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No. 29 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N

JALSARD PTY. LIMITED (Trading as JALSARD TRADING COMPANY)	Plaintiff (Respondent)
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AND

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED	Defendant (Appellant)
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CASE FOR THE RESPONDENT

RECORD

1. This is an appeal pursuant to leave granted by the Supreme Court of New South Wales from the judgment of the said Supreme Court in Commercial Causes (Macfarlan, J.) delivered on the 22nd June 1970, entering a verdict for the Plaintiff in the sum of \$14,468.30. The Plaintiff (Respondent) is hereinafter referred to as "Jalsard", and the Defendant (Appellant) as "the Bank".

pp 199-218

QUESTIONS

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2. The substantial questions raised by the appeal are :-

(a) What, upon its proper construction, is the meaning of the term "certificate of inspection" contained in the contract between Jalsard and the Bank

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(b) Whether the Bank was in breach of its contract with Jalsard by reason of its having met the beneficiary's drafts although they were not accompanied by certificates of inspection in the contractual sense (however that sense is arrived at).

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- (c) Whether the conduct of Jalsard, subsequent to the Bank's breach of contract, constitutes in law a defence to Jalsard's claim for damages, and in particular whether the doctrine of ratification applies to the facts of this case so as to deny Jalsard's claim against the Bank for damages for breach of contract.

FACTS

3. The facts giving rise to the cause and to the appeal may be summarised as follows :- 10

- p.38, 1.18
- p.10, 1.1
- p.207,11.52-56
p.208,11. 1-3
- (a) Jalsard until the end of 1966 was an investment company, but thereafter, inter alia, imported goods from overseas. Its managing director was Robin Diana Wilson (formerly Davey) (hereinafter referred to as "Mrs. Wilson"). For the purposes of the paragraphs appearing hereafter, Mrs. Wilson acted for and on behalf of Jalsard. 20
- p.128,11.30-34
p.199,11.42-53
p.200,11.1-11
- (b) In December 1966, Mrs. Wilson sought information and advice from the Bank concerning the importing of goods from Taiwan by Jalsard. She informed the Bank that she had no experience in the manner in which that could or should be done or in which Jalsard might pay for its imports. Knowing that advice was being sought and that Jalsard would rely upon that advice, the Bank advised Mrs. Wilson that it would be important for Jalsard to protect itself in respect of its imports because Taiwan constituted an area of unsure reputation in relation to goods that emerged from it, that a good means to insure this protection was to obtain a certificate of inspection, and that a certificate of inspection would verify the quality of the goods and that the best means of paying the seller was by documentary letter of credit. She informed the Bank that she wanted only her agent Raymond & Company Limited, which she trusted, to give a certificate of inspection about the quality of the goods. 30
- p.49, 11.18-26
p.16, 11.23-29
- p.148,11.8-13
p.218,11.4-6
- p.143,11.10-13
p.149,11.14-18
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- 10 (c) Thereafter Jalsard purchased certain goods in the Republic of Taiwan and obtained through the Bank documentary letters of credit by which payment for the goods was made. In respect of these letters of credit, Mrs. Wilson signed requisition forms provided by the Bank. It was provided in the requisition forms that drafts presented for negotiation must be accompanied by, inter alia, a certificate of inspection. Both parties understood that the term "certificate of inspection" meant a certificate of inspection as to quality to be given by Raymond & Company Limited. When the drafts were presented in relation to these transactions, certificates of inspection given by Raymond & Company Limited certifying as to the quality of the goods were included in the documents presented to the negotiating bank in Taiwan. pp. 337, 343, 344, 346, 353. p.201, 11.41-52
- 20
- 30 (d) On 11th July, 1967 Jalsard lodged a requisition with the Bank requesting the opening of an irrevocable documentary letter of credit authorising Raymond & Company Limited of Taipei to draw on it for any sum or sums not exceeding in all U.S. \$16,920.00 purporting to cover the invoice cost f.o.b. of certain battery operated Christmas lights to be sent in two shipments to Sydney. The requisition was accepted and acted upon by the Bank. p.203, 11.6-21 p.359
- 40 (e) Shortly after this letter of credit was established, Mrs. Wilson noticed that there was not included amongst the additional documents a certificate of inspection. She requested by letter dated 2nd August, 1967 that this document be inserted among those which the Bank's agent was required to obtain, and this was agreed to by the Bank by letter dated 3rd August, 1967. These letters constituted an amendment to the requisition, and the requisition as so amended was the contract sued on by Jalsard. p.362 p.363

