1982 October 27

[A. LOIZOU, SAVVIDES, STYLIANIDES, JJ.]

CY.E.M.S. CO. LIMITED,
Appellants-Plaintiffs,

v.

THE CENTRAL CO-OPERATIVE INDUSTRIES CO. LTD.,
Respondents-Defendants.

(*Civil Appeal No.* 6347).

Civil Procedure—Specially indorsed writ—Summary judgment—Order 18, rule 1 of the Civil Procedure Rules—Principles applicable—Claim for balance of agreed labour, material and work done under a contract for engineering and mechanical work and/or amount due by virtue of pay order and/or certificates issued by supervizing architect—Plaintiff's claim unequivocally admitted by defendants—Counterclaim set up by them not connected with contracts—Not alleged that work certified not executed and that readjustment of the certificates would be claimed by defence or counterclaim—Defendants failing to show that they have prima facie answer to plaintiff's claim whether by defence or counterclaim—Plaintiffs entitled to judgment.

The appellants-plaintiffs ("the contractor") were inter alia, contractors of electrical and mechanical installations. The defendants-respondents ("the employer") were a co-operative society who at the material time had under construction a number of factories.

The contractor and the employer entered into a number of contracts for engineering and mechanical work to be carried out by the contractor at agreed prices. The employer appointed Neoptolemos Michaelides as their supervizing architect or mechanic, who issued periodically pay orders and/or certificates. The employer on the basis of such certificates made payments to the contractor. Additional work, the nature, specification and price of which were agreed, was performed by the contractor.

The contractor instituted an action claiming:-

(a) £143,989.- balance due by the defendants to the plain-

tiffs for agreed labour and material and/or work done for the defendants and/or amount due by virtue of pay orders and/or certificates issued by the supervizing architect, Mr. Neoptolemos Michaelides; and,

(b) £4,547.675 mils, balance of agreed and/or reasonable price of goods sold and delivered.

The writ was specially indorsed with a statement of claim under 0.2, r.6. The defendants entered appearance and immediately thereafter the contractor applied for summary judgment for the amount indorsed under 0.18, r. 1 of the Civil Procedure Rules.

The application for summary judgment was supported by an affidavit sworn by the Managing Director of the contractor.

The employer opposed the application. In an affidavit sworn by the Co-ordinator-Director of the employer on 4.3.1981 it was stated that the statement of claim is rather epigrammatical; that the Council of Ministers has appointed a Commission of Inquiry; that Coopers & Lybrand, a reputable firm, were assigned the duty to inquire into the affairs and management of the Co-operative Society; they found that the amount the plaintiffs would have been entitled to upto May, 1980, should not be more than £1,307,000.-; the employer paid £1,534,000.- in excess, having paid £2,841,000.-; that the employer had a defence and/or counterclaim.

On 17.4.1981 a supplementary affidavit was filed by the Managing Director of the contractor, to which the pay orders and/or certificates issued by the said Neoptolemos Michaelides were attached as exhibits; the Director-Co-ordinator of the employers on 20.4.1981 filed another affidavit attaching thereto a photocopy of an extract of the report of Coopers & Lybrand in which it was stated that the prevailing purchase cost for the work done was £1,534,000.- whereas the price paid by the employer was £2,841,000.-, and that the employer was entitled to a counterclaim of the difference of the two figures.

The trial Court having come to the conclusion that the defendants had a defence dismissed the application for summary judgment.

Upon appeal by the contractors:

Held, that the purpose of 0.18 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried; that judgment for the plaintiff may be given unless the defendant shall satisfy the Court that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend; that since the plaintiffs' claim is unequivocally admitted by the defendants and the counterclaim they seek to set up is not connected with the contracts; that since it is not alleged that the work certified was not executed; that since there is no allegation that any readjustment to the certificates would be claimed by defence or couterclaim; that since the defendants failed to show that they have a prima facie answer to the plaintiffs' claim, whether by way of defence or counterclaim; and that since the statement of claim, though rather laconical, it fully complies with the provisions of 0.19, r.4, as it sets out all the material facts and it does not fall short of the requirements of the Rules, the plaintiffs are entitled to judgment; that, therefore, the appeal must be allowed and judgment will be given for the plaintiffs against the defendants for £148,536.675 mils with costs here and in the Court below.

