Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd

[2007] SGHC 42

High Court — Suit No 97 of 2006 (Registrar's Appeal No 173 of 2006)
Sundaresh Menon JC
31 July; 1–2 August; 11, 19 October; 23 November 2006; 30 March 2007

Civil Procedure *— Summary judgment — Leave to defend claim — Court requiring some demonstration of commitment to claimed defence on part of defendant — Whether appropriate to impose condition*

Civil Procedure *— Summary judgment — Whether facts sufficing to give rise to such a degree of proximity as to warrant raising of equitable set-off by one party against claims of the other*

Facts

The plaintiff was engaged in the business of trading in raw cashew nuts. The plaintiff's claims arose out of three sets of dealings between the plaintiff and the defendant, although the defendant was at pains to emphasise that these dealings were to be seen in the context of a relationship of some length. The defendant's principal contention was that it was entitled to raise an equitable set-off against all the plaintiff's claims. The dealings in question were: (a) a series of four contracts between the parties; (b) a contract that was referred to as the "KSCDC contract"; and (c) a transaction that was referred to as the "Abbas contract". All of these transactions related to the sale of raw cashew nuts.

The defendant succeeded before the learned assistant registrar in obtaining an order for security to be provided. The plaintiff appealed against this. At the same time, the plaintiff applied for summary judgment of its claims. Both the application for summary judgment and the appeal against the order for security were heard together.

Held, allowing the appeal in part:

(1) The question whether a sufficient degree of closeness was established in the connection between the respective claims so as to found an equitable set-off was not determined by some sort of formulaic process. In each case, the question turned on whether the respective claims were so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other: at [28].

(2) The fact that the parties had a close commercial relationship was plainly insufficient if the transactions giving rise to the claims and cross-claims were not closely connected. The critical issue was not the closeness of the commercial relationship between the parties. That was not to say that that would never be relevant, but the search was in fact directed at the connection between the claims, and the transactions giving rise to those claims. The fact that the claims

related to raw cashew nuts, most of which might have been shipped on the same vessel also did not suffice to give rise to a sufficient degree of closeness: at [30], [32] and [33].

(3) Although it was not appropriate for the court at the summary judgment stage to engage in a precise evaluation of the merits of the rival contentions or to assess the relative probabilities, it would be wrong for the court to shy away from evaluating the rival contentions simply because the papers were voluminous, the facts were many and the arguments were vigorous. Although proceedings at the summary judgment stage were not to be conducted as a trial on affidavits, that did not mean that anything set out in the affidavits was to be accepted without rational consideration to determine if there was a fair or reasonable probability of a real defence: at [36], [37] and [39].

(4) There was an issue as to the precise terms of the Abbas contract. It could not be said that the plaintiff had conclusively established its right to judgment or that there was no reasonable doubt as to what the precise terms of the contract were: at [42].

(5) It was appropriate to impose a condition on leave to defend when the court had the sense that although it could not be said that the claimed defence was so hopeless that, in truth, there was no defence, the overall impression was such that some demonstration of commitment on the part of the defendant to the claimed defence was called for. The condition could not be one which the defendant would find impossible to meet. Once the condition was met, the defendant was taken to have demonstrated his commitment and the matter should then proceed to trial with no predisposition towards any view of the strength of the defence: at [44].

Case(s) referred to

Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray [1984] 1 Lloyd's Rep 21 (refd)

Bim Kemi AB v Blackburn Chemicals Ltd [2001] 2 Lloyd's Rep 93 (refd)

British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] 1 QB 137 (refd)

Goh Chok Tong v Chee Soon Juan [2003] 3 SLR(R) 32; [2003] 3 SLR 32 (refd)

Government of Newfoundland, The v The Newfoundland Railway Company (1888) 13 App Cas 199 (refd)

Habibullah Mohamed Yousuff v Indian Bank [1999] 2 SLR(R) 880; [1999] 3 SLR 650 (refd)

Hanak v Green [1958] 2 QB 9 (refd)

International Bank of Singapore Ltd v Bader Peter Heiner Franz [1988] 2 SLR(R) 242; [1988] SLR 823 (refd)

Lee Kuan Yew v Chee Soon Juan [2003] 3 SLR(R) 8; [2003] 3 SLR 8 (refd)

MV Yorke Motors v Edwards [1982] 1 WLR 444 (refd)

Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd [1991] 2 SLR(R) 912; [1992] 1 SLR 73 (refd)

Tan Teng Muan, Alia Mattar and Loh Li Qin (Mallal & Namazie) for the plaintiff; Lawrence Teh, Mar Seow Hwei, Ajinderpal Singh and Derek Kang (Rodyk & Davidson) for the defendant.

