Messer Griesheim GmbH v Goyal MG Gases Pvt Ltd [2006] APP.L.R. 02/07

JUDGMENT : The Hon. Mr Justice Langley : Commercial Court. 7th February 2006.

The Applications

1. These are unusual applications. The Claimant ("Messer") entered a judgment in default of acknowledgment of service against the Defendant ("Goyal") on 6 February 2003. Messer applied on 6 July 2005 to set aside that judgment. It also applied at the same time to enter summary judgment on the same claim for the same amount. The reason is that Messer believes that a summary judgment would be enforceable in India as a judgment "on the merits". A default judgment is not enforceable in India. Goyal is an Indian company. Goyal has no, or at least no known, significant assets in England or Wales or, it would appear, outside India. It is Goyal's submission that, although it maintains it has a good defence to the underlying claim by Messer, the default judgment should not be set aside and the merits of the claim and any defence should be left undecided. The submission is that the claim has "merged" in the judgment and Goyal will not and cannot be made to comply with the judgment.

The 1995 Agreements

2. Messer is a German company involved in the supply of industrial gases throughout the world. Goyal carries on business in similar markets in India. In early 1995, Messer and Goyal entered into agreements whereby Goyal would be operated as a joint venture between Messer and the existing shareholders of Goyal.

3. By a Share Purchase and Cooperation Agreement (the "SPCA"), dated 12 May 1995, Messer acquired a significant shareholding in Goyal and became entitled to representation on the Goyal board of directors. By a Technical Support and Services Agreement (the "TSSA"), made on 30 November 1995, Messer and Goyal agreed to develop a joint strategy to arrange new products and upgrade existing plants in India.

The Loan Agreement

4. Funding of the strategy was provided in part by bank loans from Citibank N.A. ("Citibank"). By a loan agreement dated 30 June 1997, Citibank agreed to lend Goyal up to US$7m to be repaid by 6 instalments in 12-monthly intervals commencing 24 months from the date of the first advance. Repayment of the loan was guaranteed by Messer on the demand of Citibank. The loan agreement provided expressly that if Messer was called upon by Citibank to meet its guarantee it would be subrogated to Citibank's claims against Goyal.

5. The loan agreement provided (clause 19.4) that all payments required to be made by either Messer or Goyal should be "calculated without reference to any set-off or counterclaim" and should be "made free and clear and without any deduction for or on account of any set-off or counterclaim". The loan agreement was governed by English law. The Courts of England had consensual jurisdiction in respect of disputes arising out of the agreement and any objections to England as a forum were expressly waived.

A Deteriorating Relationship

6. There is no dispute that the relationship of Messer and Goyal began to deteriorate in 1998. Plans by Messer to acquire a company in India were alleged by Goyal, if fulfilled, to be a breach of a non-competition clause in the SPCA. Goyal obtained interim relief from the Delhi High Court restraining Messer from completing the acquisition. Arbitration proceedings commenced under the SPCA were settled by a written agreement made in February 2000.

7. In April 2001, Messer announced that it wished to divest itself of the 49% shareholding in Goyal which it then owned and to leave the Indian market. Goyal alleged that this also constituted a breach of contract by Messer.

Messer's Claim

8. Goyal had paid Citibank the first and second instalments under the loan agreement on 29 September 1999 and 2000. On 22 September 2001 Goyal informed Citibank that it would make no further payments and that Citibank should look to Messer to recover the balance of the loan. In the event of default in payment of any instalment, Citibank was entitled to repayment of the outstanding balance of the loan in full. It demanded payment from Messer in October 2001 and Messer paid the sum of US$4,794,762.98 to Citibank on 9 October 2001. There is no dispute that under the terms of the Guarantee Messer was obliged to make that payment.

9. On 17 January 2003, Messer commenced proceedings in this court to recover from Goyal, under its right of subrogation, the payment made to Citibank under the Guarantee. Goyal did not acknowledge service and the judgment in default was entered on 6 February 2003.

