Case No: 5MA70080

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MERCANTILE COURT

Date: 20 December 2007

Before :

HIS HONOUR JUDGE WAKSMAN QC

(sitting as a Judge of the High Court)

BETWEEN:

JK SONS (PVT) LIMITED

Claimant

- and-

VIRANI LIMITED

Defendant

Hearing dates: 11,17,18,20,24-28 September
and 3,4 and 8 October 2007

Counsel:
John Dagnall (instructed by Halliwells, Solicitors) for the Claimant

Paul Chaisty QC (instructed by Hill Dickinson LLP, Solicitors) for the Defendant

Approved Judgment

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

INTRODUCTION

The Claims

1. In this action, the Claimant, J K Sons (PVT) Limited, a company incorporated and based in Pakistan ("JK") brings a number of claims against Virani Limited, an English company operating here ("Virani"). They all relate to the supply or intended supply of cloth by JK to various destinations in Canada and Mexico for which JK says Virani is liable. Virani denies such liability.

2. First, JK claims the total sum of US$1,215,362.24 in relation to cloth admittedly shipped, made up of

   (I) US$661,073.35 pursuant to invoices numbered JKSF 60, 66, 69, 73, 113, 134, 149, 151 and 152 of 2003 ("the Disputed Invoices") and

   (2) US$544,288.89 pursuant to invoices numbered JKSF 80,105, 109, 119, 123, 140, 148 and 174 of 2003 ("the Admitted Invoices"),

   together with certain further sums claimed by way of damages for non-payment ("the Additional Claims").

3. Second, JK claims damages for non-acceptance of cloth which was the subject of contracts made in 2001, 2002 and 2003, which was not shipped and which JK eventually sold elsewhere at a loss. The damages claimed are in the principal sum of US $201,351.80 ("the Non-Acceptance Claim"). Included within this claim is a claim for damages for non-acceptance of cloth to be shipped pursuant to Contracts 42 and 43 of 2003 which were admittedly made with Virani. The amount claimed here is US$17,455 ("the Contracts 42 and 43 Claim").

4. In addition to defending JK's claims, Virani brings two counterclaims:

   (I) A claim for the return of monies paid over to JK in respect of cloth which was shipped in 2002 ("the Advance Payments") pursuant to invoices JKSF 171, 173, 188, 189 and 202 of 2002 ("the 5 Invoices") in the total sum of US $395,679.02 ("the Advance Payments Claim"), and

(2) A claim for damages for repudiation by JK of contracts JKSF 42 and 43 of 2003 admittedly made with Virani. The sum claimed is US $20,300. This is in effect the other side of the Contracts 42 and 43 claim.

5. A number of further claims have been made by Virani, in particular a claim for unpaid commission, but it has been agreed that the resolution of those claims should await determination of the matters referred to above.

The Principal Issues

6. In respect of JK's claims under the Disputed Invoices, Virani's defence is that (apart from two invoices) it was at no stage liable to pay such invoices albeit that the cloth was supplied. The liability rested (and rested only) with the ultimate purchaser in Mexico or Canada ("the end customer"). Virani accepts that it would have been liable to pay JK had it received payment from the relevant end-customer. It has received US $147,885.30 from the end-customer in relation to the cloth supplied under Disputed Invoices 66 and 69/2003 and has therefore admitted liability for this sum. Otherwise Virani says that it has received no monies and therefore the balance of the claim under the Disputed Invoices is denied.

7. Moreover, Virani claims back the payments made by it under the 5 Invoices in 2002 on the basis that they were not, in truth, due from it at that time, since the end-customers had not yet paid and have never paid. Virani accepts that the sums claimed under the Admitted Invoices are due but seeks to set-off against them the Advance Payments.

8. As to JK's damages claim for non-acceptance, Virani denies this on the basis that it was never a party to, or in any event liable for, the cloth to be supplied under the contracts in question. As to Virani's damages claim against JK for repudiatory breach, JK denies that breach.

BACKGROUND TO THE DISPUTE

The Parties

9. JK is a long-established textile producer and exporter with a present annual turnover of around US $50m. Its main business is the expert of grey cloth and yarn. Its Managing Director is Mr Faiq Jawed.

10. Virani carries on business here as an importer and wholesaler of textiles. It purchases substantial amounts of cloth from Pakistan although not all from JK. Its Directors include Mr Virendra ("Bakul") Virani and his brother Mr Paresh Virani.

11. JK and Virani have traded with each other since about 1974 or 1975. The points of contact at JK were originally Mr Jawed's uncle, Mr Zahid Anwar, then his brother Mr Shahid Anwar and then, since 1994, Mr Jawed himself. Very substantial business was transacted between the two companies. So the individuals concerned all knew each other very well by 2001, when the seeds of the present dispute were sown.

The Original Joint Venture

12. It is common ground that until 2001 the parties traded with each other simply as buyer (Virani) and seller (JK). The most common method of payment was by letter of credit ("LlC"). The cloth purchased by Virani was usually sold within Europe.

13. However, following a suggestion from Virani that it would be to their joint advantage to sell cloth into other markets, in Canada and Mexico, the parties agreed upon a joint venture ("JV"). Particular customers in those markets were identified by Virani, and JK was then to supply cloth to them at prices fixed by the parties after discussion between them. Virani was to receive a commission or profit share (for present purposes the description is unimportant) based upon the overall profit calculated by reference to the sale price to the end-customer and the cost of production as agreed between the parties.

14. Some contracts were made in the first part of 2001 where, it is accepted, Virani acted purely as an agent and received a fixed commission of 5.5% of the value of the contract. Those contracts were numbered JKSF 28, 54 and 59 of 2001. They are not directly relevant to this dispute. The first contract which is, was made later, in November 2001 and was numbered 107/2001. Further contracts were made in 2002. Many shipments were made in the course of 2002, some to Canada for a company called CS Brooks ("CSB") and some to Mexico for companies called Maquiladora and Mastercraft Textiles USA Inc. ("Mastercraft"). Although difficulties were experienced in obtaining payment for those shipments, ultimately JK was paid for them all. Accordingly, no claim in these proceedings arises directly out of such shipments but the way in which they came about, as between JK and Virani, is of considerable relevance to the issues in this case.

Shipments in 2003

15. Shipments to Mexico and Canada continued throughout most of 2003. Most of them ultimately went unpaid. This is what gave rise to the claims made under the Disputed Invoices and the Admitted Invoices, all of which relate to shipments made between March and September 2003. Broadly speaking, the shipments made pursuant to the Disputed Invoices consisted of stock originally purchased and held by JK for the purposes of contracts made in 2001 and 2002 which was not shipped at the time because it became clear that the original end-customer was either unwilling or unable to take it. I shall refer to such stock as "Old Stock". Not all of the Old Stock was disposed of to, or through Virani in 2003 however. That which remained became the subject of the Non-Acceptance Claim referred to in paragraph 3 above, save for stock which is the subject of the Contracts 42 and 43 Claim.

16. On the other hand, the shipments made pursuant to the Admitted Invoices consisted of stock purchased by JK in order to satisfy contracts themselves only made in 2003. I shall refer to this stock as "New Stock". It is common ground that such contracts were (a) made by JK with Virani as principal and as buyer and (b) were in no way part of any *N*. The same is true of the balance of the stock which was to have been supplied pursuant to Contracts 42 and 43 of 2003.

17. By the end of 2004, JK was out of pocket by around US $1.2m in respect of Old Stock which had been shipped, and was left with substantial amounts of Old Stock for which it had already paid. By that stage, the dispute between the parties was largely defined. JK was asserting that Virani was contractually liable for the Disputed Invoices and losses made on the unshipped Old Stock, while Virani said that it had no such liability. Virani's contention was (and remains) that at all material times from 2001 to 2003, the contractual arrangements between JK and it in relation to Old Stock were to the consistent effect that although invoices and other documents relating to the stock to be shipped were made out to Virani, it had no obligation to pay JK unless and until it was itself paid by the end-customer. I shall refer to this as "pay when paid" ("PWP").

18. In this action, JK contends, in broad terms that certainly by late 2001, the nature of the JV agreements between it and Virani were to the effect that Virani had personal liability on the contracts. In the alternative, it argues that such became the position in any event by March 2002. Further, it says that in about March 2003 not only did Virani have personal liability but

it was agreed that there would be no profit-shares between the parties, or commission arrangements. Virani bought purely as principal in the usual way (ie principal-to-principal, "P2P").

19. All of this is denied by Virani. Moreover, since it had, by the time of the dispute, paid the 5 Invoices ahead of being paid by the end-customer, and was never paid by the end-customer, it contends that those Advance Payments are recoverable by it as a loan, or pursuant to an implied term of such agreement as it did have with JK andlor pursuant to a restitutionary obligation to reimburse it on the part of JK ("the Advance Payments Claim"). For its part, JK responds that

(1) if it succeeds on its claim under the Disputed Invoices ("the Main Claim") the Advance Payments Claim must fail (which is accepted by Virani), but

(2) even if the Main Claim fails, the Advance Payments Claims still fail. This is because, absent express agreement between the parties, they were payments made without reservation pursuant to invoices already raised by JK, and honestly taken and used by it.

THE EVIDENCE

20. It is common ground that there is no discrete express agreement in writing setting out either side's position. There is, however, a large body of contemporaneous documentation, including numerous e-mails passing between the parties, sales contracts, invoices, shipping documents and documents passing between the parties and their banks or between such banks. In order to discern the true position it is necessary to examine many of those documents in their proper commercial context. It is also necessary to evaluate the oral evidence given by the parties as to various telephone conversations which one or other party says took place throughout this period. The existence andlor content of such conversations was often in dispute.

21. For JK, I heard evidence from Mr Jawed ("FJ"). For Virani, I heard from Mr Bakul Virani ("BV") and Mr Paresh Virani ("PV"). I had the opportunity to observe them give evidence over a lengthy period of time. The trial itself took place on 11, 17, 18, 19, 20, 24 - 28 September, and 3, 4, and 8 October 2007. I was provided with a transcript of the cross-examination of FJ. Written closing submissions were provided to me on 22 October and 6 and

23 November. Following a Note from me on 27 November, further written submissions were made on 30 November and 5, 7 and 10 December. I am most grateful for these, as I am to both Counsel generally for their assistance.

22. In a case of this kind, which featured numerous dealings between parties over a three-year period, where the situation on the ground (particularly in terms of end-customers) was often changing and where the accounting position was often complex, it is not surprising that there were times when the account of events given by either side was somewhat confused or inconsistent. In addition, as might be expected, the parties often concentrated on the particular commercial deal in hand and the practicalities of getting payment, as opposed to which party was liable in law if in fact the end-customer did not pay.

23. There was a very large body of e-mails passing between the parties, which was their principal method of communication along with telephone conversations and the use of an MSN "chatline" and a video-conferencing facility. It is not always possible to reconcile, or explain, the content of all of the e-mails, nor is it necessary to do so.

24. A number of e-mails were typed in capitals. For ease of reading I have reproduced them below in ordinary type but making clear where capitals are used. I have also corrected typographical and obvious grammatical errors except where the words as written may have some significance.

THE FIRST JV

25. It is common ground that the very first incarnation of the JV, which occurred before September 2001 did not involve any personal liability on Virani as buyer. The cloth was to be shipped to an end-customer in Mexico, Kentucky Lajat ("KL"), who had been found by Virani and agreed to by JK. Most importantly, KL was to make payment to JK by letter of credit ("LlC"). The first two contracts with KL are evidenced by JK's standard form of sales contract documents, numbered 28 and 42 of 2001, dated 20 March and 4 May 2001. KL duly opened LlC's in relation to these contracts and the relevant goods were supplied. A third contract with KL, number 54 of 2001 was made on 30 May 2001, also requiring KL to open an LlC. This was for a much larger quantity of cloth than before, namely 1,080,000m to a total value of US$685,800. It was to be delivered in stages, the first full container load ("FCL") (which would be about 120,000 m) in August 2001 and thereafter 2 FCL's a month

from September to December 2001. However, in the end KL never opened an LlC in respect of this order and never took any shipments. In respect of the shipments actually made by JK to KL, KL was invoiced direct by JK.

26. In addition, by contract numbered 59 of 2001 dated 25 June 2001, JK agreed to and did supply cloth to an Australian company called Sheridan. Payment was by Lie.

27. In the case of the shipments referred to above, JK paid to Virani a commission of 5.5% of the sales value of the cloth shipped, which approximated to 50% of the overall profit made by JK. It was this payment which reflected the joint venture, profit-sharing, nature of the transactions.

28. Accordingly, in terms of the deals done prior to 28 September 2001, the other contracting party was the end-customer not Virani. This was not a problem for JK or its bank smce payment was (or was intended to be) guaranteed by an LlC.

THE E-MAIL OF 28 SEPTEMBER 2001

Introduction

29. Virani's case is that after this e-mail ("the September 2001 E-mail"), the contractual relations between the parties were much as before, with Virani having no liability itself under the contracts made for the purpose of shipments of cloth to Canada and Mexico. JK's position is that following this e-mail, Virani was liable.

30. The e-mail (in capitals) reads as follows:

> "Dear Faiq
> re: non european business
>
> We can get insurance on all of the companies that we deal with here in england. the cost of the insurance is Ip cent on the sale value. we can get 85 per cent cover on the same value (that is if the customer goes bust, then we can recover from the insurance company 85 per cent of the outstandings up to the limit of the insurance.
>
> What we have been doing presently is splitting the profit between the cost and nett selling price on *50/50* basis. here, we would have to charge the insurance premium onto your account separately and any proceeds would be remitted directly to you upon receipt.
>
> You would have to invoice to us on consignment basis and we would remit to you the funds upon receipt from the customer. the bill of lading would have to be made out to virani limited (for insurance purposes to retain our control should anything go wrong). under our policy should anything go wrong, we can claim 85 per cent on all the goods invoiced. however we would have to retum back to the insurance company to resale value of the goods which are afloat up to the amount that they have paid to us.
>
> I am explaining in detail the entire procedure, as there should not be any misunderstanding between us at a later stage.

I am faxing to you the balance sheet of house oflajat which i received earlier this week....
pis study and confirm you are in agreement to do it this way.."

31. By this stage, problems over whether KL would in fact open a further LlC in favour of JK had arisen, and the question was what security for payment could be achieved for JK in the absence of an LlC.

The Terms of the September 2001 E-mail

32. In my judgment the terms of the September 2001 E-mail, and their import, are clear. Virani would obtain credit insurance which would cover 85% of the invoice value of the goods to the end-customer. (It is common ground that JK could not obtain such insurance in Pakistan.) In order to do this, Virani would have to interpose itself between JK and the end-customer so as to be, or appear to be, the seller to the end-customer, whose credit was being insured. In truth, however, the insurance was for the benefit of JK which is why Virani agreed that in the event of a claim being made, the proceeds thereof would be remitted to JK. It is also no doubt why JK would be paying the premium. The fact that Virani was obtaining the insurance and not JK would also mean that Virani had to be the beneficiary of the documents of title of the goods so that the bill of lading would be made out to it. Equally the invoice would have to be made out to Virani. Although not stated in terms in the September 2001 E-mail, it would obviously follow that Virani would invoice the end-customer in turn and would, as appropriate be in a position to endorse the bill of lading over in favour of the end-customer.

The Meaning of "Consignment Basis"

33. This was a term introduced by Virani. The context was the perceived need, now, for JK to invoice Virani and not the end-customer. Thus the expression "consignment basis" was invoked in some way to explain or qualify the new invoicing arrangement. It is common ground that there was no express discussion between the parties as to the meaning of this term.

34. The evidence of BV and PV was that this was a well-known expression used in the trade of buying and selling goods. In essence it meant that the person purchasing on the "consignment basis" would not be liable to pay the price unless and until the goods were on-sold by him and he received the proceeds of the sub-sale. In other words, PWP. In aid of this, Virani referred to the "Wikipedia" definition which refers to the consigning of goods by one person into the

hands of another, while retaining ownership until the goods are sold on. It is said to be "usually understood" that the consignee would pay the consignor "only after the sale, from the proceeds".

35. Goode's *Commercial Law (3rd Edition)* puts the matter in this way at p162, in the introduction to the chapter on *Agency in Commercial Transactions:*

> "Yet another [method of selling] is consignment. The enterprise delivers the goods to consignee to hold in first instance as bailee but on terms that the consignee is to buy the goods if he notifies his intention to do so and that he is deemed to have elected to buy them if he fails to return the goods within a given time or otherwise adopts the prospective purchase transaction, typically by selling the goods."

36. What both of these definitions make clear is that in a consignment sale, there is no unconditional liability to pay by the consignor, in the first instance.

37. In many respects sale on the "consignment basis" is analogous to "Sale or Return". In its written closing submissions and in cross-examination of BV and PV, it was suggested on behalf of JK that, as used here, the expression meant "sale or return" but so that the liability arose as soon as the sub-sale had been made, and was not further conditional upon receipt of the proceeds of the sub-sale. I have no doubt that, depending on the context, the expression could bear this meaning but this is likely to be in the usual case where (i) the goods are supplied by A to B and (ii) B has then to see if he can resell the goods to someone else. Here the goods went direct to an end-customer whose identity was already known and where the price to that end-customer was already agreed as between JK and Virani. There was therefore no uncertainty as to whether the goods could be on-sold. So the expression "consignment basis" as used in the September 2001 E-mail must have meant something else. Indeed, it is further to be noted that this is not the understanding which FJ himself claimed to have had. In cross-examination he said that he did not know what the expression meant, nor did he think to ask Virani what it meant. I have to say that I find this somewhat unlikely not least because FJ was content to use the expression in his own e-mails and other documents later. In any event, of course, absent an express agreement between the parties, the term has to be construed objectively in its own particular context.

Virani's **Obligation**

38. It seems to me that here what Virani was saying was that although it would be invoiced in its own right for the goods, it would not have any immediate liability for them. That would depend riot on whether or not they were on-sold (since they were already on-sold) but whether and when the end-customer paid. If the end-customer did not pay, then they were obliged to make a claim on the credit insurance and pay the proceeds to JK. In this context then, and at this stage, "consignment basis" was equivalent to PWP. In fact, in cross-examination, FJ more or less conceded that this was his understanding. He added that as far as he was concerned, although the September 200I E-mail made reference to insurance only in the event that "the customer goes bust", the insurance would be there to cover non-payment even outside insolvency. Given that he was not involved in the obtaining of insurance at all, I think that this would have been a fair assumption to make. Indeed, Virani's own pleaded case (as specifically amended) was that insurance was to be obtained to cover insurance for non• payment due to insolvency "or in circumstances of protracted default". (see paragraph 62 G) of the Re-re-Amended Defence and Counterclaim). FJ added that if for some reason the end• customer had not paid and had not triggered a claim under the credit insurance, the end• customer would have to return the goods or pay for them itself. Further, as will be seen hereafter, in relation to the further contracts made in late 200I and after the September 200I E-mail, FJ accepted in evidence that he did not think Virani was undertaking personal liability.

39. It was understandable why FJ would think this and be content with such an arrangement. If there was a serious problem with payment by the end-customer, insurance would essentially cover his losses although not the expected profit. The payment position was thus secure albeit not through the mechanism of an LlC.