30 March 2007

Sundaresh Menon JC:

1 The plaintiff, Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters), is based in India and is engaged in the business, among other things, of trading in raw cashew nuts. In 2005, the plaintiff had a number of dealings with the defendant, a company incorporated in Singapore and known as Nomanbhoy & Sons Pte Ltd. Disputes arose out of those dealings, and in February 2006, the plaintiff filed proceedings in Singapore seeking recovery of various amounts.

2 The defendant responded to the commencement of proceedings in various ways. One of the steps it took was to apply for security for costs. The defendant succeeded before the learned assistant registrar in obtaining an order for security to be provided below. The plaintiff appealed against this. At the same time, the plaintiff applied for summary judgment of its claims and submitted that its application for summary judgment and the appeal against the order for security should be heard together, and the matter proceeded in this way before me.

3 Following arguments, I made certain orders on 2 August 2006 in respect of the application for summary judgment. As to the order for security to be furnished, I allowed the appeal and set aside the order below.

4 Both sides requested an opportunity to present further arguments, which I acceded to. Following the further arguments, I modified my earlier orders made in relation to the summary judgment application, but not the order I made on the question of security for costs.

5 The defendant appealed against the orders I made on the summary judgment application. However, after I had prepared a draft of this judgment setting out the grounds for the decision I had earlier made, I was informed that the defendant had decided for "pragmatic" reasons not to pursue the appeal. Nonetheless, I thought it might be useful for me to set out the principal reasons for my decision in relation to the plaintiff's application for summary judgment.

Factual background

6 The plaintiff's claims arose out of three sets of dealings between the parties, although the defendant was at pains to emphasise that these dealings were to be seen in the context of a relationship of some length. The dealings in question were:

(a) a series of four contracts between the parties;

(b) a contract that was referred to in the arguments as the "KSCDC contract" and which is so referred to here; and

(c) a transaction that was referred to in the arguments as the "Abbas contract" and which is so referred to here.

7 All of these transactions related to the sale of raw cashew nuts. Although there is a suggestion by the plaintiff in the documents that there was a settlement of accounts between the parties in relation to these transactions, it was made clear in the course of arguments by Mr Tan Teng Muan, who appeared for the plaintiff, that he was not basing his application for summary judgment on any allegedly agreed settlement of the accounts.

8 The argument, therefore, turned on the contentions advanced in relation to the various transactions I have referred to above. As to this, the defendant's primary contention (as noted above) was that these transactions were to be seen in the context of a long-standing commercial relationship with dealings between the parties and the second defendant by counterclaim, a person named Vallinayagam Dheenathayalavel (referred to in the arguments and here as "Mr Dayal"), over a period of some years. It was submitted that this reached back ten years or more, and that during that time, a relationship of trust and confidence had arisen. It was further submitted that this relationship had been taken advantage of by the plaintiff in the context of the June/July 2005 season for the sale of raw cashew nuts and this caused the defendant considerable problems, loss and damage. It was therefore contended that this was not a case suitable for summary judgment.

9 The plaintiff's claim begins with a series of four contracts which it alleges it entered into with the defendant for the purchase by the plaintiff of raw cashew nuts. According to the plaintiff, three of these contracts for a total of 1,800mt of raw cashew nuts were later evidenced in contract number NS-0628/06/2005 dated 14 June 2005 ("Contract 628"). Although the defendant accepted that the parties had entered into Contract 628, it disputed the plaintiff's account of the circumstances under which it came into being.

10 The fourth contract in this series was contract number NS-0616/06/2005 dated 9 May 2005 ("Contract 616") for the purchase by the plaintiff of 500MT of raw cashew nuts. These raw cashew nuts were all shipped on the vessel, *The Dellagrazia*, which set sail from the port of Bissau, Guinea-Bissau to Tuticorin, India on or about 14 June 2005.

11 In relation to the shipments on *The Dellagrazia* relating to Contract 628 and Contract 616, the plaintiff alleged that there were deficiencies of quality as well as a shortfall in the quantity. These aspects of the plaintiff's claims are referred to as the "quality claim" and the "shortfall

claim" respectively. The defendant did not deny the shortfall in quantity, but disputed any alleged deficiency as to quality.

