COMMONWEALTH DEVELOPMENT CORPORATION v CENTRAL AFRICAN POWER CORPORATION (1968) ZR 70 (HC)

HIGH COURT
MAGNUS J
26th JULY 1968

Flynote and Headnote

[1] **Contract - Impossibility of performance - Supervenient foreign law - Exchange restrictions.**

A contract governed by English law and to be performed in England is enforceable in Zambian courts, even though the performance of such contract would involve a breach by the obliger of Rhodesian Exchange Control Regulations passed after the creation of the contract.

[2] **Contract - Accord and satisfaction - Method and place of payment.**

An obliger cannot unilaterally depart from a contractual requirement as to method and place of payment and claim discharge of his obligation by accord and satisfaction unless the obligee accepts the altered mode of payment.

[3] **Evidence - Affidavits under Order XI of High Court Rules - Extra Affidavits.**

Affidavits in excess of the number normally submitted under the High Court Rules and Practice may be admitted into evidence in the discretion of the judge - especially when neither side objects to their inclusion.

[4] **Civil procedure - Summary proceedings - Summary judgment under Order XI of the High Court Rules.**

Summary judgment may be granted under Order XI of the High Court Rules and Practice only if there is (1) no serious conflict as to matter of fact and (2) no real difficulty as to any matter of law.

[5] **Courts - High Court - Jurisdiction - Contract to be performed in England.**

The High Court has jurisdiction over a matter involving a contract to be performed in England where the defendant is resident in Zambia or where defendant has submitted to jurisdiction.

[6] **Jurisprudence - Reception of English law - Effect of decisions of Court of Appeal in England.**

Where the law of England coincides with the law of Zambia, the decisions of the Court of Appeal in England must have great persuasive authority.

[7] **Equity - Double payment of judgment prevented - Resulting trust.**

Equity will prevent a defendant from paying twice for the same contractual obligation, and a resulting trust for defendant's benefit may be imposed upon one of his payments to prevent such double payment.

Cases cited:

(1) *Roberts v Plant* [1895] 1 QB 597.

(2) *Anglo - Italian Bank v Wells* 38 LT 201.

(3) *Jacobs v Booth's Distillery Co.* 85 LT 262.

(4) *Crawford v Gilmore* 30 LR Ir. 238.

(5) *Electric & General Contract Corp. v Thomson - Houston, etc., Co.* 10 TLR 103.

(6) *Cow v Casey* [1949] 1 KB 474.

(7) *Madzimbamuto v Lardner - Burke & Others* [1969] 1 AC 645.

(8) *Carl Zeiss - Stiftung v Rayner & Keeler Ltd* (No.2) [1967] AC 853; [1966] 2 All ER 536.

(9) *Kleinwort, Sons & co v Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank* [1939] 2 KB 678; [1939] 3 All ER 38.

(10) *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287.

(11) *British Nylon Spinners Ltd v I C I Ltd* [1954] 3 All ER 88.

Rules and regulations construed:
Order XI of the High Court Rules and Practice.
Rhodesian Exchange Control Regulations (1965, as amended 4th February, 1966), ss. 9 (1), 25 (1) and 25 (5).
Gatehouse, for the plaintiff
May, for the defendant

Judgment

Magnus J: By an Agreement in writing dated 12th July, 1956, and made between the Colonial Development Corporation (called therein "the Corporation") of the first part, the Federal Power Board (referred to as "the Board") of the second part, the Government of the then Federation of Rhodesia and Nyasaland (called "the Government") and one Donald Macintyre, acting in his capacity as Minister of Finance of the Federation of the third part, the Corporate on agreed, *inter alia*, to lend the Board the sum of £15 million sterling. The recitals to this Agreement show that the loan was part of a scheme to finance the establishment of an undertaking by the Board for the supply of electricity from the waters of the Zambezi River at the Kariba Gorge and the details of this project were set out in the First Schedule to the Agreement. These recitals also show that all consents necessary at this time had been obtained. There were various provisions whereby the Board were entitled to call for payment of the capital or any instalment thereof, with which I need not deal, since it is common ground that the whole of the loan was in fact made. Nor need I do more than refer to the provisions for the payment of interest, since these, too, are not in dispute. As to repayment, there is a provision, which has not been exercised, under which the Board could, in certain circumstances, repay the whole or any part of the principal sum before the date on which it otherwise fell due, but subject to that, clause 6 (1) of the Agreement provided that the principal amount of every instalment advanced in any year ending 25th March, together with the interest payable (as calculated in accordance with clause 4) on the amount thereof for the time being outstanding, should be paid by the Board to the Corporation by thirty - three equal instalments beginning on 25th March on the eighth anniversary of the last day of the year in which the instalment was advanced.

