Neutral Citation Number: [2020] EWHC 2144 (Comm)

Case No: CL-2019-000801

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 04/08/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

HC TRADING MALTA LIMITED	**Claimant**
- and -	
SAVANNAH CEMENT LIMITED	**Defendant**

- -
- -

Kishore Sharma (instructed by **Clyde & Co LLP**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing date: 5 June 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Covid-19 Protocol: This judgment was handed down at a hearing attended by the judge remotely via Skype, and by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 4 August 2020 at 2:00 pm.

Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment follows the hearing of the Claimant's application by notice dated 14 April 2020 for:

   i) summary judgment pursuant to CPR 24, and/or that the Defendant's Defence be struck out pursuant to CPR 3.4 and/or the court's inherent jurisdiction, and/or that there be judgment upon admission pursuant to CPR 14, on the Claimant's claims for US$4,696,712.04 in respect of the price of certain shipments of bulk clinker cement sold by the Claimant to the Defendant;

   ii) summary judgment, strike-out and/or judgment upon admission in respect of demurrage claims totalling US$674,679.93; and/or

   iii) an order pursuant to CPR 25.7 that the Defendant make an interim payment of US$324,760.13 (or such other sum as the court may think fit) on account of the Claimant's demurrage claims.

2. The Defendant instructed solicitors and filed a Defence dated 19 March 2020. However, it did not respond to the Claimant's application, and did not appear at the hearing. In those circumstances it was necessary to decide whether or not to proceed with the hearing in the Defendant's absence. The circumstances leading up to the hearing were as follows:

   i) On 16 April 2020 the Claimant's solicitors sent the application and supporting evidence, along with the Claimant's draft order, to the Defendant's solicitors by email, asking them to *"please confirm that you accept service by email of this application and any further documents in this matter going forwards, which we presume is acceptable to you in light of the current situation regarding COVID-19".*

   ii) There was no reply. On 30 April, 1 May and 19 May 2020 the Claimant's solicitors emailed the Defendant's solicitors in relation to the listing appointment for the present hearing and then to give details of the date fixed

for the hearing. On 19 May 2020 the Defendant's solicitors replied by email "*With regard to your application for summary judgment now set for June 5 2020, we are still waiting for instruction*."

iii) After further emails from the Claimant's solicitors, the Defendant's solicitors on 2 June 2020 confirmed by email that they were "*instructed to receive your bundle for the summary judgment electronically*".

iv) However, on 4 June 2020 the Defendant's solicitors stated in an email to the Claimant's solicitors: "*We write to confirm that we have no instruction to take part in your application for summary judgement. Our client insists on negotiated settlement and will continue to do so in spite of the current economic situation worldwide*."

3. In these circumstances, I was satisfied, first, that there was good reason to treat the email service of the present application on 16 April 2020 as good service pursuant to CPR 6.27 (read with CPR 6.15(2)). There was good reason to authorise service by that means, including retrospectively, in circumstances where the documents were served on the Defendant's solicitors of record; the Covid-19 pandemic made service by email more reliable and safer than attempting to use postal or personal service; and the Defendant's solicitor's responses made clear that they had received and were fully aware of the contents and nature of the application and accompanying documents.

4. Secondly, I had to decide whether to proceed with the hearing in the Defendant's absence from the hearing, applying by analogy the factors identified by the Court of Appeal in *R v Hayward, Jones and Purvis* [2001] EWCA Crim 168, [2001] 2 Cr. App. R. 11 at § 22.5. I concluded that it was clearly appropriate to proceed because:

i) the proceedings had been duly served on the Defendant and the Defendant had appointed solicitors and served a Defence;

ii) the present application had been sent by email to the Defendant's solicitors of record, who had received it, referred to it, and accepted email service of the bundle;

iii) the Defendant had been given sufficient notice of the proceedings, the present applications and the hearing, and had ample opportunity to attend and/or be represented at the hearing;

iv) there was no reason to believe that an adjournment would have been likely to result in the Defendant attending the hearing at a later date;

v) there was no reason to believe that the Defendant wished to be represented at the hearing: its solicitors' email of 4 June 2020 made clear that the Defendant had voluntarily waived its right to appear or to be represented at the hearing, and was voluntarily absent;

vi) although the claims are for significant sums of money, there was a public interest in the matter proceeding without further delay; and

vii) though there would be some inevitable disadvantage for the Defendant of being absent, the Defendant had set out its position in its Defence and correspondence and court would take account of it. Court also had the benefit of the full and frank disclosure made by the Claimant in its application for permission to serve proceedings out of the jurisdiction, a copy of which was before me.

5. I therefore proceeded with the hearing, and asked counsel for the Claimant to ensure that the court was made aware, so far as possible, of such points as the Defendant might reasonably have been expected to take had it been present or represented at the hearing. I am satisfied that this was done, and at the hearing counsel for the Claimant took me carefully through the transaction documents and other relevant evidence.

(B) PRINCIPAL FACTS

6. Based on the evidence before me, including the parties' statements of case and the first witness statement of Eleanor Rose Coates (a partner in Clyde & Co LLP, the Claimant's solicitors) and the exhibited transaction and other documents, I find the key facts to be as set out below.

7. The Claimant is a company registered in Malta, carrying on business trading in, amongst other things, cement clinker in bulk. It is part of the HeidelbergCement group of companies. The Defendant is a company registered in Kenya, which carries on business there, amongst other things importing cement clinker which it processes into cement products for sale and distribution within Kenya.

8. The Claimant's claims arise under a Settlement Agreement dated 27 August 2019 ("***the Settlement Agreement***"), which followed a Sale Contract dated 10 October 2018 ("***the Sale Contract***").

