257. UNITED KINGDOM: COURT OF APPEAL – 16 May 1986 – *Zambia Steel & Building Supplies Ltd. v. James Clark & Eaton Ltd.* *

Stay of judicial proceedings pending arbitration – Agreement in writing – Reference in a document to the seller's terms of business which include an arbitration clause

(See Part I. A.3 and B.3)

Lord Justice O'CONNOR: The defendants in this case sold a large quantity of sheet glass to the plaintiffs who are a Zambian company in Zambia. The glass was contracted to be sold c. & f. Dar-es-Salaam. It arrived in four shipments during July, August and September, 197", and when the third shipment arrived in August a telex was sent by the plaintiffs complaining that the glass had been damaged in shipment in breach of contract. In due course a writ was issued claiming damages for breach of contract on Aug. 26, 1983. It was not served until August, 1984, and the statement of claim was delivered on Oct. 12, 1984. On Oct. 17 the defendants moved to stay the proceedings on the ground that there was a binding arbitration agreement.

The contract had been arranged, to use a neutral term, between October, 1976 and May, 1977. The question is whether on the facts established by the documents and the affidavits the defendants have proved a valid arbitration agreement. In this case, it is within the Arbitration Act, 1975, because the plaintiff is in Zambia. Section 1(1) of that Act provides, so far as relevant:

> If any party to any arbitration agreement to which this section applies . . . commences any legal proceedings in any court against any other party to the agreement . . . any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, [unless certain

* The text is reproduced from Lloyd's Law Reports, 2, p. 226 ff. (1986)

matters apply], shall make an order staying the proceedings.

"Arbitration agreement" is defined in s. 7 of the Act:

> "Arbitration agreement" means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration.

So it is for the defendants to prove that there was an arbitration agreement in writing. That has to be done when an application for a stay is made, and at that stage the evidence placed before the Court will be on affidavit. As is pointed out at p. 418 by the authors of Mustill and Boyd, Commercial Arbitration, there may be circumstances where at that stage it would be necessary for the Court to hear evidence as to whether an arbitration agreement is proved. But that is not the case here.

Before I examine the facts, it is necessary to say something about the evidence which was filed. It consisted of two affidavits sworn by Mr. Byford, who is the export and overseas projects manager of the defendants and held that position from 1975 onwards. To his affidavits he exhibited all documents in the case save two, and he gave his account of how the contract had been agreed with the plaintiffs. The only evidence filed by the plaintiffs consisted of a single affidavit by their solicitor, and that affidavit is really nothing but an attempt under the guise of an affidavit to argue the plaintiffs' submissions. The whole of it consists of examining Mr. Byford's affidavit and the documents exhibited thereto and seeking to argue that from his affidavit, from the documents exhibited and from the pleadings no binding agreement had been made to arbitrate.

In my judgement, that is quite valueless so far as any evidence in the case is concerned. It is not in dispute. The contract was certainly in part at least oral. It was made by an individual, a Mr. Mwanashiku, acting for the plaintiffs, and no evidence from him is forthcoming, not even in the form, from the solicitor, of "I am informed by Mr. Mwanashiku and believe". All that happened is that the solicitor exhibited two documents, to which I will refer, without in any way verifying any information as to them from her clients. The evidence, therefore, in the case is for practical purposes confined entirely to the evidence filed on behalf of the defendants.

With that introduction, let me take up the factual story. It begins in September, 1976, when a Mr. Woolcott, who was a representative of Woodgate Ltd., agents for the plaintiffs, made an approach as to whether the defendants could supply a large quantity of glass. We are talking of well over 100,000 or 150,000 square metres of glass to a value running into a quarter of a million pounds or more. As a result of that inquiry the defendants produced a quotation, and the quotation is of prime importance because in the quotation is found the arbitration clause. It is dated Oct. 11 and the face of it identifies the defendants as James Clark & Eaton Ltd. with their address, then "Our reference" and there is filled in "BN/399/October/76/VS", "Your reference" is left blank. Date "11th October 1976". Then the print reads:

> Please quote our reference on all future communications. Your telephone contact is [— and it is filled in —] Mrs. J. Mackenzie, ext. 16.

Returning to the print:

> Dear Sirs, We thank you for your inquiry. We hope that our quotation set out below proves satisfactory and that you will decide to offer us the business. If any further information is required, please let us know. Yours faithfully, James Clark & Eaton Limited.

Thereafter the quotation was set out in different categories of glass which were required totalling £395,496. Payment terms were strictly net to be made by 180 days' draft documents against acceptance.