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pp. 370, 378, 379
p. 202, 11.28-34

(f) The Bank's agent, the negotiating bank in Taiwan, received, inter alia, two certificates in relation to the two shipments. Both certificates stated the intention of the certifier to inspect the condition of the goods, but no opinion was expressed therein upon the condition or quality of the goods and the certificates were not given by Raymond & Company Limited. The Bank, by its agent, thereupon caused drafts for sums totalling U.S. \$16,920.00 to be paid to Raymond & Company Limited, the beneficiary named in the requisition. In fact Raymond & Company Limited had bought the goods from a local supplier and was the vendor of those goods to Jalsard.

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p. 416
p. 207, 11.6-39

(g) The Bank, by letter dated 4th October, 1967 advised Jalsard that it was holding the shipping documents in respect of the first shipment, and demanded payment pursuant to the terms of the letter of credit. This letter contained a reference to the fact that the negotiating bank had noted an irregularity in relation to insurance and requested an authorisation to enable its agent to release a guarantee held by it. It was a term (Clause B) in the letter of credit that Jalsard agreed to pay to the Bank on demand the Australian currency equivalent of payments made or drafts accepted by the Bank under or in intended or purported compliance with the credit or requisition. Jalsard, pursuant to the demand, paid the Bank the amount requested and gave the desired authorisation. The Bank, by letter dated 1st November, 1967 advised Jalsard that it was holding the shipping documents in respect of the second shipment and demanded payment. This letter contained a similar reference to that in the letter dated 4th October, 1967 and Jalsard duly paid the amount requested and gave the desired authorisation. No mention was made in

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either letter as to any irregularity in the certificates of inspection.

- 10 (h) The documents relating to the goods shipped were negotiated by Jalsard to Gollin & Co. Ltd., who received the documents and as buyer took delivery of the goods pursuant to a contract for their sale between it and Jalsard. The goods were found to be of defective quality and were substantially unsaleable. p.207,11.40-43
- (j) Jalsard became aware in October 1967 that there were some defects in the goods which it had sold to Gollin & Co. Ltd., and by the end of 1967 that these defects were substantial. Mrs. Wilson had discussions with Raymond & Company Limited in March 1968, as a result of which it agreed to make a compromise payment to Jalsard of A\$2,091.04. p.208,11.22-35
- 20 (k) Jalsard first consulted its solicitors early in 1968 with respect, inter alia, to the liability to it of the Bank. Copies of certain documents were obtained and legal opinions from Counsel sought and given. Following a request from Mrs. Wilson, the Bank, by letter dated 20th March, 1968 addressed to her, c/o Jalsard's solicitors, stated its definition of a certificate of inspection as being a shipping document vouching for the condition of perishable goods at the time of despatch. By letter dated 13th June, 1968 Jalsard's solicitors wrote a letter of demand to the Bank. p.209,11.34-36
p.72, 1.6
p.203,11.28-36
30 p.403
p.404

CONTENTIONS OF JALSARD AT THE HEARING.

4. Jalsard at the hearing contended that :-

- 40 (a) The contract between Jalsard and the Bank consisted of the application for an irrevocable documentary letter of credit dated 11th July, 1967, as amended by the letters dated 2nd and 3rd August, 1967 (referred to in paragraphs 3 (d) and (e) hereof).

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- p.200,11.39-46 (b) For the purpose of construing the term "certificate of inspection" in the contract, all the surrounding circumstances should be looked at, including earlier conversations and transactions dealing with similar requisitions between Jalsard and the Bank.
- (c) The term "certificate of inspection" in the contract meant a certificate certifying as to the condition and quality of the goods inspected because:- 10
- (i) the earlier conversations and transactions revealed that the parties understood the term to have this meaning, and further and alternatively revealed that they had understood the term to mean a certificate of inspection (whether as to the quality of the goods or not) given and given only by Raymond & Company Limited. 20
- p.202,11.40-42
- (ii) the phrase "certificate of inspection" according to its ordinary meaning and considered apart from its context required that the certificate by whatever person given, should certify as to the condition and quality of the goods. 30
- p.202,11.42-44
- (iii) the various terms of the contract indicated that that term in that contract meant a certificate certifying the quality of the goods.
- (d) The Bank promised Jalsard to meet drafts only in return for documents answering those described in the contract. It did not do so.
- p.201, 11.19-21 (e) The Bank was in breach of its contract with Jalsard because it (by its agent) did not receive certificates of inspection certifying as to the condition and quality of the goods before meeting the seller's 40

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drafts, and further did not receive certificates of inspection from Raymond & Company Limited.