The "Defences"

10. In reaching decisions on both applications, I think it essential first to consider the merits of Goyal's response to the substance of the claim made by Messer under the loan agreement. The basis of the response is to be found in two witness statements made by Mr Dhar, now the Deputy General Manager of Goyal. Goyal rely on three separate alleged agreements, albeit Mr Nash, counsel for Goyal, made it clear that the first was not put forward at the present hearing as itself providing any defence to the claim by Messer and the third is of more direct relevance to the exercise of the court's discretion in deciding whether or not to set aside the default judgment.

11. The first agreement is said to have been made orally at a meeting of Goyal's board on 13 June 1997, and so some 2 weeks before the loan agreement was executed. Mr Dhar's evidence is that it was then agreed that, in the event that Messer was called upon to pay under the proposed guarantee to be given to Citibank, it would not have recourse to either the other shareholders in Goyal or Goyal. I shall refer to this alleged agreement as "the June 1997 non-recourse agreement".

12. The second (also oral) agreement is said to have been made in August and September 2001. Messer is alleged to have agreed to pay the amounts outstanding under the loan agreement and not to look for repayment from Goyal. In April 2001, Goyal's lawyers in India had written to Messer making unspecified allegations of breaches by Messer of both the SPCA and the TSSA and claiming INR 5billion (some US$111m) in damages. Mr Dhar's evidence is that he and Mr Goyal (representing the Indian shareholders of Goyal) had discussed the claim by Goyal in August and September 2001 with a Mr Allcock, one of Messer's nominated directors on the board of Goyal. Mr Dhar says that Mr Allcock wanted to reach a compromise and Messer was prepared to compensate Goyal and to continue with the joint venture. Mr Dhar continued:

"We discussed the settlement of Goyal's claims against Messer. Goyal made it clear that it would only be prepared to settle the claims if Messer accepted responsibility for the balance owed by Goyal under the Loan Agreement. This was of critical importance to Goyal because a large proportion of that loan had been invested in assets which had to be written off after the disputes with Messer had arisen…. In return, Goyal would be responsible for the domestic borrowing and Goyal and the Goyal shareholders would not pursue certain claims against Messer. This deal was agreed between Mr Goyal and myself on behalf of the Goyal shareholders and Mr Allcock on behalf of Messer in September 2001. The parties proceeded with the joint venture in good faith. The agreement set out above was considered by the Goyal shareholders to be a sensible commercial deal that would avoid further litigation with Messer. It was agreed that the particulars of this agreement would be discussed and finalised after Mr Allcock had discussed with his colleagues what was required to formalise the agreement."

13. I shall refer to this alleged agreement as the September 2001 Agreement.

14. The third agreement (also oral) on which Goyal (by Mr Dhar's evidence) relies is an agreement, or at least a representation, by Messer prior to the commencement of the proceedings in this court, that the proceedings were being brought for Messer's own internal purposes and, whilst they would culminate in a default judgment, that judgment would not be enforced. I shall refer to this alleged agreement as the December 2002 Agreement.

15. It is Mr Foxton's submission, on behalf of Messer, that these alleged agreements are "so lacking in credibility and cogency, and so inconsistent with the verifiable facts, that they cannot begin to justify a refusal to set aside the default judgment" nor provide, should it prove to be material, any real prospect of a successful defence to Messer's claim under CPR 24.2. I agree. I must therefore set out as succinctly but, I hope, sufficiently as I can my reasons for that conclusion.

The June 1997 Non-Recourse Agreement

16. Mr Nash does not rely on this agreement on the present application. The consequence is that no reliance is placed on what Mr Dhar says about it.

17. Such an agreement would be radically inconsistent with the loan agreement made shortly thereafter and approved by the Board. The Board Minutes at the time make no reference to any agreement. The Minutes are detailed. They refer to a draft of the loan agreement and approval of its terms. If such an agreement had been made it would in effect have made Goyal's obligation to repay Citibank an obligation of Messer at Goyal's whim. That is a commercial nonsense which I am sure Messer would not have assented to, and, even if it had, both parties would have seen that such an unusual and important agreement inconsistent with the loan agreement was recorded and properly authorised. The agreement is referred to in no document at any time before Mr Dhar's first witness statement made in November 2005. If such an agreement had been made neither of the subsequent alleged agreements would have been necessary.

