

Mitfam International Ltd v Motley Resources Pte Ltd
[2013] SGHC 270

Case Number : Suit No 732 of 2010
Decision Date : 16 December 2013
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Edmond Pereira and Mahmood Gaznavi (Edmond Pereira & Partners) for the plaintiffs; Andrew Ang and Andrea Tan (PK Wong & Associates LLC) for the defendant.
Parties : Mitfam International Ltd — Motley Resources Pte Ltd

Contract – breach

16 December 2013

Judgment reserved.

Judith Prakash J:

Introduction

1 The parties to this action are trading companies dealing in commodities. Over the years they have traded frequently with each other, usually in relation to raw cashew nuts grown in the Ivory Coast. The plaintiff, Mitfam International Ltd (“Mitfam”), is incorporated in the Seychelles but has its main business in the Ivory Coast. The defendant, Motley Resources Pte Ltd (“Motley”), is a Singapore company.

2 The plaintiff’s claim is for the sum of US\$395,666 (“the invoiced sum”) due under its invoice dated 28 April 2010 in respect of the sale of 545.746 MT of raw cashew nuts to the defendant. The defendant admits having purchased the goods and that the invoiced sum is due. However it claims that the invoiced sum should be set off against a sum of US\$486,553.33 being the total amount of eight payments (“the Payments”) which it had made to the plaintiff (or third parties nominated by the plaintiff) for the procurement of raw cashew nuts. These payments were allegedly in the nature of advances given by the defendant to the plaintiff for the goods and, as the plaintiff did not supply goods thereafter, the defendant is entitled to be repaid the total amount by the plaintiff.

3 The defendant also has a counterclaim based on the alleged breach of two contracts. The first contract was for the sale of 1,500 MT of raw cashew nuts and the second contract was for 1,000 MT of the same product. The defendant’s claim is that the plaintiff did not perform the first contract at all, and that, in respect of the second contract, it delivered only a portion of the contracted goods. The defendant claims damages for both breaches.

4 As the defendant admits the plaintiff’s claim for the invoiced sum, the main issue in the case is whether the defendant is able to establish that the Payments were made to account of the purchase of goods from the plaintiff. The plaintiff denies this assertion and takes the position that the Payments were reimbursements of amounts which the plaintiff had paid to third parties on behalf of the defendant and at its request.

Background

5 There were eight Payments made over a period of about one year. These alleged advances are set out in Table 1 below.

Table 1			
No.	Date	Amount in US\$	Recipient
1	23/4/09	14,780.00	Mitfam
2	30/4/09	100,973.33	Stra-ci
3	21/5/09	50,000.00	Mitfam
4	22/7/09	50,000.00	Mitfam
5	25/3/10	60,000.00	Mitfam
6	26/3/10	105,000.00	Mitfam
7	14/4/10	38,000.00	Shabi Boeki Shokai
8	20/4/10	67,800.00	Sinaplast
Total:		486,553.33	

6 The plaintiff claims that each of these Payments was not an advance but a reimbursement made by the defendant for an advance the plaintiff itself had made on the defendant's behalf, at the defendant's request. The alleged advances by the plaintiff were made to two entities in the Ivory Coast: Siddhi Import Export ("Siddhi"), a trading company; and Cooperative des Producteurs Agricoles de Dimbokro ("Coopradi"), a cooperative of farmers. The details are set out in Table 2 below. While the sums correspond to the entries in Table 1 the dates and recipients all differ. Table 2 also presents the recipient named in the receipt exhibited by the plaintiff for each of the Payments.

No.	Date	Amount in US\$	Recipient
1	9/4/09	14,780.00	Coopradi
2	16/4/09	100,973.33	Siddhi
3	12/5/09	50,000.00	Coopradi
4	13/7/09	50,000.00	Coopradi
5	13/3/10	60,000.00	Coopradi
6	4/3/10	105,000.00	Coopradi
7	5/4/10	38,000.00	Siddhi
8	12/4/10	67,800.00	Siddhi
Total:		486,553.33	

The parties' business relationship

7 There were different accounts of the nature of the parties' business relationship. The evidence in relation to this was given for the plaintiff by its sole shareholder and director, Mr Mitra Prasenjit ("Mr Mitra"), and for the defendant by its director, Mr Bipin Kumar Jha ("Mr Jha").

8 Mr Mitra said Mitfam was in the business of purchasing commodities, most frequently raw cashew nuts, from suppliers in Ivory Coast which it then exported to buyers overseas. Motley was one such buyer. Mr Mitra said that Siddhi and Coopradi were never Mitfam's suppliers. Instead, he assisted Motley from time to time when it wished to make payments to Siddhi and Coopradi. On those occasions, he was asked by Motley to provide cash in the currency of Ivory Coast (that currency being known as the CFA franc or CFA for short) to Siddhi and Coopradi on Motley's account and the eight Payments (among others) were repayments in foreign currency for the money he had advanced. The Payments were made either directly to Mitfam or to third parties nominated by it.

9 Mr Mitra claimed that in the Ivory Coast a certain Mr Hussein and a certain Mr Kamal *inter alios* were his local contacts for the procurement of CFA. They were Lebanese businessmen. He would receive a telephone call from Mr Jha for the amount required, procure it (this appears to have meant borrowing the money) and then deliver it for which he received receipts from Mr Ashok Bangera ("Mr Bangera") of Siddhi and Mr Koffi Yao Appia ("Mr Koffi") of Coopradi. Mr Mitra apparently never saw any contract documents to evidence the nature of the commercial relationship between Siddhi/Coopradi and Motley and attributed the secrecy to "tax purposes". The receipts stated that they were for "commission"; this was enough explanation for him and he did not inquire further. The reason for this roundabout and seemingly suspicious mode of operating was apparently that financial transactions were difficult in Ivory Coast due to its chaotic political situation. Therefore the parties engaged in something like the "hundi" business, a remittance system based on honour and trust.