9. Prior to the Sale Contract, the parties entered into several contracts for the sale by the Claimant to the Defendant of cement clinker. It appears these were performed satisfactorily save that amounts of demurrage, totalling (on the Claimant's case) about US$336,466 remained due from the Defendant to the Claimant in respect of various shipments made by the Claimant during 2017 and 2018 ("***the Pre Sale Contract Demurrage***"). As noted below, further sums by way of demurrage became due from the Defendant to the Claimant in respect of the four shipments which were the subject of the Sale Contract ("***the Sale Contract Shipments Demurrage***").

10. It is convenient at this stage to quote recitals (A) to (E)(a) of the Settlement Agreement, which set out the ensuing events (referring to the Sale Contract as 'the Contract'):

> "(A) Pursuant to a contract dated 10 October 2018 ("the Contract") HC Trading as the seller agreed to sell and deliver to Savannah; and Savannah as the buyer agreed to accept and pay for: 4 x 45,000 – 50,000 mt (+/- 10% in the seller's option) shipments of OPC cement clinker in bulk, to be shipped during November 2018 - February 2019 in consideration of the price of US$ 48.30 pmt CFR Mombasa.

(B) There were express terms of the Contract and / or the Contract on its true construction provided, inter alia:

a. [By Articles 3, 5 and 6] That Savannah would establish a workable confirmed and irrevocable letter of credit in favour of HC Trading, payable at 270 days from the bill of lading date, to be at HC Trading's counter 10 days prior to the loading lay-can for that shipment;

b. [By Article 7] That Savannah should pay HC Trading any demurrage accrued in respect of the discharge of the shipments in accordance with Exhibit II to the Contract;

c. [By Article 21] A failure by HC Trading to exercise or delay in exercising a right or remedy would not constitute a waiver of that or other rights or remedies.

(C) At the request of Savannah, and in reliance on various assurances and / undertakings and / or commitments of Savannah that letters of credit in accordance with the Contract would be established in respect of them, HC Trading made the four shipments ("the Shipments") under the Contract despite no letters of credit having been established by Savannah in respect of any of those Shipments, whether as provided for by the Contract or at all, as follows:

a. 49,340.415 mt shipped on board the MV "TRANSOCEANIC" under a bill of lading dated 12 December 2018 ("the TRANSOCEANIC Shipment"), the total price of which amounted to US$2,383,142.04 and in respect of which demurrage under the Contract accrued at Mombasa in the sum of US$50,197.92;

b. 47,900.000 mt shipped on board the MV "NORD TRAVELLER" under a bill of lading dated 27 January 2019 ("the NORD TRAVELLER Shipment"), the total price of which amounted to US$2,313,570.00 and in respect of which demurrage under the Contract accrued at Mombasa in the sum of US$17,666.67;

c. 49,495.895 mt shipped on board the MV "NORD CHESAPEAK" under a bill of lading dated 1 March 2019 ("the NORD CHESAPEAK Shipment"), the total price of which amounted to US$2,390,651.73 and in respect of which demurrage under the Contract accrued at Mombasa in the sum of US$100,372.22;

d. 49,500.885 mt shipped on board the MV "CL CHRISTINA" under a bill of lading dated 25 March 2019 ("the CL CHRISTINA Shipment"), the total price of which amounted to US$2,390,892.75 and in respect of which

> demurrage under the Contract accrued at Mombasa in the sum of US$181,682.99.
>
> (D) All of the Shipments were delivered to Savannah on shipment and / or property in them passed to Savannah whereupon, in the premises (and in the absence of letters of credit having been established in accordance with the Contract) the full price of each of the Shipments, namely US$9,478,256.76 became due and owing from Savannah to HC Trading, and HC Trading became entitled to maintain an action against Savannah for the same (the "Shipment Dispute").
>
> (E) Further:
>
> a. The TRANSOCEANIC, NORD TRAVELLER and NORD CHESAPEAK Shipments were duly discharged at Mombasa and received there by Savannah and / or to its order. HC Trading facilitated such discharge and receipt (including and without limitation by agreeing to the release of, and releasing the bills of lading to Savannah in reliance on, amongst other things, various assurances and / undertakings and / or commitments of Savannah, as described in recital (C) above"

11. Article 16 of the Sale Contract provided that it was subject to English law. It further provided that in the event of a dispute, the parties shall use their best efforts to settle such disputes amicably, but that in the event that such resolution was not possible then all disputes shall be settled by arbitration under the rules of the London Court of International Arbitration.

12. As no letters of credit had in fact been opened for any shipments, between about 20 and 29 March 2019 the Defendant remitted funds totalling US$1.5 million to the Claimant in respect of the Nord Chesapeake shipment. In addition, transfers totalling US$300,000 were made on or about 2 and 5 April 2019 – shortly before the 5 April 2019 ETA at Mombasa of the fourth shipment – on the "CL Christina", in order to induce the Claimant to allow and facilitate the discharge and delivery of this cargo to the Defendant. This brought the total of the sums paid to the Claimant by the Defendant in respect of the price of the Nord Chesapeake shipment up to US$1.8 million, leaving a balance outstanding of US$590,651.73. The Claimant did not consider this sufficient to justify releasing the CL Christina cargo, and after further discussion the CL Christina cargo was sold afloat to another buyer at a reduced price of US$44.60 pmt, giving rise to a shortfall as compared with the contract price of US$183,153.30. The Defendant then pressed for a further shipment to be made under the Sale Contract, but the Claimant declined.

