

PT Adaro Indonesia v Rabobank
[2002] SGHC 114

Case Number : Suit 1016/2001
Decision Date : 28 May 2002
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Molly Lim SC with Wang Shao-Ing (Wong Tan & Molly Lim) for the plaintiffs; Oon Tian Seng and Aileen Boey (Joseph Tan Jude Benny) for the defendants
Parties : PT Adaro Indonesia — Rabobank

Banking – Letters of credit – Back-to-back credits – Whether letters of credit act as back-to-back credits – Conformity of documents with terms in letter of credit – Whether documents discrepant – Refusal of payment by issuing bank on account of discrepancies in documents – Whether issuing bank can refuse payment under the letter of credit – Whether issuing bank can set-off third party's debts against payment due to beneficiary under letter of credit

Judgment

GROUND OF DECISION

1. The Plaintiffs are a company incorporated in Indonesia and are engaged in the business of mining coal in South Kalimantan and in the sale and export of coal. The Defendants are bankers carrying on business at their branch in Singapore. In this action, the Plaintiffs claimed US\$1,297,255.06 on an irrevocable documentary credit issued on 13 September 2000 by the Defendants in their favour. There was an alternative claim in conversion and/or conspiracy.
2. The facts were largely not in dispute. On 7 September 2000, Bank of Ayudhya Public Company Limited ("BAP") issued an export letter of credit ("BAP L/C") in favour of G Premjee Trading Pte Ltd ["Premjee (Singapore)"] at the request of TPI Polene, a Thai buyer, to finance TPI Polene's purchase of a cargo of 71,000 (+/- 5%) MT of Indonesian thermal coal from Premjee (Singapore). On 12 September 2000, Premjee (Singapore) applied to the Defendants for an import letter of credit to finance their purchase of the same cargo from the Plaintiffs in order to sell it to TPI Polene. Premjee (Singapore) informed the Defendants that the cargo was pre-sold to TPI Polene which had obtained the BAP L/C and that the original of the BAP L/C would be lodged with the Defendants. The next day, the Defendants issued the import letter of credit ("Rabo L/C") in the Plaintiffs' favour and informed HSBC Jakarta, the Plaintiffs' advising bank.
3. Between 16 and 22 September 2000, the cargo of coal was loaded at the Indonesian port of Banjarmasin on board the vessel MV Cielo Lucia which then sailed to Koh Sichang Anchorage in Thailand to deliver the cargo to TPI Polene.
4. On 25 September 2000, the Plaintiffs faxed copies of the documents required to be tendered under the Rabo L/C to the Defendants. They also sent the originals of the draft survey report and the certificates issued by third party independent surveyors as required under the Rabo L/C.
5. On 27 September 2000, Premjee (Singapore) sent the Defendants a negotiation schedule enclosing the documents to be tendered for negotiation under the BAP L/C. These included the 3/3 original bills of lading and the originals of the certificates. In the negotiation schedule, Premjee (Singapore)'s special instructions were that the negotiation was to be against the Rabo L/C and that, upon receipt of funds, the Defendants were to contact Premjee (Singapore) for disposal instructions.

6. On 4 October 2000, the Defendants received Premjee (Singapore)'s negotiation schedule and the said documents. The next day, the Defendants checked the documents and noted some discrepancies. On 6 October 2000, Premjee (Singapore) instructed the Defendants to send the full set of documents to BAP for payment. The Defendants did so. That same day, the Defendants received documents tendered by HSBC Jakarta in respect of the Rabo L/C. These included the original Mate's Receipt and copies of the certificates.

7. On 9 October 2000, the Defendants sent a SWIFT message entitled "Advice of Refusal of Documents" to HSBC Jakarta pointing out the following discrepancies in the documents submitted :

- "1. L/C amt overdrawn by USD18,722.56
2. Cert of sampling and analysis show shipper's address which differ fm LC
3. Inv and cert of qly, under gross calorific value omitted 'kcal/kg'
4. Cert of qly on initial deformation temp omitted 'min'
5. Mate's Receipt –
 - A) Not faxed to G. Premjee Ltd, Bangkok and G. Premjee Tdg Spore.
 - B) Signing capacity not clear, that is, as master or as agent.
6. Cert of sampling n analysis under chlorine show 'kcal/kg' i/o 'min' and under gross calorific value omitted 'kcal/kg min'."