40. Notwithstanding this, it has been argued on behalf of JK that such an arrangement must have entailed that Virani was to assume ownership of the goods, when shipped, so as to enable it to effect the credit insurance and that this in turn must have meant that it was going to assume liability to pay for them, as buyer, in any event. Otherwise, it is said, JK and Virani must have been conspiring together to mislead the credit insurers. I do not think that this follows. Much would depend on the actual terms of the insurance which have not been disclosed but it does not seem to me to be implausible that Virani could have a sufficient insurable interest even where it takes goods on a PWP basis. FJ's evidence as to what if anything was agreed about

ownership was unclear. He accepted that the September 2001 E-mail did not speak of ownership and that he could not actually recall them talking about ownership in any discussions although he thought that they wanted it. In any event, whatever the position between Virani and the insurers, it makes no difference because on a proper analysis of what actually passed between the parties, I am of the firm view that they agreed, or must be taken to have agreed, that Virani would be buying on a PWP basis.

CONTRACT 107 OF 2001

Background

41. Following the September 2001 E-mail, there was only one further contract made that year. This was contract 107 of 2001 dated 1 November 2001. It is important to note, however, that no shipment was made under, or in relation to it, until 2003. The end-customer here was not KL but Maquiladora, a sister company of KL also based in Mexico.

The Sale Contract itself

42. This is addressed to "..Virani Limited..on behalf of ..Maquiladora..". 360,000 m of cloth was to be shipped to Mexico in three stages, one FCL in January, February and March 2002. The price was US$0.77 per metre. Although there is a reference to payment by LlC, FJ accepted that this was not what had been agreed. Instead, and as can be seen from Virani's e-mail to JK dated 30 October 2001, the goods would be sold to Maquiladora on "90 days from the *B/L* date". In other words, Maquiladora would have to pay within 90 days from receipt of the shipping documents. In evidence, FJ accepted that this was DA [documentary acceptance] terms on Maquiladora. The contract also referred to "payment on consignment basis to Virani." This might have made more sense if it had said "by" Virani rather than "to" Virani, but in any event, FJ accepted in evidence that on this contract as first made, Maquiladora had liability to JK and not Virani. He also said at one point, more generally, that paragraph 16 of the Amended Particulars of Claim was inaccurate to the extent it suggested that Virani had personal liability following the September 2001 E-mail. This really only came after the e-mail of 5 March 2002 (as to which see below).

43. There is no reason why JK should not have agreed to deal with Virani on a PWP basis at this stage. Virani made it clear in the e-mail of 30 October that it had obtained credit insurance up

to a limit of £250,000 in relation to Maquiladora. The value of contract 107 was about US$277,000. JK thus had ample security.

CONTRACTS 122, 123 AND 124 OF 2001

Sales Contracts 122-124

44. By early December 2001 another sales opportunity had presented itself, this time, through an end-customer in Canada, CSB. It led to the making of contracts 122-124 of 2001. The basic terms as to price and quantity were set out in 3 separate e-mails from Virani to JK dated 14 and 15 December 2001 referring to costs as having been agreed on 3 December. These were then embodied in JK's Sales Contract documents. In each case the cloth type and quality was the same but the width (and hence the price) differed. The cloth was all to be supplied in 6 monthly consecutive shipments starting in February 2002. The total value of each monthly shipment came to about US$198,300. Again, although the Sales Contracts referred to payment by LlC, in actual fact it was a simple obligation on the part of CSB to pay within 90 days. This mean that in practice, CSB would not be making any payments until May 2002. Accordingly, before JK received any payment it would have shipped out goods worth nearly US$595,000.

45. As to credit insurance, Virani's e-mails of 14 and 15 December referred to a credit limit of £300,000. If one assumes that this could be equated (at the time) to US$500,000, it would mean that the available insurance would more or less cover the amount outstanding prior to monies coming in on a monthly basis. In fact, if (as appears to be the case) the insurance would cover only 85% of sales value, the amount actually covered would be 85% of US$595,000 ie around US$505,000.

46. It was put to FJ in cross-examination that when he agreed to these contracts, he knew that the existing insurance would not cover them and this indicated that he was either cavalier about the extent of available credit insurance or was not concerned about it at all.

47. I do not accept this. If credit insurance was not of importance to JK it is difficult to see why Virani should have gone to the trouble of proposing the scheme it did. It is equally difficult to see why Virani should make a point of telling JK in terms what cover was available. The very

real importance attached to insurance cover by JK is also shown by FJ's letter to PV dated 15 December 2001, referred to in paragraphs 51 and 52 below.

Possible Further Orders

48. It is also important here to note a further e-mail (in capitals) from Virani sent on 15 December which stated as follows:

> "re: c.s. brooks -
> We have orders in hand for further 900,000 mtrs for six months on 7646 3030 249 cms @js 73/mtr(cost 61/mtr. ..) there is a good margin. we cannot get any further credit.insurance presently with our credit insurance company. apart from these orders we have in my hand further orders in 9676 4040 etc for further $600,000 per month but i am unable to take these orders unless you can confirm to that
> A) you wish to go ahead without insurance
> B) that you have insurance yourself for this customer
>
> pis advise per return as i do not have much time because they will not wait for us any more. if you are ready then let me know per return tomorrow."

49. Another e-rnail, sent almost at the same time, refers to further opportunities for more sales. It stated, among other things, as follows:

> "we need to confirm further following quantities which we have in our hand. i am disappointed that you have not got any reply from the insurance company to whom you have contacted some time ago. perhaps a more diligent aggressive way may be more suited towards these americans.. we have further following orders in hand and i hate losing orders for the wrong reasons... we have further enquiries from mexico in the following items as under. .."

50. It is quite obvious from these e-mails that Virani was encouraging JK to agree to supply further quantities of cloth over and above those to be supplied pursuant to contracts 122-124 of2001.

JK's letter to Virani dated 15 December 2001

51. This dealt mainly with Virani's enquiries as to further orders, but also, at the end, as to what were to become contracts 122-124. As to the latter, JK said:

> "We also acknowledge receipt of your E-mail JKG-7, JKG-8, JKG-9 dated December 14 2001 placing the purchase order for.. C.S.Brooks, Canada Kindly note you have given shipment schedule JanurylJune 2002 for all three contracts. You are aware that almost half month of December is over and it would not be possible for us to ship during January. Anyhow, we shall ship the goods February onwards. We shall ship you double quantity during any month to meet your given shipment schedule. In the meantime, we are issuing our sales contract and faxing you separately."

52. As to the former (further possible orders) the letter made it quite clear that they could not be undertaken without appropriate insurance cover. In particular:

> "RE: C.S.BROOKS
> We understand that you have lot of business in the pipeline but we are helpless at this moment as we do not have sufficient Insurance to ship them on DA basis without L.C. You also have to understand our position as we sitting in Pakistan or Bahrain are neither used to do insurance on the customers nor we have infrastructure available in our

> countries for the same.. We are trying to get the insurance on our customers. The latest reply we got from US Company. They have passed our request to the International Division and they will reply and confirm within a week time.
> In the meantime, we are also trying from Pakistan to get this sort of insurance.. we never heard this type of insurance available in Pakistan. Presently we have no option left other than waiting until we have the insurance and at least we should safeguard our risk. My request to you would that if you can ask the customer that they can wait little more before placing the order. So we would not regret leaving the orders if we get the insurance at the later stage.."

53. FJ confirmed in evidence that at that time, as far as he was aware, the shipments already agreed were covered by insurance and that he was making it clear in his letter of 15 December that he was not prepared to do business without it. I accept that evidence.

54. That credit insurance was an important consideration for any further orders is supported by the e-mail from Virani dated 18 December 2001 in which PV asks FJ whether he has yet had any news on credit limits for Canada and Mexico. In the context of FJ's previous letter this is clearly a reference to the further enquiries which JK was making about obtaining insurance from US or Pakistan-based insurers.

55. In the light of all this, the suggestion made (for example) by BV in evidence that at the end of December 2001, JK was knowingly taking orders (ie making contracts) far in excess of the available credit insurance cover, is simply wrong. Nor do I accept that credit insurance was merely a "nice idea" to JK but not really important to him, as BV also suggested. PV made a similar point in his evidence about what JK's attitude was to credit insurance at the end of 2001. He suggested that on the mathematics of the existing orders (ie contracts 122-124) there would be a significant shortfall because 85% cover in fact meant that one takes 85% of the credit limit (say US$500,000) not 85% of the total sales value. Thus the maximum payout is US$425,000 as against the value of goods sold of US$595,000. In the absence of further evidence about how the policy worked, it is not possible to say whether PV is correct in his analysis or not. However, if he is, this does not seem to have been a point appreciated by FJ and there is no evidence that it was brought to his attention by Virani, which, after all, was the party procuring the insurance in the UK.

THE E-MAIL OF 5 MARCH 2002 AND THE POSITION THEREAFTER

Introduction

56. It will be recalled that JK's case is that if Virani had not undertaken liability to pay in any event on the JV contracts prior to 5 March 2002 (as I have found) it nonetheless became so liable as a result of the e-mail dated 5 March 2002 ("the 5 March E-mail").

Background matters

57. By the end of 2001, KL had still not opened an LlC in favour of JK under contract 54 of 2001. Virani stated (by its e-mail of 22 December 2001 in response to JK's, of 21 December) that KL would open an LlC for the first FCL (of 120,000 m) with payment for the next two FCL's being on a CAD (cash against documents) basis. This gave more security than a simple contractual acceptance to pay against documents (DA) because the documents would not be released until payment was actually made. An LlC was obviously superior again, because (a) the payment obligation was upon the issuing bank and (b) payment was to be made in any event, provided that the documents conformed to the terms of the Lie. It was not open to the buyer to refuse payment and simply not take up the underlying documents and goods.

58. The delays in making payment arrangements on the part of KL were causing serious problems for JK which by then had 360,000 m of cloth manufactured, ready to be shipped. In order to do this, it had obtained, and used, bank finance. If there were delays in shipment then JK faced increased and extended interest charges.

The E-mails

59. By February 2002 the position with regard to KL had not progressed. Virani sent an e-mail (in capitals) to JK about it dated 15 February 2002 which read as follows:

> "..for all goods sent to virani on consignment basis, pis note the following:
> bill of lading must be made out to the order of virani limited to keep our control in case of any unforeseen problems.
> invoice must be made out to virani for our bookkeeping purpose.
> all other documentation must be made out in the name of the buyer as we shall only be changing the invoice and sending the document through the bank to the customer.."

60. JK agreed with Virani's proposal by its e-mail dated 18 February 2002.

61. Either by then or by 20 February, Virani had arranged that the LlC for the first 120,000m would in fact be opened by Maquiladora, and not KL. Likewise, it was seeking to have Maquiladora take the next two FCL's on a CAD basis. See Virani's e-mail of 20 February and JK's response of 21 February. Moreover, Virani's e-mail dated 28 February 2002 (number PNV-JKG-40) reassured JK that there was sufficient credit insurance cover on Maquiladora for the two further FCL's, which were not secured by Lie.

62. Then, by its e-mail (in capitals) dated 28 February 2002, JK wrote as follows:

> "..Re our invoice ..022/2002..shipment to Canada.. Kindly note we have already passed shipping advice against shipment of the above referred goods but till date we are awaiting the buyers bank name and address where we have to send documents for payment..

A similar request was made in respect of a shipment to Vera Cruz, Mexico, then being loaded.

63. The Canada shipment was a reference back to contract 123 with CSB and the fact that a shipment of one FCL was now being made. The Vera Cruz shipment is a reference back to contract 107 of 2001, where Maquiladora was the end-customer, as referred to above. The e• mail says 107 of 2002 but this is clearly an error as can be seen from the description of the cloth which matches that in contract 107 of 2001. The important point for present purposes is that FJ seems to have thought that the relevant shipping documents would all be sent direct to the end-customers for payment.

64. Virani responded to this by its e-mail (in capitals) dated 28 February which reads as follows:

> "this we have sold on 90 days from bll date. so you have to send the document to virani by courier on consignment basis. we shall then send the document and the bl thru the bank to the customer for acceptance and were remit to you upon receipt of the payment deducting the charges and the profit element.
> pis confirm.."

65. By that e-mail Virani was asking that the documents be sent directly to it in Manchester and then it would send them on, through its bank, to the end-customer for acceptance. Virani obviously knew what the term "acceptance" meant (ie liability to pay) and indeed neither BV nor PV suggested otherwise.

66. The response to this came in JK's e-mail (in capitals) dated 2 March:

> "Many thanks for your E-mail dated February 28 2002 and subsequent telephonic conversation regarding documents routed through bank. Kindly note we have already negotiated the documents with our bank and we cannot send the original documents directly to your office. According to SBP Rules, documents must be despatched to your Bank by our Bank.
>
> Our Bank can send documents on DA basis to your Bank along with instructions that documents should be delivered to Mls Virani Limited without getting any irrevocable undertaking for payment of export proceeds.
>
> Please let us know the bank name and address immediately so that our Bank can send the original documents to your Bank."

67. There was some suggestion in paragraph 5 of FJ's second witness statement that the word "can" in the first line of the second paragraph of that e-mail should have read "cannot". However, in oral evidence, he was less sure about this. He thought that he may have said "can" because at that stage he had not actually contacted his bank as to whether they would permit what he was proposing. He certainly did not seek to correct any mistake at that time by e-mail. Given the terms of the e-mail and FJ's uncertainty as to whether he was actually

mistaken or not, I think that FJ meant what he wrote. What he was saying in his e-mail was that he could not send the documents direct to Virani because the rules of the State Bank of Pakistan ("SBP") did not permit this. SBP was JK's bank and it had given, or agreed to give finance to JK in respect of its shipments, on the security of the shipping documents. However, as he thought at the time, the documents could then be released by Virani's bank to Virani without any irrevocable undertaking for payment of "export proceeds". This last phrase is unclear - and in particular whether it was a reference to an undertaking by Virani's bank or Virani. None of this matters much because (a) Virani made it clear by its e-mail in response what it wanted and (b) FJ was clear that at some point between 2 and 5 March he consulted, or consulted further with, JK's bank.

68. Virani's response e-mail was also sent on 2 March (numbered PNV-JKG-46). It reads as follows:

> "..re: shipmates to Canada and Mexico procedure..
> We ask you to ship the goods directly to the destination with the bill of lading and your invoice made out in our name. This is for the primary reason that we are insuring the goods with our credit insurance company on your behalf. one of the conditions of the insurance company is that at all times we, Virani must retain control of the goods
> We ask you to send the goods to us thru the bank with instructions to release the same to us without payment or acceptance.
> We would then send the document to the customer, with valid credit insurance cover, through ourbank with our invoice and endorsing the bill of lading with a draft for their acceptance. this way the customer would only receive the documents once he has accepted the draft, and this procedure would comply with the credit insurance terms.
> This way we have achieved the transaction being fully insured by the insurance company which is not possible to do from Pakistan.....We hereby undertake that the goods and the insurance cover taken by us on your behalf until the time of receipt of payment by us from the customer would be for your order and account.....We further undertake to remit the funds to you after deduction of our charges, according to our agreement would be remitted to you within 48 hours of receipt of funds by us to you by swift.
> This way we intend to safeguard your interest on the goods and the payment in full.

69. Virani was thus requesting that the documents to be sent to it initially. They should be sent via its own bank but then released to it without Virani having to payor accept an obligation to pay, in return. (The second paragraph of this e-mail refers to "..send the goods to us.." but in context it should have said "documents" not "goods"). The end-customer, however, would be required to give an acceptance against the documents. Again, it is quite obvious from this e• mail in particular that Virani was well-aware of the way in which documentary collections worked and that they normally required the buyer's bank (the collecting bank) to receive either payment or an acceptance (ie a contractual undertaking to pay) before the documents could be released.

70. This e-mail also makes it clear that insurance was stilI a very important feature of the JV transactions. Virani was explaining that if its requested procedure could be followed then JK's interests in the goods, and payment therefor, were protected.

71. However, in his response, the 5 March E-mail, FJ wrote to PV as follows:

> "Dear Bakur Bahia/Paresh Bahia,
> Kindly refer telephonic conversations with the undersigned.
> RESHIPMENTS TO CANADA AND MEXICO
> Kindly note as explained over phone, we have no problem to send documents directly to you without any acceptance but the only major problem is for our Bank where they do not allow us to avail the Finance and due to this we shall be entangled in major financial crunch. You will appreciate that at the time of finalisation of the contract, it was in our mind that we are finalizing the business on DA basis and from somewhere the acceptance will somehow come but correct picture has come up after actual execution of the shipment.
> Now you can only help us under the above situation. We suggest that for the payments which are 90 days from BIL date you can give acceptance for the period 110 days or maybe 120 days so we have sufficient time to get the payment from the buyer. If your acceptance involves any charges, you may deduct the same from the proceeds.
> We further assure you in case of any delay or problem, we shall do our utmost jointly in order to solve the same. We do not want you to put in the trouble but we also expect from you the same things which we hope you will understand. We personally feel it should not be a problem for you as a matter of trust and if we can start production of goods on your instruction worth million Dollars without knowing the customers. You should also have equal trust on us. We hope you will understand our genuine problem and will extend your usual co-operation.
> Best regards...
> FAIQ

72. In my judgment the terms of this e-mail are clear. JK, for itself, could have lived without any acceptance by Virani (unsurprising in the light of the then credit insurance regime) but JK's bank could not. Since JK relied upon its bank to finance these sales, it had to conform to the bank's requirements which include acceptance against documents by Virani. In order to help Virani, its payment obligation could be 110 or 120 days from the date of shipment (ie date of the bill of lading) while the end-customer would have to pay within 90 days. This would give Virani a margin in case of late payment by the end-customer. Moreover, as Virani was giving these acceptances at JK's request, it was prepared to pay any bank charges incurred by Virani in giving them.

73. The last paragraph indicated that JK would try to be flexible in the event that Virani experienced any delay in or problem with payment from the end-customer. This was not a contractual commitment but just a matter of trust between the parties. It was no different from the fact that (as was the case) JK had already produced very large quantities of cloth on the say-so of Virani, destined for end-customers, even though the payment arrangements (eg opening letters of credit) were not properly in place at that stage.

74. In evidence both PV and BV accepted, without much difficulty, that the 5 March E-mail was indeed requesting that Virani accept liability to pay in any event, for shipments to be made to

Canada and Mexico under the JV arrangements. They understood that this was a requirement of JK's banle As will be explained below, in relation to all relevant future shipments, on the face of it, Virani provided just such acceptances.

75. It is very important to note that this requirement, obviously, only applied to cases where payment was to be made on DA terms. If, for example, either at the outset or subsequently the goods were to be shipped on CAD terms in relation to the end-customer, there would be no need for any acceptance by Virani and the documents would not be processed that way. The documents would go straight to the end-customer who would only obtain them if the goods were paid for there and then. Some of the contracts made after March 2002 were indeed on that basis.

76. FJ confirmed in evidence that the bank had made it clear to him, before 5 March that Virani had to be liable under these shipments and I accept that evidence.

