
**Hilary Term**
[2015] UKPC 14
**Privy Council Appeal No 0053 of 2014**

# JUDGMENT

# Mauri Garments Trading and Marketing Limited (Appellant) *v* The Mauritius Commercial Bank Limited (Respondent)

## From the Court of Appeal of Mauritius

**before**

**Lord Mance**
**Lord Clarke**
**Lord Sumption**
**Lord Carnwath**
**Lord Toulson**

## JUDGMENT GIVEN ON

## 24 March 2015

**Heard on 25 February 2015**

| *Appellant* | *Respondent* |
| --- | --- |
| Rex Stephen<br>Ike Ehiribe<br>(Instructed by Astor Law International) | Gilbert Ithier SC<br><br>(Instructed by Blake Morgan LLP) |

**LORD MANCE:**

*Introduction*

1. The appellant, Mauri Garments Trading and Marketing Ltd ("T&M"), appeals against the dismissal of its claim against Mauritius Commercial Bank Ltd ("MCB") by Devat J by judgment dated 26 September 2012, which was upheld by the Court of Appeal by judgment dated 1 October 2013.

2. By sale and purchase contract dated 25 November 1992, T&M contracted to buy shirts from Mauri Garments Co Ltd ("Mauri Garments"). The contract provided for the issue of a bank guarantee up to FF5m, and for this, when issued, to evidence the binding nature of the sale and purchase contract. A letter of indemnity No 685 was accordingly issued by Banque S G Warburg Soditic SA of Zurich ("Warburgs") in favour of MCB for any amount up to FF5m. Its terms were no doubt agreed between T&M and Mauri Garments, and they have in any event clearly been accepted as complying with the sale contract, which was thereafter performed.

3. Under the letter of indemnity (as extended in validity until 30 June 1994), MCB made a demand on 30 June 1994 for FF5m, on the basis that "We have not received payments for goods supplied" to T&M by Mauri Garments totalling FF6,734,152.17. Warburgs made the payment. It is not suggested that MCB's demand did not satisfy the terms of letter of indemnity or that Warburgs could have refused to make the payment.

4. What is suggested is that Mauri Garments has a claim in tort against MCB, for having claimed more than was actually due from T&M to Mauri Garments. It is alleged that T&M only owed Mauri Garments FF2,536,386 (the equivalent of Rs7,989,617). Further, MCB had caused a receiver to be appointed over Mauri Garments on 1 April 1994, and the receiver in a statement of affairs dated 6 May 1994 had identified that sum as outstanding. With that knowledge, it is said, MCB had no basis for demanding more.

*The contractual documentation*

5. The sale agreement provided:

"Re: Contract for the supply of garments between MAURI GARMENTS CO LTD and MAURIGARMENT TRADING AND MARKETING HK.

This contract is entered into on the 25th November 1992 between MAURI GARMENTS CO LTD and MAURIGARMENT TRADING AND MARKETING HK under the following terms:

(a) TRADING guarantees the quantity 110,000 pieces of shirts per month or 1,320,000 pieces of shirts per year. MAURI agrees to supply the said quantity to TRADING.

(b) During the term of this contract. TRADING will despatch its technician(s) to MAURI for the technical assistance to MAURI. All fees relating to the technician(s) will be borne by MAURI.

(c) Pricing will be calculated on a CIF basis.

For a long sleeved shirt, fabric consumption will be based on 2.25 m2 and for a short sleeved shirt 1.28 m2 plus FRF13.50 which represent the CMT charges as well as freight charges and profits.

Pricing for old stock/shirts? will be based on a FRF6 per meter.

(d) Payment will be 150 days from Bill of Lading date/AWB date.

(e) A bank guarantee up to FRF5,000,000 will have to be set up.

(f) The bank guarantee once issued would be the evidence of the contract binding both parties."

6. The letter of indemnity provided:

"Your customer Mauri Garments concluded a contract with Mauri Garments Trading and Marketing on 25.11.1992 for the supply of

> garments. As security for the payment of the merchandise, an indemnity by a bank shall be furnished.
>
> At the request of Mauri Garments Trading and Marketing we, BANK S G WARBURG SODITIC AG, Zurich/Switzerland, hereby irrevocably undertake to pay you on first demand, irrespective of the validity and the effects of the above mentioned contract and waiving all rights of objection and defence arising from said contract, any amount up to FF5,000,000 — (French Francs five million 00/00)
>
> Upon receipt of your written and duly signed request for payment and your written confirmation that you have not received payment at maturity for the sum claimed under this letter of indemnity.
>
> The total amount of this indemnity will be reduced by any payment effected by us hereunder.
>
> For the purpose of identification, your request for payment and your confirmation hereunder have to be presented through the intermediary of a first rate bank confirming that the signatures thereon are binding for your firm.
>
> Our undertaking is valid until June 30, 1993 (nine-three), and expires in full and automatically if your written request for payment and your written confirmation, together with a first rate bank's verification of your signatures, are not in our possession on or before that date.
>
> This indemnity is governed by Swiss law, place of jurisdiction is Zurich."