12 Also shipped on that vessel were raw cashew nuts sold under two further contracts, NS-0591/04/2005 and NS-0608/05/2005 dated 21 April 2005 and 3 May 2005 respectively (hereinafter referred to as "Contract 591" and "Contract 608" respectively). These were each for the sale of 3,000mt of raw cashew nuts, and were later overtaken by a proposal from the plaintiff that the shipment be delivered to the Kerala State Cashew Development Corporation Ltd ("KSCDC") instead of to the plaintiff, on terms that the KSCDC would pay a sum higher than that contemplated under the original contract. The defendant was to remit the surplus amount to the plaintiff. There was some suggestion that the transaction was structured in this way to enable the plaintiff to recover some money it was owed by the KSCDC.

13 According to the defendant, it agreed to enter into the KSCDC contract because it trusted the plaintiff and because the plaintiff guaranteed that the KSCDC would pay the amounts due. It was therefore doing the plaintiff a favour in entering into the KSCDC contract.

14 As it turned out, *The Dellagrazia* arrived at Tuticorin on 21 July 2005, but, for a variety of reasons, the KSCDC did not make timely payment. There was no dispute that the defendant eventually received the money that was due from the KSCDC, but approximately 60% of the total amount was paid on 11 August 2005, some 21 days after the vessel arrived in India, and the balance was paid on 10 October 2005, some 81 days after the vessel had arrived. The defendant maintained that it suffered considerable damage as a result of the failure of the KSCDC to make timely payment. It was submitted that by reason of this delay, the defendant encountered serious cash-flow problems and had to take urgent steps to avert further losses at considerable cost to itself.

15 The final aspect of the claims brought by the plaintiff related to a contract that the defendant had entered into with an entity known as Abbas Cashew Company ("Abbas") for the sale of 2,500mt of raw cashew nuts under three contracts at prices falling in a range between US$968 per metric tonne and US$1,040 per metric tonne. The cashew nuts under these contracts were delivered to Tuticorin by a number of different vessels in June and July 2005. Abbas, however, defaulted on payment under these contracts. The defendant maintained that it was concerned over the prospect of damage to the cargo as well as mounting charges. Accordingly, it instructed Mr Dayal to find alternative purchasers.

16 In the meantime, the market price for raw cashew nuts was falling.

17 The parties had quite divergent positions on the Abbas contract. It was not disputed that the plaintiff in fact paid the defendant the sum of US$1,976,055.58, being the face value of the raw cashew nuts under the invoices issued in respect of the various sales to Abbas save for one invoice

with a face value of US$546,989.04. In short, the plaintiff paid the entire sum that was to have been paid by Abbas less this sum of US$546,989.04, but it took delivery of the entire shipment of raw cashew nuts. It was also not disputed that the plaintiff eventually sold all the raw cashew nuts in question to various third party purchasers at various prices for a total recovery of US$1,326,149.50. It was thus not disputed that the plaintiff had sustained a loss of around US$650,000 as a result of its involvement in this transaction. From the defendant's perspective, if it was to be responsible for this, the loss would be in excess of US$1m.

18 The plaintiff's case was that he had undertaken to dispose of the raw cashew nuts under the Abbas contract on certain terms. The essential point was that he would be reimbursed for any loss or expense that might be incurred after he had sold the raw cashew nuts to third parties at the best available prices.

19 The defendant's case was much more complicated, and I had the impression that it evolved as the case progressed. It was contended that:

(a) the plaintiff undertook to help in the resolution of this issue;

(b) the plaintiff had secured the agreement of Abbas to pay US$200,000 as compensation to the defendant, presumably as a contribution towards making good the losses sustained due to its failure to take delivery of the raw cashew nuts;

(c) the plaintiff had also secured the agreement of a number of other buyers of raw cashew nuts shipped on *The Dellagrazia* who had defaulted, and they had agreed to pay compensation amounting to between US$50 and US$475 per metric tonne;

(d) the plaintiff guaranteed that these compensatory payments at (b) and (c) above amounting in total to around US$316,000 would be paid within three months;

(e) the plaintiff would take over the raw cashew nuts under the Abbas contract at face value and sell it at the prevailing market price of "about" US$800 per metric tonne; and

(f) subject to recovery of the sums stated at (b) and (c) above, the defendant would pay the plaintiff the difference between the price paid under the Abbas contract and the price obtained from selling the raw cashew nuts to third parties at US$800 per metric tonne.

