Banque Nationale de Paris v Credit Agricole Indosuez
[2000] SGHC 117

Case Number : OS 49/2000

Decision Date : 27 June 2000

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Woo Bih Li SC and Gan Kum Yuin (Bih Lih & Lee) for the plaintiff; Toh Kian Seng and Priya Selvam (Rajah & Tann) for the defendant

Parties : Banque Nationale de Paris — Credit Agricole Indosuez

Banking – Letters of credit – Negotiable credit – Deferred payment credit – Documents indicating credit as available for certain number of days from date of negotiation – Whether credit negotiable or deferred – Whether issues can be disposed off summarily

: The question that I had to decide in this originating summons was whether a particular letter of credit issued by the defendant bank and negotiated by the plaintiff bank was, on its true construction, a deferred payment credit or a negotiation credit.

The matter arose in the following way. On 21 March 1999, the Dubai branch of the defendant sent a telex to the plaintiff`s Singapore branch stating that the defendant had opened an irrevocable letter of credit for up to US$1,333,600 in favour of a Singapore company, Amerorient Pte Ltd (`Amerorient`) on the instructions of Solo Industries Ltd of Sharjah, in the United Arab Emirates.

The letter of credit

The letter of credit (so far as material) provided that:

> *By order of Solo Industries Limited, ...*
>
> *We open our irrevocable letter of credit No P900262 favouring Amerorient Pte Ltd ...*
>
> *Expiring on 21 May 1999 for not exceeding US$1,333,600...*
>
> *Available against presentation of drafts at 180 days from the date of negotiation by deferred payment.*
>
> *Documents required: (in duplicate unless otherwise stated)*
>
> *Covering shipment of 40,000 kgs lead silver alloy 33 pct.*
>
> *...*
>
> *Documents required:*
>
> *(1) ...clean on board ocean Bills of Lading ...*

(2) ... Commercial Invoices

(3) Packing List

(4) Certificate of Russian Origin ...

(5) ...

(6) ...

(7) Shipping Marks: ? SIL SHJ? Must be mentioned on Bills of Lading.

Special Conditions:

1 ...

2 ...

3 ...

4 Non legalized/non certified Certificate of Origin issued by exporter acceptable for negotiation in which case Beneficiary`s Certificate stating that the original legalized and certified Certificate of Origin will be sent directly to the Applicant must accompany the documents presented for negotiation.

5 ...

6 ...

7 All documents to be forwarded to Credit Agricole Indosuez ... Dubai, UAE by courier in one lot.

- ...

- Credit available with Banque Nationale de Paris, Singapore and to be confirmed by Bank National de Paris, Singapore.

- We hereby engage that documents presented in conformity with the terms of this credit will be duly honoured at maturity.

- Negotiation under reserve/guarantee not acceptable without prior reference to us.

...

This telex is the operative credit instrument and is subject to Uniform Customs and Practice for Documentary Credits 1993 Revision Brochure No 500 International Chamber of Commerce, Paris, France. ...

The course of events

On 26 March 1999, the plaintiff sent the defendant a letter stating that it had advised the content of the credit to the beneficiary, Amerorient, and had added its confirmation to the credit. In the same letter, the plaintiff gave particulars of the credit and stated that it was for an amount of US$1,333,600 which was `available by def payment`.

On the same day, 26 March 1999, the plaintiff negotiated the letter of credit and made payment to Amerorient of the amount of US$1,333,466.64. Contemporaneously it sent to the defendant two documents each entitled `Covering Schedule - Export Bills`. Under cover of each of these schedules, the plaintiff forwarded to the defendant all the documents called for under the letter of credit including two drafts. Each draft was for the sum of US$654,264.16. There was a box at the top of each covering schedule. This box was divided into four compartments bearing the following headings, viz `Our reference`, `L/C Number`, `Amount` and `Tenor`. In each box entitled `Tenor`, the plaintiff inserted the words `180 days fr Date of nego- due on 21 Sept 99`. The plaintiff had obtained the due date of each payment by the defendant by taking 180 days from 26 March 1999. Each schedule also requested the defendant to please confirm the maturity date as soon as possible by tested telex or SWIFT.

On 31 March 1999, the defendant sent the plaintiff two telexes, one referring to each of the two sets of documents forwarded to it by the plaintiff. The two telexes were in practically identical terms and after giving the relevant reference numbers each stated `Documents for USD654,264.16 accepted to mature for payment on 21 Sept 99 ... On the said date, we will remit proceed as per your instructions`.

