Neutral Citation Number: [2017] EWCA Civ 27

Case No: A3/2016/4363

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE KNOWLES CBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2017

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

NATIONAL INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED	**Respondent**
- and -	
BANCO SANTANDER S.A.	**Appellant**

- -
- -

Mr Jonathan Russen QC and Mr J Kinman (instructed by **Thomas Cooper LLP**) for the **Appellant**
Ms Anneliese Day QC and Mr H Saunders (instructed by **Fenwick Elliott LLP**) for the **Respondent**

Hearing date : 12 January 2017

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Approved Judgment

Lord Justice Longmore :

Introduction

1. This is an appeal from Knowles J who, sitting in the Commercial Court, gave judgment against the appellant bank ("the bank") and in favour of the beneficiary of four letters of credit, National Infrastructure Development Company Limited ("NIDCO"). NIDCO is a corporate vehicle used by the government of Trinidad and Tobago to effect public infrastructure works.

2. On 4th July 2011 NIDCO entered into a contract with Constructora OAS Ltda ("OAS"), a Brazilian contractor, to construct an important public highway in the south of Trinidad. The construction contract was governed by the law of Trinidad and Tobago and disputes were to be resolved by arbitration with a seat in Port of Spain under the auspices of the London Court of International Arbitration ("LCIA").

3. OAS wrote to the main engineer on the project on 19th October 2015 stating that NIDCO had defaulted on payment and that it was giving notice under clause 16.1 of the construction contract. Construction work subsequently ceased (the reasons for which are disputed between NIDCO and OAS). On 21st June 2016 NIDCO issued a termination notice on the basis that OAS had abandoned the project. OAS's case was (and is) that they had stopped working because of non-payment by NIDCO.

4. OAS filed an arbitration request with LCIA on 1st August 2016 and the dispute between NIDCO and OAS is currently subject to ongoing arbitration.

5. The dispute between NIDCO and the bank has arisen because OAS, pursuant to the construction contract, procured standby letters of credit in NIDCO's favour. On 15th September 2016 NIDCO issued proceedings to enforce these letters of credit after the bank had refused on four separate occasions to honour them. The letters of credit are governed by International Standby Practices 98 (ISP 98). Any matter not governed by ISP 98 is governed by English law and the parties conferred jurisdiction on the English Courts in respect of any dispute arising under the letters of credit.

The Letters of Credit

6. On the 28th day of each month OAS would submit to the engineer a statement about work done. NIDCO would then pay for the value of the work if certified by the engineer, subtracting amounts previously paid. The contract entitled NIDCO to withhold an amount of "retention money" in accordance with clause 14.3(c) of the contract. OAS could, however, instead provide "retention security" in lieu of retention money. OAS provided such retention security by procuring standby letters of credit in NIDCO's favour. As the total retention money increased, OAS would procure from time to time new letters of credit to increase the retention security.

7. OAS also procured letters of credit in favour of NIDCO by way of "performance security" in accordance with clause 4.2 of the contract. The level of security represented a percentage value of each phase of work.

8. Clause 4 of the letters of credit required demands made under them to be in accordance with an annex. The required form was to contain the following statement:-

> "We hereby notify you that the amount of USD XXXXXXX is due and owing to us by the contractor and demand immediate payment under the letter of credit of that amount."

9. Further relevant clauses of the letters of credit provided:-

> "7. The presentation of a demand shall be conclusive evidence that the amount claimed is due and owing to you by the contractor.
>
> 8. Demands made hereunder may be made during the period from the date of issue of this letter of credit until close of business on [August 30th 2016] (the "expiry date").
>
> …
>
> 11. We will pay amounts due to you under this letter of credit in full without set-off or counterclaim.
>
> …"

10. Relevant provisions of ISP 98 include:-

> "1.06(d) Because a standby is documentary, an issuer's obligations depends on the presentation of documents and an examination of required documents on their face."

11. There is no dispute that the written demands in the present case were made in the form set out at annex 1 to the standby letters of credit. In them NIDCO stated:-

> "We hereby notify you that the amount of [the relevant USD sum is given] is due and owing to us by the Contractor [i.e. OAS]."