> Terms of an irrevocable letter of credit made in favour of us confirmed by London bankers. These prices are based on the exchange rate of 1.58 to the pound and therefore will be subject to fluctuations. All import dues and/or taxes to be paid by consignee.

Below that in print there appears the following:

> Quotations (which do not constitute offers) are made on our terms of business printed overleaf. Orders are only accepted and executed on these terms to the exclusion of all others E and OE.

On the back: "Terms of business". There are eight numbered terms dealing with a variety of matters, and the eighth term reads:

> Any disputes on the contract to be settled by arbitration in England according to English law and usage as provided by the Arbitration Act 1950 or any statutory modification thereof.

That quotation order was sent. It produced a purchase order. The original of that document, which was in fact a photocopy as sworn to by Mr. Byford, was sent by the plaintiffs to the defendants by their agents, Woodgate. For some reason it is dated Oct. 9, 1976, but the date must be wrong because on its face it refers to the quotation by its correct identifying number, and we know that that was not despatched until Oct. 11. But nothing turns on that. The document repeats the quotation verbatim, and the document is called a "Purchase order". At the foot of the document there is printed matter: "This order is not valid without all signatures". Immediately above that there is space for authorized signatories, three of them, and they are all completed. "For conditions see attached". There is nothing on the back of the document, and the evidence is that nothing was attached when this document was received by the defendants. That is sworn to by Mr. Byford, and there is no evidence to the contrary.

Negotiations continued both as to quantities and as to price. There was a revised quotation on Oct. 25 on the same form. There was an amendment to the purchase order in November, and matters then went to sleep while the letter of credit was being arranged. The letter of credit was forthcoming in April, 1977, and then in early May, in order to agree final terms it was necessary for Mr. Byford and Mr. Woolcott of Woodgate to go to Zambia, and they did go to Zambia and meet Mr. Mwanashiku. Mr. Byford told us in his affidavit what happened (p. 30 of the documents):

> . . . I went to Zambia on 6th May 1977 and stayed until 11th May 1977 and there met Mr. Mwanashiku. Prior to my departure I prepared the quotation of 2nd May 1977 . . . which was also on the pro forma contained in [the exhibits] and negotiations with Mr. Mwanashiku in Zambia were conducted around that document.

That document was again on the pro forma, which I have already recited, and it simply contained a variation of quantities and prices, the total on this occasion being £294,505.80. The final entry reads:

> This quotation is subject to our final confirmation of your acceptance.

Returning to the affidavit, Mr. Byford says:

> . . . It took several days of negotiation in Zambia before agreement was reached, but finally the defendants' revised quotation was accepted by Mr. Mwanashiku and it was on the basis of that quotation (which expressly incorporates the arbitration clause) that the contract was made.

That is the evidence as to the formation of the contract. The statement of claim says in pars. 1 and 2:

> By a contract concluded partly in writing and partly orally between the plaintiffs and the defendants between in or about October 1976 and in or about November 76 the plaintiffs purchased from the defendants quantities of glass, C & F Dar-Es-Salaam.
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> 2. Insofar as such contract was in writing it was contained in the following documents or some of them:—(i) the plaintiffs' purchase order No. 5089 dated 9th October 1976; (ii) the defendants' quotation ref. [— and the reference is given —] dated 25th October 1976; (iii) the plaintiffs' amendment to their said purchase order No. 5089. . . 3rd November.
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> 3. Insofar as such contract was made orally it was made at a meeting in or about November 1976 and attended by Mr. Mwanashiku, the plaintiffs' general manager, and by Mr. Byford of the defendants.

On that evidence, when the matter came before Sir Neil Lawson, the master had refused a stay and the defendants appealed. The learned Judge went through the documents and quite properly came to the conclusion that there was no concluded agreement until May, 1977. Inde- d, in my judgment, no other conclusion is possible. But as he was concerned with the question of the stay, and as his mind had been influenced by matters to which I will refer in a short while, he had this to say about those final conclusions. He said of the quotation of May 2 (p. 20 of the bundle):

> This constitutes a new invitation to treat. It was typed on the same standard form, and states "this quotation is subject to our final confirmation of your acceptance". Clearly this is an invitation to treat expecting an offer which the defendants will either accept, decline or vary. No documents emanated from the plaintiffs as a result of this document. What happened was that there were conversations between the parties and a contract was entered into, because a very substantial quantity of glass was shipped and in the course of transit a substantial amount was broken, hence the plaintiffs' claim.