On 22 April 1999, the defendant sent the plaintiff a telex requesting copies of the bills of lading and invoices for its internal audit purposes, by fax as well as by courier. The plaintiff complied with this request by faxing out copies on 26 April and couriering the hard copies of the documents on 27 April.

Nothing further happened until 25 May 1999 when the defendant sent the plaintiff a telex advising the plaintiff that `by reason of a serious fraud suspicion, [the plaintiff] would not be in a position to effect ... payment` under the letter of credit. The defendant went on to say that the plaintiff should retain and refuse any payment to any beneficiary under the credit until further notice from the defendant and that any payment that had been effected by the plaintiff would be deemed by the defendant to have been done by the plaintiff `under [its] own and exclusive responsibility only`. The plaintiff responded the next day and asserted that it had confirmed and negotiated documents in strict compliance with the terms of the credit and that on the due date the defendant was to effect payment according to the plaintiff`s instructions as the defendant had itself confirmed by its tested telexes in March.

The defendant did not pay the plaintiff on 21 September 1999 or thereafter. The basis of this refusal was that there had been fraud by the beneficiary and as such fraud was discovered before the maturity date no payment was due. This action was commenced by the plaintiff in January this year to enforce recovery.

The Uniform Customs and Practice for Documentary Credits (`UCP`)

The letter of credit was subject to the UCP (1993 Revision ICC No 500). For the purposes of this

case, the relevant articles are arts 9 and 10. These reflect the four types of letters of credit recognised in the UCP. I am concerned with only two of these types: the negotiation credit and the deferred payment credit. The portions of arts 9 and 10 which are relevant to these types of credit are set out below:

> *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 ...*
>
> *ii If the Credit provides for deferred payment - to pay on the maturity date(s) determinable in accordance with stipulations of the Credit;*
>
> *iii ...*
>
> *iv ivIf the Credit provides for negotiation - to pay without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as additional document(s).*
>
> *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 additional 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:*
>
> *i ...*
>
> *ii If the Credit provides for deferred payment - to pay on the maturity date(s) determinable in accordance with the stipulations of the Credit;*
>
> *iii ...*
>
> *iv If the Credit provides for negotiation - to negotiate without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as additional document(s).*
>
> *Article 10*

Types of Credit

a All Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation.

b

i ...

ii Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation.

c ...

d By nominating another bank, or by allowing for negotiation by any bank, or by authorising or requesting another bank to add its confirmation, the Issuing Bank authorises such bank to pay, accept Draft(s) or negotiate as the case may be, against documents which appear on their face to be in compliance with the terms and conditions of the Credit and undertakes to reimburse such bank in accordance with the provisions of these Articles.

Distinction between deferred payment credit and negotiable credit

As can be seen from the articles of the UCP quoted above, a deferred payment letter of credit is one whereunder the beneficiary of the credit only receives payment at the maturity of the credit. Thus, it is the obligation of the issuing bank and the confirming bank (in the case of a confirmed credit, as is the case here) to pay the beneficiary at maturity. This position was accepted by Langley J in the English case of **Banco Santander SA v Bayfern Ltd & Ors** (Unreported) , decided in the Queen`s Bench Division of the High Court on 9 June 1999) whose decision was subsequently upheld on appeal.

The ***Banco Santander*** case also confirmed that a bank which confirms a deferred payment letter of credit has no authority from the issuing bank to make payment to the beneficiary by way of a discount or an advance ahead of the maturity of the credit. It may do so but such an arrangement is strictly between itself and the beneficiary and does not bind the issuing bank. Where there is fraud on the beneficiary`s part therefore, a confirming bank which has discounted or advanced money prior to the maturity date of the credit bears the risk of the fraud. It cannot seek reimbursement from the issuing bank. Langley J stated the proposition as follows:

> *The basic authority given by the issuing bank to the confirming bank in a deferred payment letter of credit is to pay at maturity. The consequent obligation to reimburse is to reimburse on payment being made at maturity. If at that time there is established fraud, there is no obligation on the confirming bank to pay nor on the issuing bank to reimburse.*

A negotiable letter of credit on the other hand entitles the negotiating bank to buy over or otherwise give value for the documents and drafts drawn by the beneficiary and present these under the credit

in its own name to the issuing bank, for payment at maturity. See ***Documentary Credits*** by Raymond Jack at p 135. Unlike in the situation of a deferred payment credit, a negotiating bank is permitted to make payment to the beneficiary without waiting for maturity of the credit. It buys over the documents on presentation and that is the essence of negotiation. Fraud on the beneficiary`s part does not affect a negotiating bank unless the negotiating bank is itself a party to or has knowledge of the fraud.

