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Case No: 2008 Folio 1300
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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2009

Before :

Mr. Justice Teare

- -

Between :

JOHN FORSTER EMMOTT	**Claimant**
- and -	
MICHAEL WILSON & PARTNERS LIMITED	**Defendant**

MICHAEL WILSON & PARTNERS LIMITED	**Claimant**
- and -	
JOHN FORSTER EMMOTT	**Defendant**

- -
- -

Philip Shepherd QC and Steven Thompson (instructed by **Michael Robinson**) for **John Forster Emmott**
Anthony Boswood QC, Joseph Carney and Anna Dilnot (instructed by **Holman Fenwick and Willan**) for **Michael Wilson & Partners Limited**

Hearing dates: 17 December 2008

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Judgment

Mr. Justice Teare:

1. There are two applications before the Court which have been brought by the Claimant, Mr. Emmott. The first, pursuant to section 42 of the Arbitration Act 1996, is for an order requiring the Respondent ("MWP") to comply with a peremptory order made by an arbitration tribunal. The application is made with the permission of the tribunal and upon notice to MWP. The second, pursuant to section 44 of the Arbitration Act 1996, is for a freezing order. That application is also made with the permission of the tribunal and upon notice to MWP. There is also an application before the Court which has been brought by MWP, pursuant to section 67 of the Arbitration Act, challenging an award of the arbitration tribunal as to its substantive jurisdiction.

2. The court heard the applications on 17 December 2008. The argument was not finished until 5pm. Although counsel for Mr. Emmott hoped that the court would be able to give judgment on the application on the last day of term, 19 December, that was not possible because of my judicial commitments on 18 and 19 December. On 22 December 2008 I informed counsel that I had decided to grant the relief sought by Mr. Emmott and to refuse the relief sought by MWP. These are the reasons for my decisions.

3. MWP, a company incorporated in the British Virgin Islands, provides legal services in Kazakhstan. Mr. Michael Wilson is a director and was (at least until 23 February 2008) a shareholder of MWP. Mr. Emmott was a partner in the English firm of solicitors, Richards Butler. By an Agreement dated 7 December 2001 between MWP and Mr. Emmott it was agreed that Mr. Emmott would join MWP as a director and shareholder. Their strategy was to create the leading independent legal and business consultancy in Kazakhstan. It was agreed that in effect MWP and Mr. Emmott would function and operate as a quasi-partnership and that the parties would have and observe the usual partnership obligations and duties to each other. Mr. Emmott was to have a 33% profit sharing interest and, after contributing £225,000, was entitled to receive a 33% shareholding in MWP. Clause 5.2 provided as follows:

> "This Agreement shall be governed by and interpreted in accordance with the laws of England and Wales and all and any disputes shall be referred to and subject to arbitration in London before a tribunal of three arbitrators with one arbitrator to be appointed by each Party and the chairman of the tribunal to be appointed by the president of the Law Society."

4. An arbitration was commenced by MWP pursuant to the provisions of clause 5.2 in August 2006. Mr. Emmott counterclaimed against MWP. The arbitration hearing commenced on 10 November 2008. It was adjourned on 28 November 2008 and will resume on 13 January 2009. The arbitrators are Mr. Christopher Berry, Lord Millett and Ms.Val Davies. Before the hearing was adjourned the tribunal had heard evidence from Mr. Wilson and from Mr. Emmott.

<u>The procedural history</u>

5. The peremptory order which forms the subject of Mr. Emmott's application pursuant to section 42 of the Arbitration Act concerns what have been described as "the Steppe

shares". They are 9,930,000 shares in Steppe Cement, a company registered in Labuan, Malaysia and listed in London on the AIM. Mr. Emmott says that these shares were acquired by MWP in lieu of fees owed to MWP. He counterclaims 33% of the shares in MWP. The Steppe shares are a component of the value of the shares in MWP. By way of an amendment to his counterclaim he claims 27% of the Steppe shares pursuant to an agreement alleged to have been made in February 2005. Mr. Emmott says that the agreement reflected the fact that when he joined MWP in 2002 part of the legal work which generated the fees in lieu of which the Steppe shares were provided had been done before he had joined MWP.

6. The peremptory order was made by the tribunal on 27 November 2008. It has a long history. By its 8th Procedural Order on 26 September 2008 the tribunal made a number of orders one of which was:

> "That [MWP] is directed (a) to procure that its 27% shareholding in 9,930,000 Steppe shares, which is held according to the oral evidence of Mr. Wilson, nominally by HSBC Global Custody Nominees (UK) Limited (HSBC) is to be held to the order of Christopher Berry, the Chairman of the Arbitral Panel and (b) to confirm in writing to the Arbitrators that such instructions have been accepted by HSBC."