18. The one point of some apparent substance relied upon in support of the agreement is that the Reserve Bank of India (the "RBI") wrote to Goyal on 3 September 1997 giving permission for Messer to guarantee the loan to Goyal but subject to conditions that:

"(i) there is no outgo of foreign *exchange by way of any fee, direct or indirect, for the proposed guarantee.*
(ii) In case of invocation of guarantee, no liability whatsoever will extend to the Indian company."

19. The RBI was provided with a copy of the loan agreement. The conditions were, on the evidence of Indian law adduced on behalf of Messer, standard provisions intended to ensure that if the guarantor paid the lender the borrower would have no liability to the lender. That would make sense. It is difficult to see why the RBI, having permitted Goyal to use foreign exchange to meet its liabilities under the loan agreement, should be concerned that the same liabilities were owed to Messer, provided they ceased to be owed to Citibank. In any event, the incidence of Indian foreign exchange law would, as Mr Foxton submitted, only invalidate a contractual obligation if Indian was the proper law of the contract or the law of the place for its performance. Neither apply.

The September 2001 Agreement

20. A simple reading of Mr Dhar's evidence (paragraph 12) is sufficient to demonstrate that no binding agreement was made. There is nothing certain about the claims Goyal would not pursue. There is evidence that Mr Allcock did not discuss such an agreement with anyone at Messer nor was it ever "formalised".

21. The claim by Goyal at the time was the claim for INR 5billion described in paragraph 12. No sensible person could have taken such a claim seriously, let alone agreed to acknowledge it and assume a liability for some US$4.7m in relation to it. Again, this agreement is wholly undocumented. It is almost, if not wholly, inconceivable that two substantial commercial organisations would commit themselves to such an agreement in such a way, especially so when relationships were strained. Insofar as any subsequent documents from Goyal make reference to such an agreement the language is of "understanding" not agreement and to the effect that Messer agreed to

make the payment to Citibank as a payment towards and not in settlement or satisfaction of the claims made by Goyal. That is not only inconsistent with what Mr Dhar says but, if possible, even less plausible. It would mean Messer agreed to pay US$4.7m simply as a credit against the claim by Goyal.

22. It is true that it was shortly after this agreement is said to have been made that Messer in fact paid Citibank. It is also true that some 15 months then elapsed before the present claim was commenced. Mr Nash, understandably, relies on both matters as support for the agreement. They are not, however, at all convincing in the light of the factors to which I have referred above and now refer to below.

23. Goyal wrote to Citibank, copied to Messer, on 22 September asking Citibank to recover the loan from Messer. It did so expressly on the basis that Messer was in breach of its obligation to Goyal and had failed to pay Goyal the claim for INR5 billion. There was no reference to the agreement which, if it had been made, would have been natural and necessary.

24. Mr Dhar produced a typed document bearing the date 23 September 2001. The document bears no signature nor is it on any printed or recognisable paper. It purports to be addressed to "The Chairman" of Messer. It refers to the outstanding Citibank loan as "ECB". The document reads :

"Sir, Please refer my discussions with Mr Allcock on repayment of whole ECB by you in which it was agreed that Messer will make the payment of entire outstanding ECB. During the discussions Mr Allcock had pointed out the problem in repayment of whole ECB that the loan agreement prohibits the prepayment. We think it really is no problem. If we default at the due date of next instalment i.e. 30/09/2001 then the Citi Bank may recall the whole loan and will demand the whole of the outstanding ECB from Messer and this way Messer may pay the whole ECB.

Therefore, we are proceeding this way which we think should not have any problem from Citi Bank. We are enclosing the letter dated 22/09/2001 sent by us to the Citi Bank pursuant to our mutual understanding."

