Neutral Citation Number: [2014] EWHC 3131 (Comm)

Case No: 2014 FOLIO 432

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2014

Before :

THE HONOURABLE MR JUSTICE MALES

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Between :

CRUZ CITY 1 MAURITIUS HOLDINGS	**Claimant**
- and -	
(1) UNITECH LIMITED **(2) BURLEY HOLDINGS LIMITED** **(3) ARSANOVIA LIMITED** **(4) UNITECH RESIDENTIAL RESORTS LIMITED** **(5) NECTRUS LIMITED** **(6) NUWELL LIMITED** **(7) TECHNOSOLID LIMITED** **(8) UNITECH OVERSEAS LIMITED**	**Defendants**

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Mr Alain Choo Choy QC & Miss Nehali Shah (instructed by **White & Case LLP**) for the **Claimant**
Mr John Brisby QC, Mr Alastair Tomson & Dr Michael d'Arcy (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing dates: 3rd – 5th September 2014

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Judgment

Mr Justice Males :

Introduction and summary

1. This is an application by the claimant ("Cruz City") under section 37 of the Senior Courts Act 1981 for the appointment of receivers by way of equitable execution over certain assets of the first defendant ("Unitech") and the second defendant ("Burley"). The application is the latest step in Cruz City's attempt to enforce a London arbitration award which it has obtained against the defendants for almost US $300 million. With interest the sum now due approaches and may even exceed US $350 million. Unitech for its part has made clear by words and conduct that it will do whatever it can to avoid having to meet its liabilities.

2. Unitech has very substantial assets, well in excess of the sums awarded against it. The present application is concerned with its shareholdings in four companies: Unitech Residential Resorts Limited ("URRL"), an Indian company; Unitech Overseas Limited ("UOL"), an Isle of Man company; and Nuwell Limited ("Nuwell") and Technosolid Limited ("Technosolid"), two Cypriot companies.

3. The defendants resist the appointment of receivers over these assets. They say that there is no good reason why Cruz City should not seek to enforce its arbitral award against them in the various jurisdictions where they have assets, as it has begun to do. Thus Cruz City has already:

    a) commenced proceedings for enforcement of the awards in India, including an application to the Delhi High Court for the appointment of a receiver over all the assets of Unitech, including its shareholdings in URRL, UOL, Nuwell and Technosolid; however, it appears that a first instance decision on the enforcement of a foreign award can take at least 2-3 years in India, while an appeal could take in excess of a further 4-5 years to be decided; the evidence is that until a decision on enforcement is made, there is no possibility of appointment of a receiver by the Indian court;

    b) obtained a final charging order in the Isle of Man over Unitech's shareholding in UOL, as well as a freezing order against Unitech and Burley;

    c) begun enforcement proceedings in Cyprus; and

    d) obtained an interim worldwide freezing order in Mauritius.

4. The defendants say that the appointment of a receiver by way of equitable execution – especially over the foreign assets of a foreign company – is a remedy of last resort which should only be available when no other form of execution is possible or practicable, which is not the case here. There is an obvious irony in the defendants' position. On this application they say that appointment of receivers by the English court is unnecessary because Cruz City can enforce the awards abroad. But in the foreign proceedings where Cruz City is attempting to do so, they are fighting tooth and nail to resist enforcement. If the defendants' arguments abroad have the validity which they claim in those jurisdictions, either to resist altogether or even to slow down the process of enforcement, there is obvious utility in the appointment by this court of receivers over the defendants' assets. If the defendants are right in their

various arguments abroad, this may be the only way in which the award can be successfully enforced.

5. In addition, and more specifically, the defendants say that the proposed order is objectionable for another reason. That is because it seeks to side-step the problem that an English court's order for the appointment of receivers over assets located in foreign jurisdictions may not be recognised or given effect in the jurisdictions concerned, by including ancillary orders requiring Unitech and Burley not to impede or interfere with the receivers' functions and powers and, if so required, to appoint the receivers as Unitech's agents in respect of the four shareholdings concerned and to procure that URRL authorise the receivers to act as Unitech's representative for the purpose of exercising URRL's rights in connection with Nectrus Limited ("Nectrus"), a Cypriot company. They say that these provisions of the order are designed to prevent the defendants from raising arguments resisting enforcement in foreign jurisdictions (although it is probably more accurate to say that they would have the effect of rendering such arguments academic).