7. The time for compliance was 10 October 4pm. The reasons for the tribunal's order with regard to the Steppe shares was described as follows:

> "A central issue in this Arbitration surrounds the 9,930,000 Steppe shares. It is only their value (at one time around £30m. and now at least £15m.) which can have justified the vast amount of legal cost expended by the Claimant in various jurisdictions and in various applications in this jurisdiction. This is so whether or not the Respondent's new proprietary claim to 27% of the Claimant's Steppe shareholding is successful. Nevertheless, Mr. Wilson of the Claimants expressly refused, before the Arbitrators, to disclose how 73% of the Steppe shareholding is held. He informed the Arbitrators that all the Steppe shares are pledged either to HSBC or Kazholdings Incorporated "KHI". In relation to KHI he was unable to tell the Arbitrators the extent of the Claimant's liability, save that it was "north of $5m." He said that he was associated with KHI but he expressly refused to explain who are the beneficial owners and ultimate controllers of that company.
>
> Accordingly there must be real suspicion that Mr. Wilson declines to provide information so as to *"protect"* the Claimant's Steppe shareholding from the consequences of any Order the Respondent may obtain in the Arbitration."

8. MWP provided to the tribunal certain correspondence apparently passing between MWP and Kazholdings Incorporated ("KHI").

9. Counsel for Mr. Emmott told me that Mr. Wilson controlled KHI. That appeared to be based upon a number of matters. In particular, Mr. Wilson had told the tribunal that he was associated with KHI but refused to say who were the beneficial owners and ultimate controllers. Further, as noted by Mr. Emmott's solicitor in his witness statement dated 11 December 2008, Mr. Wilson has referred to KHI as "my other entity" and has referred to loans from KHI to MWP as "my generous personal advances". Mr. Wilson has stated in his witness statement dated 16 December 2008 that he is not a director, officer or shareholder of KHI. He has said that KHI is not a vehicle for and creature of MWP and that whilst he "may indirectly have some knowledge of its affairs and ability to express an opinion on its decisions, that has nothing to with MWP." Mr. Wilson's statement did not explain what his relationship with KHI was and so I asked MWP's counsel what it was. I was told that Mr. Wilson had "some ultimate control over it" but was later told by counsel that his instructions were that Mr. Wilson "does not control KHI". It seems to me that there is a very strong case that, as counsel for Mr. Emmott told me, Mr. Wilson controls KHI. This should be borne in mind when reading the correspondence between MWP and KHI.

10. By a letter dated 6 October 2008 MWP requested KHI to arrange for the "residual net interest" in relation to 27% of the Steppe shares to be held to the order of the chairman of the tribunal. It is to be noted that although Mr. Wilson had told the tribunal that the shares were pledged either to KHI or HSBC there was no letter written on or about 6 October 2008 to HSBC.

11. By a letter dated 9 October 2008 KHI required confirmation from MWP that the chairman would hold the shares subject to the prior rights of KHI and HSBC and that the tribunal would not seek to interfere with or render unenforceable those rights. It was said that 27% of the Steppe shares were held in the name of HSBC Global Custody Nominees (UK) Limited in account no. 932601. A copy of a document from Compushare, the registrar of shares in Steppe Cement, appeared to show that a larger number of shares were held in that account. Agreements between KHI and MWP were also exhibited including a fixed and floating charge and a loan agreement signed on behalf of KHI by Mr. Wilson's wife.

12. By a letter dated 10 October 2008 KHI informed MWP that legal advice had been taken and that it was considered that MWP would be in breach of a number of agreements if it were to allow 27% of the Steppe shares to be held to the order of the chairman of the tribunal. KHI said that it was prepared to consider providing the required consent but only on written confirmation by the chairman that the shares were held subject to all existing rights and by HSBC that it consents.

13. By a letter dated 28 October 2008 KHI wrote to HSBC Private Bank (Jersey) Limited requesting their agreement to holding the Steppe shares registered in the name of the bank's nominee to the order of the chairman of the tribunal.

14. The arbitration hearing began on 10 November 2008. The tribunal made a 10th Procedural Order that day. They recorded that they had been informed that MWP had made and was continuing to make efforts to comply with the 8th Procedural Order relating to the Steppe shares. Mr. Emmott sought a peremptory order. The tribunal decided to issue a fresh order reflecting changes which had been made in correspondence as follows:

> "That by 4.30 pm on Friday 14 November 2008, the Claimant must take all steps within its power to procure a letter from HSBC to the Tribunal agreeing that it holds all the Claimants' shares in Steppe to the order of the Tribunal, subject to any outstanding charges in favour of HSBC or any third party."

15. An 11th Procedural Order was made on 20 November 2008. The tribunal noted that MWP had provided the tribunal with no evidence of what approaches, written or otherwise, had been made to HSBC Global Custody Nominees (UK) Limited, despite the fact that the original Order in relation to the manner in which 27% of the Steppe shares should be held had been made on 26 September 2008. The tribunal stated that the 10th Procedural Order had not been complied with and, following representations by Leading Counsel for MWP, reinstated the order made in the 8th Procedural Order as follows:

> "The Claimant is directed (a) to procure that its 27% shareholding in 9,930,000 Steppe shares, which is held according to the oral evidence of Mr. Wilson, nominally by HSBC Global Custody Nominees (UK) Limited (HSBC) is to be held to the order of Christopher Berry, the Chairman of the Arbitral Panel and (b) to confirm in writing to the Arbitrators that such instructions have been accepted by HSBC.
>
> This Order is to be complied with by 21 November 2008."

16. By letter dated 26 November 2008 HSBC Private Bank wrote to KHI saying that that it was unable to consider the requests "in the absence of instructions to do so".

