THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 644/07

KPMG CHARTERED ACCOUNTANTS (SA) Appellant

and

SECUREFIN LIMITED First Respondent

ING BHF-BANK AKTIENGESELLSCHAFT
(formerly) BHF-BANK AKTIENGESELLSCHAFT Second Respondent

Neutral citation: *KPMG Chartered Accountants v Securefin* (644/07) [2009] ZASCA 7 (13 MARCH 2009)

Coram: HARMS DP, CLOETE, LEWIS, PONNAN and SNYDERS JJA
Heard: 17 FEBRUARY 2009
Delivered: 13 MARCH 2009
Updated:
Summary: Contract – interpretation – evidence – admissibility of evidence, expert or otherwise, to interpret.

ORDER

On appeal from: High Court, Pretoria (Van der Merwe J sitting as court of first instance):

'The appeal is dismissed with costs, including the costs of three counsel.'

JUDGMENT

HARMS DP (CLOETE, LEWIS, PONNAN and SNYDERS JJA concurring)

Introduction

[1] This appeal relates to the existence, validity and terms of an agreement between the appellant and the first respondent. The first respondent as first plaintiff alleged that the appellant had breached the agreement and that it consequently had suffered damages for which the appellant was liable. The claim of the second respondent as second plaintiff was in the alternative to that of the first respondent and was based on delict. It is for present purposes unnecessary to deal with the alternative claim. The appellant denied the agreement and in the alternative alleged that it was void because of error; and in the further alternative it denied the construction placed on the agreement by the

respondents. The court below agreed to decide these and other related issues separately. It found for the respondents and issued a declaratory order accordingly. This appeal is with the leave of the court below.

[2] During January 1998, the SA Mutual Life Assurance Society (also known as the Old Mutual), a life assurance society without shareholders decided to demutualise. This meant that it would become a company with shareholders listed on the Johannesburg Stock Exchange. Its free assets of about R29.3 billion were to be converted into share capital and the shares allocated to its members (policy holders) free of charge. To qualify for a share allocation one had to be a member and the policy had to be in force at the time of demutualisation.

[3] A policy holder wishing to terminate a policy could surrender the policy in which event a surrender value was payable to the insured. In such event the policy holder lost the benefits of the bonuses that might attach to the policy since these were payable only if the policy matured. The policy holder could instead assign the policy to a third party who might be prepared to maintain the policy until it matured by continuing to pay the premiums. The assignee may have been prepared to pay an amount over and above the surrender value as the policy had a higher intrinsic value due to the bonuses that attached to it.

[4] Some Old Mutual endowment policies permitted the insured to amend the policy conditions within certain parameters. The process is referred to as re-engineering. The insured amount could be increased or decreased; the amount of the premiums could be changed; the maturity date could be brought forward or be extended; and the policy could be paid up. There was a limitation: the maturity date could be changed only

to a date that coincided with the anniversary of the policy and this change had to be effected more than a year before the next anniversary. Because of this it was possible to create value by re-engineering the policy purchased – increasing the insured amount and bringing the maturity date forward – thereby obtaining the advantage of earlier maturity and increased bonuses.

[5] Re-engineering requires some special skills and understanding of insurance business. One David Alexander, the moving force behind KNA Insurance & Investment Brokers (Pty) Ltd (hereafter 'KNA'), was such a person. Re-engineering also required large capital outlay. The cost of a single policy could have amounted to millions and normally exceeded the surrender value. Provision had to be made for future and increased premiums.

[6] Alexander, with the assistance of one Stride, made contact with Mr N Kirsch, a wealthy businessman with business interests locally and overseas. Kirsch valued Stride's business acumen; Stride had been his auditor and long-time business associate. Kirsch, who saw the financial benefits of a scheme by which policies are purchased and re-engineered, realised that it would be prudent for tax purposes to create a special off-shore vehicle for this purpose. This vehicle, ultimately, was the first respondent, Securefin Ltd, a company incorporated in Jersey, Channel Islands. Kirsch was prepared to get involved only in a large scheme. For finance he sought the assistance of a bank, the second respondent, known then as BHF-Bank AG.

