Michaelmas Term
[2016] UKPC 31
Privy Council Appeal No 0057 of 2015

JUDGMENT

Tex Services Ltd (Appellant) *v* Shibani Knitting Co Ltd (In Receivership) (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Mance
Lord Wilson
Lord Carnwath
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

10 November 2016

Heard on 17 October 2016

Appellant	*Respondent*
Nandkishore Ramburn SC Moorari Gujadhur Keertisha Servansingh (Instructed by M A Law Solicitors)	P Maxime Sauzier SC (Instructed by ENSafrica (Mauritius))

LORD MANCE:

1. This appeal turns on the proper interpretation of a letter agreement dated 11 June 2007 relating to the production and delivery of cashmere pullovers made, in unusual circumstances, between Shibani Knitting Co Ltd in receivership ("Shibani") as suppliers and Tex Services Ltd ("Tex"). The pullovers were destined for John Lewis in the United Kingdom. The issue is whether the "CMT" (literally: cut, make and trim) price specified in that agreement was inclusive or exclusive of treatment making the pullovers machine washable.

2. Originally, Shibani had contracted with John Lewis to supply John Lewis, for whom Tex were acting as agents. After going into receivership in or about late February 2007, Shibani initially assured Tex and John Lewis that its operation and deliveries would continue as normal. Its receivers were keen to maintain its business with a substantial workforce of about 1,500 people, no doubt with a view to selling as a going concern (as appears to have occurred in or about June 2007). By April 2007, however, Shibani was having difficulties with its bank in financing raw materials. Tex then agreed to provide it with finance by opening a letter of credit for £407,484 (c 25m Rupees) on 3 April 2007. Later, at meetings on 11 and 16 May 2007, Shibani said that, even with this backing, its bank was still not prepared to finance the purchase of yarn. Tex was evidently concerned to maintain the supply, doubtless concerned for its own goodwill with John Lewis. It was in these circumstances agreed by the letter dated 11 June 2007, firstly, that Tex would itself buy the yarn from the Chinese supplier, Ningbo, secondly, that Shibani would produce the order for Tex and, thirdly, that Tex would as a principal sell and export it to its client, John Lewis.

3. The letter dated 11 June 2007 was addressed by Shibani's receivers and managers (members of Ernst & Young) to Mr Bernard Maigrot, the principal of Tex, and signed or initialled by both parties. It reads as follows:

> "**Your Cashmere Order for John Lewis**
>
> Further to our various endeavours to solution the problem of yarn sourcing for your order mentioned above, we have mutually come up with a plan as follows;
>
> 1. Tex will buy the yarn from supplier Ningbo Consinee in China;

2. Shibani will produce the order on a 'CMT' basis, knit and make-up only, plus accessories sourcing and machine washable;

3. Tex will sell and export to its client, John Lewis;

4. Tex will pay a CMT price to Shibani of Rs1.455M for the full order of 22,400 pieces. On date of delivery by Shibani, Tex will provide a Bill of Exchange for Rs1.455M payable after 60 days.

5. Tex will purchase the yarn for Ningbo Consinee. It is Shibani's and Tex's (via its quality control agent, SGS) responsibility to ensure that the yarn reaches its factory to ensure delivery of the orders as follows:

1) 1st delivery: 7,946 pieces 20/07 ex Mauritius

2) 2nd delivery: 14,454 pieces 20/08 ex Mauritius

Tex will open the letter of credit in favour of Ningbo Consinee before 14 June 2007.

Tex has requested certain comfort and guarantees from the Receiver Managers. The latter undertake to:

1. Indemnify Tex for a sum not exceeding Rs5.0m, representing the total estimated monies that Tex would lose by virtue of placing that same production elsewhere, at a premium price, should, for any unforeseen reason, Shibani be unable to deliver the services promised.

2. The Receiver Manager have sold the assets of Shibani to Mascareignes Diamond & Precious Gemstones Exchange (Ltd) but undertake, irrespective of the said sale, to ensure that the terms & conditions of this letter are respected."

4. Tex duly bought cashmere yarn as agreed, paying Rs20m. Shibani received it and in August and September 2007 made available to Tex a total of six batches of

pullovers in cartons. Tex then shipped these by sea and air to John Lewis in the United Kingdom (choosing air for three batches, because Shibani's deliveries were later than expected). In the same months, Shibani invoiced Tex with the price of Rs1.455m provided in para 4 of the letter dated 11 June 2007, requesting payment to its bank by telex transfer within 30 days. The invoices stated that interest would be charged at 15% per annum thereafter, and that the goods "remained the property" of Shibani until payment (though what the effect of that might be, when Tex had bought and supplied the yarn, can be left aside). It is undisputed that Tex has paid these invoices.

5. On 5 October 2007 Shibani submitted two further invoices, claiming washing costs at Rs115 per kg, totalling Rs760,629.55 plus Rs54,000 as a "claim for menders to remove contamination", in each case plus VAT at 15%. These invoices are the subject of the proceedings. Disregarding the small claim for mending, to which no separate submissions were addressed, the case turns in essence upon whether the price specified in para 4 of the letter dated 11 June 2007 included or excluded washable costs.

