

Magnum of 11/2

No. 29 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES IN CAUSE
NO. 5160 of 1968

B E T W E E N

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED

Appellant
(Defendant)

AND

JALSARD PTY. LIMITED (Trading as Jalsard Trading
Company)

Respondent
(Plaintiff)

CASE FOR APPELLANT

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
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LONDON W.C.1

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Nature of Proceedings

1. This is an appeal as of right to Her Majesty in Council from a decision of the Supreme Court of New South Wales. The decision was constituted by the verdict found by the Honourable Mr. Justice Macfarlan in his judgment delivered on 22nd June 1970 and the consequential entry on 30th June 1970 of judgment thereon as directed by his Honour. The verdict and judgment were in favour of the Respondent herein for the sum of \$14,468.00 (Aust.)
2. The verdict was found and judgment entered in an action at common law for damages brought by the Respondent against the Appellant. The action was entered in the Commercial Causes List and was heard and determined by the Honourable Mr. Justice Macfarlan sitting without a Jury.
3. Two separate claims by the Respondent were combined in the action. The claims arose out

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of the establishment of documentary credits by the Appellant upon the requisition of the Respondent as the buyer of certain goods and the subsequent actions of the parties in relation thereto

4. The abovementioned verdict was found in respect of the major claim which was made in connection with an irrevocable credit opened overseas. The minor claim which was made in connection with an irrevocable credit opened locally, was rejected by His Honour and may now be disregarded. 10

5. The major claim was founded primarily upon breach of Contract, and in the alternative upon negligence. The breach of Contract was alleged to occur upon the credit being made available to pay the seller of the goods against documents which were accepted as conforming with the specification of the letter of credit for "Certificate of Inspection", whereas they did not conform. The negligence was alleged to arise out of the giving of advice by the Appellant to the Respondent concerning a Certificate of Inspection, in that the Appellant failed to advise the Respondent in certain respects. 20

6. The Appellant denied the existence in the circumstances of the constituent elements of either cause of action, and the right to the damages claimed, and in relation to the alleged breach of contract relied upon an additional defence expressed as ratification and acquiescence arising from the Respondent's actions in indemnifying the Appellant, taking up and dealing with the documents and for an unreasonably long period making no complaint to the Appellant. 30

7. The verdict was based upon a finding of liability against the Appellant upon the issue of breach of contract. His Honour considered it unnecessary to decide and left undetermined the issue of negligence. The evidence adduced on the issue of negligence was extensive and conflicting. His Honour stated in general terms his impressions of the witnesses involved. The judgment does not, except as to a preliminary 40

aspect, examine or review the evidence touching this issue.

Questions Raised by Appeal

8. The questions raised by this appeal in relation to the issue of breach of contract concern principally:

- 10 (a) The nature and effect of the legal relationship created between the Respondent, as the buyer procuring from the Appellant the issue of the subject letter of credit, and the Appellant as the issuing Banker.
- (b) The proper meaning upon the true construction of the relevant documents of the expression "Certificate of Inspection".
- 20 (c) The protection afforded to the Appellant as issuing Banker as to acceptance or examination of documents tendered under the credit established in a transaction subject, inter alia, to Article 31 of Uniform Customs & Practices for Documentary Credits (1962 Revision).
- (d) The effect of the Respondent indemnifying the Appellant, taking up and dealing with the documents accepted by the Appellant under the credit coupled with the absence for a long time of any complaint by the Respondent to the Appellant.
- (e) The remoteness of the damages claimed and the measure of damages recoverable.

30 9. The questions raised by this appeal in relation to the issue of negligence concern -

- 40 (a) Generally the applicability to the factual and legal situation in this case of the principles established by the decision of the House of Lords in Hedley Byrne & Co. Limited v. Heller & Partners Limited (1964 A.C. 465), and expounded by the Privy Council in the Mutual Life & Citizens Assurance Co. Limited v. Evatt (44 A.L.J.R. 478).

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- (b) In particular -
- (i) Whether advice was given by the Appellant to the Respondent concerning Certificates of Inspection
 - (ii) Whether the claim was for failure to give advice, and if so whether the Appellant could be liable in respect thereof
 - (iii) Whether the parties were not in relevant respects merely dealing with each other contractually. 10
 - (iv) The causation and remoteness of the damages claimed.

