Glencore Grain Ltd v Agros Trading Company [1999] APP.L.R. 07/01

CA on appeal from QBD, Commercial List (Mr Justice Tuckey) before Kennedy LJ; Otton LJ; Clarke LJ. 1st July 1999.

LORD JUSTICE CLARKE:

Introduction

1. This is an appeal from an order of Tuckey J made on the 23rd July 1998 when he gave judgment for Agros Trading Company Ltd ("Agros") against Glencore Grain Ltd ("Glencore") for US$32,494.42. There were two applications before the judge. They were both for leave to enforce GAFTA arbitration awards and were made under section 26 of the Arbitration Act 1950. The first was made by Glencore, previously known as Richco Commodities Ltd ("Richco"), for leave to enforce an award for US$361,883.50 plus interest and costs against Agros. The award was no 3591 made by GAFTA on the 23rd December 1994.

2. The second application was by Agros for leave to enforce award no 11248 dated the 16th June 1993. The award was made against Richco and was for US$546,525 plus interest and costs. It was not however made in favour of Agros but in favour of Agropol Nederland BV ("Agropol"). Agros sought leave to enforce the award as assignees of Agropol's rights under the award. The assignment is dated the 13th January 1995 and notice of it was given to Glencore a week later.

3. It is common ground that in these circumstances, other things being equal, the correct course would be to set off the amounts unpaid under each award and to give judgment for the balance as appropriate. It was agreed that such a set off is or would be a set off of mutual debts at common law. However, it was submitted that other things are not equal because Glencore claimed to be entitled to set off against their liability under award 11248 debts which were admittedly due to them from Agropol before the assignment under what are known as washout agreements. Agros disputed Glencore's alleged right to set off such debts. The judge held that Glencore were not entitled to set them off and Glencore now appeal against that decision.

4. The total net amount due to Agros as assignees of Agropol's rights under award 11248 inclusive of interest under section 19 of the Arbitration Act 1950 was US$583,524.66 as at the 22nd July 1998. The total net amount due to Glencore under award 3591 calculated in the same way as at the same date was US$551,030.24. Thus on the 22nd July 1998 (which was treated as the day of the judgment for this purpose) Glencore owed Agros US$583, 524.66 and Agros owed Glencore US$551,030.24. The obligation of each to the other was a common law debt. The set off was effected on that day with the result that judgment was given for the difference, namely US$32,494.42.

The washout agreements

5. Richco were grain traders and have been renamed Glencore. Agropol were grain traders and are in liquidation. Agros were but are no longer shareholders of Agropol. The debts arose out of washout agreements which were wholly unrelated to the contracts which gave rise to either of the awards, just as the contracts which gave rise to the awards were unrelated to each other. There were two such washout agreements.

The first washout agreement

6. The first agreement was evidenced by a telex dated the 12th August 1992 from Richco to Agropol which was in these terms:

   RE CTR. 010592 NO. 476923 - ABT. 11000 TO. POLISH FEED OATS - SEPT/15TH OCT 92 - FOB SZCZIN/GDY/GDANSK
   AND
   CTR. 290492 NO. 476908 - ABT. 11000 TO POLISH FEED OATS - SEPT/15TH OCT92 - FOB SZCZIN/GDYN/GDANSK
   HEREWITH WE CONFIRM THAT WE SOLD BACK THESE TWO CONTRACTS TO YOU AT A PRICE OF USDOLLAR 88,00/1000 KOS.
   REST AT CONTRACT CONDITIONS.
   WILL SEND YOU INVOICES FOR THE PRICE DIFFERENCE.

7. The contract price under both contracts had been US$81 per metric ton. The effect of the washout agreement was that Richco sold back the two contracts to Agropol at US$88 per metric ton. The effect of the agreement was thus that Agropol became liable to Richco for the difference in price. The expression "rest at contract conditions" was a reference to the conditions of the two contracts namely nos 476908 and 476923. The conditions in both contracts provided as follows:

   All other terms and conditions not conflicting with above as per GAFTA no 64.

   ...

   Arbitration Clause:

   A. Any dispute arising out of or under this contract shall be settled by arbitration in accordance with the Arbitration Rules No. 125, of the Grain and Feed Trade Association, in the edition current at the date of this contract, such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognisant.

   B. Neither party hereto, nor any person claiming under either of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrator(s) or a Board of Appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an award from the arbitrator(s) or a Board of Appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action other legal proceedings against the other of them in respect of any such dispute.

   8. The relevant GAFTA form 64 provided (so far as material) as follows:

11 PAYMENT

...

Any monies due by either party to the contract to each other in respect of final invoices and/or accounts for other items on deliveries fulfilling this contract, shall be settled by either party without delay (except as otherwise provided under Awards of Arbitration or Appeal as governed by other provisions in the contract).

If not so settled, a dispute shall be deemed to have arisen which may be referred to arbitration as herein provided.

12 INTEREST

If there has been unreasonable delay in any payment interest appropriate to the currency involved shall be charged. If such charge is not mutually agreed, a dispute shall be deemed to exist which shall be settled by arbitration. Otherwise interest shall be payable only where specifically provided in the terms of the contract or by an award of arbitration. The terms of this clause do not override the parties obligation under the Payment Clause.

...

26 CIRCLE

Where Sellers repurchase from their Buyers or from any subsequent Buyer the same goods or part thereof, a circle shall be considered to exist as regards the particular goods so repurchased, and the provisions of the Default Clause shall not apply...

