[1988–90 Gib LR 278]

DIALDAS v. MINORIES FINANCE LIMITED

COURT OF APPEAL (Spry, P., Fieldsend and Huggins, JJ.A.):
September 20th, 1990

Bills of Exchange—form—certainty of sum payable—bill providing expressly for calculation of sum payable still certain as to sum payable despite departure from default position in Bills of Exchange Ordinance, s.72(d)—selling rate for demand drafts in Zurich no harder to ascertain than rate for sight drafts—rate may be fixed with reference to date of payment rather than date of maturity

Bills of Exchange—form—wording—parties to adhere strictly to accepted commercial usage of abbreviations regarding both meaning of abbreviation and place used—if alternative readings possible, court not to strive to detect ambiguities if one reading favours parties' presumed intentions and other nonsensical—abbreviation "D/A" meaning "documents on acceptance" need not make order to pay conditional if sense of document not altered by insertion

Bills of Exchange—payment—conditional payment—abbreviation "D/A" meaning "documents on acceptance" need not make order to pay conditional if sense of document not altered by insertion—if alternative readings possible, court not to strive to detect ambiguities if one reading favours parties' presumed intentions and other nonsensical—parties to adhere strictly to accepted commercial usage of abbreviations regarding both meaning of abbreviation and place used

Civil Procedure—judgments and orders—summary judgment—disposal of matter on O.14 application not precluded by substantive legal argument by defence on legal point—if argument relatively short or easily disproved, sensible for court to decide matter on O.14 application—on appeal, when disagreement over propriety of lower court's disposal of matter on O.14 application but substantive decision nonetheless correct, Court of Appeal to give effect to decision

The respondent bank brought an action in the Supreme Court to enforce payment under a series of documents said to be bills of exchange.

The appellant was the sole partner of M. Dialdas & Sons (Gibraltar). M. Dialdas & Sons (UK) Ltd. ("Dialdas UK"), a company linked to that of the appellant, drew documents said to be bills of exchange in favour of the

respondent's predecessor, addressed to the appellant. In exchange for these, and for documents relating to the shipment of goods to the appellant, Dialdas UK obtained advances from the respondent bank; the bills were to be presented to the appellant for payment, whereupon the shipping documents would be given to the appellant by the bank and title to the goods in question would thereby be transferred. Each document was expressed (with some variation as to the details of amount payable and time-limit) as an order to the appellant to pay an amount in Swiss Francs to the respondent "at 120 days D/A after sight from the date [t]hereof . . . until 7 days after its maturity date." The respondent applied to the Supreme Court for summary judgment under the Rules of the Supreme Court, O.14, which the appellant resisted on the ground that there were points of law raising serious questions to be tried, namely that the instruments were not bills of exchange for the purposes of the Bills of Exchange Ordinance, as they were not payable at a fixed or determinable future time owing either to their ambiguity as to when they were payable, or to their being conditional on acceptance by the drawer, and that the sum to be paid was uncertain. The Supreme Court nonetheless gave summary judgment for the respondent.

The appellant submitted that (a) the Supreme Court had been wrong to give summary judgment under O.14, as there were substantive issues of law to be tried which required considered and mature argument and which made the use of an O.14 application (which required judgment to be given "there and then") inappropriate; (b) the abbreviation "D/A" meant "days after acceptance," so the instruments were ambiguous as to the dates of maturity (as acceptance and sight were different events) and so were not bills of exchange within the provisions of the Bills of Exchange Ordinance; (c) if the abbreviation "D/A" meant "documents on acceptance," its presence in the main body of the supposed bills, rather than in a margin, meant that the obligation to pay was conditional on the delivery of the documents when the supposed bills were presented for acceptance, which meant that the supposed bills did not fulfil the requirements of the Ordinance as to certainty; (d) the sum to be paid was uncertain, as the selling rate for demand drafts in Zurich was more difficult to ascertain than the selling rate for sight drafts; and (e) to fix the exchange rate with reference to the date of payment (rather than to the date of maturity) was to create uncertainty, as payment might never occur.

The respondent submitted in reply that (a) the Supreme Court had been correct to dispose of the matter on an O.14 application, as even where there were substantive issues of law to be disposed of, an O.14 application could still be allowed if—as here—a defence, though arguable, was plainly unsustainable; (b) the abbreviation "D/A" could not mean "days after acceptance" as it would make a nonsense of the wording, and that the more logical "documents against acceptance," which was also an available interpretation, should be adopted, with the result that the bills were not unclear as to the dates of maturity; (c) the abbreviation "D/A" did not constitute an instruction to the drawee by the drawer not to accept the bills

unless the documents were proffered, but merely served as a warning that in the absence of documents the bills might not be accepted; (d) it was no harder to determine the rate for demand drafts in Zurich than that for sight drafts; and (e) even if the Supreme Court had been incorrect in refusing leave to defend, if the Court of Appeal were of the opinion that its decision on the substantive points had been correct, it should give effect to it.