Telephone Conversations in relation to the 5 March E-mail

FJ's evidence

77. FJ accepted in evidence (as is clearly the case) that there was no e-mail back from Virani accepting the terms of the 5 March E-mail. Nonetheless, as far as he was concerned they were accepted because Virani gave the relevant acceptances against documents when the shipments were made. He added, however, that there was a telephone conversation between PV and/or BV and himself before he wrote the e-mail, in which he explained the position set out in the 5 March E-mail and Virani accepted it. He was taken to task in cross-examination for not having referred to such a conversation in his witness statement. However, I do not think that there is much in this point because it is obvious from the first line of the e-mail that there had been a prior telephone conversation in which he had explained the position.

78. More significantly, while it was suggested to FJ that there was no such conversation, it was not put to FJ that there had been telephone conversations after the 5 March E-mail in which (a) BV made it clear to FJ that Virani would not accept any fonn ofliability (other than PWP) and (b) JK accepted this position. (That there was no alternative version of a conversation being put was expressly referred to during cross-examination of FJ - see the transcript for 19 September page 44A-D). However, this is what both BV and PV said (albeit in slightly

different ways) when they were cross-examined on the 5 March E-mail. Given their acknowledgment that what this e-mail sought was indeed an unconditional acceptance of documents by Virani, on their case, there would have to have been some adverse reaction to and rejection of the e-mail. Otherwise, their insistence that it changed nothing in terms of their liability would not make much sense.

RV's evidence

79. BV said that after he received the 5 March E-mail he went to see Virani's then bankers Bank Leumi ("BL"). He told BL that JK's bank needed an acceptance of some kind. As a result, BL came up with a form of words which was conditional in the sense that it would not actually constitute an unconditional acceptance - so that, in giving it, Virani would not be rendering itself liable to pay in any event for the goods. The same form of words was then agreed with Virani's later bankers namely (according to BV) Bank Negara and Ansbacher. (I add that in fact Bank Negara appears to have been on the scene before March 2002 - at least from January 2002, as is shown in the document at Bl/16.) Although no such undertaking provided to BL in 2002 has been produced, the bundle does contain examples of undertakings provided by Virani to Ansbacher. Given that BV's evidence was that the form of undertaking did not change, it is convenient here to recite the terms of the example to be found at C/58, addressed to "The Manager, Ansbacher & Co." in Birmingham, and dated 8 April 2003 ("the Undertaking"). It is on Virani headed paper, signed by BV, and says as follows:

> "Dear Sirs,
>
> We refer to documents for US$72,520 per your letter dated 7.4.03 and we hereby undertake to reimburse you with the value of these documents on the due date 29.7.2003.
>
> Kindly arrange to forward the original set of Bills of Lading along with the other documentation in your possession in connection with the abovementioned set of documents.
>
> Kindly note that payment should only be effected to the supplier up to US$72,520.00 on the due date upon receipt of written instructions from us at the time of payment.
>
> Yours faithfully,..."

80. There is an issue as to what, objectively, this letter should be read to mean, and I deal with this in paragraphs 113 to 118 below. For present purposes, however, the point is that according to BV this matter was expressly discussed with BL who said that on this wording neither Virani nor the bank would be liable. BV then took this form of wording to FJ and explained to him what it meant. In particular he told FJ that the conditional nature of the

acceptance meant that Virani would only have to pay if and when it was paid by the end-customer. FJ was apparently happy about all of this and contentto make shipments thereafter on this basis. Since none of this was put to FJ in cross-examination (despite its obvious significance to Virani's case), his account of any such conversation is not on record but I am clearly entitled and indeed bound to proceed on the basis that he would deny any such conversation.

81. BV's evidence as to what JK's bank would be told about this was unclear. Paragraph 25 (r) of BV's fifth witness statement says that JK and its bank were well aware that the undertaking was conditional. In evidence, after BV had first said that he did not know what FJ told JK's bank, he said that in fact he had assumed that JK would have told them and been open with them as to what sort of undertaking was going to be provided. If that is right then BV would have to have assumed that JK's bank would know that Virani was not agreeing to pay for the goods at all - unless it had been paid by the end-customer. From a commercial point of view that makes no sense. BV had earlier accepted in evidence that he understood that what JK was saying in the 5 March E-mail was that JK's bank would only allow for the release of documents to Virani against Virani's acceptance. Yet somehow, the same bank was now going to be content with something that really did not amount to an acceptance at all. When pressed with the unlikelihood of this BV said that actually JK's bank might well waive the acceptance requirement. I regard that as implausible, given the fact that it was the bank's requirement for an acceptance which gave rise to this issue in the first place.

82. He also said that they and JK knew that the bank would finance JK if Virani's name was on the document, presumably because the bank would see Virani as liable. He said that FJ told him that JK could get finance on the Virani name. But if (as BV said he assumed) the bank knew that there was no unconditional acceptance, that makes no sense. BV was then driven to suggest that from the point of view of JK's bank, it would make no difference whether the acceptance was unconditional or conditional. I regard that suggestion as absurd. There is an obvious and important difference between the buyer agreeing to pay in any event or only if it is paid. All the more so here when, from the perspective of JK's bank, the end-customers were in Canada and Mexico and were not tried and tested by JK, whereas Virani was known and had dealt successfully with JKJor over 25 years. In short, it must have been the case that JK's bank wanted Virani "on the hook". Nothing less would do. Reliance by the bank on Virani's "name" only makes sense if it (or its customer who is borrowing from it) could look to Virani

for payment in any event. There is an echo of this in FJ's e-mail to Virani of 17 June 2002 in which he states that "…. our Bank always grants us the finance on *DI*A business in view of your creditability." This can only mean that the bank saw Virani as good for the money. This is also borne out by the reaction of JK's bank (Askari) once the question of the nature of the undertaking given by Virani became an issue between it and Ansbacher in 2004 (dealt with in paragraphs 128 to 129 below).

PV's evidence

83. PV said that at first (before the 5 March E-mail) FJ had raised the question of getting a bill of exchange from Virani, or something like it, to satisfy his bank. As PV understood it the bank would not lend where payment was due to JK only on a consignment basis. PV accepted that no bank would lend without a period fixed for payment. There had to be a maturity date for payment because otherwise the bank will ask when it would get its money back. Apparently, FJ's request for a bill of exchange was not rejected out of hand but was still under consideration when the 5 March E-mail arrived. Thus, according to PV, when FJ was asking for an "acceptance" in the 5 March E-mail he was really asking for a bill of exchange. That does not seem to me to be very likely. If he wanted a bill of exchange at that point it is difficult to see why he did not just say so. PV's evidence here is somewhat different from BV's who said that FJ raised the question of a bill of exchange only after the 5 March E-mail.

84. FJ was not asked in cross-examination about any request for a bill of exchange (often - but not always - a feature of documentary collections) but even if this occurred it does not take matters much further. As PV said in his evidence, the point about a bill of exchange is that it is a negotiable instrument where (in his eyes) defences could not be raised. I assume that PV here was thinking of defects in the goods supplied, or short delivery or problems of that kind. That is not the position with a "simple" acceptance of an obligation to pay, as he himself recognised. One can well see Virani baulking at being liable under a bill of exchange, especially as the goods were going direct to the end-customer. But it says nothing about what lesser obligations they may have been prepared to accept.

85. To return to PV's evidence about the 5 March E-mail, he also said that BV spoke to Virani's then bank and then FJ about the acceptance to be given. Unlike BV, however, PV said that when they (or BV) spoke to FJ it was not explained to him what they thought the offered undertaking would do or not do. They just said that he could have it to assist with his funding.

He added that FJ had not said to them orally or in writing that JK's bank did want an acceptance to pay from Virani. This is an odd assertion since the 5 March E-mail says exactly that. He did say, however, that he had understood JK's bank's position to be that there would be no funding unless there was a maturity date. If, according to PV, that is what the bank had asked for, it could only have meant a requirement to be paid on a particular date - ie in any event. On Virani's case the undertaking actually offered was nothing of the sort. When it was put to PV that no bank would lend money to an exporter where the promise by the apparent buyer to pay on a particular date is meaningless, PV disagreed. In support of this denial he attempted to give an example of where JK's bank had in fact agreed to fund JK where there were no payment dates. He referred to the e-mail dated 2 January 2002 which referred to a number of contracts made in 200I and then said…

> "Kindly note as per above referred contracts, shipments were supposed to be done during January 2002. As we have avaited "refinance" against above referred contracts, therefore, we want to ship all these goods up-tit 15 January 2001. Please arrange to open the Lie immediately and fax us copy for our tracking enabling us to execute shipments well in time…"

86. It transpired that these were all P2P contracts admittedly made between JK as seller and Virani as buyer. Thus Virani was undoubtedly liable for any shipment from the outset. So I cannot see how this assists Virani's case about what JK's bank was prepared to do or not do where there was (prior to any acceptance of documents after 5 March 2002) no pre-existing acknowledged liability of Virani. Ultimately, PV just said that all that the bank needed was to have Virani's name on the document somehow. But that makes no commercial sense if the addition of the name carried with it no liability.

87. That said, PV also accepted that at the time he thought that FJ would tell JK's bank "the truth" although this would mean that if he did so he would not get the funding. Once more, this account makes little sense.

88. I should add that it is not Virani's case that what happened was that it gave an unconditional undertaking on its face to its bank, knowing that this would be relayed to JK's bank, but only after an agreement between it and JK to the effect that all of this was a sham. Both parties would thus be knowingly misleading their banks, so that the shipments could be made, yet privately as it were they agreed that Virani would still have no liability to pay unless paid. Had that happened, it could at least explain why JK's bank financed the shipments (because so far as it was aware it was getting conventional acceptances from Virani). On the other

hand, it would be a deliberate deception. As this is not alleged Virani is left with an account of what was discussed and agreed with JK which, in its own terms, does not add up.

The Contemporaneous Bank Documents

Introduction

89. The differing accounts of what was - and was not - agreed at the time of the 5 March E-mail must also be examined in the context of the banking documents relating to the acceptances as tendered by Virani thereafter. It is not in dispute that in relation to each of the Disputed Invoices and its underlying shipment, Virani was asked by its bank for, and gave, an undertaking in the same or substantially the same form as that set out in paragraph 79 above. By a somewhat drawn-out process of disclosure (by both sides), largely at trial, documents have been produced which now present a fairly clear picture of what happened.

The Exchange with HSBC

90. It appears that the first bank used by Virani in connection with its allegedly conditional undertaking was not BL but HSBC. If Virani is right, there must have been conversations with HSBC as well about the acceptance to be given but neither BV nor PV referred to them initially. When the HSBC documents emerged, PV said that he must have spoken to it about the conditional undertaking.

91. On 21 February 2002 JK's bank, VBL, sent documents for collection by HSBC in Manchester. The instruction document referred to JK as drawer and Virani as drawee. The tenor was "120 days DA". (A payment period of 120 days had been specifically mentioned in the 5 March E-mail.) It then stated that "Documents to be delivered against acceptance." and went on to say in the "Special Instructions" section:

> "Documents to be delivered against Acceptance.. Does as per URC 522. Shipping documents will be delivered against your irrevocable guarantee to pay the bill..at maturity.."

92. The instructions do not appear to have been received until much later, around 19 March. They seem to have been read as requiring a payment obligation from HSBC itself because PV wrote back to FJ in manuscript probably on 20 March:

> Dear Faiq... YR Bank has sent the documents with wrong instructions. We agreed to give QUR undertaking NOT HSBC's undertaking for these documents. Can you please sort out with your Bank immediately so that we can accept the documents..

93. At the same time, HSBC telexed (in capitals) back to UBL as follows, also, it would seem on 20 March:

> "Please amend your instructions on your schedule to allow us to release documents to the drawee against their simple acceptance to pay at maturity. Documents are held in this office pending your response and at your risk and responsibility.."

94. PV's manuscript note was written on a copy of the HSBC telex which Virani faxed to JK along with copies of the UBL request letter.

95. This elicited the following reply from JK on 21 March:

> Kindly note that we have asked our Bank to issue revised instructions for delivery of original documents as desired by your good self.
> We shall fax you copy of this revised instruction soon after receiving from our Bank. In the meantime, we are enclosing herewith our request letter sent to our Bank to do the needful, for your ready reference ..
>
> Dear Sir
> Kindly note above referred bill has already been despatched to HSBC Bank Plc Manchester in this connection we would request you to revise the instructions which you have given in your schedule for delivery of original documents to the buyer..Virani..as follows
> "Please release the documents to the drawee against their simple acceptance to pay at maturity"
> Kindly do the needful..

96. JK did indeed write to UBL in those terms. As a result on 21 March UBL wrote to HSBC to say:

> "Please disregard our special instructions on the covering schedule and treat our documents as normal transaction under URC 522. Please advise due date."

97. A normal transaction under URC 522 (the Uniform Rules for Collections) is of course one whereby in exchange for the relevant documents, the buyer either pays or accepts an obligation to pay either under a bill of exchange or a "simple" acceptance ie not fortified by a negotiable instrument.

98. There is no hint of any conditional undertaking as contended for by Virani, in any of this correspondence. Moreover, if it were to be said that Virani did not speak to HSBC about a conditional undertaking at all, it goes against the thrust of the scheme which it says was suggested by its own bank. And if it did tell HSBC about a conditional undertaking so that HSBC knew that in truth Virani was not accepting any liability to pay by a certain date, then, when HSBC referred to Virani's "simple acceptance to pay at maturity" either it had already forgotten the scheme just agreed, or it was seeking to mislead UBL. Neither is likely in my view.

A Typical Acceptance - JK's Invoice 60 of 2003

99. The documents relating to this (JV) shipment under invoice 60 of 2003 are illustrative of what tended to happen.

100. There is a JK invoice to Virani for US$72,520 with payment terms 120 days from B/L date. There is a document from Askari (JK's then bank in Pakistan) addressed to Ansbacher dated 21 March 2003 which is stated to be subject to URC 522. It encloses documents for collection. It does not say what they are but there is no dispute that in such cases they would have included the invoice and bill of lading. The amount of US$72,520 is given, with tenor expressed as 120 days from B/L date. The drawee/buyer is described as Virani and the drawer given as JK. The instructions required Ansbacher to advise Askari of payment/acceptance by airmail/telex. It said that the documents were to be delivered against Acceptance to pay at Maturity with confirmation of due date to be given. It also asked for the proceeds to be sent to a branch of Citibank in New York for the credit of the Karachi branch of Askari. Under "Special Instructions" recited that:

> "Subject to ICCP 522 URC (1995) Rev. Shipping documents will be delivered to drawee against acceptance to pay at maturity."

101. These instructions were reflected in a document from JK to Askari which for some reason is dated later, 3 April 2003. It encloses the invoice, packing list, bill of lading and certificate of origin. It states that such documents "are to be delivered against 120 days from *B/L* date on presentation of documents to ..Virani..through..Ansbacher. .. Please also give instruction to the above mentioned bank as under-shipping documents will be delivered to drawee against acceptance to pay at maturity: [documents described]."

102. Following receipt of the documents and Askari's instructions, on 7 April 2003 Mr Ian Fletcher of Ansbacher wrote to PV as follows:

> "I attach copies of the Invoice and Bill of Lading in respect of documents for USD 76,844.25 and USD 72,520.00 received from JK.. Please provide us with your written undertaking to authorise us to effect payment on the due date, on receipt of which we will release the original documents to you."

One of those invoices was invoice 60 of 2003 which related to a JV shipment for which JK remains unpaid.

103. On 8 April there is a reply from Virani in the terms of the Undertaking. For the reasons given in paragraphs 113 - 118 below, I do not consider that there was anything conditional about it.

104. Then, by a telex message from Ansbacher to Askari sent on about 11 April 2003 and obviously after receipt of the letter from Virani dated 8 April, Ansbacher said as follows:

"we refer to your collection reference. and in accordance with your instructions we have released documents to Virani Limited against their written instructions on the due date 29/7/03" .. .

105. All the other transactions which are the subject of the Disputed Invoices yielded similar documentation although the form of the message from Ansbacher to Askari occasionally changed. For example messages in May 2003 stated "in accordance with your instructions documents have been released to Virani Limited against their written confirmation that they will give written instructions to pay on the due date *17/8/03"* or: "in accordance with your instructions documents have been released to Virani Limited against their written undertaking to effect payment on the due date *3/10/03"*.

106. It is clear that on the face of those documents, Ansbacher was seeking a "straight" acceptance from Virani to pay at maturity and that it considered that this is what it received from Virani. It accordingly confirmed to Askari that Virani had undertaken to pay on the due date. As with HSBC, on Virani's case, either Ansbacher had forgotten what Virani's undertaking really was or it was party to a deception of Askari at the request of its customer. Again, neither possibility is likely.

107. I should add that when payments were made by Virani, even where it had not received monies from the end-customer, it was treated by Ansbacher as a payment due to be made under the relevant documentary collection. See B411259-1263.

108. All of the documents referred to above suggest a simple - and unconditional - acceptance being given by Virani and acted upon by JK's bank.

BV's Evidence about the bank documents

109. BV did not really seek to deny that on their face, Ansbacher's requests to Virani to provide an acceptance, and Ansbacher's relaying of Virani's acceptance to Askari, were not couched in terms of conditional undertakings. He simply said that Virani just gave the Undertaking which it understood was conditional anyway and if Ansbacher made an error in what it told Askari that was its problem. This is not persuasive. It is difficult to see why Ansbacher would forget the arrangement or that it would set out deliberately to mislead Askari.

110. BV was also asked about why it was that Virani used the same form of undertaking to its bank even where the transaction involved an admittedly unconditional undertaking ie one of the

P2P contracts where monies remain due under the Admitted Invoices. At first he said that the conditional undertakings were given because by then Virani was owed commission, as if to somehow reserve to itself the right not to pay under the acceptance in order to set-off commission owed. He then accepted that this was not something in his mind at the time. Later, he said that they had just used the conditional undertaking form for P2P contracts because, by then, a practice had been established. Neither explanation seems very plausible to me.

PV's evidence about the bank documents

111. As the HSBC documents did not emerge until after BV had given evidence only PV could be asked about them. He said that he did not understand what FJ meant in the letter to UBL by "simple acceptance". Yet HSBC itself used that expression in its own corrective letter to UBL of which Virani, as its customer must have been aware. In any event to disclaim knowledge of what it meant, or to suggest (as PV did in evidence) that it did not mean an irrevocable undertaking is not plausible. Neither was his evidence that if a bank asks its customer for an undertaking to pay one would not necessarily expect the undertaking to be unconditional. This was particularly so when one comes to look at Virani's requirements of its own customer (here Mastercraft) to give undertakings, which he accepted had to be unconditional even though the word "unconditional" was not used. See the various documents at pages 39 - 42 of D2/divider 12.

112. As to the other bank documents, PV did not have any convincing explanation as to why, for example, Ansbacher wrote to Virani as it did, requiring, without qualification, a "written undertaking to authorise us to effect payment on the due date" or why it wrote as it did to Askari, if Virani's case about the conditional undertaking was right.

The Undertaking itself

113. Furthermore, in my judgment when the allegedly conditional Undertaking is examined it does not really suggest anything conditional. For ease of reference I set it out again here:

"Dear Sirs,

We refer to documents for US$72,520 per your letter dated 7.4.03 and we hereby undertake to reimburse you with the value of these documents on the due date 29.7.03.