13. In the light of the Defendant's continued failure either to open letters of credit in accordance with the Sale Contract or to discharge the sums outstanding in respect of the shipments, a formal letter of claim dated 14 May 2019 ("***the Claim Letter***") was sent to the Defendant on the Claimant's behalf by senior group lawyers in the HeidelbergCement group. The Claim Letter sought payment of the total sum of US$6,156,902.85 comprising:

i) the price and demurrage due in respect of each of the Transoceanic and Nord Traveller shipments;

ii) the price and demurrage due in respect of the Nord Chesapeake shipment, less credit for the sum of US$1,800,000 *"paid…by way of part payment of the price of the NORD CHESAPEAK Shipment…resulting in a shortfall as compared with the contract price of US$590,651.73*";

iii) the shortfall as compared with the contract price in respect of the CL Christina Shipment of US$183,153.30, and demurrage accrued in respect of that vessel; and

iv) *"Additionally, Savannah Cement needs to settle the demurrage amount of US$336,466.38 accrued at the discharge port for the shipments made in 2017, 2018 prior to the referred supply contract"*.

The letter separately itemised the price and demurrage claimed in respect of each of the four Sale Contract shipments, i.e. the Sale Contracts Shipments Demurrage. Those demurrage claims were identified as being for US$50,197.52, US$17,666.67, US$100,372.22 and US$181.682.99, thus making a total of US$349,419.40.

14. No satisfactory response having been received, a letter before action was sent dated 29 May 2019. Further discussions ensued, resulting in the conclusion of the Settlement Agreement.

15. Recitals (A) to (E)(a) to the Settlement Agreement are quoted above. The remainder of the recitals, main operative provisions and law/jurisdiction clause of the Settlement Agreement are as follows:

> "[recital (E)] …
>
> b. Savannah has paid the sum of US$1,800,000.00 to HC Trading by way of part payment of the price of the NORD CHESAPEAK Shipment;
>
> c. The CL CHRISTINA Shipment was, with the agreement of Savannah, sold by HC Trading afloat whilst at anchorage at Mombasa at the price of US$44.60 pmt amounting to a total of US$2,207,739.47, for which HC Trading will give credit against the price under the Contract, resulting in a shortfall as compared with the contract price of US$183,153,30 (the "CL CHRISTINA Shortfall").
>
> (F) In addition demurrage is due and owing from Savannah to HC Trading in respect of various shipments made by HC Trading in 2017 and 2018 (the "Historic Demurrage"). HC Trading claims Historic Demurrage in the amount of US$684,000. Savannah disputes this calculation (the "Historic Demurrage Dispute").

(G) The Parties wish to enter into this Agreement in full and final settlement of the Shipment Dispute and the Historic Demurrage Dispute including, but not limited to, any and all claims for interest and costs.

IN CONSIDERATION of the mutual promises and terms and conditions agreed below and for other good and valuable consideration, the adequacy of which is hereby acknowledged **IT IS HEREBY AGREED BY THE PARTIES AS FOLLOWS**:

1 Savannah admits and agrees that US$7,087,363.77 is due and owing to HC Trading in respect of the Shipment Dispute.

2 Savannah shall cause and procure Kenya Commercial Bank forthwith to issue three irrevocable letters of credit on the application of Savannah, duly confirmed by Skandinaviska Enskilda Banken AB, Singapore Branch ("SEB Singapore"), in favour of HC Trading as beneficiary for the full amounts due and owing in respect (respectively) of each of the "TRANSOCEANIC" Shipment, the "NORD TRAVELLER" Shipment and the "NORD CHESAPEAK" Shipment (the "Letters of Credit") on or before 30 September 2019, 15 October 2019 and 31 October 2019 respectively. For the avoidance of doubt, in order to procure Kenya Commercial Bank to issue the Letters of Credit as aforesaid, Savannah shall make, or cause or procure the making of, all such payment(s) to Kenya Commercial Bank ("KCB"), and shall take any and all such other steps, as may be necessary to achieve the establishment of the Letters of Credit as aforesaid. For the further avoidance of doubt, confirmation of the Letters of Credit by SEB Singapore to HC Trading as aforesaid is to take place on or before 30 September 2019 for the "TRANSOCEANIC" Shipment, 15 October 2019 for the "NORD TRAVELLER" Shipment and 31 October 2019 for the "NORD CHESAPEAK" Shipment.

3 The operative wording of each of the Letters of Credit shall be in the form attached as Annex 1 to this Agreement as being satisfactory to HC Trading, and in any event the Letters of Credit shall each:

(1) Have a validity of at least 1 year from the date of confirmation by the confirming bank;

(2) Require presentation only of the bill of lading and an original commercial invoice, signed and stamped by HC Trading;

(3) Be available at the counters of SEB Singapore (as nominated and confirming bank) by negotiation of draft

drawn on KCB (as issuing bank), of tenor 270 days after the bill of lading date;

(4) Provide that "All documents shall be acceptable as presented" including where the documents are presented more than 21 days after the date of shipment;

(5) Provide that charter party bills of lading are acceptable.

4. On or before the later of 31 October 2019 and 10 days after the date when payment in full has been received by HC Trading under all of the Letters of Credit, HC Trading shall remit the sum of US$1,800,000.00 to Savannah, without any offset or deduction whatsoever, by telegraphic transfer to its following bank account: …

For the avoidance of doubt, receipt by HC Trading of payment in full under all of the Letters of Credit is a condition precedent to its making the above payment of US$1,800,000.

