Beam Technology (Mfg) Pte Ltd v Standard Chartered Bank
[2002] SGCA 53

Case Number : CA No 34 of 2002

Decision Date : 10 December 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Kenneth Tan SC, Niko Arthur Isaac and Tito Shane Isaac (Tito Isaac & Co) for the appellants; Toh Kian Sing and Tan Yew Beng David (Rajah & Tann) for the respondents

Parties : —

Banking – Letters of credit – Confirming bank – Whether bank obliged to pay under letter of credit when required document issued by fictitious entity – Whether air waybill forged or a nullity – Whether non-compliance with credit terms – Uniform Customs and Practice for Documentary Credits, 1993 Revision

Civil Procedure – Summary judgment – Whether question suitable for determination as question of law under O 14 r 12 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1 This is an appeal against the decision of the High Court, made on an application for the determination of a question of law under O.14 r 12 of the Rules of Court, where it was held that the respondents, as the confirming bank, were entitled to refuse payment under an irrevocable letter of credit on the ground that a material document tendered by the appellants was a forgery and was null and void.

The facts

2 The material facts leading to the action are straightforward and not in dispute. The appellants, Beam Technology (Mfg) Pte Ltd ('the sellers'), a Singapore company, contracted to sell electronic components to an Indonesian buyer, PT Mulia Persada Permai ('the buyers'). As required under the sale contract, the buyers obtained the issue by PT Bank Universal HO Jakarta of a letter of credit (LC) for a sum of US$277,500 in favour of the sellers. The LC was subject to the terms of the Uniform Customs and Practice for Documentary Credit, 1993 Revision ('UCP 500'). The respondents were the confirming bank of the credit.

3 Under the terms of the LC, one of the documents required to be tendered to draw on the credit was a "full set of clean air waybill …" The buyers notified the sellers that the air waybill would be issued by their freight forwarders, "Link Express (S) Pte Ltd".

4 On 14 July 2000, the sellers presented to the confirming bank the documents required in order to draw under the LC. On 17 July 2000, the confirming bank issued a notice of rejection informing the sellers that there were certain discrepancies in the documents. The particulars of those discrepancies are immaterial for the purposes of this appeal. Two days later, the confirming bank further notified the sellers that the air waybill was issued by a non-existing entity in that there was no company known as "Link Express(S) Pte Ltd". Hereinafter we shall refer to this company as "Link Express". On the evening of the same day, the confirming bank returned all the documents to the sellers on the ground that the air waybill was a forgery. Subsequently, the sellers sought to re-present the documents but the confirming bank refused to accept any further presentation.

5 Following the sellers' commencement of the action to claim for the payment due under the LC, the confirming bank applied to court for a determination of the following question of law:-

> "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.

6 The High Court allowed the application and ruled that the confirming bank was not obliged to pay and dismissed the action. Being dissatisfied with that determination, the sellers have appealed to this court. Besides the substantive issue, the sellers have also raised before us a procedural point, i.e., whether the question posed is an appropriate one to be dealt with under O 14 r 12(1).

Order 14 r 12(1)

7 The argument of the sellers on this issue is that the question posed to the court is not suitable for a determination under O 14 r 12, as it will not fully determine any issue of the action. The sellers' contention is that the confirming bank is not entitled, in the absence of fraud on the part of the beneficiary, to look beyond the face of the documents tendered. What is crucial is compliance on the face of the documents and not compliance in fact. And even if this argument were to be unsustainable, the bank should comply with Article 14 of UCP 500 and it had not so complied because it had not set out in their notice of 17 July 2000, as required under Article 14(d)(ii), all the discrepancies in respect of which the bank refused the documents. So even if there was a third party fraud exception, the confirming bank was precluded from claiming that the documents were not in compliance, having regard to Article 14(e) (quoted below at 11).

8 It is clear that O 14 r 12(1) can be invoked to determine "any issue" in the cause, without it also disposing of the entire cause: see *Payna Chettiar v Maimoon bte Ismail* [1997] 3 SLR 387. The question which the court was asked to determine in the present case would not require the calling of any witnesses, as it was assumed that the air waybill was a forgery and the sellers had obtained and tendered the documents to the confirming bank in all good faith.