[7] The bank was prepared to advance money to Securefin for a limited period but required security in the form of a cession of the re-

engineered policies. This by necessary implication meant that the bank would require the assurance that the money advanced was to be used for acquiring re-engineered policies; that the proceeds of the matured policies would cover Securefin's indebtedness; and that the policies would mature before the loan became repayable. It is accordingly not surprising that the bank insisted on a verification or overview procedure by the appellant, KPMG Chartered Accountants (SA) ('KPMG'), one of the big five (subsequently reduced to four) accounting firms in the world. KNA was to act as Securefin's agent in purchasing and re-engineering the policies. The assured profit in the hands of Securefin would be the difference between maturity value and the cost of acquisition, including interest. An added advantage (referred to by Kirsch as 'the cherry on the top'), was that Securefin would have become entitled to the relevant demutualisation shares if the policies vested in Securefin on demutualisation.

[8] Lengthy negotiations between the different parties ensued. There were negotiations between Securefin and the bank; between KNA and KPMG; and also between Securefin, KNA and KPMG. Many drafts were prepared as the proposed structure and contractual relationships around the scheme developed and changed.

[9] Alexander, it later transpired, was an accomplished swindler who manipulated the scheme and allegedly caused the respondents a loss of some US $ 40m. Since KNA was liquidated and Alexander is in prison they wish to recoup their loss from KPMG. Alexander, understandably, was not called by either party as a witness but his absence made him a useful scapegoat.

The procurement contract

[10] On 12 June 1998, Securefin and KNA entered into a procurement contract. It recorded the intention of Securefin to acquire a large number of policies. KNA was appointed as its procurement agent. KNA would be entitled to a commission of five per cent of the aggregate acquisition price. KNA had to ensure that the necessary exchange control approval was in place to reflect that Securefin was acquiring the policies as principal and that it could remit the proceeds of the matured policies in foreign currency used.

[11] The policies that KNA was to acquire had to be capable of being re-engineered and were to be assignable to Securefin. The re-engineered policies were to have 'a maturity date not later than 1 January 2001' unless otherwise stipulated. The relevance of this date will become apparent in due course. The policies had to be fully paid-up, and, if not, the discounted value of future premiums had to be deposited in a bank account for future use. The funds to pay for the policies and the premiums were to be sourced from the bank.

[12] Of critical importance to the case is clause 5, which dealt with the verification procedure and the obligation of Securefin to pay KNA the 'tranche consideration' within five days after the receipt of 'the verification certificate'. Clause 5.1 obliged KNA to deliver each 'policy tranche', together with supporting documentation, to KMPG, the 'verification agent'. A policy tranche was defined in the definition clause as a batch of policies with a 'tranche consideration' of not less than US $500 000, 'verified by the verification agent'. And 'tranche consideration' in turn was defined as the sum of (i) the total acquisition price (ie, the cost incurred by KNA in acquiring the policies) of the policies; (ii) agent's

commission plus VAT; and (iii) all future premiums discounted to present-day values. It is apparent that the purpose of the exercise was to verify the amount due by Securefin to KNA and which the former could draw against the bank loan. It is common cause that the percentage of the agent's commission was later amended but nothing at this stage turns on this.

[13] Clause 5.1 also provided that KPMG had to perform the verification procedures in order to provide the 'verification certificates'. 'Verification certificate' was defined in clause 2.1.15 to mean two certificates: the one was to be given by KPMG to Securefin and the bank and had to be 'in accordance with Appendix C'. The other, for which no form was prescribed, was to be 'a certificate verifying the cost to Securefin of the tranche consideration.'

[14] The next obligation of KPMG was set out in clause 5.2. It had to deliver each policy tranche to Nedbank International to hold in accordance with a custodial agreement. This clause holds no significance for this judgment. Thereafter, under clause 5.3, KPMG had to provide to Securefin and such other party as might be required by Securefin 'the verification certificates in terms of Appendix C.' Appendix C, which was to be prepared by KPMG, did not exist at the time the procurement contract was signed. The payment clause, clause 5.4, required payment by Securefin within five days of receipt by the latter of 'the verification certificate'. In context this did not refer to the appendix C certificate but to the second certificate mentioned in the definition clause.