The defendant`s stand

The defendant took two approaches to the action. Its first approach was to contend that the credit in question had to be construed as a deferred payment credit rather than a negotiation credit and since there was a suspicion of fraud on the part of the beneficiary, there would have to be a trial before it could be established whether it was liable to reimburse the plaintiff. Secondly, the defendant contended that there were various questions of fact which arose in this case which could not be resolved by way of an originating summons and that the matter must go to trial.

What kind of credit did the defendant issue?

In **Sinotani Pacific Pte Ltd v Agricultural Bank of China** [1999] 4 SLR 34 , the Court of Appeal had to decide whether the letter of credit involved in that case was a negotiation credit. It held that this issue had to be decided by construing the credit. In finding that the credit in that case was not a negotiation credit, Goh Joon Seng J, who delivered the judgment of the court stated (at [para] 17):

> *We also found that the credit was a straight, as opposed to a negotiation, credit. Whether or not a letter of credit allows for negotiation is a matter of construing the credit. See* ***Documentary Credits*** *(supra), para 2.25. A typical example of the wording used in a negotiation credit would be as follows:*
>
> *`We [the issuing bank] hereby engage with drawers and/or bona fide holders that drafts drawn and negotiated in conformity with the terms of the credit will be honoured by us and that drafts accepted with[in] the terms of this credit will be duly honoured at maturity.`* ***(Chinsim Trading (Pte) Ltd v Indian Bank*** *[1993] 2 SLR 144 at 146.)*
>
> *If the words used in a letter of credit are unclear, the courts are generally reluctant to treat it as a negotiation credit. See* ***Southern Ocean Shipbuilding Co Pte Ltd v Deutsche Bank AG*** *[1993] 3 SLR 686 . In the present case, although Condition 47A.5 as well as the evidence of the respondent`s witnesses in their affidavits of evidence-in-chief suggested that the parties did intend negotiation to be available under the credit, albeit only with RBC, we noted that the respondent`s payment undertaking in Condition 78 ([para] 4, supra) did not expressly extend to bona fide holders of drafts drawn under the credit, contrary to the wording usually used in negotiation credits (supra). Furthermore, the application form for the letter of credit did not state that the credit was to be available by negotiation, even though this could easily have been done. Instead, the form simply provided that the credit was to be available by acceptance of drafts.*

I noted from the above that in my task of construing the credit here I should be reluctant to treat it as a negotiation credit if the words in it were unclear.

In my view, the proper construction of this credit showed it to be a negotiation credit. In construing a letter of credit, as in the construction of any other contract, one must look at the document as a whole and not at certain phrases in isolation. In this connection, the most important sentence in the credit was the one near its beginning which stated `Available against presentation of drafts at 180 days from the date of negotiation by deferred credit`. The fact that the words `deferred credit` appeared in that sentence did not in my mind detract from the vital points that in order to obtain payment under the credit, drafts would have to be presented for payment to be made 180 days from the time those drafts had been negotiated. Drafts in themselves are negotiable instruments and the inference to be drawn from the use of the word `drafts` instead of documents was reinforced by the use of the word `negotiation` in the same sentence. It appeared to me that the words `deferred payment` were a reflection of the fact that the drafts would not be payable at sight but only after 180 days. They were surplusage but could not detract from the main meaning of the sentence. This interpretation was supported by the further references to negotiation which appeared in special condition 4 and special condition 7. In the latter case, the confirming bank (ie the plaintiff) was expressly instructed that it was not to negotiate under reserve without prior reference to the consent of the issuing bank (ie the defendant). There would have been no need for this instruction had it not been anticipated that negotiation would take place.

Counsel for the defendant argued that the words of the credit were ambiguous and that the plaintiff should have asked for clarification before seeking to negotiate the credit. I did not agree that the addition of the words `deferred payment` at the end of the sentence which dealt with how the credit could be drawn on made the credit ambiguous when the weight of the credit when construed as a whole showed it to be a negotiation credit. I was also not impressed with the argument that it could not be a negotiation credit because of the absence of the undertaking to engage with drawers that the drafts drawn and negotiated in conformity with the credit would be duly honoured at maturity. No doubt the absence of that undertaking influenced the Court of Appeal in Sinotani`s case but the provision there which dealt with the availability of the credit did not refer to negotiation at all but simply stated that the credit was available `by acceptance` and drafts drawn would be honoured on presentation at the bank and drafts accepted within the terms of the credit would be honoured at maturity. The only reference to negotiation there was in the context of negotiation by a specific bank, the Royal Bank of Canada, and the dispute in the Sinotani case did not involve negotiation. It was a dispute between a beneficiary and an issuing bank. In the present case, the wording of the credit was clear enough to indicate its negotiability even without the presence of the undertaking.

