Kuwait Oil Tanker Company SAK v Naseem Hussain Mohsin

Jurisdiction:	Jersey
Judge:	P.R. Le Cras, Jurats Tibbo, Le Breton
Judgment Date:	08 August 2001
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Date:	08 August 2001

Text

[2001] JRC 180

ROYAL COURT

(Samedi Division)

Before:

P.R. Le Cras, **Esq., Commissioner, and** Jurats Tibbo **and** Le Breton.

Between
(1) Kuwait Oil Tanker Co SAK
(2) Sitka Shipping Inc.
Plaintiffs
and
(1) Naseem Hussain Mohsin
(2) Noha Salim Anabtawi
(3) Manal Naseem Mohsin

(4) Adi Naseem Mohsin
(5) Qais Naseem Mohsin
(6) Advocate Jane Constance Martin (on behalf of the unborn issue and unascertained beneficiaries of the Mohsin Family Trust)
(7) Barclays Private Bank & Trust Ltd
Defendants

Advocate J.P. Speck **for the Plaintiffs**.

Advocate M.L. Preston **for the first to fifth Defendants**.

Advocate D. Gilbert **for the sixth Defendant**.

Advocate K. Lawrence **for the seventh Defendant**.

Authorities

Melva House Ltd v Bowshot Ltd (5th February, 1991) Jersey Unreported.

Bullen, Leak and Jacobs: Precedents of Pleadings: (12 th Ed'n): Ch. 7.

RSC (1991): O.29/11.

Shearson Lehman Bros Inc & Ors v Maclaine Watson & Co Ltd & Ors [1987] 2 All ER 181.

Gibbons & Anor v Wall (24th February, 1988) "The Times".

Ricci Burns Ltd v Toole & Anor [1989] 3 All ER 492 CA.

Application by the Plaintiffs for:

(i) summary judgment; and/or

(ii) an order striking out the answer of the first to fifth Defendants; and/or

(iii) an order that the Defendants pay to the Plaintiffs the sum of £2,000,000 by way of interim payment on account of damages in respect of Plaintiffs' claim.

THE COMMISSIONER:

1 This is a summons by Kuwait Oil Tanker Co ("KOTC") and Sitka Shipping Inc. ("SITKA") for relief against the Defendants on three grounds:

(a) that judgment should be entered summarily against the first, second, third, fourth, fifth and sixth Defendants;

(b) that the answer of the first, second, third, fourth and fifth Defendants be struck out; and,

(c) a prayer for interim damages.

2 The background to the case is this, that three individuals, holding senior positions in KOTC and SITKA viz. Mr. Al Bader, Mr. Qabazard and Captain Stafford were sued by the Plaintiffs in the High Court in England and judgment was obtained against them for frauds committed one way or another by the Defendants.

3 Mr. Mohsin was not a party to, nor a witness at the trial, at which Moore-Bick J. made certain comments as to Mr. Mohsin's involvement in the wrongdoing.

4 The Plaintiffs claim that Mr. Mohsin, as a senior employee of KOTC was, in fact, a party to the frauds and benefited from them, and in consequence seek damages from him as well.

5 Proceedings have come on in the Island as it has come to light that Mr. Mohsin had formed a trust in the Island.

6 The Trustee, the seventh Defendant, alerted it would seem by a press release that Mr. Mohsin was to be extradited from Jordan, brought a representation before the Royal Court on 16 th November, 1999, paragraph 5 reading:

> *"It has come to the notice of the Representor that it has been alleged that Mr. Mohsin was a party to a fraud perpetrated by him and others upon his employer Kuwait Oil Tanker Company SAK and its wholly owned subsidiary Sitka Shipping Inc. between 1985 and 1992 and the Representor is concerned as to whether the whole or any part of the trust fund of the Mohsin Family Trust represents the proceeds of that crime."*

And praying for certain relief.

7 The Royal Court, by Acte of that day, made certain orders, one of which read:

> *"(4) to make no distributions from the Trust Fund of the Mohsin Family Trust until further order of the Court."*

8 This order, we are told, remains in force save that on 10 th January, 2001, the Court heard a summons by the first and fifth Defendants for payment of their fees from the Trust Fund on an indemnity basis and:

> *"authorised the payment out of the said Trust Fund of such sums as necessary, and as agreed by the parties, to provide a return economy class air fare from*

Jordan to Jersey and modest accommodation in Jersey for the first Defendant."