Summary of Events

10. (a) The transaction in relation to which the Respondent's major claim arose, originated with the submission by the Respondent to the Appellant on 11th July 1967 of a requisition in writing for the establishment of a documentary letter of credit with the Appellant's Agents in Taiwan authorising payment to the seller Raymond & Co. Limited for goods bought by the Respondent to be shipped to Sydney Australia in two shipments. By confirmation in writing dated 12th July 1967 the Appellant confirmed to its Agent in Taiwan the opening of the irrevocable credit pursuant to the said requisition. Following the request in writing dated 2nd August 1967 of the Respondent the letter of credit was amended by the Appellant by, inter alia, adding the requirement as an additional document of a "Certificate of Inspection". 20
- p.359
p.201 ll.
8-12
- p.361
- pp.362
363
- (b) The first shipment was on or about 3rd September 1967 on board the vessel "Taiyuan", and the second shipment was on or about 3rd October 1967 on board the vessel "George Anson". 30
- p.206 l.12
- (c) Included amongst the documents accepted by 40

- the Appellant's Agent in Taiwan in respect of the first shipment was a document dated 4th September 1967 styled "Survey Report" provided by International Surveyor Co. Limited. Included amongst the documents accepted by the Appellant's Agent in Taiwan in respect of the second shipment was a document dated 4th October 1967 styled "Inspection Certificate" provided by Ho Cheng Surveyor Co. Limited.
- 10 (d) His Honour said of each of these documents:
- "It was acknowledged that a Certificate was received by the Defendant's Agent, but it was argued that this Certificate was simply a Certificate that the goods had been inspected and did not express the opinion of the certifier about the condition or quality of the goods at or shortly before the time of shipment"
- 20 (e) The seller of the goods was paid accordingly in respect of each shipment.
- (f) On 4th October 1967 the Appellant advised the Respondent that it was holding the shipping documents in respect of the first shipment under the Letter of Credit and requested payment therefor. On 9th October 1967 the Respondent paid the Appellant by cheque, and took up the documents and negotiated them. On 1st November 1967 the Appellant advised the Respondent that it was holding the shipping documents in respect of the second shipment under the Letter of Credit and requested payment therefor. The Respondent paid the Appellant by cheque, and took up the documents and negotiated them.
- 30 11.(a) The Respondent sold both consignments to Gollin & Co. Limited, which after receiving the shipping documents from the Respondent and obtaining possession of the goods, marketed them to retailers.
- 40 (b) The goods were found to be damaged or of defective quality with the result that they

p.201 1.53

p.202 1.10

p.370
pp.378-379

p.172
ll. 1-15

p.203 1.24

pp. 416, 417
420 207
ll.6-40

p.207
ll.44-48

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p.201 1.26
p.207 11.
48-50

were substantially unsaleable. Thereupon the rejected goods were returned to the seller in Taiwan.

p.216 1.1

(c) The Respondent requested reimbursement from the seller but received from it only the sum of \$2,901.04. The Respondent incurred other charges and expenses in relation to the goods.

p.85 1.34

p.85 1.24

p.211 1.50
p.207 1.36

12. In October 1967 the Respondent was aware of defects in the goods and before Christmas 1967 that such defects were substantial. The officers of the Respondent concerned with taking up and paying for the documents had actual knowledge of their contents, and by November 1967 the Respondent had actual knowledge of the alleged defects in the Certificates of Inspection. Despite intervening correspondence and conversations between the parties no complaint was made by the Respondent to the Appellant that it had acted outside its mandate under the terms of the Letter of Credit until 13th June 1968, when the Respondent through its Solicitors alleged that no Certificate of Inspection was received before payment was made to the seller of the goods.

p.86 11.21
25
p.87 1.7

13. The goods in question were battery operated Christmas lights shipped packed in individual boxes which themselves were packed in wooden cases secured with bands. The defects in the lights of which the Plaintiff complained were substantially, if not entirely, not discoverable by visual inspection of the lights after removal from their individual boxes, but only by physical testing.