It should also be noted that after the plaintiff had negotiated the documents against two drafts, each for US$654,264.16, it sent each draft accompanied by the relevant documents to the defendant under cover of a schedule which stated that the tenor of the drafts was `180 days fr date of nego- due on 21 Sept 99`. That was clear notice to the defendant that the plaintiff had negotiated the drafts. It was also clear that the date of maturity had been determined by counting 180 days from the date of negotiation. Yet the defendant did not respond in any way to notify the plaintiff that the credit was not a negotiation credit or to say that the 180 days should be counted from the date of presentation of the documents rather than from negotiation even if negotiation had taken place. Instead, the defendant replied about a week later to say that the documents had been accepted to mature for payment on 21 September thereby accepting the manner in which the maturity date had been calculated and indicating no objection to that manner.

Counsel for the defendant did argue that the word `negotiation` in the opening part of the letter of credit should be read as `presentation`. His only basis to support this argument was that as it was uncertain whether the letter of credit would be negotiated, the word `negotiation` must mean `presentation` otherwise the date of payment could not be determined. I considered this argument a

non-starter. Even where a letter of credit is admittedly negotiable and the maturity date is determined from the date of negotiation, such an uncertainty would be present, but such uncertainty could not and would not change the nature of the letter of credit. If the defendant`s argument was correct, it would mean that all letters of credit must stipulate that the date of payment is to be calculated solely from the date of presentation of documents. This proposition is not supported by authority.

In ***Sinotani*** , the court considered that the single reference to drafts being accepted was not sufficient to make the credit available for negotiation although drafts are negotiable instruments. In that case, however, the point was not raised as to what would have happened if a draft had been accepted by the issuing bank vis-Ã -vis a holder in due course for example the negotiating bank, and fraud by the beneficiary was subsequently discovered. This question was not raised because the dispute in ***Sinotani*** was not between the negotiating bank and the issuing bank. It was, however, mentioned by Justice Langley in ***Banco Santander SA*** and he opined that a holder in due course would be entitled to payment irrespective of any fraud subsequently being discovered. This principle was confirmed by the Court of Appeal.

In dealing with the construction of the credit, counsel for the defendant referred me to the application form submitted to the defendant for the letter of credit. This stated that the applicant required a deferred payment credit and did not mention anything about negotiability. In ***Sinotani*** , the Court of Appeal referred to the application form for the letter of credit and used that form to bolster its construction of the credit in that case. In the present case, it was not suggested that the plaintiff was aware of the terms of the application form and as such I saw no reason to use it as an aid in construing the credit when the terms of the credit were clear enough. In any case, it is not the practice to forward to an advising or confirming bank the application for the letter of credit together with the credit. The credit is intended to, and must, stand alone as the contractual document between the issuing bank and the beneficiary or the confirming bank as the case may be. As such, the credit must be construed on its own without reference to documents which are not part of it. No doubt courts can and do take into account surrounding circumstances in the construction of contracts. This principle has a very limited application however, in my view, to the situation of a letter of credit as it has to be applied in the light of the other well established principle that letters of credit are independent of the underlying contractual arrangements which they are intended to support. In my opinion, as between the issuing bank and a confirming/negotiating bank, the only circumstances that are relevant to the construction of a credit are the terms of the credit and the correspondence between the banks, if any, in relation to that credit.

The defendant`s own conduct appeared to indicate that before May 1999, it either took the view that the credit was a negotiation credit or was content for the plaintiff to act according to such a notion without feeling any necessity to set the plaintiff straight. Quite apart from the reference to negotiation on the schedules, the original invoices sent to the defendant by the plaintiff indicated that payment terms were 180 days from negotiation. These documents were among those that the defendant accepted without demur on 31 March 1999. Even in April 1999 when it was sent further copies of the documents by the plaintiff, no hue and cry was raised on the various indications that the credit was treated as a negotiation credit.

Were there questions of fact to be tried?