Kindly arrange to forward the original set of Bills of Lading along with the other documentation in your possession in connection with the abovementioned set of documents.

Kindly note that payment should only be effected to the supplier up to US$72,520 on the due date upon receipt of written instructions from us at the time of payment.

Yours faithfully, …"

114. It will be recalled that it was not given in a vacuum. It was given in response to Ansbacher's request for a written undertaking to pay in the usual way and refers specifically to its letter dated 7 April 2003. That request was clearly seeking a straight, unconditional acceptance to pay, upon receipt of which the documents would be released. See paragraphs 102 above. This was not a negotiation of terms to be agreed. Either Virani provided the acceptance or it did not.

115. The first two paragraphs clearly show Virani's agreement to pay on the due date. First, it will place its own bank in funds to the value of the documents (ie invoice value). This is obviously so that the bank can then pay JK's bank on Virani's behalf. Second, it asks for the documents to be forwarded which it knows it can only do if it provides the acceptance sought by Ansbacher.

116. Both PV and BV place reliance upon the last paragraph. I do not see this as meaning that in truth Virani had no liability at all. Rather (and as Ansbacher was to say much later, when in dispute with Askari) it simply makes provision for Virani to give a formal payment instruction at the relevant time. I do not see that it goes far wider, in effect destroying the import of the first paragraph.

117. Moreover, it is worth recalling that BV said in evidence that the true effect of this document was that Virani would only have to pay when paid and that it was conditional in that sense. Actually, if there was a conditional undertaking, the condition to be fulfilled (generating Virani's obligation to pay) was not payment by the end-customer. The document makes no reference to such a condition. Rather, the condition was Virani's willingness at the end of the day to pay. To call this a conditional undertaking is a misuse of language. In truth, it is no undertaking at all.

118. Accordingly, the Undertaking, objectively read in context, amounted to an unconditional acceptance to pay on the due date.

Matters arising with the banks in 2003 and 2004

119. To complete the picture in relation to the banks and the alleged conditional undertaking it is necessary to move forward to late 2003. By November of that year, Askari was pressing JK and Ansbacher for the payment of numerous overdue invoices which had been accepted at the time of shipment by Virani.

120. A telex from Askari to Ansbacher dated 20 November said this (in capitals):

> "Pis refer our above mentioned export bills which after acceptance by drawee were due for payment on the dates mentioned..but we regret that.. .no response or the remittance has been received..Pls note that as per terms of collection you have released the documents to..virani..against their undertaking to effect payments on the accepted dates which are now overdue..you are requested to pis firmly pursue the drawee to effect payments of above said bills on immediate basis. Meantime send us copy of the undertaking duly signed by viranLreceived by you before releasing the documents, as the same is required to take remedial measures if need be for recovery of overdue payments in court oflaw...

121. By a telex dated 25 November 2003, Ansbacher responded to say that their customer (i.e. Virani) was dealing directly with the supplier (i.e. JK) whom Askari should contact for payment arrangements. Ansbacher also said that it had asked its customer for approval to release a copy of the undertaking but approval had not been given. In the meantime, and obviously as a result of Askari's demands for payment and a copy of the undertaking PV wrote to FJ as follows:

> "Today my bank, Ansbacher telephoned me to say that they had received a fax from yr bank asking them to disclose some confidential documents signed between us and our bank. In a nutshell they were asking for the payment of the overdue invoices. I have had to disclose to my bank our agreement as we would pay when we get paid and explained to them that presently we had financed your invoices to a certain extent. My bank wanted to disclose this agreement to yr bank which I have told them not to disclose as I did not know what you have told them so could you pis ask your bank not to send out any more faxes to my bank as they will have to reply to them accordingly…"

122. On the same day FJ replied by saying that its bank had now reported JK to the Credit Information Bureau with the effect that other banks would be cautious about doing business with JK. He also said that the invoices had to be cleared by that day otherwise legal proceedings were threatened. He went on to say that he did not know what message had been sent to Ansbacher or what documents they wanted to see. He also said that

> "we are unable to understand why are you saying that we have agreement with you that you would only pay when you get paid. I do not recall any such agreement between us. As in fact you told us that since you are not being paid by the customer that is the reason for delay of payment. Kindly note all business done without insurance was being made on your specific instructions where you are comfortable that there would not any problem for delay of payment or risk of being unpaid. Therefore you are saying we have this agreement does not exist..."

123. For present purposes the important point to note is that PV was suggesting that Virani would now have to disclose the PWP agreement to its bank.

124. Given that both PV and BV said in evidence that Ansbacher was told clearly about the arrangement at the outset (hence the use of the conditional undertaking) it was odd for PV to be suggesting that the agreement was only being disclosed to Ansbacher in late 2003. BV's explanation for this was that when he had first discussed the arrangement with Ansbacher back in March 2002 he had done so through the bank's relationship manager, Barrie Kilfeather ("BK"). But when Ansbacher called him in November 2003 the person he spoke to was Mr Ian Fletcher from the bank's trade finance department. Mr Fletcher did not know about the arrangements concerning the conditional undertaking and so BV had to explain it all over again. This is not convincing. Mr Kilfeather would surely have told his staff about this important matter, had it been agreed and Mr Fletcher was the person who wrote regularly to Virani requesting the undertakings in relation to each shipment.

125. On 3 December Askari telexed Ansbacher referring to Ansbacher's obligation as collection agent and that the documents were accepted to be paid on the due dates and there was an additional undertaking confirming acceptance on the due dates. As the documents had been sent to Ansbacher it was bound to comply with the URC 522 instructions stated in the collection schedule. It then asked Ansbacher to remit the proceeds and if otherwise to send copies of "their undertaking along with accepted bills of exchange on most urgent basis." Askari sent a further brief message to the same effect to Ansbacher the following day. It is common ground that Virani did not in fact accept any bills of exchange.

126. On 12 December, Ansbacher telexed Askari to say that the instructions had been to release the documents to Virani against its undertaking to effect payment on accepted date and Ansbacher adhered to these instructions exactly and Ansbacher was chasing Virani for payment under these collections. It added that no bills of exchange had been presented. A message back from Askari on 16 December said that two further bills had now gone overdue and it was still awaiting copies of the undertaking.

127. On 8 January, Mr Fletcher wrote to BV to tell him that he was now forwarding the written undertakings to Askari in respect of the outstanding collections. On 9 January, BV wrote to BK saying that the undertakings could be sent to Askari. Importantly, he added that if Virani

received any communication from Askari, "we would advise them of the agreement we have with JK..in respect of the shipments to Mexico." It is unclear what this means but the impression is that at the time, it was thought that Askari might say that Virani was liable and Virani would then want to assert that it had some other agreement with JK. There is certainly nothing to suggest that from BV's point of view, BK knew that all Virani had given were conditional undertakings.

128. Askari continued to press for payment and it seems that it may not have received the copy undertakings until some time later. This is because it appears to refer to them for the first time, only in its telex to Ansbacher dated 8 April 2004, which stated as follows (in capitals):

> "You are requested to pIs intervene the matter and instruct your concerned branch to make payments of all long overdue export bills despite accepted..we have gone through these and surprised to note that you have delivered all these documents to drawee on their conditional undertaking text is given below".

There is then a quotation from the undertaking letter referred to above. Returning to the telex it then said:

> "it is clearly contradict with our covering schedule and your acceptance swift msgs which clearly depicts documents have released against drawee's acceptance to pay on due date without mentioning required authorisation from drawee. We appreciate your pursuation but it is your obligation to honour your acceptances which does not show instructions required from drawee. PIs arrange to remit proceeds of all overdue bills on urgent basis. We trust you will discharge your due obligations. So that we continue to maintain our seemless and cordial business relations...

129. This led to the following response from Ansbacher on 13 April 2004.

> "We do not accept the argument set out in your message. We have already discharged our due obligations..the relevant term of the documentary collection was that documents were to be delivered against "acceptance to pay at maturity". We did receive acceptance to pay (quoted in your SWIFT message)..... It is not open to you to describe that acceptance as a "conditional undertaking". As you may be aware it is a well accepted principal of banking law that where there is an authorisation to pay, a debit instruction is still required from a customer before payment can be made. In this case, there was an undertaking to make payment on the due date and the reference to "written instructions" was not a condition but merely an identification of the required debit instruction. We therefore make the point that your argument that the customer's reference to (and the bank's requirement for) a debit instruction has somehow invalidated or made conditional an undertaking to make payment is an attempt by you to claim (from us) an absolute guarantee of payment. You had no such guarantee of payment under the terms of the documentary collection arrangement. We did all that we were required to do under its terms."

130. For the reasons given above and those cited by Ansbacher, I do not think that Askari's interpretation of the undertaking was correct. It may well have wished to exert some pressure on Ansbacher, however. There is no evidence that anyone ever sought to pursue Ansbacher for any monies on the basis that it was in breach of its duties as presenting banker.

131. If Ansbacher was fully aware of conditional undertaking arrangements (and indeed had been reminded about it, according to BV only a few months earlier in November 2003), it is hard to see why it should now be asserting that the undertaking was unconditional. All BV could say was that he left all of this to Ansbacher. He added that BK had left in early 2004 (presumably

as a suggestion why those at the bank may not have appreciated the original arrangement). In fact, BK did not leave until February 2005, according to paragraph 4 of the statement of Mr Fletcher given in administration proceedings brought at one stage against Virani. There is no reason to think that Mr Fletcher, as Head of Operations at Ansbacher, would have got his dates wrong.

Conclusions as to the bank documents

132. In my judgment the bank documents discussed above point overwhelmingly to the conclusion that Virani had agreed to give, and did give unconditional acceptances against the documents presented in relation to the relevant shipments. Although BV said that the conditional undertaking arrangement and wording had been specifically discussed with (in the end) four banks, HSBC, Bank Leumi, Bank Negara and Ansbacher, no evidence has been adduced from any of them in these proceedings.

The Advance Payments and other similar payments

Introduction

133. The issue as to the Advance Payments is important for two reasons. First, the evidence about them and similar payments is relevant to whether in fact Virani had agreed to accept liability on the shipments where it gave acceptances after 5 March 2002. Second, Virani has made a counterclaim for the return of the monies paid under the 5 Invoices on the basis that if it had not agreed to be liable, then it was not obliged to pay JK ahead of receiving the monies from the end-customer even though that is in fact what it did. At this stage, I deal only with the first of these matters, that is the evidential significance of the Advance Payments.

134. Although the monies paid under the 5 Invoices amounted to US $395,679.02, it is common ground that much more was paid to JK in 2002 and 2003 when, at the time of payment, no monies had been received from the end-customer and (in some cases) the maturity date applicable to Virani had not yet arrived. The reason why the Advance Payments Claim is limited to those made under the 5 Invoices is because, eventually, Virani received the relevant monies from the end-customer in respect of other advance payments.

135. The obvious inference to be drawn from the fact of such payments is that Virani, a company being run by experienced businessmen would be most unlikely to pay monies well before they

were due (on Virani's case). Virani's answer to this was that such early payments were essentially acts of generosity on its part. For the reasons given below, I do not find this to be a likely explanation.

136. In fact, on occasion, there were requests that JK pay to Virani the commission which Virani said was by then owing to enable Virani to make the payments for the cloth. That is more consistent with a belief on the part of Virani that it was obliged to make those payments in any event, than that they were in effect merely loans.

Virani's pleaded case and the 0.75% Charge

137. Paragraph 33 of Virani's Further Information supplied on 8 November 2005 said that the system of advance payments generally had been in place for some time and was designed to alleviate JK's cash flow pressures caused by lack of payment from the end-customers. They were said to amount to loans to JK. It was said to have been in the contemplation of the parties that they would be repaid once JK's cash flow difficulties had been resolved and/or when the end-customer paid and/or otherwise on demand by Virani. A large number of documents were then referred to in reliance upon this contention. The Opening Skeleton Argument submitted on behalf of Virani referred (at paragraph 29) to that Further Information and also stated that Virani had raised a charge of 0.75% specifically in relation to these transactions (ie including the payments made under the 5 Invoices) to which JK had agreed. In respect of this charge and a separate charge relating to bank charges involved, of 1%, reference was made to documents at B2/499-500, 505 and 516-517.

138. However the documents cited do not in my judgment support either an agreement of the kind alleged by Virani or a charge of 0.75% being levied in respect of the payments under the 5 Invoices. In particular:

(1) PV's e-mail of 27 July 2002 refers to Virani having to pay certain invoices. By that time, the maturity dates on them had passed. It then referred to other invoices which had not fallen due. They were invoices where the maturity dates had not passed. Finally reference was made to payments now being made for other invoices which had fallen due. Whether the invoice was "due" or not was in tenns of the maturity date, not whether the end-customer had paid. Both BV and PV accepted that this is how the e• mail had to be read. For some reason Virani was seeking to pay some invoices in

advance of maturity dates while holding back on others. This e-mail does not therefore bear upon the advance payment agreement alleged by Virani; the same is true of Virani's e-mail of 1 August;

(2) Equally FJ's e-mail in response on 2 August of merely speaks about due and "undue" (ie not yet due) invoices. In context this had to be a reference to maturity dates, and neither BV nor PV suggested otherwise. The same is true of his e-mail of 6 August;

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(3) All the other documents referred to in paragraph 33 of the Further Information are in the same vein. Indeed BV admitted in evidence that this run of e-mails did not bear upon the payments made under the 5 Invoices at all.

139. As for the e-mails dealing with the 0.75% charge, it became clear in the course of evidence (if not already clear from the documents themselves) that they have nothing to do with the payments under the 5 Invoices. Rather they deal with an agreement made between JK and Virani that in some cases, shipments would be sent on a CAD basis vis-a-vis Virani. In other words, Virani would make payment upon presentation of documents and not within the usual 120 days agreed. It would thus have to wait much longer for payment from the end-customer, compared with its own payment, and was paying ahead of the usual maturity date. To compensate for this, JK agreed to pay an additional charge of 0.75%. In evidence, BV and PV agreed that this is what these e-mails were about. They added that the charge was also applied later, to non-CAD shipments but only where Virani had nonetheless agreed to pay ahead of the maturity date. There is no documentary support for this but even if correct it does not affect the 5 Invoices which were paid after the relevant maturity date but before payment from the end-customer. BV accepted this and went on to say that the 0.75% charge was not levied in respect of the payments made under the 5 Invoices precisely because they were paid after maturity. But there is no logic to this distinction if, in truth, Virani had no liability to JK even then. It would have logic if Virani did become liable at maturity. In that scenario, Virani was, perhaps unsurprisingly, effectively charging interest for early payment, but a payment which would nonetheless inevitably fall due at maturity.

Conclusions on the Advance Payments

140. All of this material, and the fact of the payments made under the 5 Invoices, is wholly consistent with Virani being liable at maturity, in any event. In addition,

(1) It was suggested by BV that there may have been a specific conversation with FJ to the effect that the payments under the 5 Invoices would have to be repaid in the event that the end-customer failed to pay, but this was not put to FJ (it is not part of Virani's pleaded case) and PV had no recollection of any such conversation. It seems to me that if the suggestion that the payments were liable to be repaid had been made to FJ he would have been bound to have reacted adversely not least because he was being pressed by JK's bank to get the payments in and no doubt JK's future funding was at least to some extent dependent on the proceeds of existing sales coming through. The suggestion of such a conversation can be safely discounted, therefore;

(2) It will be recalled that as far as Ansbacher was concerned, payments under those invoices were payments due from Virani under the documentary collections for which it had given acceptances - see B4/1259-1263;

(3) It was accepted by BV and PV that at no stage when actually making such payments, did they reserve to Virani the right to recall them, or set them off against other monies which might fall due from Virani.

Other Relevant Communications

Introduction

141. Over the period 2002 - 2003, the broad thrust of the communications between the parties concerning payment was to the effect that (a) JK was asserting that Virani had to pay for shipments which it had accepted and where the maturity date had passed and (b) Virani was intimating that it owed such monies to JK. I do not intend to deal with each and every document concerned with payment, and it is not necessary for me to do so. However, I do make specific comments about the documents referred to below, including those where Virani makes references to PWP. It should be noted that by late 2002, shipments to Canada and Mexico were no longer the subject of credit insurance (apart from the transactions under invoices 66 and 69 of2003).

13 June 2002

142. This is an e-mail from Virani to JK saying it had set up a facility with BL for JK's exports "thru us". The facility appears to be that in fact granted by a letter from BL dated 7 March 2002. It provided £1.5m to be used for issuing letters of credit or giving acceptances and

currency purchases all "to facilitate the import of grey cloth." Such a facility would not have been necessary if Virani was only to pay when paid. The explanation that this was all done at the outset to assist JK by making advance payments seems unlikely to me. It makes much more sense as a facility which Virani needed so that it could make the payments which it was bound to make.

17 June 20002

143. This is from Virani (B1/371) asking for an extension of time (a further 30 days) in which to pay JK. BV agreed in evidence that if the agreement was PWP, seeking such an extension was irrelevant, but said that nonetheless it was better to have a payment date. This did not seem to me to make much sense. Nor did his suggestion that the "undertaking" from Virani to pay which is referred to in the e-mail did not mean an unconditional undertaking. JK's reply to this, also on 17 June is referred to at paragraph 82 above and is supportive of its case.

20 September 2002

144. By this e-mail Virani sent to JK a "schedule of payments which we intend making to you covering the old invoices which we have not paid."

E-mails concerning advance payments and the 0.75% charge

145. I have dealt with these in paragraph 139 above. They are not consistent with Virani's case in my view.

8 October 2002 (B2/686)

146. By this e-mail Virani was asking JK to authorise its bank to allow Virani a further 120 days in which to pay. This suggests, again, that Virani considered itself bound to pay at maturity and that JK's bank thought so too. The e-mail does refer to problems in getting payment from CSB, the end-customer but this does not mean, without more, that the agreement must have been PWP. In commercial life, a buyer might often ask his supplier to give him more tiine to pay because he was waiting for payment from his sub-buyer. It might be a good reason why the supplier should indulge him (especially if they have a longstanding relationship) but it does not mean that, necessarily, the buyer was not legally bound to pay unless paid. This point has general application to those e-mails where Virani invokes late payment by the end-

customers when seeking further time, or explaining late or non-payment to Virani, or where JK discusses, or is concerned by, late payment on the part of the end-customer.

8 October 2002 (B2/688)

147. Here Virani asks JK to send "outstanding invoices" held on 120 from B/L date to Ansbacher "on usual basis (our undertaking to pay on the due date)". There is nothing conditional about this e-mail and it should be noted that the invoices referred to include 2 of the 5 Invoices where repayment is now sought. Virani says that it is now "very tight" as it is having to make payments from its facility before being paid by CSB so that the facility cannot be quickly "revolved". It is difficult to see why Virani should have put itself in this position unless it really had to make these payments.

28 October 2002

148. Virani's e-mail here makes reference to amounts which "we have outstanding" and the BL facility being limited due to late payment from CSB. Virani also suggested that JK could discount US$2.5m of invoices (which would be the total outstanding if JK made further shipments as invited to do by Virani in this e-mail). In evidence PV said that though he referred to outstanding monies in truth they were not, because of PWP. He also said that if JK's bank was being asked to discount the outstanding invoices it would be doing so against invoices not really due and subject to set-off in respect of advance payments already made but which could be reclaimed if the end-customer never paid. He denied that he was therefore asking JK to mislead its bank. That was a matter for JK. The simpler explanation of this e• mail is that sums described as due were due.

