RBS Coutts Bank Ltd v Shishir Tarachand Kothari
[2009] SGHC 273

Case Number : Suit 646/2008, RA 83/2009, 84/2009

Decision Date : 03 December 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Hri Kumar Nair SC and Benedict Teo Chun Wei (Drew & Napier LLC) for the plaintiff; Samuel Chacko and Angeline Soh Ean Leng (Legis Point LLC) for the defendant

Parties : RBS Coutts Bank Ltd — Shishir Tarachand Kothari

Banking

Civil Procedure

3 December 2009

Judith Prakash J:

Introduction

1 This matter came before me on appeal by Shishir Tarachand Kothari ("the Defendant") against the decision of the Assistant Registrar who ordered *inter alia* that final judgment be entered against the Defendant for the sum of USD 569,109 with interest ("RA 83") and that the Defendant's application to amend his defence be dismissed ("RA 84"). At the hearing of the appeal, the Defendant filed an application in Summons No. 1578 of 2009/D ("Defendant's Application") for leave to adduce further evidence. After hearing submissions from both sides, I dismissed both appeals with costs to RBS Coutts Bank Ltd ("the Plaintiff") in respect of the same and of the application to adduce further evidence. The Defendant is not satisfied with my decision and has since appealed against it. I now provide my detailed grounds of decision.

Background Facts

2 The Plaintiff carries on private banking business. The Defendant was at all material times a customer of the Plaintiff. On or about 10 August 2006, the Defendant opened an account (Account No. 380xxxxxxx) ("the Account") with the Plaintiff for the purposes, *inter alia*, of engaging in investment and forex trading activities. The Defendant was duly furnished with a set of the account opening forms ("the Application Form") together with the Plaintiff's General Terms and Conditions ("the General Terms").

3 The Account was governed by the General Terms as well as the following documents:

(a) Master Agreement for Over-The-Counter Derivatives Trading ("Trading Master Agreement");

(b) Counter Indemnity;

(c) Charge Agreement; and

(d) Facility Agreement for Revolving Loan of USD 4 million and Bank Guarantee issued in favour of the Royal Bank of Scotland to support derivative transactions of USD 1 million ("the Facility Agreement")

(collectively the "Agreements")

It will be seen that a selection of clauses in the General Terms and Agreements constitute the kernel of the present dispute and the Plaintiff's case.

4 After the opening of the Account, the Defendant engaged in, *inter alia*, various forex transactions ("the Forex Transactions") during the period 1 February to 9 November 2007. All was well until around end 2007 when the US dollar began to weaken and market forces drastically turned against the Defendant's positions in the Forex Transactions. From around January 2008, the Plaintiff's officers informed the Defendant that he had to either inject more funds into the Account in order to maintain his positions, or to close out the positions so as to cut losses. The Defendant failed to do either.

5 On 18 March 2008, in accordance with the Plaintiff's rights under Clauses 29.2 and 46.5 of the General Terms, the Plaintiff closed out the Defendant's positions in the Forex Transactions. Clauses 29.2 and 46.5 of the General Terms provide as follows:

29.2 You acknowledge and agree that RBS Coutts may dispose, or initiate a disposal by an Associated Person of RBS Coutts, of any of the Securities in settlement of any liability owed by you or on your behalf to:

29.2.1 RBS Coutts;

29.2.2 RBS Coutts' Associated Person; or

29.2.3 A Third Person.

46.5 You hereby irrevocably authorize RBS Coutts, at its discretion, to act on your behalf at any time and without any notice or liability to you, to apply, liquidate, set-off, sell, realize, dispose of or otherwise deal with so much of the Investments or take all such actions as RBS Coutts deems fit (including, but not limited to, liquidation of the Investments prior to their maturity, conversion of the same into other currencies or conclusion of any spot or forward exchange contract) and apply the Investments or net proceeds thereof against any or all of your Obligations. RBS Coutts shall be entitled to use its discretion in all aspects in relation to the sale or liquidation of the Investments. Any Investments, surplus of cash or cash proceeds held by RBS Coutts and remaining after payment in full of all your Obligations to RBS Coutts shall be delivered or paid to you or your order.

