Mae Engineering Ltd v Dragages Singapore Pte Ltd (fka Dragages et Travaux Publics (S) Pte Ltd)
[2002] SGHC 86

Case Number : Suit 1291/2001, RA 253/2001

Decision Date : 25 April 2002

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Wong Meng Meng SC, Paul Sandosham and Gandhi (Wong Partnership) for the defendants/appellants; Tan Kok Quan SC and Karam Singh Parmar (Tan Kok Quan Partnership) for the plaintiffs/respondents

Parties : Mae Engineering Ltd — Dragages Singapore Pte Ltd (fka Dragages et Travaux Publics (S) Pte Ltd)

Arbitration – Stay of court proceedings – Arbitration agreement – When court can sanction departure from such agreement – Burden on party opposing stay to show why arbitration agreement not to prevail – Whether plaintiffs have undisputable claim against defendants – Whether defendants have any basis for staying plaintiffs' claim – s 7(2) Arbitration Act (Cap 10)

stay of proceedings and granted Mae's application for summary judgment. This is an appeal by Dragages against both these decisions.

Held

: dismissing the appeal with costs,

(1) Where parties have, by contract, agreed that any dispute between them is to be resolved by arbitration, the court will not sanction a departure from that agreement except for sufficient reason : s 7 Arbitration Act (Cap 10). The burden of satisfying the court that there is sufficient reason why the agreement between the parties to refer any dispute between them to arbitration should not prevail and why the court should, instead, assume jurisdiction is on the partying opposing the stay. (9)

(2) It is not appropriate for the court to use order 14 summary judgment principles to determine whether a stay on order 14 proceedings ought to be granted. This is because the purpose of order 14 summary judgment principles is to aid the court with determining whether a claim should be immediately allowed in very obvious cases whereas applications for a stay relate to a larger issue of jurisdiction. As such, it is not entirely safe to determine whether parties should be bound by their agreement to arbitrate according to principles established to deal with very obvious claims to which there is no defence. (10 & 11)

(3) While the presence of an arbitration clause prima facie entitles a defendant to have the dispute decided by arbitration, a plaintiff in very clear cases is no doubt entitled to his summary judgment notwithstanding the clause. To this end, care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely to overcome, with the situation in which the defendant is not really raising any dispute at all. In this connection, the courts should adopt a holistic and common sense approach in determining whether the defendant has made out a prima facie case of disputes that would suffice for a matter to be stayed pending arbitration. (11 & 12)

(4) In the present case, the three claims for set-off raised by Dragages for making the deductions from Interim Certificates No. 27 & 28 were, upon closer examination of the evidence, without merit and failed to disclose any dispute whatsoever. In any case, even if Dragages had any rights of set-off, those rights ought to have been exercised before the Interim Certificate was issued. Not having done so, Dragages' contractual obligation to pay had crystallised and it was no longer open to Dragages to unilaterally vary those contractual obligation by issuing revised Interim Certificates to replace those already issued. (27, 29 – 32)

Cases referred to

Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors [1993] 1 All ER 664 **(refd)**
Ellis Mechanical Services Ltd v Wates Construction Ltd [1978] 1 LLR 33 **(folld)**
Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd [1990] 1 WLR 153 **(refd)**
Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd [1998] 2 SLR 143 **(folld)**
Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd [1993] 1 SLR 876 **(folld)**

Legislation referred to

Arbitration Act (Cap 10) 7.

Judgment

GROUNDS OF DECISION

1. The plaintiffs, Mae Engineering Ltd ("Mae"), are a company incorporated in Singapore carrying out the business of mechanical and electrical ("M&E") engineering. The defendants, Dragages Singapore Pte Ltd ("Dragages"), are a company incorporated in Singapore carrying on the business of building contractors. Dragages was engaged by Precious Treasure Pte Ltd ("the Employer") for the conservation, fitting out and other related works relating to the restoration of the Fullerton Building. Dragages entered into a sub-contract with Mae to carry out certain M&E works for the sum of $22.77 million subject to variations.