6. The defendants say that it would be unjust to make these ancillary orders which will have the effect of either depriving them of arguments which they can deploy abroad with a view to resisting enforcement of the award or putting them in contempt of court. In other words (mine, rather than those of Mr John Brisby QC who represented the defendants), if this court decides that it is just and convenient for receivers to be appointed, the defendants should be permitted to do whatever they can to frustrate whatever order the court may make. That may be the defendants' idea of justice, but it is not mine. In a case where this court has personal jurisdiction over the defendants (which is not disputed) and where there is no evidence that the order would require the defendants to do anything unlawful under any foreign law to which they are subject, there can be no valid objection to the inclusion of ancillary provisions designed to ensure the efficacy of an order for the appointment of receivers.

7. By the conclusion of the hearing I had reached the firm conclusion that receivers should be appointed and therefore made the order sought by Cruz City. I now give my reasons for that conclusion.

Background

8. Cruz City, a Mauritian company, is a special purpose vehicle which was established to be an investment vehicle for a property investment venture with Unitech and an Indian property developer which specialises in slum clearance.

9. Unitech is one of India's largest real estate investment and development companies. Its shares are publicly listed on the National Stock Exchange of India and the Bombay Stock Exchange Limited. Its balance sheet, as contained in its audited accounts for the year ended 31 March 2013 and published in August 2013, showed a surplus of approximately US $1.6 billion. The consolidated balance sheet of the entire Unitech Group as at the same date showed a surplus of approximately US $1.8 billion.

10. Burley is a Mauritian company which is a wholly owned subsidiary of Unitech. It is a special purpose vehicle which was incorporated for the purposes of a Keepwell Agreement, dated 6 June 2008, entered into between Cruz City, Unitech and Burley in the context of a joint venture in another Mauritian company, Kerrush Investments

Limited ("Kerrush"). Burley's only asset is a contractual claim against Unitech under the Keepwell Agreement to require Unitech to put it in funds to meet various defined obligations.

11. Kerrush is the joint venture company through which Cruz City was to invest in a joint venture project for the clearance and subsequent development of slums in Mumbai (the "Santacruz Project"). The parties' investment in Kerrush was governed by a Shareholders Agreement dated 6 June 2008 between Kerrush, Cruz City and Arsanovia Ltd ("Arsanovia"), a wholly owned indirect subsidiary of Unitech.

12. The parties' dispute arose from Cruz City's exercise of a put option provided for in the Kerrush Shareholders Agreement, which entitled Cruz City to require Burley and Arsanovia, jointly and severally, to purchase its 50% interest in Kerrush if certain conditions for the start of the construction of the Santacruz Project had not been fulfilled within a specified time. Unitech was required to put Burley in funds to meet its liability under the put option.

13. The project was delayed and by a notice dated 13 September 2010 Cruz City exercised the put option, requiring Burley and Arsanovia jointly and severally to acquire its 50% shareholding in Kerrush. The Unitech companies denied that they were liable to perform the put option, arguing that Arsanovia had validly served a buy-out notice on 14 July 2010 on Cruz City, exercising rights to buy-out Cruz City's shareholding in Kerrush. The reason why it mattered whether Cruz City's interest in Kerrush was to be acquired by Arsanovia or Burley pursuant to the put option or pursuant to the buy-out right was that the consideration payable to Cruz City would be significantly more under the calculation mechanism applicable to the put option.

The arbitrations

14. The agreements between the parties provided for arbitration in London under the rules of the London Court of International Arbitration. In January 2011 Cruz City commenced two sets of LCIA arbitration proceedings seeking to enforce the put option and associated obligations: the "first arbitration" was against Arsanovia and Burley under the Kerrush Shareholders Agreement. The "second arbitration" was against Unitech and Burley under the Keepwell Agreement. These were followed by a "third arbitration" commenced in February 2011 by Arsanovia against Cruz City seeking to enforce the buy-out right.

15. The three arbitrations were heard together before the same tribunal. In July 2012 partial final awards were issued in the first and second arbitrations, and a final award was issued in the third arbitration.

16. In simple terms, the result of the arbitrations was that:

    a) The tribunal rejected Arsanovia's contention in the third arbitration that it had validly exercised the buy-out right. This was a final award, concluding the proceedings.

    b) The tribunal found for Cruz City in the first and second arbitrations and ordered the defendants jointly and severally to perform their obligations under the put option by paying to Cruz City almost US $300 million against delivery

> of Cruz City's shares in Kerrush. This was a final decision, although the arbitrations were not finally concluded so that the parties could if necessary seek directions as to the mechanism for delivery of Cruz City's shares in Kerrush.

17. None of the defendants has paid any part of the sum awarded. Unitech's annual report for 2012/13 explains that it believes that the awards are not enforceable in India. It is clear that the defendants do not intend to pay. Unitech's in-house counsel has stated in a witness statement that "as a publicly listed company, Unitech owes a duty to its shareholders to investigate and protect its rights in accordance with applicable law". It seems strange for a major publicly listed company engaging in international business to believe that it owes a duty to its shareholders to default on arbitration awards made pursuant to agreements freely entered into with the benefit of legal advice, still more so where those awards have been confirmed by the court of the seat of the arbitration, but that is Unitech's position.