Subject to the terms of the Prohibition Clause in the Contract, if the goods are not delivered, or, having been delivered documents are not presented, invoices based on the mean contract quantity, (or the goods have been delivered on the delivered quantity), shall be settled by all Buyers and their Sellers in the circle by payment by all Buyers to their Sellers of the excess of the Sellers' invoice amount over the lowest invoice amount in the circle. Payment shall be due not later than 15 consecutive days after the last day for delivery, or, should the circle not be ascertained before the expiry of this time then payment shall be due not later than 15 consecutive days after the circle is ascertained Where the Circle includes Contract(s) expressed in different currencies the lowest invoice amount shall be replaced by the market price on the first day for contractual delivery and invoices shall be settled between each Buyer and his Seller in the Circle by payment of the differences between the market price and the relative contract price in the currency of the contract.

...

28 DOMICILE

Buyers and Sellers agree that, for the purpose of proceedings either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment, or otherwise, notwithstanding, and the Courts of England or arbitrators appointed in England as the case may be shall expect for the purpose of enforcing any award made in pursuance of the arbitration clause hereof , have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England, whatever the domicile, residence or place of business of the parties to this contract may be or become. Any party to this contract residing or carrying on business elsewhere than in England or Wales, shall for the purpose of proceedings at law or in arbitration be considered as ordinarily resident or carrying on business at the offices of the Grain and Feed Trade Association, and if in Scotland, he shall be held to have prorogated jurisdiction against himself to the English Courts: or if in Northern Ireland to have submitted to the jurisdiction, and to be bound by he decision of the English Courts.

Clause 29(a) and (b) provided for arbitration in identical terms to those set out in conditions A and B of the Arbitration Clause which I have quoted in paragraph 7 above.

9. The relevant provisions of the GAFTA Arbitration Rules no 125 provided (so far as relevant) as follows:

1 PRELIMINARY

1.1 Any dispute arising out of a contract embodying these Rules shall be referred to arbitration in accordance with the following provisions.

...

2 PROCEDURE FOR CLAIMING ARBITRATION AND TIME LIMITS

2.1 A party claiming arbitration shall notify the other party that he is claiming arbitration within the time limits stipulated in this Rule, and shall, no later than 7 consecutive days from the last day for claiming arbitration, appoint an arbitrator in accordance with Rule 3....

2.2 Technical

(a) In respect of Contracts for the Sale of Goods: ...

(ii) on FOB terms: not later than 90 consecutive days after the date of the last bill of lading or after the expiry of the contract period of delivery whichever shall first expire...

(c) In respect of any monies due by one party to the other, not later than 90 consecutive days of the dispute having arisen....

2.7 In the event of non-compliance with any of the preceding provisions of this Rule and of such non-compliance being raised by the respondents as a defence, claims shall be deemed to be waived and absolutely barred, unless the arbitrator(s) shall in his/their absolute discretion, otherwise determine. If the arbitrator(s) do not exercise his/their discretion to admit a claim then the Board of Appeal, on appeal, shall have the power in its absolute discretion to determine otherwise, but not so as to over-rule or set aside any determination already made by the arbitrator(s) to admit a claim.

10. On the same day as the washout agreement was made Richco sent Agropol two invoices each for US$77,000. Each invoice expressly described the purchase price as US$81 per metric ton and the sales price as US$88 per metric ton, and thus the price difference as US$7 per metric ton. It is as I understand it common ground that Agropol have at all material times admitted liability under the first washout agreement for the total sum of US$154,000, namely 2 x 11,000 metric tons x the price difference of US$7 per metric ton. It is I think also common ground that the washout agreement was an agreement to repurchase by Agropol within the meaning of clause 26 of GAFTA form 64 and that payment was accordingly due not later than 15 consecutive days from the last day for delivery under the original contracts. It follows that payment was due not later than 15 days from the 15th October 1992, namely the 30th October 1992.

The second washout agreement

11. The second washout agreement was dated the 4th September 1992. It was signed by both Agropol and Richco and is described as a repurchase of contract *477551*, which was made in May 1992. The washout agreement described the seller as Richco and the buyer as Agropol. It contained express provisions as to the commodity and the quantity and provided for shipment in September/15th October 1992. The price was described as US$100 per metric ton. Under 'other conditions' it provided as follows:

All other terms and conditions as per FOB-loading terms (see attached copy).

(A) Repurchase conditions:

Quantity: min/max 12.000 mtons

Price difference:

purchase price: usdlr 80, -- per mton

purchase price: usdlr 100 ,-- per mton

difference in our favour usdlr 20, -- p.t.

12.000 Tons at $ 20, -- p.t. = $ 240.000,00

Payment of the amount of $ 240.000,00, which is due

15th September 1992, to be effected to ABN-AMRO

Bank N.V., Rotterdam, account number 50.03.26.940.

The conditions were otherwise expressed in identical terms to those already quoted from contracts 476908 and 476923.

12. It is to be noted that, although it was not contemplated that there would be actual shipment, a final shipment date of the 15th October 1992 was given and payment of US$240,000 was agreed to be due on the 15th September 1992. It is admitted by Agropol that that sum, namely US$240,000, is and has since the 15th September 1992 been due under the second washout agreement. Richco subsequently sent Agropol an invoice in that amount.