The plaintiff exhibited a credit advice of its payment to Amerorient. Counsel for the defendant submitted that this was not sufficient evidence of payment. To support his argument, he referred to copies of other credit advices from the plaintiff which the defendant had obtained from the records of

Amerorient. His point was that each of these other credit advices contained two signatures whereas the one exhibited in the plaintiff`s affidavit did not have those signatures.

Yet counsel for the defendant stopped short of stating what the defendant`s position was. While he insinuated that the credit advice exhibited by the plaintiff was a forgery, he did not go so far as to assert this. The plaintiff submitted in reply that it was not sufficient for the defendant`s counsel to point to documents here and there without stating what the defendant`s position was. If the defendant did not have enough evidence to assert a position then there was no dispute. I agreed. Further, the defendant itself did not cast any aspersion on the authenticity of the evidence produced by the plaintiff. It could have done so through the affidavits filed on its behalf. Whilst counsel is entitled to present arguments to advance his client`s case, it is not open to him to try and advance a position which is not taken by his client.

In any case, I accepted that the exhibited credit advice read together with the affirmations made in the affidavits filed on behalf of the plaintiff could be and were sufficient evidence of payment by the plaintiff to Amerorient if the document was authentic. There was no evidence before me which was capable of casting any doubt on the authenticity of that credit advice. Further, the credit advices which were exhibited by the defendant were copies of the original documents found in Amerorient`s records whereas the one exhibited by the plaintiff was the file copy retained by the plaintiff for its own records. It is not necessary for the file copy to be signed. Other issues on payment raised by the defence, I found to be quibbles.

Another issue raised by the counsel for the defence was in relation to a scrutiny note which the plaintiff had sent to Amerorient on 26 March 1999 after Amerorient had presented the documents for negotiation under the credit. That document shows that the plaintiff returned the documents to Amerorient and asked for some amendments to be made to them. The point made by counsel was that the documents were in fact negotiated on 26 March itself and he was querying whether such amendments could actually have been effected on the same day as negotiation took place. This seemed to me to be a non-issue. If parties act fast enough (and in the case of negotiation of a letter of credit they have full incentive to do so) they can amend their documents within a few hours. It is simply a question of logistics and determination. In this case the amendments required were not even substantial ones.

Counsel for the defence also pointed out an alleged discrepancy between the documents as presented and the requirements of the credit. This arose, he submitted, because item 7 under the heading `Documents Required` on the credit, required the shipping marks on the bill of lading to be ? SIL SHJ? and though the marks SIL SHJ did in fact appear on the bills of lading they appeared without the question marks indicated in the credit. This was the discrepancy that was not corrected and still existed.

I did not find much substance in this argument. In the first place, the alleged discrepancy seemed to me to be deminimis in that the original insertion of the question marks in the credit itself was probably a typographical error. One does not really expect to see a bill of lading with question marks beside the shipping marks. As counsel for the plaintiff submitted, that would cast serious doubts on the bill of lading.

Secondly, the shipping documents as well as the bills of exchange had been forwarded by the plaintiff to the defendant in March 1999. If there was a discrepancy, it was for the defendant to say so. It never made such an allegation. On the contrary, by its two telex responses of 31 March 1999, the defendant accepted the documents as forwarded. By the time the matter came before me, it was really too late for the defendant to attempt to reject the documents at this stage. See ***Southern***

Ocean Shipbuilding Co Pte Ltd v Deutsche Bank AG . In any case, the defendant itself did not put forward such a position in its affidavit.

The scrutiny note itself showed that at the relevant time, the plaintiff had considered the payment terms to be 180 days of negotiation. One of the amendments requested by, and effected pursuant to, the scrutiny note, was that the invoices were amended to state the payment terms as being `180 days from the date of negotiation`. These invoices were sent to the defendant together with the schedules and as noted earlier, were accepted in toto by the defendant. It did not appear to me that the scrutiny note indicated any factual issues that had to be tried.

Conclusion

After hearing the arguments I was satisfied that the credit was a negotiation credit and that the defendant was legally obliged to reimburse the plaintiff at maturity the amounts paid out by the plaintiff when it negotiated the credit. I did not find any reason why the issues could not be disposed of summarily and should instead be sent for trial. I accordingly gave judgment in favour of the plaintiff. I should add that I did not find it necessary to consider the plaintiff`s alternative arguments on the defendant`s liability to pay it as holder in due course of the drafts since I was satisfied that liability under the credit had been established.

Outcome:

Plaintiff`s claim allowed.