It appears that nothing further has so far eventuated from this.

9 However, previous to that application, and clearly giving rise to it, the Plaintiffs had commenced proceedings on 10 th March, 2000, claiming damages, and further, at paragraphs 42 and 43 of the Order of Justice:

> *"In the premises, and further or alternatively to the relief set out in paragraphs 28, 29 and 39 above, the Plaintiffs seek:*
>
> > *(1) All necessary accounts and inquiries as to the use of the monies and any profits accrued thereon.*
> >
> > *(2) Further or alternatively Mr. Moshin's transfers to the Moshin Family Trust were fraudulent and/or made for no cause or consideration and the Plaintiffs seek a declaration to that effect."*

10 An answer was put in for the first to the fifth Defendants on 28 th April, in terms denying the allegations, and it is this about which the Plaintiffs' complain.

11 The sixth and seventh Defendants in their various capacities simply, and quite properly, *"restent à la sagesse de la cour"*.

12 There was one further complication in that Advocate Preston advised the Court at the outset that he was no longer instructed by the first to the fifth Defendants stating that his firm had written to Mr. Mohsin formally to advise him that they had withdrawn. Nonetheless, and until some further arrangement is put in place, his firm remains the address for service.

13 He accepted, as did the other Defendants, that the summons had been properly served and the Defendants properly warned.

14 The first question which arose for the Court was the order in which to take the various applications made in the summons.

15 As there had been effectively a blanket denial of the allegations of dishonesty, it did not seem appropriate to the Court to consider granting summary judgment against the Defendants at this stage.

16 Second, as Jurats were present and sitting, the Court deferred consideration of the second part of the summons until it could come back, if so required, before a Judge sitting alone.

17 This left the question of whether the Court should grant an interim judgment and, if so, in what amount.

18 The application is made under Royal Court rule 7A/2(1)(c):

> *"that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them."*

It is supported by an affidavit from Mr. M.S. Aspinall.

19 The rule is identical to RSC Or.29/11(1)(c) and counsel was in our view, there being no known local case, entitled to refer the Court to English authority for guidance.

20 He first referred to *Shearson Lehman Bros Inc & Ors v Maclaine Watson & Co Ltd & Ors* [1987] 2 All ER 181 where the standard of proof was described at p.187 (g):

> ***"Counsel for Rayners submitted that the judge applied the wrong test when he said that the defendants would have 'the very greatest difficulty' in establishing a defence of frustration.*** Before making an interim payment he had, so it was said, to be sure. There is some support for that submission in a recent dictum of Croom-Johnson LJ in *Breeze v R McKennon & Son Ltd* (1985) Times, 23 November. ***But in the context it is plain that the court was drawing a contrast between being satisfied on the one hand and a mere prima facie case on the other.*** Something more than a prima facie case is clearly required, but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden. This involves no lasting hardship on the defendants, since there is provision for readjustment at the trial in the case of an overpayment."

21 This was followed in *Gibbons & Anor v Wall* (24th February, 1988) "The Times":

> ***"The civil standard of proof was to be applied by the court when determining whether, on an application for an interim payment on account of damages under Order 29 of the Rules of the Supreme Court, it was satisfied that if the action proceeded to trial the plaintiff would obtain judgment for substantial damages; it was not necessary for the court to be "sure" that he would obtain such a judgment in the sense of being satisfied beyond reasonable doubt*** .
>
> ***The Court of Appeal (Lord Justice May, Lord Justice Balcombe and Lord Justice Stocker) so held on February 12, dismissing the defendant's appeal from Judge Tibber who, sitting as a judge of the High Court in chambers on October 5, 1987 had allowed the first plaintiff's appeal from a master and ordered the defendant to pay him an interim payment of £6,000***

on account of damages in a personal injury action in which liability was not admitted and the plaintiffs had not obtained judgment .

