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Case no 369/88
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

INTER MARITIME MANAGEMENT SA — Appellant

- and -

COMPANHIA PORTUGUESA DE TRANSPORTES MARITIMOS EP — Respondent

CORAM: VAN HEERDEN, SMALBERGER, NESTADT, KUMLEBEN JJA et FRIEDMAN AJA.

HEARD: 3 SEPTEMBER 1990.

DELIVERED: 27 September 1990.

J U D G M E N T

FRIEDMAN AJA:

The Durban and Coast Local Division, constituted as a court of admiralty, dismissed the appellant's action for damages for the alleged repudiation by respondent of an agreement relating to a joint shipping venture between the parties. At the same time, in respect of respondent's claim-in-reconvention for damages in the sum of US$ 562 697,00 arising out of the attachment by appellant of certain vessels owned or chartered by the respondent, judgment was granted in favour of the respondent in an amount of R 15 901,20. With the leave of the Court *a quo* the appellant now appeals to this Court against the dismissal of its claim for damages. Respondent has also cross-appealed against the quantum of the damages awarded to it on its claim-in-reconvention.

The appellant is a Swiss company which operates in the field of maritime activities, including the financing of vessel fleets and the acquisition of maritime interests. The respondent is a State owned Portuguese company which, prior to its liquidation on 3 May 1985, carried on business as a ship owner and operated the major part of Portugal's mercantile marine. The respondent is a so-called "empresa publica" which means, according to the evidence of Dr Perreira, a Portuguese lawyer who testified at the trial, that it is a company which was created by and was subject to dissolution by government decree. Such a company has its own statutes and articles of association and has an autonomous legal existence, save that in certain respects it is subject to what was referred to as the "tutelary authority" of a particular government department or departments. In the case of the respondent, such tutelary authority was exercised by the Minister of Transport and Communications as well as, in certain instances, the Minister of Finance. To the extent to which respondent was subject to tutelary authority, decisions of its board of directors required the authorisation of the responsible minister.

Appellant's claim for damages, as finally formulated, amounted to US$ 6 608 548,08. This claim was based on the alleged wrongful repudiation by respondent of certain agreements and an addendum thereto concluded between the parties at Geneva on 18 August 1981 and 22 January 1982 respectively. Both appellant and respondent are peregrini of the Republic of South Africa, but in terms of sec 3(2)(b) of the Admiralty Jurisdiction Act 105 of 1983 ("the Act"), the action became amenable to the jurisdiction of a South African Admiralty court by virtue of the attachment by appellant ad fundandam jurisdictionem of respondent's motor vessel, the H Capelo, in the Durban harbour on 4 February 1985 and thereafter the attachment of the respondent's motor vessel, the Malange, in the Port Elizabeth harbour on 20 February 1985. A further motor vessel, the Leiria, was arrested at the instance of the appellant at Freetown, Sierra Leone, on 2 March 1985 pursuant to a writ of summons issued out of the High Court of Sierra Leone, also in respect of appellant's aforesaid claim for damages. Respondent's claim-in-reconvention arose out of the arrest and attachment of these three vessels.

The agreements, on the alleged repudiation of which appellant's claim for damages is based, were aimed at the establishment of a joint venture between the two companies. The main agreement entered into on 18 August 1981 provided for the formation of "a joint venture maritime company" to be incorporated under the laws of Liberia, in which appellant and respondent would be equal shareholders. The share capital of the maritime company was to be 5% of the anticipated total investment in a fleet of vessels to be acquired at an estimated cost of US$ 75 million. The share capital was thus to be US$ 3,75 million, which was to be introduced by appellant and respondent in equal shares, i.e. US$ 1,875 million each. The share capital was to be utilised to acquire vessels which would be owned by one-ship owning Liberian companies which companies would, in turn, be wholly owned by the maritime company.

The appellant, acting through an affiliated company, Inter Maritime Bank ("IMB"), was to be responsible for arranging, through leading international banks, a syndicated loan or loans covering 80% of the anticipated cost of acquisition of the vessels. To this end the parties were to issue jointly an exclusive mandate to IMB to enable it to act on behalf of the joint venture company. In terms of the mandate IMB was to be paid a "management fee" by respondent, equal to 1% of the loan, on the signing of the loan agreements. The balance of 15% of the anticipated acquisition costs would be provided by IMB. All commissions earned as a result of the acquisition and/or sale of vessels were to be paid to the vessel-owning companies (and hence would have been effectively shared by appellant and respondent).

Clause 10 provided that the vessels were to be bareboat chartered for a period of six to ten years, depending on the age of the vessel, at a minimum charter hire rate sufficient to cover the reimbursement of the commercial bank and IMB financing, with interest thereon, as well as the expenses of the vessels and the repayment of the maritime company's investment in the vessels. The charterer was of course to be the respondent.

In terms of clause 12 the respondent was to obtain from the Portuguese government a confirmation stating that all steps would be taken as might from time to time be necessary to ensure that the respondent fulfilled all its obligations under the bareboat charters. This type of confirmation is known as a "letter of comfort" and is apparently not unusual in transactions where a government is indirectly involved. It places the Government under no more than a moral obligation to ensure that the company concerned does not default.

Clause 13 provided that the agreement would be governed by the laws of the United Kingdom and that disputes were to be settled by arbitration in London.

The whole agreement was made subject to the authorisation of the competent Portuguese Government authorities as well as the boards of the appellant and respondent. The authorisation of the Portuguese Government would in any event have been necessary as the respondent's board of directors would, in entering into an agreement of this kind, have been subject to the "tutelary authority" of the Ministeries of Transport and Communications and Finance.

The supplemental agreement, which was entered into on the same date as the main agreement, provided that the minimum bareboat charter rate referred to in clause 10 of the main agreement, was to be "adequate to remunerate the Maritime Company's equity investment in the vessels at a rate of 30% per annum". It appears that although no percentage was actually mentioned in the main agreement, a return of 20% had been envisaged but that when it came to signing the agreement Mr Rappaport, appellant's president and controlling shareholder, insisted on a return of 30% and the respondent agreed to this. The respondent's board of directors approved the agreement on 18 August 1981 and the appellant's board of directors approved it on 26 August 1981. By 24 November 1981 the necessary Government authorisation had been obtained.