Held, dismissing the appeal:

(1) It was not necessarily wrong to dispose of a matter on an O.14 application if a substantive argument on a legal point had been raised by the defence: if the argument were relatively short, or if it were readily demonstrable that the defendant's point, though arguable, was in the end unsustainable, it was sensible for the court to decide it there and then (para. 15; para. 36).

(2) Where, as here, there was disagreement over whether a lower court had been correct to dispose of the matter on an O.14 application, if the Court of Appeal agreed with the lower court on the issue of law it should give effect to its decision, notwithstanding the disagreement. In the present case, there was no indication that another hearing would produce anything other than a repetition of arguments that had already been rehearsed, and, since the Supreme Court had come to the correct decision on the substantive points of law, the appeal would be dismissed (para. 13; para. 15; paras. 38–39; para. 41; para. 53).

(3) The abbreviation "D/A" could not mean "days after acceptance," as this would make a nonsense of the instruments: the reading "documents on acceptance" was to be preferred. As a logical interpretation which appeared to support the obvious intentions of the parties was available, it should be adopted: the court should not strive to detect ambiguities where a clear alternative reading was available (para. 20; para. 45–46; para. 51).

(4) The presence of the letters "D/A" did not make the order to pay contained in the bills of exchange conditional. It was meaningless if read as part of the text, and the appellant had advanced no evidence in support of his contention that the presence of the abbreviation made the order to pay conditional (paras. 26–27; para. 50).

(5) There was no uncertainty as to the sum to be paid. The bills provided an express stipulation as to how the amount was to be calculated, and there was no evidence that the rate stipulated—the selling rate for demand drafts in Zurich on the date of payment—was any harder to calculate than the rate of exchange for sight drafts, which was the default provision in the Ordinance. There was no reason that the rate should not be fixed with reference to the date of payment, as opposed to the date of maturity (paras. 28–30; para. 52).

(6) It was not the case that the position of the letters "D/A" made no difference to the meaning of the documents. Placed as they were, they were meaningless; however, had the abbreviation been placed somewhere

else in the documents, it could easily have had the effect of making the orders to pay conditional; there was a great deal of difference between the insertion of words (including abbreviations with recognized meanings in commercial usage) in a place where they made no sense and their insertion in a place where it was at least arguable that they added some meaning to the document. Parties wishing to avail themselves of technical facilities such as bills of exchange should pay regard to accepted commercial usage of abbreviations, and adhere strictly to it (*per* Spry, P., at paras. 49–51).

Cases cited:

(1) *Bank für Gemeinwirtschaft* v. *City of London Garages Ltd.*, [1971] 1 W.L.R. 149; [1971] 1 All E.R. 541; (1970), 114 Sol. Jo. 970, *dicta* of Cairns, L.J. referred to.

(2) *British & Commonwealth Holdings plc* v. *Quadrex Holdings Inc.*, [1989] Q.B. 842; [1989] 3 W.L.R. 723; [1989] 3 All E.R. 492; (1989), 133 Sol. Jo. 694, distinguished.

(3) *European Asian Bank AG* v. *Punjab & Sind Bank (No. 2)*, [1983] 1 W.L.R. 642; [1983] 2 All E.R. 508; [1983] 1 Lloyd's Rep. 611; [1983] Com LR 128, *dicta* of Robert Goff, L.J. applied.

(4) *Forestal Mimosa Ltd.* v. *Oriental Credit Ltd.*, [1986] 1 W.L.R. 631; [1986] 2 All E.R. 400; [1986] 1 Lloyd's Rep. 329; [1986] F.L.R. 171, *dicta* of Sir John Megaw followed.

(5) *Home & Overseas Ins. Co. Ltd.* v. *Mentor Ins. Co. (UK) Ltd.*, [1990] 1 W.L.R. 153; [1989] 3 All E.R. 74; [1989] 1 Lloyd's Rep. 473; (1989), 133 Sol. Jo. 44, *dicta* of Parker, L.J. applied.