9 The sellers seem to be saying that it was not enough merely to assert that the air waybill was forged, the bank must also comply with the notice requirements prescribed under Article 14(d)(ii). The question posed is also flawed as it only focused on the fact of forgery but failed to take into consideration the notice requirements prescribed in Article 14.

10 As we see it, the question posed raises the issue as to whether a confirming bank can, independently of the grounds set out in Article 14 relating to discrepancies, refuse payment on the separate and distinct ground that a material document tendered to draw on an LC is forged and of no effect. Putting it another way, can a confirming bank, in a case where there is no discrepancy in the documents tendered, nevertheless refuse payment because they have reliably established that a material document is forged? Ordinarily such a question, which would be decisive of the action, would be suitable for determination under r 12(1). But for reasons which will become apparent when we proceed to deal with the substantive question, we think that in the circumstances of the present case, there ought to be a trial.

Relevant provisions

11 Turning now to the substantive issue, it is necessary that we should first set out the relevant provisions of UCP 500 which governed the LC in question:-

> Article 3a
>
> Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit
>
> . Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.
>
> Article 4

In credit operations all parties concerned deal with documents

, and not with goods, …

Article 9(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 …

Article 13(a) & (b)

a. Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. ….

b. The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

Article 14 (a), (b), (c), (d) and (e)

a. When the Issuing Bank authorises another bank to pay … or negotiate against documents which appear on their face to be in compliance with the terms and conditions of the Credit, the Issuing Bank and the Confirming Bank, if any, are bound:

i to reimburse the Nominated Bank which has paid, … or negotiated,

ii to take up the documents.

b . Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, … must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. …

c. If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgment approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-Article 13(b).

d. i. If the Issuing Bank and/or Confirming Bank, … decides to refuse the documents, it must give notice …. without delay but no later than the close of the seventh banking day following the day of receipt of the documents. …

ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.

> iii. The Issuing Bank and/or Confirming Bank, if any, shall then be entitled to claim from the remitting bank refund, with interest, of any reimbursement which has been made to that bank.
>
> e. If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article … the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.
>
> Article 15
>
> Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s),
>
> or for the general and/or particular conditions stipulated in the document(s) or superimposed thereon; …." (Emphasis added).

12 It is clear from these provisions of the UCP 500 that the opening of a confirmed LC imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not: see also *Hamzeh Malass & Sons v British Imex Industries Ltd* [1958] 2 QB 127 at 129.

13 The banker is only concerned with documents and what the credit requires them to be, not with goods or the contract which requires them to be paid for. If he does what he is told, he is safe; if he departs from the terms and conditions of the credit, he acts at his own risk. He is not obliged to go behind the documents and to consider whether the terms of the underlying contract conforms to the terms of the LC or whether they have been or will be performed: see Article 3a of UCP 500 and *Equitable Trust Co of New York v Dawson & Partners Ltd* [1927] 27 Lloyd's Rep 49.

14 Therefore, visual inspection of the actual documents presented is all that is called for. Of course, the bank must examine them with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of credit. A bank is under no duty to take further steps to investigate the genuineness of a signature which, on the face of it, purports to be the signature of the person named or described in the letter of credit: see *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 Lloyd's Rep 1.

15 It is also settled law that where a confirming bank has paid on a credit in the face of *prima facie* compliant documents, the confirming bank, and in turn the issuing bank, are entitled to claim reimbursement from the applicant. This was unequivocally stated by Lord Diplock, delivering the opinion of the Privy Council in *Gian Singh* (at 757), in these terms:-

> "The fact that a document presented by the beneficiary under a documentary credit, which otherwise conforms to the requirements of the credit, is in fact a forgery does not, of itself, prevent the issuing bank from recovering from its customer moneys paid under the credit. The duty of the issuing bank, which it may perform either by itself, or by its agent, the notifying bank, is to examine documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. The express provision to this effect in article 7 (now art 15 of UCP 500) of the Uniform Customs & Practice for Documentary Credits does no more than re-state the duty of the bank at common law."

16 However, nowhere in this statement was the Privy Council addressing the situation where the confirming or issuing bank was aware, within the prescribed seven day period and prior to any payment being effected, that a material document tendered was a forgery and nullity. This was not an issue that was before the court in *Gian Singh*. Therefore, the opinion expressed therein, which on the face is broad, must be considered with care. Reasoning by analogy is not always appropriate. As will be discussed shortly, the House of Lords in a case in 1981 recognised that the issue was still open.