6. The trial took place before P Lam Shang Leen J on 14 January and 5 February 2010, when he reserved judgment after hearing oral submissions. Only two witnesses were called. The first, called on behalf of Shibani, was Mr Jean Juron, a consultant with Ernst & Young. He accepted that he had no experience in the knitwear industry and no personal knowledge of the arrangements made for the supply (and did not purport to rely on information received from anyone with such knowledge), but produced certain documents from the receivers' file. The second witness, called on behalf of Tex, was Mr Maigrot, who had been party to such arrangements and had 25 years' experience in relation to the textiles industry and produced some further documents. In accordance with usual practice, the documents produced were selective, in the sense that it was open to each party to produce any documents on which it might wish to rely, but there was no obligation either to produce any unfavourable documents or to undertake any disclosure exercise of the kind familiar in English practice. The result is that there may not be a complete documentary record of events.

7. Regrettably, the judge did not deliver judgment for three years, until 14 January 2013. No particular explanation was vouchsafed for the delay. It is accepted by Mr Sauzier SC for Shibani that the advantage which a trial judge enjoys in relation to matters of fact may be weakened by such a delay and that such delay calls for special care when reviewing the evidence which was before and the findings of fact which were made by the judge. But it is still for an appellant to pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay. Peter Gibson LJ put the matter as follows in *Goose v Wilson Sandiford & Co* [1998] TLR 85, para 113, in a passage also quoted by Arden LJ in *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455, para 8:

> "113. Because of the delay in giving judgment, it has been incumbent on us to look with especial care at any finding of fact which is now challenged. In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weakened the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge. …"

8. In the present case, Mr Sauzier suggests that this passage may have limited relevance, because the case turns on the interpretation of documents. In so far as that is so, and the letter of 11 June 2007 is clearly a central document, the Board will in due course express its understanding of the terms used. But the judge and Court of Appeal also referred to a limited number of other circumstances, outside the making and performance of the contract, and it will be necessary to look closely at the judge's findings about them. In the last analysis, however, the Board considers that, despite the delay in delivery of judgment, this is a case which can be determined on the evidence and material before the court, without any need to consider a remission for which, realistically, neither side contended.

9. When the judge came to prepare his judgment, he went to some lengths to recount the oral evidence of each witness. He did this in the same order as that in which it had emerged in chief, cross-examination and re-examination, and followed this with a summary of the submissions of counsel. He no doubt relied on the transcript for the exercise. He then gave his own analysis. First, he noted that Mr Juron was only deposing from the documents produced as he was not involved in the discussion leading to the letter agreement dated 11 June 2007, but said: "Be that as it may, the documents produced speak for themselves and are illuminating". However, he added that in his view the answer lay "not only in the scrutiny of the content of the letter of the 11 June 2007 … but also of the circumstances leading to the drawing up of that letter and the subsequent events". The judge then identified a number of factors which led him to decide in favour of Shibani's claim.

10. First, as to the background to the letter, he accepted that this included the payment by Tex of Rs20m for the yarn, which must he said have had "an impact on the CMT price for the CMT practiced which is Rs210 dropped down to about Rs65". The judge had therefore derived from the evidence a conclusion that the CMT price "practiced", ie generally used, for a comparable consignment of cashmere pullovers under a comparable contract was Rs210. The Board will revert to the question whether there was a sound basis for this.

11. Second, he considered the letter itself. He had "no doubt that para 2 must be read together with para 4" and was "not prepared to read into para 2 that [Tex] was not liable to pay for '*accessories sourcing and machine washable*'". He linked this with his conclusion about "the CMT price practiced", because he went on immediately to say: "I am here dealing with two parties conversant in the textile industry and [Tex] must know what is the price practiced for CMT only". He added: "No doubt, the price of Rs64.95 in the present case for the CMT work does not include the material which in anyway was provided for by [Tex] so that he had a good deal". Why the judge thought that Tex's payment for the yarn meant that it had a "good deal" is obscure.

12. Third, the judge referred to a transcription of an email dated 30 January 2008 said to have been sent by a Mr Nicolas Kerambrun of Ernst & Young to a Mr Ithier of Tex, (though his email address, at least as shown on the transcription, seems unlikely to be correct), with a copy to Mr Maigrot. Neither Mr Kerambrun nor Mr Ithier gave evidence, and their respective roles and responsibilities were not identified. The email read:

> "Subject John Lewis
>
> Bonjour
>
> Following our telcon and our meeting of Tuesday 29 January, please find hereunder a summary of the issues raised:
>
> 1/ John Lewis/ Washing price.
>
> Shibani Knitting agreed price is Mur 115/Kg. Texservices has mentioned a price of Mur 85/Kg.
>
> We accept a reduced price of Mur 100/Kg.
>
> 2/ Carven
>
> We are waiting for the payment of the invoice SUND/058/2007 for 1,615 pieces for Mur 376,158.10
>
> Waiting for your confirmation for these two issues,

> Best regards,
>
> Nicolas."

13. There is no issue now about the Carven contract for 1,615 pieces, but it is relevant to note that its origin was a former contract between Shibani and Carven, in respect of which, after Shibani's receivership, Tex also agreed to supply the yarn and to take over responsibility as a principal, receiving the made-up goods from Shibani and on-supplying them to Carven. The goods were in this case 80% lambswool and 20% polyamide, split between 548 pieces of Debardeur Tricote at Rs188 per piece, 522 pieces of Pull Tricote at Rs210 per piece and 545 pieces of Cardigan Tricote at Rs210 per piece.

14. The judge considered that the transcribed email

> "speaks volume and brings water to the argument of [Shibani] that the costs for "*washing*" was being discussed. The letter reveals that [Shibani] was prepared to reduce its claim of Rs115/kilo to Rs100/kilo following the proposal of [Tex] of Rs85/kilo."