17. On 27 November 2008 the tribunal made its 12th Procedural Order. Counsel for Mr. Emmott had renewed his application for a peremptory order. Leading Counsel for MWP opposed the application on several grounds. In particular it was said that section 38(4) of the Arbitration Act 1996 did not give the tribunal power to make the order; that the strength of Mr. Emmott's claim to the Steppe shares was non-existent and that the balance of convenience was against the making of the order given that MWP was a trading company which could meet any award made against it and that Mr. Emmott may have no available assets and had admitted "serious defalcations" in his evidence.

18. The tribunal was evidently not persuaded by these arguments for it decided that it was appropriate to make the peremptory order which had been sought. It repeated the order it had made on 26 September and 20 November but did so "in peremptory terms, to be complied with by 4.30pm on Friday 5 December 2008." The tribunal referred to the reasons given in support of the order made on 26 September and added the following:

> "It is appropriate, in our view, to make the Order in peremptory terms. The Steppe shares form the most valuable asset of the Claimant company on the evidence before us. Mr. Emmott claims not only the Steppe shares but also a 33% shareholding of the issued share capital of the Claimant. Mr. Wilson of the Claimant has been evasive in his evidence before us concerning

> the manner in which the Claimant's own share capital has been dealt with and we have taken the view that it has been perfectly within Mr. Wilson's influence or control to bring about a situation in which the Steppe shares are secured as we have directed. We have made it clear throughout that we accept that such shares should be held to our order subject to all existing liabilities secured on them. The Claimant has not suggested that it is put under any disadvantage by ensuring compliance with our Order."

19. It is clear from that order and the reasons for it that the tribunal did not view the correspondence between MWP and KHI as a reason why Mr. Wilson was unable to bring about the securing of the shares in the manner required by the tribunal. The tribunal had had the benefit of hearing Mr. Wilson give evidence which I have not. It seems likely that the tribunal regarded Mr. Wilson as being in control of KHI.

20. I was informed by counsel for Mr. Emmott that it was made clear on 27 November 2008 that Mr. Emmott would apply in writing for permission to seek an order pursuant to section 42 of the Arbitration Act as soon as the time for compliance had expired. A transcript of the hearing to which I was referred showed that counsel for MWP stated that "we" would wish to make submissions to the tribunal on that matter.

21. By a letter dated 1 December 2008 MWP wrote to KHI attaching copies of the 11th and 12th Procedural Orders and asking KHI to procure compliance with the peremptory order.

22. By a letter dated 5 December 2008 KHI informed MWP that KHI could not accede to the request because "this is clearly not in our best interests, and also for the important reasons set out in the HSBC letter."

23. At 1700 on 5 December 2008 Mr. Emmott's solicitor wrote to the tribunal seeking its permission to make an application under section 42 of the Arbitration Act.

24. At 1711 MWP's solicitor sent an e-mail to the tribunal attaching the above correspondence between MWP, KHI and HSBC Private Bank dated 26 November, 1 December and 5 December 2008.

25. At 1139 on 8 December 2008 MWP's solicitors sent an e-mail to the tribunal stating that they were preparing a written response.

26. At 1144 on 8 December 2008 the tribunal e-mailed its 13th Procedural Order. That order noted that the 12th Procedural Order had to be complied with by 5 December 2008 and said:

> "That Order not being complied with and the Claimant having indicated, by its solicitors' e-mail of 5 December 2008, with its annexures, that it is not in a position to comply with the Order, the Arbitrators now, and hereby, give the Respondent permission, pursuant to s.42 of the Arbitration Act, to apply to the Court for such Order as the Court may see fit to ensure compliance with the Arbitrators' peremptory Order."

27. It is to be observed that in granting that permission the tribunal did so in full knowledge of what HSBC Private Bank and KHI had said on 26 November and 5 December 2008. The tribunal must have thought that such statements did not provide a good reason for MWP not complying with the peremptory order.

28. The application for an order pursuant to section 42 of the Arbitration Act 1996 was issued on 11 December 2008.

29. On 12 December 2008 MWP's solicitor asked the tribunal whether the members of the tribunal had read the solicitor's e-mail timed at 1139 on 8 December.

30. On 15 December 2008 the chairman of the tribunal replied stating that the tribunal had seen the solicitors' e-mail of 5 December attaching correspondence but had not seen the e-mail timed at 1139 before despatch of the 13th Procedural Order.

31. I was informed by counsel that both KHI and HSBC were given notice of the application for an order pursuant to section 42 of the Arbitration Act 1996.

The challenge to the jurisdiction of the tribunal under section 67 of the Arbitration Act 1996

32. Counsel for MWP submitted that the tribunal had no jurisdiction in respect of the 2005 agreement concerning 27% of the Steppe shares. He had made the same submission before the tribunal. By an award dated 19 November 2008 the tribunal held that it had jurisdiction. MWP challenged that award pursuant to section 67 of the Arbitration Act.

33. I shall deal with MWP's challenge to the jurisdiction but I am not persuaded that, even if succeeded, it would undermine the peremptory order. Mr. Emmott counterclaims a 33% interest in MWP shares. The Steppe shares must be a major part of the value of those shares and so the peremptory order can be supported as an order in support of that counterclaim. This is reflected in the reasons given by the tribunal for its order made on 26 September:

> "This is so whether or not the Respondent's new proprietary claim to 27% of the Claimant's Steppe shareholding is successful."

