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DORYFOROS YAPANIS
v.
THE IONIAN BANK LTD. AND ANOTHER.

[JACKSON, C.J., AND HALID, J.]

DORYFOROS YAPANIS, *Appellant*,

v.

THE IONIAN BANK LTD. AND ANOTHER, *Respondents.*

(*Civil Appeal No.* 3732.)

Bill of Exchange—Discount—Bill drawn against confirmed credit—Third Party procedure—Rules of Court, 1938, *Order* 10.

In March, 1939, a confirmed credit was opened with the Overseas branch of the Midland Bank in London on account of a London importer of oranges in favour of the appellant, who is an exporter of oranges. The terms of this credit were contained in a letter from the Midland Bank to the Ionian Bank in Cyprus. It was made available by sight drafts to be drawn by the appellant on the Midland Bank, accompanied by certain specified documents, which it was stipulated must agree in every detail with the terms of the credit allowed. In April, 1939, the Ionian Bank discounted a bill drawn by the appellant on the Midland Bank in the usual manner, but the Midland Bank declined to pay the bill on the ground that the invoice presented with it did not describe the oranges shipped as "New Crop Lefka Oranges" but as "Lefka Oval Oranges" marked "YAP". Although a fresh invoice was prepared relating to the same shipment the Midland Bank persisted in its refusal on the ground that the importers in England would not authorize them to take up documents which were not in order on first presentation.

The Bill was protested in London and the Ionian Bank informed the appellant that they held him responsible for the amount they had had to pay for him as drawer of the bill, and reminded him of a declaration he had signed when he discounted it. The appellant maintained that the bank had confirmed that the documents were in order and credited him with the amount of the bill; that he had complied in every respect with the terms of the credit; and was free of responsibility.

The oranges on arrival in London were sold on the instructions of the Ionian Bank and realised £271. 2*s*. 8*p*. This left a balance of £285. 15*s*. outstanding against the appellant on the transaction in regard to the draft in this case. The Ionian Bank therefore claimed this sum from the appellant in the District Court.

After close of pleadings the appellant (then defendant) applied to have the Midland Bank joined as a co-defendant and served out of the jurisdiction. This was done. The Midland Bank entered appearance and filed a defence to an amended statement of claim by the Ionian Bank, alleging that the Midland Bank's refusal to honour the draft was unreasonable. The Ionian Bank did not press their claim in Court against the Midland Bank pointing out that it was the appellant who had added the Midland Bank as co-defendant; and so that action was dismissed. The Ionian Bank however obtained judgment against the appellant for £285. 15*s*. The appellant contended in this Court that the District Court should have dealt with the issue as between the Ionian Bank and the Midland Bank.

Held: A defendant who has not served a co-defendant with a third party notice under Order 10 of the Rules of Court, 1938, has no right to require the Court to deal with an issue which arose not between the plaintiff and himself, but between the plaintiff and the co-defendant.

A person who discounts a bill with notice that it is drawn against a confirmed credit is not, by that fact alone, deprived of his right of recourse against the drawer.

Appeal from the judgment of the District Court of Famagusta.

J. Clerides (with *A. Michaelides* and *Ch. Mitsides*) for the appellant.

G. Chryssafinis (with *S. Stavrinakis*) for the respondents the Ionian Bank Ltd.

G. Achilles (with *G. Georghiou*) for the respondents the Midland Bank Ltd.

The facts of the case are fully set forth in the judgment of the Court which was delivered by :

JACKSON, C.J. : In the District Court of Famagusta the appellant, the drawer of a bill of exchange, dishonoured on presentation to the drawee, was adjudged to pay to the respondent, who had discounted the bill for him, the sum of £285. 15*s*. This is an appeal against that decision.

The facts are as follows : In March, 1939, a confirmed credit, to the extent of £475, was opened with the Overseas branch of the Midland Bank in London on account of a London importer of oranges, in favour of the appellant, who is an exporter of oranges from Cyprus.

The Midland Bank has no branch in Cyprus and the terms of this credit appear in a letter, dated 21st March, 1939, from the Overseas branch of the Midland Bank, in Old Broad Street, London, to the Ionian Bank Ltd., in Mortgate Street, London, the head office of the respondents. We shall refer to the Overseas branch of the Midland Bank simply as the Midland Bank. This letter, and all the other documents to which we shall refer, were produced in evidence at the trial by consent of all parties. The credit was to be made available by sight drafts drawn by the appellant on the Midland Bank accompanied by certain specified documents, including bills of lading and invoice, evidencing shipment by a named vessel of 1,000 boxes of " New Crop Lefka Oranges, YAP brand ", at a named price F.O.B., Cyprus, and conforming to certain specifications. The letter then continued in the following terms :—

> " Documents must agree in every respect with details stipulated and under no circumstances may any deviation from the terms of the Credit be allowed.
>
> All drafts drawn under this Credit must contain the clause— ' Drawn under L/C No. 58387 '.
>
> Kindly request your Famagusta Office by cable at deferred rate to notify the beneficiaries of the above Confirmed Credit, we hereby undertaking to honour all drafts negotiated by your said office, provided they are drawn and presented in accordance with the terms of this Credit ".