[15] That was not the only problem with the construction of the document. For instance, it may have been noted that the terms ‘certificate’ and ‘certificates’ were used loosely and interchangeably. But in order to understand the contract it was unnecessary to deconstruct it, as counsel for KPMG sought to do, without submitting that it was void for uncertainty (*Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (SCA) at 561G-562I). The inconsistencies are the result of the changes that were brought about during the preparation of the various drafts. The contract made perfect business sense and anticipated that KPMG as verification agent would perform two functions that are relevant to these proceedings. The first was that it would accept delivery from KNA of a policy tranche consisting of policies with maturity dates of not later than 1 January 2001. Furthermore, it had to verify the cost to Securefin (ie, the amount due to KNA) for each tranche, which required the verification of the tranche consideration. That, in turn, required a verification of the acquisition price, calculating the commission, and verifying the future premiums and discounting them to present-day values.

The verification contract

[16] The signed procurement contract of 12 June was soon sent to KPMG. On 26 June 1998, KPMG sent a letter to Securefin dealing with KPMG’s appointment as verification agents for the acquisition by KNA of Old Mutual policies on behalf of Securefin. It is common cause that this letter amounted to an offer by KPMG to act as Securefin’s verification agent, and it is also common cause that the offer was accepted by Securefin represented by Ms Salkinder, a business associate of Kirsch, who was closely involved with the negotiation of the various contracts in issue. Although prima facie a verification contract, KPMG alleged that

Securefin had failed to prove the contract and, in the alternative, that the contract was void due to error. Before dealing with these defences and the facts on which they were based it is convenient to deal first with the terms of the letter.

[17] Under the heading ‘background information’ the letter recorded the fact of conclusion of the procurement contract which, as annexure A, formed an attachment. The letter mentioned that the procurement contract required that KPMG perform certain procedures and report on certain aspects of the policy acquisitions. It accepted that KPMG was obliged to perform the specific procedures in accordance with clauses 5.1, 5.2 and 5.3 of the procurement contract and contained the further undertaking that KPMG would ‘carry out certain other procedures’ in order to provide Securefin with confirmation of nine facts. In order to ‘satisfy’ these aspects KPMG undertook to perform the ‘detailed audit procedures’ set out in a document compiled by KPMG, namely annexure B to the letter.

[18] The letter also recorded KPMG’s understanding that it had to report to Securefin on the verification of the nine points. A pro forma report that would deal with those aspects was attached as annexure C, which also contained an example of a draw down report which was to be used to verify at a given date the total maturity value of the verified batches in Rand terms. Annexure C did not deal with the certification of the cost to Securefin of the tranche consideration, and did not purport to incorporate the second certificate required in terms of the definition of ‘verification certificate’.

The annotation defence

[19] The first issue that arises from the letter concerns the identification of the correct version of the verification contract. The person at KPMG responsible for the matter, and who had drafted the letter and compiled the annexures for transmission to Securefin, was one Delaney. Although not a chartered accountant he occupied a senior position within KPMG but he had no authority to bind KPMG. He was intimately involved with the development of offer in the letter and had sight of all the draft agreements between Securefin and KNA and was in contact with the bank to determine its involvement and interest. KPMG alleged and Delaney testified that when he received the final procurement contract he noticed an error in the contract. It concerned the maturity date. As mentioned, it provided that KPMG had to ensure that all the policies in a tranche had to mature before 1 January 2001. Delaney thought, so he said, that they had to mature after that date. Assured by Alexander, he said, that the date was an error he made a note on the procurement contract against the relevant clause in these terms: 'x Error – should be not earlier.' He then allegedly attached the annotated procurement contract to the letter.