Common Ground

13. In the remainder of this judgment I shall for convenience refer to Richco and Glencore as Glencore since they are, as I understand it, the same legal entity. The following is common ground:

1. As already stated, Agropol have at all material times admitted the amounts of their liabilities under the washout agreements. I shall refer to those liabilities together as "the washout debt".
2. By a telex dated the 22nd October 1993 Glencore asserted that they had paid award 11248 by setting off among other things their liability for the washout debt.
3. Neither Agropol nor Agros expressly agreed that the debt constituted by the award could be wholly or partly discharged by set off in that way.
4. If Agropol had sought to enforce award 11248 in, say 1993, Glencore could have set off the washout debt which it was owed by Agropol. Such a set off would have been a legal set off of mutual debts, namely the debt created by award 11248 in favour of Agropol on the one hand and the washout debt in favour of Glencore on the other.
5. The assignment of Agropol's rights under award 11248 is a valid legal assignment under section 136 of the Law of Property Act 1925 and notice of the assignment was duly given to Glencore.

The issues

14 The essential question is whether the whole of award 11248 falls to be set off against award 3591 or vice versa, which would in fact leave a balance in favour of Agros, as the judge found, or whether before the set off between the two awards is struck, the washout debt either has been or should be set off against award 11248. Before the judge that involved a consideration of these questions:

1. Was the washout debt set off against award 11248 immediately after that award became payable or at the latest at the date of the telex of the 22nd October 1993?
2. Was the assignment in principle subject to the washout debt?
3. If so, is or was the washout debt enforceable such as to enable Glencore to set if off against their liability under award 11248?

15. The judge answered those questions 'No', 'Yes' and 'No'. Glencore essentially challenge the answers to questions 1 and 3, whereas Agros if necessary challenge the answer to question 2. As I see it, the crucial question on this

appeal is question 3. It is however logical to consider the questions in turn, although there is some overlap between them.

1. Was the washout debt set off against award 11248 before these proceedings began and, if so, when ?

16. I have to some extent reformulated the question because Mr Young's submission before us was not quite the same as that recorded by the judge in his judgment. The judge recorded Mr Young's submission as being that the set off took place immediately after award 11248 became payable or at latest at the date of Glencore's telex of the 22nd October 1993. Mr Young would, I think, like so to submit before us, but he recognises the difficulty in doing so in the light of the decision of this court in ***Aectra Refining and Manufacturing Inc v Exmar MV*** [1994] 1 WLR 1634. In the light of that decision Mr Young concedes, at least in this court, that, in the absence of an assignment, the set off would take place only on judgment. He submits, however, that the assignment makes a crucial difference. If I have understood them correctly, his submissions may be summarised as follows:

1. When Agropol assigned their rights under award 11248 to Agros they did so subject to equities.
2. One of those equities was the debt owed by Agropol to Glencore so that Glencore became entitled to set off the washout debt owed to Agropol against the debt created by award 11248 which was originally owed to Agropol but was now owed to Agros by reason of the receipt by Glencore of notice of the assignment from Agropol to Agros.
3. That set off operated upon notice of the assignment being given to Glencore.
4. It follows that by the time these proceedings were commenced the washout debt had already been set off against the liability under award 11248 with the result that the net liability under that award was reduced to a sum significantly less than the liability of Agros to Glencore under award 3591 so that judgment should be given not for Agros but for Glencore.

17. In order to analyse those submissions it is necessary to consider the decision in Aectra in some detail. The judge rejected the submission in the form in which it had been advanced before him by reference to the analyses of Hoffman LJ in Aectra and indeed of Lord Hoffman in Stein v Blake [1996] 1 AC 243. In Stein v Blake the House of Lords was concerned with bankruptcy set off. It follows that what Lord Hoffman said about statutory legal set off (with which we are concerned) are obiter dicta. However, the other members of the appellate committee agreed with Lord Hoffman. He contrasted the two forms of set off in this way (at p 251):

Section 323 [of the Insolvency Act 1986] is the latest in a line of bankruptcy set off provisions which go back to the time of Queen Anne. As it happens, legal set off between solvent parties is also based upon statutes of Queen Anne. But the two forms of set off are very different in their purpose and effect. Legal set off does not affect the substantive rights of the parties against each other, at any rate until both causes of action have been merged in a judgment of the court. It addresses questions of procedure and cash-flow. As a matter of procedure, it enables a defendant to require his cross-claim (even if based upon a wholly different subject matter) be tried together with the plaintiff's claim instead of having to be the subject of a separate action. In this way it ensures that judgment will be given simultaneously on claim and cross-claim and thereby relieves the defendant from having to fund the cash to satisfy a judgment in favour of the plaintiff (or, in the 18th century, go to a debtor's prison) before his cross-claim has been determined.

Bankruptcy set off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security....

Legal set off is confined to debts which at the time when the defence of set off is filed were due and payable and either liquidated or in sums capable of ascertainment without valuation or estimation. Bankruptcy set off has a much wider scope.

On that analysis a legal set off of mutual debts does not take effect until judgment in the action. I entirely agree with the judge that a distinction is to be drawn between the time when the right to set off arises and the time when the set off takes effect.

18. Hoffman LJ's analysis in Aectra seems to me to make that clear. In that case the plaintiffs claimed US$76,889.37 being the balance due under a settlement agreement. The defendants sought to set off an alleged liability in debt which they said the plaintiffs owed them in respect of hire and bunkers under a separate transaction. This court held that those claims were liquidated claims which were in principle capable of being set off as mutual debts at common law. The plaintiffs disputed the claims. By the terms of the charterparty under which the claims arose the parties had agreed to submit such disputes to arbitration. This court accepted the defendants' submission that to be available for a legal set off of this kind a claim must be capable of being litigated in the court in which the set off is pleaded. It held that in a case in which the plaintiff would in principle be entitled to a stay of proceedings raising such a claim under section 1 of the Arbitration Act 1975 the claim was not capable of being so litigated. It was held that it followed that any liability which the plaintiffs had in respect of hire or bunkers must be submitted to arbitration and could not be set off in the action. I should add that the result would presumably would have been different if an arbitration award had already been made in favour of the defendants against the plaintiffs.