With great respect to Sir Neil, in my judgment, that is not a sufficient finding for the purposes of this case, because it does not do what in my judgment it was necessary to do, namely, to decide as to whether it was a term of the contract and that the terms on the back of the quotation formed part of the contract. That they did form such part of the contract I have no

doubt on the evidence which has been placed before the Court. There might have been a dispute, but none is raised by the evidence placed before the Court. I have referred to the passages from Mr. Byford, and it seems to me on the evidence in this case that it is quite unarguable that the contract included the terms on the back of the quotation.

The question therefore is as to whether on those facts there has been an agreement in writing in the terms of s. 7 of the Act. That question was approached by Sir Neil, for perfectly proper reasons, by reference to one authority in this Court, *Excomm Ltd. v. Ahmed Abdul-Qawi Bamaodah (The Saint Raphael)*, [1985] 1 Lloyd's Rep. 403, from which he cited extensively. In the course of reaching his conclusion, as an aside while citing parts of the authority, he posed what in my judgment is the correct question (p. 22):

> "A document which recognises the existence of an arbitration agreement between the parties" in my judgment must be a document to which the party who has not tendered the arbitration clause has given his agreement.

Unfortunately, in considering the citation in *The Saint Raphael* of a previous decision, *Frank Fehr & Co. v. Kassam Jivraj & Co.*, (1949) 82 Ll.L.Rep. 673, Sir Neil came to the conclusion that for there to be a binding agreement, although the actual clause was in writing, it was necessary to show by some writing that the plaintiffs had assented to it. In my judgment, for reasons which again will appear in a little while, he fell into error in so doing. I am quite clear that when the authorities are examined, if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the assent by one party orally to the contract is sufficient.

There has been a time when there were cases to the contrary. We have been referred to the law starting with the case of *Hattersley v. Hatton*, (1862) 3, F. & F. 116. This was a case under the Common Law Procedure Act, 1854, which again, without setting it out, required submission to arbitration to be in writing. It was a summons to stay proceedings. The action was brought by the executor of a deceased supercargo, that is, the man in charge of the cargo on trading voyages to recover commission due to the testator by the defendant on the purchase of palm oil on the Bonny River. It appeared that in 1851 the testator entered into an agreement with the defendant to act as supercargo to a vessel trading to the Bonny River. Under the agreement, which was executed by both parties, he was to receive certain commissions. In the agreement was an arbitration clause. In 1853 he went out again to Africa. On that occasion the agreement was endorsed with similar terms. In 1855 there was a similar endorsement embracing the previous agreement. In 1860, which was the voyage on which the testator died, the defendant previous to his leaving Liverpool wrote him a letter in which was the following expression: "This voyage to be on the same terms as the former one". There was no reply by the testator who went on the voyage after receiving the letter.

The case is mercifully short and succinct. The operative parts read as follows:

> Dodgson, for the defendant, argued that the case was within section 11 of the Common Law Procedure Act 1854; that the testator's act following the letter was an acceptance of its terms binding on him and his representatives.
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> Gibbons, contra, objected that the statute required an instrument in writing, and there was no writing in this case to which the testator was a party. To deprive the plaintiff of their common law right to trial by a jury, there ought to be express words, which were here wanting.
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> Keating, J., however thought that as the parties had evidently gone on dealing on the terms of the original agreement, which contained a clause for referring disputes to arbitration, the case was fairly within the enactment.

He therefore made an order staying the proceedings.

That case is an early one showing that where assent to the written terms — there was a written term in the earlier agreement — could be inferred from the conduct of the party on the facts of the case, that was sufficient to satisfy the statute. We have been taken to cases where a partnership for a year with an arbitration clause was then continued and a dispute broke out three or four years later under the continuation where it was held that the clause was binding, although there was no writing showing that the parties had accepted the clause on the continuation.

We have been referred to a case where a lease was continued, but it is unnecessary, in my judgment, to go through the whole of the law. It is sufficient to start by looking at *Baker v. Yorkshire Fire & Life Assurance Co.*, [1892] 1 Q.B. 144. The headnote reads:

> By section 27 of the Arbitration Act 1889, "submission" means a "written agreement" to submit present or future differences to

arbitration, and by section 4 power is given to stay any legal proceedings commenced by any party to the submission against any other party thereto.

An action on a fire insurance policy having been stayed on the ground that the policy contained a clause that any differences arising under it should be referred to arbitration: — Held, that the policy, though not signed by the plaintiff, amounted to a submission to arbitration within the meaning of . . . the Act.

That case was in fact a decision of the Divisional Court. I state that because in *The Saint Raphael* Lord Justice Lloyd in error says it was a decision of the Court of Appeal.