[20] Securefin alleged that KPMG had failed to ensure that the policies would mature before 1 January 2001 and that amounted to a breach of the contract. The reason for this requirement was, according to Securefin, that the loan facility from the bank was to terminate on 31 January 2001 and was to be paid with the proceeds of the policies. Delaney, while fully aware of the repayment date and that the policies had been ceded as security to the bank, said that he believed that the policies had to mature after that date to enable Securefin to gain the advantage of the demutualisation policies.

[21] KPMG's case on this point went through an evolution process. It accepts that the annotation did not amount to an amendment of the procurement contract and that the verification contract was not void due to a mutual error concerning the date. Its case is that Securefin, relying on the letter without the annotated annexure A, failed to prove that the agreement did not consist of the letter with the annotated annexure.

[22] KPMG's problem was that Delaney was not a credible witness and, as KPMG accepts, his evidence cannot be relied on unless corroborated by objective facts. The problem facing Securefin, who bore the onus of proving its contract, was that the original verification letter signed by Salkinder could not be found. Salkinder, one can accept, did not read annexure A when signing the verification letter since she had no reason to do so: the letter explicitly confirmed that annexure A was the contract concluded between Securefin and KNA. The fact that the letter assumed the obligations placed on KPMG under the procurement contract without qualifications, coupled with the fact that the annotation was on the face of it (and according to Delaney) not intended to amend or qualify that contract, means that this defence had no legal basis.

[23] The defence also had no factual basis. It is unnecessary to consider whether Delaney misunderstood the reason for the clause or whether Alexander had told him that the date was a mistake. The trial court found Delaney's evidence unconvincing on this aspect and dealt with the issue as a matter of probabilities. It found that it was improbable that the copy sent to Securefin contained the annotation. The reasons for this finding were these. Salkinder only became aware of the existence or significance of the annotation during May 2002. During October 1998 she briefed Price Waterhouse, another firm of

accountants, to look into certain problems that had arisen in connection with the performance of the contract. These had nothing to do with the date issue. She handed her file to Price Waterhouse and they copied the whole file. They retained their copy. It did not contain the annotation. During December 1999, Securefin instructed a firm of attorneys to bring liquidation proceedings against KNA. Salkinder again handed them her file and they, too, made a full copy. That copy also did not contain the annotation. It would appear that the attorneys had mislaid the original file. In May 2002, during Delaney's interrogation at the KNA liquidation inquiry, the annotation issue came to the fore for the first time. In summary, the two copies made and kept independently are destructive of Delaney's evidence and make Securefin's version probable.

[24] The high watermark of KPMG's argument on this aspect of the case was that Salkinder's version was questionable. That is not good enough. Her evidence on this aspect was not questioned during the trial and the trial court's finding, unless shown to be wrong, has to stand. There is consequently no ground to interfere with the finding that Securefin had discharged its onus to establish that the annexure A attached to the verification letter did not have the annotation.

The appendix C argument

[25] Another defence concerning the invalidity of the verification contract raised by KPMG was based on the fact that the procurement contract required it to provide a certificate in terms of *appendix* C (not *annexure* C). There was no such appendix. However, it was common cause that the pro forma certificate had to be prepared by Delaney and was not yet ready when the procurement contract was signed. Delaney subsequently prepared annexure C, which was intended by all to be the

pro forma certificate. The letter contained an undertaking by KPMG to provide a certificate in terms of annexure C. It was common cause on the evidence that annexure C was intended to be appendix C. Thus this defence too has no basis.

The iustus error defence

[26] KPMG's main defence was one of iustus error. The error related to the obligation to verify the acquisition price and the issue arose because KPMG apparently failed to verify it independently. It will be recalled that the effect of clause 5.1 of the procurement contract, which KPMG undertook to comply with, required it to provide verification certificates, one of which had to relate to the tranche consideration payable to KNA. This in turn required a verification of the acquisition price, ie, the costs incurred by KNA in acquiring any policy on Securefin's behalf. Instead of independently verifying the price, KPMG accepted KNA's word as to what it had paid. It would appear that Alexander provided KPMG with false information with the result that Securefin overpaid KNA.