Clause 8 of the Agreement provided that, *inter alia*, so long as any moneys payable by the Board thereunder were payable to the Corporation or anybody appointed by the Imperial Parliament to succeed it, the Board undertook to pay the same without deduction of tax or impost of any nature, present or future, payable by the law of the Federation or by law of any of the territories within the Federation. I mention this provision as an indication that it was within the contemplation of the parties at the time when the Agreement was entered into, that no fiscal laws, at any rate of the Federation or any of its constituent territories, should at any time affect the entitlement of the Board to repayment of the loan moneys in manner provided for in the Agreement.

By clause 10, the Federal Government unconditionally guaranteed, as primary obliger and not as surety merely, the due and punctual payment of, *inter alia*, the principal and interest and expressly provided that the obligations of the guarantor should not be discharged except by performance and then to the extent of such performance. Then clause 15 goes on to provide that, subject to the right of the Corporation to receive payment in Salisbury in the equivalent in Rhodes and pounds of the sterling amount which it might specify, all moneys payable to the Corporation by the Board or the Government pursuant to the Agreement were to be paid in sterling in London, free of all transmission charges, fees and commissions. Finally, clause 19 provides that the Agreement shall be construed and have effect in all respects in accordance with the laws of England.

The Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, 1963, made in pursuance of sections 1 and 2 (1) of the Rhodesia and Nyasaland Act, 1963, which dissolved the Federation as from the end of 1963, also dissolved the Board and set up the defendant corporation, in whom it vested all the assets, rights, liabilities and obligations of the Board, including its rights, liabilities and obligations under the Agreement. The

plaintiff corporation, meanwhile, had become the Commonwealth Development Corporation instead of the Colonial Development Corporation.
By a Supplemental Agreement, made under seal on 30th December, 1963, between the plaintiff corporation (referred to as "CDC") of the first part, the defendant corporation (called "CAP") of the second part, the Government of Northern Rhodesia of the third part and the Government of Southern Rhodesia of the fourth part, the parties in effect ratified the Agreement as binding on them subject to such amendments as therein contained. After recitals which, *inter alia*, confirmed that the £15 million sterling provided for in the Agreement had in fact been advanced by CDC to the Board in manner and upon the terms summarised in the First Schedule to the Supplementary Agreement, it provided, in clause 2, for the Agreement, which it called the "Loan Agreement", to have effect subject to the modifications set out in the Second Schedule, by clause 5 (1) (A), each of the Governments (i.e. the Government of Northern and Southern Rhodesia, respectively), unconditionally guaranteed as a primary obliger and not merely as a surety the due and punctual payment of one - half of the principal of and interest on and other charges in respect of the loan, while clause 5 (4) had a provision similar to that contained in clause 10 of the Loan Agreement with regard to the Federal Government, namely, that the obligations of each Government should not be discharged except by performance and then only to the extent of such performance.
Clause 5 (6) provided that all moneys payable by either Government should be paid in sterling in London free of all transmission charges, fees and commissions. By clause 6, each Government undertook, *inter alia*, that, so long as any moneys remained payable under either of the Agreements, it would accord to CAP or to CDC all such permissions and consents (if any) as might from time to time be necessary to enable CAP to pay and CDC to receive, in the manner, the currency and the country prescribed, all moneys for the time being payable to CDC. This can only mean that each Government bound itself not, for example, to withhold exchange control permission for the defendant to pay to the plaintiff in sterling in London moneys payable under the Loan Agreement. It follows that if either Government withholds such permission, that Government is itself in breach of contract.
Finally, the Supplementary Agreement likewise concludes (in clause 10): "This Agreement shall be construed and have effect in all respects in accordance with the laws of England."
I need not go into in detail the circumstances in which instalments of principal and interest become payable, since it is conceded that the time for repayment has arrived and, indeed, that some repayments have been made. Difficulties have, however, arisen with regard to certain repayments which represent that part which has been guaranteed by the Government of Southern Rhodesia. This is, in fact, the second action between the parties arising out of these difficulties.
The first such action was commenced by specially endorsed writ on the 8th November, 1967 (1967 HP No. 560), and was for the recovery of one - half of two sums of £654,147 11*s*. 4*d*. sterling and £429,375 sterling, which fell due on 5th April, 1967, and 10th October, 1967, respectively, and amounting in all to £537,261 5*s*. 8*d*. sterling together with interest. At that time, the pound sterling had not yet been devalued nor had the currency of Zambia been changed, so that the sum claimed equalled its exact equivalent in Zambian currency. A summons under Order XI of the High Court Rules was issued by the plaintiff corporation on 16th November, 1967, and came before the deputy registrar on 29th November, 1967, when it was adjourned to 7th December, 1967, on which day the deputy registrar gave leave to the plaintiff to sign final judgment for the amount claimed. From this Order, the defendant corporation appealed and this appeal came before Blagden, CJ, on 11th December, 1967. Judgment, dismissing the appeal, was given by the learned Chief Justice on 2nd January, 1968.
On this appeal, three main arguments were advanced on behalf of the defendant company, all of which were rejected by the learned Chief Justice. The first was that the sums claimed did not become payable until exchange control permission had been given to pay them. To this, it was pointed out that no such term was included in either agreement, nor was one to be implied. The second related to the effect of devaluation, which had occurred after the issue of the writ but before the hearing of the appeal. Save that this argument