34. The agreement dated 7 December 2001 between Mr. Emmott and MWP has a wide scope. It provides for Mr. Emmott to join MWP as a director and shareholder; clause 1.1. It also provides for Mr. Emmott and MWP to have a business relationship and association; clause 1.2. Finally, it states that the parties have agreed that "in effect" MWP will function and operate as a quasi-Partnership between them and the Parties shall have and observe the usual partnership obligations and duties to each other; clause 1.4.

35. The arbitration clause is expressed in wide terms:

> "all and any disputes shall be referred to and subject to arbitration in London before a tribunal of three arbitrators."

36. The principles governing the construction of arbitration clauses are now to be found in *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep. 254. At paragraph 13 Lord Hoffmann said:

> "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrators' jurisdiction."

37. Mr. Emmott's case is that the Steppe shares were received by MWP in lieu of fees owed to MWP, that some of the work which generated those fees was done before he joined MWP and that the agreement he alleges was reached in 2005 was to resolve the question of to what, in those circumstances, his entitlement to a 33% profit sharing interest in MWP fees entitled him with regard to the Steppe shares.

38. Thus, not only is the 2001 agreement a part of the background or factual matrix relevant to the construction of the alleged 2005 agreement but, on Mr. Emmott's case, it also explains why MWP agreed to Mr. Emmott having 27% of the Steppe shares. The counterclaim based on the alleged 2005 agreement therefore arises out of the relationship between Mr. Emmott and MWP into which they entered by reason of the 2001 agreement.

39. Applying Lord Hoffmann's assumption Mr. Emmott and MWP are likely to have intended that the counterclaim would be determined by the tribunal appointed pursuant to the 2001 agreement. The next stage of Lord Hoffmann's approach to the construction of arbitration clauses is to see whether there is anything in the language of the clause which makes it clear that the counterclaim was intended to be excluded from the arbitrator's jurisdiction. There are no such words.

40. Thus, applying Lord Hoffmann's approach to the construction of arbitration clauses, the tribunal has jurisdiction in respect of the counterclaim to 27% of the Steppe shares.

41. Counsel for MWP submitted that that conclusion would be wrong. He said that the 2001 agreement was a bipartite agreement (between Mr. Emmott and MWP) whilst the alleged 2005 agreement was a tripartite agreement (between MWP, Mr. Wilson and Mr. Emmott), that the counterclaim therefore arises out of a subsequent and different contract from the 2001 agreement, that there is nothing in the 2001 agreement which entitled Mr. Emmott to take divisible profits of MWP in specie, whether in the form of Steppe shares or anything else, and that the alleged 2005 agreement was therefore free standing.

42. I am not persuaded that the 2001 agreement was in substance a bipartite and not a tripartite agreement. It is true that in form the 2001 agreement is between Mr. Emmott and MWP. But in substance it is of wider scope than that. One aspect of that wider scope is that, pursuant to its terms, Mr. Emmott becomes entitled to a 33% shareholding in MWP. That requires the consent of the shareholders of MWP. Clause

2.3 expressly stated that "MWP *and its shareholders* shall cause the necessary shares to be issued or transferred to Mr. Emmott or his nominee" (emphasis added).

43. Nor am I persuaded that the counterclaim in substance arises out of a subsequent and different contract from the 2001 agreement and so is a free standing agreement. It is true that in form the 2001 agreement does not entitle Mr. Emmott to 27% of the Steppe shares whilst the alleged 2005 agreement does. But the reason that Mr. Wilson was, it is alleged, willing to agree that Mr. Emmott should have 27% of the Steppe shares is that under the 2001 agreement he was entitled to a 33% profit sharing interest in MWP and the Steppe shares had been received in lieu of fees owed to MWP, though in part for work done before Mr. Emmott joined MWP. Thus in substance the counterclaim arises out of the 2001 agreement.

44. It was said that analytically the 2005 agreement is no different from an agreement in 2005 for the purchase of a used car by Mr. Emmott from MWP. I assume that the hypothetical used car was not to be used in the course of the relationship and association created by the 2001 agreement. But even so I do not regard the used car purchase as being analogous to the 2005 agreement. The explanation for the transfer of the used car is the purchase price agreed to be paid by Mr. Emmott in 2005. But the explanation for the transfer of 27% of the Steppe shares is Mr. Emmott's entitlement under the 2001 agreement to a 33% profit sharing interest in MWP.

45. For these reasons I consider that the tribunal was correct to conclude that it had jurisdiction in respect of the alleged 2005 agreement. I must therefore dismiss MWP's challenge to the jurisdiction of the arbitrators.

The application under Section 42 of the Arbitration Act 1996

46. Section 42(1) provides that "the court may make an order requiring a party to comply with a peremptory order made by the tribunal." A party seeking such an order required the permission of the tribunal; section 42(2)(b). Certain conditions must be satisfied before the court may exercise the power. The applicant must have exhausted any available arbitral process in respect of failure to comply with the tribunal's order; section 42(3). The person to whom the tribunal's order was directed must have failed to comply with it within the time specified; section 42(4).