10 In its broad lines Mr Mitra's account was corroborated by the evidence of his two witnesses, Mr Bangera and Mr Koffi. Mr Bangera testified that Motley was a customer of his company, Siddhi. He affirmed that he had produced and given the handwritten receipts to Mr Mitra. He said that part of his business was to check the quality and weight of raw cashew nuts purchased for Motley. Mr Bangera said that he received the commissions (for which the handwritten receipts were given) in return for the supply of raw cashew nuts, inspection and documentation services. However his evidence was that there was merely a mutual understanding as to how much was owed as commission, calculated with reference to the tonnage of raw cashew nuts supplied, and that in any case the dealings were confirmed through the telephone.

11 Mr Koffi's evidence was that the payments made to him/Coopradi evidenced by the printed receipts given to Mr Mitra were not commissions but advance payments for the supply of raw cashew nuts although the payments were not linked to any particular contract. His practice was to account for the advances by invoicing only the outstanding amounts instead of marking a deduction. Officially, the advance payment – which was given as cash – would not appear on the documents so as to comply with local laws on currency and export controls. To explain the lack of documentation, Mr Koffi admitted that the payments which he received constituted "illegal financing". There were internal records, he said, but these were not produced for the trial. In any case, he said, he was told that the money paid over by Mr Mitra was on Motley's account and that, at least on some occasions, he was told by Mr Bangera that Motley would be reimbursing Mr Mitra for the payments.

12 Mr Jha gave a different account of the relationships between the parties. With regards to Siddhi, Mr Jha said that Motley had an exclusive agency relationship with Siddhi and under that agreement Siddhi was supposed to supply goods only to Motley. In fact, he asserted that Siddhi was beneficially owned by Motley though for various reasons, this ownership was not made public. Mr Jha said that he made small payments to Siddhi from time to time in order to cover Siddhi's overhead

expenses which totalled perhaps \$100,000 annually; he denied that Mr Bangera provided inspection or other services for which commission was paid.

13 Mitfam was another supplier to Motley. Mr Mitra would borrow in CFA from local lenders for the purpose of purchasing raw cashew nuts from Siddhi. These loans were short term and had to be returned in seven or 10 days, and because the turnaround time for shipping raw cashew nuts was longer, Mr Mitra would routinely request money from Motley to account of the purchases. Motley would make the payment on behalf of Mitfam and treat it as an advance payment against delivery of cashew nuts by Mitfam to Motley.

14 Motley's relationship with Coopradi is not entirely clear save that Motley denied that the printed receipts were given for actual supply contracts.

Issues in dispute

15 The defendant accepts that the onus is on it to discharge the burden of proof that there was an amount of US\$486,555.33 paid by the defendant to the plaintiff as advances.

16 The defendant formulated the issues as follows:

- (a) Whether the Payments were advance payments for the procurement of cashew nuts or whether they were reimbursement for payments made by the plaintiff to Siddhi and Coopradi;
- (b) If the Payments were not paid for the procurement of cashew nuts, whether the defendant had paid the moneys to the plaintiff under a mistake of fact and or by reason of fraudulent misrepresentation by the plaintiff;
- (c) Alternatively, whether the plaintiff held the Payments as moneys had and received; and
- (d) Whether the defendant's counterclaim should be allowed.

17 The plaintiff however formulated the issues only in relation to the manner in which the defendant seeks to prove that the Payments were not reimbursements and in this respect focused on the defendant's claim that there was a "running account" between the plaintiff and the defendant and whether if so, this running account shows a sum of US\$486,555.33 as being due to the defendant. It accepts however that one of the main issues is whether the Payments were reimbursements or advances.

18 I will deal first with the running account and the defendant's ledger before discussing the nature of the Payments.

The running account

Was there a running account?

19 The running account asserted by Motley stems from its ledger which was produced in court to show the state of the financial dealings between Mitfam and Motley. The ledger shows a balance of US\$486,555.33 in favour of Motley. Motley relied on the ledger entries to substantiate its case.

20 Mr Mitra testified that Mitfam was not aware that there was any running account leading to the situation that the moneys sent to him were in the nature of advances. Mr Jha acknowledged that Motley had not at any time sent the running account to Mitfam so that it would be aware of what

was due between the parties. The evidence of Motley's former accountant, MrKalyanasundaram Jayanandam (who was referred to by the parties as Mr Jayan), was that in trading businesses, it was generally the supplier that provided the running account and that it was the buyer which had to reconcile its account with that. He confirmed that while he was working for Motley, the accounts were never sent to Mitfam. While it may be consistent with usual practice that Motley as buyer never sent Mitfam the supplier its accounts, it is odd that Motley which allegedly believed there was a running account never asked Mitfam for Mitfam's accounts so that it could reconcile its figures with Mitfam's.

21 There is no documentary evidence which indicates that Mitfam was aware of the running account. Mr Jha claimed that he had brought the running account to the notice of Mr Mitra only over the telephone, even though he admitted that it would have been more sensible to do so by email. The parties did correspond fairly frequently by email and there was no reason why Motley could not have responded to Mitfam's demands for payment of the invoiced sum by making reference to the running account especially since Mr Jha had, purportedly, told Mr Mitra about it on the telephone. On 3 September 2010, Mr Mitra sent an email to Mr Jha repeating his demand for the invoiced sum. He did not mention the running account in that email. This suggests that by that time, Mr Mitra was either still unaware of the running account or had refused to accept it. If the latter, it is strange that he did not mention it and even stranger that Mr Jha did not reply to bring it to his attention. I find that the plaintiff was not aware before the suit began of the existence of the running account.

22 If there was a running account, then Mitfam would be bound by the balance in the running account unless it could show mistakes in the entries. In this regard, Motley takes the position that all transactions with Mitfam have been duly and properly recorded in its ledger and that the ledger balance should be taken as the amount due to Motley which can be set-off against the invoiced sum. Mitfam on the other hand has raised a number of objections to both the admissibility and the accuracy of the ledger.

Is the defendant's ledger admissible?

23 The defendant did not maintain its ledger in the traditional ledger book format. Instead, its ledger was maintained electronically. The plaintiff's argument is that the defendant had not complied with the requirements of the Electronic Transactions Act (Cap 88, 2011 Rev Ed) ("ETA") in relation to the admission of electronic documents and therefore the ledger was not admissible to prove the transactions recorded in it.