He was not satisfied with Mr Maigrot's explanation in cross-examination as to "why he did not reply to that email when according to him washing costs was already included in the CMT price". He said that Mr Maigrot "had been silent on the question of negotiation". This must refer to a passage in Mr Maigrot's cross-examination, where, asked why he did not reply "to make clear that there was never on-going negotiation about the price of washing costs", he replied: "Because I consider that I did not have to reply to this e-mail because this was the responsibility from the beginning of Ernst & Young, the Receiver Managers and Shibani to do the machine washable process". The judge said: "I see no reason why he did not deny that fact" *[ie the fact that there was no on-going negotiation or room for negotiation about price]* and "On this score, his answer was evasive".

15. Fourth, the judge reverted to the terms of the letter of 11 June 2007, the subject of his second point. He said:

> "It is common ground that CMT stands for '*Cut, Make and Trim*'. So that '*plus accessories sourcing and machine washable*' cannot be said by any stretched of imagination to be included in a CMT basis. Had it been so, the wording of para 4 would certainly have been different. Paragraph 4 says '*Tex will pay a CMT price to Shibani of Rs1.455M for the full order of 22,400 pieces*' [the

> judge's highlighting]. It makes it clear that the Rs1.455M is the CMT price for 22,400 pieces of garments. I shall not follow the stretched interpretation put by the defendant on the words '*full order*'. Full order cannot mean '*finished goods*' as interpreted by the defence. In that context, the full order can only relate to the number of garments ordered. If '*plus accessories sourcing and machine washable*' were included in the price of Rs1.455M, I am sure it would have been so stated. Since that was not the case, the defendant is liable for any costs incurred under '*plus accessories sourcing and machine washable'*. Moreover no one explained what is meant by '*accessories sourcing*'. Be that as it may, the defendant was charged only for '*machine washable*' and '*mending*'."

16. Fifth and finally, the judge said:

> "The fact that invoices for payment for washing costs came only in October 2007 (Doc P1 and P2) after there were invoices in August and September 2007 (Doc D2 to D8), in my view, that does not change the situation, if the amount is due. Even if the 'washing' was to be done in-house, it would have a cost which is not included in the CMT price. It is irrelevant that the defendant had not been charged for 'accessories sourcing' which according to the defendant was allegedly for label, pressing and packing while Mr. Joorun considers that they were included. By the way, it must be noted that … there was a claim of Rs54,000 for menders, on which not a word had been said by the defence."

17. For these reasons, the judge held that Tex was liable to pay the full cost of both invoices dated 5 October 2007.

18. Tex appealed. At the hearing on 19 May 2014, Mr M Gujadhur, counsel for Tex, submitted first that the judge had misconstrued the letter of 11 June 2007 and second that in so far as he had relied on matters of surrounding fact, his delay in giving judgment was a reason for particular scrutiny of his findings. In the latter connection, counsel made a number of points with reference to the transcript of evidence. On 18 September 2014, the Court of Civil Appeal (K P Matadeen CJ and D Chan Kan Cheong J) dismissed the appeal. They referred to the first and third points, summarised above, on which the judge had relied. Turning to the construction of the letter of 11 June 2007, to which they recorded that the main thrust of the argument had been directed, they expressed their view that para 2 related to

> "the scope of the work that [Shibani] undertook …, that is to do the work on a '*CMT*' basis, which in the case of that order for cashmere pullovers meant only '*knit and make*' after the other contracting party would have provided the dyed yarn. However, in this case [Shibani] was equally responsible to do the machine wash treatment, the labelling and the packing - processes which are not included in a '*CMT*' contract but normally done by the other contracting party or charged back to him. Paragraph 4, here, assumes all its importance as it relates only to the '*CMT price*' for all the 22,400 pieces."

On this basis, the Court of Appeal held that the judge was right in holding that Tex was liable to pay for the costs incurred under the head of "accessories and machine washable".

19. The Court of Appeal also referred to the submissions of counsel for Tex that they should, because of the judge's delay in giving judgment, be the readier to scrutinise the safety of his findings of fact. They said:

> "We have, in the light of the submissions ..., reviewed the factual evidence placed before the learned Judge, bearing in mind that the central issue related to the interpretation of a written document. However, we are not in a position to state that the delay has rendered the judgment unsafe."

They did not specifically address any of the points which counsel for Tex had made on the evidence.

20. Before the Board, Mr Gujadhur's submissions have followed the same general lines as below. The ultimate issue is, as stated, one of construction of the letter of 11 June 2007. In this connection, Mr Sauzier SC for Shibani made the following points in his written case:

> "34. The starting point in interpretation of contracts is to look for the intention of the parties. The first step in establishing the intention of the parties is to favour the meaning of the relevant contract. If the language of the contract is clear and suffers no ambiguity, the words used must be given their ordinary meaning.