The message went on to state that it "constitutes our refusal of documents and is sent in accordance with article 14 of the UCP for documentary credits (ICC pub no. 500)". However the Advice of Refusal also stated that :

"Nevertheless, we have referred the above matter to the applicant and await their response of acceptance of discrepancy/ies or otherwise. Meanwhile documents are held at your risks".

8. On 10 October 2000, the Defendants faxed to Premjee (Singapore) eight pages of documents which included the Arrival Notice dated 9 October 2000 signed by the Defendants' Doris Tan Choon Ee (Assistant Manager in the International Trade Services Department) and Edwin Tan (Deputy Manager). The Arrival Notice stated in bold lettering :

"Kindly let us have your acceptance and settlement instructions on the attached 'Customer Advice' by 12/10/00.
All terms and conditions of the L/C have been complied with".

The Customer's Advice which was to be signed by Premjee (Singapore) stated :

"We hereby confirm acceptance of discrepancy/ies noted if any stated as per your 'T/T Reimbursement Advice' or 'Arrival Notice' dated 09/10/00."

Two sets of bills of exchange for the amount of US\$1,297,255.06, the value of the Plaintiffs' invoice and the subject of the claim here, were also included.

9. On the same day, the Defendants sent a SWIFT message to BAP to enquire about the status of the bills of exchange drawn on the BAP L/C for the amount of US\$1,720,546.50 which had been sent to BAP. Also on that day, HSBC Jakarta advised the Plaintiffs of the Defendants' Advice of Refusal in the following manner :

"We have received rejection telex/advice from the issuing bank for the above bill(s) which is/are a valid discrepancy(ies).

In order to obtain payment from the issuing bank :

- Kindly contact buyer to accept the discrepancy(ies) and to immediately pay the bill(s)
- Kindly advise us your further instruction."

The Plaintiffs immediately wrote to Premjee (Bangkok), which was one of the companies in the Premjee Group, to accept the discrepancies. The Plaintiffs' Marketing Administration Manager, Akhmad Sugiarto, was then advised by A. S. Krishnan of Premjee (Bangkok) that the documents had been accepted.

10. On 11 October 2000, the Defendants received the aforesaid Customer's Advice signed by Premjee (Singapore) confirming acceptance of any discrepancies noted. A date and time print of the Defendants appearing on this document showed that it was received by the Defendants' Bills Department at 11.44 am on 11 October 2000. That same day, Premjee (Singapore) was placed under interim Judicial Management.

11. At sometime past noon on 12 October 2000, the Defendants received a SWIFT message from BAP confirming that they had instructed their New York bankers to pay US\$1,720,496.50 under the BAP L/C to the Defendants. At 5.17 pm that day, the Defendants sent an amended Arrival Notice to Premjee (Singapore). In this amended Arrival Notice, the original words "All terms and conditions of the L/C have been complied with" were crossed out and replaced with the typewritten words "We have noted the following discrepancies (Plse refer swift attached)". The Defendants' evidence on the correction of the Arrival Notice was that some temporary staff prepared it and made a mistake by clicking the wrong check button thereby generating the standard clause document stating that all terms and conditions of the L/C had been complied with. Both the officers who signed this document had somehow failed to notice the fundamental error.

12. On Friday, 13 October 2000, the Defendants received payment under the BAP L/C. On Monday, 16 October 2000, they proceeded to use the funds received to settle the amount of the freight loan and interest thereon amounting to US\$352,370.96 advanced by them to pay for the freight charges for the cargo of coal. The balance was retained and used to set off part of the debts owing by Premjee (Singapore) to the Defendants. It was not sufficient to discharge the huge debts owing to the Defendants.