47. It was submitted in writing on behalf of Mr. Emmott that the proper approach of the court to the exercise of its power or discretion under section 42 of the Arbitration Act 1996 is to enforce a peremptory order save in an exceptional case. In oral submissions the submission was put a little differently. It was said that the court should only decline to enforce a peremptory order if the court is satisfied that the peremptory order falls outside the generous ambit of orders that a tribunal could properly make or where there has been a radical change of circumstances such that it would be unjust for the court to make the requested order. In support of those submissions it was said that judicial interference with the arbitral process should be kept to a minimum, that the proper role of the court is to support the arbitral process rather than to review it and that the circumstances in which the court can properly interfere with or review the arbitral process are limited to those within sections 67-69 of the Arbitration Act 1996 (challenges to the substantive jurisdiction of the arbitral tribunal, challenges based upon a serious irregularity and appeals on points of law).

48. By contrast it was submitted on behalf of MWP that the court must in every case satisfy itself that the case is a proper one for the order which is sought; it must not regard itself as a mere "rubber stamp" in respect of orders made by the tribunal. Thus, in the present case the court itself must be satisfied that MWP can perform that which the tribunal has ordered MWP to perform. In support of that submission reliance was placed on the circumstance that the making of the order had potentially serious consequences for MWP because penalties for contempt would be available.

49. In my judgment the dispute revealed by these contrasting submissions is to be resolved by having regard to the General Principles set out in section 1 of the Arbitration Act 1996, to the duties of the tribunal in section 33 of the Act and to the duties of the parties in section 40 of the Act. Those three sections have been described in the 2001 Companion Volume to *Commercial Arbitration by Mustill and Boyd* 2nd ed. 2001 at pages 23-37 as "three pillars" of the Act.

50. Section 1 provides:

> "General Principles
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly-
>
> (a) the object of an arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
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> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
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> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

51. Section 33 provides:

> "General duty of the tribunal
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> (1) The tribunal shall-
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> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable t the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings. In its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

52. Section 40 provides:

> "General duty of parties
>
> (1) the parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
>
> (2) This includes-
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> (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and
>
> (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45).

53. Thus disputes between the parties to an arbitration agreement are to be resolved by the tribunal; section 1, general principle (a). The tribunal has a general duty to resolve such disputes fairly; section 33. One of its powers to assist it in so doing is conferred by section 38(4), namely, to give "directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings - for the inspection, photographing, preservation or custody or detention of property by the tribunal, an expert or a party". If such an order is made the party to whom it is directed has a general duty to comply with it; section 40. The court is exhorted by section 1, general principle (c), not to intervene in the arbitration save where permitted by the Act. If a party fails to comply with a peremptory order of the tribunal, the court is permitted to intervene in the arbitration by making an order that the party comply with the order; section 42. In the particular context of section 38(4) one would expect that the proper role of the court would be to support the tribunal by making the requested order. Indeed, more generally, given general principle (a) and the exhortation in general principle (c) one would expect the Court to support, rather than frustrate, the tribunal.

54. This approach is supported by the Report of the Departmental Advisory Committee on the Arbitration Bill when commenting upon general principle (c) at paragraphs 20-22.

> "The limitation on the right of appeal to the Courts from awards brought into effect by the 1979 Arbitration Act, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach and it seems to us that it should be enshrined as a principle in the Bill."

55. I infer that general principle (c) was intended to give effect to that approach.

56. That approach is also supported by *Mustill and Boyd* who observe that general principle (c) has been described as expressing the concept of "judicial minimalism"; see p.28 of the Companion Volume.

> "The principle is well recognised, and is an essential element in the scheme of the Act, as a counterpart to the wide powers entrusted to the arbitrator and the explicit encouragement to use them with boldness and imagination. Unnecessary meddling by the court both falsifies the trust which the legislature and the parties have placed in the arbitrator and discourages arbitrators from employing them boldly in the future. If the courts do not back up the arbitrator even when faced with the temptation to put right a procedural decision which it would itself have made differently the Act will be a failure."

57. To the same effect is an earlier passage at p.25.

> "The general principles, read with sections 33 and 40, will now require the courts to recognise that an arbitrator who has acted fairly but firmly is entitled to support; and this will in turn fortify the arbitrator to act resolutely without apprehension about needless meddling by the court."

58. I therefore accept the submission made on behalf of Mr. Emmott that judicial interference with the arbitral process should be kept to a minimum, that the proper role of the court is to support the arbitral process rather than review it and that the circumstances in which the court can properly interfere with or review the arbitral process are limited to those within sections 67-69 of the Arbitration Act 1996 (challenges to the substantive jurisdiction of the arbitral tribunal, challenges based upon a serious irregularity and appeals on points of law).

59. I also accept, as submitted on behalf of MWP, that section 42 confers a discretion upon the court and that it would be inconsistent with the existence of a discretion that the court should act as a rubber stamp on orders made by the tribunal. However, I do not accept that the court must in every case satisfy itself that the case is a proper one for the order which is sought if by that is meant that the court must review the decision made by the tribunal and consider whether the tribunal ought to have made the order in question. The reasons that I do not accept that submission are as follows:

    i) It is inconsistent with general principle (c) in the context of sections 33 and 40 of the Act.

    ii) The Act confers on the court limited powers to rehear or review decisions of the tribunal. It would be surprising if a power to rehear or review was hidden within section 42.

    iii) It is true that the making of an order under section 42 exposes the party against whom the order is made to being in contempt of court if he breaches the order. But that is the purpose of section 42. It may only be exercised when the arbitral process is exhausted and the party in question has failed to comply with a peremptory order. I am not persuaded that the exposure of that party to

being in contempt of court requires the court to rehear or review the arbitrator's decision to grant the peremptory order.

iv) Counsel relied on a passage in *Merkin On Arbitration* at paragraph 16-25: "……the court has a discretion under s.42 of the 1996 Act whether or not to make an order. Relevant factors will doubtless *be the reasonableness of the requirements imposed by the arbitrators' peremptory order,* and whether the court takes the view that the problem could be resolved by the arbitrators themselves in their approach to the arbitration" (emphasis added). If this passage is intended to mean that the court will routinely consider whether it would have made the order I do not consider that it is correct.