1 November 2002 (B4/730)

149. Virani here sent an e-mail asking for commission so that it could pay bills "on due dates". This clearly shows that it was accepting liability to pay on maturity. In order to meet that obligation it needed to be paid the commission which it said was now owed to it by JK. If in truth Virani did not owe money on the invoices yet, it is remarkable that it should put itself in a cash-flow, or potential cash flow difficulty when there was no need. PV said that all of this was done to keep JK's funding in place but if so, apart from Virani being extremely generous, it would mean that JK's bank would continue to fund on a false basis because the payments being made by Virani would be subject to its right to recall them if it was never paid.

E-mails of 1 November 2002 (B3/749, 753)

150. FJ's e-mail seeking payment from Virani of overdue invoices clearly proceeds on the basis that such payments are actually due and Virani's e-mail in response of the same date does not suggest otherwise. Rather, it makes some other comments to the effect that JK should not lose sight of the fact that Virani has made money for JK and so on.

24 December 2002 (B3/764-764B)

151. In the first of these e-mails, FJ complains that Virani has not yet confirmed that it would be making in January the payments it should have made in December and states that JK's borrowings were "done on D/A basis on your name under our guarantee". FJ is clearly proceeding on the basis that Virani should pay on the due dates and the bank was lending to JK on the basis of Virani being liable. In evidence FJ rejected the suggestion that JK had raised money on invoices to Virani but without Virani being liable.

152. Virani's response (in bold capitals) needs to be set out in full. It reads:

> "It is important to realise the following understanding between us before doing anything thru the bank. I care about you - not abt your bank.
>
> (1) When we started this relationship/business - we had asked you for 120 days i/o 90 days to the customer. the understanding was that we would pay you when we get paid. as yet, we have not received anything more from csb and you are aware of this.
>
> (2) We further asked you to ship to us i/o sending documents directly on a lot of contracts because csb were having problems tracing the documents thru their bank - (i don't know why). we also thought we could control the payments better with everything going thru Virani.
>
> (3) We have tried to pay you, even out of our own funds when it was possible. all we have asked for is an average extention on the payments of some 15 days on some $621,000. there is no reason for your bank to panic in any way because you will receive this payment when we have told you you would and everything is in place.
>
> (4) We have told you vide previous e-mails that a confirmation from my bank to your bank is not possible in advance as this is not under le or any such payments. the accepting bank is not responsible for the payment but we are.
>
> (5) If your bank is feeling panickey they should write to us and not to the bank as we have told our banks that we are making payment arrangements directly thru other banks, which is the truth and then your bank sends out a fax stating there is no agreement of this sort between us which there clearly is, does not look good on you/your bank or us.
>
> (6) we have already sent copies of our mail exchanges to our bank if only to prove our credibility with our bank and for no other reason
>
> If you wish we can send out a message to your bank stating when they would be receiving the payment but this again will be from us not our bank, as this is not possible until at such time as the bank makes the payment.."

(paragraph numbers added).

153. Paragraph 1 clearly makes a reference to an understanding that PWP (although the context here, at this stage, is one of delayed payment by the end-customer rather than non-payment). In evidence, BV said that this was a reference to the original arrangement when made in late 2001 as opposed to March 2002. At that point in time, as I have already found, this was in

effect the position. It is not a clear reference to the post-March 2002 position though it might be read that way. However, even if it was, later paragraphs in the e-mail do not seem consistent with a firm assertion of PWP. Paragraph 3 refers to JK receiving payment "when we told you you would" but that can only be a reference to maturity dates or agreed variations thereto. If it referred simply to PWP, nothing useful could have been communicated to JK about when it could expect payment because it would all depend on a third party. Paragraph 4 then makes the point that this is not a case where Virani's bank has liability, like an Lie, but then says that Virani is "responsible for the payment".

154. It should be added that FJ did recall (though not very clearly) some sort of conversation with Virani after this e-mail. He could not remember the details but he would have been satisfied that there was not really a problem raised by the reference in paragraph 1 of the e-mail to PWP. (This conversation was denied by PV). He thought that the fact that Virani was not standing seriously on PWP at the time was supported by the fact that it did continue to make payments and give further acceptances. He also pointed to the somewhat inconsistent nature of the e-mail itself. His evidence is somewhat vague in this regard but as explained below, it does appear that for a considerable time after 24 December Virani was continuing to act as if liable at maturity.

30 December 2002

155. Certainly, by 30 December, Virani was writing to say that it was arranging to remit a number of payments "as per yr instructions, to various banks on 2 January 2003."

Virani's e-mail and schedules of sums paid and due dated 29 *January 2003*

156. In this e-mail Virani said that "we have to receive against yr invoices $1,862,832.93 out of which we have already paid to you $961,853.91..We have to pay you against your invoices $1,544,342.32..nett paid to you in advance = $318,490.61." It was suggested that this e-mail and schedules, together with JK's response of 30 January showed that JK was accepting a position whereby Virani had paid over $318,490.60 when in fact it had no liability to pay it at all because of PWP. I do not think that the documents go this far.

157. To begin with, much time was spent at trial trying to understand these documents. One could see that, as a matter of arithmetic, $318,490.61 was the difference between $1,862,832.93 and

$1,544,342.3. But it was difficult to divine how this was an advance payment. Ultimately, it was only PV who could assist and this involved him producing a further explanatory detailed schedule which became D2/divider12/62. In short he arrived at the $318,490.60 by a different route. He said that Virani had already paid to JK the sum of $961,853.91 even though it had not yet received this from the end-customers. On the other hand one had to give credit for the fact that Virani had received some payments from the end-customers (it would seem, relating to different invoices) amounting to $429,859.30. That left a balance of $531,994.61. From that one had to deduct a further $213,504 owed in respect of admitted P2P contracts. This left the figure of $318,490.60. This calculation did not feature in the e-mail of 29 January. Moreover, Virani said that it had to pay against JK's invoices the sum of $1,544,342.3. As explained by PV this represented all JK invoices which would fall due then or in the future which had not yet been paid by Virani to JK and regardless of whether the end-customers had yet paid Virani. Stripped of the sum of $213,504 for the P2P invoices, this meant that Virani was saying that it owed all the monies shown on the relevant invoices which had not yet been paid. PV said that in fact, such sums would not be owed unless the end-customers paid it, but this qualification did not appear in the e-mail.

158. JK's response dated 30 January 2003 reads thus:

> "We have made analysis of outstanding payments and noted that you have paid to us excess $318,490.61 against out due payments which you have not received from CSB plus MASTERCRAFT..
> According to Shipping Company..you have mentioned some Invoices which the goods have already cleared from customs by the buyer. Invoice-wise detail is as under…Total: 515615.00
> According to the above information, we are unable to understand the how CSB and MASTERCRAFT have cleared the above Invoices from the Customs without paying you. If we take into account that they have made payment and then cleared the goods which means you have received US $197,124.44 more from the customer which are not being paid to us. Please confirm and clarify. You will appreciate that we have already given one month extra to you for payment according to our original sales, that just in case you receive late payment than due date given by you to our Bank should be honoured. Now under present scenario we do have problem with CSB for the payments but apparently there is no problem in case of MASTERCRAFT. Therefore, we do not understand why the payments are not being received from them. Could you please explain that? You are very well aware of the credit crunch we have by holding the stocks of more than one million dollars and not receiving the payments from you. Now it is very difficult for us to face our Banks and Creditors. Please comment."

159. Taken in context and on a fair reading of the whole document, it is impossible to read the words in the first sentence as amounting to any kind of acknowledgment that Virani was only ever bound to pay if and when paid. It certainly acknowledged that according to Virani, it had paid out more than it had received from the end-customers but there was no acceptance that its liability was so limited. Indeed the reference to "our due payments" can only have been to the payments which had fallen due according to the maturity dates. Moreover, PV accepted in evidence that JK was just saying at that point that it noted that Virani was saying that it had paid $300,000 more than it had received from the end-customers. Apart from suggesting that

Virani had in fact received yet further sums from the end-customers FJ's letter made it clear at the end that JK was proceeding on the basis that Virani was actually liable on the maturity dates - because he referred to having given Virani "one month extra for payment according to our original sales."

Other Demands for Payment up to May 2003

160. JK sent further letters chasing for payment by Virani on numerous occasions thereafter, for example on 15 and 27 March (including in relation to the 5 Invoices), 3, 9 18 and 30 April 2003. They all clearly assumed that Virani was liable on the maturity dates and I do not accept the suggestion that these demands were somehow not to be taken seriously.

May 2003 e-mails

161. In his e-mail of 14 May, FJ stated how much monies were owing from Virani by reference to the maturity dates of numerous invoices. He then discussed the position, as he understood it, about the end-customers and when they might be paying Virani. I see this as no more than showing the kind of flexibility which JK had said it would try to show where there were problems with payment to Virani, in the 5 March E-mail. In fact, at one point he refers to MC as "your buyer". In Virani's e-mail in reply dated 14 May, reference was made to "$782,874.98 being owed to you (matured)" which certainly seems to indicate an acceptance that this was the strict position between Virani and JK.

162. JK sent a further e-mail on 16 May enquiring about when Virani would receive monies from the end-customers and chasing payment.

163. Virani responded on 16 May as follows.

> "..please note when we did this partnership business it was understood that we would pay to you when we get paid and you would remit our portion of the commission when you receive the monies from us. Neither of us at that ime has envisaged the delay in payment we would encounter other wise we would not have taken on the business.....discounting of these customer's invoice is to raise money to send to you was never a part of the understanding or agreement as then it would be better for us to buy on a principle to principle basis and handle all the headaches ourselves without having to respond to your queries and problems. This is of course what we are doing now and shall continue to do so to do on the same basis for the future.. We are advising you of the remittance being made to you in a separate mail today.. and shall give to you an outline as to when the other payments we expect to receive and pay to you finally to clear all of what we owe to you.. We shall also advise you.. as to what confirmed business we have in respect of yr stocks lying in Pakistan.."

164. Clearly there is a reference to PWP, in the context of delayed payment. When Virani refers to "principle to principle..this is what we are doing now.." it appears to me to cover all the

business now being or to be transacted between the parties in relation to sales of cloth to Canada and Mexico, and not merely the new admittedly P2P contracts. But even if it were otherwise this does not mean that there was in fact no liability on Virani for acceptances given thereafter for shipments of the Old Stock.

165. JK responded to that e-mail on 17 May as follows:

> "..when this business was done you were very positive that there would not be any problems since you have the insurance and delay in payments were never accounted for. Besides that we have given one month extra for the payments, in case there is any delay could have covered with this extra time..We were only looking at you for all this business and not the customers and that was more than enough for us. Therefore, we blindly closed our eyes and acted on your instructions. So please do not feel bad when we complain anything about this.. Thirdly, so much goods were produced on your instructions.. moreover piles of stocks has been accumulated due to problem with CSB. When the purpose of this whole business was to make money you will definitely make money out of this business as none of your stakes are involved. It is us who were being suffering with all this mishap. Our creditability and business respect has been badly suffered which our family has earned for the last so many years.."

166. It does not in terms reject the suggestion made by Virani about PWP, but it does make the point that JK had "given one month extra for the payments, in case there is any delay..". As with similar statements made by FJ in the past it is difficult to see why he should have said this if he did not think that Virani was strictly liable on the maturity dates. In evidence, FJ said that he did not want to push the point too hard at that stage. He was, after all, receiving payments and he still had Old Stock which he needed to dispose of.

167. It is suggested that the reference to "you will definitely make money out of this business as none of your stakes are involved" is an acceptance by FJ that Virani was not liable to pay unconditionally. I do not think it goes this far. The immediate context is the accumulated Old Stock still lying with JK which JK had purchased with its money (via its bank), not Virani's. Hence JK's stakes were involved. As FJ accepted in evidence, Virani was not liable to take the cloth under the original contracts.

168. To some extent Ff's belief that he would receive further payments from Virani was justified because on 19 May 2003, Virani wrote back as follows:

> "Today 1 am hoping to get firm offer for most of yr stocks.. we have already sent to the bank remittance instructions for abt $200,000 to be sent to you by discounting the invoices. However you will receive abt $100,000 first and the second $100,000 after abt 2/3 days - this is because our invoicing discount facility is full and we have instructed the bank to remit to you on the same we receive funds for other invoices from Africa. 1 know they have already sent you $100,000 last week the balance will follow this week. Lastly if you believe me if 1 had foresaw what was going to happen with CSB or with Lajat.. would not have taken the orders at any price/terms.. unfortunately.. we cannot foresee the future.. pis accept one point that we have acted in yr best interest by switching the invoices to Springs etc at all times.."

169. It remains the case that if Virani really did not consider itself liable, it is difficult to see why it should continue to go to the trouble which it clearly did, to continue to make payments to JK (without reservation) which, on its case, were simply not due.

170. On 29 May, JK chased again for payment of outstanding invoices and a sum of $200,000 which was supposed to be remitted that week. In its reply the same day Virani said that the sum was actually $100,000 and it was being remitted from other monies received by Virani from business in Africa. No reference to PWP was made by either party.

The August E-mails

171. On 5 August, Virani wrote to JK expressing surprise at the requests for payments when he had said on the chat line that JK had

> "almost double the outstandings to what we owe you. The agreement was that we would pay to you when we get paid. Now you seem to think that we have to pay you even when we have not received the money. I agree that the monies are late but this cannot mean that we have to keep on sending you monies irrespective of whether we have received the monies or not."

172. FJ replied the same day noting PV's

> "strange and astounding remarks regarding the outstanding payment..we don't agree with your connotation that we are in agreement that whenever you receive the payment from the buyers we will be paid accordingly. this one extra month was given to cover extra delays in payment. Moreover the risk of delay payment was on Canadian business and not Mexican business."

173. Still on the same day, PV replied (in capitals), stating as follows:

> "I. Please note, it does not make me any happier to note that you have had to hold stocks at yr end, which are predominantly the Canadian contracted goods. This business was done on a "joint venture" basis with an understanding that we would share the profits on the sale, whilst you would invest yr funds in procuring the goods and we would get the orders. It was always agreed that we would pay to you when paid.
> You are correct in saying that I did say that with business, and we have also done some business recently with Mexico where it is on a principal to principal basis, where even we do not get any funds from the customer , we still have to pay you on the due date and you do not share in the profit (principal to principal business)
>
> 2. Regarding my mail of the 17th July
> I agree that we are confident in getting paid from Mexico as otherwise I would not ask you to ship the goods. My main reason to ask you to do this was because this would provide some financial respite for you.
>
> Secondly, pIs read my mail correctly as today, I have $75,225.59 outstanding with Canada (not with CS Brooks). If you check, we have been supplying to Springs Canada. I have to receive interest amount from CS Brooks for

which I have already sent to you the credit notes for yr invoices which were delayed. The balance is due from Springs Canada as the payment is not yet due.

As for the ICD payments, we should be getting a large chunk of this this week, when I can make yr payment for the due invoice.

Faiq
I would like to personally request you on personal basis, that you please stop sending me reminders after reminders on payment due on 29th July when I am already talking to you before then on the phone to tell you I am short of the money. It can be argued that I am short because of my commission lying with you or the funds not arrived yet from the customer, but it is not my intention to hold on to yr payment for even one day then it necessary. I found it strange that you should send me a mail immediately after we had spoken to ask for the money due I had no other option but to ask you to debit my account with you as I have to pay you (no doubt abt that), but generally, you don't like to be reminded everyday, particularly when the payment is due on the same day. I can also send to you mails about my commission on a daily basis, but I am not doing this.

The fact you have trusted me means that I cannot let you down and we have been paying out of your cashflow , even for the invoices where payments have not come in as I am aware of yr stock holding and yr financial situation, however, you must also appreciate mine.

I will phone you tomorrow and advise you when we can snd this outstanding payment which has become due for payment.
I am also working on the balance of your stocks and shall discuss with you tomorrow.
With kind regards"

174. The first paragraph is a reference to PWP although the context seems to have been when the business was first started, or arranged. In its original conception in 2001, Virani did not have personal liability for JV contracts, as I have already found. In addition, it has to be read alongside the second paragraph. On a fair reading, PV is saying that with Mexican business he had said that even where no funds would be obtained from the customer, Virani would still have to pay JK on the due date. The words beginning "and we have also…principal to principal basis" are clearly a separate clause and can be treated as within parentheses, although PV did not accept this. He did accept, however, that he was responding to an assertion made by FJ in the previous e-mail of 5 August to the effect that on Mexican business the risk was with Virani. In fact, of the 12 Disputed Invoices, 10 relate to shipments to Mexico with only 2 going to Canada. In addition, in the sixth paragraph PV says that "I have to pay you (no doubt abt that)". On the basis of that e-mail overall, Virani seems to be accepting liability for the Mexico shipments.

Telephone Conversations about PWP according to Virani

175. In evidence, both PV and BV for the most part said that just because JK wrote numerous letters demanding payment it was not necessary for them to assert PWP in writing or go back to him orally. At the end of PV's evidence however, he was asked to clarify paragraph 27 of his first witness statement, where he said that "..throughout our dealings under the JVA I would refresh Mr Jawed's memory as to the structure and principles of the agreement when necessary." In evidence PV said that FJ was reminded about the terms of the JV by the correspondence after March 2002. He was also reminded following the e-mail of 5 August 2003.

176. When PV was asked whether he was saying that FJ had simply forgotten about the terms of the JV, PV said that FJ had not but was just trying to shift liability. When asked whether, in these conversations, JK had actually accepted that the basis was PWP, PV said that he had not but rather had "avoided the issue". If this had happened, so that JK was consistently refusing to accept the true position under their agreement (on Virani's case), it is very difficult to see why Virani kept on accepting documents on further shipments, for example those in August and September which relate to 7 of the 12 Disputed Invoices (all relating to Mexico), since there would be an obvious risk that JK would hold Virani liable if the end-customer did not pay, or pay on time. In evidence, PV agreed that Virani kept on taking shipments but this was because FJ had problems and they were being pressed to sell (the Old Stock) at every stage which is why Virani took the goods. This did not really answer the point, in my view because it is difficult to see why Virani would take the goods when it might be held liable if in truth it thought it was not liable.

The November E-mails

177. These have been dealt with to some extent in paragraphs 120 - 123 above. In addition, however, Virani responded to JK's e-mail of25 November (see paragraph 122 above) thus:

> Re: Yr mail received today
>
> I am rather surprised that after all this time you were under the impression that we had no agreement on the basis of we pay to you when we get paid. I respectfully suggest that you refer to my following e-mails, which I am faxing to you together with this mail separately which outlines the agreement which we did have.
>
> all in all, even when we have the agreement, I have always tried to accommodate you out of our own funds when ever it was possible and paid yr invoices even when we did not receive payment, however, this was more to help

> you with your cash flow at the time at yr request. Presently, I have so much of our funds tied up in various places, whilst I know fully well that the customer has not paid on time, and I am going to raise the matter with them when we meet, however, I would request you to be a little patient as the monies are definitely coming and they are not lost.
>
> I list below the e-rnails which I sent you as under:

(A number of e-mails are then listed including those of 28 September 2001 and 28 February 2002.)