Procedural history

18. On 3 August 2012 the defendants issued applications to challenge the awards in the first and second arbitrations under section 67 of the Arbitration Act 1996 for want of jurisdiction and all three awards under section 68 for serious irregularity. The application under section 68 was not pursued. The application under section 67 was partly successful. In a judgment handed down on 20 December 2012 Andrew Smith J set aside the award in the first arbitration, but upheld the award in the second arbitration holding that the tribunal had substantive jurisdiction to determine the dispute (see *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm)). However, the setting aside of the award in the first arbitration made little practical difference. The defendants remained liable pursuant to the award in the second arbitration.

19. On 25 and 29 January 2013 Cooke J made orders giving Cruz City permission to enforce the awards in the second and third arbitrations as if they were judgments of the court, pursuant to section 66(1) of the Arbitration Act.

20. On 23 May 2013 Field J made a worldwide disclosure order that Unitech and Burley should disclose all their assets worldwide exceeding US $1 million, and that Arsanovia should disclose all of its assets worldwide. The defendants did not comply with the disclosure order. Instead they sought to appeal against it and were granted permission to do so by Moore-Bick LJ on 12 July 2013. The disclosure order was stayed from the date of permission being granted. However, Cruz City applied for conditions to be attached to this permission to appeal and that application was successful. On 11 November 2013 Gloster LJ ordered the defendants to pay some US $334 million into court in respect of judgment debts plus £182,882 in respect of costs within 28 days from 6 November 2013, failing which their appeal would stand struck out (see [2013] EWCA Civ 1512). She said at [36]:

> "I have no doubt that, in the present case, there was indeed a compelling reason for making the Appellants either pay the judgment debt or secure it as a condition of permitting it to proceed with the appeal. The factors which in my judgment

combined to constitute a compelling reason may be summarised as follows:

i) This case is on all fours with the factual scenario in the *Masri* cases. The Appellants are clearly in a position to pay the substantial sums which they owe the Respondent under the awards, without undue disruption to their business, or concerns about insolvency, but have deliberately taken the decision not to do so and to disobey orders of the English court requiring payment.

ii) Moreover, it is perfectly clear that the Appellants have thwarted, and will continue to thwart, the Respondent's attempts at enforcement, in a variety of different jurisdictions by placing every obstacle in the latter's way.

iii) There is also, on the evidence before the court, a real risk that, in the intervening period prior to the hearing of the appeal, the Appellants may attempt to transfer assets to jurisdictions such as India, where enforcement may prove to be more difficult. Given the stay of Field J's orders for disclosure of assets worldwide, the delay may well be prejudicial to the Respondent's attempts at enforcement.

iv) Many of the factors characterised as "compelling" in the other cases to which I have referred above in the context CPR Part 52.9 are present in the present case.

v) It is the policy of the English court that arbitration awards should be satisfied and executed; see per Colman J in *The Naftilos* [1995] 1 WLR 299, at 309-310. As Field J said at [31] in his judgment in this case:

> '… it is the policy of the law that judgments of the court and arbitration awards should be enforced and this applies *a fortiori* where the award in question, as here, was made in an arbitration whose seat was within the jurisdiction.'

Contrary to Mr Hirst's submission, based on *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan,* that policy is in no way undermined by the fact that the English court recognises that a party may subsequently, and for the second time, challenge the jurisdiction of the English (or other) arbitral tribunal, in a foreign jurisdiction where enforcement is taking place. …

vi) There is no reason to suppose that the appeal will be stifled if a payment condition is attached to the grant of permission. As I have already said, the Appellants clearly have more than adequate funds to comply with such condition. In the absence of any, or any satisfactory, evidence forthcoming from the

> Appellants as to the location of their assets outside India, or any detailed evidence about exchange control constraints within India, I am not prepared to conclude that payment into court is not possible for Indian exchange control reasons, and indeed Mr Hirst did not go so far as to suggest that this was the position."

21. Much of that trenchant reasoning is equally applicable to the present application for the appointment of receivers. Points (i), (ii) and (v) are particularly relevant. They demonstrate that the policy of the English court is that arbitration awards should be satisfied notwithstanding that it may be open to a respondent to resist enforcement in its home state or elsewhere. It follows, in my judgment, that an English court should do what it properly can to assist such enforcement. If that has the consequence of making it harder for a respondent to resist enforcement abroad, that should be regarded as a good thing and not a bad thing.