On 22 January 1982 an addendum to the main agreement was concluded. The preamble states that the parties desire to elaborate in greater detail on the next steps to be taken to implement the main agreement. The addendum provided that the respondent was to draw up a list of vessels to be acquired, including a feasibility study in respect of each. The total cost of the vessels to be acquired at that stage was estimated to be US$ 43 million. In terms of clause 4 the appellant was immediately to take all necessary steps to form the maritime company under the laws of Liberia, which company was to be called Port International Shipping Corporation ("PISC"). The clause went on to provide that the appellant and respondent should each, within five days after the formation of PISC, transfer to an account to be opened with IMB in the name of that company, US$ 1,075 million, as a first contribution of their respective subscriptions to the share capital of the company. Such transfer was said to represent 5% of the first part (US$ 43 million) of the total investment of US$ 75 million.

Clause 5 provided that the board of the maritime company was to consist of six directors, three appointed by each shareholder. In terms of clause 6 the maritime company was to issue to IMB an exclusive mandate authorising it to arrange with leading international banks a syndicated loan or loans totalling US$ 43 million for the vessel acquisition programme. Clause 8 provided that in the event of a minimum financing programme of US$ 20 million not being formally committed in favour of the maritime company by 1 July 1982, the agreement would terminate, the maritime company would be liquidated and its assets distributed to the shareholders.

Following on the conclusion of these agreements, PISC was formed and registered according to the laws of Liberia. A banking account was opened in the name of PISC, and appellant and respondent each transferred into this account its capital contribution of US$ 1,075 million. The shares in PISC were issued equally to the parties and the inaugural meeting of the directors was held in Geneva on 18 May 1982. At this meeting the directors residing in Geneva were authorised to form seven subsidiary companies. These were the companies which were to own the vessels to be acquired.

Even before the signing of the addendum on 22 January 1982 Mr Rockey, who was at the time the general manager of IMB, was endeavouring to obtain finance from the Banque de Paris et des Pays-Bas (Suisse) SA ("Paribas"). On 3 February 1982 Paribas committed itself to making a loan to PISC for the financing of 70% of the cost of acquisition of vessels "provided that the documentation concerned meets with our full approval". The amount involved was US$ 14 million. The preparation of the documentation created certain problems which were never finally resolved. With regard to the balance of the finance, Mr Rockey succeeded, in May 1982, in obtaining an undertaking by the Chase Manhatten Bank in New York to advance an amount of US$ 8 million. The Chase Manhatten Bank's commitment was, however, also "contingent upon the preparation, execution and delivery of legal documentation in form and substance satisfactory to Chase". By May 1982 IMB had in principle obtained the finance necessary to enable the joint venture to proceed; all that was required was the finalisation of the documentation for the Paribas and Chase Manhatten loans. That documentation was, however, never finalised.

During the first half of 1982 various negotiations took place between representatives of the appellant and the respondent with a view to the selection of the vessels and the order of acquisition, and various meetings were held in order to finalise the loan documentation. However, before any of these matters could be finalised, the Portuguese Government on 22 July 1982 declared the respondent to be "in a difficult economic situation". Dr Perreira explained that such a declaration was aimed at preventing a company from being placed in liquidation. Its effect was to grant the respondent a moratorium and to place an embargo on new investments without previous authorisation of the Portuguese Government. It did not, however, have any effect on existing contracts and thus did not affect the implementation by the respondent of its agreements with the appellant.

The board of the respondent was required by the declaration to present to the Portuguese Government, within thirty days, a plan of how it proposed to overcome the company's financial problems and how it proposed to bring about the recovery of the company. In due course respondent's board presented the Portuguese Government with its proposals. These were that four new companies be formed: two would be shipping companies - one for domestic trade and the other for international trade; one would be a ship's agency company; and one would be a company for naval repairs and other metallo-mechanic activities. The idea was that these companies would take over the useful assets of the respondent; the respondent would itself be left with the debts previously incurred and would merely become the holding company of the four new companies. These four subsidiaries would thus commence with assets but no liabilities.

The respondent did not, however, contemplate a termination of the joint venture with the appellant. The two new shipping companies would have to renew their fleet and to this end it was contemplated by the respondent that there would be a continuing relationship with the appellant on the basis of the joint venture.

The appellant was kept fully informed by the respondent of its plans. For example, on 18 November 1982 a meeting was held in Geneva between Messrs de Melo and Guedes, who were respectively the president and a director of respondent, and representatives of the appellant at which the proposed reconstruction of the respondent and the formation of the new companies were discussed. Mr Rappaport was not present at the meeting, but received a report from Mr Gustafson who was at the time IMB's project financial analyst.

It seems clear that the respondent's proposals enjoyed the support of the appellant. Between July and November 1982 there was personal contact between de Melo and Rappaport at which the proposed reconstruction was discussed. The learned Judge in the Court _a quo_ summed the position up as follows :

"In a nutshell the position seems to be that from about July 1982, all the discussions between the parties proceeded on the basis that the new companies would be constituted and the joint venture amended to take account of this change. It was accepted that the creation of the new companies inevitably carried with it the need for a complete revision of the agreement and thenceforward that is what the parties had in mind. I accept that at no time did any person from the I.M. Group specifically state that if the new plans failed, I.M.M. reserved its right to revert to the original agreement. But, by a similar token, I also accept that at no time did any representative of C.T.M. either state (or even believe) that the contractual relationship between C.T.M. and I.M.M. had come to an end."

("IMM" and "CTM" are references to appellant and respondent respectively.)

In the meantime, political developments in

Portugal caused progress to be retarded. In December 1982 the coalition government resigned but remained on in a caretaker capacity, pending a general election. On 18 January 1983 the caretaker government approved the reconstruction plan and authorised the formation of the proposed companies, the statutes of which were approved by the Ministries of Finance and Transport.

At that stage it was apparently envisaged that the new companies would be registered and the joint venture agreement amended to take account of this by March 1983. However, the department of the Portuguese Government charged with the formation of the new companies considered that their formation might create a constitutional problem and the matter was then referred to a constitutional lawyer for opinion.

General elections were held in Portugal in

April or May 1983 and a new coalition government was formed. A favourable opinion having been received from the constitutional lawyer, it was arranged that the documents for the formation of the new companies would be executed on 8 June 1983. However, as the documents were about to be executed, the office of the notary public was invaded by a group of dissatisfied seamen which caused the notary public to flee without the execution of the documents having been attended to. The same or the following day the new Government took office and the new Minister responsible for the affairs of the respondent decided that he was not prepared to indicate his attitude to the proposed reconstruction of respondent without detailed information which would have enabled him to make his own assessment. The whole matter was accordingly further delayed.