13. An email dated 18 October 2000 from A. S. Krishnan of Premjee (Bangkok) to the Plaintiffs confirmed that they had "already accepted the discrepancies in the documents presented" and asked the Plaintiffs to check with their bank.

14. On 20 October 2000, HSBC Jakarta sent a SWIFT message to the Defendants stating that they had not received the Defendants' acceptance advice and asking for the reasons for the non-acceptance. They also asked the Defendants, if the coal had arrived at the destination, to confirm

that the coal had been stored and insured in accordance with their instructions.

15. That same day, the Defendants replied by SWIFT to HSBC Jakarta, referring to their advice of refusal of documents dated 9 October 2000 and reiterating the discrepancies in the documents. The Defendants stated that they would return the full set of documents by DHL courier service that day.

16. On 2 November 2000, the solicitors for the Judicial Managers of Premjee (Singapore) wrote to the solicitors for the Defendants confirming that the company had replied to the Defendants accepting the discrepancies on 10 October 2000 and stating that the Defendants were therefore obliged to accept the documents and effect payment under the Rabo L/C. The Defendants' solicitors replied the same day stating that "notwithstanding G Premjee Trading Pte Ltd's indication that they will accept all discrepancies, (the Defendants) do not agree that they are consequently obliged to accept the documents and effect payment" under the Rabo L/C. The letter went on to say that such payment would result in Premjee (Singapore) incurring a fresh debt of about US\$1.3 million and asked if the Judicial Managers would be personally liable for this expense.

17. The Plaintiffs argued that the Rabo L/C was issued on a back-to-back basis with the BAP L/C and that the understanding of all involved was that payment under the BAP L/C would be used to satisfy the amount owing under the Rabo L/C. They also contended that the documents, properly read and understood, were not discrepant and that even if they were, the Defendants were estopped by their conduct and the previous course of dealings between the Plaintiffs and the Defendants in respect of two other shipments from refusing payment. They also claimed that the Defendants were guilty of having converted the Plaintiffs' goods and documents of title.

18. The Defendants contended that the discrepant documents justified the refusal of payment. Further, when Premjee (Singapore) was placed under Judicial Management, they were entitled to utilize the money received from BAP to set off part of the outstanding debts owed by the company to them.

The Decision of the Court

19. Gutteridge and Megrah's Law of Bankers' Commercial Credits (8th Edition) states :

"5-21 The benefit of an irrevocable credit which is not expressed to be transferable may be made available to a third party where a beneficiary uses the original credit in his favour as a security for a credit in favour of his supplier opened either by the intermediary bank or by his own bank. This is called a back-to-back credit. The original credit is delivered by the prime beneficiary to the bank issuing the back-to-back credit. There are thus three banks involved : (i) the bank issuing the original credit, (ii) the intermediary bank through which the credit is advised to the beneficiary and to which the documents required must be presented, and (iii) the bank issuing the second credit against the security of the first.

...

5-23 Back-to-back credits are not without risk. The documents tendered to the issuing bank by the intermediary must be those called for by the issuing bank or the credit will not be realizable and the bank issuing the back-to-back credit will not have the security of the original credit, for he will not be able to comply with

its terms. "

20. The Plaintiffs said the Rabo L/C was a back-to-back credit with the BAP L/C and payment under the first was to be secured against funds received under the second. This was evidenced by the Defendants' facility letter to Premjee (Singapore) requiring all of the Defendants' import L/Cs to be supported by acceptable export L/Cs and requiring the original BAP L/C to be lodged with the Defendants. It followed from this contention that when funds were received under the BAP L/C, the Defendants could not refuse payment under their Rabo L/C. On the other hand, the Defendants contended that the documents called for under the Rabo L/C were copies of the requisite certificates and the Mate's Receipt while those required under the BAP L/C were the original certificates and the bills of lading. The Plaintiffs contended, however, that the goods involved were the same and the substance and nature of the documents called for were also the same.