The case has been conducted on the basis that the law of Mauritius applies to T&M's claim against MCB.

*The judgments below*

7. The judge, after hearing evidence, found that MCB had discounted the full value of export bills of exchange presented to it by Mauri Garments totalling as at 30 June 1994 FF6.7m (or, more precisely no doubt, FF6,734,152.17) in respect of goods shipped

to T&M under the sale contract. The difference between this total and the FF2,536,386 shown in the receiver's statement was due primarily to (a) the offsetting of sums due from Mauri Garments to T&M in respect of raw materials paid for by T&M, but in part also due to (b) the deduction of certain invoices which T&M denied receiving or in respect of which T&M denied receiving any goods. The total of the invoices in (b) was only FF1,133,109, so that, even deducting them in full from the FF6,734,152.17, the balance was well in excess of the FF5m which MCB claimed and received under the letter of indemnity.

8. The critical difference was and is therefore the offset claimed by T&M in respect of the price of raw materials supplied to Mauri Garments. The judge recorded that there was agreement between counsel at the close of both parties' case that the only issue for the court was therefore whether the price due for the purchase of the raw materials ought to have been deducted from the amount claimed by MCB. T&M take issue with the accuracy of this statement, but the basis on which it does so is that the courts below did not focus on the fact that its claim was put in tort and in reliance on the receiver's own statement of the accounting position between T&M and Mauri Garments, of which MCB must have been aware (having put Mauri Garments into the receivership).

9. T&M also argued before the judge that MCB was bound by the terms of the sale contract, pursuant to which the letter of indemnity was issued, and that T&M was not concerned with any discounting arrangement between MCB and Mauri Garments. Devat J rejected the former argument by reference to very well-known authorities on the autonomy of letters of credit from the underlying sales or other contract: *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, cited with approval in *Saint Michel Marketing Co Ltd v South East Asian Bank Ltd* [1996] MR 144, and *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233.

10. More generally, Devat J held that Warburgs' obligation to pay under the letter of indemnity was independent from the underlying sale and purchase contract between Mauri Garments and T&M. MCB having negotiated bills of exchange was entitled to look to Warburgs by making a demand under the letter of indemnity. Any adjustment that required to be made regarding the purchase price of the raw materials was a matter between T&M and Mauri Garments. On that basis, she dismissed the claim.

11. The Court of Appeal (Yeung Sik Yuen CJ and Fekna J) dismissed T&M's appeal. It saw no merit in grounds of appeal which included a complaint that the judge had not addressed the actual cause of action in tort relied on against MCB for unduly obtaining and/or enriching itself by soliciting and obtaining money to T&M's detriment. But it also questioned the existence on the evidence of any set off as between Mauri Garments and T&M.

12. On appeal to the Board, T&M reiterates that its claim is in tort. Mr Rex Stephen representing T&M draws the Board's attention to the broad terms of article 1382 of the Code civil, the first article under the head *Des délits et des quasi-délits*:

> "1382. Tout fait quelconque, de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

13. There is no allegation that MCB acted other than in good faith, but it is submitted that MCB is liable because it claimed more than it is said that it knew to be due from T&M to Mauri Garments and that in so doing it committed some sort of faute. The question is whether such a claim is maintainable in law.

14. However, the submission is put, the Board has no hesitation in saying that Devat J arrived at the right conclusion for basically the right reasons, and that the Court of Appeal was correct to uphold her decision. Where parties have, as here, entered into carefully structured contractual arrangements, involving two separate and autonomous contracts each between different parties to the other, it is impossible for the law to recognise tortious duties outside and cutting across the terms and performance of those contracts. In that respect, the knowledge which the Board is prepared to assume that MCB had of the state of account between T&M and Mauri Garments is in the Board's view irrelevant.