Because of the delay IMB, which had negotiated, in accordance with its mandate, financial commitments from Chase Manhatten, Paribas and itself, had not been paid its management fee of 1%. On 6 June 1983 IMB demanded payment of its fee amounting to US$ 314 000,00 from respondent. There was no response to this demand. On 18 July 1983 IMB simply debited PISC's banking account with that amount and by telex dated 19 July 1983 advised the respondent of this. The respondent disputed that a management fee was payable to IMB until loan agreements had actually been signed. This dispute led to ill-feeling between the parties which culminated in a telex which respondent sent to IMB on 4 November 1983, which read as follows :

".... we are only prepared to carry on

> discussion of the outstanding matters in relation to the joint venture provided IMB confirms that PISC account was credited for US dol 314,000 plus interest thereon as from the date this sum was deducted without the legal authorization from PISC."

No reply was sent to this telex, nor was the debit reversed. The trial court stated that the appellant's counsel conceded that there was no justification for IMB's having caused this debit to be made. A similar concession was made before this Court.

The telex of 4 November 1983 apparently caused a complete rift between the parties: there was no further contact between them until 18 June 1984, when the board of directors of the respondent sent the following telex to Rockey :

"att Mr Fred Rockey

re: Port International Shipping Corp.

We refer to the recent telephone conversations with you and Mr Gustafson in connection with the future guidelines of the Portuguese cabinet as regards the situation of the state owned shipping companies in our country.

It is our provisional opinion that under the present governmental policy for the shipping activities in Portugal it will most likely not be possible to conclude the project of PISC as envisaged previously despite the efforts of both partners.

In the circumstances and in our view and also as an alternative to overcome the present deadlock situation we should consider the winding up of PISC and in this respect we would welcome your proposal as regards the best course of action in this respect, namely the timing, payment of disbursements connected with PISC commitments as well as

25/...

repayment of stock capital to IMM and CTM, in order to safeguard the interests of all parties involved.
It is also our opinion that this would also preserve the goodwill arising out of our relationship towards the new shipping companies the more so that the Portuguese Government is aware of the willingness of IMB and the other banks to consider the investments in the new companies, which will need fresh and substantial money to materialize their needs as regards new tonnage."

Rockey's response on 4 July 1984 was that

".... we will be discussing this matter today at our board meeting and will revert back to you in the near future with our comments".

On 20 July 1984 a telex was sent to Guedes by one David Lawson, who described himself as "general counsel", and who purported to act for "International Maritime Services Co Ltd, as agents". The telex reads as follows -

> "attn: mr. jorge guedes
>
> in absence of an acceptable response from you to our letters and demands relating to your outstanding obligations to our affiliated company imm, i regret that i have no alternative but promptly to commence legal action to protect our interests.
> if you have recently or are in the process of taking the requested steps, i request that you immediately let me know."

On 20 July 1984 Guedes replied by telex to Lawson, with copies to Rockey at IMB and to Gustafson. The telex reads as follows -

> "we refer to yr today's messg no. 1118 and

would like to point out that we have never dealt with i.m. services on any subject and therefore we fail to see the reason of yr above tlx.

however we hasten to point out that we made a proposal to i.m.b. as per our tlx. of 18.6.84 and assume matter is under process of consideration as per imb's tlx of 4.7.84. the proposal put forward by us aimed to maintain goodwill arising out of the pisc negotiations towards the new shipping portuguese companies. in the circumstances, we are still looking forward to receiving imb's reply to our above mentioned proposal. we are therefore assuming yr tlx is the result of a misunderstanding and will be disregarded it."

The telex of 18 June 1984 evoked a response in the form of a telex from Rappaport on 24 July 1984. He commenced by expressing surprise that Guedes should have communicated with Lawson of International

Maritime Services, whereas respondent's contract was with appellant. Rappaport went on to state -

> "we have lost a tremendous amount of time and what we consider a profitable business owing to your political problems which are not of our concern. we have been promised repeatedly by your predecessor, dr. de melo and other that the matter would be resolved and we would be able to use the credits for the company.
>
> i am afraid the attitude in your telex is not constructive and we have to wind up the company and collect the money properly due to us, including loss of profits, which we shall have no choice but to prove in court in geneva unless you have a realistic suggestion to make to i.m.m. on how to resolve this matter promptly. in such case, kindly call mr. frederick rockey in geneva. otherwise, we must proceed to liquidate and collect the

funds due to us."

On 24 July 1984 Guedes telexed Rappaport as follows -

"apparently there has been a misunderstanding and therefore we are airmailing letter to you on the matter in order to clarify our position.

however, we hasten to point out that as from a certain moment on we agreed upon with you that we would send our information to mr. fred rockey for uniformity purposes, hence the reason of our sending message to imb."

Rappaport's response was a telex on 25 July 1984, reading as follows -

"we are in receipt of your telex nr. 7235/s. the misunderstanding you are referring to is

> irrelevant.
> we will wait for your letter but we have also started to commence legal proceedings. as your partners in the joint venture company, we cannot tolerate your unfortunate attitude to ignore the matter for such a long period of time and thus block funds that could be otherwise used for profitable business."

The following day Guedes replied stating, inter alia, that -

> "as far as we are concerned and under the present circumstances, we remain prepared to consider the winding up of PISC on acceptable terms."

Nothing further appears to have occurred until 4 February 1985 when the Capelo was attached. This was followed by the institution of the appellant's action.

In its Particulars of Claim the appellant averred as follows :

" 6.

The Defendant was obliged -

(a) To do all things necessary to be done by it to cause the joint venture maritime company to operate in terms of the said agreement;

(b) In particular, in terms of Clause 7 of Annexure A, to decide on the types of vessels to be acquired and to initiate negotiation for the purchase of the said vessels.

7.

The Defendant failed throughout the years 1982 and 1983 to perform its said obligations and by telex message dated 18th June 1984 stated that it was not possible to conclude the project of the said joint venture maritime company.

8.

In acting as set forth in paragraph 7 the Defendant committed a fundamental breach of and repudiated its obligations under the said agreement, Annexure A as amended by Annexures B and C.

9.

The Plaintiff has thereby become entitled and has elected to regard the said agreement as so amended as being at an end.

10.

By the Defendant's said breach and wrongful repudiation of the said agreement the Plaintiff has suffered loss and damage as set forth in the particulars hereto."