5. In the event that the Letters of Credit or any of them are not duly honoured and paid in full on presentation of the above documents, Savannah agrees that at the request of HC Trading, it shall forthwith and in any event within 24 hours of such request give all such instructions (including as to the amendment of the Letter(s) of Credit concerned) to Kenya Commercial Bank to ensure that Letter(s) of Credit are honoured and paid in full within a further 24 hours.

6. Upon receipt of the confirmation of the confirming banks, as set out above, in respect of each and every one of the Letters of Credit, and conditionally upon each and every one of the Letters of Credit being duly honoured and full payment being received by HC Trading under the same:

(1) The Shipment Dispute shall stand compromised, settled and discharged;

(2) HC Trading will be deemed to have waived its claim to the CL Christina Shortfall.

For the avoidance of doubt, the Historic Demurrage Dispute shall not be compromised, settled or discharge [sic.] pursuant to this clause 6.

7. Savannah also admits liability for the Historic Demurrage but does not admit HC Trading's calculation of the Historic Demurrage in the amount of US$684,000. Savannah and HC Trading agree to discuss the Historic Demurrage calculation

> and / or quantification with a view to settling the Historic Demurrage Dispute forthwith.
>
> 8. In the event of no such settlement having been arrived at within 45 days of the date of this agreement, the Historic Demurrage Dispute shall be referred by HC Trading and Savannah for final and binding determination by an independent expert in accordance with the Schedule to this Agreement."
>
> …
>
> 14. This Agreement and any non-contractual obligations arising out of, under or in connection with it shall be governed by and construed in accordance with the laws of England and Wales, and any dispute arising hereunder shall be subject to the exclusive jurisdiction of the English court. "

16. Although it appears drafts of the envisaged letters of credit were discussed during the negotiations for the purpose of being attached as Annex 1 to the Settlement Agreement (as contemplated by the opening words of clause 3), none were in fact attached to the Settlement Agreement as concluded by an exchange of signed/stamped pdf documents under cover of emails of 27 and 28 August 2019.

17. Clause 8 of the Settlement Agreement refers to the Schedule to the Agreement, which is headed *"Procedure for binding expert determination of the Historic Demurrage Dispute".* Paragraphs 1-4, 10 and 13-14 of the Schedule read as follows:

> "1. An Expert is a person appointed in accordance with clause 8 of this Agreement to resolve the Historic Demurrage Dispute, and in particular the calculation and / or quantification of the amount of the demurrage due from Savannah to HC Trading.
>
> 2. HC Trading and Savannah shall agree the appointment of an independent Expert and shall agree with the Expert the terms of his appointment.
>
> 3. If HC Trading and Savannah are unable to agree on an Expert within seven days of the date of this Agreement, either of those parties shall then be entitled to request the LONDON MARITIME ARBITRATORS' ASSOCIATION ("the LMAA") to appoint an Expert being one of its full or supporting members and for the LMAA to agree with the Expert the terms of his appointment.
>
> 4. The Expert is required to prepare a written decision and give notice (including a copy) of the decision to the HC Trading and Savannah within a maximum of three months of the matter being referred to the Expert.

> …
>
> 10. The Expert shall act as an expert and not as an arbitrator. The Expert shall determine the Historic Demurrage Dispute, and in particular the calculation and / or quantification of the amount of the demurrage due from Savannah to HC Trading which may include: any issue involving the interpretation of any relevant contract or charter under which or by reference to which any relevant demurrage arises or is to be assessed; his or her jurisdiction to determine the matters and issues referred to him or her; or his or her terms of reference. The Expert's written decision on the matters referred to him or her shall be final and binding on the Parties in the absence of manifest error or fraud.
>
> …
>
> 13. HC Trading and Savannah shall act reasonably and co-operate to give effect to the provisions of this clause and otherwise do nothing to hinder or prevent the Expert from reaching his or her determination.
>
> 14. HC Trading and Savannah each irrevocably waive the benefit of any pre-existing arbitration, exclusive jurisdiction or other dispute resolution agreement between them with respect to the Historic Demurrage Dispute, and in particular the calculation and / or quantification of the amount of the demurrage due from Savannah to HC Trading. If and insofar as, and to the extent, necessary, any such pre-existing arbitration, exclusive jurisdiction or other dispute resolution agreement between them shall be deemed to be varied so as not to include within its scope the Historic Demurrage Dispute, and in particular the calculation and / or quantification of the amount of the demurrage due from Savannah to HC Trading."

18. After the conclusion of the Settlement Agreement on 27 August 2019, there were preliminary exchanges between the parties about discussing the settlement of the "*Historic Demurrage dispute*" on 9 September 2019; and the Claimant complied with the Defendant's request to provide the details of its demurrage claim on that day so that it could ask its shipping agents to review them. The details which the Claimant provided included both the Pre Sale Contract Demurrage and Sale Contract Shipments Demurrage. A meeting was held in Nairobi on or about 10 September 2019. On 17 September 2019 the Claimant sent an email attaching a detailed spreadsheet summarising its claims for demurrage and certain other supporting material, quantifying the claims as totalling US$674,679.93. This again included both Pre Sale Contract Demurrage and the Sale Contract Shipments Demurrage. Clyde & Co sent a chasing email on 8 October 2019.

19. In early November 2019 the parties agreed that the Defendant would make a payment, against an invoice to be issued by the Claimant, of a further US$590,651.73 representing the outstanding balance (after the US$1.8 million payment referred to

earlier) of the price of the Nord Chesapeake shipment. That payment was received on or about 3 December 2019, and the Claimant accepts that the price of that shipment (though not the associated demurrage) has been paid in full.