was rejected, I need say no more here, since in the present case the effect of devaluation has been taken into account and no argument on this point therefore arises. The third point was r ejected on that occasion for reasons other than those which arise in the present case but falls for decision by me in the present case. That is that, since the issue of the writ and *after* the deputy registrar had directed that judgment be entered against the defendant, the Rhodesian exchange control authority had not only refused the defendant's application for permission to remit the moneys then payable to London, but had directed the defendant to pay the whole amount due to the credit of a blocked account in the name of the plaintiff in Rhodesia upon pain of criminal prosecution if this direction was not complied with. This argument was rejected on the ground that, whatever the Rhodesian exchange control authorities did after the pronouncement of the learned deputy registrar's judgment could not be prayed in aid as a defence to the action. This left open the question whether it could be available as a defence if it occurred before such, judgment had been pronounced.

On 26th April, 1968, the present action was commenced by specially endorsed writ claiming (1) the sum of K552,983.63, being the equivalent in Zambian currency of the sum of £332,573 15*s*. 8*d*. sterling after the devaluation of sterling; (2) certain sums by way of interest on the principal element in that sum, which it is admitted had fallen due at least up to the 28th March, 1968, and (3) certain sums in respect of stamp duties paid in England. As the plaintiff corporation, through its counsel, Mr Gatehouse, has now withdrawn this last part of the claim, I need not be concerned therewith. The sum of £332,573 15*s*. 8*d*. was one - half of the total sums which fell due on 25th March, 1968, the other half having been duly paid by the Zambian Government in sterling in London while the interest claimed was on £16,406 18s. 4d. or its Zambian Equivalent of K28,125.56, being the total of the principal included in the sum claimed.

A summons under Order XI of the High Court Rules was issued on 3rd May, 1968, returnable before the deputy registrar on 16th May, 1968, but, by consent of the parties, this summons was, on 16th May, adjourned to be referred to me and was returnable before me on 7th June, 1968. An application was, however, made to me on behalf of the plaintiff on 4th June, 1968, to adjourn the application *sine die*, since the plaintiff wished to bring out counsel from England and this application was granted on terms. This summons was restored on 20th June, 1968, and finally came before me on 11th July, 1968.

Although the present action is substantially of a similar nature to the previous action, there is at least one important point of difference. On 28th March, 1968, and before the issue of the writ in the present action, the equivalent amount in Rhodesian currency of the sum of K552,983.63 was paid, on the direction of the person purporting to act as the Reserve Bank of Rhodesia in Salisbury, into a blocked account in Salisbury in the name of the plaintiff corporation, exchange control permission to pay the same in London in sterling having been refused. Previously, on 19th March, 1968, similar action had been taken with regard to the stamp duty claim, but, as I have already mentioned, since that claim has been withdrawn by the plaintiff corporation in the present action, I need not concern myself with the position in that connection.