There followed particulars of appellant's claim which originally amounted to US$ 9,785 million. This figure was eventually reduced to US$ 6.608.548,08.

In its plea the respondent raised a number of alternative defences. The import of most of these was that the respondent was not bound by the agreements. One of the defences raised was a denial that the telex of 18 June 1984 amounted to a repudiation.

At the trial appellant's counsel made it clear that he was relying solely on the telex of 18 June 1984 as constituting a repudiation. The Court _a quo_ found against appellant in regard to the telex and therefore found it unnecessary to consider any of the alternative defences advanced by the respondent. If this finding is correct, it will be unnecessary for this Court to deal with such defences. I proceed therefore to consider the question whether the telex amounted to a repudiation.

It is common cause that by virtue of sec 6(1) of the Act the law to be applied in determining whether the telex constituted a repudiation, is English law "in so far as that law can be applied".

The starting point in English law is the case of Freeth and Another v Burr (1874) LR 9 CP 208 where at 213 LORD COLERIDGE CJ said that -

> "in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."

In Spettabile Consorzio Veneziano Di Armamento E. Navigazione v Northumberland Shipbuilding Company Limited (CA) 121 LT 628 LORD ATKIN LJ stated at 634 -

"A repudiation has been defined in different terms - by Lord Selborne as an absolute refusal to perform a contract; by Lord Esher as a total refusal to perform it; by Bowen, LJ in Johnstone v Milling (ubi sup) as a declaration of an intention not to carry out a contract when the time arrives, and by Lord Haldane in Bradley v H. Newsom, Sons, and Co Limited (119 LT Rep 239; (1919) AC 16) as an intention to treat the obligation as altogether at an end. They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract."

In The Mersey Steel and Iron Co (Ltd) v Naylor, Benzon & Co (1884) 9 AC 434 LORD SELBORNE stated, at 438-9 -

"I am content to take the rule as stated by Lord Coleridge in Freeth v Burr Law Rep. 9 CP

208, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part .."

Dealing with the question of repudiation in Forslind v Bechely-Crundall 1922 SC (HL) 173, VISCOUNT FINLAY stated at 184 -

"The law bearing upon this point has been clearly settled by a series of decisions, of which Freeth v Burr and the Mersey Steel and Iron Co's case are the most important. If

> one of the parties to a contract, either in express terms or by conduct, leads the other party to the reasonable conclusion that he does not mean to carry out the contract, this amounts to a repudiation which will justify the other in treating the contract as at an end, and claiming damages on that footing, without waiting for the time when, by the contract, performance was to have taken place."

In the same case VISCOUNT HALDANE stated at 179 that:

> "Whether what amounted to such repudiation actually took place is largely a question of fact, to be determined by consideration of the circumstances and of the action of the respondent in these circumstances."

The importance of looking at the whole of the circumstances was also emphasised by LORD KEITH OF KINKEL in <u>Woodar Investment Development Ltd v Wimpey</u>

Construction UK Ltd [1980] 1 All ER 571 (HL) at 586. Although it is English Law that has to be applied in determining whether there has been a repudiation, I would mention, in parentheses, that on this subject our law does not differ from the law of England. See Inrybelange (Edms) Beperk v Pretorius en ŉ Ander 1966 (2) SA 416 (A) at 427; Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou 1978 (2) SA 835 (A) at 845; Ponisammy and Another v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A) at 387 and Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A) at 653.

It is also clear that in English law, as well as in South African law, the test is an objective one, i.e. the question is not whether the party whose conduct is being considered, subjectively intended to terminate the contract; the question is whether, objectively, his words or conduct reasonably conveyed that to the other party.

In the Woodar case, supra, at 586 LORD KEITH OF KINKEL quoted with approval the following passage from the judgment of Bowen LJ in Johnstone v Milling (1886) 16 QBD 460 at 474 -

> "The claim being for wrongful repudiation of the contract it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract."

I turn now to the question whether, applying the principles set out above, the telex of 18 June 1984, is to be construed as a repudiation by respondent of its agreement with appellant. I would pause here to point out that in the light of the unfortunate events which overtook the respondent, there is considerable doubt whether the agreement in its original form still existed, or whether, tacitly, some other contract had come into existence between the parties. For the purposes of this judgment, however, I shall assume that the agreement, in its original form, was extant.

Before dealing with the contents of the telex, it is important to bear in mind that the authors were not communicating in their native tongue and that, in consequence, the terminology is not always phrased in perfect grammatical English. The telex commences with a reference to "recent telephone conversations" which Guedes had with Rockey and Gustafson. Neither Rockey nor Gustafson nor Guedes had any independent recollection of the gist of these conversations. According to the trial court it was common cause that nothing was said in these conversations which in any way assists in the interpretation of the telex or which assists the appellant's case that the telex amounts to a repudiation by the respondent of the joint venture.

In argument before this Court, however, Mr Shaw, who appeared for the appellant, did seek to rely on the following passage from the evidence of Guedes when he was cross-examined on the telephone conversation he had had with Gustafson:

> "Q. So, do you say that you spoke to Mr Gustafson and said that you wanted to talk to him about the future guidelines of the Portuguese Cabinet with regard to the situation of the state-owned shipping companies; is that what you said?
>
> A. I explained to Mr Gustafson as well as to Mr Rockey, that on the present context, on the guidelines of the Portuguese Cabinet that it didn't seem that there was any future for the PISC; and so the best thing we could do would be to try to wind up the joint venture and to save the good will for future use for the eventual use for the future companies."

This evidence, Mr Shaw argued, was "relevant to the background to the telex". I do not agree that this evidence assists appellant to discharge the onus which it bears of establishing that the telex amounted to a repudiation. The gist of Guedes' evidence is that because of the attitude of the Portuguese Government which, in his opinion, was unlikely to change, a deadlock had arisen. The telex contained a suggestion as to how that deadlock could be broken. The wording of the telex substantiates the attitude expressed by Guedes in his evidence.

In the second sentence of the telex the "provisional opinion" is expressed that "under present governmental policy ...... it will most likely not be possible to conclude the project of PISC as envisaged previously ....".