The next document is a letter from the Famagusta branch of the Ionian Bank to the appellant, dated 22nd March, 1939. This letter gave the full terms of a cable that the branch had just received, presumably from its London Office, and added that the bank would " be glad to negotiate your drafts drawn under the terms of the credit". The cable, as repeated in this letter, gave the full terms of the confirmed credit opened by the Midland Bank in London in favour of the appellant and described in the same terms the oranges to be shipped, " New Crop Lefka YAP brand ". But the telegram did not repeat the statement in the Midland Bank's letter, " documents must agree in every respect with details stipulated and under no circumstances may any deviation from the terms of the credit be allowed ". Nor did the evidence show at what date the Ionian Bank in London informed the respondents of the Midland Bank's insistence on that particular point.

The respondents later notified the appellant of two extensions of this confirmed credit, referring to it by the number originally

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given to it by the Midland Bank, No. 58387. The first extension was an increase of £250 to cover an additional 500 cases of oranges and the second was an increase of £550 to cover an additional 1,000 cases, available until the 15th April, 1939. No suggestion has been made that the terms on which these extensions were granted differed in any respect from the terms of the original credit.

The appellant made two shipments of oranges under these credits, drew bills on the Midland Bank and discounted them with the respondents. Both bills were later accepted and paid by the Midland Bank in London. It is in connection with a third bill drawn under the second extension of the credit that this case arises. This was a bill drawn by the appellant on the 13th April on the Midland Bank, London, requesting them to pay at sight to the order of the Ionian Bank £550. The bill was expressed to be drawn under credit No. 58387. It was discounted by the respondents and endorsed by them. Among the documents presented by the appellants to the respondents with the bill for discount was an invoice in respect of 1,000 cases of " Lefka Oval Oranges " marked " YAP ". On presentation of the bill and documents to the Midland Bank, London, on 21st April, the bank declined to pay the bill on the ground that the invoice did not describe the oranges as " new crop ", as stipulated by the terms of the credit. The respondents informed the appellant by letter of 22nd April and added that their own guarantee, presumably that the oranges were " new crop " had been refused by the Midland Bank. Accordingly the appellant prepared a fresh invoice relating to the same shipment, describing the oranges as " New Crop Lefka Oranges " and explaining that this meant " late crop ", because there are not two crops in Cyprus, but Lefka oranges mature a little later than others.

The Midland Bank persisted in their refusal to pay the bill on the ground that their customers, presumably the importers in England, would not authorize them to take up documents which were not in order on first presentation. The Midland Bank was prepared to accept the bill only under a banker's guarantee. Accordingly the bill was protested in London at the instance of the Ionian Bank on the 1st May.

On 2nd May the appellant was informed by the respondents of the Midland Bank's repeated refusal and, as the oranges were then about to arrive in England, he was asked for instructions as to their disposal. On the same day the respondents wrote to the appellant telling him that they held him responsible for the amount that they had paid to him as the drawer of the bill and they reminded him of a declaration that he had signed when he discounted it. This was a declaration included in a form, printed in English and Greek, and used by the respondents when they discount bills for their customers. The form used in this particular instance included the bill with which we are concerned and one other. Both bills are entered on the form as " Bills discounted to Mr. N. Yapanis ", the appellant. The form is dated 15th April, 1939, and on it is entered in manuscript, in relation to the bill in this case, " drawn under credit 58387 ". The form was signed by someone as " for " the appellant and above the signature is the following printed declaration, " I/We hereby declare that I/we have discounted the above bills and that I/we are responsible for them until final payment

even in case they have not been protested". This was the declaration of which the appellant was reminded by the respondents in their letter of 2nd May.

The appellant replied that the bill had been drawn against the credit, that the respondents had confirmed that the documents were in order and had credited him with the amount of the bill. He maintained that he was free of responsibility since he had complied in every respect with the terms of the credit opened in his favour. The Bank denied that they had undertaken any responsibility for ensuring that the documents were in order. Correspondence followed in which each side maintained his position. The appellant declined to give any instructions for the disposal of the oranges and said that if the respondents sold them they did so on their own account.

Early in May the oranges arrived in Liverpool and, on instructions from the Ionian Bank in London, were sold by a firm of fruit brokers "on account of who it may concern". They fetched a net sum £271. 2*s*. 8*p*. The respondents credited the appellant with that sum, leaving a balance of £285. 15*s*., outstanding against him in their accounts covering the whole transaction in regard to the draft in this case. They accordingly claimed that sum from him in the District Court.