17 There is a dearth of authorities touching on this issue. It appears that there are only two cases which expressly dealt with the point although the facts there were not on all fours with the instant case. The first is *United City Merchants (Investments) Ltd & Anor v Royal Bank of Canada & Ors* [1981] 1 Lloyd's Rep 604, where the bills of lading falsely stated that the goods were put on board the vessel on 15

December 1976 at London when in fact it was a day later, on the 16 December, and also not at London but at Felixstowe. The plaintiffs, the beneficiaries, were not aware of the falsehood. The question was whether those bills of lading were a forgery or were they to be treated as valid documents containing inaccuracies. In a sense each of the bills did tell a lie about itself – that it was executed on December 15, when in fact it was executed on December 16. It also contained two lies about its contents – the date of shipment and the place of shipment.

18 At first instance, Mocatta J held that unless there was personal fraud or unscrupulous conduct on the part of the seller plaintiffs, and there was none there, the bank must pay against documents which were *prima facie* conforming. His decision was reversed on appeal. Stephenson LJ, who delivered the leading judgment, said, after reviewing the authorities, (at p. 623):-

> "But whether or not a forged document is a nullity, it is not a genuine or valid document entitling the presenter of it to be paid and if the banker to which it is presented under a letter of credit knows it to be forged he must not pay."

19 Lord Justice Ackner, the second member of the quorum, put the issues presented in these terms (at p.628):-

> If the signature on the bill of lading had been forged, a fact of which the sellers were *ex hypothesi* ignorant, but of which the bank was aware when the document was presented, I can see no valid basis upon which the bank would be entitled to take up the drafts and debit their customer. Mr Hirst was virtually obliged to accept this. A banker cannot be compelled to honour a credit unless all the conditions precedent have been performed, and he ought not to be under an obligation to accept or pay against documents which he knows to be waste paper. To hold otherwise would be to deprive the banker of that security for the advances, which is a cardinal feature of the process of financing carried out by means of the credit: see *Gutteridge and Megrah, The Law of Bankers Commercial Credits, 6th ed.*, at p. 142.

20 However, on further appeal, the decision of the Court of Appeal, holding that the bank was not obliged to pay on the credit because the bills of lading contained falsehoods, was overturned by the House of Lords. The House restored the decision of Mocatta J. In coming to its decision, the House had regard to the following significant features. The goods sold were ready for shipment in the beginning of December 1976. It was intended that the goods would be shipped on a vessel due to arrive at Felixstowe on 10 December 1976. All parties had acquiesced to changing the loading port to Felixstowe instead of London. However, the arrival of that vessel at Felixstowe was cancelled and the loading brokers substituted it with another vessel scheduled to arrive only on 16 December 1976, one day after the latest date of shipment prescribed under the documentary credit. The goods were loaded on that day itself but the loading brokers, acting as agents for the carrier, put the date 15 December 1976 on the bills of lading as if that day was the day on which the goods were received on board. The brokers handed the bills to the sellers in return for payment of the freight. On 17 December, the documents were presented to the confirming bank for payment. Various points of objection relating to the bills of lading were taken. The upshot of it all was that amended bills, together with other documents, were re-presented to the bank on 22 December. The bank refused to pay because it had obtained information "which suggested that the shipment was not effected as it appeared in the bills of lading". The trial judge found that an employee of the loading brokers deliberately made a false entry as to the date of shipment.

21 Lord Diplock, having noted that there was no direct authority on point, whether in the United Kingdom or the United States, went on to state that the issue had to be decided on first principles. He said that in such a nature of international trade, there were four separate but yet interconnected transactions: (i) the contract of sale and purchase; (ii) the contract between the buyer and the issuing bank; (iii) the arrangement between the issuing bank and the confirming bank and (iv) the contract between the confirming bank and the seller. The case only concerned the fourth contract.

22 Lord Diplock observed that the object of this system of confirmed irrevocable documentary credit was to give to the seller an assured right to be paid before he parted with control of the goods and that "does not permit of any dispute with the buyer as to the performance of the contract of sale being used on a ground for non-payment or reduction or deferment of payment." However, he also said that the one established exception to the general statement of principle as to the contractual obligations of the confirming bank to the seller was where the seller "fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue …" The rationale for the exception was the principle "fraud unravels all".