Lord Coleridge, Chief Justice, said at p. 145:

The plaintiff sues on the policy, and by so suing affirms it to be his contract; he cannot disaffirm a part of the very contract on which he is suing. He contends that in order to bring into operation the arbitration clause contained in the policy, the policy must be signed by both parties; but the Act of Parliament says nothing of the kind, and the only apparent justification for the contention is to be found in *Caerleon Tinplate Co. v. Hughes*. That decision must be interpreted, however, with regard to the particular facts of the case. There was there no complete contract; the two documents constituting the contract differed materially in their terms, and the Court said it was plain that the parties never were ad idem. That being the state of facts, it was obviously impossible to allow an arbitration to be forced on an unwilling party. The present case is absolutely different; for there is here a perfectly good contract, one of the terms of which was that disputes arising under it should be referred to arbitration; the plaintiff has not complied with that term, and his action must be stayed.

It is further said by the plaintiff, that though the policy is admittedly a good contract, there must be a written submission to arbitration, signed by the plaintiff. I do not agree with that contention, and even if I did I should stay the action until the plaintiff signed the submission.

Mr. Justice A. L. Smith said:

The provisions of section 11 of the Common Law Procedure Act 1854 are well known and have been enacted on for many years, and have recently been practically re-enacted in the Arbitration Act 1889. Under the former Act many hundreds of cases of claims on fire insurance policies must have been referred under the power to stay an action given to the "parties to any deed or instrument in writing". In the present Act, the first three sections deal with the submission, and section 4, after commencing with the words "if any party to a submission" proceeds in language practically the same as that used in the Common Law Procedure Act. It is said, however, that by the interpretation clause a submission must be a written agreement to refer disputes to arbitration. This, however, is not a higher interpretation than was necessarily put on the language of the old Act, under which it was the universal practice to refer these cases, and does not mean that in all cases the written agreement to refer must be signed by both parties. It is quite unnecessary to say more as to the decision in *Caerleon Tinplate Co. v. Hughes* than that it turned entirely upon the peculiar facts of the case; for I am convinced that the learned judges who gave that decision would decide the present case in the same way that we are deciding it.

Next I refer to *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*, [1915] 1 Ch. 881. That was a case where a member of a company was in dispute with the company, the articles of association of which contain an arbitration clause. Obviously the articles were not signed by the plaintiff who was a shareholder. The question arose as to whether the arbitration clause was binding. Mr. Justice Astbury, who reviewed the authorities, at p. 900 began with the case of *In re Lewis*, (1876) 1 Q.B.D. 724, where a document containing the terms of an agreement to the amount of the costs payable by a client to his solicitor, which had been assented to I take it orally by the client but signed only by the solicitor, was held by the Court not to be sufficient. In that case Lord Coleridge said:

. . . It is quite clear that there was no agreement in writing within section 4 of the Act [— and that —] An "agreement in writing" within section 4 must be an agreement by both parties, and both parties must sign their names upon the agreement.

He then referred to *Caerleon Tinplate*. The facts there were that there was a bought note from the buyer and a sold note from the seller. One contained an arbitration clause and the other did not. As has already been seen, the case was to be distinguished on the basis that the parties were never ad idem.

Mr. Justice Astbury then cited *Baker v. Yorkshire Fire & Life Assurance Co.*, and he said at p. 902:

The result of these decisions is, I think, that if the submission is in writing and is binding

on both parties as their agreement or as the equivalent in law to an agreement between them the statute is satisfied.

I cited that because it has been expressly approved in this Court in *Anglo-Newfoundland Development Co. Ltd. v. The King*, (1919) 1 Ll.L.Rep. 534; [1920] 2 K.B. 214. The facts of that case are not relevant. The question was as to whether a petition of right could be stayed on an arbitration clause. Lord Justice Bankes, at pp. 537 and 223, said this:

> The third and fourth points affect this particular case. As to the third, the respondents contend that there was here no submission to arbitration. It is a condition precedent to any application under section 4 of the Arbitration Act 1889 that there should be a submission to arbitration by both parties to the dispute. A submission is defined by section 27 of the Arbitration Act in these terms: "Unless the contrary intention appears, 'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". It is not necessary that both parties should have signed the written agreement; if a person has accepted a written agreement and acted upon it he is bound by it for this purpose, although he may not have set his hand to the document: *Baker v. Yorkshire Fire & Life Assurance Co.* The law is clearly and accurately stated by Astbury J. who reviewed all the authorities in *Hickman v. Kent or Romney Marsh Sheep Breeders' Association*.