21. In my view, the two L/Cs in question were back-to-back transactions only in the sense that they dealt with the same cargo sold by the Plaintiffs to Premjee (Singapore) and then on-sold by Premjee (Singapore) to TPI Polene. They remained two separate transactions and two separate L/Cs. The documents simply did not match even if one set contained the copies while the other contained the originals. The arrangement could not mean that receipt of payment under the BAP L/C necessarily triggered off the obligation to pay under the Rabo L/C. Similarly, payment under the Rabo L/C was not dependent on receipt of funds under the BAP L/C first. As counsel for the Defendants put it rhetorically, "If the documents under the Rabo L/C were compliant and the documents under the BAP L/C were not, would the Plaintiffs agree that we need not pay them because we have not been paid by BAP?". It was plain that the Defendants here were not merely a conduit for the payments.

22. Were the documents discrepant? That would be a question of fact in each case. The Plaintiffs accepted the legal position that documents tendered to the issuing bank for negotiation of a L/C must comply strictly with the terms of the L/C. They contended, however, that strict compliance did not mean literal compliance to the extent of dotting the "i" and crossing the "t", that insignificant or trivial differences such as typographical errors in names ought not to be regarded as discrepancies justifying refusal of payment under a L/C and that documents should be treated as having conformed to the requirements of a L/C so long as, properly read and understood, they did not contain any discrepancy which called for an inquiry or investigation or invited litigation. For these propositions, the Plaintiffs relied on the earlier cited authority as well as *Documentary Credits (Third Edition)* by Raymond Jack, Ali Malek and David Quest, *Law of Pledges, Guarantees and Letters of Credit (Fourth Edition)* by Poh Chu Chai and the Court of Appeal's decision in *Indian Overseas Bank v United Coconut Oil Mills Inc* [1993] 1 SLR 141. Reference was also made to Article 13 (Standard for Examination of Documents) and Article 14 (Discrepant Documents and Notice) in the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits (UCP 500).

23. The Plaintiffs submitted that the overdrawn on the L/C was not a discrepancy since the tonnage of coal had a 5% margin of difference either way and 74,002 MT compared with the specified 71,000 MT was within that margin. The L/C also had a price adjustment formula and permitted a claim on the basis of the adjusted price. The same formula applied to both the BAP L/C and the Rabo L/C. The BAP L/C was in fact overdrawn by US\$105,226.50 because of this. In the previous two dealings in which the Defendants were the issuing bank, the same price adjustment formula was also present and was applied. The Defendants had prepared and sent bills of exchange for the full amount stated in the Plaintiffs' invoice to Premjee (Singapore) inspite of their assertions. The Defendants were more than adequately covered by the excess paid under the BAP L/C anyway.

24. The Defendants' position was that the invoiced amount could be different subject to the cap put on the amount of credit. The Plaintiffs could have sought an amendment to the Rabo L/C but did

not do so. The Defendants relied on Gutteridge and Megrah which states (at pages 197 and 198) that "it is not open to the beneficiary to claim more than the amount stipulated and where the credit specifies that it is subject to some limitation in amount. The bank may refuse to pay if this condition is disregarded". Article 37 (b) of the UCP states that "unless otherwise stipulated in the Credit, banks may refuse commercial invoices issued for amounts in excess of the amount permitted by the Credit". Further Article 39 (b) of the UCP provides that "a tolerance on the quantity signed of 5% more or 5% less is permissible always provided that the amount of the drawings does not exceed the amount of the Credit". In this case, the commercial invoice tendered by the Plaintiffs was overdrawn beyond the credit tolerance of +/- 5% stipulated in the Rabo L/C.

25. I agreed with the Defendants on this point. It was a discrepancy which was clearly material whatever the excess might have been.