[3] In the previous action, no affidavits in opposition had been filed at the time when the matter first came before the learned deputy registrar and only two were before him when he finally decided the matter, and, so far as I can gather, when it came before the learned Chief Justice on appeal. In the present action there has, if anything, been a superabundance of affidavit evidence. Not only was there the statutory affidavit in support of the application filed by the plaintiff and a later affidavit filed by John Guy Chance, dealing with the stamp duty claim, but no less than four affidavits filed by the defendant in opposition, the first alone, sworn by Mr Peter Goatly, exhibiting, in addition to the usual exhibits, two further affidavits. This means that I had, in effect, before me, six affidavits sworn in support of the defendant's case. As I pointed out in the course of the hearing, the practice on application of this sort is, in general, to limit the number of affidavits - usually to one affidavit in opposition, which the defendant is entitled to put in as of right, and, with leave, one affidavit in reply on behalf of the plaintiff. As, however, neither side objected to the inclusion of these affidavits, and as most of them had already been prepared by the time that the matter came before me, I decided to allow them to be

put in. In any case, in so far as they deal with matters of foreign law which were relevant to the argument of counsel (although not necessarily relevant to any decision in the present case), they were of assistance to the court.

[4] However, I must bear in mind that this is an application under Order XI of the High Court Rules and not the trial of the action. This Order corresponds to Order 14 in the Rules of the Supreme court in England, and, despite the wider scope which the latter has acquired over recent years by successive amendments, the last being in R S.C. (1965), the general principles governing both remain basically the same. Following the authorities cited in the Supreme Court Practice, 1967 (the current edition of the "White Book") at page 119 et seq., I have, therefore, to decide whether the defendant company has set up a bone fide defence or has raised an issue against the claim which ought to be tried (*Roberts v Plant* [1]) and it is only if I am satisfied, not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant may I give judgment for the plaintiff (*Anglo - Italian Bank v Wells* [2], page 201. per Jessell, M.R), Order 14, and consequently our Order Xl, was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court (see *Jacobs v Booth's Distillery Co* [3]). Thus, summary judgment should not be granted when any serious conflict as to matter of fact or any real difficulty as to matter of law arises (*Crawford v Gilmore* [4]; *Electric & General Contract Corp. v Thomson - Houston, etc. Co.* [5]). However difficult the point of law is, however, once it is understood and the court is satisfied that it is really unarguable it will give final judgment (*Cow v Casey* [6], per Lord Greene, M.R).

[1] Substantially, the defence raised by Mr May is that, payment having been made into a blocked account in Rhodesia at the direction of the authorities exercising jurisdiction in that country and under penalty for failure to do so, the plaintiff's debt has been satisfied. Evidence was put before me, in the form of an affidavit, sworn in Salisbury on 3rd May, 1968, by Ernest Jackson Whitaker, an advocate of the High Court of Rhodesia, and exhibited to the affidavit of Peter Goatly, sworn on 11th May, 1968, and filed by the defendant corporation in opposition to the plaintiff's application, that the Rhodesian Exchange Control Regulations, 1965 (published in Rhodesia Government Notice No.353 of 28th May, 1965, and effective from 1st June, 1965 - that is to say, at a time when the legal Government of Rhodesia was operating) made, *inter alia* the following provisions:

"9. (1) Except with the permission of the Minister, no person shall do any act which involves, is in association with, or is preparatory to, the making of any payment outside Rhodesia."

There is a *proviso* with which we need not here be concerned.

"25. (1) Where under any provision of these regulations the permission of the Minister is required for the making of any payment or the placing of any sum to the credit of any person resident inside or outside Rhodesia, the Minister may direct that the sum payable, or to be paid or credited shall be paid or credited to blocked account with an authorised dealer in Rhodesia authorised by the Minister to open and operate blocked accounts."

Then there was a sub-regulation 25 (5) substituted for the original sub-regulation 25 (5) on 4th February, 1966, i.e., after U.D.I. and effected by those purporting to exercise authority currently in Rhodesia, which reads as follows:

"(5) Where -

(a) a sum is due from any person to any other person but the Minister directs that it shall be paid or credited to a blocked account; and

(b) the person to whom the sum is due -

(i) nominates a particular blocked account to which the sum is to be paid or credited; or

(ii) has failed to nominate a particular blocked account and the Minister has nominated a blocked account;

then the person from whom the sum is due is under a duty to cause the sum to be paid or credited to that blocked account in accordance with the direction of the Minister and the crediting of any sum to that blocked account shall, to the extent of the sum credited, be a good discharge to the person to whom the sum is due."