- 10 (f) Jalsard's payment to the Bank did not amount to a release of its cause of action against the Bank for damages, even if the relationship between them was that of principal and agent only. However, their relationship was not that of principal and agent but banker and customer. p.211,11.54-57
p.206,11.42-44
- 20 (g) No inference could be drawn adverse to Jalsard from the facts of payment to the Bank and the taking up of the documents, because a term of the contract required Jalsard to make payment to the Bank on demand where drafts had been accepted by the Bank under or in intended or purported compliance with the credit or requisition. p.210,11.48-52
p.211, 1.1
- (h) The conduct of Jalsard subsequent to the Bank's breach of contract could amount to no more than an election not to repudiate the contract. p.214,11.32-35
- 30 (j) Payments to the Bank by Jalsard were pursuant to the Bank's demands therefor which demands stated that it held shipping documents "under" the relevant letter of credit and which stated that there was one irregularity only. It was thus implied that there were no other irregularities concerning the documents.
- (k) Jalsard was entitled to recover the losses it had sustained. These included the money wrongly paid by the Bank, expenses incurred in examining the goods and storage charges, less the amount received by way of compromise from the seller. p.215.11.27-47
- 40 (l) As an alternative to the claim in contract, the Bank negligently advised Jalsard in connection with the necessity for and specification of a certificate of inspection, p.217,11.32-39

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The contention was advanced upon the assumption that a certificate of inspection meant only a certificate that the goods had been inspected and no more.

CONTENTIONS OF THE BANK AT THE HEARING

5. The Bank at the hearing contended that :-

- p.209,11.42-47 (a) There was no contract between Jalsard and the Bank. The Bank as it dealt in documents, was only entitled to an indemnity from Jalsard if it faithfully and exactly obtained the documents it had promised to get. 10
- p.200,11.47-51 (b) If there was a contract between the parties, then it was constituted by the requisition for a letter of credit as amended, and earlier conversations and transactions were not admissible for the purpose of construing the contract.
- p.204,11.47-49 (c) The term "certificate of inspection" meant a document certifying to the fact of an inspection having been made, in which it was unnecessary to state the certifier's opinion about the quality or condition of the goods inspected. 20
- p.204, 11.49-53 (d) The Bank was entitled and bound to accept a document described as a certificate of inspection tendered by the seller, and was not concerned to examine the document to ascertain whether its contents did in fact accord with its description. 30
- (e) There was no breach of contract as the Bank obtained the required documents under the letter of credit before paying the seller.
- p.205,11.38-49 (f) If the Bank had exceeded its authority under the letter of credit, Jalsard's conduct in paying the Bank and taking up the documents, and its delay in informing the Bank that the documents were irregular, constituted a ratification of the excess of authority. 40

- (g) The alleged losses sustained did not flow from the acceptance of an irregular certificate of inspection, and were not foreseeable by the Bank. Jalsard failed to mitigate its loss.
- (h) The Bank did not give advice concerning certificates of inspection, and could not be made liable for a failure to give advice.

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REASONS FOR JUDGMENT OF MACFARLAN, J.

6. Macfarlan, J. gave a verdict and judgment for Jalsard for the reasons that :-

- (a) There was a contract between Jalsard and the Bank constituted by the written requisition for a documentary letter of credit as amended by two further written documents. p.200, 11.56-60
- (b) For the purpose of construing the contract, evidence of earlier transactions between the parties was not relevant. p.200, 11.47-56
p.200, 11.60-62
- (c) The term "certificate of inspection" contained in the requisition as amended meant a document certifying as to the quality or condition of the goods. p.203, 11.37-51
p.205, 11.40-43
- (d) According to the terms contained in the requisition, which included the Uniform Customs and Practice for Documentary Credit, the Bank was obliged to obtain a certificate of inspection as to the quality or condition of the goods. The Bank must examine the certificate of inspection tendered in order to satisfy itself that it certified as to the quality of the goods. The Bank bore no responsibility as to the validity or sufficiency of the certificate, but it was required to obtain a certificate expressing an opinion as to the quality of the goods. p.205, 11.43-47
p.203, 11.52-58
p.204, 11. 1-9
- (e) The Bank broke its contract with Jalsard in that it did not obtain a certificate p.205, 11. 1-2
p.205, 11.11-17
- (e) The Bank broke its contract with Jalsard in that it did not obtain a certificate p.202, 11.28-31
p.204, 11. 9-11

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of inspection certifying as to the quality or condition of the goods.