25. The document was not received by Messer. A copy of the letter to Citibank was received. The note does not in fact say that Messer had agreed not to recover the payment from Goyal if it paid Citibank. Mr Foxton understandably raised doubts about the authenticity of this document. It is at the lowest bizarre that it would purport to enclose a copy of the letter to the Bank which was in terms highly critical of Messer and which had in any event been copied to Messer the previous day. The document is not only never referred to after 23 September but on 24 September Goyal wrote to RBI informing RBI that Citibank had been asked to recover the outstanding loan from Messer and enclosing the letter of 22 September. The obvious enclosure, if it had been sent, was the note, or at the very least, a reference to the agreement.

26. Messer wrote to Goyal on 15 October following receipt of the copy of Goyal's letter to Citibank dated 22 September and the payment to Citibank. The contents of that letter are wholly inconsistent with the agreement. For example, the letter expressed "shock" at the contents of Goyal's letter which was said to "demonstrate a lack of bona fides on the part of" Goyal. The letter also demanded repayment of the sums paid by Messer to Citibank and intimated a claim if payment was not made promptly. Goyal's response was to purport to revoke the authority of their agent for service appointed under the loan agreement and to reply stating:

"You had made the payment to Citibank … in particular discharge of your liability towards our claim as set out in our letter of 22nd September 2001 and not as guarantor under the loan agreement. Therefore question of the rights of Citibank …under the loan agreement being subrogated to you as alleged in your aforesaid letter does not arise."

27. Mr Nash, in his final closing submissions, rightly acknowledged that insofar as the evidence suggested any agreement was made in September 2001 it was an agreement merely to credit the payment of the loan against the claim by Goyal and the agreement had not been "formalised". But, he submitted, the agreement was or had been formalised at or by the time the Accounts of Goyal were approved for the year ended 31 December 2001.Those Accounts and the 2002 Accounts were signed on behalf of Messer. Mr Nash submitted that the agreement had by then become an agreement that the payment by Messer under the guarantee was to be in full settlement of Goyal's INR5Billion claim. This submission was not consistent with Mr Dhar's evidence. It is also belied by the documented events surrounding the Accounts.

28. The Annual Report for 2001 was dated 27 May 2002. The Notes to the Accounts recorded that Messer had paid the entire outstanding Citibank loan. The note, entitled "Treatment of ECB Loan Repayment" continued:

"Messer has made this payment pursuant to understanding with the Company to partially compensate the company for the loss suffered by the company due to Messer's non-co-operation in implementing various projects and breach of certain clauses [of the SPCA]

As per mutual understanding with Messer, the Company has adjusted Rs … towards loss suffered by the Company in the value of its investment in … and balance amount in Rs … has been adjusted towards the Company's claim of [Rs5billion] against Messer for the loss suffered by the Company on account of breach of certain clauses [of the SPCA]."

29. A further note entitled "Contingent Liabilities not accounted for" recorded:

"Contrary to the understanding with the Company, Messer … had made a demand on the company to make payment of the amount of USD 4.78Million … being the amount of ECB Loan paid by Messer to Citi Bank. The Company is of the view that contentions of Messer has no merits."

30. The Minutes of the Board Meeting on 27 May 2002, when the accounts were discussed and approved, record that Mr Schmidt (a director appointed by Messer) "wanted to record his disagreement" with the statement in the Contingent Liabilities Note that the contentions of Messer had no merit.

31. The 2002 Annual Report is dated 31 January 2003. The Contingent Liability Note referred back to the 2001 Note on "Treatment of ECB Loan Repayment" adding "the loan of USD 4.8 millions as agreed with Messer is not payable and hence not shown as a contingent liability."

32. However, on 19 February, Mr Schmidt sent an e-mail to Mr Goyal and Mr Bagri, (the Company Secretary of Goyal) which read:

"As discussed during our last board meeting, the accounting treatment of the Citibank loan in the financial statements as of December 31, 2002 is in our opinion not correct. I refer to the document signed on May 27, 2002; as the treatment has not changed compared to the financial statements as of December 31, 2001. The same statement is valid for December 31, 2002.