20 I found it difficult to understand the commercial point of the transaction as described by the defendant. In the course of the argument, a supplementary note was submitted. In it, the defendant explained that this was not something undertaken gratuitously. Rather, it was done in consideration of the defendant agreeing to treat the plaintiff's claims with

regard to the raw cashew nuts shipped on *The Dellagrazia* favourably. It was further suggested that the terms were that:

(a) the plaintiff was to sell the raw cashew nuts under the Abbas contract as soon as possible at the market rate of US$800 per metric tonne, but subject to a minimum or floor price of US$700 per metric tonne;

(b) the plaintiff guaranteed that the defendant would be paid the total compensation from the defaulting buyers amounting to around US$316,000, and, if this was paid, the port and clearing charges incurred by the plaintiff would be reimbursed; and

(c) the defendant would pay the plaintiff a sum of around US$376,000, being the difference between the amount paid by the plaintiff and the amount that would be recovered based on a selling price of US$800 per metric tonne.

21 In any event, the defendant submitted, as long as there was any uncertainty over the terms of the arrangement between the plaintiff and the defendant in relation to the Abbas claim, this gave rise to a triable issue.

My decision

22 At the conclusion of the further arguments, I made the following findings and orders:

(a) With respect to the plaintiff's claim for the shortfall of quantity under Contract 628 and Contract 616 (see [11] above) there was no dispute as to the shortfall and I found that there was no admissible set-off. I therefore ordered that judgment be entered in favour of the plaintiff in the sum of US$149,349.90. However, given the cross-claims between the parties, I ordered that execution be stayed on this pending the trial of the defendant's cross-claims or further order.

(b) With respect to the plaintiff's claim for the alleged quality defects (see [11] above), I was satisfied that there were triable issues and I gave the defendant unconditional leave to defend the claim.

(c) With respect to the KSCDC claim, I gave the defendant unconditional leave to defend the claim.

(d) Finally, with respect to the Abbas claim, I gave the defendant conditional leave to defend the claim by requiring that security in the sum of US$316,946.76 be furnished.

23 The defendant appealed against the orders set out at sub-paras (a) and (d) of [22] above. I now set out the grounds underlying these parts of my decision.

The shortfall claim

24 As I have noted above, there was no dispute as to the fact of the shortfall. The defendant's principal contention was that it was entitled to raise an equitable set-off against all the plaintiff's claims. In effect, the defendant's position was that all of these transactions were so closely connected that it would be manifestly unjust to allow the plaintiff's claim to be enforced without regard to the defendant's cross-claims.

25 Mr Lawrence Teh, who appeared for the defendant, placed considerable reliance on the decision of the English Court of Appeal in *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd's Rep 93 ("*Bim Kemi*"). In that case, the defendant contracted with the plaintiff in 1984 to provide it with a licence and with technical assistance for the production of certain chemicals manufactured by the defendant. Following negotiations, a fresh agreement was concluded in 1994 relating to the supply of a new range of products. When the plaintiff commenced proceedings under the 1994 agreement, the defendant raised a set-off in respect of loss and damage it allegedly suffered under the 1984 agreement. The Court of Appeal upheld the right of set-off.

26 Potter LJ reviewed the authorities at [24]–[30] of the judgment, and the following propositions emerge from the authorities:

> (a) There is a general right to equitable set-off in cases where there is a close relationship or connection between the dealings and the transactions which give rise to the respective claims : see *Hanak v Green* [1958] 2 QB 9.
>
> (b) It is not necessarily the case that the claim and cross-claim must arise out of the same contract: see *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137.
>
> (c) There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances: see *The Government of Newfoundland v The Newfoundland Railway Company* (1888) 13 App Cas 199.
>
> (d) In determining how close the connection needs to be, the court should not get bogged down in the nuances of differently expressed formulations, save that there must be a close and inseparable relationship between the claims. Beyond this, the outcome can be left to be governed by notions of fairness and whether the circumstances are such that it would be manifestly unjust to allow one claim to be enforced without regard to the other: see *Bim Kemi* ([25] *supra*) at [29].