- p.213,11.23-29
p.214, 11.13-28
p.214,11.36-46
- (f) The relationship between Jalsard and the Bank in relation to the application for and establishment of the letter of credit was not that of principal and agent. The plea of ratification was not a sufficient answer by the Bank of Jalsard's claim for general damages for breach of contract. In this case Jalsard was precluded from denying its obligation to indemnify the Bank (a question which did not arise), but the Bank was liable to Jalsard for such damages as it could prove were the consequences of the breach by the Bank of that contract. 10
- p.215,11.47-55
p.215
p.216
- (g) There being a contract between the parties, the innocent party was entitled to damages assessed in accordance with general principles for breach of contract. The loss claimed was caused by the Bank's breach of contract, and the Bank could have foreseen the consequences that in fact took place. The actions of Jalsard after the discovery of the defects were reasonable and justifiable in the circumstances. 20
- p.217, 11.21-23
7. Macfarlan, J., having held that there was a breach of contract by the Bank, found it unnecessary to decide Jalsard's claim that the Bank, by its agents, had negligently advised it in connection with the necessity for and specification of the certificate of inspection. However, Macfarlan, J. made a number of findings relevant to this claim, in case it became necessary to decide this point on appeal, as follows :- 30
- p.217,11.39-46
- (a) In general and on points that were important to the case, the recollection of Mrs. Wilson was to be preferred to that of Messrs. Parker, Stevens and Carman when there was a conflict between them. 40
- p.217,11.45-54
p.218,11. 1-11
p.199,11. 42-43
- (b) Mrs. Wilson sought information and advice from the Bank concerning the importing of
- p.199,11. 45-53
p.200,11. 1-11

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goods from Taiwan. She informed the Bank that she had no experience in the manner in which that could or should be done or in which Jalsard might pay for its imports. Knowing that advice was being sought, the Bank advised Mrs. Wilson that it would be important for the Company to protect itself in respect of its imports because Taiwan constituted an area of unsure reputation in relation to goods that emerged from it, that a good means to insure this protection was to obtain a certificate of inspection and that the best means of paying the seller was by a documentary letter of credit. Mrs. Wilson was informed that a Mr. Carman was experienced in establishing documentary letters of credit and would give her information and advice. Mr. Carman was informed by an officer of the Bank that Mrs. Wilson intended to import goods from Taiwan and was asked to assist and advise her on the best means to do this. Mr. Carman advised her, inter alia, that a certificate of inspection would verify the condition, quality and standard of the goods. Mrs. Wilson informed the Bank that she wanted only her agent Raymond & Company Limited, which she trusted, to give a certificate of inspection about the quality of the goods. Mr. Carman subsequently advised her that it was unnecessary to stipulate who was going to give the certificate of inspection in the requisition for a letter of credit

p.49,11.18-26
p.16,11.23-29
p.130,11.4-17
p.131,11.4-8

p.218,11.4-6
p.16,11.27-29
p.148,11.8-13
p.148,11.33-36
p.24, 11.25-31
p.16, 11.23-29
p.143,11.10-13
p.149,11.14-18
p.23, 11.23-38
p.24, 11. 1-5
p.64, 11.19-21
p.152.11.19-38

(c) The buyer was ill protected, if there was any protection at all, in obtaining a certificate of inspection, if all that it did was to certify that an inspection had been made.

p.203,11.37-51

SUBMISSIONS OF THE RESPONDENT (PLAINTIFF)

8. The first substantial question raised by the appeal is what, upon its proper construction, is the meaning of the term "certificate of inspection" contained in the contract between the parties. Upon this question, Jalsard makes

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the following submissions :-

p.359
pp.362,363

(a) There is a contract between the parties, which is embodied in the requisition for a documentary letter of credit dated 11th July, 1967, as amended by two further written documents.

pp.342,348,
358.