(6) *Korea Exchange Bank* v. *Debenhams (Central Buying) Ltd.*, [1979] 1 Lloyd's Rep. 100, *dictum* of Donaldson, J. applied; on appeal, [1979] 1 Lloyd's Rep 548; (1978), 123 Sol. Jo. 163, *dicta* of Megaw, L.J. applied.

(7) *Miliangos* v. *George Frank (Textiles) Ltd.*, [1977] Q.B. 489; [1976] 3 W.L.R. 477; [1976] 3 All E.R. 599; [1976] 2 Lloyd's Rep. 434, applied.

(8) *Nichimen Corp.* v. *Gatoil Inc.*, [1987] 2 Lloyd's Rep. 46, *dicta* of Kerr, L.J. referred to.

(9) *Rosenhain* v. *Commonwealth Bank of Australia* (1922), 31 C.L.R. 46; 28 A.L.R. 396; [1922] V.L.R. 787, not followed.

(10) *Sethia (S.L.) Liners Ltd.* v. *State Trading Corp. of India Ltd.*, [1985] 1 W.L.R. 1398; [1986] 2 All E.R. 395; [1986] 1 Lloyd's Rep. 31; (1985), 129 Sol. Jo. 889, *dicta* of Kerr, L.J. applied.

Legislation construed:

Bills of Exchange Ordinance (1984 Edition), s.72(d): The relevant terms of this section are set out at para. 28.

A.A. Vasquez for the plaintiff;
D.J.V. Dumas for the defendant.

1 **FIELDSEND, J.A.:** This appeal arises out of a successful application for summary judgment on the plaintiff's claim founded upon a series of documents said to be bills of exchange. Each of these documents was drawn by M. Dialdas & Sons (UK) Ltd. in favour of Johnson Matthey Bankers, the earlier name of the respondent, and addressed to M. Dialdas & Sons (Gibraltar), a firm in which at the material times the appellant was the sole partner.

2 Each document is expressed as an order to the defendant to pay to the plaintiff, "at 120 days D/A after sight"—or in some cases a lesser number of days—a sum expressed in Swiss francs, "payable at the selling rate for demand drafts on Zurich on the date of payment with interest at 7%"—or in 3 cases at 9%—"from the date hereof until 7 days after its maturity date."

3 In its defence the defendant denied that any of the documents were bills of exchange, but also alleged that they were given as security for liabilities of M. Dialdas & Sons (UK) Ltd. to the plaintiff which had been discharged or ought to be so regarded, and that the plaintiff was not a holder in due course. These latter contentions were not persisted in, but some time was taken up in sketching the background to the giving of the documents which was in the event common cause between the parties.

4 Put shortly, M. Dialdas & Sons (UK) Ltd. obtained advances from the plaintiff on the presentation of bills of exchange and documents relating to the shipment of trading goods to the defendant. The bills would then be presented to the defendant for acceptance, upon which the shipping documents would be handed to the defendant, thereby transferring to him title to the goods therein referred.

5 The only defence relied on in resisting the claim for summary judgment was the legal one that the instruments sued on were not bills of exchange for two main reasons, namely that—

(1) on the face of them, the instruments were not payable at a fixed or determinable future time, because either—

(a) they were ambiguous as to when they were payable, or

(b) they were conditional upon acceptance by the drawee; and

(2) the sum to be paid was not a sum certain within the meaning of the Bills of Exchange Ordinance.

6 The defendant, relying on *Home & Overseas Ins. Co. Ltd.* v. *Mentor Ins. Co. (UK) Ltd.* (5) and *British & Commonwealth Holdings plc* v. *Quadrex Holdings Inc*. (2), contended that this was not a proper case for the grant of summary judgment under O.14 of the Rules of the Supreme Court because there were points of law which raised serious questions calling for detailed argument and mature consideration to be tried.

7 The *Quadrex* case involved complicated factual issues as well as legal issues which were not entirely straightforward, raising at least one important point of law, and is therefore not of great assistance, save that it adopts the following passage in the *Home & Overseas Insurance* case ([1989] 3 All E.R. at 77):

> "The purpose of O.14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But O.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 O.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."

8 This case involved the interpretation of a reinsurance contract which contained an arbitration clause. The effect of granting the summary judgment there claimed would have been to defeat the arbitration clause. The Court of Appeal held that, save in the clearest of cases, the defendant was entitled to have the dispute determined by the tribunal chosen by the parties; this was an important factor in denying the plaintiff summary judgment.