60. Counsel for MWP referred to the rights of KHI under charging and pledging agreements with MWP and to HSBC's general lien over KHI's property. It was submitted that having regard to those rights the basis upon which the tribunal had concluded that it is within MWP's power to do that which it had been ordered to do by the peremptory order is not apparent. That may be so in the sense that the tribunal has not set out in detail the reasoning which led to the conclusion it reached. But the tribunal clearly stated when making the peremptory order that

> "we have taken the view that it has been perfectly within Mr. Wilson's influence or control to bring about a situation in which the Steppe shares are secured as we have directed."

61. Counsel for MWP has submitted that the court should satisfy itself that it is within MWP's control to do that which it has been ordered to do. For the reasons I have given I do not consider that that is appropriate when the tribunal has reached a clear and firm view on that very matter. That is particularly so in circumstances where the tribunal has heard oral evidence from Mr. Wilson and the court has not.

62. In what circumstances then might a court decide not to make an order that a party comply with a peremptory order of the tribunal ? In general terms the answer to that question will be where such an order is not required in the interests of justice to assist the proper functioning of the arbitral process; see para.212 of the DAC report. This is not the occasion for a comprehensive list of such circumstances, even assuming it were possible to compile such a list. One example might be where there has been a material change of circumstances after the peremptory order was made. Another might be where the tribunal has not fulfilled its duty to act fairly and impartially between the parties in breach of its general duty to do so. Another might be where the tribunal has made an order which it had no power to make.

63. In the present case counsel for MWP did not suggest that there had been a material change of circumstances after the tribunal made the peremptory order. A witness statement from Mr. Wilson was submitted which had not been seen by the tribunal but it was not suggested that it evidenced a material change in circumstances. On the contrary it appeared to repeat much of what had been put before and considered by the tribunal.

64. Counsel did not suggest that the tribunal had breached its duty to act fairly and impartially in making the 8th, 10th, 11th and 12th Procedural Orders but he did suggest that the tribunal had acted unfairly in granting permission for this application. The

basis of this submission was that although counsel for MWP had indicated that submissions would be made in the event that permission were sought the tribunal granted permission without hearing submissions on behalf of MWP. This appears to be factually correct but I am not persuaded that the tribunal acted unfairly. The tribunal granted permission on 8 December having been requested to do so in writing on 5 December and having received an e-mail from MWP's solicitors on 5 December attaching the most recent correspondence passing between MWP, KHI and HSBC. That e-mail did not say that representations would be made in addition. That was stated on 8 December after the tribunal had decided to grant permission. The correspondence produced on 5 December brought the tribunal up to date and the tribunal was entitled to assume, in circumstances where that correspondence had been brought to its attention by MWP's solicitors without those solicitors saying that further written submissions would be forthcoming, that the tribunal had considered all that MWP wished to put before it. The tribunal had heard detailed submissions before making the peremptory order on 27 November and it was not suggested to me that those representing Mr. Emmott were intending to make submissions which had not already been considered by the tribunal before making the peremptory order.

65. Counsel for MWP suggested that the tribunal had no power to make an order in respect of the Steppe shares pursuant to section 38(4) because the section applied only to physical property and that the order granted was not an order "for the inspection, photographing, preservation, custody or preservation of property". However, the Steppe shares are, in my judgment, property within the meaning of section 38(4) and the order made by the tribunal was for the preservation or custody of the Steppe shares.

66. Counsel for MWP further submitted that the court should refuse to make the order sought under section 42 on the grounds that there was no risk of the Steppe shares being dissipated, that the balance of convenience was in favour of refusing the order, that the claim in respect of the Steppe shares had no real prospect of success and that Mr. Emmott has now admitted misconduct which he had not disclosed before. I was informed that each of these submissions had been made before the tribunal.

Risk of dissipation

67. It was said that because the Steppe shares were held by an HSBC nominee company as security for loans made by HSBC to KHI there was no risk that such shares might be dissipated. Furthermore the shares are the subject of an undertaking given to Tomlinson J. on 24 July 2007 that MWP will not dispose of, deal with, charge, assign or diminish the value of more than 73% of the shares that it currently holds in Steppe Cement Limited. That being so there was no justification for an order by the tribunal under section 38(4) or by the court under section 42 in support of an order under section 38(4).

68. The tribunal decided on 26 September 2008 that it was appropriate to make an order for the preservation or custody of 27% of the Steppe shares. It explained its reasons for so concluding.

