Privy Council Appeal No. 57 of 1985

(1) Westpac Banking Corporation and
(2) Commonwealth Steel Company Limited — *Appellants*

v.

South Carolina National Bank — *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH FEBRUARY 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Goff of Chieveley**]*

There are before their Lordships two consolidated appeals from a decision of the Court of Appeal of New South Wales. The issue in the appeals is whether the respondent, the South Carolina National Bank, was entitled to refuse to pay under a letter of credit, issued by it to the second appellant, Commonwealth Steel Company Limited, and negotiated by the second appellant to the first appellant, Westpac Banking Corporation, on the ground that certain documents presented for payment under the letter of credit, viz. a set of three bills of lading, did not comply with the terms of the letter of credit.

The matter has arisen in the following way. The second appellant ("Commonwealth Steel") agreed to sell certain goods, viz. 400 truck side frames and 200 truck bolsters, to a corporation in South Carolina called the National Railway Utilization Corporation. The sale was on the basis of c.i.f. Charleston, South Carolina. The buyers then caused the respondent ("S.C.N.B.") to open an irrevocable documentary letter of credit in favour of Commonwealth Steel. The letter of credit was dated

21st November 1979, and was expressed to expire on 31st January 1980. It was in the sum of US$429,000.00. It was made available against the beneficiary's draft at sight drawn on S.C.N.B. accompanied by certain specified documents. These included:-

> "Full set of clean ON BOARD ocean bills of lading made to the order of South Carolina National Bank, Columbia S.C. marked notify applicant and notify Mr. George Biediger-Greenville, S.C., 803-242-6810."

The letter of credit also contained the following provision:-

> "Except so far as otherwise expressly stated this documentary letter of credit is subject to the 'Uniform Customs and Practice for Documentary Credits' (1974 Revision) the International Chamber of Commerce Document No. 290."

Their Lordships will refer to that document as "the UCP".

A set of three original bills of lading (which were later presented to S.C.N.B. and rejected by it, and which lie at the heart of this dispute) was issued to Commonwealth Steel by agents acting on behalf of Columbus Line, Newcastle Cargo Services Pty. Ltd., the bills purporting to be signed at Newcastle on 29th January 1980. The form used for the bills was a form for ordinary "received for shipment" bills of lading. In boxes provided on the form, the shipper was stated to be Commonwealth Steel; the place of receipt for shipment was stated to be Sydney; the "intended vessel/voy" was stated to be V42 Columbus America (Columbus America obviously being the name of the intended vessel); the intended port of loading was stated to be Melbourne; and the intended port of discharge was stated to be Charleston. In the centre of the bill, the goods were described together with their marks and gross weight. At the bottom of the bill the freight was specified, and the number of packages. Also at the bottom of the bill, as part of the printed form, are to be found words typical of a "received for shipment" bill, which commence as follows:-

> "Received for shipment by the carrier from the merchant or his agent, THE CONTAINERS, PACKAGES OR PIECES, the total number of which is shown above, stated by the merchant or his agent to contain the goods specified above, in apparent good order and condition (unless otherwise noted herein) to be transported from the place of acceptance to the place of delivery shown herein, subject to all the terms and conditions on the face and back of this Bill of Lading. ..."

All this is consistent with an ordinary received for shipment bill. However, there are certain other words in the centre of the bill which are crucial to the issue in the present case. These words, which (as is obvious from the face of the original bills) were cut from the same stencil used to complete the other parts of the bill to which reference has already been made, are:-

"Shipped on Board

Freight Prepaid."

In addition, to the right of those words, there were added, with the use of three separate stamps, the following three provisions - "LOADED ON BOARD"; "FREIGHT PREPAID"; and "THIS IS TO CERTIFY THE WEIGHT SPECIFIED IN THE BILL OF LADING AS TRUE AND CORRECT NETT - GROSS WEIGHT AT THE TIME OF SHIPMENT".