24 The relevant provision is s 10 of the ETA which provides:

Provision of originals

10-(1) Where a rule of law requires any document, record or information to be provided or retained in its original form, or provides for certain consequences if it is not, that requirement is satisfied by providing or retaining the document, record or information in the form of an electronic record if the following conditions are satisfied:

- (a) There exists a reliable assurance as to the integrity of the information contained in the electronic record from the time the document, record or information was first made in its final form, whether as a document in writing or as an electronic record

...

(2) For the purposes of subsection (1)(a)

(a) the criterion for assessing integrity shall be whether the information has remained complete and unaltered, apart from the introduction of any changes that arise in the normal course of communication, storage and display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances...

25 Also relevant is s 116A of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"), the material portions of which provide:

116A-(1) Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, if properly used, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.

Illustration

A seeks to adduce evidence in the form of an electronic record or document produced by an electronic or process. A proves that the electronic device or process in question is one that, or is of a kind that, if properly used, ordinarily produces that electronic record or document. This is a relevant fact for the court to presume that in producing the electronic record or document on the occasion in question, the electronic device or process produced the electronic record or document which A seeks to adduce.

(1) Unless evidence to the contrary is adduced, the court shall presume that any electronic record generated, recorded or stored is authentic if it is established that the electronic record was generated, recorded or stored in the usual and ordinary course of business by a person who was not a party to the proceedings on the occasion in question and who did not generate, record or store it under the control of the party seeking to introduce the electronic record.

...

(6) Where an electronic record was recorded or stored from a document produced pursuant to an approved process, the court shall presume, unless evidence to the contrary is adduced, that the electronic record accurately reproduces that document.

(7) The matters referred to in this section may be established by an affidavit given to the best of the deponent's knowledge and belief.

26 According to s 116A(1) of the Evidence Act, the court is at liberty to presume that records which have been maintained electronically are accurate if such records have been "properly used". The plaintiff's submission is that the defendant did not properly maintain or update its ledger.

27 In this regard, the plaintiff asserts that the defendant did not adduce any evidence to assure the court that the entries in the ledger had been entered contemporaneously into the computer system or that the ledger had not been tampered with thereafter. The defendant did not call any auditor or digital forensic specialist to assure the court that the ledger had not been tampered with.

This is a requirement of s 10 of the ETA. Hence the integrity of the information in the ledger was doubtful. The maker of the document, apparently a clerk who had since left the defendant's employ, was not called to give evidence pertaining to the creation and authenticity of the ledger entries.

28 The plaintiff asks me to draw an adverse inference under s 116(g) of the Evidence Act from the absence of the clerk whom the defendant employed to maintain its ledger. The plaintiff identified this clerk as one "Miss Alamu". The defendant did not call her as a witness and no explanation was given for her absence until Mr Jha testified. He said that she had "returned to India". However, the plaintiff says that there is no evidence which corroborates this claim. Further, the defendant did not adduce any evidence of what Ms Alamu did when she left the defendant company nor of what efforts were made to trace her and secure her evidence.

29 The defendant's response is that the defendant did not make a case that the ledger was to be treated as an electronic document under the ETA. There is therefore no issue as to whether the defendant's ledger was tampered with or whether it was created by way of contemporaneous entries. The defendant's previous accounts clerk whose name Mr Jha could not remember at the trial was not Ms Alamu. Ms Alamu is the defendant's present accounts clerk.

30 Whether the ledger was maintained by Ms Alamu or someone else, that person should have been called to testify as to the way in which the ledger was kept. In order to be satisfied as to the accuracy of the ledger and the running account which it purported to reflect, I need the evidence of the ledger keeper. As the ledger was kept as an electronic document, I also need to be satisfied that the copy of the ledger that was produced in court was an authentic copy of the ledger as it was kept and that no alterations were made to the ledger before the same was adduced in hard copy as evidence for the trial. The ledger keeper's testimony would have been essential on this point.

31 Further, although Mr Jayan was called to give evidence on the accuracy of the entries in the ledger, his evidence in this regard was not of much weight. He did not post all the entries into the ledger. On his employment, he brought the ledger up to date but he was not able to testify that the ledger had been properly kept before he started the updating process. As he was not an expert witness, Mr Jayan could not testify that the ledger had not been altered or that the entries had not been adjusted to suit the occasion.

32 The defendant has not satisfied the requirements of the ETA and therefore, I do not accept that the hard copy of the ledger accurately reflects its contents. I hold that the ledger is not admissible.

Does the ledger show that the Payments were advances?

33 Even if I disregard the failure of the defendant to meet the requirements of the ETA, I am also satisfied that the ledger does not show that the Payments were in the nature of advances.

34 The ledger as it was produced was shown during the trial to contain a number of inaccuracies. It was also clear that entries were not made contemporaneously with the receipt or transmission of funds. In its closing submissions, the defendant says that notwithstanding that the defendant's ledger did not capture the actual dates of some payments, in totality the ledger did show the transactions between the plaintiff and the defendant and therefore should be accepted as a record of the same. I find this argument to be unconvincing. What is at issue is the nature of the transactions, not simply whether transactions occurred. There were many errors in the ledger and these errors make it difficult for me to accept that the ledger accurately recorded the nature of the transactions or reflected a running account between the parties.

35 The ledger was the defendant's sole piece of documentary evidence that the Payments were advances. Mr Jha said that the accounts clerk who left the defendant's employ in October 2009 had failed to keep the records in proper order and had updated them only up to 31 March 2009. Mr Jayan therefore had to reconstruct the ledger before he was able to get a picture of the accounts between the defendant and the plaintiff. This was the defendant's reason for its delayed realisation that it was the plaintiff that owed it money notwithstanding that the invoiced sum was still outstanding.