14. (a) The major claim of the Respondent as pleaded was based upon conversations and transactions between the parties antecedent to the above mentioned transaction initiated by the requisition dated 11th July 1967. The Respondent adduced this evidence of antecedent events for two purposes. The first purpose was to ground the allegation that the document referred to in the letter of credit as amended as "Certificate of Inspection" was by reason thereof intended by the Respondent and

understood by the Appellant to mean a Certificate of Inspection by Raymond & Co. Limited - which as well as being the seller was also the Agent of the Respondent in Taiwan - "certifying that the goods were up to standard at the time they were loaded on the ships upon which they were to be carried".

p.200 1.30

10 The second purpose was to lay the foundation for the allegation of negligence on the part of the Appellant in advising the Respondent in connection with the necessity for and specification of the Certificate of Inspection as alleged to have been recommended by the Appellant to the Respondent.

p.201 1.4

20 (b) The evidence concerning antecedent conversations and transactions commenced with introductory conversations in December in 1966 as to which the recollection of the witnesses conflicted. His Honour preferred to accept in substantial respects the evidence of the principal witness for the Respondent, to the effect that she sought advice from officers of the Appellant concerning the import of goods from Taiwan and that they advised her, inter alia, to protect the Respondent in respect of goods imported from Taiwan by means of obtaining a Certificate of Inspection, and that the best means of paying the seller was by a documentary letter of credit.

p.199 1.50

30 (c) Some five transactions ensued between December 1966 and July 1967 in which the Appellant established documentary credits in Taiwan upon the requisition of the Respondent as the buyer of goods from Raymond & Co. Limited.

40 (d) At the inception of each transaction prior to the completion and signature by the Respondent of a form of requisition by it to the Appellant conversations occurred in relation to provisions for a Certificate of Inspection as an additional document to be specified in the relevant letter of credit. The evidence as to these conversations was conflicting but his Honour preferred the recollection of the Respondent's principal witness.

p.218 1.4

History of Proceedings on Issue of Breach of Contract

- p.200 11.60-62
- 15.(a) On the issue of breach of contract, His Honour upheld the contention of the Appellant that the evidence as to antecedent events was irrelevant. Thus the case of the Respondent as pleaded on this issue failed.
- (b) However, it was argued on behalf of the Respondent that the expression "Certificate of Inspection" either according to its ordinary meaning, or considered in the context of the contractual relations between the parties, must be regarded as expressing an intention that the Certificate should express the certifier's opinion upon the quality or condition of the goods inspected. 10
- (c) The Respondent further argued that the Appellant was contractually bound by the terms of the requisition and of the letter of credit to ensure by examination of the documents tendered by the seller and otherwise, that in respect of each shipment of goods a Certificate of Inspection as so construed was received before the price was paid to the seller. 20
- (d) The Respondent further argued that as the price was paid to the seller under the credit against acceptance by the Appellant as "Certificates of Inspection" documents which did not certify as to the condition and quality of the goods, it committed a breach of its contract with the Respondent. 30
- (e) The Respondent further argued that the damages claimed were recoverable as representing the proper measure of the Respondent's loss, and that such loss was not too remote in accordance with the general principles for assessment of damages for breach of contract. 40
- (f) The Respondent also argued that a defence of ratification did not exist because -

- (i) The relationship between the parties was that of Banker and Customer, not that of principal and agent,
- (ii) The facts did not establish ratification
- (iii) The Respondent was contractually bound by Clause B of the requisition to reimburse the Appellant upon demand
- 10 (iv) The Respondent merely accepted the benefit of its Contract with the Appellant, without affecting the Respondent's right to sue for damages for breach of contract.

16. The foregoing case of the Respondent upon the issue of breach of Contract as argued at the hearing was met by arguments on behalf of the Appellant to the following effect :-

- 20 (a) No contract was created between the Respondent and the Appellant by the acceptance of the requisition
- (b) No promise was made or obligation undertaken by the Appellant to obtain the documents specified in the letter of credit
- 30 (c) The rights and obligations created between the parties in the transaction were confined to the creation of an entitlement in the Appellant which dealt in documents, to be indemnified by the Respondent in the event of the stipulated conditions precedent to such right of indemnity being fulfilled - namely the receipt by the Appellant of the documents specified in the Letter of Credit issued by it.
- 40 (d) The transaction between the parties was composed of the amended requisition by the Respondent for the letter of credit, the opening by the Appellant of the irrevocable credit, the subsequent receipt by the Appellant of the documents, and the

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indemnification of the Appellant by the Respondent upon uplifting the documents from it. In so far as the transactions be considered to be contractual, the whole of its terms were expressed in the requisition as amended.