Lord Justice May said that he was in no doubt at all that Lord Justice Croom-Johnson in (*Breeze v R McKennon & Sons Ltd* The Times November 23, 1985) ***had not meant by his use of the word "sure" that anything but the civil standard applied.*** Lord Justice Lloyd had taken the same view of Breeze in *Shearson Lehman Brothers Inc v Maclaine, Watson & Co Ltd* (1987) 1 WLR 480, 489).

The civil standard was flexible, and in the context of an application for an interim payment the standard to be applied was at the high end of the range."

These guidelines are quite clear, and the Court accepts them.

22 The Court also notes that there is provision (see *Shearson Lehman*, supra) for readjustment at the trial in case of overpayment, and we assume from that that the standing of the Plaintiff, in this case effectively it would seem the Government of Kuwait, ought to be taken into account.

23 To turn now to the Order of Justice and the answer, a good deal of the Order of Justice would appear to describe the actions of the three Defendants in the English action.

24 However, it is claimed (see paragraph 3 of the Order of Justice) that Mr. Mohsin was the former General Superintendent of KOTC, although he claims that he was the Manager (Financial).

25 In general the Plaintiffs' claim is that due to his position, Mr. Mohsin had to be and indeed was a necessary part of the dishonesty, and indeed that was the finding of the High Court.

26 This by itself would not, in our view, be enough for the Court to make any order for an interim payment.

27 However, there are in addition certain definite allegations that Mr. Mohsin handled money dishonestly, and that he was able to place in the Trust far more monies than he would have been able to earn under the terms of his employment.

28 Before dealing with these, counsel submitted that the Court should take into account certain passages from Bullen, Leak and Jacobs: Precedents of Pleadings: (12 th Ed'n): Ch.7, in particular the following passages:

"A traverse must, however, be made either by a denial or by a statement of non-admission, and it may be made either expressly or by necessary implication. Every allegation of fact made in the statement of claim, except as to damages, which the defendant does not intend to admit must be specifically traversed by him in his defence. A general denial of such allegations or a general statement of non-admission of them is not a sufficient traverse of them .

…

A traverse whether by denial or non-admission must, however, be clear and explicit, and it must show clearly and exactly how much of the allegation pleaded to is admitted and how much of it is denied. It must not be equivocal or ambiguous or evasive .

…

Allegations in the statement of claim which are not admitted must be specifically denied or not admitted. As the effect of the traverse in the defence is to contradict an allegation of fact in the statement of claim, it must not be vague or general or evasive but must be specific and must deal specifically with each allegation of fact and, as regards each, must answer the point of substance, and the traverse must nonetheless be specific, although it is generally framed in the negative .

Thus, in an action for a debt or liquidated demand, a mere denial of the debt is inadmissible, and does not operate as a traverse, which should deal specifically with the facts relied on as giving rise to the debt, such as a claim for the price of goods sold or work done or services rendered or a loan or as the case may be .

…

Where the defendant traverses any allegation of fact in the statement of claim, whether by denial or refusal to admit, he must not do so evasively but must answer the point of substance. This is a basic rule of pleading, since a traverse which is evasive, or ambiguous, or equivocal or does not answer the point of substance will not amount to a specific traverse of the allegation. Thus, if it be alleged that the defendant received a certain sum of money, it will not be sufficient to deny that he received that particular sum, but he must deny that he received that sum or any part thereof or else set out how much he received, and if the allegation is made with divers circumstances it will not be sufficient to deny it along with those circumstances, and in such case, the allegation of each circumstance should be traversed specifically .

The defendant must deal specifically with every allegation of fact made by the plaintiff, and this requires him either to admit it frankly or to deny it boldly. Any half-admission of half-denial is evasive. Thus, where it is alleged that an agreement or terms of arrangement were arrived at, a defence in these

words “The terms of the arrangement were never definitely agreed upon as alleged” is evasive. As Jessel MR said:

> ***“[The defendant] is bound to deny that any agreements or any terms of arrangement were ever come to, if that is what he means: if he does not mean that he should say that there were no terms of arrangement come to, except the following terms and state what the terms were;…”***
>
> ***The defence, therefore, must not contain evasive denials or denials which are ambiguous or do not show clearly what are the specific facts which are denied.”***