27 Mr Teh relied in particular on these extracts from the judgment of Potter LJ in *Bim Kemi* ([25] *supra*) at [29]–[30]:

> For myself, I consider that Lord Brandon's formulation is to be preferred because on the one hand it emphasizes that the degree of closeness required is that of an "inseparable connection", while on the other it makes clear that it is not necessary that the cross-claim should arise out of the same contract; all that is required is that it should flow from the dealings and transactions which gave rise to the subject of the claim. It is of course in such cases, which frequently involve periodic settlement of accounts between the parties on an "overall" basis rather than separate treatment as between each transaction, that the injustice of disallowing a set-off is most likely to arise.
>
> That said, however, it is clear that the principle as stated by Lord Brandon and applied in the *Dole Fruit* case is apt to cover a situation where there are claims and cross-claims for damages in respect of different but closely connected contracts arising out of a long-standing trading relationship which is terminated. That fact will not per se establish the requisite "inseparable connection" but, in an appropriate case, it may well be manifestly unjust to allow one claim to be enforced without taking account of the other. Further, I consider that the necessary equity may well be demonstrable in a situation where, in the context of such a relationship, the claimant claims damages for the repudiation of a supply contract which the defendant justifies by asserting conduct of the claimant which not only breached the supply contract but also breached a related contract between the parties for supply of other products of the defendant, in respect of which the defendant counterclaims damages.

28 I do not consider that the further passages cited above add to the understanding of the applicable principles when considering whether an equitable set-off may be raised. The question of whether a sufficient degree of closeness is established in the connection between the respective claims is not determined by some sort of formulaic process. In each case, the question turns on whether the respective claims are so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other.

29 Mr Teh relied on the following factors in support of his contention that such a close connection does exist in this case:

> (a) the transactions had to be seen in the context of a close and long-standing relationship between the parties; and
>
> (b) the respective claims and cross-claims all arose in connection with cargo shipped on *The Dellagrazia*.

30 In my judgment, these facts neither singly nor cumulatively suffice to give rise to such a degree of proximity as to warrant the raising of a set-off. The fact that the parties had a close commercial relationship is plainly insufficient if the transactions giving rise to the claims and cross-claims were not closely connected. In this regard, it is pertinent to recall the

following extract from the judgment of Potter LJ in *Bim Kemi* ([25] *supra*) at [36]–[37]:

> [T]he circumstances of every case call for individual consideration …
>
> In this case, … the alleged 1994 agreement related to the sale to Bim Kemi of "new" products, which were not the subject of the 1984 agreement. Nonetheless, it seems to me that the two agreements are inseparably connected within the continuum of the parties' trading relationship for the sale of Blackburn's anti-foaming agents, within which both contemplated a continuing expansion and exploitation of the market for Dispelair products in Scandinavia, the 1994 agreement supplementing rather than replacing the 1984 agreement. Both continued in parallel over the period prior to termination, so that conduct such as that alleged by Blackburn in relation to Bim Kemi's promotion of Tensidef products at the expense of the Dispelair range was a breach of obligations contained in both agreements. In these circumstances, it seems to me that Lord Brandon's test of a "close and inseparable connection" is satisfied.

31 It is a question to be considered in the individual circumstances of each case whether a sufficient degree of closeness has been demonstrated. In order to establish the equity underlying the set-off, there must be a sufficient connection between the dealings or transactions giving rise to the respective claims.

32 Potter LJ found a sufficient degree of closeness on the facts of *Bim Kemi* as mentioned at [30] above. In the case before me, however, I could not find such closeness as would raise an equity to justify a set-off. The critical issue is not the closeness of the commercial relationship between the parties. That is not to say that would never be relevant, but the search is in fact directed at the connection between the claims and the transactions giving rise to those claims.

33 Further, the fact that the claims relate to raw cashew nuts, most of which may have been shipped on *The Dellagrazia*, would also not suffice to give rise to a sufficient degree of closeness. The cargo could have been shipped on different vessels or on the same vessel, but that is not material if the claims are not shown to be so closely connected.

34 In the present case, the contracts under which the shortfall claim arose were quite separate from the transactions relating to the KSCDC contract or the Abbas contract. The plaintiff purchased some quantities of raw cashew nuts from the defendant and there was an admitted shortfall in the quantity delivered. This was a self-standing transaction and I saw nothing in the defendant's cross-claims that could be said to be so closely and inseparably connected to the shortfall claim that judgment should not be entered on the latter claim.

35 In the premises, I was satisfied that there was no defence to this claim and I made an order for judgment to be entered in the amount stated at [22(a)] above. However, I was satisfied that although there was no defence to the claim, the defendant had some plausible counterclaims for an amount possibly in excess of the plaintiff's claim. In these circumstances, I considered it appropriate to stay execution on the judgment until the trial of the counterclaim or further order, in line with the principle stated and the authorities collected at *Singapore Civil Procedure 2003* (G P Selvam ed) (Sweet & Maxwell Asia, 2003) at para 14/4/10, p 155. Mr Tan did not contest this order.