22. As to Gloster LJ's point (vi), it is significant that the defendants did not suggest at that stage that it was impossible for them to pay the sum awarded or to provide security by reason of Indian exchange control regulations. Their position, as set out in the evidence of their in-house counsel, was merely that it would take longer than 14 days to obtain the necessary permission and that permission was "by no means assured". I have no doubt that careful consideration had been given by the defendants and by the experienced lawyers then acting for them with a view to putting forward as strong a case as they could as to any problems which Indian exchange control regulations might place in the way of payment being made. But as Gloster LJ pointed out, the case put forward did not amount to much. Since her judgment, the defendants have adduced voluminous evidence with a view to saying that they are after all prevented by Indian exchange control regulations from making payment without the permission of the Reserve Bank of India and that there is little or no prospect that permission to do so would be given, but they have failed to explain how it was that they adopted the position which they did adopt before Gloster LJ.

23. The defendants did not provide security as required and accordingly, as of 5 December 2013, their appeal stood struck out. The stay of execution of Field J's disclosure order was also lifted. However, the defendants still did not provide the disclosure ordered and on 17 December 2013 Cruz City's solicitors threatened to commence contempt proceedings. The defendants clearly were in contempt. However, this warning did not have the desired effect.

24. On 9 April 2014 Cruz City made an *ex parte* application for a worldwide freezing order including disclosure obligations on Unitech going beyond what was already required by the disclosure order made by Field J. Flaux J made the freezing order in the form sought on the following day, with a return date of 1 May 2014. He referred in his judgment ([2014] EWHC 1131 (Comm) at [5]) to "the dogged determination on the part of the defendants to avoid paying these arbitration awards in any jurisdiction, not only in their own home jurisdiction of India, but in all other jurisdictions, which has given rise to highly critical comments in judgments of courts in the Isle of Man and in Mauritius, in particular with regard to the frustration of enforcement on the part of the defendants described by the Deemster in the Isle of Man as verging on abuse of process." Those comments by the Deemster were to the effect that Unitech "appeared to be playing tactical games and coming close to abusing the due legal process".

25. On 30 April 2014, the day before the return date, the defendants finally gave disclosure of their assets. On the return date Flaux J ordered that the freezing order be continued, with certain amendments, the final form of which was only determined at a further hearing on 15 May 2014. Flaux J was not impressed by the defendants' reliance on the problems of Indian exchange control. He said ([2014] EWHC 1323 (Comm)):

> "19. It is striking, since these exchange control issues continue to be advanced by the defendants as an excuse for their failure and refusal to honour the awards, that the defendants have not disclosed any correspondence with the Reserve Bank of India or with their own bank, or anything to suggest that special permission has been sought from the Reserve Bank of India and refused.
>
> 20. Material has been put before the court at this hearing from a Mr Malhotra of the first defendant, which explains in detail what the relevant exchange control regulations are. I have to say that I am far from convinced that the matters that are relied upon would lead to the Reserve Bank of India refusing permission for the claimants to honour their obligations under these arbitration awards which are, on the face of it, valid and binding and which the claimant has permission to enforce as if they were judgments of the court.
>
> 21. But, be that as it may, what is tolerably clear is that there has been no application to the Reserve Bank of India for permission, special or otherwise, to make any payment, let alone any refusal by the Reserve Bank of India to give such permission. As I pointed out earlier during the course of argument, it would be most surprising if the Reserve Bank of India were not prepared to grant permission to an Indian corporation of this size to honour its contractual and arbitral obligations. …
>
> 23. It is to be inferred -- and I so find -- that the real reason why these awards have not been honoured is that the defendants are determined, by any means available to them, not to honour their obligations, and that the reason why these awards have not been honoured has nothing to do with any refusal or reluctance on the part of the Reserve Bank of India to grant any permission. …
>
> 49. I should add that, as I think I have already indicated, I am wholly unimpressed by the resort on the part of the defendant to any problems there may be with exchange control regulations in India, and that Mr Choo-Choy is right in saying that that is essentially a red herring, because the real reason for the non-payment of the awards is that the defendants have chosen, for reasons of their own, not to honour their

> obligations, not because the Reserve Bank of India has refused to allow them to honour their obligations."