> I can go through the file further but I think it is enough to illustrate the point and I am not trying to score any points but to clarify the situation so that we should have any misunderstanding between us. Pis let me know if you need me to dig any deeper into this.."

178. This is an assertion of PWP although it might be thought that the e-mails (only those from Virani) listed are somewhat selective in that no reference is made to the 5 March E-mail or the two e-mails of 2 March 2002 or indeed to the telephone agreement now relied upon by Virani.

Other Communications in 2002 and 2003

179. I have also considered certain other communications in the context of individual contracts, in paragraphs 207 to 241 below.

Communications between JK and Virani after 2003

180. By this stage the parties' competing positions as to what had been agreed were hardening and the ongoing correspondence (culminating in a solicitor's letter on behalf of JK on 15 June 2004) reflected this. It is therefore not necessary to examine it within the present context.

The ICD Guarantee

181. By a written guarantee dated 23 December 2002, International Commerce Development SA DE CV ("ICD") guaranteed the liabilities of Mastercraft to Virani in respect of cloth supplied (B3/763A), as its parent company ("the ICD Guarantee"). Given that Virani was (on its case) selling to Mastercraft only as agent for JK, it is surprising that it did not procure this guarantee in favour of JK. In fact, PV accepted that Virani did not even mention the ICD Guarantee to FJ until 2 or 2½ months after it was made. However, in the e-mail dated 14 May 2003, Virani stated to JK that "we have got cross-guarantees for mic from the parent..we do not see any problem in getting all the payment." That very clearly suggests that in fact FJ was not told of the existence of the ICD Guarantee until then. BV said that JK was told of the ICD

Guarantee before May though not as early as January 2003 because the parties were not around much in that month. That does not seem to be right because there was considerable e• mail traffic between them then, not least the statements of account correspondence of 29 and 30 January.

182. In this context PV and BV both suggested that Mastercraft knew in some way that Virani was acting as agent and that Mastercraft did not really think that it was contracting with Virani at all. This is in contrast to BV's statement in paragraph 24 of his first witness statement that all the end-customers thought that they were dealing with Virani as principal. When pressed, BV and PV said that Mastercraft at least knew that there was some sort of agency or other arrangement between JK and Virani though they did not know its terms. They also said that Mastercraft knew that the goods had been shipped from Pakistan by JK. That last suggestion is almost certainly true since that fact would be shown on the shipping documents. But this does not assist as to who was the true seller to Mastercraft. So the assertions made by Virani about what Mastercraft knew (to the extent that they are clear) do not assist them. The existence of the ICD Guarantee is some evidence against Virani's case.

The Mastercraft Proceedings

183. Another relevant factor in this context is the claim commenced by Virani against Tim Johnson ("TJ"), Mastercraft, ICD and Huejutla Intemacional SA DE CV ("Huejutla") and Ms Claudia Barrera in this Court in October 2004 ("the Mastercraft Proceedings"). In this action Virani sued the Defendants on or in relation to a number of sales contracts pleaded by Virani to have been made by it as seller. Of the total sum of US$1.6m claimed, about US$370,000 worth relates to cloth supplied originally by JK to Virani under some of the Admitted Invoices. The balance relates to cloth supplied by JK to Virani under the Disputed Invoices, save for the cloth sent to Springs Canada which has now been paid for.

184. According to Virani, Mastercraft, ICD and Huejutla were all companies owned and/or controlled by TJ and which he introduced as new end-customers to take over consignments of cloth originally intended for CSB ie Old Stock.

185. There is no suggestion at all in the Mastercraft Proceedings that Virani was acting as agent for JK, disclosed or otherwise, even though this is its case in respect of that claim. In evidence, BV said at one stage that the proceedings were actually brought by Virani as agent for JK and

on its instructions. Indeed, by an application made on 30 May 2007, Virani sought to amend its defence to include a claim for an indemnity in respect of the costs of the Mastercraft Proceedings - see A2/p587-588. This was on the basis that JK had expressly authorised and instructed Virani to bring the Mastercraft Proceedings as agent for JK and that in March!April 2004 Counsel and solicitors had been instructed on behalf of JK. The evidence in support of this application, at paragraph 11 (A2/562) of the statement made by Virani's solicitor, stated that JK had "agreed to indemnify the Defendant [Virani] for the legal costs and expenses incurred in relation to the Mastercraft Proceedings". An indemnity for all of the costs of those proceedings would have been surprising since a significant part of the sums claimed did not, on any view, relate to the Disputed Invoices. In fact; this application to amend was never pursued. It was not put to FJ that he had agreed so to indemnify Virani. It was put to him that he had encouraged Virani to bring the action although he denied this. In evidence, BV and PV maintained that he had encouraged the bringing of the Mastercraft Proceedings. This is despite the fact that the clear import of paragraph 68 of PV's witness statement was that FJ had not been keen to take legal action because he would never see his money. If this was so he would have been equally reluctant to encourage Virani to do so at his expense, or possible expense. I did not find the explanation given by PV, that this encouragement came in the form of FJ saying that Virani should do whatever it could to extract the monies, if necessary by legal action, very convincing - at least not in the context of an allegation that Virani would be acting simply as his agent so that it would fall to be reimbursed by him. No more satisfactory was PV's suggestion that actually FJ had wanted Virani to sue originally (though it was not clear when) but was less attracted to the idea by late 2004.

186. On the face of it, then, all the claims against the Defendants in the Mastercraft Proceedings (and in Virani's solicitors' letters before action dated 11 March 2004) were being made by Virani without any suggestion that a substantial part of them were in fact made as agent for Virani and without any real evidence that JK had authorised such claims to be made on its behalf. This is significant evidence against Virani. It is true that by March and October 2004, Virani had asserted, on occasion, that it was only acting as agent and/or its liability was PWP. However, this does not mean that the Mastercraft Proceedings must be seen as having been taken by Virani as agent for JK. It is equally (and in my view more) plausible to say that the Mastercraft Proceedings amount to significant evidence that although Virani had asserted PWP (in the context of claims for payment by JK), in truth this was not so and Virani did not really believe it to be so.

187. I should add that the present position is that Mastercraft no longer trades and ICD and Huejutla are in the process of being served. The only Defence served is from TJ who denies liability.

Non-use of Sales and Purchase Contract Documentation

188. It is accepted that prior to the JV scheme in 2001, when JK contracted with Virani, JK would use a Sales Contract document addressed to Virani (in the same form as that used in the original JV contracts referred to above) and Virani would use a Purchase Contract form of the kind which can be seen in C dividers 18 to 25. There would usually be a covering letter from JK enclosing the Sales Contract. Each side requested the other to sign its respective form although in practice this was never done. In the case of the Disputed Invoices, which all concerned the (eventual) sale of some of the Old Stock, there was the original Sales Contract form as can be seen in C dividers 1 to 15 but no Purchase Contract from Virani.

189. It is said that the absence of Purchase Contracts from Virani and the absence of Sales Contracts addressed, and addressed only to Virani, shows that the sales lying behind the Disputed Invoices could not have involved unconditional liability to pay on the part of Virani. I do not agree for the following reasons.

190. First, the Purchase Contract form was not of any real significance for JK. FJ said that he regarded the contract as made before any such form was sent. And although Virani's evidence was that it would always send such a form if it was buying in its own right, the fact is that although the form stated that a copy should be signed by the seller (ie JK) in fact it never was and Virani did not insist otherwise. Second, these disputed transactions were treated as purchases by Virani in its own ledgers and for the purposes of its own accounts. Virani's evidence was that it simply followed its accountants' advice about how to deal with them but nonetheless, without more they appeared as its purchases in its books. According to BV they went into a separate purchase ledger called "JK Sons" rather than another ledger which recorded other purchases from JK called "JK Group". It was said by BV that the JK ledger was meant to contain only the "purchases" from JK concerned with JV deals where Virani did not have any unconditional liability although if so it is unclear why the expression "JK Sons" was used to denote this. (There is in fact a group of companies of which JK Sons is part). In any event, it transpires that the 4 contracts in 2003 concerning cloth bound for Canada and Mexico which Virani admits were P2P contracts, being numbered 14, 18, 42 and 43, the

subject of the Admitted Invoices, were also included in the separate ledger named "JK Sons". Accordingly that ledger drew no distinction between (on Virani's case) JV contracts (where it had no unconditional liability) and P2P contracts where it did. BV said that it was an error to have put these purchases in that ledger. I did not find this a very convincing explanation. As far as can be seen the only admitted P2P purchases in relation to goods supplied by JK for Canada and Mexico were those 4, so this means that all cloth from JK and bound for Mexico and Canada was in that ledger. So the ledger could be there to show non-European business as opposed to JV (but not P2P) business.

191. In addition, there are the undisputed invoices from JK to Virani and then from Virani to the end-customers.

192. Third and although in evidence this was somewhat qualified, BV stated in paragraph 24 of his first witness statement (A/678) that all the end-customers thought that they were dealing with Virani as principal and that Virani issued its own sales contracts to them and was itself acting as agent for an undisclosed principal (ie JK). He does not explain why this was thought necessary. It might at one time have been to assist on credit insurance but many transactions in 2002 and 2003 (and all those the subject of the Disputed Invoices) were without such Insurance.

193. The upshot of all of this is that it is not as if there were no other Virani documents which, at least on their face indicated that Virani was buying the Old Stock as principal. In my view this diminishes the significance of the fact that no new Purchase Contract forms were raised by Virani.

194. Further, I suspect, as was thought possible by FJ when asked about it in evidence, that in these unusual circumstances where JK was agreeing to ship pre-existing Old Stock which had, at one time, been the subject of an earlier original Sales Contract, and had already been acquired for that purpose and was lying in stock, it was not thought necessary to produce a Purchase Contract.

195. As to the absence of Sales Contracts from JK, again, FJ said that he did not in fact attach much importance to them. When they were used they were never signed or returned by Virani. And where (as here) there in fact had been an original Sales Contract relating to the

cloth in question which had changed, on many occasions a fresh contract for the particular shipment in question was simply not issued. The implication being that it was not felt necessary. In the case of the shipments concerned, where the relevant contract would be made at around the time of shipment and for that particular shipment of Old Stock only, there was of course JK's invoice as evidence of it. In addition FJ said that even without the Sales Contract, he was confident that an agreement had been made because the shipment had been agreed bye-mail and/or on the telephone.

196. In all of those circumstances, I do not consider that the absence of Purchase and Sales Contracts in respect of the individual shipments which formed the subject-matter of the Disputed Invoices militates against there being a sale to Virani for which it would be liable in any event.

197. I should add that while some of the Sales Contracts that were issued by JK are suggestive of the possible role of Virani merely as agent for the end-customer (though BV stated in paragraph 23 of his first statement that Virani did not act as agent for the end-customer, only for JK), the Sales Contracts even when revised do not show the whole picture. This is because none of them refer to ICD, Springs or Huejutla who were in fact the actual end-customers at the time when the documents were accepted. I deal further with such documents in paragraphs 231 - 242 below.

Commercial Considerations

198. It is contended on behalf of Virani that it would never have agreed to a position whereby it was itself liable to pay irrespective of whether the end-customer paid or not. It is said that this would not have made much sense because if Virani wanted to assume the risk of non• payment, it would simply have bought the cloth from JK (or elsewhere) and then taken all the profit. Actually, it would not be all the profit because any supplier would only sell to Virani, or any other buyer, if it could make a profit itself. The starting-point was bound to be different because in a JV transaction the profit to be shared was measured by reference to the difference between (a) the price to the end-customer and (b) JK's cost price. If it was a sale on a P2P basis the price to Virani would have to be higher than cost to allow JK to make any profit at all. But the point made by BV and PV in evidence was that Virani could at least make more money this way than on a JV basis where it was in effect required to split the overall profit (ie the difference between JK's base costs and the price paid by the end-

customer). It was said that a usual margin for a supplier like JK was only 1-2% and the gross margin on the Mexican and Canadian deals were very much more than this.

199. FJ agreed at the outset of cross-examination that Virani would or might (see transcript of 17 September pp2D and 3B) make more profit from end-customers if it dealt with JK on a straight P2P basis as opposed to sharing profits on a JV basis. Later, however, he pointed to charges which Virani would incur if selling to the end-customers in its own right for example on letters of credit if used, (significant sums given the size of these orders). It is said that in relation to the 2003 shipments at issue Virani did not incur LlC charges but that misses the point in my view. In terms of the original conception of the JV back in 2001, LlCs were certainly contemplated and required (see paragraphs 25 to 28 above). FJ also said that Virani would also have to bear any other bank charges itself. He thought that the JV deal was a good one for Virani. (See transcript for 19 September p48D-G). In re-examination, FJ said that he was not sure whether Virani would have been better off doing the deals a different way. He referred again to bank charges and also freight which would have to be paid by Virani if dealing in its own right. It is also common ground that Virani procured credit insurance at least at the outset, at a cost.

200. It is also common ground that Virani made certain charges to JK in round sums, which came "off the top" of sums due from the end-customer, in particular bank charges at 1% and credit insurance at 1% of invoice value although it was not clear that the sums actually defrayed by Virani in these respects were quite as much. I thought that BV was somewhat evasive in his denial that in the relevant e-mails about the credit insurance charges, for example 30 October and 15 December 2001 he was not representing to JK that the charges actually were 1%. Equally although he said that there was a meeting in October or November with FJ where these "ad hoc" charges were agreed, PV did not seem to think so.

201. No detailed analysis or comparison was carried out in this regard by reference to any particular transaction. So it is not entirely clear that Virani would inevitably have made significantly more on a P2P basis.

202. However, even assuming that Virani could ultimately have made more money if it had not gone through the JV arrangement, it by no means follows that just because of this, Virani would not have contemplated agreeing to be liable by accepting the documents in March

2002. The matter has to be looked at in context. First, when the JV was originally mooted and agreed, Virani was not to have liability to pay JK in any event as I have already found. But critically, and by 5 March 2002, whatever view JK took, it was undoubtedly the case that JK's bank wanted Virani to give acceptances, otherwise the deals could not go through. Virani might have preferred that it were otherwise but in reality it had no choice. It could have sought to renegotiate the entire arrangement and seek a higher margin for itself, and less for JK, but it did not do so. As at March 2002, it is clear that Virani was very keen to do this business and saw a very large market yielding better margins than in Europe. See for example the correspondence in December 2001 referred to in paragraphs 48 to 55 above. Given that PV accepted (at least at one point in his evidence) that any bank was not likely to finance exports where the buyer will only PWP and given that it was not suggested that JK and Virani planned to deceive the bank into providing finance on the basis of bogus acceptances, the only logical possibility is that Virani just went along with what was required. The evidence of PV and BV was so unsatisfactory on the question of what was discussed with FJ after 5 March that it really excludes the notion that in truth they went to FJ and point-blank refused. FJ was criticised, unfairly in my view, for saying, when asked why Virani would agree to give the acceptances even if they could have done a straight P2P deal with him at that time instead, that it was "their decision", But he cannot be expected to have read the minds of BV and PV and from his perspective it was simple. JK's bank needed Virani to give the acceptances otherwise the shipments could not be made. Either Virani played ball by accepting liability or it did not. It chose to do it this way. It was indeed "their decision".

203. In truth, I think that although Virani would have preferred not to give acceptances they agreed to do so because they did not at that time see any particular risk. In this regard:

(l) as at March 2002, the parties were not specifically contemplating that any particular end-customer was likely to default in payment;

(2) Virani was at that time taking the general step of obtaining credit insurance (which Virani seems to have had in place as a matter of course for overseas buyers, subject to limits) in case the end-customer did default; credit insurance only ceased later in 2002;

(3) these were end-customers coming at the instigation of Virani and ones which it trusted. CSB, in particular, came from Tim Johnson, its buyer, whom Virani had known for around 20 years. Other companies, such as Mastercraft and ICD, were also

associated with TJ and again, at the time, Virani trusted him. TJ had in fact been very helpful in the recovery of monies from CSB. Later on, in relation to Mastercraft, Virani obtained a parent company guarantee, as described above;

(4) in a number of cases after March 2002, the shipments went originally on CAD terms from the end-customer where Virani would not have to accept documents anyway;

(5) I also suspect that the giving of acceptances by Virani became somewhat routine (though not any the less effective in law) with both parties focussing much more on the commercial aspects including shipping stock out and getting monies in.

204. Moreover, the fact is that later, in 2003, Virani did buy cloth from JK on an admitted P2P basis (sold under the Admitted Invoices) where the end-customers were the same entities, as I describe in more detail below. It therefore assumed the risk of non-payment. It also obviously chose to use JK as opposed to some other supplier. I think that the argument that Virani was prepared to assume that risk but only if it stood to make more money, was overstated in evidence by both BV and PV. If there really was a risk of non-payment and no security in terms of credit insurance or a letter of credit, I cannot see that Virani would have wanted to sell at all, regardless of the margin to be made, having had to buy in the cloth from elsewhere.

205. It therefore seems to me that Virani could quite plausibly have agreed to give acceptances where necessary, back in March 2002. For the reasons already given, I do not suppose that Virani actually thought at the time that there was much risk in doing so. This is the critical time in my view because, having assented to the scheme of giving acceptances in relation to DA sales, the die was cast. Absent some later variation agreed between the parties to the effect that any acceptances thereafter given were to be treated as between JK and Virani as ineffective and thus worthless (and no such variation is alleged) all the acceptances must be taken at face value, including those now at issue in relation to the Disputed Invoices.

206. The only relevance of the points raised about the commercial realities is (as invoked by Virani) to suggest that the acceptance arrangement was so hopelessly implausible and unlikely from a commercial point of view that it must mean that the evidence of BV and PV (itself inconsistent and implausible for the reasons given above) in relation to the alleged discussions after the 5 March E-mail and the banking arrangement is to be preferred to that of FJ and the clear import of the banking documents. I reject that contention. At best the

commercial point is but one factor to be taken into account when assessing the totality of the evidence on these matters. It is in my judgment, heavily outweighed by the matters pointing the other way, to which I have already referred above.

Individual Contracts relating to the Disputed Invoices

207. If Virani accepted unconditionally the shipping documents in relation to the shipments under the Disputed Invoices it would be liable as principal on the maturity date, and Virani has not suggested that the general scheme of DA was at any point varied so as to produce a different result for any particular shipment. This is not surprising since Virani's case is a root and branch rejection of any unconditional liability after March 2002. This means that an analysis of the documentation (including the original contract documentation) and pricing relating to each separate Disputed Invoice is unlikely to be of much assistance, save (a) insofar as it throws light on what Virani would have been likely to agree to, back in March 2002 and (b) in relation to the March 2003 Agreement which JK says brought about a change so that there was no longer any commission or profit share payable on any shipments to Mexico and Canada from that point on. Instead the parties dealt with each other on a "pure" P2P basis. I deal with the individual contracts in relation to the March 2003 Agreement in paragraphs 227 - 243 below. Having considered all of the evidence as to those particular contracts, to the extent that the documents and circumstances surrounding those transactions can in some way be said to be relevant to what Virani did agree or would have agreed to back in March 2002, I do not think that there is anything in them which significantly helps Virani's case.