The next sentence contains a suggestion that in the circumstances, as a possible means of overcoming the present deadlock situation, "we should consider the winding up of PISC". The word "we" indicates that what respondent had in mind was that both parties should give consideration to that suggestion; it was not an intimation that respondent was firmly of that view. The fact that respondent stated that it "would welcome your proposal as regards the best course of action in this respect", emphasises the provisional nature of the proposal. The remainder of the telex points out the advantages that would flow (to both parties) from the liquidation of PISC. That respondent did not intend, by the telex, to convey anything more than a "proposal", is made clear from the telex which Guedes sent to appellant on 20 July 1984. By that date appellant had not purported to accept the "repudiation" and if it was in any doubt as to what respondent intended to convey by the telex of 18 June 1984, such doubt would have been removed by the telex of 20 July 1984. Indeed, Rappaport himself, in his telex of 24 July 1984, while describing respondent's attitude as "not constructive" envisaged the winding up of PISC as being the only alternative unless respondent had "a realistic suggestion to make to (appellant) on how to resolve this matter promptly".

The telex, read as a whole and in the context of the circumstances under which it came to be sent, could not reasonably have been interpreted by the appellant as a statement by respondent that it no longer intended to be bound by, or that it was unable to proceed with the existing agreement. Rappaport certainly does not appear, if one has regard to his telex of 24 July 1984, to have construed it as such.

It must be borne in mind that there had, over a long period, been discussions between the parties as to the future of the joint venture in the light of the respondent's proposals to the Portuguese Government as to the formation of the four new companies. Although it was felt that the acceptance (by the Portuguese Government) of these proposals would involve a restructuring of the joint venture, the appellant had certainly not been averse to such a step. The suggestion in the telex of the possibility of PISC being liquidated, merely took these discussions a stage further.

Mr Shaw conceded that if, on a proper construction of the telex, it contained no more than a proposal, that would not be sufficient to constitute a repudiation. He argued however, that the telex did not amount to a proposal, but to a definite statement that PISC must be wound up. He submitted, further, that the telex amounted to a statement by respondent of its inability to proceed with the operation as originally contemplated.

I do not agree. The telex cannot reasonably be construed as a statement that PISC <u>must</u> be liquidated. Nor, in my view, is it reasonably capable of being construed as a statement by respondent that it was unable to proceed with the operation as originally contemplated. The respondent did not indicate that if its suggestion that PISC be wound up was not acceptable to appellant, it would not be able to go forward with the agreement. The telex contains no suggestion of such an inability. Mr Shaw referred to a passage in Guedes' evidence where he answered affirmatively to the suggestion that he wished to put "an end to the operation". The evidence was as follows -

"Q. And, in June, 1984 was your attitude not to say, 'Look. It's no use carrying on with any discussions because the government's attitude is that the company is going to be liquidated'. Isn't that what you were saying?

A. On June, '84, we said that our provisional opinion was that we thought the guidelines of the cabinet were on that direction, and what we said is this: 'We are to sit around the table and make all the calculations for the profitable running of the operation.' The $ 314,000 were definitely to be discussed and to be put on the table.

Q. Certainly. But, with the object of, as you say, putting an end to the operation?

A. Yes."

Whatever view Guedes might have held in June 1984 as to the future of the joint venture, that was not conveyed to the appellant. This evidence therefore does not advance appellant's case. There is no basis for construing the telex as a repudiation. The trial court was accordingly, in my judgment, correct in dismissing the appellant's action based, as it was, solely on the telex of 18 June 1984. In view of this conclusion it is unnecessary to consider the remaining defences raised in respondent's plea. The appeal cannot succeed.

I turn now to the cross-appeal.

The claim-in-reconvention arose out of the attachment of the motor vessels H Capelo and Malange and the arrest and detention of the motor vessel Leiria. At the hearing of the appeal respondent's counsel abandoned its claim in relation to the Leiria; it is therefore unnecessary to deal with that vessel. The respondent alleged that the orders for the attachment of the Capelo and the Malange were each obtained without good cause within the meaning of sec 5(4) of the Act. In the alternative it was alleged that the appellant had made an excessive claim and had required the respondent to furnish excessive security in order to obtain the release of the two vessels. Respondent alleged that as a consequence of the attachments, alternatively the excessive claim or alternatively the excessive claim for security, it had suffered damages. Respondent claimed R 119 214,12, being the cost of establishing a guarantee, and US$ 286 991,60 and US$ 171 586 being the wasted expenditure in respect of the Capelo and Malange respectively, during the period of their detention. At the trial agreement was, subject to a caveat, reached on the quantum of the various heads of damage claimed by the respondent.

A schedule reflecting this agreement was handed in at the trial. In the caveat appellant recorded that it did not admit that the expenses and losses set out in the schedule constituted valid heads of damages. There was also agreement regarding the method of calculating the fees and commission charged by the bank for establishing and maintaining the bank guarantee which was given in order to secure the release of the vessels.

No evidence was led on the claim-in-reconvention: it was agreed that all the relevant facts appeared from the applications concerning the attachments. These form part of the appeal record and may be summarised thus :

On 4 February 1985 the appellant applied <u>ex parte</u> and obtained an order in the Durban and Coast

Local Division for the attachment of the Capelo, to found jurisdiction in an action which the appellant intended to institute against the respondent for US$ 8,769 million plus interest at 20% per annum and costs. In paragraph 13 of the founding affidavit, deposed to by one Herholdt, an attorney acting for the appellant, it was stated that the appellant was still in the process of calculating its damages but was exposed to a loss of US$ 8,769 million based on its initial equity investment and an anticipated return of 30% per annum over the six to ten year period contemplated in the agreements.

On 28 February 1985 the appellant applied <u>ex parte</u> and obtained an order in the South East Cape Local Division for the attachment of the Malange. This was also said in the notice of motion to be an attachment to found jurisdiction in respect of the appellant's claim for US$ 8,769 million plus interest at 20% per annum.

On 18 June 1985 appellant instituted procedings in the Durban and Coast Local Division by edictal citation in which it claimed damages in an amount of US$ 9,785 million with interest thereon at 30% per annum and costs. The figure of US$ 9,785 million was arrived at by adding an amount of US$ 1,016 million, being the residual value of the vessels, to appellant's alleged loss of US$ 8,769 million. The damages claimed by the respondent relate to the figure of US$ 8,796 million; it is accordingly unnecessary to refer any further to the figure of US$ 9,785 million.