In the result, the final aggregate sum (at the end of the closing out process) of USD 569,109 ("the Outstanding Sum") became due and owing by the Defendant to the Plaintiff as at 2 September 2008.

6 On or about 17 December 2008, the Plaintiff's Gary Tucker signed and issued a conclusive certificate of indebtedness pursuant to Clause 58 of the General Terms, certifying the Outstanding Sum to be due and owing from the Defendant to the Plaintiffs ("Conclusive Certificate"). Clause 58 of the General Terms, which authorises the Plaintiff to issue "conclusive evidence" certificates, states:

A certificate signed by any authorised representative of RBS Coutts showing the amount of

> Obligations from time to time due from you to RBS Coutts shall be conclusive evidence *as against you of the amount so owing*.
>
> [Emphasis added]

The applicable principles of law

Summary Judgement

7 It hardly bears repeating that once the plaintiff has shown a *prima facie* case that he is entitled to apply for summary judgment, the onus is on the defendant to show cause why judgment should not be entered (see *Singapore Civil Procedure 2007* at 14/2/11). I agree with the observations made by Ackner LJ in *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21 where he remarked at [23]:

> 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.

Conclusive Evidence Clauses

8 It is axiomatic that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the certificate, *determinative of the amount due*. In *Bache & Co (London) Ltd v Banque Vernes et Commercials De Paris SA* [1973] 2 Lloyd's Rep 437 ("*Bache*") Lord Denning MR said at p 440:

> I would only add this: this commercial practice (of inserting 'conclusive evidence' clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a 'conclusive evidence' clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.

The above articulation of the rationale underlying the legal acceptance of conclusive evidence clauses was approved in *Bangkok Bank Ltd v Cheng Lip Kwong* [1989] SLR 1154 ("*Bangkok Bank*") where Yong Pung How J stated at [18] – [19]:

> The widespread use by banks of 'conclusive evidence' clauses has arisen simply because of the dictates of commerce, and has been supported by the assumption that money institutions, which are themselves closely regulated by the law, are completely honest and reliable … What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt.

9 Clause 58, however, in my view, does not preclude a *legal review* by the court into the *propriety* of the demand itself. In this regard, I agree with the views of V K Rajah J in *Standard*

Chartered Bank v Neocorp International Ltd [2005] 2 SLR 345 ("*Standard Chartered Bank*"), a decision which was not referred to me by either counsel but certainly warrants a mention. One of the issues which faced Rajah J in *Standard Chartered Bank* was whether the court is precluded by the terms of the conclusive evidence certificate from reviewing the legal basis of the plaintiff's claim. Rajah J was of the view at [19] that:

> [t]he real foundation for the legal efficacy of such a clause is contract. It can be cogently argued that if parties expressly agree on the modalities for determining a matter, such an agreement should be upheld in the absence of any relevant public policy considerations. Indeed, this is the very basis on which the court recognises and gives effect to arbitration agreements, conclusive certificates of engineers and architects found in construction contracts and experts' decisions, among others. The High Court of Australia correctly observed in Dobbs' case at 652 that:
>
> > It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them. … Parties may contract with the intention of affecting their legal relations but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person.

10 It appears to me that there is a significant degree of variation in the manner in which conclusive evidence clauses are drafted in practice. Indeed, an examination of the authorities cited thus far in this judgment will bolster that view (see also *Bangkok Bank* at 1159). It is therefore my view that the precise effect of a so-called conclusive evidence clause is dependent on its specific wording and formulation. In the present case, the conclusive evidence clause (Clause 58) is worded as follows:

> A certificate signed by any authorised representative of RBS Coutts showing the amount of Obligations from time to time due from you to RBS Coutts shall be conclusive evidence as against you of the amount so owing.

No defence to Plaintiffs' claim

11 As disclosed in the Defence and the affidavits, the Defendant's case, in summary, was as follows:

(a) the Defendant was not bound by the General Terms and terms of the Agreements because he was not given copies of the same;

(b) some of the Forex Transactions were not duly authorised by the Defendant; and

(c) the Account was wrongfully manipulated to reflect a deficit and should instead properly show a positive credit balance.