2. Clause 17 of the sub-contract with Mae laid down the procedure that was to be followed in making progress payments to Mae:

> "17(3) The Contractor shall after having received the Employer's/Architect's certificate relative to the Main Contract, issue an Interim Certificate to the Sub-Contractor showing the amounts which have been accepted for payment by the Contractor taking into account the real progress achieved during the month less a deduction of retention money at the rate of ten percent (10%) of the value of the Interim Payment up to a maximum retention of five percent (5%) of the Sub-Contract Price *and less any back charges due* by the Sub-Contractor to the Contractor.
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> 17(4) The Sub-Contractor shall raise an invoice in the amount stated on the Interim Certificate and forward this to the Contractor for payment together with a copy of the Interim Certificate.
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> 17(5) Within thirty (30) days of his receiving from the Employer on account of

> the Main Works any payment which includes a sum in respect of the Sub-Contract Works properly executed, the Contractor shall pay to the Sub-Contractor the amount shown on the Interim Certificate providing the Sub-Contractor has provide (sic) his invoice as required under 17(4)."
>
> (Emphasis added.)

Pursuant to the sub-contract, Dragages on 17 February 2001 issued to Mae an Interim Payment Certificate No. 27 certifying the total value of M&E works for November 2000 to be $2,058,742.73. Mae, on 17 February 2001, in accordance with cl 17(4), forwarded to Dragages their invoice No. 8150 for payment of that sum of $2,058,742.73 ($2,120,486.47 inclusive of GST). On 15 March 2001, Dragages issued to Mae Interim Payment Certificate No. 28 certifying the total value of M&E works for December 2000 to be $581,479.06. Based on Certificate No. 28, Mae, on 30 March 2001 in accordance with cl 17(4), forwarded their invoice No. 8470 for the said sum ($598,923.43 inclusive of GST). By the terms of cl 17(5), Dragages was obliged to pay Mae, within 30 days of receipt of amounts stated in the Employer's/Architect's Certificate, the amount stated in the Interim Certificate provided Mae has issued the invoice called for under cl 17(4).

3. Despite requests from Mae, Dragages did not pay the sums due under Interim Certificates No. 27 and 28 to Mae. Instead, Dragages, on 25 April 2001 and 18 May 2001, issued revised Interim Payment Certificates No. 27A and 28 (Revised) to replace Interim Certificates No. 27 and 28 respectively. In revised Interim Certificate No. 27A, Dragages deducted $1,191,061.28 from the amount certified as due and payable to Mae in Interim Certificate No. 27 and tendered to Mae the (balance) sum of $850,689.74 after such deduction. In Interim Certificate No. 28 (Revised), Dragages deducted $227,885.91 from the amount certified as due in Interim Certificate No. 28 and tendered to Mae the (balance) sum of $347,125.74 after such deduction. Mae accepted, under protest, the two sums tendered as part-payment of the amounts due to Mae under Interim Certificates No. 27 and 28. Based on Interim Certificates No. 27 and 28, there would still be a sum of $1,461,515.60 due to Mae. No explanation was given to Mae at that time for the deductions.

4. The sub-contract with Mae contained, in cl 31, an arbitration clause which read:

> "31(1) *If any dispute arises between the Contractor and the Sub-Contractor in connection with this Sub-Contract, it shall, subject to the provisions of this clause, be referred to the arbitration and final decision of a single arbitrator* to be agreed upon between the parties or failing agreement by either party within twenty eight (28) days of being requested in writing by the other party to be nominated by the President of the Singapore International Arbitration Centre (SIAC) *and any such references shall be a submission to arbitration in accordance with and subject to the provisions of the Arbitration Act (Cap 10)* or any statutory modification thereof for the time being in force in Singapore and the rules of the SIAC."
>
> (Emphasis added.)

Mae, on 24 July 2001, gave notice of arbitration under cl 31. It would be relevant to note that the disputes in respect of which Mae sought arbitration were very much broader in scope and involved very much larger sums of money than the claims Mae had against Dragages for the balance amount of $1,461,515.60 under Interim Certificates No. 27 and 28. Pursuant to the notice of arbitration, the parties agreed to the appointment of Mr Alan Thambiah as arbitrator and Mr Thambiah has given directions in respect of the arbitration.

5. The obligation, under cl 17(5), for Dragages to pay to Mae the amounts in respect of the M&E works due under the Interim Certificates would arise only upon Dragages receiving the said amounts from the Employer. At the time Mae commenced arbitration proceedings, Mae did not know whether or not Dragages had received payment of the said amounts. It was only in September 2001 that Mae learnt that Dragages had received that payment in full from the Employer.