- (e) The expression "Certificate of Inspection" meant upon its true construction a document certifying the fact of an inspection having been made without any necessity that it should state also the certifier's opinion of the quality or condition of the goods inspected. 10
- (f) The Appellant was not concerned to examine the contents of the Certificates tendered and described as Certificates of Inspection. Article 31 of Uniform Customs & Practice for documentary credits (1962 Revision) relieved the Appellant from any obligation to ensure that a document described as a Certificate did in truth certify in accordance with its description. 20
- (g) If the Appellant had acted outside its mandate -
 - (i) The relationship between the parties in the subject transaction being that of principal and agent, the Respondent's conduct constituted a ratification of the act done in excess of authority. 30
 - (ii) The conduct of the Respondent is to be characterised as ratification as understood in the special and extended sense of this term adopted in the special class of case involving documentary credits
 - (iii) Clause B of the requisition was not applicable upon the facts and, while giving the Appellant some added protection, did not alter the basic nature of the rights and obligations created between the parties in relation 40

to a documentary letter of credit and the fundamental conditions precedent to payment

(h) The damages claimed did not flow from the breach complained of

(i) The Respondent failed to mitigate its loss

Findings of Trial Judge on Issue of Breach of Contract

10 17. The findings of Macfarlan J. upon the abovementioned respective arguments on the issue of breach of contract may be summarised as follows :-

(a) A contract was created between the parties by the Respondent's offer in the form of the requisition for a documentary letter of credit as amended and the Defendant's acceptance of such offer in agreeing to establish the credit, the terms of the contract being those stated in the requisition as amended. p.210 1.30 p.200 1.56

20 (b) The expression "Certificate of Inspection" as used in the subject contract meant upon the true meaning of this contract a document stating the certifier's opinion of the condition of the goods. p.203 1.40

(c) The contract was subject to the provisions of Uniform Customs & Practice for Documentary Credits (1962 Revision) International Chamber of Commerce Brochure No. 222. It is consistent with Article 31 that the documents tendered by the seller be required to be of the kind described in the letter of credit, and the Appellant was obliged to read the documents tendered to it to ascertain accordingly that the relevant Certificates did certify as to the condition or quality of the goods. p.204 1.28 p.205 1.37

40 (d) A breach of contract was established by the acceptance by the Appellant's agent as Certificates of Inspection of documents not certifying as to the quality or p.205 1.46 pp.362-363

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condition of the goods

- p.214 1.38 (e) By virtue of Clause b of the requisition the Respondent was obliged upon demand to reimburse the Appellant. The doctrine of ratification was inapplicable, but the facts established rather that the Respondent had taken the benefit of its contract with the Appellant so that it would have been precluded from denying its obligation to indemnify the Defendant if it had not already done so. Nevertheless, the Appellant was liable to the Respondent for such damages as were the consequences of the above mentioned breach of Contract on the part of the Appellant 10
- p.214 11.40-45 (f) The Respondent was entitled to recover damages assessed in accordance with general principles for breach of contract, and the Respondent acted reasonably. Thus the Appellant should be held responsible for the loss that was caused. 20
- p.217 1.21

History of Proceedings on Issue of Negligence

18. Upon the issue of negligence -

- p.217 1.37 (a) The Respondent argued that if the expression "Certificate of Inspection" called for a Certificate certifying merely to the fact of an inspection having been made without also stating the certifier's opinion of the quality or condition of the goods inspected, the Appellant committed a breach of its duty to the Respondent in failing to advise the Respondent that this expression had this limited meaning. 30
- (b) The Appellant argued that no relevant request for advice was made concerning Certificates of Inspection, that no advice was given in relation thereto, that no liability arose by failure to give such advice, and that the damages claimed were too remote. 40
- p.217 1.43 (c) His Honour held that it was unnecessary to decide this issue.