Such were the relevant parts of the bill of lading. Their Lordships now resume the narrative of events. After Commonwealth Steel had been advised by an advising bank that the letter of credit had been received by it from S.C.N.B., Commonwealth Steel negotiated the letter of credit with the Newcastle branch of the first appellant ("Westpac"). On 4th February 1980 S.C.N.B. in Columbia, South Carolina, received from Westpac a bill of exchange drawn by Commonwealth Steel on S.C.N.B. together with documents which purported to comply with the terms of the letter of credit. On 6th February, S.C.N.B. sent Westpac a telex to the effect that payment would not be made under the letter of credit against these documents, because the bills of lading did not comply with its terms. The telex read as follows:-

"RE OUR LETTER OF CREDIT IDI-2770 11/21/79 $429,000.00 FAVOR COMMONWEALTH STEEL CO. LTD, YOUR NEGOTIATION REF 2301N1073 1/30/80. BLADINGS BEARING DISCREPANCIES OF ON BOARD NOTATION NOT SIGNED/INITIALLED NOT DATED PER ICC PUB 290 ARTICLE 20(B). ACCOUNTEE DOES NOT WAIVE DISCREPANCIES. DOCUMENTS HELD AT YOUR DISPOSAL. PLEASE INSTRUCT TO OUR TELEX 573425."

Article 20(b) of the UCP, referred to in that telex, provides as follows:-

"Loading on board a named vessel or shipment on a named vessel may be evidenced either by a Bill of Lading bearing wording indicating loading on board a named vessel or shipment on a named vessel, or by means of a notation to that effect on the Bill of Lading signed or initialled and dated by the carrier or his agent, and the date of this notation shall be regarded as the date of loading on board the named vessel or shipment on the named vessel."

It is plain, therefore, that the reason relied on by S.C.N.B. for declining to pay was that the statements on the face of the bill to the effect that the goods were on board constituted notations to that effect, which had not been signed or initialled and dated by the carrier or his agent as required by Article 20(b).

Thereafter Westpac commenced proceedings in the Supreme Court of New South Wales against both Commonwealth Steel and S.C.N.B., claiming (*inter alia*) against the former the recovery of the sum paid to it upon the negotiation of the letter of credit, and against the latter the sum due under the letter of credit. In the same proceedings, Commonwealth Steel cross-claimed against S.C.N.B. declarations to the effect that, if Westpac was held to be entitled to succeed against it, it was entitled to be indemnified by S.C.N.B. On a summons before Rogers J. in the Supreme Court, the only issue arising in the proceedings was identified as being whether the words "shipped on board" on the bills of lading were words of notation which required to be but which were not signed, initialled and dated in accordance with the UCP. However subsequently before Yeldham J., S.C.N.B. was given leave to amend its defence as follows:-

> "13. In answer to the whole of the statement of claim, the second defendant says that the bill of lading presented to the second defendant with the draft referred to in the statement of claim did not comply with the letter of credit for the following reasons:
>
> (a) The said bill of lading failed to show that the goods referred to therein were loaded on board a named vessel or shipped on a named vessel;
>
> (b) The said bill of lading did not bear wording indicating loading on board a named vessel or shipment on a named vessel;
>
> (c) The purported 'on board' notation on the said bill of lading was not signed or initialled and dated by the carrier or his agent;
>
> and in these premises the second defendant was justified in refusing to make payment against the said draft."

It was later accepted that if none of the defences specified in that paragraph was established, Westpac was entitled to succeed against S.C.N.B., and the action as between S.C.N.B. and Commonwealth Steel would become academic.

The matter then came on for hearing before Yeldham J. His conclusion, expressed in a judgment delivered on 21st October 1983, was that the bills of lading presented to S.C.N.B. did comply with the terms of the letter of credit. He first concluded that the words "Shipped on Board ... Freight Prepaid" appearing on the face of the bills did not constitute a notation, it being plain from the face of the bills that these words constituted part of the original documents presented to the ship's agents for signature and then signed by them. Next he concluded that, although in its original printed form the bill of lading was a "received for shipment" bill, nevertheless as signed it was, by virtue of the words "Shipped on Board", a bill acknowledging the shipment of the goods on board the Columbus America, the ship named in the bill as the intended vessel. On that basis, he held that S.C.N.B. was not entitled to refuse payment under the letter of credit, and that Westpac was therefore entitled to succeed in its claim against S.C.N.B.