He then cites and approves the passage which I have cited.

One might have thought that after 1920 the law would have been clear. Unfortunately it got slightly astray in the case of *Frank Fehr & Co. v. Kurnam Jeeraj & Co.*, (1949) 82 Ll.L.Rep. 673. All the relevant passages from that authority are fully dealt with by Lord Justice Lloyd in *The Saint Raphael*, I find it unnecessary to go to the case itself. I will turn at once to *The Saint Raphael*, the authority upon which Sir Neil Lawson relied and came to the conclusion in the present case. That will be found reported in [1985] 1 Lloyd's Rep. 403. The headnote provides:

> By a contract entered into in January, 1976, the plaintiffs sold to the defendant 10,000 tonnes 10 per cent more or less of Australian white wheat, c & f Jeddah. The contract was negotiated through intermediaries in Jeddah and London.
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> The plaintiffs alleged that the contract was contained in or evidenced by a broker's note dated January 27, 1976, which set out the terms and incorporated GAFTA 14. It was signed by the plaintiffs and a copy was sent to the defendant in Jeddah for signature. He never signed it.
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> GAFTA 14 provided for disputes to be referred to arbitration in London in accordance with the arbitration rules specified in GAFTA 125. Clause 32 provided inter alia, and then there is provision for the service of proceedings. They vessel arrived in Jeddah on May 7. There was notice of readiness. She was not able to berth until August and the discharge was not completed until November. The plaintiffs claimed arbitration on June 16, 1978 and GAFTA appointed an arbitrator.
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> By letter dated July 2, 1978, the defendant wrote to the plaintiffs denying having signed any contract or being a member of GAFTA and asserting that the arbitrator's decision would not be binding.
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> An award was dated Sept. 5. The umpire found in favour of the plaintiffs. They applied ex parte for leave to enforce the award. Mr. Justice Mocatta granted leave provided that the defendant could apply within 21 days to set aside. Judgment was entered on Feb. 1, 1979.
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> On Sept. 23, 1983, the defendant applied to set aside the judgment on the ground (1) that the defendant did not agree to submit to arbitration; (2) he did not agree in writing to arbitrate and (3) the application under s. 26 had been irregular.

That is irrelevant to this case.

> Mr. Justice Webster held that the order had not been validly served, and the plaintiffs appealed. It was held in this Court that—
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> . . . for an agreement to be a written agreement to arbitrate it was unnecessary for the whole of the contract including the arbitration agreement to be contained in the same document; it was sufficient that the arbitration agreement was itself in writing and it was sufficient if there was a document which recognised the existence of an arbitration agreement between the parties.

It is that last matter which, in my judgment, has led Sir Neil Lawson into error in the present case. When one goes to the judgment of Lord Justice Lloyd, who gave the first judgment, he went through all the facts, which it is unnecessary to consider further. Then at p. 408 he said:

> Mr. Johnson submits that there was never any written agreement to arbitrate between the parties. Indeed he submits that there was

never any written contract at all. He concedes that the defendant bought the goods and took delivery. But he says that contract was made orally and not in writing. That submission is based on Mr. Vlasto's affidavit. The submission found favour with the judge to this extent, that he held that there was a triable issue whether there was a written agreement to arbitrate in the sense that the defendant had established an arguable case to the contrary. I regret that I cannot agree with the Judge on that point.

For an agreement to be a written agreement to arbitrate it is unnecessary for the whole of the contract, including the arbitration agreement, to be contained in the same document. It is sufficient that the arbitration agreement is itself in writing; indeed it is sufficient if there is a document which recognises the existence of an arbitration agreement between the parties.

This appears from the decision of the Court of Appeal in *Frank Fehr & Co. v. Kassum Jivraj & Co.*, (1949) 82 Ll.L.Rep. 673. That was a case on the old LCFTA printed form of contract containing an arbitration clause. The printed form had a slip or memorandum at the foot, which should have been torn off and signed. It never was signed. The question was whether there was a written agreement to submit within s. 27 of the 1889 Act. Lord Greene, giving the leading judgment in the Court of Appeal, said at p. 676: "On that footing, what we have to look for, therefore, is a signature authenticating, recognising or incorporating — whatever word one chooses to use — a written document containing an agreement to submit. Quite clearly, if, on receipt of this printed form, the sellers had cabled to London saying, 'We accept the terms set out in your written document', that cable, plus the printed form, would have constituted a written agreement to submit, and that would be so irrespective of the fact, if fact it was, that there was a pre-existing agreement merely by the passing of the earlier cables. In other words, the section, to my mind, is quite clearly satisfied if there is produced a document or documents signed by the parties which records a pre-existing agreement or authenticates or recognises the existence of an agreement to submit. That, to my mind, is sufficient to satisfy the statute. Sir William emphasized the distinction, which, of course, is well known, between an agreement and a note or memorandum of an agreement. That appears to me to be an irrelevant distinction in this case. What we have to look at is to see whether or not there is a written, signed document recognising, incorporating or confirming the existence of an agreement to submit.

