that of an advising bank as per the UCP DC500."

9.

The Court of Appeal rejected the judge's reasoning. It examined the correspondence between the parties and concluded:

"There is no evidence to indicate that the MCB had in any way added its confirmation to the documentary credit that it was asked by DD Bank to advise to SS Ltd. Nowhere in the long exchange of correspondence that ensued between the parties is there any indication that the MCB was conveying any engagement on its part. On the contrary that correspondence shows beyond any doubt that the MCB was no more than an advising bank and DD Bank was the bank that had confirmed the

Credit. In the circumstances any claim in relation to the documentary credit should have been directed against DD Bank. As no claim could in law lie against the MCB, the action of SS Ltd against MCB should have been set aside. And as no action could lie against the MCB, the question of DD Bank . . . taking up the defence of MCB and indemnifying it could not arise.

It is also relevant to state that the action of SS Ltd against the MCB is based solely on the letter of credit. It is neither an action for damages for negligence against the MCB nor the equivalent of an action for damages for breach of warranty of authority..."

10.

Ms Mootien-Rogbeer endeavoured to persuade the Board that the trial judge's analysis was right and the Court of Appeal were wrong, but it was an impossible task. The suggestion that by its letter to the appellant dated 6 September 1996, enclosing the letter of credit, MCB undertook a role beyond that of an advising bank, and accepted responsibility for the payment of sums due under the credit, is contrary to the entire language and tenor of the letter. Throughout the correspondence which followed between the parties, regarding both tranches of the credit, MCB acted as a channel of communication between the appellant and the respondent, but the trial judge did not identify and Ms Mootien-Rogbeer was not able to identify any letter which showed a change in MCB's role from that of advising bank to that effectively of a confirming bank. The Board has examined the correspondence and can see no basis for finding that MCB accepted direct liability for payment of the credit.

Procedure before the Court of Appeal

11.

The trial judge delivered her judgment on 20 May 2009. The (present) respondent's notice of appeal, dated 8 June 2009, did not challenge the judge's conclusion about the role of MCB. The grounds of appeal related to her finding that the appellants had presented all the necessary documents within the period of validity of the letter of credit (which the judge found to have been extended). MCB did not appeal against the judgment but on the contrary it gave notice, dated 11 June 2009, that it intended to resist the respondent's appeal.

12.

The respondent served a skeleton argument on 1 November 2010, which was confined to the grounds set out in its notice of appeal.

13.

The appeal was heard on 18 November 2010. The transcript of the hearing shows that counsel for the respondent began his submissions by taking the point that MCB was merely an advising bank and that it was therefore not under any liability to the appellant so as to give rise to a right of indemnity against the respondent. He developed his argument by reference to the language of the letter of credit, the correspondence and the provisions of UCP 500, without interruption by Ms Mootien-Rogbeer. His submissions took him some time and continued into the afternoon.

14.

When Ms Mootien-Rogbeer came to address the court, she began by observing that there was no appeal by MCB and she submitted that the court should disregard any submission made on behalf of the (now) respondent that MCB was not liable to the appellant. However, she made no reference to the fact that this point had not been raised in the respondent's notice of appeal, nor did she suggest that she was not in a position to argue the point.

15.

The court heard next from counsel for MCB. He submitted that the respondent was right in its argument that there was no liability on the part of MCB. At this point Ms Mootien-Rogbeer intervened to remind the court that MCB had not appealed against the judgment. The court indicated that it was fully aware of this and invited counsel for MCB to continue, as he did. It was therefore apparent that the court was allowing the point to be argued. The position taken by Ms Mootien-Rogbeer in the Court of Appeal was that the court ought not to entertain it, because the respondent was not entitled, in her words, to “step into the shoes of the defendant” (MCB), which had not itself appealed against the trial judge’s finding of liability.

16.

Before the Board, Ms Mootien-Rogbeer submitted that the respondent was precluded from challenging MCB’s liability to the appellant before the Court of Appeal by its failure to raise the point in its grounds of appeal. She also repeated her submission before the Court of Appeal that the respondent was not entitled to put itself in the place of MCB so as to dispute the liability of MCB.

17.

As to the first point, it would have been open to Ms Mootien-Rogbeer to have objected in the Court of Appeal to the respondent raising a point which was not in its grounds of appeal without obtaining leave to amend, and to have opposed any grant of leave or to have submitted that any grant of leave to amend should have been on terms, for example, that the hearing was adjourned. She did not take that course. The Board has some sympathy with Ms Mootien-Rogbeer’s submission that she was caught by surprise, but even so she had time (for example over the mid-day adjournment) to consider her response. The Court of Appeal had a discretion whether to allow the respondent to argue a point which it had not originally raised in its notice of appeal, and the Board would not interfere with its decision on a procedural matter of that kind unless it considered that there had been a real miscarriage of justice. This is not such a case, and in any event Ms Mootien-Rogbeer had a full opportunity to present her argument on the role of the MCB to the Board (as she had done to the trial judge).

18.

The argument which Ms Mootien-Rogbeer made to the Court of Appeal, and repeated before the Board, that it was not open to the respondent to challenge the trial judge’s finding of liability on the part of MCB, which had not itself appealed against the decision of the trial judge, is unsound. A defendant which is entitled to indemnity from a third party may have no interest in disputing its own liability. Indeed, in the present case MCB adopted the position in its skeleton argument before the Court of Appeal that it was indifferent as to the outcome of the appeal, because if the present respondent’s appeal was successful, both the claim against itself and the respondent would fall, but if it was unsuccessful, MCB would be entitled to indemnity. One of the purposes of a defendant who claims an indemnity from a third party being able to join the third party in the action is precisely in order that the third party should be bound by any findings made by the court between the claimant and the defendant. The corollary is that a third party who is joined in an action, and will therefore be bound by findings made between the claimant and the defendant, is entitled to advance any defence which may be available to the defendant.

19.

For those reasons the Board dismisses the appeal.