Appeal allowed.

Cases referred to:

Roberts v. *Plant* [1895] 1 Q.B. 597 (C.A.);

Robinson & Co. v. *Lynes* [1894] 2 Q.B. 577;

Jocobs v. *Booth's Distillery Co.*, 85 T.L.R. 262;

John Wallingford v. *The Directors etc. of the Mutual Society*, 5 App. Cas. 685 at pp. 703–704;

Anglo–Italian Bank v. *Wells* (and Davies), 38 L.T. 197 at p. 199;

Morgan & Son Ltd. v. *Martin Johnson & Co.* [1949] 1 K.B. 107 (C.A.);

Zoedone Co. v. *Barrett* [1882] S.J.657 (C.A.);

Sheppards & Co. v. *Wilkinson & Jarvis* [1889] 6 T.L.R. 13 (C.A.);

Gordon v. *Cradcock* [1963] 2 All E.R. 121;

Kyprianides v. *Ioannou* (1966) 1 C.L.R. 265;

Evans v. *Bartlam* [1937] 2 All E.R. 646 at p. 654:

Dawnays Ltd. v. *F.G. Minter Ltd. and Trollope and Coll Ltd.* [1971] 1 W.L.R. 1205 at p. 1209;

Tharsis Surphur & Copper Co. v. *McElroy* [1878] 3 App. Cas. 1040 at p. 1045;

Gilbert–Ash (Northern) Ltd. v. *Modern Engineering (Bristol) Ltd.* [1974] A.C. 689;

Mottram Consultants Ltd. v. *Bernard Sunley & Sons Ltd* [1975] 2 All E.R. 197.

Appeal.

Appeal by plaintiffs against the ruling of the District Court of Nicosia (Papadopoulos, P.D.C. and S. Nicolaides, D.J.) dated the 28th November, 1981 (Action No. 5071/80) whereby their application for summary judgment was refused and the defendants were given unconditional leave to defend.

K. Michaelides with *N. Ioannou (Mrs.)* and *P. Papageorghiou*, for the appellants.

E. Efstathiou with *S. Mamantopoulos*, for the respondent.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Stylianides J.

STYLIANIDES J.: This is an appeal by the plaintiffs against a ruling of the Full District Court of Nicosia refusing summary judgment and giving the defendants unconditional leave to defend.

The appellants–plaintiffs (hereinafter referred to as "the contractor") are, inter alia, contractors of electrical and mechanical installations. The defendants–respondents (hereinafter referred to as "the employer") are a co–operative society who at the material time had under construction a number of factories.

The contractor and the employer entered into a number of contracts for engineering and mechanical work to be carried out by the contractor at agreed prices. The employer appointed Neoptolemos Michaelides as their supervizing architect or mechanic, who issued periodically pay orders and/or certificates. The employer on the basis of such certificates made payments to the contractor. Additional work, the nature, specification and price of which were agreed, was performed by the contractor.

The contractor instituted this action claiming:-

(a) £143,989.-, balance due by the defendants to the plaintiffs for agreed labour and material and/or work done for the defendants and/or amount due by virtue of pay orders and/or certificates issued by the supervizing architect, Mr. Neoptolemos Michaelides; and,

(b) £4,547.675 mils, balance of agreed and/or reasonable price of goods sold and delivered.

The writ was specially indorsed with a statement of claim under 0.2, r.6. The defendants entered appearance and immediately thereafter the contractor applied for summary judgment for the amount indorsed under 0.18, r.1, of the Civil Procedure Rules.

This Order corresponds to the English Order 14, r.1, before the latter was recast by R.S.C. (Rev.) (1962) which greatly extended the operation of this procedure and made significant changes in the practice under 0.14.

Under 0.18, r.1, the plaintiffs must satisfy the Court that there is a specially indorsed writ under 0.2, r.6, and must support the application with an affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, and stating that in his belief there is no defence to the action.