Lord Justice Lloyd continues:

> . . . I would adopt Lord Greene's definition of what is meant by a written agreement to arbitrate, except that I would respectfully question whether it is necessary for the agreement to be signed.

He then refers to *Baker v. Yorkshire Fire & Life Assurance Co.* and pointed out that it was not cited to the Court of Appeal in the *Frank Fehr* case. He then continued at p. 409, citing from Lord Greene:

> . . . I am quite content to proceed on what I am bound to say, prima facie, I should have thought, was the right construction of the Act. Where the Act speaks about a written agreement, it is contemplating not only an agreement which is in writing, but an agreement which is signed by both parties. I do not find it necessary to decide that question, but I am prepared to accept that view and I base my judgment on it.

Lord Justice Lloyd continues:

> Despite the great weight to be attached to any dictum of Lord Greene, the authorities generally are against any necessity for an arbitration agreement to be signed: see Mustill and Boyd, p. 57, footnote 12. There is certainly no express requirement to that effect in the definition of an arbitration agreement in the 1950 Act. I would hold that an arbitration agreement need not be signed and that the definition in s. 32 of the Act is satisfied provided there is a document or documents in writing which, to use the language of Lord Greene, recognise, incorporate or confirm the existence of an agreement to submit. Applying that test in the present case, I would agree with the submission of Mr. Boyd that the evidence here is overwhelming that there was a written agreement to arbitrate.
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> If it were necessary to decide, I should say that the whole of the contract between the parties here was contained in the broker's note, one copy of which was signed by the plaintiffs and another copy of which was sent by Marpro Ltd. to Saudi Marketing Establishment for onward transmission to the defendant. When I refer to the broker's note I include, of course, the documents incorporated in the broker's note by reference. The fact that the broker's note was never signed by the defendant makes no difference. That happens all the time.

But it is unnecessary to decide whether the contract is contained in the broker's note. Even if it is not I would still reach the same conclusion. For the document which the defendant admittedly received, namely the order sheet, unequivocally recognises the existence of an arbitration agreement. That in my view is sufficient.

It is said in the present case that there is nothing in writing after the oral negotiations which led to the formation of the contract in Zambia during Mr. Byford's visit there in May, 1977. That is true. But in my judgment, I do not find that the cases require me to hold that there must be some subsequent express acknowledgment in writing of an arbitration clause forming part of a document which, on the facts of the case, is found to be a part of the agreement.

For the reasons which I have already given, I am satisfied that the quotation, including the printed terms on the back of it, did form part of the agreement of sale, and as a result the arbitration clause was incorporated into that agreement. By making the agreement, albeit orally assenting to it, once it is clear that that document formed part of the agreement, then in my judgment the requirement of s. 1 of the 1975 Act is satisfied and there was a binding agreement to arbitrate. The defendants are entitled to a stay. I would allow this appeal and stay the action.

Lord Justice RALPH GIBSON: I agree. The evidence before the learned Judge and this Court shows, in my judgment, that there was an oral agreement made in May, 1977, for the supply of the glass which was eventually shipped to Dar-es-Salaam, and that that oral agreement contained the terms set out in the document dated May 2, 1977, (p. 49 of the bundle) which was in the form appearing at p. 52. The quotation was stated to be made on the terms printed on the back. Those terms, which are clearly legible, included No. 8, the arbitration clause which my Lord has already read.

I reach that conclusion as to the nature of the oral agreement, because in his affidavit of Jan. 15, 1985, Mr. Byford so asserts as a matter within his own knowledge. He negotiated the oral agreement with Mr. Mwanashiku on the basis of that document at the meeting in Zambia. As my Lord has pointed out, there is no evidence to the contrary. The affidavit of the plaintiffs' solicitor contains the assertions that the defendant—

> . . . verily believes that it is not established by the documents referred to that the arbitration clause contended for was in fact a term of the contract [— and that —] on the basis of the instructions given and the documents provided to my [sic] by representatives of the plaintiffs, the defendants verily believe that the clause was not incorporated.