26. Flaux J found also that, although there had, but only as of the previous day, been substantial compliance with the defendants' obligations to disclose assets, that compliance was purely for tactical reasons:

> "31. Furthermore, at least until yesterday, 30 April 2014, the defendants were in flagrant breach of the disclosure order. Despite the apology now advanced on their behalf by Mr Brisby QC, I am singularly unimpressed by the suggestion that their non-compliance can be excused by the fact that White & Case did not write again chasing Skadden Arps after 17 December, and that somehow the defendants were entitled to think that the claimant was no longer pressing for compliance with the disclosure order. The fact is, that as the defendants well knew, there was an order from this court with a penal notice attached to it requiring disclosure, and the defendants simply deliberately flouted that order.
>
> 32. Such compliance as has taken place late in the day is evidently tactical, because it suits the defendants, who appreciate that they would have no hope of getting the freezing injunction set aside unless they complied with the disclosure order of Field J and with the order for disclosure I made when granting the freezing order ex parte. …
>
> 42. The fact that they have now chosen to comply with the order, as I indicated, at least in one sense for tactical reasons because had they not done so there would be no basis whatsoever for seeking to set aside the freezing injunction, only takes the defendants so far, in my judgment, because it remains the case that until they made the decision that they would give the disclosure which they have, they had undoubtedly failed to give that disclosure, thereby demonstrating that they were prepared to take whatever steps they could to avoid honouring their obligations."

27. On 26 August 2014 Cruz City obtained permission on paper from Blair J to join URRL, Nectrus, Nuwell, Technosolid and UOL to these proceedings as the fourth to eighth defendants for the purpose of seeking relief against those companies directly in accordance with the principles discussed in *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 and other similar cases. It remains to be decided whether Cruz City is entitled to any such relief. For the purpose of this application it was agreed that no argument would be addressed on that point and that I should ignore it. The present order is made only against Unitech and Burley, and where this judgment refers to "the defendants", that does not include the fourth to eighth defendants.

The receivership application

28. Cruz City's application for the appointment of receivers by way of equitable execution over the property of Unitech and Burley was first made by an application notice dated 23 April 2014 seeking orders in wide terms for the appointment of receivers over the property of Unitech and Burley generally. Now that the defendants have given disclosure of their assets, the application has become more focused. As noted above, the application is now concerned with Unitech's shareholdings in four companies, URRL, UOL, Nuwell and Technosolid.

29. The disclosure provided by the defendants (which stated the position as at 31 December 2013, although some more up to date information has since been provided) referred to land or land rights in India, amounts in bank accounts (very few of which were outside India), and a large number of shareholdings in other companies, all of which were valued on the basis of "the cost of the value invested", i.e. book value, rather than current market values. The defendants' evidence is that current values are likely to be higher than book values, but that it would be an onerous task to provide current valuations.

30. Leaving Indian subsidiaries to one side, Unitech's latest group consolidated accounts show that it has 34 non-Indian subsidiary companies (many of which are subsidiaries of subsidiaries), all but two of which are wholly owned, in Cyprus, Mauritius, the British Virgin Islands, the Isle of Man, Singapore and Libya. It also holds shares in three non-Indian joint venture companies (including Arsanovia and Kerrush).

31. Many of the assets ultimately owned by the group are held by subsidiaries of subsidiaries. For example, Unitech owns 100% of each of URRL and Nuwell which together own 100% of Nectrus, a Cypriot company. Nectrus owns 50% of Arsanovia and (currently) 13.6% of Unitech Corporate Parks Ltd ("UCP"), an Isle of Man company which is listed on the AIM in London. UCP has (through a 100% shareholding in a Mauritius company called Candor Investments Ltd) an indirect 100% interest in six Mauritius companies each of which in turn holds a 60% shareholding in an Indian company, the remaining 40% of which was formerly (but is no longer) held indirectly by 100% Indian subsidiaries of Unitech. The significance of this example is that UCP (which is not part of the Unitech group but, as indicated, a company in which Unitech has an indirect minority shareholding) proposes to sell its holding in Candor for an aggregate cash figure of over £200 million, which is expected to result in a distribution of the sale proceeds to UCP's shareholders, including Nectrus. This is currently expected to happen in mid-October 2014 and may therefore result in a flow to Nectrus (and potentially up the chain to Unitech) of about £25 million later this year.

32. Unitech's direct shareholdings outside India include its holdings in UOL, Nuwell and Technosolid, the combined book value of which is US $141 million. However, it is impossible to tell from the various company accounts which have been provided or which are publicly available what the underlying assets are which comprise that value, in what jurisdiction they are located and by which company in the group they are held. Their accounts suggest that the principal assets of these directly held companies consist of their investments in their own subsidiaries or loans due from other companies in the group. Accordingly, while it is apparent that Unitech's shareholdings in UOL, Nuwell and Technosolid are extremely valuable, it is

impossible to tell from the information provided what that value consists of or how it might best be realised. Unitech has to date refused to provide any information about this.

Receivership by way of equitable execution – the law

33. Section 37(1) of the Senior Courts Act 1981 gives the court jurisdiction to appoint a receiver by final or interlocutory order "in all cases in which it appears to the court to be just and convenient to do so". Section 37(2) provides that any such order "may be made either unconditionally or on such terms and conditions as the court thinks just". Section 37(4) makes explicit reference to the power of the court to appoint a receiver by way of equitable execution.