The application for summary judgment was indeed supported by an affidavit sworn by the Managing Director of the contractor.

The employer opposed this application. Michael Ioannides, the new Co-ordinator-Director of the employer, deposed in affidavit on 4.3.1981 that the statement of claim is rather epigrammatical; that the Council of Ministers has appointed a Commission of Inquiry; that Coopers & Lybrand, a reputable firm, were assigned the duty to inquire into the affairs and management of the Co-operative Society; they found that the amount the plaintiffs would have been entitled to upto May, 1980, should not be more than £1,307,000.-; the employer paid £1,534,000.- in excess, having paid £2,841,000.-; that the employer had a defence and/or a counterclaim.

On 17.4.1981 a supplementary affidavit was filed by the

Managing Director of the contractor, to which the pay orders and/or certificates issued by the said Neoptolemos Michaelides were attached as exhibits; Mr. Ioannides on 20.4.1981 filed another affidavit attaching thereto a photocopy of an extract of the report of Coopers & Lybrand in which it is stated that the prevailing purchase cost for the work done was £1,534,000. whereas the price paid by the employer was £2,841,000.–, and that the employer is entitled to a counterclaim of the difference of the two figures.

The last deponent was called in Court and cross-examined and re-examined. Finally the trial Court issued its ruling.

The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried. (*Roberts* v. *Plant*, [1895] 1 Q.B. 597, C.A.; *Robinson & Co.* v. *Lynes*, [1894] 2 Q.B. 577).

Judgment for the plaintiff may be given unless the defendant shall satisfy the Court that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend.

In *Jacobs* v. *Booth's Distillery Co.*, 85 L.T.R. 262, Halsbury, L.C., said:–

> "People do not seem to understand that the effect of Order XIV, is, that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a court; that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights".

Lord James of Hereford in the same case said:–

"The view which I think ought to be taken of Order XIV

is that the tribunal to which the application is made should simply determine, 'Is there a triable issue to go before a jury or a court?' It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, 'You have no defence. You could not by general demurrer, if it were a point of law, raise a defence here. We think it impossible for you to go before any tribunal to determine the question of fact'. We are not expressing any opinion whatever upon the merits of the case. It appears to me that there is a fair issue to be tried. On which side the chances of success are it is not for this House to determine; but thinking, as I do, that there is a fair issue to be tried by a competent tribunal, it seems to me to be perfectly clear that the order of the Court of Appeal ought to be reversed".

In *John Wallingford* v. *The Directors, etc., of the Mutual Society*, 5 App. Cas. 685, Lord Blackburn lucidly stated the principle pertaining to a summary judgment as follows at pp. 703–704:–

"The order allows that a plaintiff may swear positively that the money is due, and that there is no defence to his action; and when he so swears the defendant has 'by affidavit or otherwise, to satisfy the Court or a Judge that he has a good defence to the action upon the merits, or disclose such facts as may be deemed sufficient to entitle him to defend'. Unless he does so, the Judge may make an order allowing the plaintiff to sign judgment.

Now I think what we have to see here is, what is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the plaintiff to sign judgment. If he is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right, unless there be something very extraordinary (which I can hardly conceive), that the defendant should be able to raise that defence upon the merits, either to the whole or to a part. He may fall far short of satisfying a Judge that there is a defence upon the merits; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend.

And that, my Lords, raises another question altogether. There may very well be facts brought before the Judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits. I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, 'I say I owe the man nothing'. Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned".

In *Anglo-Italian Bank* v. *Wells* (*and Davies*), 38 L.T. 197, Jessel, M.R., said at p. 199:-

"The order on which this decision is made is a most useful order. It is intended to prevent a man, clearly entitled to money, from being delayed where there is no fairly arguable defence to be brought forward".

And Thesiger, L J., said:-

"If the appellants had disclosed by their affidavits facts sufficient to establish a good ground of counterclaim, I think the counterclaim would have been sufficiently connected with the cause of action in the present case to justify its being set up as a defence even to a liquidated claim on a bill of exchange".