Submissions of Appellant on Issue of Breach of Contract

19. As to the nature and effect of the legal relationship created between the parties in the subject transaction the Appellant submits -

- 10 (a) (i) The acceptance by the Appellant of the requisition as amended submitted by the Respondent to open an irrevocable documentary credit created no contractual rights or obligations between them. Commercial sanctions, and not legal obligations, governed the subsequent conduct of the parties involving the opening of the desired credit.
- 20 (ii) The specification in the requisition as amended of particular documents to be obtained was merely descriptive of the kind of credit requested to be opened. The acceptance of such requisition did not create a promise by the Appellant to obtain such documents. Nor in opening the credit in the terms requested did the Appellant expressly or impliedly promise that the credit would not be made available except against particular documents
- 30 (iii) The only contract between the parties arising out of the transaction was one of indemnity, whereby in the event of the desired credit being opened and made available to the seller, and the relevant condition precedent being fulfilled - namely the receipt by the Appellant of the specified documents upon the terms of the letter of credit issued by it - the Appellant would become entitled to
- 40 indemnity from the Respondent, and the Respondent would become bound to reimburse the Appellant in order to indemnify it accordingly.

(iv) But if after the desired credit was

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opened the Appellant or its Agent made it available to pay the seller without obtaining upon the terms of the Letter of Credit the specified documents, the consequence would be that the condition precedent to the Appellant's right to indemnity was not fulfilled and the right was lost. However, no promise would be broken so as to create a breach of Contract.

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- (v) Support for the foregoing propositions is to be found in the speech of Viscount Sumner in Equitable Trust Company of New York v. Dawson Partners Limited (27 Ll.L.R. 49) in which at page 52 the essence of this class of case is described in the following terms :-

"The substance of the claim is really the indemnity for which the terms of the letter of credit provide,.. the case rests entirely on performance of the conditions precedent to the right of indemnity which is provided for in the letter of credit."

20

In so far as the High Court in Friedlander v. Bank of Australasia (8 C.L.R. 85) held otherwise, it is to be noted that in that case there was no analysis of the nature of the legal relationship between the buyer procuring the issue of a documentary credit and the issuing Bank. This aspect was not of great importance in that case, there being apparently no damages proved by the buyer. The High Court's conclusion on this aspect was erroneous. The point of principle remains open for examination by the Privy Council.

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p. 359

- (b) If a Contract was created upon the Appellant accepting from the Respondent the requisition as amended or upon the Appellant establishing the desired credit, the terms thereof are embodied in the requisition as amended. These terms provide protection to the Appellant by

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conferring upon it certain immunities and by imposing upon the Respondent certain obligations. First, by virtue of Clause A (i) of the requisition the Appellant was exonerated from liability for loss such as that claimed by the Respondent in that such loss is alleged to arise from error or omission by the Appellant in compliance with its mandate under the requisition or the letter of credit issued pursuant thereto. Secondly, whether Clause A (i) is inapplicable or is by implication to be read down, it is apparent from Clause G (and Clause B) of the requisition that the obligation undertaken by the Appellant was limited to acting in intended or purported compliance with the requisition or any Letter of Credit issued in consequence thereof. In accepting each of the subject Certificates the Appellant was acting in intended or purported compliance with the requisition or any Letter of Credit issued in consequence thereof. Such acceptance therefore did not involve a breach of its contractual obligations to the Respondent.

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- (c) If the contractual obligation undertaken by the Appellant was not limited as aforesaid, the effect of Clause G of the requisition was that, provided the Appellant acted in intended or purported compliance with the requisition or the letter of credit issued in consequence thereof, the Respondent was precluded by its undertaking to hold the Appellant harmless from loss, from asserting its claim for damages for breach of contract against the Appellant. As the Appellant acted in intended or purported compliance with the requisition or Letter of Credit issued in consequence thereof, it was not open to the Respondent to assert its claim for damages for breach of contract against the Appellant or to recover thereunder.

20. It is submitted that each of the submissions comprised in sub-paragraphs (a), (b) and (c) respectively of Paragraph 19 hereof

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warrants the reversal of his Honour's finding upon the issue of breach of Contract. If, however, none of these submissions be upheld the Appellant makes the further submissions hereinafter appearing as to the questions which would then be outstanding.