15. The letter of indemnity was given in terms by one bank (Warburgs) to another (MCB). It was given "as security for the payment of the merchandise". More specifically, it was given to cover MCB in respect of sums which MCB had not received, since it was payable on "your written confirmation that you have not received payment at maturity for the sum claimed under this letter of indemnity". It was therefore given to cover precisely the situation that occurred, a situation in which MCB was out of pocket in respect of monies advanced to Mauri Garments under bills which had matured without payment being made. Its autonomy from the underlying sale contract (which would anyway normally be implicit) was furthermore explicitly recognised by its very terms – "we [WARBURGS] hereby irrevocably undertake to pay you on first demand, irrespective of the validity and the effects of the above mentioned contract and waiving all rights of objection and defence arising from said contract". Any cross-claim or set-off which might exist as between T&M and Mauri Garments, whether under the sale contract or under any separate arrangement, was therefore irrelevant. There is in fact no provision in the sale contract for T&M to fund the purchase cost of any materials, so, as far as appears, this must have taken place under some separate arrangement. But, even if it had taken place under the terms of the sale contract, it would have been irrelevant under and in the context of the letter of indemnity, which protects MCB in respect of sums advanced to Mauri Garments and not received by MCB.

16. T&M's attempt to assert a tortious duty owed to it by MCB would undermine and conflict with the deliberate and familiar contractual scheme agreed between the parties. The principles governing letters of credit are as much applicable to letters of indemnity of the present nature, as well as other forms of on demand guarantee. As Kerr J said in *R D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 156B-C:

> "[The authorities] were mostly concerned with confirmed letters of credit, but they equally apply to confirmed performance guarantees. In both cases the banks are only concerned to ensure that the terms of their mandate and confirmations are complied with, eg of [sic] the conformity of the documents presented. ... This is unfortunate for the plaintiffs, but it is what they have agreed. Banks are not concerned with the rights or wrongs of the underlying disputes but only with the performance of the obligations which they themselves have confirmed."

17. So here, T&M have committed themselves to a situation in which their bank, Warburgs, may have to pay up to FF5m to Mauri Garments' bank, MCB, under an on demand letter of indemnity. Provided that the terms of the letter of indemnity are complied with, as it is common ground that they were, T&M can have no complaint against Warburgs. Still less can they have any complaint against MCB. T&M's remedy, if it has a right for material paid for, is against Mauri Garments. The fact that that remedy may be valueless or less valuable, because Mauri Garments is in receivership is irrelevant. T&M could in fact have protected itself in respect of cross-claims, whether arising out of the sale contract or from some separate arrangement, by itself requiring cash in advance or itself stipulating for a letter of indemnity from a bank before paying for such material.

18. The notice of appeal raised a number of other complaints. One was that the judge was biased, because she stated at one point "That's clear". This was in the course of the evidence of a witness using a blackboard, who in fact asked whether there was "any question or that's clear enough". The judge's response "That's clear" appears to the Board entirely innocuous, and, in any event, irrelevant to the point of law on which this case in the Board's view turns. The letter of indemnity explains in its own terms that it was to protect MCB in respect of anticipated advances which MCB would be making (to Mauri Garments) relying on its protection.

19. Another complaint is that the Court of Appeal did not have, and proceeded without, the benefit of Mr Stephen's advocacy, because he had been unfortunate enough for unspecified reasons to miss his flight back to Port-Louis from Rodrigues. The Court of Appeal refused a short adjournment to enable Mr Stephen to arrive and argue the appeal. But he had filed a skeleton argument in writing and he was substituted at the hearing by Mr Moirt, who made brief submissions. The Board cannot regard this course

of events as representing any form of denial of appellate justice, with which it can or should interfere. But in any event T&M has now had a full opportunity of arguing the case, with Mr Stephen's advocacy, before the Board.

20. A third complaint is that the Court of Appeal engaged itself in determining factual issues. It is right, as the Board has observed, that the Court of Appeal concluded by expressing doubts about whether there was any sufficient proof of any cross claim for the price of raw materials which could give rise to a set off. The Board has, in contrast, proceeded on the basis that a cross claim did exist in the full amount indicated by the receivers' statement and underlying documents. The critical issue on that basis is the issue of law, whether it is open to a company in T&M's position to bring a tort claim against a bank such as MCB on the basis that awareness on the bank's part of the state of account between the parties to the underlying sale and purchase contract precludes the bank from claiming an indemnity in respect of advances in respect of the price of goods for which it has not been repaid.

*Conclusion*

21. No other points have been raised which require specific mention. For the reasons given, the Board concludes that this appeal must be dismissed.