34. Numerous cases were cited in which the circumstances where such an order will be made were discussed. These included important recent statements of principle by the Court of Appeal in *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303, [2009] QB 450 and by the Privy Council in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721. Those statements do not mean that the pre-existing law is irrelevant, but they do avoid the necessity for an extensive review of older authority. I summarise the position, so far as relevant to the present application, under five headings.

Jurisdiction over foreign assets

35. It is clear that an order for appointment of a receiver does not confer any proprietary right transferring ownership of the asset in question to the receiver. Rather it operates *in personam*, having effect as an injunction restraining the judgment debtor from receiving any part of the property which it covers, if that property is not already in his possession: *Masri* at [50] to [53]. There is, therefore, no rule preventing the court from making a receivership order by way of equitable execution in relation to foreign assets. Such orders have been made for well over a century, even if not necessarily by way of equitable execution: *Masri* at [62]. There needs to be a sufficient connection with the English jurisdiction to justify the making of such an order and to satisfy the requirements of comity, but the fact that the order is made with a view to the enforcement of an English judgment or award provides that connection: *Masri* at [59] to [61].

36. Because the order operates *in personam*, what matters is whether the court has personal jurisdiction over the defendant. It is not a bar to the appointment of receivers that the English court's order will not or may not be recognised by the foreign court where the assets are located. Thus in *Derby & Co Ltd v Weldon (No. 3 & No. 4)* [1990] Ch 65 Lord Donaldson MR said, at 86B-D:

> "True it is that C.M.I. is a Luxembourg company, but it is a party to the action and can properly be ordered to deal with its assets in accordance with the orders of this court, regardless of whether the order is recognised and enforced in Luxembourg. The only effect of non-recognition would be to remove one of the potential sanctions for disobedience."

37. Dillon LJ made a similar point in a later judgment in the same case (*Derby & Co Ltd v Weldon (No. 6)* [1990] 1 WLR 1139 at 1150):

> "The court has always been ready to appoint a receiver over the foreign as well as British assets of an English company, even though it has recognised that in relation to foreign assets the appointment may not prove effective without assistance from a foreign court: *In re Maudslay, Sons & Field; Maudslay v. Maudslay, Sons & Field* [1900] 1 Ch. 602 . Moreover where a foreign court of the country where the assets are situate refuses to recognise the receiver appointed by the English court, the English court will, in an appropriate case, do what it can to render the appointment effective by orders *in personam* against persons who are subject to the jurisdiction of the English court; see the helpful decision of Neville J in *In re Huinac Copper Mines Ltd; Matheson & Co v The Company* [1910] W.N. 218."

38. *Derby & Co Ltd v Weldon* was a case where receivers were appointed before judgment in support of a freezing order, but the same reasoning applies to an appointment of receivers post judgment by way of equitable execution: *Masri* at [69]. It is therefore irrelevant that the defendants' assets over which the receivership is sought are not located in England and that the courts in India will not (and the courts elsewhere may not -- the position is disputed) recognise an order for the appointment of receivers made by this court. That means that one possible way of giving effect to an order of this court, that is to say by enforcing the order in the foreign court, will not or may not be available. But the sanction of contempt proceedings here will remain. In circumstances where directors of the defendants may wish to come to this country on business or for pleasure, the prospect that their next visit may be for a more extended duration and in less comfortable accommodation than anticipated should provide a real incentive to comply with an order. Likewise if the defendants wish or need to do business here, whether by raising money on the international capital markets or otherwise.

39. However, an order of the English court should not in general require the defendant to do something which exposes it to a real danger of criminal liability under the law of its home state or the state where the assets are located. Following the decision of the Court of Appeal in *Masri* the defendant in that case expressed concern that a further receivership order which the claimant then sought would have that consequence. Tomlinson J dealt with the point by referring to the "flexible discretionary approach" which the court will adopt "when faced with a suggestion that compliance with its requirements will involve incrimination under another system of law", citing *Brannigan v Davidson* [1996] UKPC 35, [1997] AC 238: see *Masri v Consolidated Contractors International Company SAL* [2008] EWHC 2492 (Comm) at [26]. That approach involves an assessment by the English court of what is the real risk of prosecution abroad and an exercise of discretion in the light of that assessment.

40. A related point arose in *Joubal v Masri* [2011] EWCA Civ 746, [2011] 2 CLC 566, a yet further application in the *Masri* case, where a further order for the appointment of receivers was made which was directed not only against directors and officers of the defendants, but also against administrators appointed by the Lebanese court. The Court of Appeal held that in this latter respect the order had gone too far, albeit

properly made against the defendants' officers and directors, because it required the administrators (who were officers of the Lebanese court) to act contrary to the order of that court.