> 35. As set out under JurisClasseur Civil Code, article 1156 à 1164 Fasc. 10: CONTRATS ET OBLIGATIONS. - Interpretation des contrats. -L'instrument : Notion, normes, champ d'application:
>
> '... étant admis qu'il faut, par priorité, respecter l'intention des parties, comment les intentions peuvent-elles être perçues par le juge? Si l'on raisonne sur l'hypothèse la plus commune, où il existe un écrit, il faut assurément scruter d'abord le contenu de l'acte. Aussi imparfait que soit le langage comme véhicule de la pensée, si la formulation est claire et dénuée d'ambiguïté, elle doit être tenue pour exacte, pour des raisons évidentes de sécurité du commerce juridique. Telle est la justification du contrôle par la Cour de cassation de la dénaturation des clauses claires et précises.'"[1]

21. Here, the Board is, as contemplated in this citation, concerned with the construction of a written contract, and, more particularly, of its paragraphs numbered 2 and 4. But these paragraphs have to be read in the context of the letter as a whole and the letter itself has to be read in the light of any relevant background and other factual circumstances.

22. The Board will start with the letter. On the face of it, it represents a complete contract, governing the procurement of yarn by Tex, its supply to Shibani, an order to be fulfilled by Shibani in relation to the yarn, the delivery of the resulting product to Tex for sale and export by Tex to John Lewis, and payment of a price to Shibani by Tex by bill of exchange payable 60 days after delivery of the order by Shibani to Tex. Paragraph 2 is on its face a definition of the work constituting the order. The initials "CMT" stand, literally, for "cut, make and trim". That makes no sense in the context of knitted cashmere pullovers. The immediately following words "knit and make-up only" must therefore be definitional, as the Court of Appeal thought. The question is whether the further words "plus accessories sourcing and machine washable" are also definitional of "CMT". The more natural reading in the Board's opinion is that they are. It is one order. To read para 2 as, in effect, covering two separate orders - one "on a 'CMT' basis, knit and make-up only", the other without any verbal introduction for "accessories sourcing and machine washable" is unnatural.

[1] In a translation into English submitted by Shibani:

> "...since it is accepted that, as a starting point, the intention of the parties should be respected, how can such intentions be ascertained by the judge? If we proceed upon the most common assumption, where there exists a written document, surely one must first scrutinise the contents of that document. No matter how flawed the language used is as an expression of the intention, if the formulation is clear and devoid of ambiguity, it must be held as accurate for obvious reasons of legal certainty. Such is the justification for the control by the Supreme Court of the denaturation of clear and precise clauses".

"Dénaturation" might be more clearly expressed in English as "deprivation of their natural meaning".

23. Contrary to what the judge (in the second and fourth strands of his reasoning: see paras 11 and 15 above) as well as the Court of Appeal thought, no assistance can be gained on this point from the reference in para 4 to Tex paying "a CMT price". Nor does the point in any way depend on the reference to the "full" order in para 4, which the judge addressed. The Board accepts that this reference may as a matter of objective interpretation simply be to the "total" number of pieces, although it is at the same time possible that Mr Maigrot may, as he said (p 81), have seen this word as referring to the totality of the operations making up the order. All that actually matters is that, if the definition of "CMT" in para 2 includes "accessories sourcing and machine washable", then it does so also in para 4. If not, then not. In the Board's opinion, the more natural reading is that there is one order, with "the order on a 'CMT' basis" being defined by reference to all the operations specified in para 2 and the price in para 4 therefore covering all such operations.

24. It is however also appropriate to stand back a little and look at the scheme of the contract contained in the letter as a whole. On Tex's case, the scheme makes perfect sense. All aspects of the revised arrangements are regulated, with some precision. The price for the order being undertaken by Shibani is carefully defined, and the manner and time of its payment likewise. The pullovers are to be delivered, ready for export to and sale in the United Kingdom, with all relevant operations embraced within the CMT work to be undertaken. This would include labelling, ironing and packaging, with labels and packaging being sourced by Shibani. In contrast, on Shibani's contrary case, this is a most unusual open-ended contract. On the one hand, it involves Tex in undefined exposure to costs of "accessories sourcing and machine washable" treatment, and, on the other hand, it contains no provision in Shibani's favour defining its entitlement under this head, or providing for the manner or time of payment of the sums inevitably becoming due under this head. It is a recipe for uncertainty and disputes. It is the last sort of contract that one would expect an experienced businessman and accountants to make with each other, particularly when in every other respect they have gone to trouble to tie down the precise basis of their revised arrangements.

25. The Board adds that there is no suggestion of any discussion or agreement about the costs of accessories sourcing or machine washable treatment during the negotiation or performance of the contract in 2007, and still less of any discussion or agreement about the sum of Rs115 per kilo which Shibani actually claimed. The basis of the Rs115 per kilo claim is unexplained. It is true that, in his last answer in re-examination, Mr Juron said that Tex knew that the "prix pratiqué" was Rs115. But in cross-examination he had, immediately after making a similar statement, accepted that what he was relying on was the email of 30 January 2008 and that he could not speak to the period when the contract was signed and knew only the subsequent "dossier" (transcript, p 46). He also said that he did not know exactly what "knit and make up only" meant (p 52) or what the agreed price of Rs67 (more accurately, c Rs65) included (pp 54-55), upon which the judge commented at the time, with justification: "The problem is … he is not the person who is aware of the case. He says that he was not there" and "He is just here, producing the documents" (p 55).

26. However, some insight into the washing treatment process and the origin of the Rs115 figure can with hindsight be gained from uncontradicted evidence given by Mr Maigrot. He said this (p 71):

> "Q. And was this price of Rs115 per kg ever agreed?
>
> A. Never agreed.
>
> Q. Do you know at all what is the washing cost?
>
> A. Well I have costings made by Shibani for this process because it was a process that was supposed to be done in-house, at Shibani's itself. And I have a costing done by Shibani which is much less. But technically speaking, when we financed the yarn, we had Rs20m of money put into yarn that we were not supposed to put. And I remember that when they were doing the treatment onto the yarn, they faced difficulty into doing it in-house because a lot of the members of their staff had left since they were in receivership. And I know that some of it was outsourced - that treatment to third party, which is nothing to do and which is not my concern. I have explained the context, but it has nothing to do with our liability as such."