Further, the Defendant applied to amend his Defence (the amendment of his defence was the subject matter of RA 84 which I dismissed) to include, *inter alia*:

(a) an allegation that the Plaintiffs did not take into account all authorised transactions in the Account; and

(b) a counterclaim for an account of all authorised transactions in the Account.

12 It was not in dispute that the Defendant received a copy of the Application Form, which he *signed* and returned to the Plaintiffs. It was, however, the (bare) contention of the Defendant that he did not receive the General Terms when he signed the Application Form. Further, the Defendant vehemently denied that he had ever received copies of the Agreements. He, however, admitted that he *did sign* the signature pages of the Agreements ("the Enclosures").

13 In this regard, it bears mention that it was not the Defendant's pleaded case that he did not know what he was signing or that he did not know he was agreeing to contractual terms with the Plaintiffs or that the operation of the Account was subject to the Plaintiffs' standard terms. In any event, it was incontrovertible that the Defendant is an experienced businessman who had been involved in numerous investments through various private bankers. His belated portrayal of himself as a babe in the woods was clearly an afterthought, to stave off his legal liability to the Plaintiffs. It is also apposite to note that the Defendant never raised any concerns in respect of the General Terms and the terms of the Agreements, prior to the close-out date. To that extent, it was evident that the Defendant signed both the Application Form and the Enclosures *without* any manifest reservation about the terms of the Plaintiff's standard provisions.

14 Further, both the Application Form and the Enclosures (comprising a letter from the Plaintiffs to the Defendant dated 20 December 2006 with the subject matter described as "Offer of Credit Facilities" ("Credit Letter"), another letter with the subject matter described as "Advising Letter for Derivatives Trading Facilities" ("Derivatives Letter") and the signature pages of the Charge Agreement, the Counter Indemnity and the Facility Agreement) made express reference to the General Terms and/or the Agreements. I should also add that the Plaintiff specifically called the Defendant's attention to the fact that he was agreeing to be bound to the terms therein. These provisions are reproduced below for ease of reference:

> **Application Form**
>
> You hereby request and authorise Coutts Bank von Ernst Ltd, Singapore Branch ("Coutts") to open a bank account (the "Account") through which Coutts may provide banking and investment services to you subject to the terms and conditions of this account application and Coutts' General Terms and Conditions (the "Terms"). In addition to this account application, you may also be required to sign additional documentation…
>
> … …
>
> **General Terms & Conditions**
>
> This account application form is subject to the Terms as amended or supplemented from time to time. This account application, together with the Terms and (for the avoidance of doubt) any other Applicable Agreement (as defined in the Terms) shall form a single agreement between you and Coutts…
>
> … …
>
> Note: This is an important document. You should take independent legal advice before signing and sign only if you want to be legally bound. By signing you acknowledge that you fully understand the Terms and legal implications of this document.
>
> Agreement

I/We * have read, understood and agreed to the above

Name Shishir Tarachand Kothari

Signature SIGNED

… …

Establishment of the beneficial owner's identity

… …

This document is subject to Coutts' General Terms and Conditions (the "Terms") as amended or supplemented from time to time. This document together with the Terms and (for the avoidance of doubt) Applicable Agreement (as defined in the Terms) shall form a single agreement between you and Coutts.

Credit Letter

The facilities will be subject to the terms of the Facility Agreement, two sets of which are enclosed for your execution (the "Facility Agreement") and return…

… …

This letter is subject to and forms an integral part of the Facility Agreement as it may be amended or supplemented from time to time…

… …

Kindly indicate your acceptance by signing and returning to us a signed copy of this letter. We look forward to receiving from you an executed copy of the Facility Agreement as well as the documents set out in Parts C and D of Schedule 2 of the Facility Agreement as soon as possible…

… …

Signed and accepted this 22 day of Dec 2006

SIGNED

Name: Shishir Tarachand Kothari

Derivatives Letter

In addition to our General Terms and Conditions, the facilities will (except as regards Exchange Traded Options) be subject to the terms of the Master Agreement for Over-the-Counter Derivatives Trading ("OTC Master Agreement"), two sets of which are enclosed for your execution, and return.