[27] KPMG's case in this regard is in summary as follows. Delaney never intended to verify the cost of acquisition since Alexander had told him that it was not possible to verify it. Salkinder knew or ought to have known of KPMG's stance. The duty to verify the cost was not contained in any of the draft procurement contracts that had been perused by Delaney. In particular, the document of 10 June 1998, which he had sent to his advisers in KPMG for comment, did not contain a reference to a certificate dealing with the tranche consideration. He believed that the 12 June procurement contract was the same and he therefore had no reason to read or check it. It follows from this, according to the argument, that Salkinder had a duty to inform Delaney that the signed

copy differed in a material respect from the 10 June copy; she failed to do so; and thus Delaney acted reasonably by assuming that there was no difference between the two documents.

[28] Basic to KPMG's defence of justus error is a finding that Delaney had not read the signed procurement contract before transmitting the verification letter to Securefin because, as Nicholas J said in *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd* 1979 (3) SA 210 (T) at 215A-C:

'The fact that a person has put his signature to a document gives rise to a presumption of fact that he knew what it contained. The reason given (in Hoffmann South African Law of Evidence 2nd ed at 391) is that "people do not usually sign documents without reading them". . . . It would not in my view be at all unusual for a person signing such a document [a standard form of contract] not to read it, whether because of laxity, unwariness, heedlessness, or confidence in the integrity of the [offeror]. In my view, a more satisfactory basis for the presumption of fact is that a person by his conduct in putting his signature to a document admits that he is acquainted with its contents (cf *Knocker v Standard Bank of SA Ltd* 1933 AD 128). The admission is not of course conclusive, but it is sufficient to establish that fact prima facie.'

[29] As mentioned, Delaney was not a credible witness and, absent material corroboration of his version that he had not read the letter, the defence cannot succeed. The only corroboration that counsel for KPMG could refer to was that Delaney had failed to verify the acquisition price. Although consistent with the version that he had not read the contract, his failure is equally consistent with a failure to comply with the terms of the contract.

[30] It is unlikely that Delaney had not read annexure A before attaching it to his letter. He was on his own version told that the 10 June

copy was not final in form. Indeed, he had to change his draft letter after receipt of the signed contract. His letter specifically referred to clauses 5.1 to 5.3 of the procurement contract and they were different from those contained in the 10 June draft. Although the acquisition price verification was not all that obvious because it required a reference to the definition clause, which had changed on the 12 June version, the definition of 'verification certificate' itself stood out because the amendment did not follow the paragraph formatting of the rest of the document. The responsible partner, one De Villiers, who was the directing mind of KPMG and who signed the letter on its behalf did not say that he had not read the attachments to the letter. If he had not done so, he would have been reckless.

[31] There is, furthermore, corroboration for a finding that Delaney had read the contract at the time and fully understood KPMG's obligation to verify the acquisition consideration. Soon after the conclusion of the verification contract (on 30 June 1998) a dry or test run was undertaken during which KPMG not only certified the total guaranteed maturity value in accordance with annexure C, but also certified the total purchase price of the tranche in the same document. This was unacceptable to Securefin and KPMG consequently issued two certificates, one reflecting the verification of the total guaranteed maturity value and the other the total purchase price, both without qualification. Thereafter and for more than a year KPMG issued, in addition to the annexure C certificates, 22 further verification certificates, certifying on the face thereof the total purchase price of each tranche in SA Rands. These certificates were, however, accompanied by a letter qualifying them, something to which I shall revert in another context. Except for the usual 'blame it on Alexander'- excuse, there is no credible explanation why

these certificates were issued if Delaney had not understood that KPMG was contractually bound to issue them.

[32] During November 1998, Delaney had occasion to consider the terms of the procurement contract carefully. He was using it as a precedent for another engagement to verify the purchase of re-engineered policies by Alexander, who had surreptitiously created another vehicle to divert business from Securefin. Delaney compared the two documents clause by clause and noted the differences. He noticed the relevant clause and made an annotation against it to the effect that KPMG had not in fact verified the tranche costs. Although recognising the contractual obligation and the failure to comply, he did nothing. In particular, he did not alert Securefin to the alleged error in the contract.