36 Mr Jha said that up to 14 May 2010, he was taking steps to pay the plaintiff the invoiced sum; in fact on 12 May 2010 a document referred to as an "MT-103" was sent to the plaintiff as evidence that the sum had been paid. It was only on 14 May 2010 that Mr Jha discovered from Mr Jayan that based on the running account there were outstanding sums due from Mitfam to Motley. On that day Mr Jha called Mr Mitra. His evidence of the contents of the call was as follows:

Q: And the – you told that the reason they weren't paid was because your account was – what – what were you saying? Your – why? What was the reason?

A: No, I told him the reason why it did not go is because my account is under review in Standard Chartered Bank, that is why this money did not leave on the 12th.

Q: I see.

A: "But my accountant has brought to my notice today that there are outstandings with you, so this will not be payable."

37 Mr Jayan joined Motley on 1 Feb 2010. He said that it took until the end of April 2010 to bring the ledger up to date. To do so, he said, he had matched entries in the ledger against bank statements and other documents such as invoices, bills of lading and payment documents. The reason he had classed the eight Payments as advances was that he could not find any incoming goods for those payments. On being informed on 13 May 2010 of the intended payment of the invoiced sum to Mitfam, he said he had reviewed the running account in the ledger and concluded that there were sums to Motley's credit as against Mitfam.

38 There are a number of problems with the evidence relating to the ledger. First, Mr Jayan's evidence that he realised on 13 May 2010 that there were outstanding sums owing to Motley does not square with the evidence of the ledger itself. As at 13 May 2010, the ledger showed a total debit figure of US\$486,553.33 (opening balance on 1 April 2010 of US\$243,818.33 added to three subsequent debit entries of US\$136,935, US\$38,000 and US\$67,800). As at 13 May 2010, the comparable sum to Mitfam's credit totalled US\$618,348 (US\$395,666, the invoiced sum, added to the next purchase of US\$222,682). This meant there was a net sum of US\$131,794.67 due from Motley to Mitfam. On cross examination, Mr Jayan said the net sum was US\$137,547. (I am unable to replicate his calculation to derive this figure and assume that there was a calculation error.) The entry in the credit column of US\$222,682 was not paid until 29 June 2010 and therefore as at 13 May 2010 it could not be ignored. It is difficult to make any sense of Mr Jayan's explanation as to why at that point in time a net amount of some US\$90,887.33 was owed by Mitfam as Motley is claiming, especially given Mr Jayan's claim that the accounts were current by the end of April 2010.

39 Second, Mr Jayan's evidence was that the sole reason he had booked the Payments as advances was that the Payments had been made to third parties and that had prompted him to check with his management, either Mr Jha or the general manager, one Mr Umesh Pravinkumar Chevli ("Mr Chevli"). He was told to book the payments as advances. The following passage from Mr Jayan's cross examination is illuminating.

Q: [Reads] "I was given to understand the Plaintiff had represented to Mr Bipin that they would be purchasing RCN on the Defendant's behalf and requested advances from the Defendant on the following dates.

And then you tabulate 8 such payments on 8 different dates, right?

A: Yes.

Q: Who—who was it who made you understand this particular fact that you are alleging at paragraph 26?

A: Yes. Some out of er, bad records, some out of erm, Mr Jha's er, personal – er, oral statement.

40 Therefore the ledger cannot be considered as independent corroboration of the status of the eight Payments.

41 One example of inaccurate recording in the ledger may be useful. This came about in relation to a contract made on 9 July 2009 under which Motley agreed to sell rice to Mitfam for US\$216,000. The terms of the contract obliged Mitfam to pay an advance of 25% of the purchase price, viz US\$54,000. On 21 July 2009, Mitfam made an advance of US\$65,000 to one "Hussen" in the Ivory Coast at the request of Motley and on the same day it sent Motley an email asking for the amount to be reimbursed to it by 27 July 2009. By 6 August 2009, Motley had not paid this money and Mitfam therefore requested it to use US\$54,000 of the US\$65,000 as the advance for the rice shipment and to return only the balance of US\$11,000. On 9 August 2009, Motley sent an invoice for the rice shipment which showed that it had applied the whole of the US\$65,000 to account of the purchase price of the rice. Four days later Mr Jha sent Mr Mitra an email saying that he had told Mr Bangera "to tell you to kindly treat 65000 as advance for the rice shipment." Significantly, he went on to say "Kindly understand the situation is bad on cash flow that is why asking you to adjust". Mitfam accepted this and, in due course, completed the rice transaction by paying the balance of US\$151,000 due for the rice to Motley on 15 September 2009.

42 However, Motley did not record this transaction in its ledger in the way that it was actually effected. The ledger shows the sale of rice for US\$216,000 on 9 August 2009 and the receipt of the sum of US\$151,000 on 15 September 2009. However it does not show that either on 9 August 2009 (invoice date) or on 13 August 2009 (email date), Motley had received a part payment of US\$65,000. The receipt of US\$65,000 was only recorded on 31 December 2009, some five months later. Further, in that record, the sum of US\$65,000 was described as a "Temporary Loan Mitfam International Ltd". This description was odd given that it was the defendant's position that it had never taken any loan from the plaintiff.

43 Mr Jha had a very complicated explanation for this. Although the ledger entry seemed to indicate that the loan was taken from the plaintiff, Mr Jha said that the loan was a loan of US\$170,000 taken from an entity called Tan Mondial and that he had instructed the plaintiff who owed him an advance for the rice transaction to pay the sum of US\$65,000 to Motley in the Ivory Coast so that Motley could settle the debt to Tan Mondial. This explanation ignored the fact that the deposit due for the rice transaction was only US\$54,000 and it also disregarded the email messages sent by the plaintiff to Motley which clearly indicated that the US\$65,000 had been paid on 21 July 2009 as a short term advance and on the basis that it would be reimbursed by 27 July 2009. It also blithely overlooked Mr Jha's request to Mitfam to "adjust" because Motley's cash flow situation was

bad.

44 It was also odd that when the defendant came to record this transaction, its journal entry attributed to the plaintiff stated :

“As per Umesh, this sum (Tan Mondial Loan) was settled by Siddhi Import Export on 31.12.09 – USD105K, the balance we got from Mitfam as advance for MOT/141 – USD65K (confirmed by Bipin) on 22.06.10.”