6. Upon learning that Dragages had in fact been paid by the Employer for those M&E works, Mae instituted Suit No. 1291/01 in the High Court for the recovery of the amount of $1,461.515.60 remaining unpaid under Interim Certificates No. 27 and 28. In its Points of Claim filed thereafter in the arbitration proceedings, Mae adverted to that suit and stated that its claims in the arbitration under Interim Certificates No. 27 and 28 were "strictly without prejudice to [Mae's] claim in Suit No. 1291 of 2001/E … and is without prejudice to [Mae's] contention that the said monies are indisputably due and owing".

7. Following the commencement of the suit, Mae, by way of SIC No. 2571/01, commenced Order 14 proceedings against Dragages for the outstanding amount of $1,461,515.60 under Interim Certificates No. 27 and 28. Dragages, for its part, in SIC No. 2822/01 sought, under s 7 of the Arbitration Act (Ch 10), to have all further proceedings in Suit No. 1291/2001 stayed.

8. The applications in SIC No. 2571/01 and 2822/01 were heard by the Senior Assistant Registrar ("SAR") on 7 December 2001. The SAR dismissed Dragages' application in SIC No. 2822/01 for a stay proceedings and granted Mae's application for summary judgment. This is an appeal by Dragages against both these decisions.

9. Where parties have, by contract, agreed that any dispute between them is to be resolved by arbitration, the court will not sanction a departure from that agreement except for sufficient reason. This is apparent from s 7 of the Arbitration Act which reads:

> "7(1) If any party to an arbitration agreement, or any person claiming through or under him, commenced any legal proceedings against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
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> 7(2) The court or a judge thereof, *if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement*, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, *may make an order staying the proceedings*."
>
> (Emphasis added.)

Section 7(2) of the Arbitration Act, in effect puts the burden on the party applying for a stay to satisfy the court that there is sufficient reason why the agreement between the parties to refer any dispute between them to arbitration should not prevail and why the court should, instead, assume jurisdiction.

10. The scope of the court's discretion under s 7(2) of the Arbitration Act was considered by the Court of Appeal in the case of *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 143. In that case the trial judge dealing with an application for stay under s 7 of the

Arbitration Act had taken the view that the contractor was prima facie entitled to summary judgment for the amount stated to be due to the contractor under an Interim Certificate and that it was for the employer to show that the employer had a bona fide defence to that claim. In rejecting that approach Karthigesu JA, delivering the decision of the Court of Appeal, said at page 143:

> "This approach may or may not be consonant with the O 14 principles applicable in our courts but it certainly is not consonant with s 7 of the Arbitration Act which guides that the burden shall fall on the plaintiffs in the action (the contractors) to show cause to the contrary to allowing a stay."

11. The trial judge in the *Kwan Im Tong* case had gone on to consider in detail the affidavit evidence before him and had arrived at the conclusion that the employer had no valid defences to the claim by the contractor. The trial judge had, on that ground, dismissed the application for stay. The Court of Appeal took the view that it was not appropriate for a court hearing an application for stay to embark on such an exercise. In the words of Karthigesu JA at page 141:

> "The learned judge, in determining whether there was a dispute that fell within cl 15 to be referred to arbitration, applied principles used in summary judgment proceedings to examine whether the employers' cross-claim had sufficient validity to resist the contractors' prima facie entitlement to the sum certified by the architect. While the learned judge's application of the law was not wrong, applying summary judgment principles should not be held to be an exhaustive means of weighing the claims. The learned judge has essentially held that prima facie the contractors are entitled to their claim for $55,590.42 unless the employers can demonstrate a valid set-off. *It is our view that while O 14 summary judgment principles aid the court with determining whether a claim should be immediately allowed in very obvious cases, applications for a stay such as the present one relate to a larger issue of jurisdiction. With respect, it does not appear entirely safe to determine whether parties should be bound by their agreement to arbitrate according to principles established to deal with very obvious claims to which there is no defence*."
>
> (Emphasis added.)

Karthigesu JA then went on to endorse and adopt the following observation that Parker LJ made in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1990] 1 WLR 153 at pages 158 and 159:

> "The purpose of Order 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. … But Order 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Order 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision.
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> *In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts*

…

… In very clear cases a plaintiff is no doubt entitled to his summary judgment notwithstanding the clause …"

(Emphasis added.)