12. On 6th July 2016, a fortnight after NIDCO issued their termination notice, OAS, on appeal, persuaded a Brazilian court to issue a temporary injunction preventing the bank from paying out on any demand under these letters of credit, pending the determination of that court as to its jurisdiction. No determination has yet been made.

The decision of Knowles J

13. The issue for the judge was whether summary judgment ought to be granted in NIDCO's favour against the bank in respect of the sums stated to be due and owing. The bank resisted summary judgment on the following basis:-

    i) That the sums claimed were not "due and owing" from OAS as stated in the drawing notice and NIDCO had no honest belief in the truth of its statement that they were "due and owing". NIDCO had therefore acted fraudulently in seeking to operate the letters of credit;

ii) NIDCO was claiming around US$35m retention scrutiny when in fact it was only entitled to US$31m in retention money and NIDCO was fully aware of this;

iii) There was potentially an equitable jurisdiction to prevent unconscionable demands under letters of credit, in addition to the fraud exception. This was said to be a developing area of law not suitable for summary judgment; and

iv) There ought to be a stay of execution pending further order because the bank was prohibited by Brazilian court order from paying the money, even though that order may soon fall away.

14. The judge rejected these arguments, granted summary judgment and ordered the bank to pay US$38,020,306.79 by 4pm on 23rd November 2016. He refused permission to appeal and refused to grant a stay of execution. There is now an appeal for which, as it happens, I gave permission.

15. In support of the bank's case of fraud, three pieces of evidence were put forward:-

i) A statement by the president of the claimant made to the Public Accounts (Enterprises) Committee on 1st June 2016 that OAS did not owe money to NIDCO;

ii) The lack of any mention of sums due in a letter from the claimant signed by its president in the letter terminating the contract on 21st June 2016; and

iii) A letter dated 6th July 2016 from the claimant, signed by its president, which divided sums up into debts described as due and debts which required quantification in due course.

16. The judge dismissed the first piece of evidence because the president's evidence predated termination and dealt only with "very large overall sums indeed". He did not regard the second piece of evidence as persuasive and said that the third matter "shows the way in which the claimant viewed their entitlement as a current entitlment in respect of all sums". He said that even if what was demanded was based on an estimate of future sums that did not mean that the claimant did not hold an honest belief that those sums were due and owing now.

The substantive law

17. The principles are well settled. In **RD Harbottle v National Westminster Bank** [1978] QB 146, 155 Kerr J said:-

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in contracts."

18. That decision was approved in the Court of Appeal case of **Edward Owen Engineering Ltd v Barclays Bank International Ltd** [1978] QB 159 where it was emphasised that the bank must honour a performance bond unless it has notice of clear fraud.

19. **Edward Owen** was itself approved by the House of Lords in **United City Merchants v Royal Bank of Canada** [1983] 1 A.C. 168 which concerned a letter of credit issued to a seller of goods who presented apparently conforming documents including falsely dated bills of lading which it (the seller) did not know were false. Having set out the obligations of the confirming bank to pay the seller Lord Diplock continued (page 183):-

> "To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases of which the leading or "landmark" case is **Sztejn v J.Henry Schroder Banking Corporation** (1941) 31 N.Y.S. 2d 631. This judgment of the New York Court of Appeals was referred to with approval by the English Court of Appeal in **Edward Owen Engineering Ltd v Barclays Bank International Ltd** [1978] QB 159, though this was actually a case about a performance bond under which a bank assumes obligations to a buyer analogous to those assumed by a confirming bank to the seller under a documentary credit. The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim ex turpi causa non oritur actio or, if plain English is to be preferred, "fraud unravels all". The courts will not allow their process to be used by a dishonest person to carry out a fraud."

The position on a summary judgment application

20. This was a matter of some debate because commercial judges have been somewhat troubled by the supposedly low burden assumed by a defendant successfully resisting summary judgment namely "a real prospect of establishing a defence" according to CPR Part 24. Even before the advent of CPR Part 24 Rix J had said in **Czarnikow-Rionda v Standard Bank** [1999] 2 Lloyd's Rep. 187, 202:-

> "… the fact that the [relevant party] gets the benefit of a lower standard of proof for the purposes of a pre-trial hearing, places on the court, as I believe the cases demonstrate, an additional requirement to be careful… not to upset what is in effect a strong presumption in favour of the fulfilment of the independent banking commitments."