As the plaintiff submitted, it was curious that a transaction ostensibly recorded on 31 December 2009 was able to make reference to a future payment which would come in six months later (22 June 2010). While Mr Jha did say that the dates reflected in the ledger were the dates on which the entries were made and not the actual transactions, this explanation does not give one confidence in the accuracy of the ledger.

45 Finally, there appeared to be a number of discrepancies between the ledger and Motley’s own bank statements. These discrepancies can be found in the document marked as P2. The left hand column lists entries from the ledger marked as A1 to A24. The right hand column lists corresponding entries in the relevant bank statements. The discrepancies when comparing A1 to A6 with F1 to F4 are not material. The other discrepancies are substantial, however. Mr Jayan said that A7 corresponded to F5; however the former was dated 27 December 2009 while the latter was dated 9 October 2009. Mr Jayan said F7 corresponded to A10 and A11 but the former is dated 2 November 2009 while the latter two are dated 21 January 2010. Other discrepancies as to the dates can be found when comparing F9 to A15 and F10 to A14. Mr Jayan’s initial explanation for the different dates is that in some cases the date was recorded as the loan date and in others it was recorded as the date the loan was retired. Subsequently he admitted that a lot of the accounts reconciliation had not been done and that the records were in very poor state. On further cross examination, he admitted to further discrepancies in the documentation. In one case, payment for an invoice was recorded in the ledger almost two months before the invoice was issued and furthermore, as he agreed, the invoice numbers did not match.

46 Quite apart therefore from the question of whether the ledger is admissible in evidence, I find that it does not establish the running account or indicate accurately the transactions that took place between the plaintiff and the defendant during the relevant period. This does not mean, of course, that the Payments were not advances. I go on to consider the other evidence led by the defendant.

Other evidence in relation to the nature of the Payments

Relationship between advances and transactions

47 Although Motley maintained that the Payments were made to account of purchases of commodities from Mitfam, it was unable to relate specific Payments to specific transactions. Mr Jha’s evidence was that all the Payments were advances on Mitfam’s account but he agreed that there was no indication in any of the documents that any Payment was being made to account of a purchase. He agreed that the advances were not documented as such and that they were not tied to any specific contract.

48 Mr Jha agreed that there was no language in any of the correspondence between Mitfam and Motley that showed that Mitfam was asking to borrow money or for an advance. Instead the language used by Mitfam showed that it was demanding money from Motley. He disagreed that the demands were made because the money was owed by Motley. He said those emails that used the word “loan”

did not refer to loans made by Mitfam to Motley, but to loans which Mitfam had taken from local "importers".

49 Mr Jha said that the arrangement was Mitfam was taking money from the importers and paying the same to Mr Bangera in order to purchase goods. Mitfam paid interest on these amounts and Motley would, as and when possible, reimburse the amounts to Mitfam either to Mitfam's account or to a third party's account and the payment would be treated as an advance for contracts which Mitfam had with Motley. He said that there was an arrangement that if Mitfam took money locally in the Ivory Coast, it could be reimbursed by Motley as an advance. I asked him why, if he was prepared to make an advance to Mitfam, the latter would borrow money on which it had to pay interest. His response was that the date on which Motley would be in a position to make an advance was not certain but the date on which Mitfam required the money locally was known to it. Mitfam would borrow from the locals to gain two benefits, *ie* timing and the exchange rate. Subsequently Mitfam would ask Motley for an advance "for so and so contract or on an open account basis" and Motley would then pay or not pay depending on whether it had money. He agreed that Mitfam did not need to get Motley's prior permission before making a borrowing locally but said that it was limited to borrowing "rational amounts, not irrational amounts".

50 The above explanation did not make sense. Mr Jha was saying that when Mitfam needed money for its own purchases it would borrow money locally in the expectation that it would get an advance subsequently from Motley even though there might not be an existing contract against which the advance could be credited. Mr Jha was also willing to make such advances without any contract to set them off against. If Mitfam could depend on Motley to make advances against existing or future contracts it did not need to incur interest costs. It was, however, clear from Mr Jha's testimony that there was never any commitment to pay as an advance any particular amount. It was also peculiar that Mitfam would rely on Motley which itself had cashflow problems since, as Mr Jha admitted, the dates on which he would be in a position to make an advance were not certain. Mr Mitra's story that it was Mitfam that advanced money on behalf of Motley was more consistent with such cashflow difficulties.

The emails

51 The plaintiff adduced a number of emails demanding reimbursement of the Payments. In all these emails the language used was consistent with Mitfam's position that it had given cash to Siddhi or Coopradi as the case might be on behalf of Motley and was seeking repayment. Mr Jha's testimony that Mitfam wanted an advance to settle its own loans does not sit as well with the language of the correspondence.

52 There were also occasions when Mr Jha himself agreed that the language used by Mr Mitra sounded like a demand. For example on 16 April 2009 Mitfam made a Payment in the CFA equivalent of EUR75,000 to Mr Bangera and Mr Mitra then sent an email to Motley demanding payment by 22 April 2009 ("pls transfer this fund in one time (no part) to below account on next Wednesday, 22/04/09 (without fail)") and for the payment to be evidenced by attaching a copy of the telegraphic transfer. In court, Mr Jha admitted that the language of this email was consistent with Mr Mitra making a demand rather than a request for an advance payment. Similar emails demanding settlement of a Payment of US\$50,000 made on 13 July 2009 were sent on 14 July 2009, 20 July 2009 and 22 July 2009. Mr Jha agreed that these emails were sent to urge payment of the same sum of US\$50,000. Other emails in which Mitfam asked for the payment of money it had paid to Coopradi or Siddhi can be found in the agreed bundle.

53 Generally, the emails are consistent with the plaintiff's account of the Payments as

reimbursements of money owed. The language used was that of demands for payment rather than of requests for advances. The plaintiff did not appear as a supplicant but rather as a party asserting an entitlement. This interpretation is reinforced by the demand for interest that Mr Mitra made on several occasions.