21. As to the proper meaning upon the true construction of the relevant documents, of the expression "Certificate of Inspection" the Appellant submits -

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(a) These words have an ordinary and usual meaning which is clear and unambiguous. Accordingly, his Honour's ruling that the evidence adduced by the Respondent as to antecedent transactions and conversations was irrelevant and should be disregarded for the purpose of construing these words contained in the requisition as amended, was correct.

(b) In any event, admissible surrounding circumstances of the subject transaction did not affect the plain meaning of the words "Certificate of Inspection". The evidence as to antecedent events did not form part of the admissible surrounding circumstances of the subject transaction.

20

(c) If there was a Contract between the parties the requisition as amended contained the whole of the terms thereof. The meaning of the expression "Certificate of Inspection" therein depends upon the words of the requisition as amended through which the parties have expressed their intention

30

(d) Upon the true construction of the requisition as amended the expression "Certificate of Inspection" meant a document certifying the fact of an inspection having been made without any necessity that it should state also the certifier's opinion as to the quality or condition of the goods inspected. This conclusion is supported by the expert evidence including the opinion of Mr. Cardwell described by his Honour as "a senior and experienced officer of another Bank" that -

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- (i) a certificate of inspection was complete and regular if it certified merely to the fact of an inspection having been made and that it was unnecessary that it should also state the certifier's opinion of the quality or condition of the goods he had inspected, and p.203 l.23
- 10 (ii) the documents being Exhibits "EE" and "FF" would be acceptable to practically any Bank in the world as Certificates of Inspection for the purposes of the subject credit. p.172 ll.5 & 15
- (e) A Certificate of Inspection so construed affords an appropriate measure of protection to the buyer requiring it as an additional document to be specified in a letter of credit. To require the Certificate of Inspection in this instance 20 to certify as to the quality or condition of the goods is to force a meaning into this expression based upon unilateral motive rather than upon the intention of the parties, and upon considerations apt rather to the contract between the buyer and seller of the goods. This case was not analogous in respect of a Certificate of Inspection, to a documentary credit transaction concerning perishable goods.
- 30 (f) Although his Honour stated that his opinion was based only upon the Contract between the parties, there is no suggestion by him of any special or peculiar incidents in such Contract. Indeed his Honour appears to base his view upon general considerations. There were no peculiar features in the subject transaction as evidenced in the terms of the requisition as amended, justifying construction thereof 40 by other than general criteria.
- (g) Having regard to the commercial context of the transaction his Honour's construction of the expression "Certificate of Inspection" would create uncertainty and complications in implementing the requirements of the Letter of Credit, which

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are inconsistent with the nature and intent of such transaction. Thus, if the content of the Certificate of Inspection is to be governed by the need for it to afford protection to the buyer, doubtful questions may have to be resolved by the issuing Bank or its Agent where the type and extent of inspection made is stated as the basis for the certifier's opinion as to the condition or quality of the subject goods. On the other hand, a Certificate expressing the certifier's opinion that the goods were of poor quality would comply with his Honour's stated specifications for a Certificate of Inspection which would have to be accepted by the issuing Bank and its Agent. If this not be so, questions of degree arise in ascertaining the implied standard of approval or satisfaction to be expressed by the certifier, and as to whether his opinion as stated adequately expresses the desired approval or satisfaction.

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- (h) Should the expression "Certificate of Inspection" be susceptible of different meanings, the Appellant acting in good faith adopted a reasonable interpretation conforming with usual acceptation, and was accordingly justified vis a vis the Respondent in accepting as such the documents tendered as Certificates of Inspection under the subject letter of credit (Equitable Trust Company of New York v. Dawson Partners Limited (Supra); Montagu v. Banco de Portugal (1924) 19 Ll. L.R.99; Ireland v. Livingston (1872) L.R. 5 H.L. 395; Miles v. Haselhurst (1906) 12 Com. Cas. 83).

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22. As to the effect of Article 31 of Uniform Customs & Practices for Documentary Credits (1962 Revision) the Appellant submits -

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- (a) The provisions of Uniform Custom & Practice for Documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222 were incorporated by reference into the transaction between the parties evidenced by the requisition as amended.