(b) The term "certificate of inspection" according to its ordinary meaning, and in this contract, requires that the document should certify as to the condition and quality of the goods inspected. It must not only certify as to the condition and quality of the goods, but before it can be accepted by the Bank, must indicate on its face that the goods are up to or of an acceptable standard. All the certificates of inspection tendered in relation to the earlier transactions certify that the goods were of an acceptable standard. The definition of certificate of inspection contained in "Thomson's Dictionary of Banking", p.135 is of assistance in ascertaining the ordinary meaning of the term. This definition was supplied by the Bank to Jalsard on request, and states

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p.203, ll. 31-36
p.403

"Certificate of Inspection", "A shipping document vouching for the condition of perishable goods at the time of despatch". There is no reason why such a definition should be restricted to perishable goods, but it is clear that the document should vouch for the condition of goods. A certificate of inspection is intended to be a form of insurance by the buyer that before it pays the price to the seller it will have the assurance of the certifier about the condition of the goods. The real object of such a certificate is to afford protection to the buyer. The buyer is not adequately protected by a certificate that merely certifies as to an inspection having been made. Mr. Carman, an officer of the Bank, admitted in evidence that a certificate of inspection was one related to the inspection of goods for the purpose

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p.148, ll.8-12

to the inspection of goods for the purpose

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of ascertaining their condition and quality, and that a certificate which certified no more than the fact of an inspection was quite worthless.

p.168,11.16-17

- 10 (c) The contract, embodied in the requisition dated 11th July, 1967, as amended, by its terms reveals that a certificate of inspection must mean something more than a mere inspection of goods. The requisition provides that the drafts must be accompanied by, inter alia, a packing list and a certificate of inspection. The packing lists describe the goods and how they are packed into boxes and cases. The requisition further provides under a heading "additional instructions", "Beneficiary to certify on invoices that each box contains ten pieces and that each export case contains 12 dozen boxes".
- 20 The term "packing list" was in the document prior to the inclusion of the term "certificate of inspection", which must therefore have been intended by the parties to be a certificate that does more than just describe the goods and their boxes, it must certify as to the quality of the goods as well. Both certificates of inspection express an intention by the certifier to check
- 30 the quantity and condition of the contents of the boxes, but in actual fact nothing is said at all about the condition of the goods.

p.371,373

p.370
p.378-9

- 40 (d) Alternatively to (b) and (c), where a term in a commercial document is not plain and clear in meaning, or is ambiguous or general in nature, evidence of the surrounding circumstances, including earlier conversations and transactions between the parties dealing with that term, is admissible to show the sense and meaning to be given to that term in the document.

(Charrington & Co. Limited v. Wooder (1914)
A.C.71, per Viscount Haldane L.C. at 77
and per Lord Atkinson at 93; Lewis v.
Great Western Railway Co. (1877) 3 Q.B.D.

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195 per Bramwell L.J. at 202; White v. Australian and New Zealand Theatres Ltd. 67 C.L.R. 266 per Latham C.J. at 270; Phipson on Evidence (10 Ed.) paras, 1870-1873). If a term in such a document does have an ordinary meaning, but it is clear either from the contract or the facts that such meaning cannot have been intended, evidence of the surrounding circumstances may be given to show that the term was used in a less ordinary sense provided it is one which the words can properly bear. (Phipson on Evidence (10 Ed.) par. 1907). In order to ascertain the meaning of a term, the whole of the terms of the contract must be examined. As this contract is a mercantile document, a more liberal construction should be given when construing its terms (Cohen & Co. v. Ockerby & Co. Ltd. 24 C.L.R. 288 per Isaacs J. at 299,300; Hillas v. Arcos Ltd. 147 L.T. 503 per Lord Wright at 514), and especially those terms which are not included in the printed part of the requisition form (Joyce v. Realm Insurance Co. L.R. 7 Q.B. 580 per Blackburn J. at 583). 10 20

In applying the abovementioned principles regard may be had to the following :-

- (i) In this contract it could be contended that the term "certificate of inspection" is general in nature and capable of more than one meaning. The term raises, inter alia, the following questions: Does the document refer only to the fact that an inspection of the goods has taken place or must it certify also as to the quality and condition of the goods inspected; who is to carry out the inspection, an independent expert or any other person; what goods must be inspected and at what time must the inspection be made. 30 40
- (ii) The term appears in a commercial document as a term "written in", and

not appearing in the printed part of the form. It became included in the contract by a subsequent written amendment, showing that the parties had given special consideration to that term.