9 Among the authorities cited in the *Home & Overseas Insurance* case was *European Asian Bank AG* v. *Punjab & Sind Bank (No. 2)* (3). In that case, Robert Goff, L.J. said ([1983] 1 W.L.R. at 654) that—

> ". . . since *Cow* v. *Casey*, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under R.S.C., O.14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand.' It may offend against the whole purpose of O.14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal: see *Verrall* v. *Great Yarmouth Borough Council*, *per* Lord Denning, M.R. and Roskill, L.J. The policy of O.14 is to prevent delay in cases where there is no defence; and this policy is, if anything, reinforced in a case such as the present, concerned as it is with a claim by a negotiating bank under a letter of credit: compare *Bank für Gemeinwirtschaft Aktiengesellschaft* v. *City of London Garages Ltd.*, *per* Cairns L.J., a

case concerned with a claim on a bill of exchange by a holder in due course."

10 In that last-cited case, it was said that it was of great importance that the right of a holder in due course to obtain judgment as speedily as possible for what was due to him under a negotiable instrument should be maintained. The *European Asian Bank* case involved four days of argument, with judgment reserved for about a month; *Bank für Gemeinwirtschaft* v. *City of London Garages Ltd.* (1) involved three days of argument.

11 This was followed by *Sethia (S.L.) Liners Ltd.* v. *State Trading Corp. of India Ltd.* (10), where Kerr, L.J. said ([1985] 1 W.L.R. at 1401):

"If a point of law is raised on behalf of the defendants, which the court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under O.14 the court will do so to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs."

12 In *Forestal Mimosa Ltd.* v. *Oriental Credit Ltd.* (4), Sir John Megaw said ([1986] 1 W.L.R. at 635–636):

". . . [W]e are here faced with the question of the proper approach to the determination of an appeal under O.14 where the issue is a point of law. If the right approach were that the appeal must be dismissed if this court regarded the appeal as being 'arguable,' even though this court were to take the view strongly that the argument ought to be decided in favour of the appellants, one would be faced then with the question what is really meant by the word 'arguable' in that context. In one sense the issue of law here is plainly arguable because it has been fairly and sensibly and, if I may say so, most helpfully argued, and also the defendants' argument has found favour with the judge. But, in my view, both common sense and the prevailing practice require, or at least permit, this court to take a broader view."

A fortiori these words are applicable to proceedings at first instance.

13 Sir John then quoted with approval from the judgment of Kerr, L.J. in *Sethia* and continued (*ibid.*, at 636):

"In my view, it would neither be good law nor good sense that, if each member of this court took a clear and confident view that the issue, though in one sense arguable, ought to be decided in favour of the plaintiffs, they should, nevertheless, dismiss the appeal, leaving the issue of law to be argued at the trial of the action . . . with the prospect of the issue, whichever way it might then be decided by the

trial judge, coming again before this court, it may be many months hence."

14 Finally, in *Nichimen Corp.* v. *Gatoil Inc.* (8) ([1987] 2 Lloyd's Rep. at 51–52), Kerr, L.J. said that—

> "it has been said again and again in this court in recent years that it is not sufficient to conclude that the defendants have an arguable case if the issues turn on a point of law, or other material, which enables the court to form a definitive view on the right of the plaintiff there and then. . . . The latest in [the series of cases illustrating] this . . . is the judgment of this court given by Sir John Megaw in *Forestal Mimosa Ltd.* v. *Oriental Credit Ltd.* . . . As I have said, it is not sufficient upon an application under O.14 merely to conclude, on a point of law, that it is arguable on the side of the defendants. Most points are arguable, perhaps particularly in the Commercial Court, as Mr. Pollock's performance in this case amply demonstrated. In a case like the present, the judge should only give leave to defend if, after full consideration of the material before him, he is satisfied that the plaintiff is not entitled to judgment there and then."

15 This persuasive line of authority seems to me to set out the correct approach to an application for summary judgment where the defendant's defence is based on a point of law. If that can be decided upon the material before the court then the judge is not wrong to consider and rule upon the point of law, even though the argument may take some time. It may be that where the point of law is long and complex, involving the citation of many authorities, then the matter may be sent for trial. With these principles in mind I turn to the detailed points raised by the defendant on the validity of the instruments.

Were the instruments ambiguous as to the dates of maturity?

16 The defendant's contention as to ambiguity was founded upon the premise that the letters "D/A" meant "days after acceptance." If they did, then the order to pay, if expanded, would read: "pay 120 days after acceptance after sight." This would clearly make it impossible to determine when the bills were to mature, as the dates would depend on one or the other of two events: acceptance and sight. And, of course, a bill whose maturity date was dependent on acceptance would not be payable at a determinable future time: *Korea Exchange Bank* v. *Debenhams (Central Buying) Ltd.* (6).