19. Hoffman LJ drew an important distinction between transaction set off and independent set off. The set off of mutual debts of the kind that exists here is an example of independent set off and not transaction set off. He said (at p 1648 to 1649):

But the plaintiffs challenge the claim to set off on another ground, which the judge did not find necessary to decide. They say that, to be available as a set off, a claim must be capable of being litigated in the court in which the set off is pleaded. This claim, it is said, did not qualify for set off because the parties had agreed that it should be submitted to the decision of an arbitrator.

This is a difficult point on which there is no authority. The answer must be deduced from first principles. For this purpose it is necessary to distinguish between what Mr Philip Wood, in his valuable book on ***English and International Set Off*** *(1989), calls "independent set off" and "transaction set off". Independent set off, as its name suggests, does not require any relationship between the transactions out of which the cross claims arise. In English law it is based upon section 13 of the Insolvent Debtors Relief Act 1729 (2 Geo 2 c 22) as amended by the Debtors Relief Amendment Act 1735 (8 Geo 2 c 24), known as the Statutes of Set-off, whose effect is now to be found in RSC Ord 18, r 17. The only requirements are that the cross-claims must both be due and payable and either liquidated or capable of being quantified by reference to ascertainable facts which do not in their nature require estimation or valuation. Transaction set off, on the other hand, is a cross-claim arising out of the same transaction or one so closely related that it operates in law or in equity as a complete or partial defeasance of the plaintiff's claim. The category covers a common law abatement of the price goods or services for breach of warranty, as explained by Parke B. in* ***Mondel v Steel*** *(1841) 8 M & W. 858, 872 and equitable set off, as explained by Morris L J in* ***Hanak v Green*** *[1958] 2 QB 9, 19. At common law, as Parke B said, the purchaser* ***"defend[s] himself by showing how much less the subject matter of the action was worth"*** *and in equitable set off the defendant asserts what Morris LJ called an equity which went to impeach 'the title to the legal demand.' "*

Hoffman LJ then considered various different types of situation in which what he called the question of actionability or jurisdiction could arise. They included arbitration cases in which the court had a discretion to stay the proceedings under section 4 of the Arbitration Act 1950 or was obliged to do so by section 1 of the Arbitration Act 1975. He also considered cases in which the court has a discretion to stay under its inherent jurisdiction because of an exclusive jurisdiction clause or is bound to decline jurisdiction under article 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. It may be noted that the instant case is not a case to which the Arbitration Act 1996 applies. Hoffman LJ then drew attention to a number of authorities in which it had been said that in cases of common law abatement or equitable set off (that is in cases of transaction set off) a defendant should be entitled to rely upon the abatement or equitable set off in the plaintiffs' action. Hoffman LJ expressed the reason for that approach in this way (at p 1650 B to C): *It would be quite unreasonable for the plaintiff who has chosen to sue in one forum to rely upon an arbitration or jurisdiction clause to confine the court to the facts which he chooses to prove and prevent it from examining related facts as well.*

20. There then follows what to my mind is a key passage in Hoffman LJ's judgment. He said: *This argument is not nearly so strong in the case of independent set off, which is not a substantive defence to the claim but a procedure for taking an account of the balance due between the parties. It would not be entirely true to say that transaction set off was substantive while independent set off was procedural, because independent set off does operate as a substantive reduction or extinction of the debt owed to the plaintiff. But it arrives at this result by procedural means. It entitles the defendant to require that the merits of an unrelated cross-claim be tried in the same action and converts the plaintiff's original cause of action into the right to a balance due on the taking of an account.*

The procedural basis of independent set off is reflected in the rule that the mere existence of liquidated cross-claims does not automatically extinguish the smaller debt. It operates only by express or implied agreement or through the judicial process by which the account is taken. As Sir George Jessel MR said in ***Talbot v Frere*** (1878) 9 Ch D 568, 573, "there could not be a set off until action brought and set off pleaded." The Act of 1729 is expressed in procedural terms: *"Where there are mutual debts between the plaintiff and the defendant ... one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require..."* (Section 13.)

Hoffman LJ pointed out that the courts have always held that the cross-claim upon which the set off is based has to be actionable. Thus, for example, it must not be time barred at the time the plaintiffs' action is commenced: see eg ***Walker v Clements*** (1850) 15 QB 1046 and now section 35(3) of the Limitation Act 1980. Thus, suppose here Glencore allowed six years to elapse after their cause of action in respect of the washout debt had accrued and Agropol had then sought to enforce award 11248, Glencore could not then have relied upon the washout debt because it would have been time barred.

21. Hoffman LJ added (at p 1651 B to C): *In my view it is of the essence of independent set off in English law that the defendant should be entitled to have the merits of his cross-claim tried by the court in which he has been impleaded. The machinery of the Statutes of Set-off simply cannot operate unless this is possible. This, I think, is the meaning of Lord Campbell CJ's gnomic observation in* ***Walker v Clements*** *(1850) 15 QB 1046, 1050: "****The set-off is substituted for a cross-action.****" If, therefore, the defendant is faced with a procedural bar to having his claim determined, for example, because he has agreed to the jurisdiction of another tribunal, he cannot assert an independent set-off.*

The Statutes of Set Off were replaced by what was, at least until very recently, RSC Order 18 rule 17. In short Hoffman LJ's analysis shows that a defendant is only entitled to set off a mutual debt if it remains available to him when the plaintiff brings his action. Moreover it must be capable of being litigated in the action in the sense referred to by Hoffman LJ. Thus if the court is or would have been bound to stay such an action under section 1 of the Arbitration Act 1975 or section 9 of the Arbitration Act 1996 the claim would not be capable of being so

litigated. The same is true if the court would have no jurisdiction by reason of a choice of jurisdiction clause under article 17 of the Brussels Convention. Moreover the same would be true if the court would exercise its discretion to stay such proceedings under its inherent jurisdiction or, where applicable, section 4 of the Arbitration Act 1950.