Both the order for the attachment of the Capelo and that for the attachment of the Malange contained a paragraph to the effect that the vessels would be released on the furnishing of security to the satisfaction of the Registrar for the payment of an amount of US$ 8,769 million plus interest. The appellant at no time insisted on security for the full amount of its claim: it was prepared to release both the Capelo and the Malange from attachment on being furnished with security in an amount of US$ 2,3 million as it had erroneously been advised that it was limited, in its request for security, to the value of those two vessels. The respondent, however, feared that if it furnished security for only US$ 2,3 million it would be exposed to further attachments. Hence it insisted on providing security for the full amount of the claim i.e. for the sum of US$ 8,769 million plus interest and costs making a total of US$ 12,928,208. Security in that amount was furnished by means of a bank guarantee on 4 April 1985. Thereafter the respondent applied to the Durban and Coast Local Division in terms of section 5(2)(c) of the Act for a reduction of the security to US$ 250 000. On 26 September 1985 an order was made reducing the security from US$ 12 928 208 to US$ 5 124 000.

The trial court found that respondent had not established that the attachment of either the Capelo or the Malange had, in the circumstances, been obtained without good cause. No damages were accordingly recoverable from the appellant by reason of the attachment _per se_. This finding is not challenged in the cross-appeal. The trial court found, however, that the appellant had made an excessive claim and awarded the respondent damages, on that basis, in an amount of R15 901,20. The latter figure was arrived at as follows : The trial court found that appellant's revised claim of US$ 6 608 548,08 was not excessive; it found, however, that to the extent of the difference between that amount and the amount claimed (US$ 8,769 million), the claim was excessive; that difference amounted to US$ 2 160 451,92. For all practical purposes that difference was the result of the appellant's having proceeded, in its original claim, on the assumption that the parties' equity investment in PISC would have been repaid out of charter hire fees, on an annuity basis, and that each instalment would have been reinvested at a rate of interest compounded at 30% per annum. That method of assessing its loss was effectively abandoned in the revised claim: Mr Shaw, who appeared for appellant at the trial, candidly stated, in opening the appellant's case, that "this rather generous method of investment was not in fact contemplated". The trial court found that for the period from 1 April 1985, when the guarantee was furnished (it was in fact furnished on 4 April 1985, not 1 April 1985) until 26 September 1985, when the security was reduced by the order of the Durban and Coast Local Division to US$ 5,124,000, respondent had been obliged to maintain a guarantee of US$ 3 180 243,91 in excess of that which it would have had to maintain had the claim not exceeded US$ 6 608 548,08. The figure of US$ 3 180 243,91 is the sum of the aforementioned figure of US$ 2 160 451,92 and US$ 1 019 791,99, being the interest thereon at 11% per annum from 18 June 1984 to

8 February 1985 and at 20% per annum from 9 February 1985 for two years. That was the interest that had been fixed by the Registrar. The cost of maintaining this additional portion of the guarantee for the period in question was, in accordance with the agreed method of calculation, $^{1}/_{4}$% thereof or US$ 7 950,60. At the agreed rate of exchange, that amounted to R15 901,20 and that was the amount awarded to respondent.

Mr Wallis, who appeared for the respondent, argued that (a) the court a quo ought to have found that any claim in excess of US$ 2,5 million was excessive in terms of sec 5(4); alternatively (b) if the court a quo was correct in assessing that appellant's legitimate claim was US$ 6 608 548,08, it ought to have awarded damages based on the difference between that amount and the total amount of the security furnished, namely US$ 12 928 208, and not between US$ 8,769 million and US$ 6 608 548,08.

As to (a):

Mr Wallis argued as follows: until the notice of intention to amend the particulars of claim was given by the appellant to the respondent two or three days before the hearing of the evidence began on commission in London on 3 November 1987, the major portion of the appellant's claim was based on a compounding of interest at 30% per annum; Mr Shaw had conceded in his opening address that there was no justification for such compounding of interest; in the amended particulars of claim a new claim was introduced for commissions to be earned on the purchase of vessels in terms of the joint venture; that claim included one for loss of interest; the aggregate of these two claims amounted, after discounting, to US$ 2 841 535,73; initially the appellant claimed US$ 1,016 million in respect of its claim for 50% of the residual value of the vessels at the end of the bareboat charters; this was based on the scrap value of US$ 80 per lightweight ton; in terms of the amendment this amount was increased to US $ 5 138 428 based on the resale value of the vessels at the end of the bareboat charters; on the evidence of the appellant's expert witness, Jupe, this increase was based on a fortuitous upswing in the shipping market shortly before the evidence on commission began and could not have been anticipated by the appellant when proceedings were instituted; this increase can therefore not be considered when deciding what security the appellant would have been entitled to demand when the claim was instituted. Accordingly, so the argument ran, appellant ought not to have demanded security in excess of US$ 2,5 million made up as follows -

Appellant's claim for loss of interest and loss of commissions	US$2 841 535,73
<u>plus</u> 50% of the scrap value of the vessels at the end of the bareboat charters	US$1 016 000,00
<u>less</u> value of the invest= ment in the PISC account already returned, and interest thereon	US$1 371 415,65
TOTAL	USD2 486 120,08

(The figures of US$ 2 841 535,73 and US$ 1 371 415,65, referred to in the above calculation, are taken from appellant's amended particulars of claim, whereas the figure of US$ 1 016 000 is taken from the particulars of claim prior to amendment.)

Respondent's counsel argued that appellant ought, on this basis, to have been penalised in an amount of R86 045,22, being the difference between the cost of establishing and maintaining a guarantee of US$ 12 928 208 and that of establishing and maintaining a guarantee of US$ 2,5 million. Calculated on the agreed basis, that difference results in a loss of R86 045,22.

Two questions arise: (a) What is meant by an "excessive claim" in sec 5(4)? (b) When must the determination of whether a claim is excessive, be made, in order to enable a plaintiff to recover damages in terms of sec 5(4)? Sec 5(4) reads as follows :

> "5(4) Any person who makes an excessive claim or requires excessive security or without

> good cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof for that loss or damage."

The word "excessive" is defined in the Oxford English Dictionary as meaning _inter alia_ "exceeding what is right, proportionate or desirable; immoderate, inordinate, extravagant". In Black's Law Dictionary 5th ed (1979)"excessive" is defined as follows :

> "greater than what is usual or proper. A general term for what goes beyond just measure or amount ...... Tending to or marked by excess, which is the quality or state of exceeding the proper or reasonable limit or measure."