21. After the CPR came into force, Mance LJ in an obiter passage in **Solo Industries UK Ltd v Canara Bank** [2001] 1 WLR 1800 (para 31) said that the words "real prospect" provided a comparatively low hurdle and (para 32) that **Harbottle** and **Edward Owen** had required fraud to be "established" and that such defence if good at all must be capable of being established with clarity at the interlocutory stage. These paragraphs were expressly approved by the Privy Council in **Alternative Power Solution Ltd v Central Electricity Board** [2015] 1 WLR 697 at paragraph 59 which, however, was a case in which the bank's customer had sought to restrain the bank from paying sums required to be paid under a letter of credit on the ground that it was "seriously arguable" that the beneficiary could not honestly have believed in the validity of its demands. Speaking for the judicial committee, Lord Clarke of Stone-cum-Ebony said:-

> "In summary the Board concludes that it must be clearly established at the interlocutory stage that the only realistic inference is (a) that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and (b) that the bank was aware of the fraud."

22. The position with regard to cases of interlocutory injunctions sought against the bank by the bank's own customer is, however, not the same as the position in cases in which the beneficiary of the letter of credit seeks summary judgment against the bank. This was recognised and accepted by Teare J in **Enka Insaat Ve Sanayi A.S. v Banca Popolare Dell'Alto Adige SpA** [2009] EWHC 2410 (Comm) [paras 24-25]:-

> "In my judgment the test to be applied must be that of a "real prospect" because that is the test set out in CPR Part 24. I do not consider that this court is bound to apply a "heightened test" because the courts in **Solo** and **Banque Saudi Fransi** were not considering a claim against a bank under a guarantee where the defence was that the demand was said to be fraudulent. I therefore consider that the test in the present context is whether there is a real prospect that the Banks will establish at trial that the only realistic inference is that the fraud exception applies, that is, that ENKA could not honestly have believed in the validity of its demands.
>
> However, there is considerable support for the view, which I accept, that in applying that test the Court must be mindful of the principle that banks, when sued on a letter of credit or performance bond or guarantee, need particularly cogent evidence to establish the fraud exception."

23. This seems to me to be the correct approach despite the fact that decision of Teare J was given before the Privy Council in **Alternative Power** had approved the obiter passage of Mance LJ in **Solo**.

24. The matter is of some importance in this case because the judge in his unreserved judgment said twice (paras 15 and 24 that he did not regard it as seriously arguable that NIDCO did not honestly believe in the validity of its demands. He seems to have derived that phrase from its use in the **Alternative Power** case where it was used

appropriately to describe the burden on a claimant seeking to establish a claim for interim relief in the form of an interlocutory injunction; but the phrase is, with respect to the judge, not appropriate to describe the burden on a defendant seeking to resist summary judgment who only has to establish a "real prospect" of establishing his defence. With these prefatory remarks I can turn to the permitted grounds of appeal.

Grounds of Appeal

25. There are now six grounds of appeal:-

i) The judge applied an incorrect test of serious arguability when he should have asked himself whether the bank had a real prospect of establishing its defence.

ii) The bank did have a real prospect of establishing that NIDCO did not believe in the validity of its claim because a claim for unliquidated damage for premature abandonment of the construction contract was not in law a claim that money was "due and owing".

iii) The factual evidence relied on by the bank demonstrated that NIDCO had no genuine belief that money was due and owing from OAS.

iv) On any view the claim under the retention letters of credit could only be in respect of the certified retention; at the time of the demand the certified retention was only US$31m and it was therefore wrong to claim an amount of US$34m in respect of the retention security.

v) It was wrong to give summary judgment without offering the bank an opportunity to cross-examine NIDCO's witnesses.

vi) The judge's refusal to order a stay in the light of the Brazilian Injunction was wrong in principle.

(1) The "incorrect test"?

26. It will be apparent from what I have already said that I think that the judge did apply the wrong test. The use of the phrase "seriously arguable" may have been an inadvertent infelicity in the course of an unreserved judgment. But the judge appears to have set the bar too high and this ground of appeal, so far as it goes, must succeed.

27. I say "so far as it goes" because one must bear in mind exactly what it is that the bank must have a "real prospect" of establishing. It is in the words of Teare J that "the only realistic inference is that [the claimant] could not honestly have believed in the validity of its demands" (the emphasis is mine but none the less crucial for that).