29 It is put in this way: First, under paragraph 17, *et seq*, Mr. Mohsin's reply is remarkably coy as to the Liberian Companies formed to effect back to back charterparties, where the three English Defendants were found to have misappropriated funds. Second, at paragraph 33(1) it is alleged that Mr. Mohsin received travellers' cheques amounting to US$301,500 in answer to which, simply, no admission is made. Third, at 34(3) it is alleged:

> *“In order to disguise within SITKA the fraudulent purpose which lay behind the request at (1) above, Mr. Mohsin created a false debit note no. 2457 dated 16 th May 1988 from Clarksons to KOTC for US$98,224.38 and a false request to the Bank dated 25 May 1988 (which was never sent to the Bank) to debit that amount to SITKA's dollar call account.”*

To which the answer:

> *“with regard to paragraph 34(3) it is denied that Mr. Mohsin created a false debit note or a false request as pleaded or at all.”*

30 Counsel put it in this way that the Defendant denied only that it is false but does not say whether it is genuine or give any reasons. Fourth, at paragraph 34(5):

> *“By a number of further letters dated 2 nd June 1987, 24 th November 1987, 14 th February 1988, 25 th May 1988 and 21 st July 1988, Mr. Qabazard asked the Bank to debit SITKA's dollar call account and to supply travellers' cheques in a sum totalling US$614,090.* Mr. Moshin benefited personally from these travellers' cheques. For example, he received at least US$40,000 of the US$118,080 travellers' cheques withdrawn under cover of Mr. Qabazard's letter dated 21 st July 1988.”

Which is answered by 19(b):

> *“with regard to paragraph 34(5) it is denied that Mr. Mohsin benefited personally from the travellers' cheques referred to or at all.”*

Fifth, at paragraph 34(8):

> *"By letters dated 18 th November 1986, 19 th October 1988, 21 st November 1989 and 4 th March 1990, Mr. Mohsin asked the Bank to debit SITKA's dollar call account and to supply travellers' cheques in the sum of US$172,000; £65,050; US$20,000 and £15,000 respectively."*

Which is answered by 19(c):

> *"with regard to paragraph 34(8) until discovery herein Mr. Moshin is unable to specifically plead to this allegation save to deny that if, which is not admitted, the said requests were made they were anything but legitimate requests made during the course of Mr. Mohsin's employment and not as part of the alleged conspiracy."*

The point made there by counsel is that there was no need to wait for discovery, as copies could have been requested before pleading.

This, too, claims counsel, is an evasive pleading.

31 Similarly, paragraphs 36(1), (2) and (3) read:

> *(1) By a number of letters Mr. Mohsin and the co-conspirators (by Mr. Qabazard) asked the Bank (or, in the case of the letter dated 10 th July 1988, the National Bank of Kuwait) to debit KOTC's dollar call account and to transfer the sums to the account of Porchester Shipping held at the Bank*.
>
> *(2) Mr. Mohsin created misleading letters bearing the same dates as the letters referred to above which were purportedly addressed by KOTC to the Bank (or, in the case of the letter dated 10 th July 1988, to the National Bank of Kuwait) but were never in fact sent to the Bank.* These letters gave the false impression that sums were being remitted *to the account of Brown & Root (Gulf) EC at Citibank, Bahrain, when in fact (in order to facilitate the misappropriations) the sums were being transferred to the account of Porchester Shipping held by the Bank*.
>
> *(3) The sums transferred to the account of Porchester Shipping were US$3,781,156.28 in excess of the amounts required to pay KOTC's trading expenses to Brown & Root and KOTC has thereby suffered loss in that amount."*

To which the answer at 21 is:

> *"No admissions are made as to paragraphs 36 and 37.* Mr. Mohsin is unable to specifically plead to these allegations until discovery herein save to repeat his denial of involvement in any conspiracy as pleaded or at all."

Counsel reiterates his submission that this pleading, too, is evasive, and that the same applies to paragraph 37(2):

> *"By letters dated 1 st December 1987, 26 th January 1988 and 1 st August 1988, Mr. Mohsin asked the Bank to debit Yucatan's account held by the bank and to supply travellers' cheques in the sums of US$60,100, US$33,000 and £33,000 cash respectively.* Mr. Mohsin ought to have accounted for these sums to KOTC but did not do so. KOTC has thereby suffered loss in the sum of US$93,100 and £33,000."