The requirements for equitable execution

41. From the numerous cases cited which deal with the circumstances in which an order for the appointment of receivers by way of equitable execution will be made, it is sufficient for present purposes to cite three statements of general principle.

42. The first is *Bourne v. Colodense Ltd* [1985] ICR 291, where Dillon LJ stated the position in these terms at 302 in *dicta* which have since been treated as authoritative:

> "The appointment of a receiver by way, as it is traditionally called, of equitable execution is a form of equitable relief to enforce payment of a judgment debt which the court may grant in the special circumstances of a particular case if, as in the present case, the recovery of the judgment debt by the more usual processes of execution or attachment of debts is not practicable. The remedy is, however, discretionary and it is plain that the court would not appoint a receiver if the court were satisfied that the appointment would be fruitless because there was nothing for the receiver to get in."

43. The second is the *TMSF* case in the Privy Council [2011] UKPC 17, [2012] 1 WLR 1721, where Lord Collins summarised the decision in *Masri* in these terms:

> "6. In *Masri (No 2)* [2009] QB 450, the Court of Appeal in England held that the jurisdiction to appoint a receiver by way of equitable execution permitted of gradual and incremental development, and in particular was not limited to choses in action which were presently available for legal execution. The appointment of a receiver was not limited to such property as might be taken in execution, but to whatever is considered in equity to be assets: *Masri (No 2)*, para 151; *Kerr on Receivers*, 1st ed (1869), p87…
>
> 55. The background to the decision in *Masri (No 2)* [2009] QB 45 was that it had long been thought that the power in what is now section 37(1) of the Senior Courts Act 1981 (formerly the Supreme Court Act 1981) to "appoint a receiver in all cases in which it appears to the court to be just and convenient to do so" could only be exercised in circumstances which would have enabled the court to appoint a receiver prior to the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66), section 25(8), when it was first put on a statutory basis: *Holmes v Millage* [1893] 1 QB 551; *Edwards & Co v Picard* [1909] 2 KB 903, 905; *Harris v Beauchamp Bros* [1894] 1 QB 801, 809-810; *Morgan v Hart* [1914] 2 KB 183, 189; *Maclaine Watson & Co Ltd v International Tin Council* [1988] Ch 1, 17 (affirmed [1989] Ch 253).

> 56. But in *Masri (No 2)* [2009] QB 450 it was held that these decisions were based on a misunderstanding of *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, and that the court was not bound by pre-1873 practice to abstain from incremental development. The jurisdiction could be exercised to apply old principles to new situations. *Masri (No 2)* confirms or establishes the following principles: (1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under section 37(1); (2) the court has power to grant injunctions and appoint receivers in circumstances where no injunction would have been granted or receiver appointed before 1873; (3) a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amenable to execution at law; and (4) the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations.
>
> 57. *Masri (No 2)* also confirmed that section 37(1) does not confer an unfettered power. It pointed out that there are many decisions on the injunctive power to that effect: *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV* [1987] AC 24, 40, per Lord Brandon of Oakbrook: 'although the terms of section 37(1) of the Act of 1981 and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years.' … "

44. Finally, in the later application in the *Masri* case itself referred to at [39] above, Tomlinson J rejected a submission that an order can only be made if legal, as opposed to equitable, enforcement is impossible, or there exist some special circumstances which practically render it very difficult, if not impossible, for the judgment creditor to obtain the fruits of his judgment by other means. He held at [17] that:

> "Execution of an English judgment overseas, particularly in countries outside the European Community, is always relatively speaking a difficult exercise. In the present case I am satisfied that it will indeed be practically very difficult for Mr Masri to enforce his judgment by conventional means of attachment against the Defendants' assets abroad. However I am far from satisfied that the jurisdiction has ever been regarded as rigidly circumscribed."

45. After reviewing some of the same cases as relied on by the defendants in the present application, Tomlinson J concluded:

> "Since the source of the jurisdiction is section 37(1) of the Supreme Court Act 1981, it is to my mind clear that the Court of Appeal in this case regarded the modern jurisdiction as unconstrained by rigid expressions of principle and responsive to the demands of justice in the contemporary context. In these

> circumstances it is unrealistic to expect this court to reach a conclusion as to the availability of the remedy different from that reached by the Court of Appeal. However in case it be said that I have failed to exercise my own discretion, I record my own finding that the practical difficulty which Mr Masri will encounter in pursing conventional means of attachment overseas, and the difficulties which the Defendants will seek to put in his way, amply justify the making of a receivership order."