> "Mr. Wilson of the Claimants expressly refused, before the Arbitrators, to disclose how 73% of the Steppe shareholding is held. He informed the Arbitrators that all the Steppe shares are

> pledged either to HSBC or Kazholdings Incorporated "KHI". In relation to KHI he was unable to tell the Arbitrators the extent of the Claimant's liability, save that it was "north of $5m." He said that he was associated with KHI but he expressly refused to explain who are the beneficial owners and ultimate controllers of that company.
>
> Accordingly there must be real suspicion that Mr. Wilson declines to provide information so as to *"protect"* the Claimants' Steppe shareholding from the consequences of any Order the Respondent may obtain in the Arbitration."

69. By 27 November 2008, having heard evidence from Mr. Wilson and Mr. Emmott, the tribunal remained of that view. They added:

> "It is appropriate, in our view, to make the Order in peremptory terms. The Steppe shares form the most valuable asset of the Claimant company on the evidence before us. Mr. Emmott claims not only the Steppe shares but also a 33% shareholding of the issued share capital of the Claimant. Mr. Wilson of the Claimant has been evasive in his evidence before us concerning the manner in which the Claimant's own share capital has been dealt with and we have taken the view that it has been perfectly within Mr. Wilson's influence or control to bring about a situation in which the Steppe shares are secured as we have directed."

70. The tribunal formed that view notwithstanding that they were aware that the Steppe shares were the subject of an undertaking to Tomlinson J. and were held in an HSBC nominee account.

71. Counsel for MWP said, in answer to a question from me, that he was asking the court to take a different view from the tribunal as to the need for an order under section 38(4). For the reasons that I have given I do not consider that it is appropriate or in the interests of justice for the court to rehear the application for an order under section 38(4) or even to review that order, at any rate in circumstances where the tribunal has given reasons for its decision which may reasonably be considered to support its decision. I therefore decline to consider whether the court would have taken a different view of the need for an order under section 38(4). The tribunal has formed a clear view that there is such a need having had the benefit of considering the documents in the case and of hearing Mr. Wilson give evidence. For the reasons I have given the court should use its power under section 42 to support the order made by the tribunal rather than to frustrate that order.

Balance of convenience

72. It was said that the balance of convenience was not in favour of making the order. In addition to saying that there was no risk of the Steppe shares being dissipated it was said that Mr. Emmott's assets were so modest that any cross-undertaking was valueless and that there were risks to MWP arising from the making of the order.

73. However, the balance of convenience was one of the issues argued before the tribunal before it made its peremptory order. The tribunal considered that it was appropriate to make the order. For the reasons that I have given I decline to consider whether the court would have taken a different view.

Prospects of success

74. It was said that Mr. Emmott's claim had no prospect of success. There were two limbs to this argument. The first was that there was no evidence in support of the pleaded agreement concerning 27% of the Steppe shares. The second was that Mr. Emmott had admitted serious breaches of fiduciary duty such that he was disentitled from recovering the 27% of Steppe shares. This second limb was elaborated in a skeleton argument of some 10 pages. I was told that the alleged breaches of fiduciary duty were relied upon before the tribunal but not the citation of authority found in the skeleton argument. I was also told that MWP required permission from the tribunal to pursue the second limb of the argument.

75. Since it was submitted before the tribunal that the strength of the claim to 27% of the Steppe shares was "non-existent" and yet the tribunal made the peremptory order I can safely infer that the tribunal did not consider that the strength of the claim was "non-existent". In those circumstances I do not consider that it is appropriate or in the interests of justice for the court to review the merits of the underlying claim. The parties have referred that claim to the tribunal and it is that tribunal, rather than the court, that should consider the merits of the claim. I therefore decline to enter into an assessment of the merits of Mr. Emmott's claim in order to measure its prospects of success.

Misconduct not before disclosed

76. The question of Mr. Emmott's "serious defalcations" was put before the tribunal. It nevertheless made the peremptory order. The tribunal is in a far better position than the court to judge the significance of these matters in the context of the case as a whole and in any event I decline to enter into such an assessment when the tribunal must have done so.

Third parties

77. Finally, it was said that the court ought not to make the order sought without giving third parties potentially affected by the order an opportunity to make submissions. However, I am told that KHI and HSBC were given notice of the application to be made by Mr. Emmott and neither has chosen to appear and make submissions. Moreover, a third party is always at liberty to come to the court if it considers itself affected by an order of the court.

78. In any event, with regard to the Steppe shares the tribunal has said

> "We have made it clear throughout that we accept that such shares should be held to our order subject to all existing liabilities secured on them."

79. In those circumstances it is difficult to see how third parties might be affected by compliance with the tribunal's order.

Conclusion as to the application under section 42

80. The conditions set out in section 42(3) and (4) for the enforcement of a peremptory order of the tribunal are satisfied. Firstly, Mr. Emmott has exhausted the arbitral process in respect of MWP's failure to comply with the order; it was not suggested that he had not done so. Secondly, the court is satisfied that MWP has failed to comply with the peremptory order within the time prescribed.

81. For the reasons I have given it is appropriate that the court should support the tribunal's peremptory order by making an order requiring MWP to comply with it. There are no reasons why in the interests of justice the court should refuse to do so.

82. I shall therefore make the order which has been sought under section 42. I have varied the time for compliance until 4pm on 13 January 2009. I am unable to hand down these reasons until 12 January 2009.