As you were not prepared to repeat this in the official documents, I would like to point out that the approval of the financial statements as of December 31, 2002 was subject to this disagreement. Please ensure that my dissent is included in the board minutes which I am still waiting to receive."

33. There is no dispute that this e-mail was sent by Messer and received by Goyal. There is no response in the papers.

34. In my judgment it is quite impossible to spell out from the Accounts and the exchanges about them any relevant agreement in respect of the payment by Messer under the guarantee. None of the versions of the agreement put forward by Mr Dhar (or Mr Nash) are consistent with such documents as there are or even with themselves. Far from the evidence being that Messer made any relevant agreement, the documents show a consistent rejection of Goyal's assertions which themselves fall short of agreement. Again, I think it fanciful to suppose that any such agreement, if made, would not have been formally drawn up and authorised. Mr Foxton rightly drew attention to Clause 1.3 of the SPCA which provided that any agreement between Goyal and Messer would be legally binding only if made in writing and signed for Messer by two members of its management board. I do not think it necessary to address Mr Foxton's submission that the clause in any event precludes Goyal from seeking to rely on the oral agreement it alleges. The clause fully reflects commercial sense and the parties' acceptance of it.

The December 2002 Agreement

35. The agreement, again wholly undocumented, is said to have been made at a date after the approval of the 2001 and before the approval of the 2002 Accounts. To state the obvious, it is not consistent with Messer's recorded response to those Accounts. The present proceedings were begun on 17 January 2003. The default judgment was entered on 6 February 2003. Messer sought advice from lawyers in New Delhi whether or not the default judgment was enforceable in India. That is reflected in the accounts of the advisers. Some advice was, it seems, provided in early February and further advice in March. On 25 March 2003, Messer's Indian lawyers served a Notice on Goyal under the Indian Companies Act 1956 (equivalent to a statutory demand). The terms and expressed purpose of the Notice were as would be expected if it was intended to pursue the judgment, and to proceed to wind up Goyal if it was unsatisfied.

36. On 15 April 2003 the Indian lawyers instructed by Goyal replied. This letter asserted an agreement by Messer to pay Citibank "*to compensate in part our clients for the loss suffered*". It also asserted that "*the understanding arrived at between the parties is also writ large on the face of the record*". That is not explained. It may be intended to be a reference to the Accounts. In paragraph 10 of the letter, it was stated:

"That contrary to the understanding and merely as an arm-twisting tactic and with ulterior motive, it now appears that on or about 17.1.2003, a suit for recovery of USD 4794762.98 was filed against our client by your client in Queens Bench Division, Royal Courts of Justice, Commercial Court."

37. Finally, the letter stated that the default judgment was not a judgment given on the merits of the case, had been obtained by fraud and, in any event, could not be executed and any winding up proceedings would be misconceived. On 24 June 2003 Messer's lawyers replied in similarly strong terms including an assertion that the judgment was valid and enforceable under Indian law.

38. It cannot be imagined, if these exchanges meant half of what they said, that in fact what was going on was an elaborate charade because it had been agreed that the judgment would not be enforced and was only needed for Messer's internal purposes. Goyal's suggestion is that Messer was seeking some tax advantage to be gained from having an unenforceable judgment against a company in which it held 49% of the shares. Mr Foxton characterised that as a "preposterous" suggestion. Again, I agree. There is no evidence to support it; indeed it is advanced as the only explanation for the body of evidence which refutes it. The evidence is clear; the supposed explanation is fanciful.

39. Mr Nash, again understandably, points to the delay in making the present applications and the fact that the claim by Messer was not pursued further after April 2003. That, he submits, supports the December 2002 Agreement. He points out that it was in May 2004 that Messer was acquired by another company which Goyal viewed as a competitor. Goyal began proceedings in India in connection with the acquisition and its alleged effect on the continuing commercial relationship between the two companies. Mr Nash submitted that was the trigger for the acquiring company to look for grounds for a counter-attack and the default judgment was resurrected and the

present applications made for that reason and in that context. He also submitted that it was significant for the tactics of Messer that the INR5 billion claim became statute-barred in September 2004.