22. The decision in Aectra is binding upon this court. It follows that Mr Young is right to concede here that, at least in the absence of an assignment, and assuming no relevant arbitration clause, Glencore's claim in respect of the washout debt had not been set off against Agropol's claim under award 11248 before these proceedings were commenced. However, Mr Young submits that the set off took effect when Glencore were given notice of the assignment of Agropol's rights under award 11248 to Agros. In my judgment, however, that submission is contrary to the reasoning in ***Aectra.*** It would be contrary to the general principle that there could not be a set off (as Sir George Jessel MR put it) until action brought and set off pleaded. As Lord Hoffman said in ***Stein v Blake***, legal set off does not affect the substantive rights of the parties against each other, at any rate until both causes of action have been merged in a judgment of the court. I do not see how in principle the fact of an assignment or notice of it can make any difference.

23. However, Mr Young relies upon the decisions of this court in ***Roxburghe v Cox*** (1881) 17 ch D 520 and ***BICC v Burndy Corporation*** [1985] Ch 232. In ***Roxburghe v Cox*** one Ker owed the plaintiff £5,000 plus interest. He also owed the defendants, who were his bankers, £647. When he retired from the army the proceeds of sale of his commission, namely £3000, were sent to the defendants as his bankers and paid into his account. Before that Ker had covenanted with the plaintiff by deed that the proceeds of sale of his commission would be applied towards the discharge of his debt to the plaintiff and that such monies should stand charged with and be security for such discharge. Notice of that assignment of the debt to the plaintiff was, however, received by the defendants only after the £3000 had been paid into Ker's account.

24. The plaintiff claimed the sum of £3000 from the defendants, who asserted that they were entitled to set off Ker's liability to them for £647. It was held by this court that they were entitled to do so. James LJ said this (at pp 525-6): *The Government paid to Messrs Cox & Co a certain sum of money to the use of Lord Charles Ker. He has assented to that payment being made to them for his use. After that Lord Charles Ker had a claim against them which made them liable, not merely to a suit in equity, but to an action at law by Lord Charles Ker for the money, as being money paid to his use. It appears to me that beyond all doubt they could have pleaded a set-off in that action for the money that was due to them from him. Both rights were Common Law rights. There was a simple contract debt due from A to B, and at the same moment a simple contract debt due from B to A. There was a claim by Lord Charles Ker for money had and received to his use, and a claim by Cox & Co for money due, so that if the action had been brought by Lord Charles Ker himself the right of set-off would have been clear. It is not brought by him, but it is brought by a person who claims as assignee of the chose in action belonging to him. Now an assignee of a chose in action , according to my view of the law, takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception. Therefore the question is, was this right of set-off existing at the time when the notice was given by the Duke of Roxburghe? Under the old law the proper course for the Duke to take would have been, not to come into a Court of Equity, but to use the name of Lord Charles Ker at law; the proper course for an assignee of a chose in action , unless there were some equitable circumstances to justify him in coming to a Court of Equity, having been to sue at law in the name of the assignor. In that case set-off could have been pleaded as against the assignor, and in the present mode of procedure that defence is equally available.*

    Baggallay LJ agreed. He said (at p 527) that notice of the assignment to the plaintiff was not given to the defendants until "after the right of set off had arisen". Lush LJ said much the same at p 528.

25. Mr Young submits that it follows from that decision that the assignment took effect subject to the statutory right of set off and that the right of set off became effective or took effect before the notice of the assignment. I accept the first part of that submission but not the second. I shall return to the first part under question 2 below. The second is inconsistent with the reasoning of Hoffman LJ in ***Aectra.*** I can see no reason in principle why an independent set off should take effect differently in a case where there has been an assignment from the way it takes effect in a case where there has been no assignment. Moreover there is nothing in ***Roxburghe v Cox*** to suggest that it does. On the contrary James LJ merely said that after Ker received the sum of £3000 the defendants could have pleaded their set off of the debt of £647 owed to them as against the assignor. If they had been sued for £3000, as Lush LJ put it (at p 528), "they might undoubtedly have pleaded a set off of that amount in that action". James and Lush LJJ were thus describing the way the statutes of set off worked in this context in the same way as Hoffman LJ did in Aectra.

26. In ***BICC v Burndy*** this court was concerned with an agreement which gave BICC the right to have patents assigned to it if the defendants failed to make payments under the agreement. The defendants did so fail but were owed other larger amounts under another agreement which gave them a right of legal set off. This court refused specific performance of the obligation to assign the patent rights. Dillon LJ, after referring to various forms of set off, said (at p 248 D-E):

    *In discussing legal set off of the first class in **Hanak v Green** [1958] 2 QB 9, 23 Morris LJ approved the explanation of the basis of the doctrine given by Cockburn CJ in **Stooke v Taylor** (1880) 5 QBD 569, 576, that the existence and amount of such a set off must be taken to be known to a plaintiff who should give credit for it in his action against the defendant. In the present case, therefore (as Mr Gratwick accepts), if BICC had sued Burndy for the*

unpaid amount of Burndy's half share of the fees and costs incurred by BICC under clause 10(ii) of the assignment, Burndy would have had a cast iron defence of legal set off in respect of the amounts due from BICC to Burndy under the commercial agreement and BICC's action would have been dismissed with costs.