It is well settled that where the defendant sets up a bona fide counterclaim arising out of the same subjectmatter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of

execution pending the trial of the counterclaim, but should be for unconditional leave to defend, even if the defendant admits the whole or part of the claim. (*Morgan & Son Ltd.* v. *S. Martin Johnson & Co.*, [1949] 1 K.B. 107, C.A.). A counterclaim is a crossaction but for the purposes of Order 14 it ought to be treated as a defence. (*Zoedone Co.* v. *Barrett*, (1882) 26 S.J. 657, C.A., per Cotton, L.J.).

In *Anglo-Italian Bank* v. *Wells* (supra) it was held that the right to bring a counterclaim is not a right of course but depends on the discretion of the Judge. Where, therefore, there is clearly no defence to the plaintiff's claim so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with costs, with a stay of execution until the trial of the counterclaim or pending further order. (*Sheppards & Co.* v. *Wilkinson & Jarvis*, [1889] 6 T.L.R. 13, C.A.).

The counterclaim will be disregarded if it is totally foreign to the action or it ought for any reason in the discretion of the Judge to be disposed of by a separate action.

Thus the burden is on the defendant to satisfy the Court that he bona fide has a good defence in the sense that there is a triable issue to be argued before a competent Court. In deciding this matter the Judge has to exercise his discretion.

It is well settled that where a Judge has exercised his discretion under Order 18, the Court of Appeal will not interfere with the exercise of his discretion unless there has been some error of principle or misapprehension of fact on his part, or unless he has given undue weight to a particular aspect of the facts. (*Gordon* v. *Cradock*, [1963] 2 All E.R. 121; *Kypros S. Kyprianides* v. *Symeon Ioannou*, (1966) 1 C.L.R. 265).

The Court of Appeal must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order of the trial Judge. (*Evans* v. *Bartlam* [1937] 2 All E.R. 646, per Lord Wright at p. 654).

The trial Court, after referring very summarily to the affidavits and the oral evidence of Ioannides before it, said the following:-

"The defendants have opposed the application of the plaintiffs. In their affidavit in support of the opposition it is stated among other things that the defendants have employed experts to check the work which has been done by the plaintiffs and it was found that the work done by them, i.e. the plaintiffs, does not exceed £1,534,000.- (for) which they were paid £2,841,000.-.

In a supplementary affidavit by Kyriacos Parpas it is stated that the work done was certified by architect, Neoptolemos Michaelides, and photocopies of the pay orders were attached. Mr. Parpas further stated that the experts never expressed the view that the plaintiffs overcharged for the work they did.

In a further supplementary affidavit in support of the opposition, Mr. Michael Ioannides insists that the plaintiffs overcharged. In fact such overcharge amounted to £1,000,307.- and were paid an amount of £1,000,307.- over and above the amount they were entitled which amount they counterclaim. A photocopy of the experts' report was also attached. Mr. Ioannides at the request of the applicants was cross-examined in Court. We do not think it pertinent to analyse the evidence of Mr. Ioannides nor do we think proper to examine the various contracts which were made by the plaintiffs and the defendants. ... ...

It is obvious that the defendants have a defence. They have expert advice in (sic) it. It does not mean that it is a defence that will stand the challenge at the trial. But certainly there is a triable issue. We do not want to examine the various contracts and their effect at this stage as they will probably be examined at the trial. Nor do we want to say anything about the credibility of Mr. Ioannides. This is not for us at this stage".

And further down:-

"In our opinion and in the light of the authorities 'interim certificates will not be taken as an approval of the work' and 'interim payments will always be regarded as subject

to such adjustments'. We, therefore, hold that the application should be dismissed".

We consider pertinent to examine anew the relevant facts as set out in the affidavits and emerging from the testimony of Mr. Ioannides, the Co-ordinator-Director of the defendants.