17 The only "evidence," if one may call it that, which was before the court that "D/A" might mean "days after acceptance" was an entry in *Thomson's Dictionary of Banking*, 12th ed., at 1 (1974). There, under the heading "ABBREVIATIONS," are entries for "D/A" as standing for both "Days after Acceptance" and "Documents on Acceptance."

18 What indications there are of commercial usage show that the common meaning of "D/A" is "documents on acceptance." See the evidence of four witnesses in *Korea Exchange Bank* at first instance; the *Encyclopaedia of Banking Law*, ss. F2–F3, and what has been described by Megaw, L.J. ([1979] 1 Lloyd's Rep. at 551) as something of a "Delphic oracle," *Questions on Banking Practice*, 10th ed., para. 201, at 98 (1965).

19 Mr. Dumas for the defendant argued that expert evidence was required as to the meaning of the letters. But there is no allegation in the affidavit of opposition that evidence would be available that "D/A" in commercial practice meant "days after acceptance." A small point against the defendant's contention is that, fully expanded, the abbreviation would make the bill read "at 120 days days after acceptance," whereas ideally the written word "days" should not have been included.

20 On the papers before us, despite the ingenious argument of Mr. Dumas, I am of the view that it is unsustainable that "D/A" on these instruments means "days after acceptance." It would make a nonsense of them, and if a more logical interpretation which favours the obvious intentions of the parties is available it should be adopted. As Donaldson, J. said in *Korea Exchange Bank* (6) ([1979] 1 Lloyd's Rep. at 102), a court should not be "astute to detect ambiguities in such a document" as this. In my view, the argument of the defendant is clearly unsustainable and it needed no complex argument to show this. The bills clearly mean that they are payable at a stated number of days after sight.

Were the instruments conditional?

21 The defendant contends that if the letters "D/A" mean "documents on acceptance" they mean, being where they are in the body of the bill, that the obligation to pay is conditional upon the delivery of the documents when the bill is presented for acceptance, because the drawee is neither obliged nor entitled to accept it if the documents are not delivered.

22 The plaintiff accepts that the words "documents on acceptance"—or their abbreviation "D/A" when used—normally appear in the margin of a bill, or at the top, or even on a separate piece of paper. The defendant accepts that when the letters or words appear in that way they do not make the bill conditional. All that they do is make the drawee's obligation to the drawer dependent upon the delivery of the documents, and give notice to anyone taking the bill before acceptance that in the absence of documents it is likely that the bill will not be accepted. In short, they are not an instruction to the drawee by the drawer not to accept unless the documents are delivered.

23 The defendant contends that it is an open and arguable point of law that where the letters appear, as they do here, in the body of the bill they are part of the drawer's order to the drawee, thus making the order to pay

a conditional order, dependent upon the delivery of the documents when presenting the bill for acceptance.

24 In *Korea Exchange Bank* (6), the letters "D/A" appeared in the bill in this way: "at 90 days D/A of this first bill pay," the printed word "sight" between "D/A" and "of" having been deleted. The omission of the word "sight" was there the complicating factor. The defendants there contended that the letters meaning "documents against acceptance" were not directed to the drawee but were simply to call to the attention of holders or potential holders the fact that the drawee would not accept the bill for payment unless the proper documents were produced. This was accepted by the Court of Appeal, despite their positioning. But Megaw, L.J. did say ([1979] 1 Lloyd's Rep. at 551) that if the phrase were directed to the drawee "it would, or might, make the purported bill a conditional order to pay, and hence prevent it from being a bill of exchange under the Act." But that, he said, did not fall to be decided, as the court held that the letters were not part of the order to the drawee.

25 It is the leaving open of this question which the defendant contends leaves him with an arguable point of law. He also relied on the Australian case of *Rosenhain* v. *Commonwealth Bank of Australia* (9), decided on appeal from Victoria. That case queried whether the words "documents on acceptance" appearing on the top of a purported bill prevented it from being an unconditional order to pay. The doubt of the High Court has, I would have thought, been overtaken by the accepted practice that such words, placed as they were there, do not make the order to pay conditional. This is in effect conceded by the defendant.