Notwithstanding clause 9.3 of the OTC Master Agreement, this letter is subject to and forms an integral part of the OTC Master Agreement as it may be amended or supplemented from time to time…

… …

Kindly indicate your acceptance by signing and returning to us a signed copy of this letter…

… …

Signed and accepted this 22 day of Dec 2006

SIGNED

Name: Shishir Tarachand Kothari

The Signature Pages of the Charge Agreement, the Counter Indemnity and the Facility Agreement

Note: This is an important document. You are advised to seek independent legal advice before signing and sign only if you want to be legally bound. By signing, you acknowledge that you fully understand the terms and conditions and the legal implications of this document.

15 In *Stephan Machinery Singapore Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2000] 2 SLR 191 ("*Stephan Machinery*"), the court when similarly confronted with a plaintiff who alleged that he did not receive the standard terms of the defendant bank, dismissed the plaintiff's allegations in the following terms at [4] to [6]:

> In the pleadings and at the trial, the plaintiffs took the position that they did not admit that a copy of the Terms and Conditions For Current Account was given to them. Mr Reeg in evidence said he did not recall receiving a copy of the Terms and Conditions For Current Accounts. The first time he saw the document was when his solicitor showed it to him, after the action had commenced…
>
> … …
>
> I concluded that it was impermissible for the plaintiffs to disavow any knowledge of the terms in the Application Form or in the Terms and Conditions relating to the accounts. The signatures of both Mr Reeg and Mr Lim Tiong Beng, the other director of the plaintiffs, bound the plaintiffs to what they had acknowledged and what they had agreed to abide…
>
> … …
>
> *They were content to sign the acknowledgements of having received and read the Terms and Conditions and the agreement to be bound. The plaintiffs could not be heard to say otherwise*."
>
> [Emphasis added]

The legal basis for the decision in *Stephan Machinery*, although not explicit, must have been the signature rule embodied in the English Court of Appeal decision in *L'Estrange v. F. Graucob, Limited* [1934] 2 K.B. 394 where the court held at pages 403 and 406 as follows:

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not…

… …

where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents. That is true in any case in which the agreement is held to be an agreement in writing.

16 In the present case, it was clear that the Defendant knew that he was agreeing to the terms in the Agreements and the General Terms, and was bound by the same.

17 That, however, was not the end of the matter (at least from the point of view of the Defendant who alleged that some of the Forex Transactions were not authorised). In my view, this was yet another illusive crutch that the Defendant attempted to depend on in defence to the quantum of his liability to the Plaintiffs. Indeed, I must observe that it was certainly not enough for the Defendant to make the bare allegation that *some* of the Forex Transactions were unauthorised to avoid liability for the Outstanding Sum, without even indicating exactly *which* of the Forex Transactions were unauthorised. In any event, the Defendant was certainly not in a position to claim that any of the Forex Transactions was unauthorised. Indeed, the Defendant received statements in respect of the Account ("the Statements"). The Statements evidenced *all* of the Forex Transactions. Further, I note that cl 17 of the General Terms states that:

17.1 RBS Coutts will, unless it receives written instructions from you to the contrary, send to your address of record a Statement on any Account at periodic intervals.

You agree that it will be your sole responsibility to ensure that you receive Statements in due time and to make enquiries with and obtain the same from RBS Coutts immediately if not duly received. *You undertake to verify the correctness of (a) each Statement; and (b) any accompanying cheques or vouchers received from RBS Coutts, and to inform RBS Coutts within 90 days from the receipt thereof of any discrepancies, omissions or inaccurate or incorrect entries in the account or details so stated in the Statement*.

At the end of the period of 90 days, the Account as kept by RBS Coutts and the details set out in the Statement shall be conclusive evidence without any further proof that the Statement, the entries and details therein are correct (subject to the right of RBS Coutts, which may be exercised by it at any time, to adjust any entries in the Account or details in the Statement where they have been wrongly or mistakenly made by it) except for:-

17.3.1 any alleged errors notified by you to RBS Coutts in accordance with the notice provisions in these Terms;

… …

17.4 Except as provided above, RBS Coutts shall not be liable for any errors in the Statement.

[Emphasis added]

18 In *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR 828 ("*Consmat*"), the court considered the legal effect of a similar contractual clause which obliged a bank's customer to check its monthly bank statement, and to highlight any discrepancy therein to the bank within a stipulated time frame. In the result, the court held at 835-836 that:

> In respect of such obligations, the provisions of cl 3(c) are clear and unambiguous: they impose upon the customers of the defendant bank express obligations to verify the statements of accounts and the cheques and to notify the bank, within seven days, of 'discrepancies, omissions, or debits wrongly made to or inaccuracies or incorrect entries' in the accounts and *make those statements 'unchallengeable by the [customers] after the expiry of a time limit'*.
>
> [Emphasis added]

I take a similar view in the present case. The time period provided for dispute was a generous one and gave the Defendant more than adequate time to examine all transactions in detail. The Statements, not having been disputed during the relevant periods, were conclusive evidence that the Forex Transactions were authorised.

19 Quite apart from the evidence of authority which I derived from the Statements, there were other documents that supported such a conclusion. The Defendant was notified (by way of email and/or written confirmations sent to the Defendant) after each of the Forex Transactions had been carried out, of the particulars of each transaction. On no occasion did the Defendant object to any of these particulars or to the transaction as a whole on the basis that he had not authorised the same. The Defendant admitted receiving the confirmations. In each case, the confirmations comprised a pre-confirmation email giving particulars of the transaction that was about to be conducted and a hard copy confirmation letter confirming the accomplishment of the transaction. There was some dispute about when the Defendant received the hard copy confirmation letter but in no case did he dispute having received the pre-confirmation email at the time when it was sent out. If the Defendant had had any queries about a particular transaction that was about to be concluded on his behalf, he would, as a shrewd and experienced businessman, have raised these queries on receipt of the pre-confirmation email. His failure to do any such thing in any case speaks volumes.

20 The Defendant had submitted that the Plaintiff was not entitled to rely on cl 17 of the General Terms because the Statements were not sent to the correct address. This submission was, strictly speaking, not permissible because the Defendant neither pleaded it nor raised it in his affidavits filed in answer to the summary judgment application. On the facts, however, it appeared to me that there was no substance in the allegation in any case. First, there were only two relevant addresses *viz* a Bangkok address which was stated in the account opening forms in August 2006 and a Mumbai address which was given by written instruction on 26 September 2006. Second, the Statements were sent to Mumbai after 26 September 2006 and the Defendant admitted receiving them. Third, whilst the Defendant alleged that the written instruction of 26 September 2006 was forged, the Plaintiff produced the transcript of a telephone conversation between its officer and the Defendant confirming his written instructions to change his address. It also adduced an email from the Defendant's own email address requesting a change of address from Bangkok to Mumbai.

21 The Defendant also relied on certain conflicting documents which he received from the Plaintiff to argue that he had a triable defence. He had received conflicting statements, one showing a positive balance in his account and the other showing a negative balance. The Defendant's submission was that there was a triable issue as to whether his account had a positive or negative balance. He submitted that the Plaintiff had created a "shadow" account to conduct unauthorised trading. The Defendant relied on the statement of account for April 2008 in that this statement showed various transactions which took place after the closing out of the Defendant's forex position on or about 18 March 2008.

22 I was convinced by the Plaintiff's submissions that there was no substance in the Defendant's arguments on this point. First, the Defendant had given no basis for his allegation that his account

should have a positive balance and had offered no computation to support the same. Second, the allegation of a "shadow" account was not pleaded and there was no evidence of its existence. Third, the Plaintiff had explained that the transactions set out in the Defendant's April 2008 statement related to:

(a) accumulator contracts for which the Defendant had contracted prior to the close-out date, to accept further deliveries of currencies after the close-out date; and

(b) the squaring of forex loan positions taken by the Defendant to fund the accumulator contracts, as well as the accrued interest of these loans.

The Plaintiff had also adduced tables explaining these purported transactions. Fourth, I accepted the Plaintiff's explanation contained in its affidavits that the positive statement was an internal document produced to allow the Plaintiff to make provisions for indebtedness due to it. The contents of these positive statements made this clear. The only error on the Plaintiff's part was that it had sent the positive statements to the Defendant together with the Statements. This error could not afford the Defendant a defence where none existed.

23 The Defendant raised various minor points in his attempt to establish triable issues. I found no merit in these and need not deal with them in detail.

