Privy Council Appeal No. 29 of 1971

The Commercial Banking Company of Sydney Limited *Appellant*

v.

Jalsard Pty. Limited (Trading as Jalsard Trading Company) *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE 1972

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD DIPLOCK
LORD CROSS OF CHELSEA
LORD KILBRANDON

[*Delivered by* LORD DIPLOCK]

This appeal from the Supreme Court of New South Wales arises out of a confirmed irrevocable documentary letter of credit issued by the appellant the Commercial Banking Company of Sydney Limited at the request of the respondent in respect of a shipment of two consignments of decorative battery-operated Christmas lights which the respondent had contracted to buy F.O.B. Keelung for shipment to Sydney from a Taiwan Company, Raymond & Company Limited, (hereinafter called the Seller) who were acting as the respondent's Commission Agent in Taiwan.

The respondent, (hereinafter called the Buyer,) claimed that the appellant Bank accepted documents tendered by the Seller which did not comply with the terms of the letter of credit. These documents were handed over by the appellant Bank to the Buyer against reimbursement of the purchase price of the goods. In the action brought by the Buyer against the Bank, the principal claim was for damages for breach of the contract in accepting the non-complying documents.

There was an alternative claim for damages for negligent advice given by the Bank to the Buyer as to the nature of the documents which should be specified as required by a letter of credit in respect of shipments of goods from Taiwan.

The Supreme Court (Macfarlan J.) held that the documents tendered did not comply with the requirements of the credit and awarded the Buyer damages in the sum of 14,468·30 Australian dollars. Having found in the Buyer's favour for breach of contract, he made no finding on the alternative claim in negligence.

The facts are set out in detail in the careful judgment of the learned Judge but since, in their Lordships' view, the Bank was not in breach of its contractual obligations to the Buyer, only a very brief summary of them is needed to dispose of the principal claim in the action.

The Buyer's requisition for the letter of credit was made to the Bank on 11th July 1967.

It was in the usual form and requested the Bank to authorise the Seller to draw upon the Bank's correspondent in Taipei, (who was in fact the Nippon Mangyo Bank Limited,) for a sum not exceeding 16,920 U.S. dollars, purporting to cover invoice costs F.O.B. of two shipments of battery-operated Christmas lights. The credit required that, in addition to the usual documents, the Seller should tender with the drafts a packing list and should certify on the invoices that each box contained 10 pieces and that each export case contained 12 dozen boxes. On 2nd August 1967 the Buyer wrote to the Bank requesting various amendments to the letter of credit of which the relevant one was the addition to the documents required of a " Certificate of Inspection." The Bank duly advised its correspondent Bank of this amendment. The only dispute between the parties is as to whether certain documents which were tendered by the Seller complied with the description " Certificate of Inspection ".

The disputed documents which were tendered were issued by two firms of Surveyors in Taipei, The International Surveyor Company and the Ho Cheng Surveyor Company Limited. They were in substantially the same form and certified that the Surveyor, at the request of the Seller, did proceed to Keelung Harbour for the purpose of checking upon the quantity and condition of the goods and that they reported as follows:

" PACKING. Each box contains ten pieces and that each export case contains 12 dozen boxes, the shipping marks as stated aforesaid.

CONDITION. The cases were found to be in good condition for ocean transit.

SHIPPING MARK.

JTC
3/12341
SYDNEY
C/NO. 1/70
MADE IN TAIWAN

INSPECTION. The contents was packed in carton box and wooden cases, secured with two bands under supervised by us, for checking the quantity and condition of the contents, with the result as shown below:

C/No.	*Description*	*Quantity*	*Remarks*
1–35	Battery Operated Christmas lights round shape 144 boxes per case 10 pieces per box	420 doz. (35 gross)	The bulb located to keep distance, each one pieces, total 5 bulbs per box
36–70	but Lantern Shape	420 doz. (35 gross)	—ditto—

Total: 70 cases—70 gross—840 dozen—100,800 pieces."

It is to be observed that against the rubric " Inspection " it is stated the Surveyor had supervised the packing of the boxes for checking the quantity and condition of the contents. Although there is no express statement as to what the condition of the contents was, unless the words " the cases " against the rubric " Condition " was intended to include

this, it is a clear implication from the document as a whole that no defects in the goods or in the manner of their packing had been apparent to the Surveyors when they supervised the packing of the goods.