23 Lord Diplock further amplified that the contractual duty between the confirming bank and the issuing bank, and as between the issuing bank and the buyer under the credit, was "to examine with reasonable care all documents presented in order to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit" and if they so appeared, to pay on it. He referred to Article 7 of the then UCP (now Article 15 of UCP 500) which provided that neither the confirming bank nor the issuing bank assumed any liability or responsibility to one another or to the buyer "for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents."

24 His Lordship also noted that there was a distinction between a document which was a nullity and that which only contained some inaccuracies. In respect of the former situation, his Lordship left the question open:-

> "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."

25 But in so far as the inaccuracy as to the date of shipment on the bills of lading was concerned, Lord Diplock was of the view that the bills were far from being a nullity. He said:-

> "It was a valid transferable receipt for the goods giving the holder a right to claim them at their destination, Callao, and was evidence of the terms of the contract under which they were being carried."

Thus the House allowed the appeal on the ground that the bills of lading were not null and void but only that they contained inaccuracies.

26 The question left open in *United City Merchants* came up for consideration in *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2001] 1 All ER (Comm) 368. There, the credit required the presentation of inspection certificates signed by the applicant for the credit, who had provided finance to the buyer of the goods. The buyer informed the seller, the beneficiary under the credit, that one of its employees should sign the inspection certificates on behalf of the applicant. The seller, honestly thinking that it had the applicant's authority, signed the certificates on behalf of the applicant, and presented them for payment. In accordance with the terms of the credit, payment was to be effected 45 days after presentation of the documents. Before the expiry of the 45 day period, it became apparent that the applicant had not given any authority to the seller to sign the certificates. The bank nevertheless paid on it.

27 It was argued that the certificates were a nullity and as the bank knew of it before payment, the bank should not have paid the seller. At first instance, the Deputy High Court Judge (Deputy Judge) held that the seller did not act fraudulently when its representative signed the certificates and that the seller was entitled to payment. The issuing bank was, in turn, entitled to reimbursement from the applicant. The Deputy Judge was of the view that the banks need only consider the documents alone and should not take into account other matters. He felt that the fraud exception should be restricted to a case where there was fraud or knowledge of fraud on the part of the beneficiary or other party seeking payment. He concluded by stating that -

> "the nullity exception should and does form no part of English law. It is unsupported by authority. It provides a further complication where simplicity and clarity are needed. There are problems in defining when a document is a nullity."

28 On appeal, Montrod argued that besides fraud on the part of the beneficiary, there should still, in law, be room for a nullity exception where a document tendered was worthless, which was really a natural extension of the fraud exception. The fraud exception allowed the court to intervene to prevent the perpetration of fraud on the part of the beneficiary or other presenting party. It was contended that surely the court should also intervene where the document presented was a nullity even though the beneficiary did not know it. However, Potter LJ, who delivered the sole judgment of the court, rejected the suggestion of a nullity exception. He said (at p. 273):-

> "The fraud exception to the autonomy principle recognised in English law has hitherto been restricted to, and it is in my view desirable that it should remain based upon, the fraud or knowledge of fraud on the part of the beneficiary or other party seeking payment under and in accordance with the terms of the letter of credit. It should not be avoided or extended by the argument that a document presented, which conforms on its face with the terms of the letter of the credit, is none the less of a character which