After the close of the pleadings in the action, the appellant, who was the defendant, applied to the District Court, to have the Midland Bank added as a co-defendant and served out of the jurisdiction. An order was made by the District Court to that effect on 20th March, 1940. The Midland Bank has no branch in Cyprus and it is evident that questions arose as to the jurisdiction of the District Court. B it the Midland Bank entered an appearance and filed a defence in answer to an amended statement of claim in which the plaintiff, now respondent, claimed against the Midland Bank on the ground that the bank's refusal to honour the draft was unreasonable. The Ionian Bank, as plaintiff, maintained, as against the Midland Bank, that there was no material difference between the description of the oranges to which the Midland Bank had objected, "Lefka Cyprus Oranges", and the description given by the Midland Bank when opening the confirmed credit, "New Crop Lefka Cyprus Oranges", there being only one annual crop of oranges in Cyprus.

In their defence the Midland Bank denied that the District Court had jurisdiction over them, as they had no branch in Cyprus and their contract with the Ionian Bank was made in London and was to be entirely executed there. At the trial of the action, however, the Midland Bank did not insist on that objection and expressly submitted to the jurisdiction of the Court. In so doing they clearly acted with the motive of giving every assistance to the Court that they could. At the trial the Ionian Bank pointed out that the Midland Bank had been added as co-defendant by the defendant, and they did not press their claim against the Midland Bank. The District Court said in its judgment that the defendant had not complied with Order 10 of the Rules of Court and had not served the Midland Bank with a "third party notice". The District Court held therefore that it was not called upon to consider what claim, if any, the defendant had against the Midland Bank and the action against that bank was dismissed.

The plaintiffs, the Ionian Bank, have not appealed against that decision, but the defendant, now appellant, maintains that the District Court ought to have dealt with the issue as between the Ionian Bank and the Midland Bank. It will be convenient, therefore, to dispose of that point now, before passing on to the main issue in this appeal, the issue as between the appellant and the respondent.

The appellant, as defendant in the District Court, made no claim against the Midland Bank and took no steps to bring into operation the third party procedure for which Order 10 provides. He had, therefore, in our opinion, no right to require the District Court to deal with an issue which arose, not between the plaintiff and himself, but between the plaintiff and a third party. He had not taken the proper procedure to make that issue an issue between the third party and himself. We think, therefore, that the District Court was right in declining to decide that issue and in dismissing the action against the Midland Bank. Indeed, looking at the substance of that issue, the District Court had not the material before it upon which it could have reached a decision. There was no doubt evidence upon which it might have been decided that the descriptions " New Crop Lefka Oranges " and " Lefka Oranges ", when used in April in any given year, mean the same thing in Cyprus. But there was certainly not material before the Court upon which it could have been decided whether or not those descriptions mean the same thing in the fruit trade in England. That was the issue on that particular point, though there would, of course, be other issues also in a claim by one bank against the other.

We turn now to the main issue in this appeal, the issue between the appellant and the respondents. The appellant's argument was that, as the Midland Bank had no branch in Cyprus, they had made the Ionian Bank, the respondents, their agents for the purpose of giving effect to the confirmed credit in this Island. Consequently the Ionian Bank was in the same position as that in which the Midland Bank would have been if presented with a draft drawn against the confirmed credit and complying with its terms. The Bank could not refuse to pay. On this point the appellant referred to the case of *Urguhart Lindsay & Co.* v. *Eastern Bank* (1922 L.J. Vol. 91, p. 274).

For the purposes of this argument it was assumed that the appellant had in fact complied with the terms of the credit and the respondents have never suggested that he had not. They did not base their claim against him on that ground. We must therefore deal with the appellant's argument in this appeal on the assumption on which both parties have treated it and we shall not concern ourselves with the question whether or not the terms of the credit had been observed, a question which, as we have already said, could not be answered upon the material before us. Nor are we, by consequence, concerned with the position arising between two parties one of whom has paid money to the other because of a mistake, either of fact or law.