Karthigesu JA described these observations as "a timely reminder that the basis on which the application for stay is brought is a contract wherein parties have chosen arbitration over the litigation process as the forum for the resolution of their disputes."

12. Although the Court of Appeal in *Kwan Im Tong* had alluded to an application for a stay as one that related to the larger issue of jurisdiction, it nevertheless envisaged that there were circumstances where a stay ought not to be granted. In this respect the court cited with approval the decision in *Channel Tunnel Group Ltd & Anor v Balfour Beatty Construction Ltd & Ors* [1993] 1 All ER 664, in particular what where Lord Mustill stated at page 680:

"If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. … *I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all*."

(Emphasis added.)

The Court of Appeal also adopted the following approach which Selvam JC (as he then was) took in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876:

"The common form arbitration agreement provides for disputes to be decided by arbitrators. *In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute*. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. ... If the defendant, therefore, makes out a prima facie case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment."

(Emphasis added.)

13. Mr Tan Kok Quan SC, who appeared for Mae, submitted that the court in this case should assume jurisdiction because there could really be no dispute between the parties insofar as the payments due to Mae under Interim Certificates No. 27 and 28 were concerned that ought to be referred for arbitration. He argued that as all the requirements of cl 17 of the sub-contract – including the requirement in cl 17(5) that before the obligation to pay arises, Dragages must have received payment from the Employer for the sub-contract works in question – had been fulfilled, the contractual obligation of Dragages to make payment under Interim Certificates No. 27 and 28 had crystallised and it was not open to Dragages to resile from those obligations by the issue of fresh revised Interim Certificates.

14. Mr Wong Meng Meng SC, counsel for Dragages, argued on the other hand that the fact that

Mae had referred their claim arising from Certificates No. 27 and 28 to arbitration was itself evidence of a "dispute". The fact that Mae rejected Dragages' right to issue revised Interim Certificates in place of Interim Certificates already issued, he submitted, was also evidence of a dispute between the parties.

15. Mr Wong also referred the court to cl 17(8) of the sub-contract. Clause 17(8) reads:

> "17(8) Nothing in this Clause shall modify or abrogate the Contractor's right to deduct from or set off against any money due to the Sub-Contractor under this Sub-Contract (including retention money) any sum or sums which the Sub-Contractor is or may be liable to pay to the Contractor in respect of any claim or counterclaim against the Sub-Contractor whether or not arising out of any default, breach or non-performance of this Sub-Contract."

The effect of cl 17(8), he submitted, was to reserve Dragages' right to deduct or set off any claims that Dragages has or may have against Mae from amounts due to Mae. Dragages, he submitted, had claims against Mae arising from:

> (a) Backcharges ($141,722.80);
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> (b) Cost of rectifying defects in the sub-contract works ($330,000); and
>
> (c) Adjustments to the final accounts that the Employer may make.

and Dragages, in deducting those claims from the amounts due to Mae under Interim Certificates No. 27 and 28 was exercising its rights under cl 17(8). Mae, he submitted, may well dispute these claims but as the parties had agreed that disputes between them should be submitted to arbitration effect should be given to that agreement and the court should grant the stay prayed for.

16. Mr Tan submitted that the Court of Appeal in the *Kwan Im Tong* case did not go so far as to say that a bare allegation of a dispute would suffice for a matter to be stayed pending arbitration. Before a court can decide whether or not there was a dispute, the court would have to weigh the claims of both parties. For this purpose, he submitted – quoting from the judgment of Selvam JC referred to above – that the court should adopt "a holistic and commonsense approach to see if there is a dispute". How far the courts should delve into the facts to ascertain whether it was a genuine dispute was a matter, he submitted, that would depend on the facts and circumstances of each case. In respect of the three heads of claim relied on by Dragages, Mr Tan made the following points:

Claim for backcharges

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17. Clause 17(3) of the sub-contract specifically allows Dragages to make deductions in the Interim Certificate for any back payments "due" from Mae. Mr Tan submitted that the backcharges deducted in this case from Interim Certificates No. 27 and 28 only became "due" after the dates the Interim Certificates No. 27 and 28 had been issued. In support, he pointed out that Dragages had (at page 412 of their first affidavit) admitted that these backcharges were in fact to be deducted from Interim Certificates No. 29 and 30. Mr Tan submitted that in these circumstances Dragages was not entitled to deduct the said backcharges from Interim Certificates No. 27 and 28.