Demands for interest

54 On several occasions, Mr Mitra demanded that Motley pay interest because it was late in making payment to Mitfam. These demands for interest support the plaintiff's story that it had made advances on behalf of the defendant for which the Payments were reimbursements.

55 On 4 March 2010, Mr Mitra sent Mr Jha an email in which he said he had given CFA to the equivalent of US\$100,000 to Mr Bangera and wanted payment of this amount together with "prev \$11,553 ... to mitfam usd a/c next wed (10 mar) without fail". Mr Jha admitted that this additional sum of US\$11,553 referred to interest owed by Mr Mitra to importers from whom he had borrowed CFA and for which he sought reimbursement. It is not quite clear from the evidence whether this amount was paid by 10 March 2010 as requested, but a further email sent by Mitfam on 24 March 2010 makes it clear that by then there was still some money owing to Mitfam. In this later email, Mr Mitra asked Mr Jha to transfer a further US\$2,000 as, he said, "this time can't pay on ur behalf as the previous is still pending for last 5 months".

56 Apart from the demands for interest cited above which relate to the eight Payments, other evidence adduced by the plaintiff showed that it had consistently demanded interest payment on outstanding sums due from Motley. Such demands are inconsistent with a running account. If the practice of the parties was to set-off outstanding sums in the running account, it would make no sense to demand interest at any time. The repeated demands for interest are evidence that the parties conducted their affairs on a transaction by transaction basis and not on a running account basis.

57 An email sent as early as 21 January 2008 showed a demand by Mr Mitra for payment of interest. Mr Mitra complained that the delayed payments were affecting his credibility in the local Lebanese money market. The defendant did not plead that the sums referred to in the email were advances made to the plaintiff but Mr Jha claimed on cross-examination that they were in fact advances. Another email sent to Mr Jha on 14 July 2008 made a demand for US\$157,000 which was repeated the next day. On 20 July 2008, Mr Mitra sent another email demanding payment of US\$154,416 saying that late payments had upset his financing arrangement and that Motley should urgently pay the balance sum. Further, in December 2008, Mr Mitra sent an email to Motley in which he disclosed a series of payments, the exchange rate of the payment and the due date. There was no need for Mr Mitra to disclose the CFA conversion rate and Mr Jha's reason, when asked to explain why this was done if Motley had made advances to Mitfam, does not stand up to scrutiny. His reason was that Motley would be able to tell thereby that Mitfam had made a gain out of the exchange rate.

58 The emails that I have referred to in [57] above did not relate to the Payments. However the demands for interest and/or complaints about late payment continued during and after the period encompassed by the eight Payments. On 24 November 2009, Mr Mitra sent an email in which he set out a table of pending payment amounts, the due dates and the interest payable together with the hope that "respective funds reach on time as shown on the chart". A few days later on 2 December 2009, Mr Mitra complained that no payment had been received, that he was facing problems from his Lebanese lenders and that Motley "may have to pay 1% extra interest to pacify them". Mr Jha claimed in court that he had told Mr Mitra many times over the telephone that he was not responsible for Mitfam's debts. He was not however able to produce any written evidence of such admonishment

and repudiation.

59 Rather ironically, the only payment of interest that the defendant made to the plaintiff was made in June 2010, after the defendant had apparently discovered that on its running account, it was the plaintiff that owed it money and not the other way around. This payment was made in respect of the last commercial transaction between the plaintiff and the defendant which was for the sale by the plaintiff to the defendant of raw cashew nuts for the sum of US\$222,682.00. The defendant was late in making payment for the same and on 21 June 2010, the plaintiff demanded interest of 3% on the outstanding amount. On 29 June 2010, the defendant paid the plaintiff US\$3,000 towards account of the interest.

The plaintiff's demands and the defendant's response

60 The defendant's behaviour in response to the many demands that the plaintiff made for payment of the invoiced sum was frequently inconsistent with its stand that it was the plaintiff that was the indebted party.

61 The plaintiff made many demands for the invoiced sum: on 18 May 2010, 21 June 2010, 2 August 2010 and 3 September 2010. According to Mr Jha, he did not pay the invoiced sum because he had explained to Mr Mitra over the telephone that the running account between the parties was in the defendant's favour and Mr Mitra had agreed that payment would be held in abeyance until the parties could meet to sort out the account. This claim of an oral agreement which Mr Mitra emphatically denied was an oral claim which was not supported by any contemporaneous documentation. Despite the fact that the plaintiff kept sending email demands, the defendant did not see it fit to reply in writing to set the record straight until 4 September 2010.

62 On 3 September 2010, Mr Mitra sent an email to Mr Jha in which he complained that more than four months had passed since payment of the invoiced sum had fallen due. He stated that his "financier" was putting a lot of pressure on him as he had been supposed to return the funds to his "financier" by the first week of May 2010. Mr Mitra wanted to know the date by which Motley could pay the invoiced sum plus interest at the rate of 3% per month for the delay. The next day, Mr Jha replied to say that there were a number of issues to be resolved between the parties and that on inspection of Siddhi's books he had discovered various "anomalies" in relation to expenses which he alleged Mitfam was supposed to bear. He then asked how Mitfam would resolve "this issue of these extra expenses incurred by Siddhi in doing your operations". Even then, when he was claiming that there were amounts due to Siddhi, there was no mention of the alleged running account and the outstanding balance due to Mitfam.

63 The record showed no written correspondence between the plaintiff and the defendant pertaining to the existence of the running account or any attempt to reconcile the amounts shown in the same prior to the commencement of this action. The first time that the defendant brought up the running account was after the plaintiff had sued it. The plaintiff submitted and I agree that the only reason why the alleged arrangement between the plaintiff and the defendant to hold the payment of the invoiced sum in abeyance was never brought up was that no such agreement was ever made. The plaintiff further submitted no such agreement was ever made because the defendant never over-paid the plaintiff in the first place. I agree.