20. By a letter of 8 November 2019, the Claimant's solicitors stated:

> "We write further to our letters of 11 and 22 October 2019. We note your continued failure to open any of the three letters of credit in compliance with your obligations under Clause 2 of the Settlement Agreement dated 27 August 2019.
>
> Further, we understand that you are continuing to fail and refuse to co-operate in the resolution in the Historic Demurrage Dispute as provided for by the Settlement Agreement and its Schedule.
>
> For the avoidance of doubt, the negotiation and terms (if agreement can be reached) of the Addendum to the Settlement Agreement that Savannah and HC Trading are currently discussing are expressly without prejudice to HC Trading's rights in respect of Savannah's further and continuing breaches of the Settlement Agreement, which remain fully reserved.
>
> We hereby remind you that we have our client's instructions to start proceedings without further notice to you."

21. Further correspondence followed, but by the time the present proceedings were commenced on 20 December 2019, no reference had been made for expert determination pursuant to clause 8 of and the Schedule to the Settlement Agreement.

(C) APPLICABLE PRINCIPLES

22. CPR 24 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial"

23. CPR 3.4(2)(a) provides that a defence can be struck out on the ground that it discloses *"no reasonable grounds for…defending the claim"*.

24. The Court of Appeal in *The LCD Appeals* [2018] EWCA Civ 220 §§ 38-39 set out the principles to be applied to applications for summary judgment and strike-out:

> "The court may strike out a statement of case if, amongst other things, it appears that it discloses no reasonable grounds for bringing the claim: CPR 3.4(2)(a). It may grant reverse summary judgment where it considers that there is no real prospect of the claimant succeeding on the claim or issue and there is no other compelling reason why the case should be disposed of at trial: CPR 24.2(a)(i) and (b). In order to defeat an application for summary judgment it is only necessary to show that there is a real as opposed to a fanciful prospect of success. Although it is necessary to have a case which is better than merely arguable, a party is not required to show that they will probably succeed at trial. A case may have a real prospect of success even if it is improbable. Furthermore, an application for summary judgment is not appropriate to resolve a complex question of law and fact."

25. The Court of Appeal quoted with approval the following considerations applicable to summary judgment applications, taken from passages in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *Swain v Hillman* [2001] 1 All ER 91 at 94:

i) the court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) a "*realistic*" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 § 8;

iii) in reaching its conclusion the court must not conduct a "*mini-trial*": *Swain v Hillman*;

iv) this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* § 10;

v) however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case

would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;

vii) on the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725; and

viii) a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose; and it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position: *Swain v Hillman* [2001] 1 All ER 91 § 94.

26. I have also had regard to the helpful summary given by Bryan J in *European Union v Syrian Arab Republic* [2018] EWHC 1712 (Comm) § 66.

27. CPR 14.1 includes the following:

> "14.1— Admissions made after commencement of proceedings
>
> (1) A party may admit the truth of the whole or any part of another party's case.
>
> (2) The party may do this by giving notice in writing (such as in a statement of case or by letter)…"

28. Note 14.1.5 to the White Book indicates that *"Where an admission is made pursuant to r.14.1(2) an application to the court for judgment is necessary. This contrasts with the claimant's right to enter judgment under r.14.1(4) whereby judgment is obtained administratively without judicial involvement."*

29. CPR 25.1(k) gives the Court power to make an interim payment order under CPR 25.6 *"on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay"*. CPR 25.7 sets out the conditions to be satisfied and matters to be taken into account. The Claimant refers in particular to the condition set out in CPR 25.7(1)(c), which applies where the court *"is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order*

for an interim payment…". By CPR 27.7(4), the Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(D) ANALYSIS

(1) The claim for the price of the Sale Contract shipments

30. The Claimant's application under this heading relates to the prices of the Transoceanic shipment (US$2,383,142.04) and the Nord Traveller shipment (US$2,313,570).

31. In the Claimant's Particulars of Claim:

i) § 4 *inter alia* alleges those sums to be "*accrued due owing and payable*" under the Sale Contract;

ii) § 5 alleges that the Defendant has "*failed and refused*" to pay those sums, having paid only the price of the Nord Chesapeake shipment;

iii) § 7[2] alleges that by clause 2 of the Settlement Agreement it was agreed that:

> "[t]he Defendant would pay the Claimant the full amounts due and owing to the latter under the Sale Contract in respect of [the price of] each of the TRANSOCEANIC Shipment, NORD TRAVELLER Shipment … on or before, respectively, 30 September, 15 October … 2019 by causing and procuring Kenya Commercial Bank on its application to issue … irrevocable letters of credit (one in respect of each of these shipments, respectively, the "TRANSOCEANIC LoC", the "NORD TRAVELLER LoC" …) in favour of the Claimant as beneficiary, duly confirmed by Skandinaviska Enskilda Banken Appeal Board, Singapore Branch ("SEB"); and

iv) § 9 alleges as follows:

> "**Non-payment and / or breach**
>
> Wrongfully and in breach of the express term of the Settlement Agreement pleaded in paragraph 7(2) above, the Defendant has failed and refused to pay to the Claimant the amounts that it was required to pay the Claimant pursuant to clause 2 of the Settlement Agreement in respect of the TRANSOCEANIC, NORD TRAVELLER and NORD CHESAPEAKE Shipments, whether by causing the and procuring the establishment of the TRANSOCEANIC, NORD TRAVELLER and NORD CHESAPEAKE LoCs (or either of them) pursuant to clause 2 of the Settlement Agreement or at all; and whether by the dates therein stipulated, or at all." (my emphasis)

32. In the Defence:

i) Particulars of Claim § 4 is admitted;

ii) as to Particulars of Claim § 5, the payment of the Nord Chesapeake price is admitted, and the Defendant denies that it has "*not acted in line with the contract terms*";

iii) Particulars of Claim § 7[2] is admitted; and

iv) as to Particulars of Claim § 9, the Defendant states in Defence § 5:

> "The Defendant does not admit that he has refused to pay the Claimant the sum required under the Settlement Agreement, that the Defendant has acted reasonably throughout the period and continue to do so despite down turn of the macro situation in Kenya." (my emphasis)

33. It is apparent that Defence § 5, which denies refusal to pay but does not deny failure to pay, implicitly admits a failure to pay the sums due.