- 10 (iii) The contract includes Article 31 of the Uniform Customs and Practice for Documentary Credits (1962 Revision). The earlier conversations and transactions were admissible to establish a "further definition" for the purposes of that article.
- 20 (iv) The earlier conversations and transactions between the parties show that at the time they entered into the contract the term "certificate of inspection" meant to them a certificate verifying the quality of the goods inspected. All the certificates of inspection presented in relation to earlier transactions certified as to the quality of the goods inspected.
- 30 (v) The earlier conversations and transactions between the parties show that at the time they entered into the contract, they were both aware that the certificate of inspection had to be given by Raymond & Company Limited. Mrs. Wilson informed the Bank that she wanted no one else but her agent Raymond & Company Limited, which she trusted, to give a certificate about the quality of the goods. This was agreed to by the Bank, and she was told that it was unnecessary to insert Raymond & Company Limited as the person who was to give the certificate of inspection as it would be the only one which would be giving it. All the certificates of inspection presented in relation to earlier transactions were given by Raymond & Company Limited.
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p.16,11.27-29
p.148,11.8-13
p.148,11.33-36
p.218,11.4-6
p.342
p.348
p.358

p.16,11.23-31
p.24,11.25-31
p.143,11.10-13
p.147,11.24-27
p.147,11.32-35

p.149,11.14-18
p.23, 11.23-38
p.24, 11.1-5
p.152,11.19-38
p.64, 11.19-21
p.65, 11.17-21
p.56, 11.30-31
p.109,11.19-20

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9. The second substantial question raised by the appeal is whether the Bank was in breach of its contract with Jalsard by reason of it having met the beneficiary's drafts although they were not accompanied by certificates of inspection in the contractual sense (however that sense is arrived at). Upon this question, Jalsard makes the following submissions :-

- (a) The requisition for a letter of credit provides that the drafts must be accompanied by, inter alia, a certificate of inspection. The Bank must strictly observe the conditions of the letter of credit, and obtain a certificate of inspection certifying as to the quality of the goods. In Equitable Trust Co. of New York v. Dawson Partners (1927) 27 Ll.L Rep.49 at 52 Viscount Sumner said: "It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same or which will do just as well. Business could not proceed securely on any other lines". In that case it was held, inter alia, that the acceptance of a certificate by one expert was not a strict compliance with the terms of the letter of credit which called for a certificate from experts. (See also Bank Melli Iran v. Barclays Bank (Dominion, Colonial & Overseas) (1951), Vol.2 Ll.L Rep.367 per McNair J. at 374; Midland Bank Ltd. v. Seymour (1955) Vol. 2 Ll.L Rep. 147 per Devlin J. at 151). 10 20 30
- (b) No provision of the Uniform Customs and Practice for Documentary Credits (1962 Revision) displaces this obligation, nor does any such provision vary it. The contract provides that the documents it refers to and describes "must" accompany the drafts. The evidence discloses that the practice of Australian Bankers is to accept the accompanying documents without 40

checking them at all. The Bank called no evidence to suggest that it checked any accompanying document against the credit nor that it complied with Article 8 nor any other Article.

10 (c) Article 7 imposes an obligation on the Bank to determine that the documents on their face accord with what the contract calls for. So also do Articles 22, 23, 24, 25, 26 and 28. To this obligation Article 31 is subject. Article 31 does not excuse a bank acting in breach of its obligations under the Articles nor exempt it from paying the beneficiary only in return for the contractual documents.

(d) The reasoning of the learned Judge is adopted.

20 10. The third substantial question raised by the appeal is whether the conduct of Jalsard, subsequent to the Bank's breach of contract, constitutes in law a defence to Jalsard's claim for damages, and in particular whether the doctrine of ratification applies to the facts of this case so as to deny Jalsard's claim against the Bank for damages for breach of contract. Upon this question, Jalsard makes the following submissions :-

30 (a) The relationship at all material times between Jalsard and the Bank was one of customer and banker, and not one of principal and agent. (Friedlander v. Bank of Australasia 8 C.L.R. 85; Ward & Harfield "Bank Credits and Acceptances" (4 Ed.) p.75-76). That this is the relationship is admitted on the pleadings.

p.223

40 (b) The doctrine of ratification only applies as between a principal and his agent, for example, in the present case between the Bank and the negotiating bank in Taiwan. It does not apply between customer and banker bound by a contractual document. (Bank Melli Iran v. Barclays Bank (Dominion, Colonial and Overseas) (1951) 2 LL.L Rep. 367 per McNair J. at 376;

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Friedlander v. Bank of Australasia, supra;
Bowstead on Agency (13th Ed.) p.34).