The Abbas contract

36 I have set out the rival contentions on the Abbas contract at [15]–[21] above. Mr Teh's principal submission was to the effect that where the terms of a contract were disputed between the parties, the proper order should be for unconditional leave to defend the claim. He submitted that it was not appropriate for the court, at the summary judgment stage, to engage in a precise evaluation of the merits of the rival contentions or to assess the relative probabilities.

37 I consider that there is some force in this submission, but it would be wrong for the court to shy away from evaluating the rival contentions simply because the papers are voluminous, the facts are many and the arguments are vigorous.

38 In this regard, it should be noted that the proper course is not for the court to assume that every sworn averment is to be accepted as true. The following observations of Ackner LJ in *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21 at 23 are instructive:

> It is of course trite law that O. 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants' having a real or bona fide defence.

39 This was cited with approval in *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25] and in *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 at [24]. It is often said that proceedings at the summary judgment stage are not to be conducted as a trial on affidavits, but that does not mean that anything set out in the affidavits is to be accepted without rational consideration to determine if there is a fair or reasonable probability of a real defence.

40 The nature of the inquiry was thus expressed by Karthigesu JA writing for the Court of Appeal in *Habibullah Mohamed Yousuff v Indian Bank* [1999] 2 SLR(R) 880 at [21] and [43]:

> Under O 14 r 3(1) of the Rules of Court, summary judgment should not be given where the defendant 'satisfies the Court … that there is an issue or question in dispute which ought to be tried'. The power to give summary judgment under O 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay; *Jones v Stone* [1894] AC 122. Where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend; *Ironclad (Australia) Gold Mining Co v Gardner* (1887) 4 TLR 18, *Ward v Plumbley* (1890) 6 TLR 198.
>
> ...
>
> Based on what was adduced before us, we were of the view there was insufficient evidence to make a conclusive finding on this issue. This issue was a further reason for the matter to be tried.

41 In that light, I consider the submission before me in relation to the Abbas claim. I entertained reservations about the plausibility of the commercial transaction that the defendant had put forward. I also could not see that a hope that the defendant would treat favourably the plaintiff's other claims could amount to consideration to support a contract, as was contended by the defendant. Furthermore, as far as I could see, the documents relied upon by the defendant to support the argument that the plaintiff "had guaranteed" the damages that the third parties were to pay simply did not bear out such a contention.

42 Despite these misgivings, I consider that there is an issue as to the precise terms of the contract. In short, I could not say that the plaintiff had conclusively established its right to judgment or that there was no reasonable doubt as to what the precise terms of the contract were. For that reason, I gave leave to defend.

43 However, the question then was whether I should impose a condition. There is a multitude of terms that have evolved over the years to express the circumstances in which this would be appropriate. These include such terms as "a real doubt about the defendant's good faith", "shadowy", "sham", "suspicious", "hardly of substance" and so on.

44 These terms are somewhat pejorative and this may obscure the true principle. In my judgment, a condition is appropriate when the court has the sense that although it cannot be said that the claimed defence is so hopeless that, in truth, there is no defence, the overall impression is such that some demonstration of commitment on the part of the defendant to the claimed defence is called for. For this reason, the condition must not be

one which the defendant would find impossible to meet: see *MV Yorke Motors v Edwards* [1982] 1 WLR 444 and *International Bank of Singapore Ltd v Bader Peter Heiner Franz* [1988] 2 SLR(R) 242. Further, once the condition is met, the defendant is taken to have demonstrated his commitment and the matter should then proceed to trial with no predisposition towards any view of the strength of the defence: see *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1991] 2 SLR(R) 912 at [8], albeit that the point was made in a different context.

45 In my judgment, the defendant's case on the Abbas claim was in this category. As set out at [41]–[42], I was not prepared to conclude that the plaintiff's claim had been conclusively made out, but, at the same time, I was of the view that some demonstration of commitment to the claimed defence on the part of the defendant was called for.

46 I therefore concluded that a condition should be imposed that security be furnished. I concluded that security in the sum of US$316,946.76, which reflected the amount that the defendant contended had been guaranteed by the plaintiff, would be a sufficient demonstration of commitment. There was no suggestion that the defendant would not be able to provide such security, and so, there was no danger that it would be denied the opportunity to make out its defence at trial.

47 For these reasons, I made the orders that I did.

Reported by Douglas Chi Qiyuan.