The appellant's argument, as we have already stated it, was supported by a number of propositions. Mr. Clerides pointed out that the Midland Bank's statement of the terms of the confirmed credit was communicated only to the respondents, and extended

only to bills negotiated by them. He argued, therefore, that if the appellant wished to take advantage of the confirmed credit, he could only do so by discounting his bills with the respondents. This argument, as far as it goes, seems to us to be correct and it states one of several facts that distinguish this case from the case of *Sasson* v. *International Banking Corporation* (L.R, 1927 A.C. 711) to which reference was made in the Court below and before us. But that argument does not, in our opinion, enable us to say that the Ionian Bank was in the same position as the Midland Bank who had opened the confirmed credit and could not refuse to pay bills properly drawn against it. The relations that existed between the buyer and the Midland Bank, and upon which the confirmed credit rested, did not exist between the buyer and the Ionian Bank, and the confirmed credit had not been opened by them. Bills were to be drawn upon the Midland Bank and not upon the respondents. But, the argument proceeded, the Midland Bank had chosen the Ionian Bank as the instrument to give effect to the confirmed credit in Cyprus and the Ionian Bank had accepted that position. Consequently, said Mr. Clerides, a contractual relation was established between the Ionian Bank and the appellant which deprived the Bank of the right of recourse which they would normally have against him when the bill was dishonoured by the Midland Bank. What was this contractual relation ? The Ionian Bank informed the appellant of the opening of the confirmed credit by the Midland Bank in his favour and of the terms of the credit, as far as the Cyprus branch knew them at that time, and they said that they would be pleased to negotiate his drafts drawn under the terms of the credit. We may say, in the first place, that in our opinion the Ionian Bank undertook by their letter no obligation towards the appellant to ensure that his documents were in order, and it has not been argued that they did. Whatever obligation the Ionian Bank's letter may have cast upon the Bank when the appellant acted on it, we cannot see anything in it which deprived the Bank of their ordinary right of recourse against appellant in respect of bills drawn by him against the credit and discounted by them. Sassons' case seems to us to be sufficient authority for saying that a person who discounts a bill with notice that it is drawn against a confirmed credit is not, by that fact alone, deprived of his right of recourse against the drawer. We can see no reason to modify the application of that proposition to the case before us because the Ionian Bank was the only bank authorized to negotiate bills drawn against the credit. It may be that, because of that fact, the decision in the case of In re the Agra and Masterman's Bank and the Asiatic Banking Corporation (1867 L.J. Vol. 36 p. 223) would apply with special force to the case before us. But, according to the decision in Sasson's case, the decision in the former case would only affect the position as between the Ionian Bank and the Midland Bank and would not impose on the Ionian Bank a duty towards the appellant " so as to modify the ordinary right of recourse in all events or in any event ". (pp. 729 and 730 of report of Sasson's case already cited).

What we have already said is sufficient, in our view, to dispose of another argument urged on behalf of the appellant, namely, that the insertion of the words "drawn under credit No. 58387" in the bill itself, and in the form signed on behalf of the appellant

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when the bill was discounted, modified the Bank's right of recourse. In so far as the issue in this case is concerned, the only point of those words was to show that the Bank knew that the bill was drawn against the confirmed credit. But it was obvious in other ways that the Bank had that knowledge and, as we have already said, there was no reason why their possession of it should modify their ordinary right of recourse.

We have not hitherto referred, in dealing with the arguments, to the undertaking which was signed on the appellant's behalf when the bill was discounted, an undertaking that the appellant remained responsible for the bill until final payment. It will be clear from what we have already said that there is, in our view, no conflict whatever between that printed undertaking and the written reference to the credit against which the bill was drawn. There can be no question, therefore, whether one should prevail over the other. The responsibility of the appellant would have been the same, in our opinion, whether he had signed the undertaking or not. If the undertaking has any significance, it would seem to lie in the indication that it gives of the Bank's attitude to the transaction. The same attitude was shown in the evidence of the sub-manager of the Bank. He said that the appellant was an old customer of the Bank, known to them as a man of substance, and that they discounted his bill because he was a customer. The sub-manager said that it was only as an additional security that they took his undertaking to remain responsible for the bill. If the facts had been such as to deprive the Bank of their ordinary right of recourse against the appellant, a question might have arisen whether or not the respondents' reliance on him, and on his signed undertaking, would have been enough to restore it. But that is not, in our view the position in this case.

We think that it is going very much too far to say, as was said on behalf of the appellant, that because the Ionian Bank undertook to give effect to the credit in Cyprus and was the only bank authorized to do so, the Ionian Bank, though it had not opened the confirmed credit, was in the same position as the Midland Bank which had done so. No authority that has been cited to us gives support to that proposition.

We recognize the differences between Sasson's case and the case before us, but we think that in spite of those differences, we may properly apply to this case the following passage from the conclusion of the judgment in the Privy Council. "The appellant is not in a position to show that, when he discounted this bill, he bargained that the transaction should be without recourse, and in order to limit the respondents *prima facie* right of recourse against himself he must show some contract with them to that effect or some breach of contract or duty on their part, which would have that effect in law. No authority has been produced which enables (him) to do so, and (we) cannot say that any legal principle leads to that conclusion". (Page 731 of report cited). We think therefore that this appeal must be dismissed with costs.