[33] His inaction may have been due to his professed belief that the duty to verify did not require the ascertainment of the correctness of the tranche consideration and that KPMG was instead entitled to rely in this regard on the information given to it by KNA. This may explain the fact that, as mentioned, he did issue certificates albeit that they were qualified. This indicates that Delaney knew of the obligation but misconceived its ambit.

[34] As mentioned, KNA was liquidated and Delaney testified at the liquidation inquiry during May 2002. He was asked about KPMG's failure to verify the acquisition price in the light of the provisions of the contract. He had no explanation. He did not express surprise at the existence of the clause. He did not say that he had been unaware of the requirement. His explanation four years later at the trial was that he was

too perplexed at the inquiry to realise that the clause should not have been in the contract.

[35] It is in this regard significant to ascertain how the error defence developed. During consultation in preparation for trial and after a minute analysis of the paper trail, which was painfully replicated during the trial, the explanation that KPMG had never intended to verify the acquisition price, and that Delaney had not read the procurement contract at the time, apparently sprang to mind. It resulted in an amendment to the plea. This was about eight years after the event. One cannot but conclude that Delaney contrived his evidence to fit the lawyers' points.

[36] In the first drafts of the verification letter KPMG indicated it would not verify the acquisition costs. Significantly, that statement was omitted from later drafts and in the final letter. Counsel proffered an explanation for the change (namely that it was no longer necessary to state because it was implicit in the whole arrangement) but the explanation appears to me to be too subtle to accept and is, once again, based on counsel's reading of the exhibits and not on Delaney's evidence.

[37] A conclusive indication that the error defence was an afterthought appears from annexure B to the letter, which contained the 'verification procedures' devised by KPMG and which formed part of its undertakings under the letter. KPMG undertook to 'ensure' that the calculated draw down value (ie, the amount that was to be drawn from the bank) was the lesser of the total purchase price of the policies and 80 per cent of the calculated total guaranteed maturity value. (The latter had to be certified in accordance with annexure C.) This requirement arose from the provisions of the loan agreement since the bank was prepared to

advance only the amount so calculated. This Delaney surely knew. KPMG could not have complied with this obligation without ensuring what the total purchase price of the policies was. The court below was accordingly correct when it held that KPMG intended to verify the acquisition costs and that the late amendment to the procurement contract did not add any substantive obligation that had not been envisaged by the parties.

The meaning of 'verify'

[38] Much of the evidence dealt with the interpretation of the verification contract. Indeed, each party called an expert on the issue and they testified for about fourteen days on the interpretation of the contract. The factual witnesses, too, spent most of their time dealing with interpretation issues. The parties were able to create a record consisting of 6600 pages of evidence and exhibits. It is difficult to understand why the trial judge permitted the evidence or the cross-examination or overruled the objection to the leading of some of the evidence. Obviously, courts are fully justified in ignoring provisionally objections to evidence if those objections interfere with the flow of the case. It is different if a substantive objection is raised which could affect the scope of the evidence that will follow. In such a case a court should decide the issue and not postpone it. It is accordingly necessary to say something about the role of evidence and, more particularly, expert evidence in matters concerning interpretation.

[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict,

add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corp* [1985] ZASCA 132 (at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2008 (6) SA 654 (SCA) para 7.)

[40] Trollip JA in *Gentiruco AG v Firestone (SA) (Pty) Ltd* 1972 (1) SA 589 (A) at 617F-618C dealt with the admissibility of expert evidence in interpreting a document (a patent specification in that case) and quoted with approval from a speech of Lord Tomlin in *British Celanese Ltd v Courtaulds Ltd* (1935) 52 RPC 171 (HL):

'The area of the territory in which in cases of this kind an expert witness may legitimately move is not doubtful. . . . He is entitled to explain the meaning of any

technical terms used in the art. . . . He is not entitled to say nor is counsel entitled to ask him what the [document] means, nor does the question become any more admissible if it takes the form of asking him what it means to him as an [expert].'