Separate contracts for paper mill, edible oil plant, bituminous materials store, carton factory, aluminium plant, nut and bolt plant and can making plant for the stipulated amount of £2,841,377.- were entered into by the parties to this action. Mr. Neoptolemos Michaelides was the appointed agent of the employer to supervise the execution of the work and to issue certificates and/or pay orders. He was issuing such orders/certificates and payments were being effected accordingly until sometime before the institution of this action. Some of the factories were completed. The employer, for reasons of his own, unconnected with the contractor, sometime before the institution of this action terminated the contract and called upon the contractor not to execute the remaining work.

He referred specifically to each of the contracts, the amount agreed and the certificates and/or pay orders issued by the employer's—defendants'—agent. Additional work agreed and executed was not disputed. He produced the main contracts and the contracts for the additional work. In cross-examination he said:-

"Ε. Τὸ σύνολον τοῦ ποσοῦ τὸ ὁποῖον ἔχει πιστοποιηθεῖ ὡς ὀφειλόμενον καὶ παραμένει ἀπλήρωτο εἶναι £143,989;

Α. Μάλιστα.

Ε. Καί γιὰ ὁλόκληρο αὐτὸ τὸ ποσὸν ὑπάρχουν ἐντάλματα πληρωμῶν τοῦ κ. Ν. Μιχαηλίδη;

Α. Μάλιστα.

Ε. Πόσον εἶναι τὸ ποσὸν τὸ ἀπλήρωτο;

Α. Εἶναι £143,989.-.

Ε. Πέστε μου, αὐτὰ τὰ ποσὰ τὰ ὁποῖα ἀνέφερα, κ. Ἰωαννίδη, τὰ ἔχει μόνον ἡ ἐναγομένη ἑταιρεία καταχωρημένα εἰς τὰ λογιστικά της βιβλία;

Α. Μάλιστα".

In cross-examination he said:-

"Ε. Γιατὶ διεκδικεῖται αὐτὸ τὸ ποσὸν τοῦ 1 ½ ἑκατομμυρίου;

Α. Βάσει τῆς ἐκθέσεως τῶν "Κούπερς καὶ Λάιπραντ" ὅπου φαίνεται ὅτι ἐπληρώθησαν καθ' ὑπέρβασιν.

Ε. Ἐπληρώσετε ποσὰ ἐσεῖς πρὸς τὴν ἐνάγουσαν ἑταιρείαν μεγαλύτερα ἀπ' ἐκεῖνα τὰ ὁποῖα συνεφωνήθησαν διὰ τῶν γραπτῶν συμφωνιῶν ποὺ μᾶς ἀναφέρετε;

Α. "Οχι."

("Q. Is the total amount which has been certified as owed and which is still unpaid £143,989?

A. Yes.

Q. And for the whole of this amount there are payment vouchers by Mr. Michaelides?

A. Yes.

Q. How much is the unpaid amount?

A. It is £143,989—

Q. Tell me, these amounts which I mentioned, Mr. Ioannides, have been recorded only by the plaintiff company in their accounts books.

A. Yes").

In cross-examination he said:-

("Q. Why do you claim this sum of 1 1/2 million?

A. In accordance with the report of Coopers and Lybrand it seems that it was paid in excess.

Q. Did you pay to the plaintiff company sums greater than those which had been agreed by the written agreements which you mentioned to us?

A. No.").

The material part of the extracts of the report of Coopers & Lybrand, a company appointed by the Government for the purpose of an inquiry wholly unconnected with this trial, was before the trial Court. It is on this report that the defendant-employer based the opposition to the application for summary judgment. In this report we read that the contractor's tenders and the amount agreed totalled £2,841,377.- whereas the "prevailing purchase cost" assessed by another company—GEMAC

—was £1,534,000.–. It is admitted by the employer that the amount agreed in the contracts produced by Ioannides himself, and not challenged, is £2,841,377.–.

There is no allegation of fraud or mistake and no ground is alleged against the validity of the said contracts. The contracts produced by Ioannides himself are admitted; the amounts stiputated are admitted; the additional work was agreed; the price thereof was agreed; the amount due is admitted; the certificates and/or pay orders issued by the employer's agent are admitted. It is only alleged that some experts expressed the opinion, long after the signing of the contracts and even after the execution of the work, that the price stiputated in the contracts is higher than the "prevailing purchase cost".