> disentitles the person making the demand to payment because it is fraudulent *in itself,* independently of the knowledge and bona fides of the demanding party. In my view, that is the clear import of Lord Diplock's observations in *Gian Singh* and in the *United City Merchants* case, in which all their Lordships concurred. As I understand it, Lord Diplock was of the view that a seller/beneficiary who was ignorant of forgery by a third party of one of the documents presented, or of the fact that the document contained a representation false to the knowledge of the person who created it, should not be in a worse position than someone who has taken a draft drawn under a letter of credit in circumstances which rendered him a holder in due course. While he left open the position in relation to a forged document where the effect of the forgery was to render the document a 'nullity', there is nothing to suggest that he would have recognised any nullity exception as extending to a document which was not forged (i.e., fraudulently produced) but was signed by the creator in honest error as to his authority, nor do I consider that such an exception should be recognised.
>
> That being so, I do not consider that the fact that in this case it was the seller/beneficiary himself who created the document said to be a nullity should *of itself* disentitle him to payment, assuming (as the judge found) that such creation was devoid of any fraudulent intent and was effected in the belief that GK enjoyed the authority of Montrod, as applicant for the credit, to sign and issue the certificate. Although the circumstances were highly unusual, they may none the less be regarded as no more than an illustration of the wide variety of circumstances in which documents come into existence in a commercial context which do not necessarily reflect the factual situation but which parties may none the less employ as a convenient means of progressing a particular transaction. If, in the circumstances of a multipartite transaction, a seller/beneficiary is indeed led to believe that he has authority to create and present a certificate of inspection for the purpose of triggering payment by letter of credit, I do not see why he should be regarded as any less entitled to payment in accordance with UCP 500 than in a case where he receives from a third party a document regular on its face which has, unknown to him, been created without authority." (Emphasis added).

29 Potter LJ also thought that as a matter of policy, the UCP 500, which embodied the international banking practice, should be interpreted and applied to ensure certainty and precision. He felt that if the court were to create a general nullity exception, the formulation of which was insusceptible of precision, that would involve making undesirable inroads into the principles of autonomy and negotiability universally recognised in relation to letters of credit transactions.

30 At this juncture we should refer to a local first instance case, *Mees Pierson N Bay Pacific (S) Pte Ltd & Ors* [2000] 4 SLR 393, where one of the documents required for presentation to the confirming bank, a health certificate, was a forgery. At the time of presentation, neither the seller nor the confirming bank had knowledge of the forgery. The confirming bank accepted the documents and paid the sums under the credit. When it subsequently discovered the forgery, it sought to recover the sum from the seller. Rajendran J dismissed the bank's claim on the basis that the bank had already accepted the documents and made payment under the credit. Further, it had also failed to give the necessary notice of rejection within the period stipulated under article 14(d) of the UCP 500. Rajendran J, however, expressed, *obiter*, the following opinion at 40 of the judgment:-

> When a confirming bank makes a payment out under a commercial credit, the bank holds the documents as security for the payment. However, if the bills of lading are forged and therefore a nullity, the bank would not have any security. To require the bank to make payment when the bank knows that the bills of lading are a nullity is to require the bank to knowingly forgo its security. That would be tantamount to requiring the bank to honour the credit on terms less favourable to the bank than that envisaged under the credit arrangement. (Emphasis added).

Rajendran J would appear to have accepted the reasoning expounded by Ackner LJ in *United City Merchants*.

Our views

31 In summary, the current position of the law would appear to be this. The House of Lords in *United City Merchants* had left open the question whether there is a nullity exception although at the Court of Appeal all the three members of the quorum thought there was. In *Montrod* the Court of Appeal (of a different quorum) was inclined to the view that, apart from the traditional fraud exception (i.e., fraud or knowledge of fraud on the part of the beneficiary or other party seeking payment), there was no separate nullity exception. In any case, even if there was such a nullity exception, it held that the certificate issued by the seller in *Montrod* in honest belief that he had the authority of the applicant of the LC could not be a nullity. Perhaps another way of differentiating *Montrod* from the present case is that there the certificate required was not an essential document but one touching on the question as to the quality of the goods sold. In short, there is no definite authority on point, although the views of the Court of Appeal in *United City Merchants* are no doubt highly persuasive.

32 It seems to us that the issue must be approached on first principles. It is clear that the obligation of the issuing/confirming bank towards the beneficiary is independent and separate from the contractual obligations between the seller and the buyer, and the obligation to pay is absolute irrespective of any dispute that may arise between the seller and the buyer. As far as the confirming or negotiating bank is concerned, their duty is only to verify whether what appears on the documents conforms with what is required by the credit. If there is *prima facie* compliance, the bank is authorised to pay and may claim reimbursement from the issuing bank notwithstanding that a document tendered may subsequently turn out to be a forgery: *Gian Singh*. This is to protect the bank and to ensure the smooth flow of international trade and the avoidance of delay. But we are unable to see why such a rule should also lead to the result that if the confirming or negotiating bank, from whatever source, is able to establish within the prescribed seven day limit that a material document tendered is a forgery, being null and void, the bank is nevertheless obliged to pay.