Lord Tomlin spelt out the disadvantages of allowing expert evidence on interpretation:

'In the first place time is wasted and money spent on what is not legitimate. In the second place there accumulates a mass of material which so far from assisting the Judge renders his task the more difficult, because he has to sift the grain from an unnecessary amount of chaff.

In my opinion the trial Courts should make strenuous efforts to put a check upon an undesirable and growing practice.'

That was in 1935, but the chaff is still heaping up, the undesirable practice keeps growing and courts make no effort to curtail it. An expert may be asked relevant questions based on assumptions or hypotheses put by counsel as to the meaning of a document. The witness may not be asked what the document means to him or her. The witness (expert or otherwise) may also not be cross-examined on the meaning of the document or the validity of the hypothesis about its meaning. Dealing with an argument that a particular construction of a document did not conform to the evidence, Aldous LJ quite rightly responded with 'So what?' (*Scanvaegt International A/s v Pelcombe Ltd* 1998 EWCA Civ 436). All this was sadly and at some cost ignored by all.

[41] The debate about the meaning of the verification letter imploded during oral argument before this court and no one sought to rely on the expert evidence. KPMG accepted that if it was bound by the verification contract, it was obliged to verify the tranche consideration by ensuring

that it was accurate; and that it could not comply with that obligation by relying on information provided by KNA.

[42] The final argument raised by KPMG concerned its right to qualify a verifying certificate. It has been mentioned that although KPMG had certified the acquisition costs it added a qualification with a statement that it had not verified the tranche consideration because it had relied on KNA for the information and that Alexander, with these embarrassing documents in hand, apparently changed them and transmitted unqualified reports to Securefin. This issue did not arise on the pleadings as they stand and was not considered by the trial court. Apart from the fact that the submission amounts to a contradiction in terms, this issue is moot in view of the findings in the next section of this judgment.

[43] The trial court dealt with a large number of tacit terms of the verification contract and found that the terms alleged by the plaintiffs were indeed terms of the verification contract. Since KPMG did not pursue these issues on appeal it is unnecessary to deal with them. I should, however, point out that once again much inadmissible evidence was led in this regard. Whether a tacit term can be inferred depends on the interpretation of the document and not on evidence.

The amendment

[44] On or soon after 4 August 1998, KPMG received a letter purportedly signed by Salkinder on behalf of Securefin. One of the aspects covered by the letter was an instruction that the completed reports (the certificates) had to be handed to KNA for onward transmission to Securefin and the bank. This instruction conflicted with

the terms of the verification contract which required that KPMG 'report direct' to Securefin. KPMG alleged that this letter amended the verification agreement while Salkinder denied that she had written the letter. The relevance of the dispute is this: KPMG handed the verification certificates to Alexander who apparently amended them to suit his dishonest purposes and then sent them on to Securefin and the bank. If the letter did not amend the verification contract, the failure of KPMG to report directly to Securefin was a breach of the verification contract.

[45] The court below, while doubting that the letter had emanated from Salkinder, dismissed the defence by holding that KPMG had not accepted the offer. KPMG argued that the finding was cynical but in my judgment it was fully justified. Paragraph 1 of the letter required KPMG first to issue all future draw down reports in a particular format and, second, to hand the reports to KNA for onward transmission to the relevant parties. According to Delaney, KPMG was not prepared to accept the first obligation but it accepted the second by transmitting reports in another format to KNA for onward transmission. This evidence established that KPMG had failed to accept the offer in its terms. The answer of counsel was that the offer was divisible. That is not so. The letter contemplated that certificates in the format prescribed in the letter had to be sent to KNA. This did not entitle KPMG to send other certificates to KNA on the basis that it had accepted part of the offer. It follows that this defence was correctly dismissed.

Conclusion and order

[46] In the result the judgment of the court below should be upheld and the appeal dismissed. The costs of three counsel are in the circumstances appropriate. The following order is made:

‘The appeal is dismissed with costs including the costs of three counsel.’

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L T C HARMS
DEPUTY PRESIDENT

For Appellant:	A O CooK SC L N Harris SC
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