S.C.N.B. then appealed to the Court of Appeal of New South Wales against the decision of Yeldham J. On 21st December 1984 the Court of Appeal, by a majority (Samuels and Priestley JJ.A., Mahoney J.A. dissenting), allowed the appeal, the judgment of the majority being delivered by Priestley J.A. Before the Court of Appeal, S.C.N.B. did not argue that the words "Shipped on Board" constituted a notation; it accepted that those words must, as part of the stencilled part of the bill, have been on the bill when signed and issued on behalf of Columbus Line. Its main submission was that the words "Shipped on Board" either should, or might, be read as not meaning that, when the bill of lading was issued, the goods had been shipped on board. It was submitted that they might have been read as intended to have no operation until the goods were in fact shipped on board and this fact was then acknowledged on the bill - as, it was suggested, might have been done when the words "LOADED ON BOARD" were stamped on the bill of lading. In support of this submission, reliance was placed on the description of the Columbus America as the intended vessel; on the fact that the bill was signed at Newcastle on 29th January 1980 as being the receipt for the goods at Sydney, from which (it was suggested) it must be inferred that the goods could not have been shipped on board any vessel in Melbourne on that day. This submission was, in substance, accepted by Priestley J.A. He considered that the presence of the stencilled words "Shipped on Board" made the bill internally inconsistent. He said:

> "It is at the same time saying that the goods have been received for shipment in Sydney for later loading on board in Melbourne and that they have

> already been shipped on board. Both cannot be right."

He inferred that the bill, as the receipt for the goods, would be handed over in exchange for the goods, and probably would not have been issued later; and he therefore concluded that, at the time of the issue of the bill to Commonwealth Steel in Newcastle, the goods were not on board the ship at Melbourne. In drawing that inference, he regarded the fact that the bill was signed in Newcastle, for goods delivered in Sydney, as a fact of decisive importance. S.C.N.B. was entitled to a bill which showed without any plausible doubt that, when it was issued, the goods were then loaded on board or shipped on a named vessel; this bill did not fulfil that requirement, and so S.C.N.B was entitled to refuse to pay under the letter of credit. It is from that decision that the two appellants now appeal.

Their Lordships have been much assisted by the lucid and helpful submissions advanced by counsel for all three parties in this appeal. But, having considered those arguments, they have reached the conclusion that the approach adopted by Yeldham J. at first instance, and indeed also by Mahoney J.A. in the Court of Appeal, is to be preferred to that adopted by the majority of the Court of Appeal.

Before their Lordships, and indeed in the Courts below, there has been no dispute as to the applicable principles of law. Indeed, once the argument that the words "Shipped on Board" constituted a notation had been abandoned, as it was before the Court of Appeal, the question at issue was simply whether the bills as tendered to S.C.N.B., including those words, were "clean ON BOARD bills of lading" as required by the letter of credit, having regard to the provisions of Article 20(b) of the UCP to which reference has already been made, or whether a competent employee of a bank, acting with due care, might reasonably regard the bill as not falling within that description.

In considering that question, it is not unreasonable to observe at the outset that this is not one of those cases where the bank in question has rejected documents on a certain ground, and it is subsequently sought to argue that in so doing the relevent employee of the bank formed a view of the documents which a competent employee, acting with due care, might reasonably form. On the contrary, in the present case the bills were first accepted by Westpac from Commonwealth Steel without question, and were then rejected by S.C.N.B. on a ground which has now been abandoned by them, since they now accept that the words "Shipped on Board" do not constitute a notation. Of course S.C.N.B. is fully entitled to establish, if it can, that there was some other

ground upon which it could have rejected the documents; but it lacks the practical support which it could have derived from an actual rejection on the ground now relied upon by it.

Their Lordships approach the matter as follows. First, they are unable to accept the proposition that the words "Shipped on Board" make the bill internally inconsistent. True it is that the bill is on a "received for shipment" form and for that reason refers to the Columbus America as the intended vessel; but there is nothing inconsistent in a document which states that the specified goods have been received for shipment on board a named vessel and have in fact been shipped on board that vessel. Their Lordships feel bound to say, with all respect, that the majority of the Court of Appeal fell into error in their approach to the construction of the bill of lading. For, as appears from the judgment of Priestley J.A., he went beyond the terms of the document itself and sought to draw inferences of fact as to what had occurred at the time when the document was issued. In particular, he inferred that the bill of lading was in fact the receipt which was issued for the goods received at Sydney, and that it was in fact so issued at the time when those goods were so received. In their Lordships' view there was no sufficient basis for either inference. Some other more informal receipt may have been provided by the agents at Sydney at the time when the goods were received there, to be replaced later by the bill of lading issued at Newcastle; and in any event the bill of lading may have been signed and issued at Newcastle at some date after the date of the receipt of the goods at Sydney. Be that as it may, it is well settled that a bank which issues a letter of credit is concerned with the form of the documents presented to it, and not with the underlying facts. It forms no part of the bank's function, when considering whether to pay against the documents presented to it, to speculate about the underlying facts. For that reason, the Court of Appeal erred in approaching the problem by seeking to draw the inferences of fact to which their Lordships have referred.