The learned judge in the court _a quo_ said the following in regard to sec 5(4) :

> "The section is basically designed to impose a liability for damages on a claimant who is guilty of some 'wrongful' act - I here use the word 'wrongful' in a broad non-technical sense - and not to punish a claimant who might, in the final result, have been somewhat over-optimistic in his assessment of his claim. The sanction is against an inordinately high or extravagantly high claim. Mr Shaw suggested in argument that the test was whether the claim is beyond one which can reasonably be regarded by the claimant as recoverable. This formulation is, I believe, a convenient yard stick by which to judge whether or not a claim is inordinate or extravagant .."

I agree with that approach. I would merely add two observations. Firstly, in order to determine whether a claim falls within the section, an objective standard must be applied. Secondly, the onus is on the party claiming to have suffered damages as a result of an excessive claim having been made, to prove that the claim is excessive.

The next question is a more difficult one, namely: at what time must the determination of whether a claim is excessive, be made? Mr Wallis submitted that the test for determining whether a claim is excessive is whether or not, on the facts known or reasonably anticipated at the time the claim was made, it was in fact excessive. He argued that in the case of a maritime claim an arrest normally takes place at the beginning of an action. Therefore - so the argument ran - the court had to look at the position when the claim was made in order to determine whether it was excessive. I understood him to argue, also, that if at any time after a claim was made, but before adjudication by the court, circumstances became known which rendered the claim excessive, a plaintiff who persisted in such a claim would be hit by the section.

Sec 5(4) refers separately to (1) making an excessive claim and (2) requiring excessive security. Depending on the circumstances, these could give rise to different amounts of damages. In the present case, however, the amount of the security was fixed with reference to the claim. Consequently, if the claim was excessive, the resultant security would have been excessive and that would have been the cause of the respondent's loss. I mention this because Mr Wallis, in his heads of argument, tended to treat the concepts of "making an excessive claim" and "requiring excessive security" interchangeably. It is clear, however, that Respondent's case is that appellant made an excessive claim.

On the facts of the present case, the result would be the same, but technically, of course, respondent's loss was the result of an excessive claim having been made; it was that fact which caused it to provide security in an amount which exceeded that which it would have provided had the claim not been excessive. Applying the test suggested by him to the facts of the present case, Mr Wallis argued that there was no justification for the appellant, during the period from which the claim arose until the fortuitous circumstances referred to by the witness, Jupe, being ascertained, to insist on security in excess of US$ 2,5 million.

The difficulty in applying the test suggested by Mr Wallis, is that it could, in a case such as the present, give rise to an anomaly which I do not consider could have been intended by the legislature. If a claim is assessed at the time it is made, it could be held to be excessive, whereas a court could, at the end of a trial, fix an amount which shows that the amount claimed originally was not excessive. Moreover, a claim might, if assessed at the commencement of the proceedings, be considered reasonable (i.e. not excessive); events may subsequently occur which render the claim excessive; but, by the time the matter comes to trial, the circumstances may again be such that the claim could no longer be regarded as excessive. If Mr Wallis' argument is correct, namely that a plaintiff who persists in a claim after he becomes aware that it is excessive, renders himself liable to damages in terms of sec 5(4), it would mean that, whatever the trial court's determination of the claim might be, the claim could still be adjudged to have been excessive for a period prior to such determination. The legislature could not have had in mind fluctuations of this kind which could result in different valuations being placed on a claim, depending on the time when it has to be assessed.

In my judgment, in a case such as the present where the claim is said to be excessive and the determination of that issue takes place simultaneously with the main action on that claim, the time at which the court must decide whether the claim is excessive, is when it comes to determine the actual amount to which the plaintiff is entitled, or could reasonably have considered he was entitled. Should a settlement be reached before trial or should the matter be withdrawn, there would be no judgment on the claim. That is not what occurred in the present case and it is unnecessary to deal with those situations. I accordingly express no view thereon.

The fact that a plaintiff does not succeed in his claim (as appellant did not in this case) does not mean that the claim was per se excessive. A plaintiff might reasonably have considered that he had a claim for a particular amount (as the court found appellant did in the present case). A court, in deciding whether the claim was excessive, would then determine whether, applying an objective standard, the amount claimed was one which the plaintiff could reasonably have considered to be recoverable. The court would, at that stage, have before it all the evidence and would be in a position to make an appropriate assessment of an actual situation, as opposed to a hypothetical one; it would not be necessary for the court to make an assessment on assumptions or hypotheses which have, in the result, turned out to be incorrect in the light of the findings made by the court on the actual evidence before it on which it has given a judgment. This would accord with the general principle that "where facts are available, they are to be preferred to prophecies". See Simpson v Jones [1968] 2 All ER 929 at 935.

As the learned judge in the court a quo pointed out, the making of a claim by a plaintiff is a continuous process which commences when proceedings are instituted and continues until judgment is finally given. Throughout this time circumstances may change and projections and assumptions which were made initially might have to be altered. An assessment of what could, hypothetically, have been reasonable at any particular time, would not necessarily coincide with the actual decision on the claim which is made when judgment is given and the matter becomes crystallized. To make a determination of whether a claim was excessive at a time other than when judgment is finally given on that claim, would introduce an element of artificiality into the proceedings. It would mean that a trial court, having fixed an amount of a claim in the light of the evidence before it, would then have to determine, on the basis of hypotheses and projections which have, in the light of the evidence, turned out to be unwarranted, whether the plaintiff's claim (on which judgment has actually been entered) was excessive when the action was instituted.

In my view the word "claim", as used in sec 5(4), should be given its primary meaning. According to the Oxford English Dictionary the primary meaning of the word "claim" is "a demand for something as due; an assertion of a right to something". In <u>West Wake Price & Co v Ching</u> [1956] 3 All ER 821 DEVLIN J pointed out that "claim" could mean "cause of action" but that that was not its primary meaning. DEVLIN J said at 829 :

> "I think that the primary meaning of the word 'claim' - whether used in a popular sense or in a strict legal sense - is such as to attach it to the object that is claimed; and is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based."

What the legislature intended, when it used the word "claim" in section 5(4), was an amount and not the constituent elements that go to make up that amount. Once the word "claim" in the sec 5(4) is given its primary meaning, anomalies which might arise if constituent elements which make up that claim should change from time to time before the court is ultimately called upon to place a value on the claim, would fall away.