26 Returning to the present case, the only contention advanced in the affidavit of opposition to summary judgment on the issue of whether the documents are conditional is in para. 5 of Mr. Dumas's affidavit of November 9th, 1989. There he says that he verily believes that there is a triable issue, stating baldly that "the said instruments are all conditional." There is no allegation that there is any evidence of fact upon which the defendant would rely, nor was it at any stage suggested that there was specific evidence which could assist in resolving the issue. In para. 7 of the affidavit it was indicated that the defendant would rely only on the form of the instruments themselves.

27 In my view, there is no basis upon which to found the defendant's argument that the order to pay is made conditional by the letters "D/A" used as they are on these bills. It may be that there is no authority directly in the plaintiff's favour, but that does not mean that the defendant has a case which should go to trial. On the material before the court it is my view that the defendant's argument is not sustainable. The fact that it has taken some time to hear, appreciate and set out the argument does not

mean that it is not relatively easily disposed of once it has been understood and examined.

Is the sum to be paid certain?

28 Where a bill is drawn out as payable in Gibraltar and the sum payable is not expressed in the currency of Gibraltar, the Bills of Exchange Ordinance, s.72(d) provides that "the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable." Here, of course, there was an express provision as to how the amount was to be calculated. It was to be payable at the selling rate for demand drafts on Zurich on the date of payment.

29 Mr. Dumas contended that the selling rate for a demand draft on Zurich was more difficult to ascertain than the rate of exchange for sight drafts. Despite his valiant argument, I am satisfied that it is quite unsustainable. He supported it by no authority nor evidence from any banker. I would have thought that the selling rate for a demand draft was if anything more specific than the rate of exchange for a sight draft.

30 The final point was that to fix the rate of exchange by reference to the date of payment rather than to the date of maturity was to introduce uncertainty, *inter alia* because payment may never occur. Such an argument in my view loses sight of all commercial reality. It may be that the amount in Gibraltar currency will not be fixed until date of payment, just as with a bill negotiated before maturity the amount of Gibraltar currency would not be ascertainable until maturity. I see no reason why the rate should not be fixed by reference to the date of payment, particularly now that, since *Miliangos* v. *Goerge Frank (Textiles) Ltd.* (7), judgment can be given in a foreign currency.

Conclusion

31 For all these reasons, I am satisfied that the learned Chief Justice was right to have granted summary judgment. There were no disputes of fact. What disputes there were over the interpretation of the instruments and the legal principles applicable were in the event straightforward, and the arguments against their validity as bills of exchange unsustainable. The fact that the arguments below and in this court each took two days does not mean that they were difficult to resolve once the principles and the background were grasped. There were only two relevant authorities, and neither was closely in point. I would dismiss the appeal.

32 **SPRY, P.:** The facts from which this appeal arises are fully set out in the judgment of Fieldsend, J.A., and I shall not repeat them. An application for summary judgment was made by the respondent (the bank) under

the Rules of the Supreme Court, O.14, in an action in which it was seeking to recover the amount due on 20 instruments which it claimed were bills of exchange. The application was resisted by the appellant, who sought leave to defend, contending that the instruments did not qualify as bills of exchange within the meaning of the Bills of Exchange Ordinance and submitting that if the action were tried as a suit, he had a legitimate defence and counterclaim.

33 The Chief Justice refused leave to defend. He placed great reliance on a passage from the judgment of Parker, L.J. in *Home & Overseas Ins. Co. Ltd.* v. *Mentor Ins. Co. (UK) Ltd.* (5), in which it was stated ([1989] 3 All E.R. at 77–78) that the purpose of O.14 was—

> "to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment . . . If the point of law relied on by the defendant raises a serious question to be tried which calls for detailed argument and mature consideration the point is not suitable to be dealt with in O.14 proceedings."

34 Towards the end of his ruling in the Supreme Court, the Chief Justice said that—

> "the fact that the submissions took some time and the delivery of this ruling has also taken a while does not mean in the end that the matter was technical and complex to the point that O.14 did not apply here. It seems to me, on the contrary, that there was a defence which although arguable was shown in the end to be plainly unsustainable and the plaintiff is entitled to judgment."

35 I should perhaps quote another passage from the judgment of Parker, L.J. in which, after quoting certain observations of Kerr, L.J. in *Nichimen Corp.* v. *Gatoil Inc.* (8), he said ([1989] 3 All E.R. at 78) that—

> "the observations which have been made were however not intended, in my judgment, to indicate any more than that it was insufficient for the defendant to raise an arguable point of law if that point could be readily demonstrated to be unsustainable. They cannot be taken as granting to a plaintiff the right to an accelerated and lengthy trial on a difficult point of law."