The trial Court in the concluding paragraph of its ruling said that "interim certificates will not be taken as an approval of the work" and "interim payments will always be regarded as subject to such adjustments".

Contracts for works of construction frequently provide that the contractor should carry out and complete the works to the satisfaction or approval of the architect or engineer. In such a case, such approval may, on the proper construction of the contract, be a condition precedent to the contractor's right to payment. This question of construction may turn on considerations similar to those which determine whether the issue of a certificate is a condition precedent, but the mere fact that the architect or engineer is required to express his approval in a certificate is not decisive. The main test seems to be whether the decision of the architect or engineer in granting or withholding approval was intended by the parties to be final. (*Halsbury's Laws of England*, 4th edition, volume 4, paragraph 1194).

In the present case there is no allegation that Mr. Neoptolemos Michaelides had no authority to issue the certificates. On the contrary, £2,044,141.– certified for value of work done were paid.

Before the decision of the Court of Appeal in *Dawnays Ltd.* v. *F. G. Minter Ltd. and Trollope and Colls Ltd.*, [1971] 1 W.L.R. 1205, such certificates, which are usually subject to readjustment,

not only in the final certificate but also in subsequent interim certificates, as a matter of pure valuation may, in the absence of an overriding arbitration clause or a right of the employer to set off the cost of remedying or the value of defective work, be given binding effect until the time for the final certificate, or a subsequent amending interim certificate.

Lord Cairns, L.C., in *Tharsis Sulphur & Copper Co.* v. *Mc-Elroy*, [1878] 3 App. Cas. 1040, at p. 1045, described the certificates in that case as follows:-

> "The certificates I look upon as simply a statement of a matter of fact, namely, what was the weight and what was the contract price of the materials actually delivered from time to time upon the ground, and the payments made under those certificates were altogether provisional, and subject to adjustment or to readjustment at the end of the contract".

Lord Blackburn in the same case said:-

> "They were made out with a view to regulating the advances, and showing how much should be paid on account; not at all as showing how much was to be paid ultimately upon the final account and reckoning".

In *Dawnays Ltd.* v. *F. G. Minter Ltd. and Trollope and Colls Ltd.*, (supra), Lord Denning at p. 1209 said that an interim certificate is to be regarded virtually as cash, like a bill of exchange, and he further held that employers were precluded from raising matters of overvaluation or defective work as a set-off or defence when sued on these certificates.

The decision in *Dawnays* case, however, had a very short life. It was overruled by *Gilbert-Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.*, reported in [1974] A.C. 689, where it was held that no principle such as that enunciated in *Dawnays Ltd.* case existed. The *Gilbert-Ash* case establishes that an interim certificate entitles the contractor to payment of the amount certified but in the absence of clear expression to the contrary in the contract it does not debar the employer from raising any matter available as a set-off or counterclaim in proceedings based upon that certificate.

The majority judgment in the *Gilbert–Ash* case was adopted and applied by the House of Lords in *Mottram Consultants Ltd.* v. *Bernard Sunley & Sons Ltd.*, [1975] 2 Lloyd's Rep. 197, and the rule in *Dawnays* case, namely, that whenever a claim is from an architect's certificate, the defendant must pay first and arbitrate afterwards, was disapproved.

Having reviewed the facts, we find that the plaintiffs' claim is unequivocally admitted by the defendants. The counterclaim they seek to set up is not connected with the contracts. It is not alleged that the work certified was not executed. There is no allegation that any readjustment to the certificates would be claimed by defence or counterclaim. The defendants failed to show that they have a prima facie answer to the plaintiffs' claim, whether by way of defence or counterclaim. The statement of claim though rather laconical, it fully complies with the provisions of 0.19, r.4, as it sets out all the material facts and it does not fall short of the requirements of the Rules. The plaintiffs are entitled to judgment.

For the aforesaid reasons the appeal is allowed and judgment is given for the plaintiffs against the defendants for £148,536.675 mils with costs here and in the Court below.

Appeal allowed. Judgment and order as to costs as above.