Evidence was also given by Mr Whitaker in his affidavit that, by Rhodesian Government Notice No. 373 of 1965 (published on 4th June, 1965), the Minister delegated the powers vested in him under the regulations to the Reserve Bank of Rhodesia, save for his power

to make statutory instruments. I would here observe that this notice, having been published before UDI, is undoubtedly a valid notice, but the question of who is the Reserve Bank of Rhodesia today, is not quite so certain.
I would also add that it is common ground that the plaintiff corporation refused to nominate a blocked account and that, if payment has been made into such an account, it is by nomination under regulation 25 (5) (ii) and without the acquiescence of the plaintiff.
An interesting dissertation was then given by Mr May as to the effectiveness of the acts, legislative and administrative, of the present authorities exercising control in Rhodesia, and I was taken at length into the judgments both of the general and appellate divisions of the High Court of Rhodesia in the case of *Madzimbamuto v Lardner - Burke and Others* [7], which have been specially printed at the request of the court and copies of which were very kindly furnished to me by Mr May. Mr May also cited to me the House of Lords case of *Carl - Zeiss - Stiftung v Rayner and Keeler Ltd* [8] and other authorities which tended to show that, so long as the courts of a country gave effect to the legislation of their Government, that legislation had to be recognised as the law of that country, even if that Government was not recognised as either the de jure or the de facto government of that country. I should here mention that I have been furnished with a certificate by the Minister of Foreign Affairs of Zambia to the effect that the Government of the Republic of Zambia does not recognise the present regime in Rhodesia as either the *de facto* or *de jure* government of that country.
Mr May then posed the proposition that, once the defendant corporation had made application in Rhodesia for exchange control permission, they immediately came under an obligation, if so directed, to make payment into a blocked account and that this was a good discharge of their liability to the plaintiff corporation. He made the, to my mind, valid point, that if the plaintiff had accepted payment in Rhodesia, that would have been a good discharge and submitted that it made no difference simply because the discharge was by virtue of a statutory "deeming". He added that the defendant corporation has been deprived of the money and the plaintiff credited therewith, albeit in a blocked account, that the defendant had done everything it could to perform its part of the contract and had suffered exactly the same detriment as if it had made payment in the ordinary way and the plaintiff had at least achieved the advantage of having the money held in trust for it. He therefore submitted that, as there was an actual discharge in Rhodesian law, there was also an actual discharge according to the law of Zambia.
As an alternative, he cited Order XXV, rule l, of our High Court Rules, which provides that every suit implies an offer to do equity in the matter thereof, and admits of any equitable defence. He submitted that, if the plaintiff is now given leave to sign final judgment, the defendant would be made to pay twice over and that this would be inequitable.
Mr Gatehouse, replying on behalf of the plaintiff corporation, conceded that, as applied by the Rhodesian Courts, the law as stated by Mr Whitaker in his affidavit would be the law of Rhodesia. He submitted, however, that there were two such laws: (a) domestically and (b) as applied by English or Zambian law. The *Carl - Zeiss - Stiftung* [8] case decided that a foreign corporation was governed by the law of its domicile. The appellant corporation in that case was an East German corporation and its capacity was governed by East German law. In the present case, the Rhodesian direction was no defence, since this was an English contract with which we were concerned and the obligation was to pay in sterling in London. Mr Gatehouse then cited the case of *Kleinwort Sons and Co. v Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank* [9]. In that case (and I quote the headnote) "the plaintiffs, who were bankers carrying on business in London, accepted three bills of exchange drawn on them by a Hungarian company and payable in three months in London. The bills were sent to the plaintiffs on 4th April, 1938, by a Hungarian bank together with a letter from the Hungarian Company undertaking to provide cover for the bills in London one day before maturity and a guarantee by the Hungarian bank. On the same day the Hungarian bank wrote to the plaintiffs under separate cover drawing the attention of the plaintiffs to the fact that both the drawers and they would only be in a position to provide cover at maturity if the exchange regulations prevailing in Hungary enabled them to do so. At that date legislation in Hungary made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the