Thus, it appears that Shibani normally undertook washing treatment in-house, and originally intended to do so in this case. But their receivership, here as elsewhere, upset their ability to perform normally, they decided to outsource and their washing treatment costs were much higher than usual. Although Shibani did not vouchsafe the relevant documents to the judge, the Rs115 may in these circumstances bear a close relationship to the unusually high washing costs which Shibani incurred by having unexpectedly to outsource.

27. In summary, however, and contrary to the views of the judge and Court of Appeal, the strong initial message gained from reading the letter is that para 2 defines as "CMT" all aspects of the order, that is knit and make-up, accessories sourcing and machine washable, and that para 4 provides a "CMT" price covering all such aspects. But this message should be further tested by reference to background and other factual circumstances.

28. The first strand of the judge's reasoning in this connection rests on the proposition that there was a "practiced" price for CMT of Rs210, which must have had an impact on the reduction in price from Rs210 to Rs65. This reasoning does not stand

scrutiny. The evidence does not support the treatment of Rs210 as a standard or established price for the supplying yarn and knitting and making it up, but excluding the costs of accessories sourcing and machine washable treatment:

i) The suggestion that one could start from a standard price of Rs210 for CMT (not including the cost of the lambswool yarn for which Tex agreed to pay), and compare this with a price of Rs67 (or more accurately c Rs65) for CMT (not including the cost of cashmere yarn for which Tex also agreed to pay) came in fact from the judge to counsel during Mr Juron's cross-examination (p 58). The judge himself qualified the value of any such comparison by commenting, realistically, both that "cashmere was more expensive than lambswool as far as I know" and that "unfortunately the witness does not know anything". The suggestion occurred to the judge during examination of the limited documentation produced in relation to the Carven order, which, as stated above, included small quantities at CMT prices of Rs188 and Rs210 per piece of 80% lambswool mixed with 20% polyamide. It may perhaps also have been prompted by a reference in Shibani's letter dated 7 February 2008 to "various CMT work being carried out" by Shibani on behalf of Tex for an average price per unit of Mur210 - this was not further explained or documented, and may well simply refer to the Carven order. The reference in the letter is perhaps also of interest for apparently treating, without sign of incongruity, the concept of "CMT work" as including washable treatment (unless, implausibly, it was being suggested that the fair price for CMT work with machine washable treatment would be Rs325). But, since the letter is on its face a receiver/accountant's argument on the available documentation, the Board does not attach significance to that.

ii) The witness who did have relevant expertise and knowledge was Mr Maigrot, who during his evidence in chief interposed this explanation (p 74):

> "I would like to add that, My Lord, when he pointed out at a time when he looked at the 'CMT' price and he saw the 'CMT' price was low on the cashmere as opposed to the lambswool - Rs64 to Rs188. I would like to address this issue by saying that we are talking about 1,615 pieces on the lambswool as opposed to 22,000 pieces of cashmere. And the amount of money that I have to put up on the cashmere is Rs20m. And I think, My Lord would appreciate that my risk element on the cashmere was the hell of a big one and that's why my negotiation, when I dealt with Shibani was a fairly good one in terms of getting the order out. Because they have messed up my order as far as I am concerned. I am sorry but I wanted to add this.
>
> …

The 'CMT' price is not the reflection because it is only for 1,615 pieces. ..."

iii) There was cross-examination in this area, as follows:

"Q. I tell you, Mr Maigrot, you have dealt with Shibani on a number of occasions. You know how they proceed, you know the price they practise for such orders. Don't you? For having dealt with them for quite a number of times.

A. Well, I know that there is no standard price. That the price is as per order and as per agreement. There is not one price. Price varies from order to order.

Q. Usually the same price is practised because the production costs are the same, Mr Maigrot.

A. Absolutely not, My Lord."

iv) The cashmere and the lambswool orders were for different products and of completely different magnitude. The terms of the latter (in particular what the lambswool cost Tex and whether the lambswool order price included sourcing accessories and machine washable treatment) were not examined. In the light of this and the other evidence above, there was no basis to extrapolate from one to the other, or to treat the Carven prices as a guide to the commercial plausibility of any particular construction of the contract dated 11 June 2007.

29. Any attempt to identify and extrapolate from any "standard" price for CMT and/or washable treatment is also perilous, in the light of the further commercial background explained by Mr Maigrot. As already observed, not only had Tex been forced to step in as principals, and to buy and pay a very large sum for a large quantity of cashmere yarn to be delivered to Shibani in receivership, but Shibani and the receivers were also keen to keep this and other orders alive, in order that Shibani might continue to operate and its business be sold as a going concern.

30. The Board turns to the third strand of the judge's reasoning, based on the email dated 30 January 2008. The Board accepts the judge's categorisation of Mr Maigrot's response in cross-examination in relation to this email as evasive. His evidence at this point read as follows:

"Q. If you say that you never agreed to pay the washing costs, Mr Maigrot, why were you trying to negotiate for a lower price then?