33 While the underlying principle is that the negotiating/confirming bank need not investigate the documents tendered, it is altogether a different proposition to say that the bank should ignore what is clearly a null and void document and proceed nevertheless to pay. Implicit in the requirement of a conforming document is the assumption that the document is true and genuine although under the UCP 500 and common law, and in the interest of international trade, the bank is not required to look beyond what appears on the surface of the documents. But to say that a bank, in the face of a forged null and void document (even though the beneficiary is not privy to that forgery), must still pay on the credit, defies reason and good sense. It amounts to saying that the scheme of things under the UCP 500 is only concerned with commas and full stops or some misdescriptions, and that the question as to the genuineness or otherwise of a material document, which was the cause for the issue of the LC, is of no consequence.

34 As the judge below observed, UCP 500 does not provide that a bank is obliged to accept a document which is a nullity notwithstanding that the time prescribed under Article 14 for the bank to reject the document has not expired. Thus the nullity exception which we postulate is a limited one and would not have given rise to the sort of problems which Potter LJ had expressed concern:-

> "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."

We are not in any way suggesting that the bank is obliged to investigate into any document tendered. The nullity exception would only permit a bank to refuse payment if it is satisfied that a material document is a nullity.

35 Here, we would like to refer to the following comments of Professor R M Goode in an article in Centre Point entitled *"Reflections on Letters of Credit –1",* where he, in discussing the position of the *bona fide* plaintiff, said:-

> "Is a plaintiff who seeks to enforce a letter of credit affected by forgery of the documents or other fraud in the transaction if he himself acted in good faith? There is a remarkable dearth of authority on this question. Let us start with the beneficiary. He himself has a duty to tender documents which are in order, and the fact that he acted in good faith in tendering forged documents is thus irrelevant. This fundamental point appears to have been overlooked by Mr Justice Mocatta in The American Accord when he held that the beneficiary was entitled to collect payment despite the insertion of a fraudulent shipping date on the bill of lading, since the fraud had been committed by the loading broker who was the agent of the carrier, not of the seller/beneficiary. But this, with respect, is not to the point. The beneficiary under a credit is not like a holder in due course of a bill of exchange; he is only entitled to be paid if the documents are in order.

A fraudulently completed bill of lading does not become a conforming document merely because the fraud is that of a third party."

36 It is our opinion that the negotiating/confirming bank is not obliged to pay if it has established within the seven day period that a material document required under the credit is forged and null and void and notice of it is given within that period. While we recognise that there could be difficulties in determining under what circumstances a document would be considered material or a nullity, such a question can only be answered on the facts of each case. One cannot generalise. It is not possible to define when is a document a nullity. But it is really not that much more difficult to answer such questions than to determine what is reasonable, an exercise which the courts are all too familiar with.

Judgment

37 However there is one fact in this case which troubles us and which, in our view, merits further consideration and it is this. The buyers nominated "Link Express (S) Pte Ltd" as the freight forwarder to whom the sellers should consign the goods. Presumably the buyers would have given the sellers the name of the contact person at "Link Express" as well as the latter's telephone number. The sellers would have contacted the person at "Link Express" to air-freight the goods to the buyers. An air waybill was accordingly issued by "Link Express" for the consignment. Could the air waybill so issued by "Link Express" be considered to be a forgery, as being issued by a non-existent entity, when it was the very entity which the buyer had nominated the seller to deal with? Indeed, one could say that the very document asked for by the buyers was tendered. Could it, therefore, still be considered to be non-compliant or a forgery? These are serious issues which must be answered because they could be determinative of the action. The question posed to the court, pursuant to O 14 r 12 (as set out in 5 above), simply assumed that the document was a forgery and nullity.

38 Accordingly, in our judgment, the questions whether the air waybill constituted forgery and is null and void and whether it amounted to non-compliance with the credit terms, warrant, in the circumstances of the present case, further exploration.

39 In the result, we would allow the appeal and set aside the judgment in favour of the respondents, the confirming bank. The appellants (the sellers) shall have the costs of this appeal, and the security deposit, together with any accrued interest, shall be refunded to the appellants' solicitors. The costs of the hearing below shall be in the cause.

Sgd:

CHAO HICK TIN	TAN LEE MENG
JUDGE OF APPEAL	JUDGE