Hungarian National Bank. No consent was obtained for payment of the bills in question. Cover not having been provided at maturity, the plaintiffs brought an action against the Hungarian company and the Hungarian bank claiming payment of the amount of the bills and interest: Held (1) that the letter sent by the Hungarian bank under separate cover was not part of the contract and did not limit the clear promise contained in the undertaking and the guarantee; and (2) that the proper law of the contract was English law and that, since the contract was to be performed in England, it was enforceable in the English courts, even although its performance might involve a breach by the defendants of the law of Hungary.
The head - note I have quoted is from the King's Bench report of the case. The head - note in *All England law Reports* puts the second point as follows:

"The law of Hungary did not make it impossible for the customer to fulfil his contract to provide cover in London, since the contract could only be made unenforceable in England if there was a forbidden act required to be done in Hungary. As the contracts might have been fulfilled by applying to them funds lying to the credit of the defendants in London or elsewhere out of Hungary, the above conditions were not fulfilled, and the plaintiffs were entitled to succeed."

Mr Gatehouse therefore submitted that it was not material what a foreign government might say should happen to the debt. The court, he said, was only concerned with the creditor enforcing his right to payment. As to satisfaction, he pointed out that the contract was to pay in London and submitted that there was no satisfaction of this obligation by payment in Salisbury.
[5] The *Kleinwort* [9] case is a decision of the Court of Appeal in England, and, apart from the great persuasive authority which decisions of that court must have where the law of England coincides with the law of Zambia, as it does in the present case, I am impressed by the sound common sense of that decision.
At first instance, Branson, J, pointed out (at page 683) that the contract in that case was written in English and obliged the defendants concerned to provide pounds sterling in London. He added, "London is therefore the *locus* both *contractus* and *solutionis*, and I can see no principle upon which it should be held that Hungarian law should be applied to it."
Citing, Scrutton, L. J, in *Ralli Bros v Compania Naviera Sota y Aznar* [10], "where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country" he adds, at page 687 that "two elements must co - exist if an English contract, lawful at its inception, is to be rendered unenforceable in the Courts of this country by supervenient foreign legislation: (1) there must be an act which the contract requires to be performed in the foreign country; and (2) that act must have been rendered unlawful there. The contract in the present case is not concerned with the doing of any act in Hungary". He goes on to say (at page 689) ". . . no English court has yet held that an enactment forbidding persons within its jurisdiction from fulfilling an English contract to pay sterling in London can provide a defence to an action in our Courts upon that debt."
In the Court of Appeal, Mackinnon, LJ, at page 694, says, citing Dicey on Conflict of Laws, Rule 160, 5th ed., page 647: "The material or essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed by the proper law of the contract." The proper law of this contract is English law. The third exception, at page 657, states: "A contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*)." Here it is said that to pay this money in London is unlawful by the law of Hungary. If this contract had been to pay money in Budapest, no doubt that principle would have applied, and the law of Hungary would have been the *lex loci solutionis*. Therefore, the exception where the performance is unlawful by the law of the country where the contract is to be performed does not arise, and the defendants can base no defence on that principle.

"The attempted extension of the principle, would obviously lead to preposterous results. Suppose the Kingdom or Legislature of Ruritania passed a law that no Ruritanian subject should pay a hotel bill which he has incurred in England. When the Ruritanian subject was sued in the country court by the hotel proprietor the county court judge, if that principle were correct, would have to give judgment for the defendant. That seems to me obviously absurd and I do not think I need discuss the matter any further."

Du Parcq, LJ, puts the matter succinctly when he says (at pages 696 and 697), "One starts with the rule that English law is the law which governs the performance of this contract. An elementary principle of English law is that people should keep their contracts and carry them out." He goes on to say (at pages 698 and 699), "The question in this case is whether one can go very much further than any decision ever has done and say that if a sovereign state chooses to enact that, if one of its subjects, obeying the law of a foreign country, carries out in that foreign country a contract which he has made according to its laws, he will be committing an offence against the laws of his own country, then the courts of England must say, "We cannot compel you to keep your contract because, if you do, you will be breaking the law of your Sovereign State." I think the answer to that suggestion ought to be a very emphatic negative. I do not say for a moment that a sovereign state may not legislate to control the acts of its subjects beyond its borders. Of course it may. Nothing can prevent a sovereign state from so legislating and it is a matter with which these courts have no concern. But it is right that it should be understood that, if a sovereign state legislates so as to interfere with the acts of its subjects outside its own territory and, in a sense, its own jurisdiction, then it cannot expect - and I suppose that no State would expect - that the courts of another country will enforce legislation at the expense of its own laws."

