

Litigation - Cyprus

Supreme Court reconfirms hands-off approach to banking obligations

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Background
Facts
Decision

Background

On July 19 2012, in its judgment in *Pakistan Cables Limited (PCL) v NSB General Trading (Overseas) Company Limited (NSB)*,⁽¹⁾ the Supreme Court of Cyprus reconfirmed the general principle that courts will rarely interfere in banking mechanisms created by virtue of irrevocable bank obligations. The court quoted the observation of Justice Kerr in the English case of *RD Harbottle (Mercantile) Ltd v National Westminster Bank Limited*,⁽²⁾ that such obligations "are the life-blood of international commerce".

The Supreme Court further stated that:

"Apart from instances of clear fraud in which the bank itself is involved or has notice of, the courts leave businessmen to settle their disputes in court or by arbitration as per the contractual rights and obligations that each one undertook."

As Kerr stated in *RD Harbottle*, "the courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take".

Facts

In the course of a contract for the sale and purchase of goods, PCL (as foreign buyer) gave orders to its bank at its place of residence - the Muslim Commercial Bank Ltd (the issuing bank) - to open an irrevocable credit in favour of NSB (the seller of the goods), in accordance with the terms stated in the issuing bank's instructions. The issuing bank made arrangements with Hellenic Bank (the correspondent bank), which was established at the place of residence of the seller, to undertake the negotiation, acceptance and payment of the exporter's credit, on production of the documents by the seller.

The correspondent bank advised the exporter that it would negotiate, accept and pay the credit either without its acceptance or by confirming the credit opened by the issuing bank. The Supreme Court noted that "these are the common stages of arranging settlement of the payment of exported goods from one country to another when a credit or guarantee mechanism is used".⁽³⁾

In this case, even though the respondents - PSB, Slobodan Popovich and the Hellenic Bank Public Company Limited - had issued an irrevocable bank guarantee, they did not receive the goods. The proceedings raised issues of international financing, the correctness of bills of lading for the carriage of goods by sea, bank liability, misrepresentations and compensation on the basis of unjust enrichment. Popovich, who was joined as a co-defendant, was a director of NSB.

Decision

As a general rule, courts in Cyprus have the power to issue interim orders in all cases in which it appears to the court just or convenient so to do, provided that the following conditions have been satisfied:

- A serious question has arisen to be tried at the main hearing;
- There appears to be 'a probability' that the plaintiff is entitled to relief; and
- It would be difficult or impossible to carry out complete justice at a later stage without granting an interlocutory injunction.

In the present case, PCL had applied for interim orders to prevent the bank from making payment of the credit, but these were refused.

The Supreme Court held that:

*"The whole philosophy that must govern transactions of this nature was expressed by Diplock J in *Ian Stach Ltd v Baker Bosley Ltd (1958) 2 QB 130*, as a direct undertaking by the banker that the seller, if he presents the documents as required in the required time, will receive payment."*

In an earlier case, *Michael & Onisiforou Developers Ltd v Hellenic Bank*,⁽⁴⁾ where the applicants had obtained an *ex parte* interim order prohibiting the respondent from paying any amount based on a guarantee, the first instance court had later cancelled the order, citing the following:

"Before leaving this appeal, we should like to add a word about the circumstances in which an ex parte injunction should be issued which prohibits a bank from paying under an irrevocable letter of credit or a performance bond or guarantee. The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined."⁽⁵⁾

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Endnotes

⁽¹⁾ Civil Appeal 194/2009.

⁽²⁾ [1977] 2 All ER 862.

⁽³⁾ *The Export Trade*, Clive M Schmitthoff, sixth edition.

⁽⁴⁾ Civil Action 1035/10.

⁽⁵⁾ Extract from judgment of Sir John Donaldson MR in *Bolivinter Oil SA v Chase Manhattan Bank*, [1984] 1 All ER 351.

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