Leave to amend defence

24 On the eve of the hearing for summary judgment before the Assistant Registrar, the Defendant applied for leave to amend his defence. His proposed amendments related to his allegation that if all the transactions in the account were taken into account, there would be a credit balance in the account. The Defendant also wanted to include a counterclaim for an account of all authorised transactions under the account as at 18 March 2008, and an order for payment of any and all sums due from the Plaintiff. The Assistant Registrar dismissed this application and, being of the opinion that she was entirely correct to do so, I dismissed RA 84.

25 The court does not grant leave to amend a defence when the proposed amendments are immaterial and raise no reasonable defence to the claim. The Defendant's proposed amendment was based solely on his allegation that there were mirror entry statements which purportedly showed a credit balance. I have dealt with these positive statements in [21] and [22] above. The Defendant had no basis on which to rely on these statements as showing amounts due to him. He did not justify his allegation that other transactions in the Account were not accounted for in determining the Outstanding Sum nor did he explain which transactions were omitted and how the same would have had a bearing on the Outstanding Sum. His proposed amendment to include a counterclaim for an account, and an order for payment of any and all sums due from the Plaintiff was predicated on the supposition that there existed transactions which were omitted by the Plaintiff. As already stated, however, there was no evidence of any such omitted transactions nor did the Defendant himself even give particulars of any transactions that were allegedly omitted. The Defendant had all the Statements and Confirmations but was not able to prove that any transaction existed which had not been properly reflected.

Leave to adduce further evidence

26 The High Court has the discretion to decide whether to grant leave to adduce further evidence in Registrar's Appeals (see *Lassiter Ann Masters v To Keng Lam (alias Toh Jeanette)* [2004] 2 SLR 392 ("*Lassiter*") at [13]). *Lassiter* was recently approved by the Court of Appeal decision in *WBG Network*

(S) Pte Ltd v Sunny Daisy Ltd [2007] 1 SLR 1133 ("*Sunny Daisy*") which was an appeal against a High Court decision to allow summary judgment against the appellant and to refuse leave to the appellant to adduce further evidence at the hearing of that Registrar's Appeal. In *Sunny Daisy*, the Court of Appeal held that the judge hearing a Registrar's Appeal has a wider discretion when the appeal did not arise from a hearing which bore the characteristics of a trial like an assessment of damages. However, it is pertinent to note that the Court of Appeal cautioned at [14] and [15] as follows:

> A party wishing to adduce further evidence before the judge in chambers in cases where the hearing at first instance did not possess the characteristics of a trial might still have to persuade the judge hearing the matter that he had overcome all three requirements of *Ladd v Marshall* if he were to entertain any hope of admitting the further evidence because the judge was entitled, though not obliged, to employ the conditions of Ladd v Marshall to help her decide whether or not to exercise her discretion to admit or reject the further evidence. In such a case, if the appellant could not persuade the judge that the conditions, if applied, would result in his favour, then it would be unlikely that the judge would allow his application to adduce the fresh evidence...
>
> …
>
> … we would go even further and say that the judge would not have been wrong had she rejected the further evidence on the ground that the letter in question had been in the appellant's possession all the time and that its absence from the evidence hitherto had not been satisfactorily explained.

27 In accordance with the above legal principles, I found the Defendant's Application entirely misconceived. Indeed, the Defendant's affidavit ("the Defendant's Affidavit") filed in support of the Defendant's Application did not furnish any evidence which could not have been adduced before the Assistant Registrar. Further, I did not accept the reasons as to why he had difficulty putting forward his evidence earlier. In any event, I considered that the matters raised in the Defendant's Affidavit were either irrelevant or did not afford the Defendant a defence to the Plaintiff's claim. It was therefore my view that the evidence which the Defendant sought to adduce did not satisfy the second and third conditions under the *Ladd v Marshall* test.

Conclusion

28 For the reasons set out above, I dismissed both RA 83 and RA 84 with costs to the Plaintiff in respect of both appeals and of the application to adduce further evidence. As the Trading Master Agreement provided for indemnity costs, I also directed that the Plaintiff's costs be taxed on an indemnity basis if they could not be agreed upon.