Kleinwort's [9] case has been considered in several later cases and was (*inter alia*) applied in *British Nylon Spinners Ltd v I.C.I. Ltd* [11]. As I have said, not only is it of great persuasive force, so far as I am concerned, but the arguments cited by me seem to me to be sound common sense.

Applying them to the present case, both the agreements in question expressly provide that they shall be construed and have effect in all respects in accordance with the laws of England, and the payment of moneys thereunder are likewise expressly to be paid in sterling in London. Quite apart from the *lex loci contractus*, therefore, the *lex loci solutionis* is England. In *Kleinwort's* [9] case, the defendants were resident in Hungary. In the present case, the defendant corporation is resident both in Rhodesia and in Zambia, and has assets in both places. [6] It is true that, at the outset, I expressed some doubts as to whether I had jurisdiction to deal with this matter at all, since the place of performance is clearly in England. Both counsel, however, have agreed that I have jurisdiction both on the ground that the defendant is resident in Zambia and on the ground that the defendant has, in any case, submitted to the jurisdiction. I think this is correct.

[1] I have come to the conclusion that I am not concerned with the legality or otherwise of the acts of the Rhodesian authorities, although I might mention in passing that, since the hearing before me, the Privy Council has reversed the decision of the Appellate Division of the High Court of Rhodesia in the *Madzimbamuto* [7] case. *Kleinwort's* [9] case is directly applicable to the present case and applying the facts to the principles there set out, I am satisfied that the direction of the Rhodesian exchange control authorities does not constitute a defence to the plaintiff's claim.

[2] I would say one word on the submission of Mr May that payment into a blocked account in Salisbury amounts to satisfaction of the plaintiff's claim. The full term in the law of contract is accord and satisfaction. *Prima facie* if a contract requires payment in a certain way and in a certain place, payment in some other way or at some other place is not a satisfaction of the obligation. The obligee may, however, unilaterally accept the altered mode of payment in satisfaction of his claim. In the present case, there is express provision in the agreement between the parties for the plaintiff, in fact, to require payment in Salisbury if it so wished. The plaintiff did not so require nor had it ever acquiesced in any alteration in the mode of payment laid down in the contract. One thing is certain, the obligee cannot unilaterally depart from the contractual requirements as to payment. That being so, I cannot see on what principles the defendant can contend that an obligation to pay in sterling in London, to be freely disposed of by the plaintiff as it wishes can, without

the consent of the plaintiff, be satisfied by payment in Rhodesian currency in Salisbury into a blocked account of which, at present, the plaintiff cannot make any use whatsoever. I appreciate that the question of law raised by the defendant is, at first sight, one of substance. I am, however, satisfied that it has been clearly decided and is quite inarguable and that this is a proper case where leave to defend should be refused.

[**7**] Before, however, leaving the subject, I feel that I ought to say something on the point of equity raised by Mr May. First, I would observe that the plaintiff corporation comes to this court with clean hands. It has said and done nothing to bring about the present state of affairs which, if anything, has been brought about by the breach of a contractual undertaking by one of the guaranteeing governments. Secondly, although I am not, at this stage, concerned with the exact method whereby the plaintiff enforces its judgment, it is quite clear that in equity it cannot exact payment twice over. Although the moneys may, at present, be in a blocked account in Salisbury in the name of the plaintiff, once the plaintiff's judgment has been satisfied, the moneys reposing in that blocked account would, in my view, be impressed with a resulting trust in favour of the defendant corporation.

This has, however, no bearing on the merits of the present application, for the reasons already stated by me. I therefore order that the plaintiff has leave to sign final judgment for the sum of K552,983.63, together with interest on K28,125.56 from the 25th March, 1968, until payment at the rate of 6.328 *per centum per annum* with costs to be taxed on the higher scale. Certificate for counsel, if necessary.

Judgment for the plaintiff.