Cost of rectifying defects

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18. The relevant clause in the sub-contract dealing with the obligation of Mae to rectify defects in its works is in cl 16(2) which reads:

> "16(2) After completion of the Main Works or of the last of the sections thereof in which the Sub-Contract Works are comprised, as the case maybe, *the Sub-Contractor* shall maintain the Sub-Contract Works and *shall make good such defects and imperfections therein as the Contractor is liable to make good under the Main Contract* for the like period and otherwise upon the like terms as the Contractor is liable to do under the Main Contract.
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> *If the Sub-Contractor shall fail to do any such work as aforesaid required by the Contractor, the Contractor shall be entitled to carry out such work by his own workmen or by*
>
> other contractors and if such work is work which the Sub-Contractor should have carried out at the Sub-Contractor's own cost *the Contractor shall be entitled to recover from the Sub-Contractor the cost thereof or deduct the same from any monies due or which may become due to the Sub-Contractor*."
>
> (Emphasis added.)

By the terms of cl 16(2), Dragages can proceed to make good any defects in the sub-contract works and recover the costs of such works only if Mae fails to carry out the necessary works. Mr Tan pointed out that Dragages had in fact requested Mae to rectify certain defects – which were in any event of a minor nature – and Mae was attending to those rectification works. Dragages, he pointed out, had not alleged that because Mae refused to carry out the rectification works Dragages itself had effected the rectification. He submitted that, in those circumstances, Dragages was not entitled to claim any monies from Mae in respect of rectification works and could not make any deductions in respect thereof from the Interim Certificates.

19. Mr Tan also submitted that Dragages cannot just arbitrarily pick a figure out of the air and say that that would be the cost of carrying out rectification works. He pointed out that absolutely no evidence, not even a quotation, had been produced by Dragages to show the sum of $330,000 deducted for such works was arrived at.

Possible adjustments to final accounts

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20. Under this head, Dragages was providing for a possible downward evaluation of Mae's works in the final accounts. Mr Tan submitted that Dragages cannot raise a set off or a counterclaim based on a "possible" revaluation in the future. The amount that Dragages deducted under this head was, he submitted, picked out of the air. I would note here that Dragages did not, in so many words, specify the amount deducted under this head. The amount deducted would presumably be the difference between the total amounts deducted in the revised Interim Certificates [No. 27A and 28 (Revised)] and amounts deducted in those revised Interim Certificates for backcharges and rectification works.

Bona fide disputes?

21. Mr Wong had raised the three claims referred to above as claims that gave Dragages a right of set off under cl 17(8) of the sub-contract. It is true that cl 17(8) preserved Dragages' right of set off but such a right, as Mr Tan has correctly stated, can exist only in respect of set offs recognised in law or permitted under the sub-contract.

22. The sub-contract permits backcharges to be deducted in an Interim Certificate only if the backcharges are "due" at the time the Interim Certificate was issued. In the present case, Dragages purported to deduct backcharges from Interim Certificates No. 27 and 28 that were not due at that time. They therefore had no mandate to make that deduction.

23. Deductions in respect of the costs of rectification works, can, by the terms of the sub-contract, be made by Dragages for the costs of any rectification works only if Mae failed to carry out such works and Dragages had stepped in to carry out that rectification works. That did not happen in this case.

24. The deductions for possible adjustments were also no more than mere speculation on the part of Dragages. No rational basis for this speculation was provided nor was any rational explanation proffered as to how the deductions were quantified. Clause 17(6) of the sub-contract which deals with final accounts does not say that progress payments can be withheld pending the issuance of the final accounts. In this regard, the words of Lawton J in *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 LLR 33 at page 36 is apposite:

> "If the main contractor can turn round, as the main contractor has done in this case, and say '*Well, I don't accept your account; therefore there is a dispute*', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. *Then the sub-contractor is put into considerable difficulties; he is deprived of his commercial lifeblood*. It seems to me that the administration of justice in our Courts should do all it can to restore that lifeblood as quickly as possible."
>
> (Emphasis added.)