The observations made by Kerr, L.J. to which he was referring were as follows ([1987] 2 Lloyd's Rep. at 51–52):

> "It has been said again and again in this court in recent years that it is

> not sufficient to conclude that the defendants have an arguable case if the issues turn on a point of law, or other material, which enables the court to form a definitive view on the right of the plaintiff there and then . . . In a case like the present, the judge should only give leave to defend if, after full consideration of the material before him, he is satisfied that the plaintiff is not entitled to judgment there and then."

36 I was at first inclined to regard the issue in this appeal as whether or not the Chief Justice was right in disposing of the matter on an O.14 application. On that basis, I thought that the appeal ought to be allowed. The hearing of the application took two days, separated by an adjournment. Six English decisions and one Australian were cited and reference was made to textbooks and other publications. The Chief Justice reserved his ruling. When he delivered it, he referred to most of the authorities cited and to two other English decisions. He dealt fully and carefully with all the submissions made to him. In so doing, it seemed to me, he went beyond merely deciding an O.14 application: he decided the case on its merits. Having reached his conclusion, he looked back and found that the argument advanced by the appellant had been clearly unsustainable. I did not see and I do not see how it can be said that the argument was "relatively short" or that it had been "readily demonstrated" that the point made by the appellant was unsustainable. Moreover, I do not think the fact that judgment was reserved can, without explanation, be said to accord with the expression "there and then" twice used by Kerr, L.J.

37 My attention was then drawn to the decisions in the English cases of *European Asian Bank AG* v. *Punjab & Sind Bank (No. 2)* (3), *Sethia (S.L.) Liners Ltd.* v. *State Trading Corp. of India Ltd.* (10) and *Forestal Mimosa Ltd.* v. *Oriental Credit Ltd.* (4), which are dealt with in detail in the judgment of Fieldsend, J.A. These had not been the subject of argument before us, and we felt that their implications were so important that we offerred counsel an opportunity to address us on them. We have received submissions in writing from them and we have considered them. That I do not deal with them in detail is only because of the desirability of disposing of this matter, which has already been unduly delayed.

38 I propose only to refer to *Forestal*. That was a case where the issue was a point of law and the judge gave unconditional leave to defend. He also gave leave to appeal, while expressing his view that the defendant's argument was correct. The members of the Court of Appeal were all of the opinion that the plaintiff's contentions were correct. Sir John Megaw said ([1986] 1 W.L.R. at 636):

> "In my view, it would neither be good law nor good sense that, if each member of this court took a clear and confident view that the issue, though in one sense arguable, ought to be decided in favour of the plaintiffs, they should, nevertheless, dismiss the appeal, leaving

> the issue of law to be argued at the trial of the action . . . with the prospect of the issue, whichever way it might then be decided by the trial judge, coming again before this court, it may be many months hence."

He went on to say that if all the members of the court were agreed as to the right answer on the issue of law, the court should give effect to it and not remit the case for a renewed argument on the question of law.

39 In the present proceedings, the position is the reverse but the same reasoning applies. It follows that, even if leave to defend should have been given, we should not allow the appeal if we are all in agreement that the decision of the Chief Justice on the substantive issue was correct. It would only lead to the same arguments being repeated at the trial and to another appeal on the same grounds.

40 What Parker, L.J. said in *Home & Overseas Insurance* (5) seems to have been directed towards judges at first instance; nothing that he said conflicts with what was said in *Forestal*, although, as he said himself, there might appear to be a conflict. The difficulty for the trial judge is that he cannot know before an argument is presented whether it is going to be "relatively short," and he cannot judge whether it has merits until he has heard it.

41 So far as the present case is concerned, I do not think that there is anything before us to indicate that another hearing would produce anything other than a repetition of the same arguments. Mr. Dumas did speak of calling evidence, but he gave no indication what that evidence might be or what it might establish.

42 I turn then to the merits of the case itself. Each of the instruments was in the usual form for a bill of exchange, except that in each case there was interposed in the order to pay, between the words "at 120 days" (or other period) and "after sight," the abbreviation "D/A." The first two issues concerned this abbreviation. They were (a) what did the abbreviation "D/A" mean, and (b) was the position of the abbreviation "D/A" within the order to pay of any significance?

43 The case for the bank, as argued by Mr. Vasquez, seems to have been as follows. The abbreviation "D/A" is used in connection with bills of exchange to serve as a reminder that documents of title to goods are to be handed over at the time of acceptance of the bills. The abbreviation is usually placed in the margin of the bill or some other place outside the text, but it conveys the same message wherever it is placed, even within the text. No authority was cited for this proposition, but Mr. Vasquez cited in support *Korea Exchange Bank* v. *Debenhams (Central Buying) Ltd.* (6).