The crucial question is that, as I see it, whether, even though a claim for payment would fail because of a defence of set off, a claim for other relief dependent upon non-payment can succeed. I cannot see that it can make any difference in substance whether procedurally the claim for the other relief is joined in one action with the claim for payment to which the set off is a valid defence, or whether only the other relief is claimed, leaving the claim for payment to be raised in a subsequent action or to be resolved by the application of the set off.

27. It does not seem to me that the way in which Dillon LJ was describing the operation of legal set off is any different from the way in which it was described in Aectra. Dillon LJ then referred to two cases of equitable set off and said that if BICC's cross-claim had given rise to an equitable rather than a legal set off BICC would not have been entitled to call for the assignment. He then said (at p 249 E): *I cannot see that it makes any difference in principle that the set off in the present case is a legal set off of the first class and not an equitable set off. The would-be plaintiff - here BICC - is, as Cockburn CJ in* ***Stooke v Taylor*** *, 5 QBD 569, 576 and Morris LJ in* ***Hanak v Green*** *[1958] 2 QB 9, 23 explained, to be taken to know the existence and amount of liquidated money claims against it, and that must be equally applicable whether the plaintiff is seeking to claim payment of the sum or some other relief which is dependent on non-payment of that sum.*

A little later Dillon LJ said at p 250 F - G and 251 A - B:

It seems to me right that, under the present practice, a set off should be a defence, as in such a case as ***British Anzani (Felixstowe) Ltd v International Marine Management (UK Ltd*** *[1980] QB 137, not only to a money claim for unpaid rent but also to a claim for forfeiture or other relief for non-payment of the rent. It would make no difference if the re-entry clause had been backed by an agreement by the tenant to surrender the lease in the event of non-payment of rent, and the landlord had sought specific performance of that agreement.*

...

But, if the equitable set off can be a good defence to a claim for equitable relief, then I cannot see why legal set off should not also be a good defence, since legal set off was authorised by statute and equitable set off was developed form it.

Ackner LJ agreed with Dillon LJ. Kerr LJ thought that set off would only operate under the terms of the agreement in question if and when BICC sought to enforce payment by action and not in other circumstances until a right to set off had actually been claimed.

28. There is, in my judgment, nothing in ***BICC v Burndy*** to suggest that Dillon LJ disagreed or would have disagreed with Hoffman LJ's analysis of the way the statutes of set off worked. However, if he did, we should in my opinion follow Aectra because it contains a compelling analysis of the way legal or independent set off works, whereas Dillon LJ did not embark upon such an analysis in ***BICC v Burndy***. It is not I think without significance that the claim in ***BICC v Burndy*** was a claim for equitable relief, namely specific performance. It seems to me that the fact that the plaintiffs owed the defendants larger amounts than the plaintiffs owed the defendants, albeit under a separate agreement, was a sufficient reason to refuse equitable relief. However that may be, in this regard the judge said this: *On the Hoffman analysis of the nature of the legal set off it cannot take effect as soon as the cross claims arise. He says that the cross claims do not affect the substantial rights of the parties against each other at any rate until both causes of action have been merged in a judgment of the court. The right to a legal set off is merely procedural. By contrast the right to an equitable set off operates 'as a complete or partial defeasance of the Plaintiff's claim.' I find this analysis compelling and accept it. Mr Young says I cannot or should not do so because of what was said in BICC. Careful reading of the judgment of Dillon LJ, however, does not I think support his submission. Dillon LJ's analysis is in the context of 'an action' 'a claim' and 'a defence' to such an action or claim. What he says, it seems to me, is directed to the question of when the right of legal set off arises rather than when it takes effect.*

I respectfully agree. That reasoning also seems to me to defeat Mr Young's submission that the set off took effect when Glencore were given notice of the assignment of Agropol's rights under award 11248 to Agros. I would therefore answer question 1 'No'. The washout debt was not set off against award 11248 before these proceedings began.

2. Was the assignment in principle subject to the washout debt ?

29. It is common ground that the assignment was a legal assignment within the meaning of section 136(1) of the Law of Property Act 1925, which provides that such an assignment *is "effectual in law (subject to equities having priority over the right of the assignee)"*. Mr Young submits that the expression subject to equities is wide enough to include a right of legal set off. The judge accepted that submission. He did so on the basis of the decision in Roxburghe v Cox. As has been seen above, this court held in that case, where the defendants' right to set off the debt of £647 which Ker owed to them against the debt of £3,000 which they owed to the plaintiff arose before they received notice of the assignment, the plaintiff took the assignment subject to the defendants' right of set off.

30. Mr Milligan submits that the case would or should be decided differently today. He submits that the expression subject to equities is not wide enough to include a right of legal set off because such a right is not an equity. He further submits that when ***Roxburghe v Cox*** was decided the relevant statute was section 25(6) of the Supreme Court of Judicature Act 1873, which was in different terms from section 136(1) of the 1925 Act. In fact it was in almost identical terms except that it provided that a legal assignment *"shall be, and be deemed to have been*

effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) ... "

Section 136(1) of the 1925 Act is dealing with precisely the same subject matter as section 25(6) of the 1873 Act. It is true that the expressions in brackets in the two Acts are in somewhat different terms, but when section 136(1) was enacted the decision in ***Roxburghe v Cox*** had stood for many years. It seems to me to be inconceivable that if Parliament had intended to change the law as it is stated to be in ***Roxburghe v Cox*** it would have done so by such a modest change in the wording. As I see it, all that the draftsman was trying to do was to modernise the expression in brackets but not to change its meaning.