Mr Jha's credibility

64 As I have stated above, the onus of proof is on the defendant. Due to this, Mr Jha's credibility is relevant. I found Mr Jha to be an unsatisfactory witness. He was frequently evasive. He

prevaricated and often his story was illogical and inconsistent with business or common sense. I have pointed out above some instances where Mr Jha's evidence did not make sense.

65 An example of incredible evidence given by Mr Jha was his reason for making advances to Mitfam rather than to Siddhi. It was his position that Motley was the beneficial owner of Siddhi. Siddhi was active in the raw cashew nut business in the Ivory Coast and Mr Bangera was there on-site to carry out its business. In that situation I would have expected that Motley would fund Siddhi either generally or specifically in relation to particular consignments of cashew nuts. Instead, it chose to give advances to Mitfam, a company in which it had no beneficial interest. Mr Jha maintained also that Siddhi had better contacts than Mitfam. I therefore asked him why he had bothered to purchase raw cashew nuts from Mitfam. His response was that because of limited lines there was a limitation in Motley's ability to provide financing to Siddhi. I then asked him if there was a limitation, why Motley had divided its lines between Mitfam and Siddhi instead of concentrating all its lines on Siddhi. His response was that in 2008, Mitfam was introduced to "our system" and he allowed the system to continue through 2008 to 2009. This explanation did not make sense. Under further questioning, Mr Jha also agreed that if Siddhi made profits, eventually the same would return to Motley's pockets and when pressed confessed that he did not know why in that situation he had diverted funds to Mitfam instead of directing them to Siddhi. He then said:

But I used to get, er, reasonable rates from, er, Mitfam also, and Siddhi also. Both of them used to price their goods more or less in an equivalent level at that point in time. I didn't really have a serious problem in the beginning.

66 It can be seen that Mr Jha was not able to give a logical explanation as to why Motley chose to advance money to Mitfam rather than to Siddhi despite its claim that Siddhi was bigger player in the market than Mitfam and despite the claim that Motley owned Siddhi. The plaintiff's explanation that Mr Mitra was able to get advances from his Lebanese contacts in Ivory Coast and pass this money on to Siddhi and Coopradi on Motley's behalf (*ie* to fund Motley rather than the other way around) makes much more sense as a reason for why the defendant was sending Mitfam money that had no connection with specific purchases from Mitfam. If truly Motley was making advances rather than reimbursements, it would have made advances to its own agent, Siddhi.

67 There were other areas in which the credibility of Mr Jha's evidence was deficient. I have pointed out above the answers that he gave in relation to the ledger entry of 31 December 2009 entitled "Temporary Loan Mitfam International Limited" which he maintained in fact reflected a loan related to a company called Tan Mondial.

68 There was also a portion of Mr Jha's testimony which related to his assertion in his affidavit that he had never ever instructed Mitfam to pay Siddhi on Motley's behalf. In court he corrected this and admitted that Motley had twice given instructions to Mitfam to pay money on its behalf to Siddhi. He then said he would like to rephrase his evidence. Mr Jha went on to elaborate that the two transactions he was referring to were initially booked under Mitfam's account because payment had been made to Mitfam. Subsequently Siddhi explained that the shipments were under Siddhi's account and Motley then told Mitfam to refund money to Siddhi, which it did, and the transactions were then booked under the Siddhi account. When he was questioned further on these entries, Mr Jha's evidence became very confused. He said that when he first made payment to Mitfam, he did not know that the payment should have gone to Siddhi because the invoice and bill of lading had come from Mitfam. It was only a month or so later that Siddhi informed Motley that the transactions were Siddhi's and then the moneys paid by Motley to Mitfam were sent by Mitfam to Siddhi. He asserted that the payments were "an aberration". This explanation for why Mitfam had paid moneys to Siddhi on the defendant's behalf was confused and unbelievable. If the defendant had received invoices and

bills of lading in respect of goods shipped by Motley on its instructions, how could Siddhi later state that those transactions were Siddhi's transactions? I did not believe Mr Jha's elaborate attempt to explain away his admission that, at least twice, the plaintiff had paid Siddhi moneys at the request of the defendant.

Other evidence relating to credibility

69 The credibility of the defendant's case as a whole was also cast in doubt by some of the documents that it produced. First of all, there were six invoices which the defendant claimed had been issued to it by the plaintiff, the authenticity of which the plaintiff disputed. The peculiar thing about these invoices is that the plaintiff admitted having entered into the transactions which the invoices purported to reflect but said that the invoices it sent out for the same were different documents. The plaintiff produced the six original invoices it issued and pointed out all the discrepancies in the six corresponding invoices adduced by the defendant which showed that the latter were not genuine. These discrepancies included the lack of the plaintiff's logo in the forged invoices, the incorrect arrangement of the words in the plaintiff's slogan, an incorrect signature and a lack of the plaintiff's seal.

70 I accept the plaintiff's evidence in relation to the "forged" invoices and find that these were not issued by the plaintiff. The plaintiff submitted that the reason for the creation of the forged invoices was to mask transactions that were conducted between the parties in order to support the defendant's stand in the lawsuit. The falsity of at least one of the forged invoices can be shown by reference to the defendant's ledger. The defendant produced invoice number MIL/RCN/269 dated 13 November 2009 ("Inv 269") for the sum of US\$62,920 in respect of its purchase of 96.103 MT of raw cashew nuts to be loaded at Abidjan and delivered to Ho Chi Minh City Port. The plaintiff said that the authentic invoice for this sale of 96.103 MT was its invoice MIL/RCN/645 dated 28 September 2009 ("Inv 645") for the same amount of US\$62,920. It pointed out that, according to the ledger, the sum of US\$62,920 was credited to the plaintiff on 28 September 2009. This supported the plaintiff's position that Inv 645 was the authentic one and that Inv 269 produced by the defendant was false since it was dated some two months after the entry. The defendant could only have recorded the amount of US\$62,920 as being due to the plaintiff in September 2009 because it had seen Inv 645 then.