(2) No sum "due and owing" in law?

28. It follows from (1) above that this ground of appeal is misconceived. The position in law is irrelevant because it is the beneficiary's belief in the validity of its demands which is relevant, not whether the demands are correct as a matter of law.

29. That said the words "due and owing" in a contractual context must inevitably be construed against their contractual background. In the present case the construction

contract required the performance security to be provided to cover a number of events set out in clause 4.2(d) of the contract, including not merely failure to pay amounts due but:-

> "(d) circumstances which entitle the Employer to termination…. irrespective of whether notice of termination has been given".

30. In the light of this provision it must be arguable (and, if necessary, I would hold) (1) that the letters of credit constituting performance security covered the sums for which clause 4.2 (d) of the construction contract contemplated the letters of credit would be given and (2) that the requirement that any demand should state that a sum was "due and owing" enabled the beneficiary to include sums to which it was entitled on any allegedly contractual termination, following OAS's repudiation by abandoning the work. Mr Russen QC for the bank submitted that no claim in respect of damages for wrongful termination could be made under the letter of credit unless and until such sum has been determined by agreement or award. But that cannot be right in the light of the context in which the letters of credit were issued.

31. Since, moreover, there is a set date on which the letter of credit expires (albeit one which OAS may have been contractually required to extend), the bank (if the letter of credit was not in fact extended) could escape any liability if an arbitration award could not be made before the date of expiry. That is also something which the parties could not have intended when the letters of credit were provided.

32. This conclusion is also consistent with **Balfour Beatty v Technical & General** [2000] CLC 252 in which the beneficiary had to state that the sum demanded was "due and payable" and the claim made was a claim for repudiation of the contact.

Genuine belief that money was "due and owing"?

33. In these circumstances the bank's assertion that NIDCO were fraudulent in asserting that money was due and owing to them as a result of OAS's wrongful repudiation of the construction contract would be extremely difficult to establish. It cannot be fraudulent to make a demand one is entitled to make. Even if there was (as Mr Russen submits) in fact no entitlement in law to make the demands which NIDCO made under the letters of credit, there was nevertheless a strongly arguable case as to such entitlement and the question whether as to the facts, there is a real prospect of establishing

> "that the only realistic inference is that [NIDCO] could not honestly have believed in the validity of its demands"

virtually answers itself. I should, however deal with the matters relied on by the bank and itemised at paragraph 15 above.

34. The president's evidence to the Public Accounts (Enterprises) Committee of the Trinidad and Tobago Parliament was given before NIDCO gave notice of termination under clause 15.2 of the construction contract and thus while the contract was still continuing. It was nevertheless at a time when no work had been done on the road for a number of months. The project was a project of great concern to the people in the

south of the island and was (and is) one of the biggest projects undertaken by the government. It was thus entirely natural for the Public Accounts (Enterprises) Committee to take a major interest in what was going on. No doubt NIDCO's president, Mr Garibsingh, did not have an entirely comfortable ride from the committee while giving his evidence. The bank relies on a passage in which the committee was endeavouring to discover how much payment had been made to OAS for the work done to date and whether OAS had done less work than that for which they had been entitled to payment. They established that the contract sum was $5.2 billion and that 61% of the work had been done and that $3.7 billion had been paid, which was around 71% of the contract sum and the evidence then proceeded:-

> "Mr Garibsingh: Yes, that is around 71 per cent of the budget. However, that would include the advance payment. So therefore when – you have to retract the advance payment from that figure.
>
> Dr Gopeesingh: So you have 61 per cent of the work, let us say 60 per cent of $5.2 billion, which is $3.12 billion, and you have paid $3.6 billion?
>
> Mr Garibsingh: $3.7 billion.
>
> Dr Gopeesingh: But that $3.7 billion includes a significant part of the advance payment.
>
> Mr Garibsingh: Correct.
>
> Dr Gopeesingh: So, therefore, the State and the OAS are at the same situation, where no one really owes anybody any money or anything, basically.
>
> Mr Garibsingh: More or less."