The contention of the Buyer was that a document does not satisfy the description of " Certificate of Inspection " as that expression is used in a documentary credit unless it certifies that in the opinion of the inspector the goods are of an acceptable standard, *i.e.* that they conform to the requirements of the contract under which they have been sold. No evidence was called, however, to prove any usage either in the export trade generally or in the trade of exporting goods from Taiwan by which the ordinary English words " Certificate of Inspection " bear some special meaning. The respondent's claim in contract therefore turns upon the ordinary meaning of these words.

" Certificate of Inspection " is a term capable of covering documents which contain a wide variety of information as to the nature and the results of the inspection which had been undertaken. The minimum requirement implicit in the ordinary meaning of the words is that the goods the subject-matter of the inspection have been inspected, at any rate visually, by the person issuing the certificate. If it is intended that a particular method of inspection should be adopted or that particular information as to the result of the inspection should be recorded, this, in their Lordships' view, would not be implicit in the words " Certificate of Inspection " by themselves, but would need to be expressly stated.

It is a well-established principle in relation to commercial credits that if the instructions given by the customer to the issuing banker as to the documents to be tendered by the beneficiary are ambiguous or are capable of covering more than one kind of document, the banker is not in default if he acts upon a reasonable meaning of the ambiguous expression or accepts any kind of document which fairly falls within the wide description used. (See *Midland Bank Ltd. v. Seymour* [1955] 2 LL. L.R. 147).

There is good reason for this. By issuing the credit, the banker does not only enter into a contractual obligation to his own customer, the buyer, to honour the seller's drafts if they are accompanied by the specified documents. By confirming the credit to the seller through his correspondent bank at the place of shipment he assumes a contractual obligation to the seller that his drafts on the correspondent bank will be accepted if accompanied by the specified documents, and a contractual obligation to his correspondent bank to reimburse it for accepting the seller's drafts.

The banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description. Both the issuing banker and his correspondent bank have to make quick decisions as to whether a document which has been tendered by the seller complies with the requirements of the credit at the risk of incurring liability to one or other of the parties to the transaction if the decision is wrong. Delay in deciding may in itself result in a breach of his contractual obligations to the buyer or to the seller. This is the reason for the rule that where the banker's instructions from his customer are ambiguous or unclear he commits no breach of his contract with the buyer if he has construed them in a reasonable sense, even though upon the closer consideration which can be given to questions of construction in an action in a court of law, it is possible to say that some other meaning is to be preferred.

Their Lordships are of opinion that the documents tendered by the two Surveyors in the instant case clearly fall within the generic description

" Certificate of Inspection ". They record that the goods themselves, as well as the packages, were inspected. This, in the Board's view, would itself be sufficient to comply with the requirements of the credit. In addition, they contain an express statement as to the condition of the cases and an implied statement that the goods contained in the cases were in apparent good condition so far as could be seen in the course of supervising the packing of them.

The Buyer, however, also sought to rely upon certain conversations which had taken place between the Buyer and the Bank, principally in December, 1966, to show that the expression " Certificate of Inspection " was intended by both parties to bear the narrower meaning of a certificate containing a statement by the inspector that in his opinion the condition and the quantity of the goods conformed with the requirements of the contract of sale. The learned Judge was of opinion that these conversations were not admissible for the purpose of construing the document though they were admitted as relevant upon the issue of negligence. Their Lordships agree that the conversations were not admissible on the question of construction. Even if they had been, however, they do not in their Lordships' view establish any mutual understanding of the parties that the expression " Certificate of Inspection " was to be used in letters of credit issued by the Bank in any meaning other than the natural meaning that those words bear.

In these circumstances, no breach of contract by the Bank was established and it is not necessary for the Board to consider the difficult and interesting questions of law as to the alleged ratification by the Buyer of the manner in which the Bank carried out its instructions or as to the proper measure of damages, to which much of the learned Judge's judgment is directed.