31. The judge held that he was bound by the decision in ***Roxburghe v Cox*** to hold that the assignment was in principle subject to Glencore's right of set off. He added:

I should say that I am glad that I am. I can see no real justification for distinguishing between equitable and legal set off for this purpose. As Dillon LJ said equitable set off has developed out of legal set off. Why should someone entitled to a legal set off be worse off than someone with an equitable set off? Mr Milligan submitted that there were good reasons for the difference. Legal set off involved separate transactions. You could never safely take an assignment without enquiring as to the existence of cross claims arising from all other transactions between the debtor and the assignor. Banks would not take the precaution of providing expressly for their right to legal set off if this was unnecessary.

I do not think that any of these reasons are persuasive. An assignee takes a risk in any event if he does not make enquiries since it is common ground that he takes subject to equities. Banks are not unknown for excessive caution in the way in which they draft their agreements with their customers.

Once it is held that the expression subject to equities in section 136(1) of the 1925 Act is not materially different from the similar expression in section 25(6) of the 1873 Act it follows that both the judge and this court are bound by ***Roxburghe v Cox*** *to hold that an assignee takes subject to any rights of legal set off which the debtor has against the assignor. In these circumstances I agree with the judge that the answer to question 2 is 'Yes', although in the light of my answer to question 3 the determination of this issue is not necessary to the decision in this appeal.*

32. As I see it the position is that an assignment takes effect subject to any right of set off which is available to the debtor against the assignor, but whether it is possible for the debtor to rely upon the set off depends upon whether the set off is available to him when he is sued by the assignee. Thus, for example, by that time the claim for the debt which he was entitled to set off is time barred, the set off will no longer be available to him and cannot (as the judge put it) take effect. It may be noted that the above conclusions are consistent with the reasoning of Templeman J in ***Business Computers Ltd v Anglo African Leasing Ltd*** 1977 1 WLR 578. He was considering a case in which notice of an assignment to debenture holders had been given on the 17 th June 1974. He said (at p 582): *By June 17, 1974, the defendants had acquired the right to sue for and recover the debt owed to them by BCL namely the instalment of £1,477.50 due under the hire purchase agreement on May 18. It is conceded that this can be set off against the debt of £10,587.50 due from the defendants to BCL. The two debts were mutual debts in respect of which a right of set off vested in the defendants prior to receiving notice of the assignment to the debenture holders; see* ***Hanak v Green*** *[1958] 2 QB 9, 23. That right of set off remains exercisable against the debenture holders.*

He added (at p 585): *The result of the relevant authorities is that a debt which accrues due before notice of an assignment is received, whether or not it is payable before that date, or a debt which arises out of the same contract as that which gives rise to the assigned debt, or is closely connected with that contract, may be set off against the assignee. But a debt which is neither accrued nor connected may not be set off even though it arises from a contract made before the assignment. In the present case the claim for £30,000 did not accrue before June 17 1974 when the defendants received notice of the appointment of the receiver and thus notice of the completed assignment of the debt of £10,587.50 to the debenture holders and there was no relevant connection between the transactions which gave rise to the claim and to the debt respectively.*

I respectfully agree with those conclusions.

3. Is or was the washout debt enforceable such as to enable Glencore to set it off against their liability under award 11248 ?

33. Before the judge Mr Milligan submitted that the washout debt was no longer enforceable when these proceedings began because of the Scott v Avery clause in clause 29 of GAFTA form 64 and/or the time bar provisions in rule 2 of the GAFTA arbitration rules. The judge accepted that submission. He held that clause 11 of form 64 applied to the washout agreements, that Agropol failed to settle the washout invoices without delay and that a dispute was deemed to have arisen by the express terms of clause 11. He held that in those circumstances Glencore had no right of set off because of clause 29(b) of form 64 and/or because such a claim was time barred under clause 2 of the GAFTA arbitration rules. Before us Mr Milligan recognised that there were difficulties in relying upon clause 2 of the arbitration rules because of the express terms of clause 2.7. His submissions were therefore principally directed to the true construction of clause 11 of GAFTA form 64. There was much discussion during the argument as to the circumstances in which a dispute will or might be held to have arisen under various forms of clause. In particular Mr Young submits that where a party admits liability but does not pay there will be no dispute within the meaning of a typical clause. I shall return briefly to that point in a moment, but Mr Young correctly accepts that whether the parties have agreed to submit a particular claim or dispute to arbitration

depends upon the true construction of the clause in each particular case. I turn therefore to the terms of the contracts here.

34. Mr Milligan submits that on the facts of this case there was deemed to be a dispute when Agropol failed to settle the washout invoices without delay. He further submits that the effect of clause 29(b) of GAFTA form 64 (which is in the same terms as clause B of the arbitration clause in contract numbers 476908 and 476923) was that Glencore could not bring any action or other legal proceedings against Agropol without first obtaining an award. It follows, he submits, that Glencore's claim to set off Agropol's liability under the washout agreement by way of defence to Agros' claim to enforce award no 11248 is not capable of being litigated before the court and that it follows from the analysis of Hoffman LJ in Aectra that the set off is not available to Glencore. In my judgment, if there was a dispute within the meaning of the Scott v Avery clause, clause 29(b), that submission is correct.