34. In any event, nothing in the Defence puts forward any arguable defence to the allegations that the Defendant failed to open the letters of credit required by § 2 of the Settlement Agreement. The averments that the Defendant acted "*reasonably*" despite the downturn could not give rise to an arguable defence, particularly given the absence of any *force majeure* or hardship provision in the Settlement Agreement, or any tenable argument that the agreement has been frustrated or become impossible to perform.

35. The Claimant notes that a bankers' documentary credit operates as conditional payment for an underlying debt, and that in the event of such payment failing the creditor may sue on the underlying obligation as a debt (see, e.g., *Chitty on Contracts* (33rd ed., 2018)). The Claimant submits that clause 2 of the Settlement Agreement created such an underlying debt obligation, which thus arises under the Settlement Agreement; and that, in the absence of the establishment of the letters of credit (let alone their being honoured), the Claimant can bring a claim in debt under clause 2 pursuant to the dispute resolution clause (clause 14) in the Settlement Agreement.

36. In clause 1 of the Settlement Agreement, the Defendant *"admits and agrees"* the sums in question to be "*due and owing*". Although the words *"due and owing"* might simply refer to the relevant sums being due and owing under the Sale Contract, on balance I consider that the words *"and agrees"* in clause 1 create a further, free-standing obligation to pay, upon which the Claimant can sue. Clause 2 then requires letters of credit to be set up in order to discharge the sums due, but does not itself in my judgment create a further, independent obligation to pay.

37. In any event, I accept the Claimant's alternative submission that it has a cause of action in damages for breach of contract, arising from the Defendant's failure to procure the establishment of the letters of credit, and that the measure of damages is the sums for which the letters of credit were required to be established (less, in the case of the Nord Chesapeake letter of credit, the payments subsequently made in discharge of the price of the Nord Chesapeake shipment). It is clear that, had letters of credit complying with the Settlement Agreement been established, the Claimant

would have been able to call upon them and to receive payment of the sums in question.

38. By way of full and frank disclosure, Ms Coates' first witness statement explains certain points.

39. First, Ms Coates states that in order to induce the Claimant to assent to the discharge and delivery to the Defendant of the Transoceanic Shipment, the Claimant was provided on about 24 December 2018 with:

i) a letter of indemnity form addressed to "*HC Trading Malta Limited*" [and] "*The disponent Owners of the MV Transoceanic*" seeking delivery of the cargo without production of the original bill of lading;

ii) a letter of undertaking of the same date, addressed to the Claimant, undertaking that KCB would within 14-21 days issue a "*confirmed letter of credit*" in favour of the Claimant on certain terms in respect of an amount equivalent to the price of the Transoceanic Shipment i.e. US$2,383,142.04. The letter recited that:

> "This undertaking is issued in confidence and is in addition to the enclosed cheque from our strategic business partners Multiple Hauliers East Africa Ltd which will act as a further guarantee of settlement by [the Defendant]"
>
> and also stated:
>
> "This undertaking will be subject to international law and any dispute and/or arbitration will be handled as such".

However, no such letter of credit was ever issued;

iii) a letter also dated 24 December 2018, addressed to the Claimant, from a Dubai entity, Manhattan Global FZE, which referred to the Transoceanic Shipment and so far as material went on to state:

> "…we are aware of this purchase by Savannah Cement Ltd wherein there has been a delay in the issuance of Letter of Credit by them owing to reasons well known to you while the Cargo awaits to berth at Mombasa port.
>
> In view of the foregoing and by virtue of Manhattan Global FZE being an associated company of Multiple Hauliers (E.A) Ltd who are sole transporters and logistics service providers to Savannah Cement Co Ltd, we would like hereby to assist towards the guarantee of payment of US$ 2,383,142.04 (equivalent to AED 8,722,299.86) against their obligations to provide the Letter of Credit to yourselves prior to the berthing of this Vessel by our cheque no. 500017 dated 24th December 2018 with a value of AED 8,722,299.86 issued in favour of HC Trading FZE against their value of cargo to hold as security and

> on the understanding that upon receipt of the said letter of Credit from Savannah Cement Ltd. HC Trading FZE shall return the cheque back to us on receipt of the LC.
>
> The LC shall be issued before 31/01/19 and in the event any delay the cheque can be banked.
>
> This letter is issued to facilitate only the above referred transaction of Savannah Cement Ltd and we shall cease to stand guarantee upon completion of this transaction and with no recourse to us"; and

iv) a cheque of the same date drawn payable to HC Trading FZE (a member of the HeidelbergCement Group incorporated in Dubai) by Manhattan Global FZE on Abu Dhabi Islamic Bank ("***ADIB***") at their Dubai Internet City (DIC) Branch in the sum of AED 8,722,299.86. This cheque was in fact presented for payment to the drawee bank in Dubai by HC Trading FZE on about 25 June 2019, just after six months from its date of issue. However, the presenting/collecting bank informed HC Trading FZE that the cheque was dishonoured by ADIB on the basis that it was "*stale*". Ms Coates confirms that the Claimant has no present intention to attempt to enforce this cheque.