As already stated, the learned Judge made no findings upon the alternative claim in negligence. This was originally advanced by an amendment of the statement of claim made shortly before the hearing. As pleaded, the negligence alleged was in respect of advice given to the Buyer by the Bank in December, 1966, in connection with the first purchase made by the Buyer from the Seller of a consignment of snake skins. The advice alleged to be negligent was pleaded as having been given by the Bank in the positive terms: " You should have a Certificate of Inspection. This is a certificate given by your agents certifying that the goods are up to standard at the time of being loaded on the ship." At the trial, however, the Buyer appears to have changed its mind and to have relied upon a negligent omission to advise. As recited by Macfarlan J. the Buyer's case was that the Bank ought to have advised the Buyer that the true meaning of a " Certificate of Inspection " was that the certifier was obliged to state only that he had inspected the goods and not his opinion upon their quality or condition. Before this Board the negligent omission to advise was put in yet another way, viz., that the Bank ought to have advised the Buyer that in connection with a shipment of battery-operated electrical lights, the Buyer ought to require a certificate that the goods had been tested electrically and found to work satisfactorily.

It was submitted by the Buyer that in the absence of any finding by the learned Judge the case should be remitted to him for re-consideration upon the issue of negligence. The relevant evidence on this issue is comparatively short and is available upon the record. The recipient of the advice was Mrs. Wilson, a Director of the respondent company, whom the Judge found to be in general a reliable witness. Even accepted at its face value and rejecting any conflicting evidence by Mr. Carman, the Bank's employee, by whom the advice was alleged to have been given, their Lordships are of opinion that the claim based on negligence is

bound to fail and that, in these circumstances, it would be a misfortune for both the parties to this appeal if they were compelled to incur the expense of a further hearing in the Supreme Court of New South Wales.

In the Board's opinion, the evidence does not establish any request by Mrs. Wilson for advice as to the nature of the Certificate of Inspection required in connection with the purchase of the Christmas lights from Taiwan or any reliance by her upon anything that was said in her discussions with Mr. Carman either in December, 1966, or at any other time about Certificates of Inspection. Nor does it disclose anything said by Mr. Carman in those discussions which was negligent, even if it could be regarded as advice.

All that this evidence really amounts to is that Mrs. Wilson, who had already made the acquaintance of the directors of Raymond and Company Limited while on a visit to Taiwan, had formed a good opinion of their trustworthiness and reliability. As a result, she wished to embark upon the business of importing goods from Taiwan using Raymond and Company Limited as Commission Agents, to procure the goods for her and to sell them on to her as vendors at the price at which they had purchased them plus a commission. At the interview in December, 1966, when she consulted the Bank as to the way in which payments in respect of such transactions could be made, she expressed the wish that the shipping documents to be provided should include a certificate by Raymond and Company Limited that they had inspected the goods before dispatch. The first transaction was for a shipment of snake skins. As Raymond and Company Limited were the Sellers and thus the beneficiaries of the credit, Mr. Carman at first suggested that it was preferable that any Certificate of Inspection should be given by an independent company. Mrs. Wilson was, however, insistent that she could trust Raymond and Company Limited, who were her commission agents, and Mr. Carman acquiesced in this suggestion. Since Mrs. Wilson as buyer from Raymond and Company Limited was in a position to require that any Certificate of Inspection called for by the contract of sale should be made by them and also to give them instructions as her commission agents about the kind of examination or inspection which she wanted them to make of any goods procured for her by them, it was not negligent of Mr. Carman to acquiesce in her suggestion.

The terms of the actual contract between the respondent and Raymond and Company Limited for the purchase of the battery-operated Christmas lights were not disclosed. Correspondence between her and Raymond and Company relating to an earlier consignment of similar goods which was in evidence, suggests that she was expecting them to test the goods electrically themselves. But she never told this to the Bank. In fact the goods upon arrival were to all appearance in good order and condition. Their deficiencies were due to electrical faults which it seems would not be discovered unless they were subjected to prolonged electrical tests.

For all these reasons the alternative claim in negligence would, in their Lordships' view, be bound to fail. They will accordingly humbly advise Her Majesty that this appeal should be allowed and judgment entered for the appellants with costs here and below.

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In the Privy Council

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED

v.

JALSARD PTY. LIMITED (TRADING AS JALSARD TRADING COMPANY)

DELIVERED BY
LORD DIPLOCK

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