35. It follows that it is not relevant to consider whether this is a case to which section 4 of the Arbitration Act 1950 or section 1 of the Arbitration Act 1975 applies, although to my mind it is the latter notwithstanding the terms of clause 28 of GAFTA form 64. I will only add that if there were no Scott v Avery clause and if this were a case in which the court had a discretion under section 4 from the 1950 Act the correct course would be for the court to consider how it would exercise its discretion under that section. In that event I have little doubt that, given the admissions of liability, any such discretion would be exercised by refusing a stay. If, on the other hand, it were necessary to consider the application of section 1 of the 1975 Act, the court would be likely to hold, again because of the admissions, that "there was not in fact any dispute between the parties with regard to the matter agreed to be referred" and would refuse a stay. It follows that the crucial question on this part of the case is whether there was a dispute within the meaning of clause 29(b).

36. There can I think be no doubt that if there is a dispute within the meaning of clause 11 of GAFTA form 64 there must be a dispute within the meaning of clause 29(b). Mr Young submits, however, that there was no deemed dispute within the meaning of clause 11. Mr Young submits that clause 11 applies to invoices in respect of actual deliveries and not to invoices in respect of washouts. He submits that all that form 64 did was to provide that non-payment of invoices and/or accounts for other items "*on deliveries*" amounted to a deemed dispute which "may be referred to arbitration", but that it did not render an admitted but unpaid debt under the contract pursuant to which there were never any deliveries a dispute. He further submits that all that the reference to arbitration could do would be to order the payment of a sum which was in any event admitted, thereby leaving untouched the question of how payment was to be effected. To construe the contract as requiring the submission to arbitration of an admitted debt would be to construe it as requiring a futile act. The admission superseded any *"deemed dispute"*. A dispute, once resolved by admissions cannot continue to be a *"dispute",* whether deemed or otherwise.

37. I am unable to accept Mr Young's submission that clause 11 has no application to a case in which there have been no actual deliveries. Clause 26 expressly provides for the not uncommon case where there is a circle, that is where sellers repurchase from their buyers the same goods. In those circumstances there will be no delivery but the clause expressly provides that invoices shall be settled in a particular way and that payment shall be due not later than 15 consecutive days after the last day for delivery. In these circumstances it seems to me to be clear that such invoices are included in the expression "invoices" in clause 11. It makes no sense to hold that clause 11 applies only to cases of actual delivery. I have set out clause 11 in paragraph 8 above. It seems to me that the words "*on deliveries fulfilling this contract*" are governed only by "*accounts for other items*" and not also by final invoices". In any event in the context of a washout agreement which expressly incorporates these clauses, sums due under the washout agreement must be "*any monies due by either party to the contract to each other in respect of final invoices*". If that is so, it follows that a dispute was deemed to have arisen when Agropol failed to settle the washout invoices without delay. It is not I think suggested that the word "*settled*" in clause 11 means anything other than paid.

38. In these circumstances I am unable to accept the second part of Mr Young's submission set out above. I do not see how an admission can supersede the deemed dispute. I do not accept that a dispute cannot continue to be a dispute once the claim has been admitted. An important purpose of the clause and indeed of the arbitration machinery is to enable a claimant to obtain an arbitration award which will be enforceable under the New York Convention. I accept Mr Milligan's submission that in many cases an award will be as valuable as or more valuable than a judgment. As I see it, the scheme of the contract is that it is the duty of the paying party to settle final invoices without delay. If they are not so settled a dispute is deemed to exist. Such a dispute naturally falls within the expression "*any dispute arising out of or under this contract*" in clause 29(a) and is therefore a dispute within the meaning of the expression "any such dispute in clause 29(b)". It follows, in my judgment, that the ***Scott v Avery*** provision in clause 29(b) applies to such a dispute. It appears to me that the fact that a party may have admitted liability is irrelevant. If the party entitled to payment wishes to obtain a judgment he must first obtain an award under clause 29(b).

39. It follows that the washout debt would only be enforceable such as to enable Glencore to set it off against their liability under or award 11248 once an arbitration award was obtained, which has not occurred. It follows that I agree with the judge that on that basis the answer to question 3 is 'No'. I only wish to comment on two further matters. The first relates to time bar. As I read clause 2.7 of the arbitration rules claims are deemed to be waived and absolutely barred only in the event of non-compliance with the provisions of the rule "being raised by the respondents as a defence". That has not occurred. Moreover the arbitrators have a discretion under clause 2.7 to disapply the time limits. It follows that, as I see it, Glencore's claim is not at present barred by clause 2.7.

40. The second matter relates to the meaning of dispute. There have been many cases in which the courts have considered the meaning of dispute under different contracts and in different circumstances. Most of them are discussed, or at least touched upon, in the judgments in this court in ***Halki Shipping Corporation v Sopex Oils Ltd*** [1998] 1 WLR 726. Interesting though the problems are, I do not think that it would be appropriate to lengthen this already over long judgment by a consideration of the meaning or possible meaning of the word "dispute" in other contracts. I shall not therefore do so.

CONCLUSION.

41. The assignment was in principle subject to the washout debt but that debt has not so far been set off against award 11248. Such a set off would only become effective if and when Glencore obtained an award in respect of the washout debt, which has not occurred. It follows that the judge was right. I would therefore dismiss the appeal.

LORD JUSTICE OTTON: I agree.

LORD JUSTICE KENNEDY: I agree.

Order: Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

MR T YOUNG QC (Instructed by Messrs Richards Butler, London, EC3A 7EE) appeared on behalf of the Appellant.
MR I MILLIGAN QC (Instructed by Messrs Middleton Potts, London, EC1 7NP) appeared on behalf of the Respondent.