25. Although Mr Tan's criticism of the three heads of deduction raised by Dragages were cogent, the reference by the Court of Appeal in *Kwan Im Tong* to the larger issue of jurisdiction and the criticism of the trial judge by the Court of Appeal for having undertaken an extensive appraisal of the affidavit evidence before him, led me to the initial view that this appeal should be allowed on the grounds that as there was an arbitration clause in the sub-contract which Mae had in fact invoked, the parties should seek their remedies before the arbitrator.

26. However, having heard further arguments from counsel and bearing in mind the words of Lawton J in *Ellis v Wates Construction* that interim payments are the lifeblood of the sub-contractors and the courts should do all it can to restore that lifebood as quickly as possible, I formed the view that my first reading of *Kwan Im Tong* was overly cautious. The Court of Appeal in *Kwan Im Tong* had recognised that there were circumstances when the courts should, despite the existence of an arbitration clause, assume jurisdiction to adjudicate the matter. The Court of Appeal had, after all, endorsed the view expressed by Lord Mustill in the *Channel Tunnel* case that if a plaintiff can show that the defendant has no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and give final judgment for the plaintiff.

27. In the present case, even though I had to consider in some detail the evidence adduced before me, I was at the end of it satisfied that there was really no basis whatsoever for Dragages to make the deductions that it made from Interim Certificates No. 27 and 28. It could, in my view, safely be said that there really was no dispute at all between Dragages and Mae in connection with the amounts that were certified as due to Mae under the Interim Certificates. By issuing the revised Interim Certificates containing deductions, Dragages, it seemed to me, was merely trying to delay payment of the sums so certified. I am satisfied that the rights of set off claimed by Dragages had no basis whatsoever and that in this case it could, to paraphrase Lord Mustill, safely be said that Dragages was "not really raising a dispute at all".

28. I now turn to consider Mr Wong's submission that because Mae had already instituted arbitration proceedings, Mae should be precluded from continuing with the court proceedings in Suit No. 1291/01. Dragages' obligation to pay Mae the amounts certified in the Interim Certificates arises [by virtue of cl 17(5)] only after Dragages has recovered those amounts from the Employer. Mae, at the time it commenced the arbitration proceedings, did not know that the Employer had already paid to Dragages in full the amounts certified under Interim Certificates No. 27 and 28. As soon as Mae realised that Dragages had been paid those amounts in full and Mae therefore could make an immediate claim against Dragages for the said, Mae commenced these proceedings. In so doing, Mae made it clear in the arbitration proceedings that its claim under Interim Certificates No. 27 and 28 in the arbitration were without prejudice to its claims in Suit No. 1291/01. In these circumstances, I do not think that it could be said that Mae was precluded from commencing these proceedings or that it should be precluded from continuing these proceedings.

29. There is another and more fundamental reason to arrive at the conclusion that there was in fact no "dispute" between the parties that ought to be referred for arbitration. Dragages under its contract with Mae had to make progress payments to Mae in accordance with the procedures stipulated in cl 17 of the sub-contract. Clause 17(5) makes it mandatory for Dragages to pay Mae the amount stated in an Interim Certificate within 30 days of receipt from the Employer of monies relating to that Interim Certificate provided Mae has rendered its invoice under cl 17(4).

30. In this case, Mae had rendered its invoice under cl 17(4) and the Employer had made the relevant payments in full to Dragages. In such a situation, Dragages was contractually bound to pay the monies over to Mae. If Dragages had any rights of set off, those rights ought to have been exercised before the Interim Certificate was issued. Not having done so and the contractual obligation to pay having crystallised, it was no longer open to Dragages to unilaterally vary those contractual obligations by issuing revised Interim Certificates to replace Interim Certificates already issued. There is in fact no provision in the sub-contract for the unilateral issue of such revised Interim Certificates.

31. The only remedy that Dragages had, if indeed it had overlooked a deduction that it ought to have made in an Interim Certificate it has issued, is to make that deduction in any subsequent Interim Certificate that it may issue or in the final accounts. There can, in my view, be no "dispute" on this matter. This is therefore, in my view, a proper case for the court to refuse the application under s 7(2) of the Arbitration Act for a stay.

32. For the above reasons, I dismiss this appeal with costs. The Senior Assistant Registrar's decision refusing Dragages' application for stay and the Senior Assistant Registrar's decision granting Mae's application for summary judgment is upheld.

Sgd:

S. RAJENDRAN
Judge