It is this single answer on which the Bank relies to assert that, when demands on the letters of credit were made on 11 July 2016 after NIDCO terminated the contract on 21 June 2016 and confirmed that termination on 6th July 2016, the directors did not believe that they were entitled to recover substantial sums for OAS's repudiation of the contract.

35. The short response is that neither the Committee nor Mr Garibsingh were talking of the consequences of a termination which had not then occurred. They were only talking of the financial position before termination when payments had been made which did not entirely match the work done because parts of the payments were made by way of payments in advance. That was the context in which Mr Garibsingh agreed that no one owed anybody any money "more or less".

36. That is then confirmed by the immediately following exchange:

> "Dr Gopeesingh: So, if OAS decides to terminate their work now on the original contract, it means then that about $1.5 billion work has to be done still to that extent? Yes?

> Mr Garibsingh: That will be the remaining budget, yes.
>
> Dr Gopeesingh: You said you have reached a critical stage, a sensitive stage in your negotiation with them. We would not want to go into that because that is between your client and the other one. I just want to thank you very much. I wanted to get an appreciation and I think the country and, of course, we would have liked – everyone would want to know where we are.
>
> So in summary, the original contract is $5.2 billion for the highway, $3.7 billion has been paid, 61 per cent of the work has been done, and you all are still discussing the way forward on the completion of the highway? Yes?"

The cost of completing the highway is thus an altogether different matter which would have to be met, if possible, by getting OAS to complete the highway or paying damages if they do not. There is just no evidence of fraud at all.

37. The fact that NIDCO's letter of 21 June 2016 did not make any financial claim at that stage is, if anything, still less indicative of fraud. The confirmation letter of 6th July did make financial claims before notice of entitlement under the letters of credit was given on 11 July 2016. It is true that the letter did draw a distinction between debts that were due and "debts" that required quantification but that is no evidence of absence of belief that NIDCO were entitled to draw down the letters of credit.

38. Mr Russen submitted that there was no evidence that personnel at NIDCO had addressed their minds to the question whether sums were presently "due and owing" or would become "due and owing" at some future date and that he should be entitled to cross-examine them to try to establish that they were reckless as to that distinction, such recklessness amounting to fraud in the **Derry v Peek** sense. No doubt lawyers can have a debate as to whether a current entitlement to claim damages for repudiation entitles one to say that the amount of such damages is due and owing (and I have summarised my own views on that interesting question above) but it borders on the absurd to say that the only realistic inference from the fact that businessman did not have (or may not have had) that debate is that they could not have believed in the validity of their demands.

Sums due under retention letters of credit

39. These letters of credit were set so that OAS would not have to submit to sums being retained from the purchase price in the ordinary way to constitute security for contractual performance of the work. The bank is able to point to a document of 14 January 2016 stating that the certified entitlement to retention as at that date was $31 million, if retention in cash had been exercised. That document cannot, however, be conclusive of that matter since it expressly adds:-

> "Total amount of Retention covered by SBLC equals $35,359,590.56"

In fact demands of $35 million were made under the retention letters of credit. The bank says that a demand could only have been made for $31 million and that the excessive demand shows NIDCO's fraudulent intent or that, at least, the claim under this head should be reduced to $31 million.

40. While it is true that there are different letters of credit for "performance security" and "retention security", that is only because the underlying contract so required; performance security was axiomatic for a big construction contract; retention in some form or another would also be axiomatic. OAS was entitled, if it did not wish to submit to cash retention, to procure letters of credit in respect of that retention so that it could be paid instalments in full during the operation of the contract. That did not mean that the retention letter of credit could not be operated for the same purpose as that for which retention in cash would have been utilised if there had been a cash retention. Mr Russen had to accept that if there had been a cash retention it could have been used as security for any claim for wrongful repudiation by OAS, in the sense that any such claim would be diminished by the amount of the retention. There is no reason to think that letters of credit put up in place of a cash retention should be treated any differently. It would be most odd if a contractual provision existing for the benefit of the contractor (in that it obtains the full amount of any instalment without deduction for retention) entitled it to say that letters of credit put in place for retention purposes could not be used as security for any claim but could only be operated so as to enable the beneficiary to claim the amount of retention to which he would have been entitled but for the letter of credit option being used by the contractor. If that had been intended, the letter of credit could easily have said so.