The problem in the present case arose because the claim as originally formulated, contained a component (the claim for compound interest at 30% per annum) which was unwarranted. The amendment shortly before the trial commenced, effectively eliminated that component, but introduced another, viz the resale value of the vessels. The result was that the claim was reduced from US$ 8,769 million to US$ 6 608 548,08. What the court decided at the end of the trial was that the claim, which appellant had initially cast at US$ 8,769 million, could not reasonably have been considered to be worth more than US$ 6 608 548,08. It is on that basis that a determination has to be made as to whether or not the claim was excessive. Once the trial court decided, in the light of the evidence, that anything beyond the amount of US$ 6 608 548,08 was not reasonably justified, that meant that to the extent that the claim made by the appellant exceeded that amount, it was excessive. It is not relevant to determine whether, at any particular time, one or more of the components which went to make up the amount of US$ 6 608 548,08, could or could not reasonably have been justified. It is the amount that must be looked at in order to determine whether the claim of US$ 8,769 million was excessive and, if so, by how much. An amount of US$ 6 608 548,08 was found, on the facts available when the assessment was made, to be reasonable and that finding cannot be faulted. The fact that one of the elements comprising that amount became claimable by reason of circumstances which arose shortly before the trial, and not at some earlier stage, does not detract from this conclusion.

There is accordingly no basis for holding that to the extent that the claim exceeded US$ 2,5 million, it was excessive.

As to (b):

I turn now to the alternative argument advanced by Mr Wallis. This argument is based on an acceptance of the correctness of the court a quo's finding that the appellant's claim, up to an amount of US$ 6 608 548,08, was not excessive. Mr Wallis submitted that the appellant required security in the amount of US $ 12 928 208 in order to release the Capelo and the Malange. He submitted that this security was excessive in an amount of US$ 6 319 659,92, being the difference between US$ 12 928 208 and US $ 6 608 548,08, for the period 4 April 1985 (when the security was furnished) until 26 September 1985 (when the security was reduced to US$ 5 124 000).

This approach is correct. What the trial court did was to calculate the loss suffered by respondent on the hypothesis that it was obliged to furnish security in an amount which was excessive to the extent of only US$ 3 180 243. That amount was arrived at by adding interest of US$ 1 019 791 to the difference between what it regarded as a legitimate claim (US$ 6 608 548,08) and the capital amount actually claimed originally (US$ 8 769 000). What the trial court should have done was to calculate respondent's loss by comparing the security it was actually obliged to furnish because of the excessive claim, with the security it would have been obliged to furnish had the claim been limited to US$ 6 608 548,08. There was, in any event, no warrant for adding interest, as the learned judge did, to the difference between those two amounts. Appellant's claim for US$ 6 608 548,08 was arrived at by discounting the losses alleged to have been suffered, in order to arrive at their present value; appellant would therefore not have been entitled to interest on the amount so arrived at even in terms of sec 5(2)(f) of the Act.

When the appellant applied for the attachment of these vessels, it stated that it intended to institute an action for damages in the sum of US$ 8,769 million together with interest at the rate of 20% per annum from 18 June 1984, and costs. It also asked, in its notice of motion, that the court should order that the vessels be released subject to security being provided, in a form to be approved by the Registrar, for its claim of US$ 8,769 million, plus interest. The Registrar fixed the interest at US$ 4 139 208; costs were agreed at an amount of US$20 000. That brought the amount of the security to be provided up to US$ 12 928 208. It was common cause, at the hearing of the appeal, that there was no basis on which interest was claimable on the damages alleged to have been suffered by appellant. The claim for US$ 8,769 million was largely a claim for the interest which appellant was alleged to have lost; there was no basis on which the appellant could have claimed to be entitled to any further interest. Indeed Mr Shaw correctly conceded that the claim for interest was "an erroneous claim". In order to secure the release of the vessels, respondent was, however, obliged to provide security for the full amount of the claim i.e. for the capital and interest. As the claim for interest was not one which any reasonable person would have considered claimable, the claim was to that extent excessive. That position persisted until the hearing of the application for the reduction of the security. At that stage, we were told from the bar, appellant's counsel did not contest that appellant was not entitled to interest and that the starting point of the enquiry as to what the amount of the security should be, was the capital amount of the claim.

On a re-assessment of its claim, with the compound interest component eliminated, but with the discounted higher residual value of the vessels added, appellant arrived at an amount of US$ 6 608 548.08. As already pointed out, no interest could have been awarded on that amount. Accepting the trial court's finding that a claim for that amount was not excessive, appellant would have been justified in requiring security for such amount and costs, but not for US$ 12 928 208. The latter figure included security for costs in an agreed figure of US$ 20 000. As respondent would have had to furnish security for costs, whatever the claim was, the amount of US$ 20 000 has to be deducted from US$ 12 928 208, leaving an amount of US$ 12 908 208. It is from the latter figure that US$ 6 608 548,08 has to be deducted in order to ascertain to what extent the claim and, consequently, the security furnished, was excessive. The excess therefore amounts to US$ 6 299 659,92. The cost of establishing and maintaining security for the excess of US$ 6 299 659,92, represents the damages suffered by the respondent.

According to the agreed schedule for establishing the guarantee the bank charged an "establishment fee" and every six months thereafter charged a "maintenance fee" which covered the following six month period or part thereof. For the first six month period i.e. from 1 April 1985 until 30 September 1985 the agreed establishment fee was $^1/_2$% on R100 000 and $^1/_4$% on the balance. The exchange rate was R1 = US$ 0,50. As respondent would have had to provide security for the first R100 000 in any event, in order to calculate the loss respondent suffered as a result of having to furnish the excessive security, the establishment fee must be calculated at $^1/_4$% on the whole amount of the excess. The amount of damages to which respondent was entitled was accordingly R31 498,30 which is arrived at as follows :

Amount whereby claim was excessive	US$6 299 659,92
Establishment fee : 1/4% thereof	US$ 15 749,15
Converted to Rands at agreed exchange rate of R1 = US$0,50	R 31 498,30

That is the figure that should have been awarded to the respondent, and not R15 901,20. As this represents substantial success on the cross-appeal, respondent is entitled to the costs of the latter.

In the result:

1. The appeal is dismissed with costs.
2. The cross-appeal is upheld with costs and the order of the court a quo is altered to read: "On the counterclaim there will be judgment in favour of the defendant in the sum of R31 498,30".
3. The orders for costs in paragraphs 1 and 2 hereof, shall include the costs occasioned by the employment of two counsel.

G. FRIEDMAN AJA.

VAN HEERDEN JA)
SMALBERGER JA)
NESTADT JA) Concur.
KUMLEBEN JA)