There were other similar references to belief based upon instructions. It is necessary, as I think, to emphasize that such statements do not constitute evidence of the facts upon which the deponent chooses to found a belief, and that the belief itself, however "verily" held, is not evidence of those facts.

The Rules of the Supreme Court, O. 41, r. 5, sub-r. (2) provide that—

> . . . an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

In *Young v. J. L. Young Manufacturing Co. Ltd.*, [1900] 2 Ch. 753, which is a case cited in the notes to that rule, at a time when the relevant rule was in similar terms, Lord Justice Rigby, in words with which the other members of the Court agreed, said:

> In the present day, in utter defiance of the order . . . solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows but also of what he believes, without giving the slightest information with regard to what his belief is founded on. Or he says, "I am informed", without giving the slightest intimation where he has got his information. Now, every affidavit of that kind is utterly irregular.

For the deponent merely to refer to "instructions" or to "documents provided" is not, in my judgment, to comply with the rule. The purpose of the rule is to force responsibility for the truth of the assertion of fact upon an identified source. The deponent, to comply with the rule, must say that Mr. X told him that certain facts occurred or exist and that the deponent believed the information so given to be true. Circumstances may arise in which a deponent can sufficiently, for the purposes of the rule, identify the source of the information without identifying a named person who gave it, for example, where the person refused to give a name, or where the deponent has forgotten the name but can describe the relationship of the informant to the parties, but this is not such a case and no explanation has been offered for not identifying the informant or for not stating what information the informant gave.

Next, on the evidence before the Court it is clear to me that the plaintiffs are to be treated as having accepted the defendants' terms of

business set out on the back of the quotation form. The plaintiffs must have expected there to be such terms on such a document, and there was a legible reference to them on the face of the quotation. The plaintiffs had had a copy of a similar document containing the same terms since October, 1976, and had done nothing to show that they did not or would not accept those terms. The evidence before the Court shows that the plaintiffs' own terms of business were not attached to the purchase order No. 5089, dated Oct. 9, 1976, which was sent to the defendants.

The sole question, therefore, is one of law. The oral contract proved before the Court and on which the plaintiffs put forward their claim in the action is shown to include a term which constitutes an effective agreement "to submit to arbitration present or future differences" within the meaning of s. 1 and s. 7 (1) of the 1975 Act. The question of law is whether the defendants have proved that the term is or is not contained in an "agreement in writing".

It seems to me that the phrase "an agreement in writing" may have two meanings at least. The first is that the terms agreed between the parties are set out in writing. On that basis, provided that the terms of agreement to submit to arbitration are contained in a document or documents, proof that those terms were agreed by the parties to be binding upon them may be given outside those documents. Such proof may be given by evidence of conduct from which the Court is persuaded that the inference of agreement must be drawn, or by evidence of oral acceptance, or indeed any other evidence which satisfies the Court that the written terms constitute or form part of an agreement between the parties.

The second possible meaning is that both the terms of the agreement to submit and the apparent assent to those terms are contained in the document or documents. A requirement of this nature, of course, is to be seen in s. 40 of the Law of Property Act, 1925, which provides that—

> . . . no action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

That provision permits proof of the making of a prior agreement by a subsequent signed note of it.

The origin of the provisions of the 1975 Act is the New York Convention, and on looking at the provisions of the New York Convention I was left at first with the impression that this Act was intended to be dealing with an agreement in writing in the second sense to which I have referred. The Convention, by art. 2, provides that—

> . . . each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Then by par. 2:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

The 1975 Act, as it states, was enacted to give effect to that Convention. It is clear to me that the Convention by art. 2, par. 2, did not impose upon the contracting state an obligation to recognize an agreement in writing to submit to arbitration unless it is signed by the parties or unless the agreement is contained in an exchange of letters or telegrams in the sense that the assent to be bound by both parties is given in writing by such document. If, however, Parliament enacts legislation which requires the Courts of this country to recognize agreements in writing of that nature, the obligation under the Convention is fulfilled. If the enactment also requires our Courts to recognize an agreement in writing within the first meaning given above, in which proof of assent to the written terms is provided outside the document, there is no basis for regarding such provision as constituting departure by this country from any obligation assumed under the Convention.

It was not argued before Sir Neil Lawson or before this Court that there is any difference in meaning between the phrase "written agreement to submit" in s. 32 of the Arbitration Act, 1950, and "agreement in writing" included in s. 7 (1) of the 1975 Act. For my part, I agree that there is no relevant difference. The words "including an agreement contained in an exchange of letters or telegrams" were no doubt included so as to avoid any argument based upon their omission. It is clear that the omission of the words "signed by the parties" was intended to leave the requirement the same as it is under s. 32 of the 1950 Act.