- (c) Even if, contrary to Jalsard's submission, the relevant relationship is that of principal and agent, what the Bank did was to erroneously pursue its authority, not to act without authority.
- (d) No inference adverse to Jalsard can be drawn from the facts of payment to the Bank and the taking up of the documents. Clause B of the requisition for a letter of credit obliges the Company to pay the Bank on demand where the Bank has made payment or accepted the drafts under or in intended or purported compliance with the credit or the requisition. Clause C allows the Bank to hold the documents as a continuing security by way of pledge for complete payment by Jalsard. Jalsard is under an obligation to pay the Bank, regardless of whether the Bank has the documents or whether they are regular, provided the Bank itself has paid out or accepted drafts in purported compliance with the credit. The letter of credit is significantly different, in this respect only, from that considered in Equitable Trusts Co. of New York v. Dawson Partners Ltd., supra. 10 20
- (e) Jalsard's delay after the Bank's breach of contract in informing the Bank that the certificate of inspection was irregular affords no defence to an action for breach of contract. In some cases dealing with principal and agent, inaction by a principal may constitute ratification of an excess of authority. Article 8 of the Uniform Customs and Practice for Documentary Credits suggests that the issuing bank cannot delay beyond a reasonable time in deciding whether to take up or reject documents tendered by the negotiating bank. In Bank Melli Iran v. Barclays Bank (Dominion, Colonial and Overseas), supra the negotiating bank had paid out against documents which were not in accordance 30 40

with the terms of the credit. However, because of the fact that the issuing bank had taken up the documents and delayed in making any repudiation for some weeks and continued to deal with the negotiating bank during that time, it was held that the issuing bank had ratified the excess of authority. That case involved a dispute between principal and agent, namely, the issuing and negotiating banks, and not customer and banker, where the doctrine does not apply. When the Bank made a demand for payment in the present case, it did so by a letter that suggested that, apart from an irregularity concerning insurance, the remainder of the documents were in order. The Bank should not now be permitted to take advantage of any delay caused by such a suggestion concerning the remainder of the documents when it is subsequently found that one of them, namely a certificate of inspection, was irregular.

(f) Jalsard's conduct subsequent to the Bank's breach of contract, can amount to no more than an acceptance of the benefit of the Bank's imperfect performance of its obligations under the letter of credit, not affecting its right to bring a claim against the Bank for damages. In this case Jalsard carried out its terms of the contract and paid the Bank when requested to do so.

In Friedlander v. Bank of Australasia, supra, the letter of credit stipulated that the customer Friedlander had to reimburse the Bank when presented with the documents. When he was presented with the documents he refused to reimburse the Bank on the basis that there was an irregularity in relation to the insurance policies, and as a result the Bank brought an action to enforce the customer's liability. It was held that by the customer's own action, the term concerning insurance had been altered and this change had been notified to the Bank. The

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customer expressly waived the necessity for the insurance policies to be among the documents presented and therefore there was no breach of contract by the Bank. Assuming that there was a breach of contract by the Bank, then the customer by taking possession of the goods and dealing with them knowing that there was an irregularity concerning insurance, had taken advantage of the benefit of the Bank's imperfect performance of the contract. He must reimburse the Bank, but was entitled to claim damages for the Bank's breach of contract (Griffith C.J. at 98, O'Connor J. at 102-3). In the present case Jalsard was obliged under the terms of the letter of credit to reimburse the Bank, not when presented with the documents, but when the Bank made demand upon it. There has been no waiver by the Respondent Company of its right to bring an action for damages for breach of contract.

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11. A further question raised by the appeal is what loss did Jalsard suffer by reason of the Bank's breach of contract. Upon this question Jalsard makes the following submissions :-

- (a) The Bank is liable for the actual loss claimed, which loss came as a direct consequence of the Bank's failure to obtain the required document, and which loss could have been reasonably foreseen by the Bank as the probable result of that failure. (Hadley v. Baxendale 9 Ex.341; Koufos v. C. Czarnickow Ltd. 1969 1 A.C. 350; Urquhart Lindsay & Co. Limited v. Eastern Bank Limited 9 Ll.L Rep.572). These matters are discussed in detail in the judgment of Macfarlan, J. (pp.215-217). Jalsard adopts the learned Judge's reasoning and his conclusion at these pages on this topic.
- (b) Jalsard's actions after the discovery of the defects were reasonable in the circumstances (Banco de Portugal v. Waterlow & Sons Limited (1932) A.C.452 per Lord Macmillan at 506).