Before their Lordships, Mr. Handley for S.C.N.B. sought to support the conclusion of the majority of the Court of Appeal by invoking Article 15 of the UCP. That Article provides as follows:-

> "Except as stated in Article 20, the date of the Bill of Lading, or the date of any other document evidencing shipment or dispatch or taking in charge, or the date indicated in the reception stamp or by notation on any such document, will be taken in each case to be the date of shipment or dispatch or taking in charge of the goods."

It was the submission of Mr. Handley that, having regard to the terms of Article 15, both the date of shipment of the goods, and the date of receipt of the goods for shipment, must be taken to be the date of the bill of lading, viz. 29th January 1980; and that, having regard to the distance between Melbourne (the port of shipment) and Sydney (the place of receipt for shipment), and the consequent improbability that the goods could have been shipped at Melbourne on the same day as they were received for shipment at Sydney, the words "Shipped on Board" on the bill could, or might, be read as not taking effect as at the date of the issue of the bills. But this approach reveals, in their Lordships' view, a misapplication of Article 15. Article 15 is, in effect, a deeming provision, enabling and indeed requiring a bank which receives a bill of lading bearing a certain date to treat that date as being the date of an event which may be relevant for the purposes of the letter of credit (shipment, dispatch, or taking in charge of the goods). So if, for example, a letter of credit requires on board June bills of lading and a bill of lading is tendered which bears a date in June, the bank must take the date of the bill as being the date of shipment, with the effect that the bill will to that extent comply with the letter of credit. But it does not follow that the date borne by the bill, which purports to be no more than the date of signature, was in fact the date of shipment; indeed, it is a commonplace that shipped bills of lading may be issued on a date after the date of completion of the shipment of the goods. So in the present case S.C.N.B. was bound to take 29th January 1980, the date of the bills, as the date when the goods were shipped on board the Columbus America, and (if relevant) as also being the date when they were received for shipment at Sydney; but it does not follow that the goods were in fact received for shipment, or shipped, on that date - merely that a document has been signed bearing that date which evidenced both their receipt and their shipment. It follows that Article 15 cannot, as their Lordships see it, support the argument that the words "Shipped on Board" on the bill did not mean what they say.

Mr. Handley also suggested that the stamped words "LOADED ON BOARD" in some way detracted from the plain meaning of the stencilled words "Shipped on Board". Their Lordships are unable to accept this argument. If it were permissible to speculate, it is highly probable that these stamped words were placed on the document (perhaps by some over-enthusiastic clerk) before it was issued and came into the hands of the shippers, Commonwealth Steel. But in any event, on the face of the document, their Lordships cannot see that their presence in any way detracts from the plain meaning of the words "Shipped on Board".

Finally Mr. Handley suggested that, in the face of an equal division of opinion among the judges below, it was difficult for the appellants to argue that the bill was sufficiently clear on its face for the purposes of presentation under a letter of credit. In some circumstances, there might be force in such a submission; but in the present case the answer is, in their Lordships' view, that the reasoning of the majority of the Court of Appeal was founded upon an erroneous basis, in that they did not confine themselves to the construction of the document in question but sought to proceed on the basis of inferences of fact which were both extraneous and erroneous.

Their Lordships' conclusion is, in the end, simple. True, this bill of lading was, in form, a "received for shipment" bill; but with the words "Shipped on Board" forming part of the stencilled wording inserted in the bill and present at the time of its signature and issue, it was plain on the face of the bill that it stated that the goods had at that time been shipped on board the intended ship, Columbus America, at the intended port of loading, Melbourne, and it followed that the set of bills presented to S.C.N.B. was a set of on board ocean bills of lading as required by the letter of credit.

Their Lordships will therefore humbly advise Her Majesty that the appeals should be allowed with costs to both appellants in the Supreme Court and in the Court of Appeal and that the order of Mr. Justice Yeldham should be restored. The respondent must also pay the costs of this appeal.