208. A general point was made to the effect that there was no need for Virani to take personal liability on any of the Disputed Invoices because it was not liable on the original underlying contracts. However, as noted below, the position had changed very considerably since the making of the original Sales Contracts both in terms of the end-customers, and the payment terms (ie DA instead of CAD or LlC). What matters, in my view, are the acceptances given by Virani at the time of shipment not the original Sales Contract documents.

Conclusions as to the liability or otherwise of Virani after 5 March 2002.

The Evidence

209. In my judgment it is clear that Virani understood that because of what JK's bank required in order to fund (and therefore make possible) further shipments it would have to become liable

to JK as buyer of the goods where documents were sent to Virani's bank for acceptance by it, irrespective of whether the end-customer paid. Moreover, it agreed to that position. I therefore reject the evidence of BV and PV to the effect that they agreed PWP with FJ following the 5 March E-mail, so as to displace the otherwise clear effect of the documents. In doing so I have taken into account all of the various matters referred to above.

210. I have also taken into account a general submission that I should regard Mr Jawed generally as an unreliable witness. I do not agree. It is true that some parts of his evidence left omething to be desired, for example, what he said at first about "consignment basis" (see paragraph 37 above) or the "jack up" e-mail (see paragraph 234 below) but on the other hand he was prepared to make significant and realistic concessions, for example on whether Virani was liable prior to March 2002. There were occasions where he was confused on a certain point but that could be said of all the witnesses. Overall, he struck me as essentially truthful and willing to help the Court. And as will be clear from what I have said above, his account has considerable support from the other materials. By contrast, although BV and PV often appeared confident in what they said, the key problem for them which, in my view, made them very much less reliable, was their account of the alleged post-5 March E-mail conversations with Virani's bank and with FJ and the fact that it largely did not square with the other materials. Again all of this has been recounted in detail above.

211. That being so, and given my observations above as to the meaning and effect of the bank documents, those documents can and should be taken at face value. There was no agreement made with JK that Virani would not be liable and it would give some kind of conditional undertaking only (as alleged by Virani). On the contrary, Virani agreed at the time that it would provide unconditional acceptances as required by JK's bank (as alleged by JK). The Undertaking was not only unconditional as a matter of objective analysis - this is what both parties, subjectively, had intended it to be.

Contractual Analysis

212. What this means is that in relation to each of the relevant shipments under the Disputed Invoices a separate contract was made between JK and Virani on each occasion when documents were submitted to Virani for acceptance through its bank and Virani provided the Undertaking. Indeed, the contract was probably formed slightly earlier than this, when the parties agreed on the terms of a particular shipment which was going to involve DA terms to

Virani (as opposed, say, to CAD terms on an end-customer), since Virani had already agreed (in March 2002) that in such cases, it would provide the relevant acceptance. However, nothing turns on this since in the case of all the Disputed Invoices, the relevant presentation was made and acceptance given.

213. In particular,

(1) When JK's bank (in the case of all the Disputed Invoices, Askari) sent the documents to Virani's bank (in the case of all the Disputed Invoices, Ansbacher) with an instruction to obtain Virani's acceptance to pay, JK's bank was clearly acting as agent for JK. It could not have been acting for anyone else and it was not suggested otherwise. In fact, there was an express instruction from JK to Askari to release the documents against an appropriate instruction - see paragraph 101 above;

(2) Equally, when Ansbacher requested Virani's acceptance to pay, upon which it would release the documents, that bank must have been acting as agent for JK's bank and thus for JK. Logically, the same would be true when Ansbacher received the Undertaking. In this regard, it is worth noting that while BV and PV both asserted in evidence that Ansbacher was not Virani's agent for the purpose of giving the undertakings (as to which see paragraphs 216 - 219 below) BV said that it was the agent of "the Pakistani bank" (ie Askari or equivalent), and PV said (unsurprisingly) that he knew that Ansbacher would transmit the Undertaking to Askari;

(3) Further, the actual transaction on its face was a documentary collection. This is how it was described by the banks involved. See for example Ansbacher's reference to "Documentary Collections" at B4/1259-12643, the reference by UBL in its instructions to HSBC to "Does as per URC 522", the references by the banks to Virani as "Drawee" (see Article 3 of URC 522) and the reference to documentary collections in the exchange between Ansbacher and Askari in the first part of 2004. Indeed it is plain from their evidence that PV and BV, as experienced importers, and FJ as an experienced exporter were entirely familiar with terms such as "acceptance" and "D/A Terms" which are a feature of documentary collections. Under Article 3 of URC 522, Askari is the remitting bank having received instructions from the principal, JK, to handle the collection. As noted above it is clearly the agent for JK in this regard. As for Ansbacher, it is the presenting bank, as also defined by Article 3, being a collecting

bank (ie a bank involved in the collection) which makes the presentation to the drawee ie Virani. Paragraphs 22-091 and 22-092 of Benjamin's *Sale a/Goods i^h Ed* point out generally that the collecting bank (which would include the presenting bank here) is the agent of the remitting bank;

(4) Accordingly, Virani's bank was also acting as agent for JK (through the agency of Askari) when it received the Undertaking;

(5) Since (as I have found) the acceptance in the Undertaking was (a) unconditional in form and (b) not qualified or rendered conditional by any countervailing oral agreement made between JK and Virani direct, it is at the point of Ansbacher receiving the Undertaking, at the latest, that the contract would be made.

(6) From this standpoint, the advices of acceptances sent from Ansbacher to Askari (see for example paragraph 104 above) are not part of the contract between JK and Virani (which had by then been made). They are, however, of evidential significance because they show that the presenting banks which received the acceptance from Virani certainly assumed that what they had received was unconditional, even though, according to Virani, they had all agreed with Virani that it could produce a form of words which was only conditional.

214. It is suggested on behalf of Virani that there is no evidence that JK was even aware of the Undertakings. In terms of the actual documents submitted by Virani to its bankers at the time, that is almost certainly correct. Askari had not seen them at the time of making, either. But this is irrelevant because:

(1) Ansbacher was JK's agent to receive the Undertakings, and had no power to release the documents without them, which was not only the instruction of Askari (itself JK's agent for these purposes), but also JK; see paragraph 101 above;

(2) At the outset, that Virani was giving its undertaking was expressly confirmed by it to JK - see paragraph 92 above;

(3) On the evidence the parties agreed the scheme at the outset in March 2002. JK expected Virani to give the acceptances and it did. JK knew that Virani had done so because it received the relevant finance and in any event each transaction was started

by JK's instruction to its bank to forward the documents for acceptance. One of the key documents presented to Virani for acceptance was, of course, JK's own invoice which showed that the party to be paid was JK. Virani was requested specifically by Ansbacher to give its acceptance to pay by reference to that invoice. See paragraph 102;

(4) In the knowledge that Virani had accepted the documents in relation to any given shipment, JK thereafter called for payment in accordance with the relevant maturity date;

(5) Indeed the whole thrust of the evidence of BV and PV in relation to the 5 March 2002 was that they knew that in the absence of agreeing something different with JK in relation to any acceptance which Virani would be required to give, Virani would be unconditionally liable to JK, the seller. That is why, on Virani's own case (though I do not accept it on the facts) it made such efforts to avoid that liability coming into being both by discussing it with JK and Virani's own bank and by adopting a form of words for the Undertaking which made it conditional.

215. In my judgment there is no legal or factual justification for dismissing the bank documentation as an irrelevance, as contended for by Virani, either on the ground that Ansbacher was not acting as agent for JK in receiving the acceptance, or on any other ground.

JK's Further Submission

216. In this context, JK further submits that in receiving the acceptance (ie the Undertaking), JK's bank at that point is in fact no longer acting as agent for JK, but rather as agent for Virani. This contention is only of relevance if the Undertaking was not as I have found it to be, but was conditional in such a way as to negate it being an acceptance for present purposes. Then, it is argued, Virani is still liable because Ansbacher communicated to Askari that an unconditional acceptance had been given (again, see by way of example paragraph 104 above) and as this communication was made as Virani's agent (contends JK), Virani is bound by its agent's actions. Given the findings which I have already made, this point does not strictly arise but in deference to the arguments made I deal with this contention in paragraphs 217 to 218 below.

217. JK submits that "for the purposes of receiving the requests for the Undertakings and, more importantly, passing the information that the Undertakings had been given up the chain to JK's Bank and to JK, Ansbacher was acting as VL's agent and so as to bind VL." (paragraph 35 (2) of its submissions dated 30 November 2007). This is because "the position is the same as a drawee banker (under the URC or a cheque), who is the banker of the payor (being the drawer), which drawee banker may act in part as agent/sub-agent for the payee and/or the payee's bank (whether remitting bank or collecting bank (under the URC) or collecting bank (in relation to a cheque» but which drawee banker pays over the monies as agent for its debtor customer being the payor" (paragraph 186 (2) ofits submissions dated 22 October as modified by its submissions dated 30 November).

218. I do not accept this because Ansbacher must have been hitherto holding the documents and then presenting them as agent for JK - a position which JK accepts. If it then releases the documents in exchange for the acceptance it is very difficult to see how it could become at that point agent for Virani. I am fortified in this conclusion by the following matters:

(1) The Code created by URC 522 prescribes particular duties for each of the parties involved in a documentary collection, which includes (here) Ansbacher as presenting bank. As the relevant collecting bank it is obliged to follow the instructions of the remitting bank (here, Askari) as to what is to be presented and what is to be received (see paragraphs 100 to 104 above). It has its own specific responsibilities under URC 522. Apart from (obviously) following its instructions, it also has to "give advice of acceptance to the bank from which the collection instruction was received" see Art. 26 (ii) "without delay". It would be very odd if a presenting bank were manifestly to fail to follow its instructions (because it did not in fact obtain a proper acceptance) and yet not have any liability as a result; in truth, of course, this is what Askari was (incorrectly) asserting as against Ansbacher in 2004 - see paragraphs 128 to 129 above. But if it was acting purely as agent for Virani (to make representations as to the acceptance) then, on normal principles, it would be difficult to see how it could be liable to Askari or to JK for its default;

(2) As noted above, paragraphs 22-091 and 22-092 of Benjamin's *Sale of Goods 7th Edition* point out generally that the collecting bank (which would include the presenting bank here) is the agent of the remitting bank. It is true that these passages are not addressed specifically to the problem at hand but they do seem to me to

provide support for the contention that Ansbacher should be seen not as agent of Virani, but of JK in receiving the acceptances;

219. As to the position of a drawee banker in relation to the payment of a cheque issued by its payor customer, the point is made on behalf of JK that this is a case where the payor's bank is its agent for the purpose of making payment. Hence, by analogy, Ansbacher should be seen as the agent of Virani for the (allegedly similar) purpose of giving an acceptance to pay. I do not think that this analogy works. Of course the payor's bank is its agent for making payment in the sense that the bank must conform to its mandate. As Lord Atkinson observed in *Westminster Bank* v *Hi/ton* [1926] TLR 124, a cheque is an order by the customer principal to its agent bank to payout the principal's money in its agent's hands. And in addition, there can clearly be no payment under the cheque unless it has actually been made to the collecting bank (in this context, usually the bank of the payee) Qy the payor's bank. The latter holds its customer's money anyway so obviously a "payment" by the customer to its own bank cannot discharge the debt created by the cheque. But the position where a simple acceptance against documents is required is different. The presentation is made to the drawee under the collection ie here, Virani. The acceptance is the undertaking to pay given by the drawee, Virani. It can be meaningfully given to its own bank which is appointed under the documentary collection to procure it. Once the acceptance is given the essential parts of the transaction as provided for by URC 522 are in place, subject only to the duty upon Ansbacher to notify Askari of the giving of the acceptance.

220. I therefore reject JK's further submission in this regard.

Article 8

221. Virani in paragraph 3 (3) of its written submissions sent on 5 December has drawn attention to Article 8 of URC 522. Under the rubric of "Creation of Documents" this provides that:

> "Where the remitting bank instructs either the collecting bank or the drawee is to create documents (bills of exchange, promissory notes, trust receipts, letters of undertaking or other documents) that were not included in the collection, the form and wording of such documents shall be provided by the remitting bank, otherwise the collecting bank shall be not be liable or responsible for the form and wording of any such documents provided by the collecting bank and/or the drawee."

222. I do not think that this takes the matter further in the context of the present case. It is simply saying that the collecting bank has no responsibility, as collecting bank, for the form and wording of a document it takes from the drawee where that form and wording were not prescribed by the remitting bank and where the document itself was not originally provided. Here, the instructions from Askari were clearly to the effect that there should be an unconditional acceptance from Virani albeit that the precise wording was not set out and in any event, for the reasons already given, the document Ansbacher received was in fact what Askari had asked for.

Overall Conclusion

223. Accordingly, since each of the Disputed Invoices generated an unconditional acceptance on the part of Virani (as is shown at pages 14,24,35,46,58, 73, 82, 108, and 121 in Bundle C) it must follow that JK's claim for their total value (US $661,073.35) succeeds. I deal with the further claims in respect of the Disputed Invoices, in paragraphs 244 to 261 below.

224. In those circumstances, JK's alternative claim for payment of the Disputed Invoices based upon estoppel does not fall for consideration.

THE ADVANCE PAYMENT CLAIMS

225. It must also follow, given my findings above, that the counterclaim for the return of the Advance Payments must fail. Virani was indeed obliged to make such payments by no later than the relevant maturity date. All such dates have long passed.

226. On the facts as I have found them, JK's alternative defence to the Advance Payments Claim (referred to in paragraph 19(2) above) does not arise.

THE MARCH 2003 AGREEMENT

Introduction

227. JK further contends that in around March 2003 the position changed yet further because from then on, there was no JV element to any sale of cloth bound for Mexico or Canada, in the sense that these were straight sales to Virani without any profit share or commission. Virani would simply pay the price agreed with JK and make whatever it made on resale. This contention applies to all of the Disputed Invoices save for Invoices 66 and 69 of2003. Having

perused the claim for commission as made by Virani in its latest schedule at D2/352, it appears that no claim is made (contingently or otherwise) for any commission in relation to the shipments the subject of the Disputed Invoices, in any event. So this further contention is probably of little significance. But as it forms part of the whole sequence of events as recounted by FJ, I make observations about it as set out below.

228. The thrust of FJ's evidence was that he wanted the JV to terminate completely by March 2003 not only in relation to the supply of any new stock to Virani for onward sale to Mexico and Canada, but also in relation to the shipment of the remaining Old Stock. Although JK's pleaded case said otherwise, in his oral evidence FJ said that invoices 66 and 69 did attract commission because (unusually) there was credit insurance in place. Virani does not dispute that a fresh start was agreed for any new stock to be produced (as evidenced by the P2P shipments made in relation to the Admitted Invoices) but it says that this had no application to sales of Old Stock. This denial is of course in the context of its general denial of liability for any of the Old Stock sold whether in 2003 or 2002.

The likelihood of the March 2003 Agreement

229. In my judgment it is likely that some sort of agreement was made in around March 2003 to the effect that commission was no longer payable on the shipments made then and afterwards, whether of Old or New Stock:

(1) By this time, JK was owed very considerable sums of money by (on its case) Virani and in any event in respect of cloth supplied to Canada and Mexico. It had kept to its word and been flexible with regard to payments. It would not be surprising if JK wanted a more rigorous and simple regime, whereby Virani had to pay on time, without the complications of commission and simply took whatever profit it could get on any shipments it agreed to take. Virani agrees that there was a new regime to replace the JV scheme, though only in respect of New Stock;

(2) Virani was still keen in principle to enter transactions for the supply of cloth to Canada and Mexico because on any view it took some shipments on a P2P basis which were the subject of the Admitted Invoices. These shipments were to precisely the same end• customers as those which fell under the Disputed Invoices - namely Springs (for Canada), and ICD/Huejutla (for Mexico through TJ). At the time, it obviously had

sufficient confidence in such customers to deal with them as principal and take the risk. As indicated above, I do not accept the argument that if they perceived a real risk here they would have still dealt with them anyway because of a greater profit margin; I think that they would just not have dealt with them at all, at least not without some form of security;

(3) Given that Virani was prepared as a matter of principle to deal with such end• customers in its own right as principal, it is difficult to see why it should necessarily object to taking Old Stock from JK for onward sale to the same customers;

(4) There is some further support for this agreement to be found in the e-mails from Virani dated 16 May and 5 August 2003, referred to in paragraphs 163-164 and 173• 174 above.

The Individual Contracts

The Original Contract Forms

230. These are of limited significance (in relation to the claims made under the Disputed Invoices) since, by the time of the shipments under the Disputed Invoices, the end-customer had changed and the contract concerning the original end-customer (whether through Virani as intermediate principal buyer or otherwise) was no longer in place.

Contract 10712001

231. This started life before March 2002 and JK accepted that there was back in November 2001 no liability imposed on Virani. At that time, credit insurance was to be in place for this contract. See paragraph 42 above. There was an original covering letter from JK dated 1 November which referred to the original end-customer, Maquiladora, as "your [ie Virani's] principal". That is suggestive of an agency role for Virani but it adds nothing to the present issue if indeed Virani was not originally liable anyway. There was a revised version of the sales contract which is dated 27 July 2002 although FJ thought that it should be 2003 being the time of the relevant shipments. It is addressed to "M/S Virani..AlC C.S. Brooks." FJ said that it should simply have been addressed to Virani but in any event the expression *"AlC* C. S. Brooks" does not necessarily connote a role for Virani as agent only. In fact, at least according to Virani, it never received the revised document and CSB was not the actual end• customer for shipments of cloth originally destined for this contract anyway - it was

ICD/Huejutla. JK issued no contracts in favour of them or even referring to them. It is not inconceivable that the revised contracts were not sent to Virani, I rather suspect that JK may have revised them for internal purposes in an attempt (not always successful) to track or reflect what actually happened to the cloth. There is nothing sinister in this. But it does mean that such documents are not especially helpful for present purpose.

232. There is a price difference between that charged by JK to Virani and that charged by Virani to ICD/Huejutla. The relevant Disputed Invoices here are 134, 149, 151 and 152. Although the parties are at odds as to how that came about it is certainly consistent with Virani taking as principal and moreover not charging a separate commission.

Contract 23 of 2002

233. This is addressed to "C. S. Brooks Canada C/O M/S Virani..;". It could be consistent with CSB as principal and in fact this would not be surprising because as originally intended this was to be a CAD deal on CSB. It followed Virani's e-mail to JK dated 4 April 2002 that it had now sold 200,000m of cloth to CSB on "CAD NETT PAYMENT". It was not, therefore, DA on Virani, (Some cloth was shipped to CSB on CAD which gave rise to problems in 2002 when CSB refused to pay for the goods once at the port). There was a revised version (again not sent to Virani, according to it) dated 20 March 2003. It repeated the reference to CSB but again this was by then meaningless because CSB was out of the picture and the actual the end-customers were either ICD/Huejutla (Invoice 60) or Springs (Invoices 66 and 69). Again, there was a price differential.