44 Mr. Dumas, for the appellant (then the defendant) argued that the abbreviation might mean "days after acceptance" or "documents on or

against acceptance," citing in support *Thomson's Dictionary of Banking*, 12th ed., at 1 (1974). If the former were accepted as the true interpretation, the bills would have been expressed to be payable so many days after acceptance and after sight, and could not be deemed to be payable at a fixed or determinable future date. If the latter interpretation were preferred, the order to pay was qualified by the requirement that the bill was only to be accepted against the release of documents and therefore the order was a conditional one. In the alternative, Mr. Dumas argued that whatever the abbreviation meant, its position in the order to pay rendered the order meaningless: neither "at 120 days documents against acceptance after sight" nor "at 120 days days after acceptance after sight" makes any sense.

45 On these issues, the Chief Justice rejected the possibility that "D/A" might mean "days after acceptance," because "days after acceptance after sight" did not make sense. He held that it meant "documents on acceptance," which he described as a memorandum of instructions binding on anyone who took the bills and documents "wheresoever it is placed on a bill."

46 So far as the first issue is concerned, I agree. In *Korea Exchange Bank*, Megaw, L.J. said ([1979] 1 Lloyd's Rep. at 550): "Expert banking evidence was given, and, as Donaldson, J. says, it emerges as common ground that 'D/A' in this context means 'documents against acceptance.'" That is the only material available to us regarding the meaning of the abbreviation specifically in relation to bills of exchange. The entry in the *Dictionary of Banking* relates to uses of the abbreviation generally.

47 Where the second issue is concerned, the Chief Justice cited no authority for his statement that it was immaterial where the abbreviation was placed on a bill, and I know of none. One of four expert witnesses in *Korea Exchange Bank* said that he had seen and accepted instruments which contained the abbreviation (or the words "documents to be released against acceptance," it is not entirely clear which), after the word "sight." The other three experts had never seen such instruments. This, as Megaw, L.J. said, constituted no sufficient evidence of accepted commercial usage.

48 Megaw, L.J. then went on to say ([1979] 1 Lloyd's Rep. at 550):

> "If the bill itself contains words by which the drawer's (the seller's) order to the drawee (the buyer) to pay is made a requirement which need be complied with only if the proper documents are produced, then the effect might be—we do not have to decide such a question on this preliminary issue—that the purported bill of exchange would not have the status of a bill of exchange under the Bills of Exchange Act, 1882, because the drawer's order to the drawee might lack the essential quality of being an unconditional order to pay as stipulated by s.3(1) of the Act. On the other hand, the mere fact that there is a

> contractual relation between the seller and the buyer whereby the buyer's obligation to pay is conditional on the proper documents being exchanged for the buyer's acceptance of the bill would not affect the validity of the bill under the Act, so long as the bill itself does not, in the words used by it, make the order conditional."

49 It seems to me that in posing a question which it was not necessary for the court to answer, Megaw, L.J. indicated that it was a question to which the answer was not obvious. I think also that "words" in that passage must include an abbreviation which has a recognized meaning in commercial usage.

50 I agree with the Chief Justice that the presence of the abbreviation in the instruments with which we are concerned may be ignored, because it is meaningless if read as part of the text. I must, however, dissociate myself from the words "wheresoever it is placed on a bill," used by the Chief Justice—words which were not essential to the decision—because I think that had the abbreviation appeared in some different position, as, for example, immediately following the words "after sight," it might well have affected the meaning of the instrument. It seems to me that there is a considerable difference between the insertion of words or symbols in a position where it is at least arguable that they make sense and their insertion where they make no sense and interrupt the sequence of words of technical significance.

51 I respectfully agree with the observation made by Donaldson, J. in *Korea Exchange Bank* (6) ([1979] 1 Lloyd's Rep. at 102) that a court should not be "astute to detect ambiguities in such a document," but I think that those who wish to avail themselves of a facility as technical as the use of bills of exchange would be well advised to adhere strictly to the forms recognized by commercial usage.

52 As regards the third issue, I think it is sufficient to say that I agree with the conclusions of Fieldsend, J.A.

53 Although I do not think that summary judgment should have been given, and I do regard the position of the abbreviation in the text as a material consideration, I agree that the appeal should be dismissed. The order of the court is that the appeal be dismissed.

Appeal dismissed.