10 (b) The effect of these provisions according to their true construction was to entitle the Appellant and its Agent to accept the subject Certificates tendered under the Letter of Credit notwithstanding that such Certificates did not qualify as "Certificates of Inspection" as specified in the Letter of Credit. Accordingly, the Appellant was not thereby disentitled from its right to indemnity by the Respondent and no breach occurred of any contractual obligation of the Appellant to the Respondent.

(c) In particular Article 31 -

20 (i) is clearly intended to relieve the issuing Bank and its Agent to a substantial degree if not wholly, of responsibility which they would otherwise incur if additional (that is, other than non-basic) documents as tendered are subsequently held not to be as specified in the Letter of Credit.

(ii) authorised the Appellant to accept without further examination a document described as a Certificate of Inspection as being what by its description, it purported to be.

30 (iii) authorised the Appellant to accept without further examination a document appearing on its face to comply with the essential elements of its specification, namely that it was a Certificate and that it certified at least as to inspection of the goods.

40 (iv) authorised the Appellant to accept without further examination a document certifying on its face to the making of an inspection for the purpose of checking upon the quantity and condition of the subject goods.

(v) on the facts of this case and read in conjunction with Clause F of the

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requisition exonerated the Appellant from responsibility in respect of the discrepancy between each of the documents accepted and a "Certificate of Inspection" as defined by his Honour. The documents accepted were for purposes of Article 31 documents of the kind described in the Letter of Credit.

23. As to the effect of the Respondent indemnifying the Appellant, taking up and dealing with the documents accepted by the Appellant under the credit coupled with the absence for a long time of any complaint by the Respondent to the Appellant, the Appellant submits - 10

(a) Although the Respondent was a customer of the Appellant, the relevant relationship between them respecting the subject transaction was that of principal and agent. The Respondent by procuring the issue of the Letter of Credit by the Appellant constituted the Appellant its paymaster to the seller of the goods. (Morgan v. Lariviere (1875) L.R. 7 H.L. Cas. 423 per Lord Cairns; Paget's "Law of Banking" Sixth Edition page 560.) 20

(b) The abovementioned conduct of the Respondent constituted a ratification of the act done by the Appellant in excess of its authority.

(c) The conduct of the Respondent is to be characterised as ratification as understood in the special and extended sense of this term adopted in the special class of case involving documentary credits. (Bank Mellī Iran v. Barclays Bank (1951) 2 T.L.R. 1057; Bank of Montreal v. Recknagel 109 N.Y. 482; Lamborn v. Lake Shore Banking Co. (1921) 196 App. Div. 504 and on appeal 231 N.Y. 616). Westminster Bank Limited v. Banca Nazionale di Credito 31 Ll.L.R.306; Gutteridge & Megrah "The Law of Bankers Commercial Credits" pp.86, 151-152; A.G. Davis "The Law Relating to Commercial Letters of Credit" Third Edition page 98; and British Imex Industries Limited v. Midland Bank (1951) 2 Ll.L.R.591).) 30 40

Upon the footing of this special use of the term, the Respondent in choosing to indemnify the Appellant notwithstanding the latter's failure to obtain the specified documents and in abstaining from complaint for a long time, must be taken to adopt the Appellant's action so as to be precluded from afterwards asserting that the Appellant acted outside its mandate.

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- (d) The defence expressed in terms that the Appellant's action "was ratified and acquiesced in by the Plaintiff" is equivalent in substance to a defence of waiver.

p.6. 1.19

The conduct of the Respondent amounted to a waiver of fulfilment of the relevant condition and of any right constituting a cause of action for breach thereof.

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The Respondent having approbated the transaction as performed by the Appellant, is prevented from reprobating (Pitman v. Crum Ewing 1911 A.C. 217 at page 239 per Lord Skaw; Craine v. Colonial Mutual Fire Insurance Co. Limited 28 C.L.R. 305).

- (e) The provisions of Clause B of the requisition do not enable the Respondent to deny its adoption of the Appellant's execution of its mandate or the consequences thereof. It is apparent on the facts of the matter that no demand for payment purported to be made by the Appellant to the Respondent under or pursuant to Clause B. Payment was requested and made for the shipping documents held by the Appellant. Moreover, Clause B upon its true construction merely secured to the Appellant some added protection and did not alter the basic nature of the rights and obligations created between the parties in relation to a documentary Letter of Credit. Nor can Clause B be properly read so as to have imposed upon the Respondent an obligation to pay the Appellant whether or not the fundamental conditions precedent to payment were fulfilled.