234. It was in this context that FJ wrote the e-mail dated 25 March. In respect of the shipments to Canada to be made in April (and which became the subject of Invoices 66 and 69) he asked PV to tell him "how much prices we can jack-up for the above mentioned shipments". Although FJ somewhat implausibly suggested that "jack up" might refer to the prices to be charged to Virani, it seems to me that this expression refers to the ultimate prices ie to be paid by the end-customers. This is not inconsistent with Virani being liable in its own right. On a JV basis the parties had to agree on a price to be charged to the end-customer. The ultimate price might be less important to JK where the transaction was pure P2P (although no doubt the higher the end price the more Virani would be willing to pay JK) and in fact, in the end, FJ said that the new P2P regime brought in for all shipments of cloth to Canada and Mexico

was not applicable to invoices 66 and 69 as they were specifically covered by insurance. I deal with this further below.

Contract 46 of 2002

235. This took the same form as Contract 23 and much the same can be said about it. There was an original covering letter from JK to Virani when enclosing the contract which made reference to "your principals M/S C S Books.." It was on a CAD basis to CSB. All had changed by March 2003 however when the shipments were made (under part of Invoice 134) in August 2003 to ICD/Huejutla. Again there is a price differential between the respective invoices.

Contract 48 of 2002

236. This is dated 2 July 2002 and is addressed to "M/S Virani..on behalf of Maquiladora..Mexico". There was an original covering letter from JK to Virani which referred to a business confirmation for Maquiladora and then a reference to "your principals M/S C S Books.." These are certainly suggestive of Virani's role as agent, but the original terms specified payment on CAD basis which would not involve any DA on Virani. Indeed, FJ accepted in evidence that in such cases there would be no personal liability on Virani. There is a revised version dated 2 July 2002 although it must have been done much later at around the time of the shipments (generating Invoices 73 in 103) in June and July 2003, not least because the price changed from 67.5c per metre to 60c. The end-customers by then were ICD/Huejutla and not Maquiladora. There is a price differential here although only a modest one, which BV said was simply to cover commission payable to TJ. He said that in this particular case, Virani had agreed to waive its commission altogether. So there is no dispute between the parties as to the non-payment of commission. The point was made, particularly in the case of this particular shipment, as to why Virani would have agreed to take as principal when there was really no profit in it at all. However, the instruction or request to JK to make these shipments came from Virani. It is clear from JK's letter of 27 May 2003 that from its perspective, if it was shipping at this price it was doing so on a P2P (ie no commission) basis in the absence of some other agreement. The letter stated "Now your sale at US$0.60/meter is based on principal basis or what net rate we have to consider here?" having referred to the fact that the original cost price had been US$0.5611. The documents show that no other price was agreed because the invoices and banking documents went out and were accepted on the basis of 60c. That is certainly sufficient evidence to dispel the notion that the small difference in

price here must mean that Virani was not dealing as principal at all, either in relation to this particular contract, or more generally.

Contract 54

237. This is dated 29 July 2002. It is addressed to "MlS Virani..AlC C S Brooks." There was again an original covering letter from JK to Virani when enclosing the contract which made reference to "your principals MlS C S Books.." Payment is expressed to be by LlC which was confirmed by FJ in his witness statement, although he was less sure about this in evidence and thought it may have been CAD. However, he had no difficulty on accepting that if it was originally by way of LlC then Virani would have had no personal liability. There is a revised contract dated 29 July 2002 but it has a different price being the US$1.09 charged (on part of Invoice 134) when the relevant shipment was made, in August 2003, to ICD/Huejutla. FJ said that the price of US$1.09 (after bleaching) was a good price to Virani which invoiced ICD/Huejutla at US$I.225.

The Commission Schedule

238. All witnesses were cross-examined on this document. It came first from JK and was attached to its e-mail of 16 October 2003 along with other documents. By this time, all the relevant shipments had been made.

239. It is not wholly consistent with either side's case as to the position after March 2003 in that:

(1) The monies under each of the Disputed Invoices 151 and 152 and some of the monies due under Disputed Invoices 134 and 149 (amounting to a total sum of about US$229,000) are expressly stated in this Schedule to have been the subject of P2P shipments attracting no commission. Yet Virani's case is that (a) it had no liability for these shipments at all and (b) was entitled to commission on them;

(2) The remaining monies due under Disputed Invoices 134 and 149 in the total sum of around US$98,000 are described as attracting commission at 5.5%, which is contrary to JK's case;

(3) The monies due under Disputed Invoices 60, 66 and 69 are shown as attracting commission of 1.5% (about US$221,000 in total of which US$147,885 has been received by Virani). According to JK's pleaded case, invoices 66 and 69 did not attract

commission. However, in evidence, FJ said that in fact they did, though on JK's case, there should be no commission on invoice 60 here;

(4) The monies due under Disputed Invoices 113 and 73 are shown as attracting nil commission. Virani accepts that this was the position here not because the shipments by now were not attracting commission anyway but because it had agreed to waive commission on these particular shipments. This is not accepted by JK.

240. Moreover, the schedule included claims for commission where the end-customer had not even paid, which was wrong in any event.

241. Perhaps unsurprisingly, both sides contended in evidence that the commission schedule was mistaken in certain respects. It is therefore of limited assistance. In my view it certainly does not amount to substantial evidence against JK's claim that no commission was payable after March 2003 (or against its more general claim that after March 2002 - and hence as at March 2003 and thereafter - Virani was accepting liability as a matter of course by virtue of its acceptance of the shipping documents for each shipment).

Generally

242. I am unable to conclude that the relevant documents show that there was no change to a non-commission basis after March 2003, as contended for by Virani. Indeed overall I consider that they are more consistent with there having been such a change.

Conclusion on the March 2003 Agreement

243. To the extent that it matters, therefore, I conclude that there was a change in around March 2003 so that commission or a profit share was not thereafter payable, for all the Disputed Invoices save Invoices 66 and 69 of 2003.

ADDITIONAL CLAIMS IN RELATION TO THE DISPUTED AND ADMITTED INVOICES

Sales tax refunds and Duty Drawback

244. JK contends (in paragraph 52 of the Amended Particulars of Claim) that the sales tax and duty it paid when originally acquiring the cloth for the purpose of these (among other) shipments then shipping it, was refunded because it was being used for exports. However, such refunds

were (or became) dependent upon the monies for the exports actually being received. JK had to provide a guarantee in respect of any liability to return the refunds. As the payment for these shipments was not made the refunds were called back from JK pursuant to its guarantee. There is no prospect of unwinding this situation if payment were made now, some 4 years after the event. The total amount claimed is US$182,755.28. These matters are dealt with in paragraphs 107 and 122 of FJ's first witness statement and there is a comprehensive set of documents about them at D2/divider 1.

245. The underlying facts as to what has happened with these refunds is not seriously challenged and in any event, there is no reason to dispute JK's evidence about them. Further details of how the regime worked are set out in the reports of the joint expert, Mr Altaf Qureshi, at divider 4 of file A2.

246. However, what is said by Virani is that it is not liable for such sums, claimed as additional losses for its breach in not paying JK under the Disputed Invoices and the Admitted Invoices, because they were not in the reasonable contemplation of the parties when the relevant contracts were made.

247. As far as this is concerned, FJ's evidence was that JK's ability to claim refunds was certainly discussed between the parties when they worked out the base costs for the JV contracts. However, he accepted in evidence that the first time that he specifically raised with Virani the prospect that the refunds were at risk was in the e-mail to Virani dated 9 April 2003. This was written in the context of JK wishing to be paid for outstanding invoices. It referred to outstanding monies and being pressed by its bank. It also stated that:

> "Further note, Government of Pakistan has passed a new rule that Sales Tax Refund will be released on presentation of BCA (Bank Credit Advice) against exports... ..Our sales tax refund is pending since October November 2002 which is 15% of the Invoice Value. They hold the whole sales tax for the month whose amount becomes approximately more than 10 million rupees if even a single invoice is pending and yet to realise. Please note normally payment tenure is 120 days from BIL date and if our bank receive payment with delay, sales tax refund case is time barred for that month and creates so many complications for us to get the claim.."

248. This e-mail seems to me to be sufficient to have brought within the reasonable contemplation of the parties that sales tax refund at least was at risk if the invoices were not paid. Duty drawback is not referred to in this e-mail and so I confine JK's claim here to the loss of the sales tax refunds.

249. Accordingly, JK is entitled to sums in respect of such losses in relation to all contracts made after 9 April. Of the Disputed Invoices, this has the effect of removing the shipments which were the subject of invoices 60 and 66. The other contracts came later and the total amount of the sales tax refund losses is US$124,161.69 as is shown in the schedule to the Amended Particulars of Claim at A l/55n-s.

Interest on the liquidated sums due under the Disputed and Admitted Invoices

250. This is claimed upon the sums due in three, alternative, ways:

(1) Compensation and interest under the Late Payment of Commercial Debts (Interest) Act 1998;

(2) Financing costs claimed by way of damages. Such costs would have been saved if payment of the Disputed Invoices and the Admitted Invoices was made on time;

(3) Interest pursuant to section 35A of the Supreme Court Act 1981.

Compensation and interest under the Late Payment of Commercial Debts (Interest) Act 1998

251. It is not in dispute that in principle the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act") applies to the claims under the Disputed Invoices and the Admitted Invoices, save that paragraph 42 (1) of the Re-re-Amended Defence and Counterclaim contends that the 1998 Act does not apply to the contracts relied upon by JK because Virani was simply an agent. However, as I have found that it was buying the goods in its own right at the price contained in the Disputed Invoices and as it accepts that it is liable to pay the Admitted Invoices as principal, this contention does not apply. The relevant contracts were contracts for the sale of goods.

252. Under the 1998 Act and the relevant S.L, the statutory rate of interest is 8% above the official dealing rate of the Bank of England.

253. The total sum claimed, up to 10 September 2007, is US$586,606.34. See the schedule annexed to the Amended Particulars of Claim at Al/55A-H. No point is taken as to the rate of interest claimed, namely between 11.75% and 13.5% depending on the relevant period (Al/55B).

254. The 1998 Act provides, in section 5, for the remission of statutory interest over the whole or part of any period if the interests of justice require it by reason of any conduct. Further, the rate of interest may be reduced if the interests of justice so require. Remission is claimed in general terms in paragraph 42 (2) of the Re-re-Amended Defence and Counterclaim by reason of the matters previously pleaded and the matters, especially set-off, pleaded thereafter. The matters pleaded "above" must be a reference to the various defences to the claim which (so far as are relevant) I have rejected, in finding the claims under the Disputed Invoices made out. As to set-off, the main set-off claimed relates to the counterclaim for the return of the Advance Payments which I have dismissed. No further points in relation to the claim under the 1998 Act are made in the closing written submissions of Virani.

255. Accordingly, in principle, JK is entitled to the full sum claimed under the 1998 Act. However, there are various other counterclaims made by Virani which have not yet been determined. If any of them succeed, they may reduce the figure for judgment to be entered in favour of JK at least for interest purposes and I therefore do not think it appropriate to make an award in the full sum of US$586,606.34 at this stage without further argument. Such argument can be made following the handing-down of this judgment. I should make it clear, however, that the only live issue in relation to the claim under the 1998 Act appears to be the question of set-off in relation to the as-yet undetermined further claims to be made by Virani.

256. JK is further entitled to compensation at the rate of £100 per qualifying debt ie, here, those arising under each of the Disputed Invoices and the Admitted Invoices. There are a total of 17 such invoices yielding a total further sum of £I,700.

Financing costs claimed by way of damages

257. A total of US$482,562 is claimed here, being financing charges which JK contends it would not have to have paid but for the non-payment by Virani of the Disputed Invoices and the Admitted Invoices. In principle, such losses are recoverable - see *Sempra* v *IRe* [2007] 3 WLR 354, paragraphs 16, 17 and 95-96 in particular. Their recoverability as damages is not denied by Virani.

258. Moreover, such losses were clearly in the reasonable contemplation of the parties in this case by March 2003. In particular,

(1) There are many e-mails back and forth between the parties in 2002 referring to the finance which was required by JK in order to effect the shipments. Examples are JK's e-mails to Virani dated 27 July and 20 September 2002. See further paragraph 123 (a) to (i) of FJ's first witness statement. In addition, Virani's own case was that it was making payments to JK to alleviate JK's position with its bank;

(2) BV accepted in evidence that if Virani was bound to pay JK and did not, that JK would be running up interest. He said that he would not have known at what rates but I do not consider that this matters for present purposes. In any event, the e-mail of 20 September 2002 makes a reference to 18% finance charges.

259. As to the actual sums payable, FJ deposes specifically to accumulated charges as at 31 December 2004 and further charges thereafter, in paragraph 122 (a) of his witness statement. The figures are then set out in the schedule at Al/55n-s.

260. However, unlike the position in relation to sales tax refund, there are no detailed supporting documents and FJ was not able to explain the particular figures claimed, as a member of his staff had done the calculation and inserted the figures into the schedule. As the *Sempra* case (supra) makes plain a claim for damages under this head is an alternative for interest *per se* and so it is not necessary since I have found JK entitled to interest under the 1998 Act. Were this claim to become relevant, however, I would allow it in principle subject to further argument and evidence on the figures.

Interest under section 35A

261. If the 1998 Act did not apply, interest is recoverable here at the rate of 8%. I would be prepared to allow a higher rate so as to match that recoverable by way of damages for finance charges. I cannot take that aspect of the matter any further because of the uncertainty referred to in paragraph 260 above. As matters stand, there is no need for an award under this head anyway because of the award under the 1998 Act.

Further Argument

262. Insofar as further matters remain to be argued on interest (within the confines of my conclusions as set out above) they can be made following the handing-down of this judgment.

Interest upon damages in respect of lost sales tax refunds

263. Interest pursuant to section 35A of the Supreme Court Act 1981 is also claimed upon the damages for the lost sales tax refunds awarded in paragraph 249 above. JK is entitled to such interest, to be assessed.

THE NON-ACCEPTANCE CLAIMS

264. The analysis set out above bases Virani's liability for the Disputed Invoices on individual contracts constituted at the time of shipment due to its acceptance of the documents. At the time of the original making of the JV Sales Contract documents the position was very different in terms of end-customers and modes of payment, as has been explained above. FJ has accepted in evidence that originally (and even in 2002 but where DA was not originally involved) Virani would have had no liability. It must follow that despite its clear role in recommending the initial end-customers to JK and requesting it to procure the necessary cloth, some of which, in the end, was never shipped, I cannot conclude that Virani was contractually liable to take it. The Non-Acceptance Claim must therefore fail. The evidence concerning the disposal of the Old Stock not shipped out, therefore, does not fall for consideration. The Contracts 42 and 43 Claim is a separate matter, dealt with below.

THE CONTRACTS 42 AND 43 CLAIMS

265. In essence, JK claims damages of US$17,455 for Virani's alleged repudiation of P2P Contracts 42 and 43 in relation to cloth the subject thereof but which was not delivered. JK says that Virani wrongfully refused to open an LlC in respect of such shipments, in the absence of which JK was not bound to deliver the cloth to Virani and did not do so.

266. Virani denies this claim and contends that there was no obligation to open an LlC. Hence JK's refusal to deliver without one was itself a repudiation of the contracts. It counterclaims US$20,300 loss of profit.

267. It is common ground that the underlying Contracts 42 and 43 did not require an LlC, as originally agreed. They were on DA terms to Virani. See C/216 and 237. JK's e-mail dated 20 September 2003, referring to the relevant cloth, stated that its bank was no longer going to grant finance on a DA basis. The correspondence referred to in paragraph 28.2 of the Reply makes it clear that what happened was that JK had reached a position with its bank which

meant that it could not and would not make any shipments unless they were secured by an LlC. See in particular the e-mails dated 22 March, 12 and 24 April and 7 and 8 May, 19 November and 9 December 2004. It was in truth seeking to change the terms. It may well be, as JK suggested, that the reason why its bank was no longer prepared to finance shipments, save on LlC terms, was because of all the monies owed by Virani to JK. But that did not permit JK to change the terms of Contracts 42 and 43. Nor does it amount to a repudiation of these contracts by Virani, which is how the case is put in JK's closing submissions.

268. On 3 March 2005 the present action began and paragraphs 67 and 68 of the Amended Particulars of Claim alleged breach of contract on the part of Virani, for failing to take delivery of these shipments, and interest charges on the stock still lying with Virani were claimed. The stock was later sold by JK at a loss compared to the contract price which is why the damages figure changed from US$ 19,217.68 to US$17,455 (see Al/55j).

269. For its part, Virani was expressing interest in taking the cloth but not with an LlC. In my judgment, it was entitled, contractually, to take such a stance. The e-mails show that no actual variation of the contracts to this effect had been agreed. Accordingly, JK's claim in this respect must fail.

270. As for Virani's counterclaim, paragraphs 38 and 39 of the Re-re-Amended Defence and Counterclaim allege that JK's requirement that an LlC be provided before the goods could be shipped was a repudiation of the contracts, and I agree. Virani accepted that repudiation by its debit note dated 29 March 2005 in which it claimed loss of profit of US$20,300 as result of not being able to obtain these shipments. There clearly was some customer available because there was correspondence between the parties in March 2005 referring to a prospective on• sale by Virani (it is marked "Without Prejudice" but is in the bundle and I assume it meant without prejudice to the open dispute about whether Virani was liable to take the shipments on an LlC basis). BV stated at page 36 of his first witness statement that the debit note related to the profit which Virani would have made had it sold on to ICD as intended. ICD was certainly the originally intended end-customer under Contracts 42 and 43. However, it is not clear to me from the correspondence whether it was still in fact ICD to whom Virani had the prospect of selling in March 2005. There is also the fact that the debit note actually refers to losses made under contracts 14 and 43 rather than 42 and 43, although this may have been an error because the same type of cloth was to be supplied under contract 14, as under contract

42. In the event, however, neither BV not PV were challenged as to the loss of profit claim in terms of whether they had a customer at that point or what the losses were. In those circumstances, Virani is entitled to recover on the basis pleaded and as set out in its evidence. There will therefore be judgment for Virani on this aspect of its Counterclaim for US$20,300. It will be entitled to interest pursuant to section 35A of the Supreme Court Act 1981. I will deal with the amount of interest along with other related matters following the handing down of this judgment.

CONCLUSIONS

271. Accordingly,

(1) There will be judgment for JK in the sum of US$I,215,362.24 in respect of the Disputed and Admitted Invoices, together with interest to be dealt with as set out in paragraphs 250 to 262 above, plus compensation of £1,700;

(2) There will be a further judgment for JK for damages in respect of the lost sales tax refunds in the sum of US$124,161.69, together with interest as set out in paragraph 263 above;

(3) JK's Non-Acceptance Claim is dismissed;

(4) There will be judgment for Virani, in the sum of US$20,300 together with interest to be assessed as set out in paragraph 270 above;

(5) Virani's Advance Payments Claim is dismissed.

272. Apart from questions of interest there will need to be directions in relation to the outstanding claims which consist of the matters pleaded in paragraph 48 (2) to (7) of the Re-re-Amended Defence and Counterclaim. By my calculation the total claimed under these heads amounts to US$323,778.90 plus interest. As they are pleaded, among other things, by way of set-off against the Claimant's claims, I will here argument as to the impact at this stage (if any) of such claims on the judgment referred to in paragraph (1) above.