41. Even if all that is wrong, I still cannot see that the demand in fact made can only be referable to fraud on the part of NIDCO; it is equally (if not more) referable to a genuine belief that NIDCO were entitled to make the relevant demands.

42. The facts and matters put forward as evidence of fraud to my mind just do not amount to fraud at all; the judge was therefore right to order summary judgment in the sum which he did.

Ability to cross-examine NIDCO personnel

43. I have dealt with this in paragraph 38 above as part and parcel of the fraud allegations. As a free-standing ground of appeal it amounts to no more than a hope that something might turn up at a trial which cannot be identified now. As such it is no reason for the case to go to trial.

Stay?

44. The bank submits that if it pays the sums required by the judgment it will be in breach of the injunction granted by the Brazilian Court of Appeal and will be liable to pay a fine of 10% of the judgment. It also submits that the arbitrators in the LCIA arbitration have power under Brazilian Law to discharge the injunction and are likely to do so. The first submission cannot prevail. If the bank chooses to do business in any particular jurisdiction it has to submit to any order of courts, in such jurisdictions. The second submission is difficult to understand. Even if the arbitrators sitting in Trinidad technically have jurisdiction to discharge the injunction granted in Brazil,

there is no reason to suppose that they will do so. There is not even any reason to suppose that OAS will ask them to do so.

45. In general terms it is inappropriate for a court to stay its judgment in a letter of credit case. Letters of credit are part of the lifeblood of commerce and must be honoured in the absence of fraud on the part of the beneficiary. The whole point of them is that beneficiaries should be paid without regard to the merits of any underlying dispute between the beneficiary and its contractor. In **Power Curber Intl Ltd v National Bank of Kuwait** [1981] 1 WLR 1233, the seller of goods had obtained an order from the courts of the place where the bank was registered and had its head office preventing payment under a letter of credit. In the light of that order Parker J had granted a stay of execution of the judgment he had given in favour of the seller/beneficiary. But this court set aside the stay. Lord Denning MR said (page 1241D)

> "If the court of any of the countries should interfere with the obligations of one of its banks (by ordering it not to pay under a letter of credit) it would strike at the very heart of that country's international trade. No foreign seller would supply goods to that country on letters of credit – because he could no longer be confident of being paid. No trader would accept a letter of credit issued by a bank of that country if it might be ordered by its courts not to pay. So it is part of the law of international trade that letters of credit should be honoured – and not nullified by an attachment order at the suit of the buyer.
>
> …
>
> Yet another consideration occurs to me. Many banks now have branches in many foreign countries. Each branch has to be licensed by the country in which it operates. Each branch is treated in that country as independent of its parent body. The branch is subject to the orders of the courts of the country in which it operates; but not to the orders of the courts where its head office is situate. We so decided in the recent case about bankers' books in the Isle of Man: Reg v Grossman, the Times, March 6, 1981. In this case I think that the order for "provisional attachment" operates against the head office in Kuwait, but not against the branch office in London. That branch is subject to orders of the English Courts."

Griffiths LJ agreed:-

> "We should do the Bank of Kuwait a grave disservice if we were not to remove this stay for it would undoubtedly seriously damage their credibility as an international bank if it was thought that their paper was not worth holding because an ex parte application to their domestic courts could prevent payment under an expressedly irrevocable obligation.

> There is no recognised rule of international law that compels this court to recognise this ex parte order of the Kuwaiti court. It is of course entitled to be treated with respect and wherever possible this court will in the interests of comity seek to recognise and uphold the order of the court of a friendly state. But unhappily in this case the approach of the Kuwaiti court appears to be so out of step with that of our own courts and the courts of other trading nations that I fear we cannot recognise it. The choice lies between upholding the world-wide practices of international commerce or the order of the Kuwaiti court. I choose the first option and would remove the stay."

46. The argument for a stay in the present case is even weaker than it was in **Power Curber** since the order of the Brazilian Court is not even an order of the place where the bank has its head office (namely Spain) but merely an order of the place where the contractor has its own place of business.

Conclusion

47. For all these reasons, although the judge may have applied too generous a test in favour of NIDCO as the claimant, I would nevertheless uphold his orders entering summary judgment in favour of NIDCO and refusing any stay. I would, therefore, dismiss this appeal.

Lord Justice Christopher Clarke :

48. I agree.