A. No, we were not trying to negotiate for a lower price.

Q. This is what comes out from this e-mail, Mr Maigrot.

A. This e-mail, My Lord, is written by Ernst & Young, not written by Tex.

Q. Yes, but addressed to you, Mr Maigrot.

A. No, it is not addressed to me. It is addressed to Patrick [Ithier].

Q. You are in copy to this e-mail.

A. Yes, I am in copy of this e-mail.

Q. And what do you have to say about this?

A. We did not comment on that because like we said, the price that we paid Shibani for included the machine washable process and the accessories. Now, I also told the Court before that this was the process that Shibani had to do in-house.

Q. Why did you not reply to this e-mail, Mr Maigrot, to make clear that there was never on-going negotiation about the price of washing costs?

A. Because I consider that I did not have to reply to this e-mail because this was the responsibility from the beginning of Ernst & Young, the Receiver Managers and Shibani to do the machine washable process."

31. The question is what if any inference can properly be drawn from any evasiveness by Mr Maigrot in response to questioning about an email, copied to him, about a meeting to which it is not suggested that he was party and about which no direct evidence has been called. It certainly appears from the email that Mr Kerambrun, whose absence as a witness was not explained, understood that Mr Ithier of Tex had at a meeting on 29 January 2008 mentioned a price of Rs85 per kilogram for washing. It does not follow that Mr Ithier knew about the contractual background or had purported to commit Tex to making any payment. And it does not follow from any silence on Mr Maigrot's part in relation to an email which he only received in copy that he accepted that there was any obligation or commitment to make any washing payment.

32. The judge's conclusion that the email and Mr Maigrot's silence spoke volumes postulates two things: first, that Tex was, after failing to pay the washing invoices for some four months, prepared through Mr Ithier in late January 2008 to admit liability for them at least in principle, and, second, that Mr Maigrot's silence shows that he too had the same attitude. But the judge failed at this point to refer to or take account of other much clearer evidence of Mr Maigrot's state of mind and indeed Mr Kerambrun's understanding, supported by Shibani's own documentation. Due to production at trial of, and cross-examination on, the letter dated 7 February 2008 and email dated 30 January 2008 in reverse date order, Mr Maigrot had, when he gave the evidence set out in para 30 above, already been cross-examined about a later meeting evidenced by the letter from Shibani dated 7 February 2008. It seems clear that, under cross-examination, he did not put the two closely associated events (the email copied to him and the later meeting) together. Their reverse ordering also appears in the judge's recital of the evidence taken, and probably explains why he too did not associate the two events. The reverse ordering continues in the bundle used before the Board.

33. The letter dated 7 February 2008 written by a Mr Chan of Ernst & Young is addressed to Mr Maigrot, and refers to a meeting between Mr Maigrot, Mr Kerambrun and Mr Chan said to have occurred on 6 March 2008 (though either this or the date 7 February 2008 must be a month out). It records this:

> "JOHN LEWIS ORDER
>
> During the meeting, you made reference to an agreement concerning cashmere order for John Lewis, signed on 11 June 2007, stating that the unit quoted price for CMT work was of Mur64- inclusive of the cost for machine wash treatment (Mur115/Kg). We would like to draw your attention on the following:

> - The agreement clearly stipulates that Shibani Knitting Co Ltd (In Receivership) ('SKL') will be responsible for the execution of the order on a CMT basis but does not specify that SKL will pay for the accessories and machine washable treatment.
>
> - Furthermore, the CMT work of Mur1.455M-, represents a unit price of Mur64-. The machine washable treatment unit price for a garment of an average weight of 0.305 Kg is, as per invoiced price of Mur115/ Kg, Mur35.08-. If your contention that the cost of machine washable treatment is included in the CMT price this would mean that the CMT charge per pullover is only Mur28.92-, which you will no doubt agreed with, is impossible.
>
> - We would like to draw your attention on the fact that various CMT work were carried out by SKL on behalf of your company Tex Services and that the average price per unit was Mur210-.
>
> - Based on the above facts, it is abundantly clear that the cost for the machine washable treatment is not included in the CMT unit price of Mur64-. …"

34. The letter went on to threaten legal proceedings in respect of the outstanding claim for washing treatment costs. It did not suggest that Tex or Mr Kerambrun had reneged on any confirmation that Tex would meet or any negotiations to pay such costs. Instead, the letter presented arguments of a sort which one could expect of a diligent receiver, based on the wording of the letter and other documentation in his possession.

35. Still more important, however, is Mr Maigrot's (unchallenged) evidence about the meeting recorded in the letter. He said this (pp 75-77):

> "Q. Would you say that you had a good working relationship with Shibani?
>
> A. Definitely. We had been working with them for a long time. I know the Receiver Managers also and we were running the factory because we had 200,000 pieces of orders running which we can prove.

…

Q. Now suddenly Shibani writes to you on the 7th of February, 2008.

A. That's correct.

Q. You just told the Court that there was a very good working relationship, you trusted them, you paid so much money for the order they had done, suddenly this letter? Could you just explain? Let's take it one by one. There is the John Lewis' order and there is the Carven's order. And they started claiming you, what was the reason for that? Suddenly, why they started saying that you owed for the washing costs?

A. Well I don't know why, but when they came to see me and they put the machine washable discussion on the table, I told them that this was never agreed, never discussed and whatever was agreed was a full price. So I was very clear with them on that and as far as the Carven's order was concerned, again I reiterated to them that they were fully aware from the beginning of all the difficulties we've met with the yarn. So there was no way I was going to pay them. And I must add that in the context, Tex never claimed back to Shibani further discounts for costs of air freight. They were late on most of our orders and the John Lewis' order clearly confirmed that they were late by over a month and a half from agreed date with Tex.