None of these matters constitutes a defence to the Claimant's claim for damages.

40. Secondly, Ms Coates explains that at around the dates by which the Transoceanic and the Nord Chesapeake letters of credit were required to be opened (30 September 2019 and 30 October 2019), the Defendant sent emails and enclosures to the Claimant the broad effect of which was that it was attempting to procure KCB to establish the relevant letters of credit in accordance with clause 2 of the Settlement Agreement, but that KCB was raising objections to the terms of the documentary credits sought to be opened, in particular with regard to the dates of the bills of lading being in the past.

41. However, it is clear from the Settlement Agreement that the risk of any such purported objections by KCB was assumed by the Defendant, which by clause 2 assumed an unqualified obligation to procure the issue of the requisite letters of credit. Clause 3(4) specifically provided that the letters of credit should provide that documents presented more than 21 days after the date of shipment would be acceptable. In any event, it is clear from the facts recited in the Settlement Agreement that the parties were well aware that the shipments had also been made. That fact is not capable of providing a justification for the Defendant's failure to procure the letters of credit.

42. Ms Coates also explains that by an email dated 13 December 2019, the Defendant suggested that the "*reinstatement/enhancement*" of its letter of credit facility with KCB had been approved; that that facility would be "*operationalized*" in the week beginning 23 December 2019; but that KCB "*still has a challenge issuing LC's to cover clinker already delivered and consumed*". The Defendant suggested that it would settle the amounts of the "Transoceanic" and "Nord Traveller" letters of credit by telegraphic transfer payments in full by 30 April 2020, with a first instalment being made by the end of 2019; and also that they would "*commit a settlement plan*".

However, Ms Coates states that no payments have been made in respect of these sums, nor any payment timetable provided.

43. In these circumstances, the Defendant has no real prospect of defending the Claimant's claim for US$4,696,712.04 in respect of the failure to open the Transoceanic and Nord Traveller letters of credit. Nor is there any reason why this claim should be disposed of at a trial. The Claimant is therefore entitled to summary judgment on this claim.

44. In these circumstances it is unnecessary to consider the Claimant's further contention that it is entitled to judgment on the Defendant's admission in respect of this sum.

(2) Demurrage claims

45. Two issues arise in relation to these claims:

i) whether the "*Historic Demurrage Dispute*" to which the Settlement Agreement applies includes the Sale Contract Shipments Demurrage, or only the Pre Sale Contract Demurrage; and

ii) whether the Claimant is entitled to summary judgment, alternatively an interim payment, in relation to the Historic Demurrage Dispute, or whether it must instead proceed via the expert determination procedure provided for in clause 8 of and the Schedule to the Settlement Agreement.

(a) Scope of the "Historic Demurrage Dispute"

46. The Defendant alleges that:

> "The Historic Demurrage as defined by the Settlement Agreement did not include the US$349,919.80 demurrage claimed in respect of the four 2019 shipments under the Sale Contract.
>
> Alternatively the demurrage claim only encompasses demurrage claimed in relation to earlier shipments during the period of 2017 and 2018 (calculated by [HCT] as totalling US$324,760.13."

47. Recital (F) to the Settlement Agreement reads:

> "In addition demurrage is due and owing from Savannah to HC Trading in respect of various shipments made by HC Trading in 2017 and 2018 (the "Historic Demurrage"). HC Trading claims Historic Demurrage in the amount of US$684,000. Savannah disputes this calculation (the "Historic Demurrage Dispute")."

48. On a literal interpretation of the first sentence, the "*Historic Demurrage*" is confined to either (a) the Pre Sale Contract Demurrage or (b) the Pre Sale Contract Demurrage together with the demurrage in respect of the Transoceanic shipment (which, unlike the other three Sale Contract shipments, was made in 2018 as opposed to 2019).

49. However, reading recital (F), and the Settlement Agreement, as a whole, I do not consider that to be the correct interpretation.

50. First, both recital (F) itself and clause 7 of the Settlement Agreement refer to the Claimant's quantification of the Historic Demurrage as US$684,000. The Claim Letter, dated 14 May 2019, shows that the parties were well aware that that figure approximated to the aggregate of the Pre Sale Contract Demurrage (stated in that letter as US$336,466.38) and the Sale Contract Shipments Demurrage (which that letter indicated totalled US$349,419.40). It was clearly not confined to the Pre Sale Contract Demurrage.

51. Secondly, recital (C) to the Settlement Agreement sets out both the price and the demurrage for each of the four Sale Contract shipments as being due under the Sale Contract. There would have been little point in doing so if (as the Defendant's case would mean) the Settlement Agreement had no application to the Sale Contract Shipments Demurrage.

52. Thirdly, there is no rational basis on which the parties could be expected to have intended either (a) to draw an arbitrary distinction between the demurrage on the Transocean shipment (in 2018) and other demurrage claims from 2017/2018 shipments, on the one hand, and the demurrage on the 2019 shipments on the other hand, or (b) to cover only the Pre Sale Contract Demurrage in the Settlement Agreement – including its dispute resolution mechanism – leaving the Sale Contract Shipments Demurrage to be dealt with by arbitration under the dispute resolution provisions of the Sale Contract. As rational businessmen, one would naturally have expected all the demurrage claims to be addressed in the same way, namely under the Settlement Agreement (cf. *Fiona Trust & Holding Corp v Privalov (Premium Nafta Products Ltd & Ors v Fili Shipping Co Ltd & Ors.)* [2007] UKHL 40 § 13).

53. Fourthly, although the year "*2019*" was not used in recital (F), the Sale Contract shipments were "*historic*" in the context of the Settlement Agreement just as the earlier shipments in 2017 and 2018 were.