71 The other suspicious document produced by the defendant was the "MT-103" document referred to in [36] above. The defendant's claim was that on 10 May 2010 it submitted an application to its bank for payment of the invoiced sum. After the payment was apparently cleared, the MT-103 was sent by the bank to the defendant and on 12 May 2010, the defendant sent the plaintiff an email to which it attached a copy of the MT-103. This indicated that the sum of US\$395,666 was being remitted from the defendant's account to the plaintiff. In fact, of course, no such sum was ever sent out. The plaintiff challenged the authenticity of the MT-103 claiming that it had been produced by the defendant to mislead it in relation to the payment of the invoiced sum.

72 I am doubtful about the authenticity of the MT-103 sent by the defendant to the plaintiff on 12 May 2010. It should be noted that the defendant did not call any bank officer to confirm that this document had indeed been issued by the bank on 12 May 2010. Further, the MT-103 indicated that a sum of US\$50 would be debited to the defendant's account as the bank's charge for the issue of the document. However, Mr Jayan stated that this charge was never deducted and there was no documentary evidence from the bank which showed that this charge was levied. The defendant's bank statements showed that the charge was not made.

73 Additionally, Mr Jha's own evidence cast doubt on the authenticity of the MT-103. According to

Mr Jha, an MT-103 is a document issued by a bank to confirm that moneys have been paid from the named payer's account with that bank to a named payee's bank account. Mr Jha also confirmed that an MT-103 is only issued by banks if a particular transaction has been approved and the client specifically asks for it. However, in this case it was the defendant's position that the payment did not go through because the bank had stopped payment on finding the defendant had inadequate facilities. Mr Jha's evidence that the MT-103 was a post transaction document contradicts the defendant's assertion that the payment was stopped: if the payment was stopped by the bank, how could the MT-103 exist?

Conclusion on the defence

74 I find that the defendant has not been able to prove that the Payments were advances. Instead, on balance, they were reimbursements of amounts paid by the plaintiff at the defendant's request. Therefore, there is no need for me to consider the issues set out in [16(b)] and [16(c)]. This being the case, the defence to the plaintiff's claim for the invoiced sum must fail. I have concentrated on the deficiencies in the defendant's case because throughout the burden has lain on the defendant to establish its defence. I am satisfied that overall the documentary and oral evidence support the plaintiff's version of events rather than that of the defendant. The defendant made various points about what it viewed as shortcomings in the plaintiff's position on the receipts. I have not dealt with these because minor discrepancies in the plaintiff's case do not shift the burden from the defendant to the plaintiff.

The counterclaims

75 The defendant's counterclaim relates to two transactions between it and the plaintiff. I will deal with these in turn.

76 The first claim made by the defendant relates to a contract dated 9 April 2009 by which the plaintiff agreed to sell to the defendant 1,500 MT of raw cashew nuts to be shipped in May 2009 from Abidjan. The defendant's complaint is that the plaintiff never delivered this cargo and that the defendant therefore had to find an alternative source of supply and suffered loss as a result. The plaintiff's defence to this claim is that the defendant had failed to comply with its contractual obligations to establish a sight letter of credit in favour of AAA Trading of Toronto, Canada and therefore the plaintiff was not obliged to make the shipment.

77 The defendant did not produce any evidence in court that it had established the letter of credit required by the contract. Mr Jha was asked about this and he admitted that no such evidence had been produced. The copy of the contract which was adduced in evidence contained the requirement for the establishment of the letter of credit. Although the contract does not state the date by which the letter of credit had to be established, I agree with the plaintiff's submission that this obligation should have been fulfilled by May 2009 to enable the plaintiff to make shipment of the cargo in that month as required by the contract. As this was not done, the plaintiff was released from its obligation to supply the goods. I therefore find that the defendant's claim for breach of the April 2009 contract has no merit.

78 The second transaction was a contract dated 1 September 2009 by which the plaintiff agreed to sell the defendant 1,000 MT (+/- 10% at seller's option) of raw cashew nuts to be shipped in September/October 2009. The plaintiff delivered only 735.181 MT of raw cashew nuts to the defendant and the defendant therefore claimed damages for the shortfall which it quantified at US\$20,781.48.

79 In court, Mr Mitra admitted that the plaintiff had made short delivery of the goods. He attributed the shortfall to an unexpected rise in the cost price of raw cashew nuts. Mr Mitra agreed that he would have been obliged to make up the shortfall given his contractual commitment but explained that he did not do so because parties had agreed that they would "just continue to the next contract". The defendant submitted that there was no such agreement and no documentary evidence of the same had been produced. The plaintiff's response was that the defendant had never quantified its loss or demanded the shortfall or damages from the plaintiff prior to the institution of this action.

80 The evidence is clear: the plaintiff did default in its obligations under the September 2009 contract. There is no evidence of any agreement by the defendant not to enforce its rights and the fact that no claim was made contemporaneously cannot result in a waiver of the defendant's rights. Accordingly I find that the plaintiff was in breach of this contract. As for quantum however, the alleged shortfall of 264.814 MT was based on an obligation by the plaintiff to supply 1,000 MT. However the contract gave the plaintiff the option to supply 10% more or less of that quantity and therefore the plaintiff's minimum obligation was to supply 900 MT. Accordingly the shortfall was 164.819 MT and not 264.819 MT. The defendant quantified its loss on the basis of loss of profit margin of 15% on the quantity purchased. The plaintiff did not make any submissions on this method of quantification and I therefore adopt the same. The 164.819 MT shortfall would, if delivered, have cost the defendant US\$97,243.41 on the basis of the sale price of US\$590 per tonne. A profit margin of 15% therefore translates into US\$14,586.48. The defendant is entitled to payment of this amount from the plaintiff and to setoff the same against the amount that it owes to the plaintiff.

Conclusion

81 For the reasons given above, there will be judgment for the plaintiff on its claim in the sum of US\$381,079.52 (being US\$395,666 less US\$14,586.48). The plaintiff shall also be entitled to interest on US\$381,079.52 at the court rate of 5.33% per annum from the date of the writ until payment. I award the plaintiff its costs of pursuing the claim and of defending the counterclaim. The defendant's limited success in relation to the counterclaim does not entitle it to costs. In any case, almost all of the trial time was spent on the claim.

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