Q. Which is a long time in textiles industry?

A. Well you know we usually get cancellation of orders or claims. Now the John Lewis' order was very important to John Lewis because the bulk of that order for the Cashmere which is a very, very sensitive product was done in Mauritius based on the trust of John Lewis had on Tex. So to be late by three months or four months is a big, big disaster in our business.

Q. So suddenly this letter came in, so what was your reaction to this?

> A. Well, it was not the letter, they came to see me before. I just want to point out that there is a problem of dates in the letter. The letter is dated 7th of February and they refer to a meeting of 6th March. So there is something wrong somewhere.
>
> Q. But you were having a lot of meetings?
>
> A. No, this was the one when they came to see me.
>
> Q. Before the 7th of February.
>
> A. I don't know which is which but I do know I had a meeting and then followed the letter. I can't remember which is which in terms of date. But they came to see me into a friendly meeting and I put the whole context of all the relationships of Tex and Shibani to them and I said to them: *'You know they've made a mistake as far as the machine washable was concerned and there was no deal, no discussion. And as far as the yarn was concerned, again I had helped out and I lost money. And I thought the money I had lost they were totally responsible for that.'* So that was the discussion we had. It was a meeting in my office which then was confirmed in writing by them."

36. Since he did not identify in this connection the relevance of the letter dated 7 February 2008 and of Mr Maigrot's evidence about the meeting to which it referred, the judge did not ask himself two relevant questions. First, he did not ask how plausible it was to think that Tex would, after failing to accept the washing invoices for some four months, enter into negotiations to pay the invoices through Mr Ithier, and then, within a matter of days or weeks, revert to a strong contention that there was no basis at all for the invoices. Second, he did not ask himself how plausible it was to think that, if Mr Ithier had on 29 January 2008 given Mr Kerambrun an unqualified indication of willingness to pay the major part of those invoices, Shibani (which was represented at the later meeting by inter alios Mr Kerambrun), would not have reminded Tex of this at the later meeting and in its letter dated 7 February 2008. In short, the email dated 30 January 2008, relating to a meeting between participants neither of whom was called, cannot serve as a basis for reliable interpretation of the contract contained in the letter dated 11 June 2007, sent eight months earlier. Accepting that such an email, sent after the event, might in some circumstances provide evidence as to the textile industry's, or even the particular parties', understanding of a trade abbreviation, the judge attached unjustified weight to it in the present case.

37. The Board turns finally to the fifth head of the judge's reasoning. In it the judge dismissed as insignificant the absence of any charge for accessories sourcing, saying simply that, "according to the defendant [Tex]" this was "allegedly for label, pressing and packing while Mr Juron considers that they were included". In fact, Mr Juron immediately withdrew his answer that labelling, ironing and poly bags were all included in the CMT, since, on being challenged as to why he now accepted that CMT included more than "knit and make up only", he said "Je n'accepte étant donné que je ne sais pas"[2]. In contrast, Mr Maigrot gave categorical evidence that the abbreviation "CMT" embraces all aspects involved in production of the finished product, including the knit and make process, accessories and machine washable treatment (p 67). More specifically, he explained that it included after the machine washable treatment, the finishing stage at which the main and care labels are added and pressing or ironing and packing in poly bags ready for export and sale. He pointed out that Shibani had never suggested it had any claim for labelling, pressing, ironing or packing (pp 67-68) - just as there has been no suggestion it made or has any claim for sourcing the labels and poly bags. Later, he added this (pp 80-81)

> " …'CMT' for us meant that it was a finished product and the reason why we put it between inverted commas was that it included the accessories and the machine washable process.
>
> Q. Don't you find it strange, Mr Maigrot, that care has been taken to specify in this letter '*Knit and Make up only plus accessories sourcing and machine washable*'? Won't it have been simpler to simply have put 'CMT basis'. If 'CMT' basis meant the whole finished product including the washing treatment?
>
> A. My Lord, for avoidance of doubts we put 'CMT' basis 'Knit and Make only' in inverted commas and for avoidance of doubts, plus accessories sourcing and machine washable.
>
> Q. The 'CMT' basis on its own, according to you, could have meant the finished product including the machine washable treatment?
>
> A. 'CMT' includes all. It includes making it, knitting it, doing the machine process treatment, the accessories, the pressing, the packing and the carton packing. That's why I refer on Part IV of that same document to the full order."

[2] In translation: "I don't accept given that I don't know."

38. The Court of Appeal concluded that it was established that "the machine wash treatment, the labelling and the packing" were "processes which are not included in a '*CMT*' contract but normally done by the other contracting party or charged back to him." So also, it concluded, the "*CMT price*" in para 4 did not include washing costs. The Board sees no basis for these conclusions, which are contrary to the only informed evidence given at trial, as well as contrary in the Board's opinion to the natural meaning of the contract.

39. In the Board's view, it was clearly established by the evidence that the CMT price contained in the letter dated 11 June 2007 must have been intended to embrace a considerable number of operations necessary to fit the goods for export, including the sourcing of labels and poly bags. On the logic of its case, Shibani would have been entitled to raise further bills for at least some of such operations, but has never suggested that it could do so.