54. For these reasons, I consider that the terms "*Historic Demurrage*" and "*Historic Demurrage Claim*" in the Settlement Agreement include both the Pre Sale Contract Demurrage and the demurrage in respect of all four Sale Contract shipments i.e. the whole of the Sale Contract Shipments Demurrage.

55. The Claimant further submitted that whilst the court cannot look at conduct subsequent to the making of a contract for the purpose of construing its terms, on a summary judgment application the court may assess the Defendant's subsequent conduct to help determine whether there is an arguable defence (or, in the words of Longmore LJ in *Gulf Azov Shipping Company Ltd and anor. v. Chief Humphrey Idisi* [2001] EWCA Civ 505, a fair and reasonable probability of the defendant having a real and bona fide defence). It relies in this respect on the post Settlement Agreement dealings referred to in § 18 above, in which the Defendant did not challenge the Claimant's inclusion of the Sale Contract Shipments Demurrage in its calculations.

56. I do not accept that submission. Since subsequent conduct is not admissible when construing the Settlement Agreement (absent any plea or evidence of estoppel by convention), the same must apply on a summary judgment application. However, this

point does not affect the conclusion I have already reached as a matter of construction of the Settlement Agreement.

(b) Dispute Resolution provisions for the Historic Demurrage Dispute

57. Clause 8 of the Settlement Agreement provides that:

> "In the event of no such settlement having been arrived at within 45 days of the date of this agreement, the Historic Demurrage Dispute shall be referred by HC Trading and Savannah for final and binding determination by an independent expert in accordance with the Schedule to this Agreement."

58. The Claimant submits that the Settlement Agreement contained an implied term that the Defendant would co-operate with the process of seeking to arrive at a settlement, and that in the circumstances summarised in §§ 18-21 above the Defendant has breached this obligation. The Claimant contends that in these circumstances it is entitled to sue for damages reflecting the amount of its Historical Demurrage claims. It suggests that since § 3 of the Schedule to the Settlement Agreement states that absent agreement on an expert within seven days of the date of the agreement either party "*shall then be entitled*" to request the LMAA to appoint one, the use of the expert determination procedure is optional.

59. The Defendant denies that any such implied term exists, or that it has failed to co-operate in trying to resolve the Historic Demurrage dispute. In the alternative, the Defendant pleads that any damages for breach of such a term would be either nil or nominal damages reflecting any delay in resolving the dispute.

60. I am not persuaded that any such implied term exists or, in any event, that the Claimant is entitled to pursue a claim for substantive damages. An implied term of co-operation would be too vague to be enforceable. It is also unnecessary, because the Settlement Agreement provides in clause 8 and the Schedule a mechanism by which any failure to settle can be resolved, even if one party is failing to co-operate. I do not accept the Claimant's submission that any failure by one party to attempt to settle renders it unnecessary for the other party to deploy the expert determination procedure.

61. Moreover, the words *"shall be referred"* in clause 8 make the use of the expert determination procedure, as distinct from any other dispute resolution process, mandatory. Neither party is entitled to proceed straight to litigation in order to resolve the Historic Demurrage Dispute. It is only if a party needs to enforce an expert determination made pursuant to § 10 of the Schedule, or if the court's assistance is for some other reason required in order to assist the operation of the expert determination process, that the claim may be pursued via litigation. In the present case there is no indication that either party has attempted to invoke that process.

62. The Claimant submits that the expert determination procedure does not oust the jurisdiction of the court. I am inclined to agree. However, the court should normally stay a claim which the parties have agreed should be resolved by expert

determination: cf *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826 (per Thomas LJ):

> "The issue on this appeal is whether the court should stay proceedings brought for a declaration as to the interpretation of an agreement on the grounds that the issue falls within the expert determination clause of the agreement. …" (§ 1)

On the facts, the Court of Appeal held the dispute to fall outside the clause, but clearly assumed that a stay would have been appropriate had it fallen within the clause. See also *DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd* [2007] EWHC 1584 (TCC) [2008] Bus. L.R. 132 (TCC) § 5-12 and cases cited: the court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate; the jurisdiction is discretionary but there is a presumption in favour of the parties' agreement to adjudicate, putting the persuasive burden on the party resisting the stay to show good reasons for its stance).

63. Further, the court's power under CPR 25.1(k) is to require an interim payment *"on account of any damages, debt or other sum (except costs) which <u>the court</u> may hold the defendant liable to pay"*, and the condition set out in CPR 25.7(1)(c) applies where the court *"is satisfied that, <u>if the claim went to trial</u>, the claimant would obtain <u>judgment</u> for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment…"* (my emphasis in both cases). It follows in my judgment that the court has no power to order an interim payment, alternatively ought not to order such a payment, where the parties' agreed dispute resolution procedure is expert determination rather than (or, at least, prior to any question of) litigation.

(E) CONCLUSIONS

64. As a result, the Claimant's claim succeeds in part. It is entitled to judgment in the sum of US$4,696,712.04 plus interest in respect of the price of the Sale Contract shipments. It is also entitled to a declaration that the demurrage relating to those shipments falls within the definitions of *"Historic Demurrage"* and *"Historic Demurrage Dispute"* in the Settlement Agreement.

65. However, the Claimant is both entitled and bound to pursue the Historic Demurrage claim via the expert determination procedure set out in the Settlement Agreement. The applications for judgment or an interim payment in respect of demurrage must therefore be stayed.

66. I shall hear counsel further as to the relief to be granted, and on consequential matters including the Claimant's claim for costs.