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pp.416-417
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(f) The fact of payment having been made by the Respondent to the Appellant in this case distinguishes it in a critical respect from Friedlander v. Bank of Australasia (Supra). The benefit for which the Respondent paid the Appellant comprised the documents accepted by the Appellant and the rights inherent to possession of them. The value of this benefit was equivalent to the amount paid by the Respondent to the Appellant. 10

24. As to the remoteness of the damages claimed and the measure of damages recoverable, the Appellant submits as follows :-

(a) The damages claimed did not flow from the breach complained of.

(b) The Respondent was not liable to pay the Appellant if the documents were not in order. The Respondent elected to accept the documents as being in order.

(c) The contract between the parties concerned the payment of money. Damage sustained by the Respondent thereunder must consist in a wrongful payment of its money or of money which it was obliged to recoup to the Appellant. The Appellant neither disbursed money of the Respondent nor money which the Respondent was obliged to recoup - unless his Honour's view of Clause B of the requisition is accepted. Upon this last mentioned basis, the breach by the Appellant would consist of its having through its Agent paid the seller against defective documents and then forced the Respondent to recoup it. However, as previously mentioned a Certificate of Inspection stating that the goods were of poor quality or not up to standard would have fulfilled the requirements for a valid Certificate of Inspection as defined by his Honour. Payment against such a document would accordingly have rendered the Respondent liable to recoup the Appellant. 20
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(d) It was not established on the evidence that the Respondent "was entitled to expect under

its contract that the goods would be goods in working order and in accordance with the sample". In any event, a Certificate of Inspection would not have safeguarded the Respondent as buyer of the goods in relation to a sale by sample.

- 10 (e) The Respondent was under a duty to mitigate its loss and failed to do so. (Stein v. Hambro's Bank of Northern Commerce (1921) 9 Ll.L.R. 507)

Submissions of Appellant on Issue of Negligence

25. As to the issue of negligence the Appellant submits as follows :-

- (a) No advice in relation to or affecting the subject transaction was requested by the Respondent or given to it by the Appellant
- (b) The allegation of the Respondent was in essence of failure to give advice not of giving advice negligently
- 20 (c) The parties were in relevant respects dealing with each other in a contractual context, and their relationship was for present purposes contractual in character. The principles applicable to the relevant conversations between the parties are those enunciated in Heilbut, Symons & Co. v. Buckleton (1913) A.C.30.
- 30 (d) The facts of this case do not attract the application thereto of the principles established in Hedley Byrne & Co. Limited v. Heller & Partners Limited (Supra).
- (e) The Respondent did not in relation to the subject transaction act upon the advice alleged to have been given.
- (f) The damages claimed are too remote to be recoverable.

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General

26. To the extent that any of the foregoing submissions -

(a) challenge his Honour's findings of fact, such findings are founded upon inferences open to review upon appeal (Benmax v. Austin Motor Co. Limited 1955 A.C. 370), or

(b) raise questions of law not specifically raised before his Honour, such questions are proper to be determined upon appeal (Yorkshire Insurance Co. Limited v. Craine 1922 2 A.C. 541).

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Reasons

27. The Appellant respectfully submits that the appeal should be allowed -

(a) So as to enable a verdict and judgment for the Appellant to be substituted for the verdict and judgment appealed from; or failing this

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(b) So as to enable the verdict and judgment appealed from to be set aside and the issue of negligence remitted to the Supreme Court for determination

For the following, among other,

R E A S O N S

(1) The transaction between the parties -

(i) created no contract between them other than one of indemnity whereunder the Appellant would become entitled to be indemnified by the Respondent in the event of the stipulated conditions precedent to such right of indemnity being fulfilled, or

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(ii) created a contract whereunder no breach was committed by the Appellant of its obligations as specified therein, or

No. 29 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH
WALES IN CAUSE NO. 5160 of 1968.

B E T W E E N

THE COMMERCIAL BANKING Appellant
COMPANY OF SYDNEY LIMITED (Defendant)

AND

JALSARD PTY. LIMITED
(Trading as Jalsard Respondent
Trading Company) (Plaintiff)

CASE FOR THE APPELLANT

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