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12. The final question raised by the appeal is whether the Bank was negligent in and about its advice to Jalsard concerning certificates of inspection. Assuming the Board will entertain submissions in the absence of a decision thereon by the learned trial Judge, Jalsard makes the following submissions :-

- 10 (a) At all material times the Bank has carried on the business of banking. As part of such business it arranges on behalf of its customers facilities for furnishing letters of credit overseas and advises customers in connection with transactions in which customers are purchasing goods from abroad. p.223,par.3
p.107,11.5-9
p.124,11.9-29
p.130,11.8-17
- 20 (b) Knowing that Mrs. Wilson on behalf of Jalsard was seeking information and advice concerning importing goods from Taiwan, the Bank, acting within the scope and course of its business, advised Mrs. Wilson of a number of matters outlined above in paragraph 7.
- 30 (c) The Bank owed a duty to its customer to conform to that standard of skill and competence which is generally possessed and exercised by persons who carry on the business of banking. The Bank within the ordinary course of its business, advised Jalsard knowing that reliance was being placed upon the special skill of the Bank, and that its advice would be acted upon (Hedley Byrne v. Heller (1964) A.C. 465; M.L.C. Assurance Co. Ltd. v. Evatt 44 A.L.J.R. 478; Woods v. Martins Bank Ltd. (1959) 1QB 55; Midland Bank Ltd. v. Seymour (1955) Vol. 2, Ll.L Rep.147).
- 40 (d) The Bank was in breach of this duty in that :-
(i) if a certificate of inspection means a document only certifying to the fact of an inspection having been made, as was submitted by the Bank, the Bank was negligent in giving

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p.144,11.30-37
p.165,11.42-44
p.166,11.1-2

Jalsard an inaccurate definition, namely that it must vouch for the quality of goods, and in failing to inform Jalsard of what the term did mean.

p.168,11.17-18

(ii) if a certificate of inspection means only a document certifying to the fact of an inspection having been made, the Bank was negligent in advising that such a document afforded protection to the buyer and in failing to inform Jalsard that such a document did not afford it adequate protection.

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p.153,11.12-15

(iii) knowing that Jalsard wanted only its agent Raymond & Company Limited, which it trusted, to give the certificate of inspection, the Bank was negligent in advising Jalsard that it was unnecessary to put its agent's name in the requisition form as the person to give the certificate, and was negligent in failing to advise it that it was essential to put the agent's name in the contract if it wished to ensure that payment was made only against such a certificate.

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p.162,11.13-17
p.163,11.34-36

(iv) the Bank failed to advise Jalsard that the negotiating bank was entitled to make a payment to the beneficiary even though it did not have all the documents called for in the letter of credit, as the Bank contended it might do, and that if the Bank in intended or purported compliance with the credit took up the documents, the Company was liable to reimburse the Bank for sums paid by it to the negotiating bank.

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(e) In consequence of the breaches of duty, Jalsard suffered the losses claimed in this action, which losses it is entitled to recover from the Bank.

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R E A S O N S

13. The Respondent respectfully submits that the appeal should be dismissed with costs for the following, among other, reasons :-

- (a) The Judgment appealed from is correct.
- (b) The term "certificate of inspection" contained in the contract means a document certifying as to the quality and condition of the goods inspected.
- 10 (c) The term "certificate of inspection" contained in the contract means, inter alia, a certificate to be given only by Raymond & Company Limited.
- (d) The Bank, in breach of its contract with Jalsard, met the drafts presented by the beneficiary.
- (e) Jalsard's conduct, subsequent to the Bank's breach of contract, provides no defence to its claim for damages against
20 the Bank.
- (f) The Bank was negligent in and about giving certain advice to Jalsard and in consequence thereof Jalsard suffered the loss claimed, which it is entitled to recover from the Bank.

M. H. BYERS

PHILIP JENKYN

No. 29 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH
WALES

B E T W E E N

JALSARD PTY. LIMITED
(Trading as JALSARD Plaintiff
TRADING COMPANY) (Respondent)

AND

THE COMMERCIAL BANKING Defendant
COMPANY OF SYDNEY LIMITED (Appellant)

CASE FOR THE RESPONDENT

ASHURST, MORRIS, CRISP & CO.
17 Throgmorton Avenue,
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Solicitors for the Respondent.