On that basis, this Court should, in my judgment, conclude that the defendants have

demonstrated an agreement in writing to submit to arbitration within s. 1 of the 1975 Act.

The decision of the Divisional Court in *Baker v. Yorkshire Fire & Life Assurance Co.*, [1892] 1 Q.B. 144, to which my Lord has referred, established that there could be a written agreement to submit within s. 27 of the Act of 1889, although the document containing the arbitration clause had not been signed by the party against whom it was raised. The plaintiff sued upon the agreement in which the clause was contained and he was held to be bound by the clause for the purposes of s. 27 of the 1889 Act. In *Excomm Ltd. v. Ahmed Abdul-Qawi Bamaodah (The St. Raphael)*, [1985] 1 Lloyd's Rep. 403, at p. 409, in a passage which my Lord has already read, Lord Justice Lloyd said:

> I would hold that an arbitration agreement need not be signed and that the definition in section 32 of the Act is satisfied provided there is a document or documents in writing which, to use the language of Lord Greene, recognise, incorporate or confirm the existence of an agreement to submit.

It appears to me that the test there proposed did not require that the assent of the defendant to the arbitration clause contained in the document or documents, or evidence of that assent, should be contained in those or any other documents. It is sufficient if it is proved that the defendant is contractually bound by the arbitration agreement incorporated in the document.

In his judgment Sir Neil Lawson referred to a passage from the judgment of Lord Justice Lloyd in *The St. Raphael* case at p. 408, to which my Lord has already referred, and at p. 10 of his judgment he concluded his reasons for his finding by saying:

> ... I find here that there is no document emanating from the plaintiffs which recognises, incorporates or confirms the existence of an agreement to submit.

I am unable to accept that the 1975 Act requires proof of a document emanating from the party against whom the arbitration clause is raised upon an application to stay. If the term containing the agreement to submit is incorporated in a document and it is proved that the party is bound by an agreement which includes the terms of that document, then no further proof of the agreement to submit is, in my judgment, required.

As to the class of cases in which a written agreement to arbitrate could be proved so as to satisfy s. 1 of the 1975 Act, despite the absence of any signature or document emanating from the party against whom the agreement to submit is raised, Mr. Potter sought to limit it to cases where the Court is satisfied, in the absence of contrary evidence, that the written document embodies the agreement between the parties by reference to established rules of law or well-known commercial practice or some prior agreement between the parties, such as the unsigned policy in *Baker v. Yorkshire Fire & Life Assurance Co.*, which I have already referred to, or the principle of holding over after termination of a lease, as in *Morgan v. William Harrison Ltd.*, [1907] 2 Ch. 137. I am unable to accept that any such limitation can be derived either from the cases or from the terms of the Act. Once it is clear that the assent to the written terms or evidence of it is not required to be contained in the written agreement, but that assent to the written terms may be proved by other evidence, then in my judgment any evidence which proves that the party has agreed to be bound by an agreement to submit contained in a document or documents is sufficient to make the document or documents an agreement in writing within the 1975 Act.

Accordingly, for the reasons I have given and for the reasons which my Lord set out in his judgment, I agree that this appeal should be allowed.

Sir DENYS BUCKLEY: I agree with both the judgments that have been delivered. I would only add this short observation. Sir Neil Lawson in his judgment, quite rightly in my view, expressed the view that the quotation which was given by the defendant company for the glass, the subject matter of the sale, in October, 1976, amounted to no more than an invitation to treat. That must have been the case because it stated on the face of it that it was not an offer. The same must be equally true of the revised quotation which was taken to Zambia in May, 1977. But the evidence clearly establishes, in my judgment, that the oral contract which the parties entered into in Zambia in May, 1977, was a contract which was made including the terms which are set out in the endorsement on the two quotations. Those terms include the arbitration clause. The arbitration clause became, in my judgment, as the result of the oral agreement, part of the terms of the contract between the parties, and it is a statement of that term in writing.

In consequence of that sequence of events, the contract was, in my view, a contract partly unwritten and partly in writing, and I think that on the facts of this case the agreement to arbitrate was a term in writing, a written term, of the agreement which the parties entered into. The endorsed terms of business contained in each of the quotations thus became, in my

judgment, a written record of the terms to which the parties were assenting and a contractual document, part of the contract.

For the reasons which my Lords have given, and what I have just briefly said, I also agree that this appeal should be allowed.

[*The appeal was allowed with an order for the plaintiffs to pay the defendants' costs both here and below. The action was stayed.*]