This is, again, answered by 21, *supra*.

32 Again, paragraphs 41(1), (2) and (3) read:

> *(1) Through the operation of the Burgan Bank Scheme, Mr. Mohsin personally cashed a huge number of travellers' cheques stolen thereby.* The Plaintiffs have in their possession copies of at least US$880,000 worth of these travellers' cheques. A substantial proportion of these travellers' cheques were cashed and deposited to his credit at Barclays Bank, New Bond Street, London.
>
> *(2) Further, through Mr. Qabazard, Mr. Mohsin received bank transfers from the Gulf Shipping account into his Barclays Bank, New Bond Street account.* These represented the proceeds of the back-to-back charterparty scheme.
>
> *(3) Throughout the entire course of his employment with KOTC between 1 st January 1981 (the date from which records are kept) and his retirement on 1 st August 1990, Mr. Mohsin was paid a total of 260,894.236 Kuwaiti Dinars (about US$852,000) by way of legitimate earnings, out of which he would have had to pay his living expenses.* He had no other legitimate source of income. During his final and highest paid year Mr. Mohsin earned 22,000 Kuwaiti Dinars (about US$73,000). The monies transferred by Mr. Mohsin into the Mohsin Family Trust could not have come from any source other than the monies stolen by him from the Plaintiffs."

These are simply answered by paragraph 24:

> *"Paragraph 41 is admitted save that it is denied that the money which Mr. Mohsin settled on to the trusts of the Mohsin Family Trust were moneys or the proceeds of moneys stolen by Mr. Mohsin or any party from the Plaintiffs.* No admissions are made with regard to sub-paragraphs 41(1), (2) or (3)."

33 To say the least, it is not obvious to the Court how Mr. Mohsin could have earned the sums claimed by the seventh Defendant to have been placed in the Trust. This was put by the Bank in their representation *(supra)*:

Sum of Money	Date of Receipt

£500,000	*30 th December 1991 (initially held on fixed deposit and transferred to the Mohsin Family Trust after 20 th January 1992).*
US$2,000,000	*31 st January 1992*
£1,400	*17 th February 1992*
£5,195.43	*5 th October 1995*
US$41,944.05	*5 th October 1995*

34 Mr. Mohsin did give an explanation in his affidavit seeking funds *(supra)* when he stated at paragraph 8 of his affidavit:

> *"I was employed by the First Plaintiff for approximately 29 years between 1961 and 1991.* In view of the cost of living in Kuwait, I was able to make substantial savings. For example, during the period 1981 to 1990 I saved approximately US$50,000 per annum from my salary referred to in paragraph 7 above. My wife was also employed in Kuwait for 11 years with the Ministry of Education (1965–1970). My wife's salary was in the region of US$600 per month. I invested in real estate in the 1980's which assisted in deriving further income. My return on property investments amounted to approximately US$150,000 per annum. In short, the fund of the Mohsin Family Trust is derived from my family's savings incurred over 30 years spent in Kuwait."

35 The Court has to say that, as at present advised, it does not find the explanation convincing.

36 In addition, counsel was able to point to certain correspondence where Mr. Mohsin called for travellers' cheques e.g. a letter of 15 th February 1989:

> *"You are kindly requested to supply us with travellers' cheques (TC each £200) in the amount of £63,000.00 (sterling pounds sixty three thousand only).* You may debit our Dollar Call Account No. 50-01-30031-9 with the counter value under advice to us."

37 In all the circumstances the Court has come to the conclusion, on the balance of probabilities and to the standard of proof set out above, that this is a proper case to order an interim payment; and that the proper figure to order is a payment of £1 $^{1}/_{4}$ million which the Trustee is to pay over to the Plaintiffs.

38 This leaves the first two applications for the Court.

39 It appears to the Court that, again, the proper way to proceed, if the Plaintiffs desire to proceed, is to deal next with the application to strike out in whole or in part the answer.

40 We should add that subject only to costs, the present order freezing the Trust assets, must of course remain in force.