40. These theories, extraordinary and unsupported by any evidence as they are, do not begin to stand up to examination.

41. In December 2003 and January 2004 (and in all probability earlier) Messer and Goyal were in serious negotiations to resolve the disputes between them. English solicitors prepared and considered a formal draft settlement agreement which, essentially, would have resulted in Messer selling its interest in Goyal for US$5m, the settlement of all claims including (by express reference) the default judgment and the underlying subrogation claim, and a continuing commercial supply agreement. The draft had a Schedule attached to it giving details of the considerable number of pending litigation and arbitration claims between the parties. Neither the present claim (or judgment) nor the INR 5billion claim (which was never pursued in litigation or arbitration) were referred to in the Schedule but both were plainly covered by the body of the draft. It appears from later documents that it was Goyal who wished for "the litigation" to be excluded from any agreement but wanted the payment of $5m to settle Messer's "Bank Guarantee claim" as well as pay for the shares Messer owned in Goyal. Progress on any agreement came to an end when the problems arising from the acquisition of Messer came to the fore. There was to be a meeting in India towards the end of March 2004 but the evidence does not disclose what happened.

42. Mr Nash also relied, in support of the December 2002 agreement, on the knowledge of Messer that a default judgment would not be enforceable in India. He submitted that the judgment was obtained with that knowledge, and not by mistake, or at least that there was an issue about the knowledge of Messer which Goyal was entitled to have tried. The evidence is that Messer was seeking and receiving legal advice on the enforceability of the judgment both before and after it obtained it. Mr Schmidt says he did not know a default judgment was unenforceable in India until April 2003. A careful reading of Clause 12.3 of the loan agreement itself and the Annex to the Fifth Schedule to the agreement (which set out the relevant provision of the Indian Civil Code providing that a foreign judgment should be conclusive except where, among other examples, "it has not been given on the merits of the case") would or at least might well have alerted Messer to a problem in seeking to enforce a default judgment in India. Mr Nash is right to point out that the evidence adduced by Messer does not in terms state that the entry of the judgment was a "mistake" but, as Mr Foxton submits, the submission by Goyal assumes it was believed that Goyal would not comply with the judgment, had no assets against which it could be enforced, and that Messer intended to merge and so "lose" the claim in an unenforceable judgment. That is, in my judgment, truly fanciful.

43. The acquisition of Messer was completed on 6 May 2004. Mr Schmidt's evidence is that the acquisition led to a complete refinancing of the Messer group and the departure of the people within Messer who had been handling the dispute with Goyal. Messer also instructed their present London solicitors in place of the solicitors who had acted previously.

44. Mr Nash criticised the period of "delay" from the end of the negotiations until the issue of the present applications. He described the explanation as unconvincing, pointing out that Mr Schmidt himself had remained with Messer. Whilst I think the whole period concerned is not readily explained by Mr Schmidt's evidence, I have no reason at all to doubt its veracity and it is of no consequence relative to the evidence as a whole and does not affect my views of it.

Conclusion on "Defences"

45. I am satisfied that this is a case in which it is right to conclude that none of the agreements on which Goyal seeks to rely were in fact made.

Setting aside the default Judgment

46. CPR 31.3 provides that:

> *"(1) … the court may set aside or vary a judgment entered (in default) if-*
> *(a) the defendant has a real prospect of defending the claim; or*
> *(b) it appears to the court that there is some other good reason why-*
> *(i)the judgment should be set aside or varied; or*
> *(ii) the defendant should be allowed to defend the claim.*
>
> *(2) In considering whether to set aside or vary a (default) judgment … the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."*

47. The rule is, of course, oriented to an application made by a defendant. But there is (rightly) no dispute that sub-rule (1)(b)(i) applies to and permits applications to be made by a Claimant: see ***Society of Lloyd's v Monaghan and Hewson*** [2003] EWHC 2576 and ***C Inc Plc v L*** [2001] 2 Lloyd's Rep 459.