The application under Section 44 of the Arbitration Act 1996

83. This is an application by Mr. Emmott for a freezing order in respect of the Steppe shares. The court is empowered to make such an order in respect of an arbitration by section 44(2)(e) of the Act. If the case is not one of urgency the permission of the tribunal is required; section 44(4).

84. The order is sought in circumstances where in 2007, upon an application by Mr. Emmott for a freezing order in respect of 27% of the Steppe shares, Tomlinson J. accepted an undertaking from MWP that it will not in any way dispose of, deal with, charge, assign or diminish the value of more than 73% of the shares that it currently holds in Steppe Cement Limited

85. During a hearing on 26 September 2008 Mr. Wilson gave evidence which gave rise to the possibility that MWP had not complied with its undertaking by borrowing against the Steppe shares. Lord Millett said in relation to that evidence:

> "We now have a problem. Will the Steppe shares be there unencumbered to the extent of the amount necessary to meet the counterclaim and we have no idea. We have the man here and we just don't know."

86. Moreover, I was told by counsel for Emmott without contradiction by counsel for MWP that on 23 February 2008 Mr. Wilson personally signed documents which caused the shares in MWP to be transferred to a Liechtenstein Anstalt called Windsor Fine Arts Establishment for seemingly no value. Liechtenstein has not ratified the New York Convention on the Enforcement of Arbitration Awards. No commercial

justification for this transfer has been suggested. There is therefore the real possibility that this transfer was executed in an attempt to put the MWP shares beyond the reach of Mr. Emmott. It was suggested on behalf of MWP that this transfer does not support a risk that assets of MWP may be put beyond the reach of Mr. Emmott. It is true that the shares of MWP are not assets of MWP but Mr. Wilson's conduct in effecting the transfer in circumstances where Mr. Emmott claims to be a 33% shareholder in MWP gives rise to a real sense of unease that MWP may seek to put assets of MWP, in particular the Steppe shares, beyond the reach of Mr. Emmott. This is so notwithstanding that MWP gave an undertaking to Tomlinson J. not to do so and has adduced evidence that the Steppe shares are held by an HSBC nominee company.

87. In these circumstances there is a clear risk of dissipation of the Steppe shares such that it is appropriate to make the freezing order sought. The order is sought in respect of all the Steppe shares, not just 27% of them. Counsel for MWP said there was no reason why the order should be in respect of more than 27% of the shares. He also said that the permission of the tribunal for the freezing order application was in respect of 27% of the Steppe shares rather than all of the shares.

88. I can envisage reasons why a freezing order might be sought in respect of more than 27% of the Steppe shares since Mr. Emmott not only seeks a declaration as to ownership of 27% of the shares but also has a damages claim. However, these reasons were not articulated either in the written or oral submissions of counsel for Mr. Emmott and so counsel for MWP did not have an opportunity to respond to them. In those circumstances I consider that the freezing order should be restricted to 27% of the Steppe shares, as was the undertaking to Tomlinson J.

89. It was suggested that Mr. Emmott's undertaking in damages should be fortified by provision of a guarantee in the sum of £200,000 from a first class bank with a place of business in this jurisdiction. Tomlinson J. did not require the undertaking to be fortified. Since then Mr. Emmott has admitted to misconduct. This should be taken into account. However, the misconduct was not such as to dissuade the tribunal from making the peremptory order. Further, it appears to be common ground that Mr. Emmott has modest means. There is therefore a risk that a requirement that the undertaking be fortified by a bank guarantee in the sum of £200,000 will not be satisfied and the court will be unable to assist the arbitral process to operate effectively. No specific loss has been identified as likely to flow from the grant of a freezing order. When granting the peremptory order the tribunal noted that MWP had not suggested it would be put under any disadvantage by ensuring compliance with it. KHI, an entity which there is good reason to believe is controlled by Mr. Wilson, is said by him to have other assets. There is therefore the possibility that any loans by HSBC to KHI can be secured on those other assets. I consider, taking all these matters into account, that the court should not require the undertaking to be fortified in the manner suggested.

90. I have considered whether, in circumstances where Mr. Emmott has admitted misconduct in the course of his cross-examination before the tribunal, it is appropriate to grant a freezing order on his application. However, the misconduct was not such as to dissuade the tribunal from making the peremptory order or from granting permission for this application. I therefore consider it is appropriate to grant the freezing order "to help the arbitral process to operate effectively" (see paragraph 214 of the DAC report) notwithstanding the misconduct admitted by Mr. Emmott.

91. There should be a provision in the order making clear that compliance with the order pursuant to section 42 shall not be regarded as a breach of the order pursuant to section 44.

92. I have considered the other objections which were raised to the form of the order. I agree that the tribunal should have power to vary or discharge the order; see section 44(6) of the Arbitration Act 1996. The words "or of the Tribunal of Arbitrators pursuant to clause 7 of this order" should be inserted in paragraph 2 after the words "until further order of this court". I also agree that MWP should not be excluded from the persons who may apply for a variation or discharge of this order. A new clause 14 should therefore be added giving MWP liberty to apply for a variation or discharge on two clear days' notice to Mr. Emmott's solicitor. I would however expect any application to vary or discharge to be made in the first instance to the tribunal.

Conclusion as to the application under section 44

93. For the reasons I have given I will make the order which has been sought under section 44, subject to the amendments which I have indicated.