26. Where the discrepancies involving the certificates were concerned, I accepted the Defendants' position that the unit of measurement, and not merely the numbers, ought to have been stated clearly in the test results of the respective certificates. A bank could not be expected to assume a number next to a quality tested must necessarily have used the same unit of measurement as stated in the L/C. Banks are not expected to know detailed trade customs or the jargon used so as to be able to form an opinion whether particular words in a document have the same meaning as the terms used in a L/C (see *English, Scottish and Australian Bank Ltd v Bank of South Africa* [1922] 13 LLR 21). The Defendants' officers were not expected to know the jargon and measurements in the coal trade even if some of them should gain some familiarity over the course of time. Similarly, it would be foolhardy of them to assume that certain numbers have been misaligned on the documents and were meant to refer to words on another line in another column or that certain technical words have been misspelt.

27. Where the Mate's Receipt was concerned, it seemed to me from a cursory look at the document that the agent had signed on behalf of the named master of the vessel and that there was no uncertainty as alleged. The question of faxing over of the Mate's Receipt was no longer in issue.

28. The only discrepancy relied on by the Defendants which I thought bordered very closely on nitpicking was the issue concerning the Plaintiffs' address in the certificate of sampling and analysis being different from that stated in the L/C. The certificate had the Plaintiffs' address as "Jl. Jend. Sudirman kav. 29 – 31" whereas the Rabo L/C stated it as "Jl. Jend. Sudirman kav. 31". All other particulars of the address were the same in both documents.

29. Having found that the Defendants were justified in their view that there were at least some valid discrepancies in the documents, I agreed with the Plaintiffs that the Defendants were estopped from relying on such to refuse payment in the circumstances. The Defendants had stated their stand to the Plaintiffs in their Advice of Refusal of Documents that they would refer the discrepancies to Premjee (Singapore) for acceptance and it was patent that the applicants of the Rabo L/C had accepted all discrepancies and had conveyed such acceptance to the Defendants. The Plaintiffs came to know about this fact. The Plaintiffs had relied on the Defendants' unequivocal position and had therefore not taken any steps to rectify the documents.

30. The amended Arrival Notice was clearly an afterthought and was created by the Defendants because they had got wind of Premjee (Singapore) being placed under interim Judicial Management by then. They decided to set off the funds received against the outstanding debts of the company on 12 October 2000. To achieve that, they had to avoid payment on the Rabo L/C and they sought to do that by feigning an error in their Arrival Notice, knowing that Premjee (Singapore) was in no position to contend with them in the matter. In any event, even if they were entitled to alter their

unequivocal document so fundamentally, the fact remained that Premjee (Singapore) had accepted whatever discrepancies there were and had already informed the Defendants in writing.

31. The Plaintiffs' claim in conversion and their allegation of collusion between the Defendants and Premjee (Singapore) in causing the bills of lading to be improperly issued were not seriously pursued. The contention was that the Defendants, by using the Plaintiffs' documents of title (the bills of lading and the original certificates) in negotiating the BAP L/C and then refusing to pay the Plaintiffs for their cargo, had converted the bills of lading and the cargo they represented. A. S. Krishnan had signed a letter of indemnity on behalf of the charterers of the vessel (another company in the Premjee Group) allowing the cargo to be released without a bill of lading. The discharge in Thailand took place between 28 September and 4 October 2000 and the cargo was therefore gone by the time the Defendants negotiated the BAP L/C on 6 October 2000. There was also no evidence of any such alleged collusion between the Defendants and Premjee (Singapore). Accordingly, the claims in conversion and of collusion failed.

32. It was unconscionable for the Defendants to alter their Arrival Notice on 12 October 2000 and to change their stand and decide on a set off when the funds should have gone to the Plaintiffs. By doing so, they improved their position to the detriment of the Plaintiffs who were entitled to be paid under the Rabo L/C. In any event, the Defendants were only entitled to set off the amount in respect of their freight loan as that arose out of the transaction but were not entitled to set off against what was due to the Plaintiffs (*Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1989] 3 AER 513).

33. In the result, I gave judgment for the Plaintiffs for US\$1,297,255.06 with interest at 6% per annum from the date of the writ till payment. After taking into consideration my findings for and against the Plaintiffs in their claim, I decided to award them 80% of the costs of the proceedings.

Sgd:

TAY YONG KWANG
JUDICIAL COMMISSIONER

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