40. Drawing the threads together, the Board considers that the nature, scheme and language of the contract contained in the letter dated 11 June 2007 point clearly towards a conclusion that the CMT price agreed was for the totality of the work which is specified - and, in the Board's opinion, defined as part of the agreed "order on a 'CMT' basis" - in para 2 of that letter, including therefore both accessories sourcing and machine washable treatment.

41. Further, the factors on which the judge relied as pointing to a contrary conclusion do not bear the significance or weight which he attributed to them. The first strand, the suggested "price practiced" of Rs210 for comparable contracts, has no solid foundation. This was a large and very unusual contract made in difficult circumstances, when Shibani was keen to keep all the orders it had and Tex had to step in as a principal, provide very large funding by itself buying the necessary yarn and take a correspondingly large risk, to try to satisfy the demands of its original client, John Lewis.

42. The third strand, the email of 30 January 2008, was given unjustified weight by the judge, who overlooked the countervailing considerations consisting of the letter dated 7 February 2008 and Mr Maigrot's clear evidence. The justified criticism of Mr Maigrot's evasiveness in trying to explain silence after the email loses significance once it is realised, first, that Mr Maigrot was not in fact silent, but made his position very clear shortly thereafter, at the one and only meeting at that time in which it appears that he personally took part confirmed by Shibani's letter dated 7 February 2008, and, secondly, that Shibani's letter dated 7 February 2008 itself indicates that the meeting of 29 January 2008 cannot have been as significant as the email of 30 January 2008 might at first sight suggest, since Shibani made no complaint or suggestion that Tex was reneging or changing course on any agreement or negotiations to pay.

43. Finally, the fifth thread of the judge's reasoning, as well as an important strand of the Court of Appeal's reasoning, overlook the fact that the product to be delivered by Shibani to Tex was to be finished and delivered up for export and sale. This would involve a large number of operations which would not fall within any literal understanding of "knit and make up". Further, these operations would include including sourcing labels and packaging, which Shibani arranged and delivered and for which it has never made or suggested that it could make a claim.

44. In these circumstances, there is nothing in the factors on which the judge drew from outside the language of the contract which gives any significant support to a view that the contract has any meaning other than which flows from its language as a matter of ordinary construction. Any residual weight which any of them bears is insufficient to outweigh that meaning. In particular, the general commercial considerations which the judge thought could be identified either dissipate entirely or pale into insignificance, when the nature and commercial background of the contract are properly recognised.

45. The Board will therefore allow the appeal, set aside the judgments below and order that Shibani's claims be dismissed in relation to the contract dated 11 June 2007.

46. The Board has been able to address and determine the appeal with reference to the material before it, in particular the letter dated 11 June 2007 and other documentation, the evidence and the judge's and Court of Appeal's analyses. The Board cannot, however, allow this appeal to pass without reverting to the delay taken by the judge in delivering judgment. This was not explained, and, when and if delays do unfortunately occur, an explanation is normally desirable and appropriate. But the Board is given by counsel to understand that such delays are, sadly, not uncommon, and, indeed, that they can be even longer. Whatever their cause, they amount to breaches of the constitutional right of litigants to a fair hearing "within a reasonable time": section 10(8) of the Constitution. This includes determination within a reasonable time.

47. Such delays also imperil the judicial decision-making process. The Board has been referred to authorities in which the Court of Civil Appeal has explained the digital recording systems, which exist and doubtless led to the transcript on which the judge evidently relied. In *Chaton M R v Kurreemun A R* [2008] MR 240, the Court of Civil Appeal explained that

> "There are however possibilities for the trial judge to play back the recorded evidence of any witness from his own personal computer in the seclusion of his Chambers as an 'aide memoire' whenever the need is felt."

48. These facilities, commendable though they are, cannot and do not put a judge who is returning to a case after much if not all direct memory of it and its detailed course has inevitably faded, in the same position as a judge who thinks it through and analyses the issues when his or her direct memory is still fresh. The prospect of a judge having the time or patience to sit through large parts of an oral recording taken from his computer is probably also limited. Aural digestion of a course of events anyway differs from its visual appreciation. The transcript is in reality likely to be the judge's main support. The result can be the effective recitation, as in this case, of a summary of the evidence and submissions taken from the transcript in the order in which they took place.

49. The infinitely preferable position is for a judge to have the time and possibility, not long after the trial is concluded when the overall picture is fresh in his or her mind, to analyse the issues and the relevant evidence and to reflect the result of this analysis in a written judgment. In the present case, Mr Sauzier suggests that this desideratum may have limited relevance, because the case turns on the interpretation of documents. It is true that the letter of 11 June 2007 is clearly central to this case, and that the Board has formed a clear view about the interpretation of its terms. But the judge and Court of Appeal also referred to other surrounding circumstances as supporting their opposite interpretation of the letter. It has been appropriate to look closely at the judge's findings about these circumstances, some of which the Board has found unsustainable. Although it is not necessary for the Board to reach any positive conclusion on this, the Board cannot exclude the possibility that the time taken meant that the judge had to spend so much time and effort in reintegrating himself into the case that he missed some of the points to which the Board has now in its judgment drawn attention.

50. The Board well understands that delays feed on other delays, and that an inveterate problem of delay is difficult to address or eradicate. If there is an underlying problem of judicial resources, whether of manpower or otherwise, to manage the volume of litigation, the Board hopes that this judgment may promote its resolution, with the involvement of all concerned. The parties are requested to make submissions in writing as to terms of any order including costs, such submissions to be lodged with the Registrar (and simultaneously served on the other party) 21 days after this judgment is handed down.