48. There was no agreement to the effect that the default judgment would be obtained but not enforced. The question is whether or not, as a matter of discretion, the court should set aside a judgment which is of no commercial value to Messer to enable Messer to achieve its objective of obtaining a judgment which it believes it would be able to enforce in India.

49. The notes to the White Book state, as one would expect, that the discretionary power to set aside is unconditional and "the purpose of the power is to avoid injustice". It is for that reason that, where a defendant does demonstrate a real prospect of defending the claim notwithstanding delay in seeking to set aside a default

judgment, the court will nonetheless usually set aside such a judgment. The corollary, Mr Foxton submits, is that a Claimant which demonstrates that it has a good, indeed in this case unanswerable, claim on the merits which will effectively be lost unless a default judgment is set aside, should be taken to have shown a good reason why the judgment should be set aside. I agree. There is obvious injustice to Messer if the judgment is not set aside.

50. The common law principle of "merger", namely that a cause of action is merged in a judgment upon it, has the consequence that unless the judgment is set aside the cause of action which gave rise to it cannot be pursued. Indeed Goyal relies on this principle: the cause of action has been lost; the judgment is ineffective; it cannot or should not be set aside; and so Messer has deprived itself of a good claim.

51. In my judgment merger was not intended to have such a consequence. The policy underlying the principle is to avoid "double jeopardy" and multiplicity of proceedings and perhaps to achieve finality; not to deprive a claimant of the claim, but rather to establish it by court order the better to enable the claimant to enforce it, and not to enable both claim and order to be ignored.

52. There may be circumstances in which the injustice to a defendant, if a default judgment were to be set aside, would outweigh any injustice to a claimant. Indeed Goyal submits this is such a case. In paragraphs 71 to 76 of his first witness statement, Mr Dhar refers to "significant prejudice" which he says will be suffered by Goyal were the judgment to be set aside. Much (if not all) of what he relies upon is dependant on the "agreements" and need not be addressed again. In addition reliance is placed on the fact (as advised by counsel) that the INR 5 billion claims are statute-barred. But on my findings, that is not a consequence of any agreement, but the failure of Goyal to pursue these claims for whatever other reason. It is also said that Goyal would have to re-open its Accounts, which have been relied upon by others, and would be a step which could affect Goyal's access to liquidity and damage the company's reputation. It is also said it has paid, and could not recover, tax on the basis it has no liability to Messer.

53. I do not think Goyal was at any time entitled to conduct its affairs on the basis it had no liability to Messer on the claim. Messer had made it clear it asserted and intended to pursue the claim. It made no contrary representation. There was a regular judgment on the claim entered in the Courts of the forum chosen by the parties to resolve the claim. There is no injustice to Goyal in setting aside the judgment and so, in principle, enabling it to put forward such defences as it might have on the merits. It is not an attractive stand to maintain that a valid court order will not be met but can be relied upon as discharging the liability which gave rise to it. Mr Nash submitted that Goyal was entitled to arrange its affairs on the basis of its legal rights and liabilities as they had been settled by due process. That is a more elegant way of describing the stand Goyal seek to take. But in my judgment Goyal is not entitled both to ignore "due process" and to rely on it. Nor is there any injustice in this case in the court granting an application which would provide an opportunity for an order to be made which could not be ignored if it is appropriate to do so. I will therefore set aside the default judgment.

Summary Judgment

54. I have already addressed such defences as Goyal has sought to raise. None, in my judgment, provide any real prospect of a defence to the claim succeeding. Messer is entitled to summary judgment. No issues have been raised on the amount of the claim. At 16 January 2006 the claim was for the principal sum of US$ 4,794,762.98 together with interest calculated in accordance with the loan agreement of US$ 996,842.94. A small further amount of interest will be due when this judgment is handed down. There is also a claim under clause 17.5 of the loan agreement to recover certain legal fees. If there are any points to be made on the precise amount of the Part 24 judgment to be entered they should be raised when this judgment is handed down if they cannot be agreed beforehand.

Mr D. Foxton (instructed by Freshfields Bruckhaus Deringer) for the Claimant
Mr J. Nash (instructed by Denton Wilde Sapte) for the Defendant