46. Permission to appeal from this decision was refused ([2008] EWCA Civ 1367).

47. In the light of these and other statements cited, I would summarise the position so far as relevant to the present application as follows:

a) The overriding consideration in determining the scope of the court's jurisdiction is the demands of justice. Those demands include the promotion of the policy of English law that judgments of the English court and English arbitration awards should be complied with and, if necessary, enforced.

b) Nevertheless the jurisdiction is not unfettered. It must be exercised in accordance with established principles, though it is capable of being developed incrementally. It is not limited to situations where equity would have appointed a receiver before the fusion of law and equity pursuant to the 1873 Judicature Acts. Specifically, in modern conditions where business is increasingly global in nature, the jurisdiction is "unconstrained by rigid expressions of principle and responsive to the demands of justice in the contemporary context".

c) The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by *dicta* which speak of the need for "special circumstances": see in particular the decision of Tomlinson J in *Masri* cited above and also the decision of Arnold J in *UCB Home Loans Corporation Limited v Grace* [2011] EWHC 851 (Ch), holding that there were sufficient "special circumstances" rendering it just and convenient to appoint a receiver by way of equitable execution when it would be "difficult for the claimant to enforce its judgment by other means" and that the appointment of a receiver was the only realistic prospect available to the judgment creditor to enforce its judgment in the short term.

d) As the statutory source of the court's power to appoint a receiver speaks of what is "just and convenient", it is impossible to say that convenience is not at least a relevant consideration (albeit not the only one).

e) A receiver will not be appointed if the court is satisfied that the appointment would be fruitless, for example because there is no property which can be reached either in law or equity. That is an aspect of the maxim that equity does not act in vain. However, a receiver may be appointed if there is a reasonable

> prospect that the appointment will assist in the enforcement of a judgment or award. It is unnecessary, and will generally be pointless, for the court to attempt to decide hypothetical questions as to the likely effectiveness of any order. That applies with even greater force where such questions involve disputed issues of foreign law. It is sufficient that there is a real prospect that the appointment of receivers will serve a useful purpose.

The assets of subsidiaries

48. Receivers can be appointed to exercise the rights of shareholders. Thus in *Ka Wah International Merchant Finance Ltd v Asean Resources Ltd* (1986) 8 IPR 241, receivers were appointed with a power of management over shares to exercise the rights of shareholders. More recently, *Lakatamia Shipping Co v Nobu* [2014] EWCA Civ 636 shows that a receiver can only be appointed over the assets of the judgment debtor itself and that assets of a company in which the judgment debtor holds shares are not assets of the judgment debtor, even in the case of a 100% shareholding. (I leave on one side, for this purpose, any possibility of such an order pursuant to the *Chabra* principles). However, a receiver would be able to exercise the judgment debtor's rights over its shareholdings which are assets of the judgment debtor itself. That could include a sale of the shares, the exercise of voting powers, the appointment of directors and seeking a winding up of the subsidiary companies and, in consequence, a distribution of any of their surplus assets.

Ancillary orders

49. As appears from the passages cited above from *Derby v Weldon (No. 6)*, the English court will, in an appropriate case, do what it can to render the appointment of receivers effective. That must include the making of appropriate ancillary orders to assist the receivers in the performance of their functions including, where appropriate, to assist the receivers in the exercise of the judgment debtor's rights as a shareholder of subsidiary companies. Such orders were made in *Masri* where they were approved by the Court of Appeal (see [23] and [183], and the order set out in the Appendix to the judgment) and in *TMSF* (see [8] and [61]). Lawrence Collins LJ's reference in *Masri* at [183] to the demands of justice being the overriding consideration was expressly made in the context of the need "to make orders to render any other order of the court effective".

Support of a freezing order

50. Finally, it is worth noting that, separate from any process of equitable execution, jurisdiction to appoint a receiver under section 37 of the Senior Courts Act 1981 in support of a freezing order exists at the pre-judgment stage. Such an order can be made, for example, if there is a real risk that a defendant will act in breach of such an order. In *JSC BTA Bank v A* [2010] EWCA Civ 1141, the Court of Appeal held at [14] that:

> "A receivership order will no doubt be completely inappropriate in the ordinary Freezing Order case where assets are constituted by money in bank accounts (in respect of which the relevant bank can be given notice) or by immovable property. The order will therefore only be appropriate in cases

> where an injunction is insufficient on its own. Such cases are only likely to arise where there is a measurable risk that, if it is not granted, a defendant will act in breach of the Freezing Order or otherwise seek to ensure that his assets will not be available to satisfy any judgment which may in due course be given against him. If, therefore, the method by which a defendant beneficially holds his assets is transparent, a receivership order may well not be necessary. But if it is opaque and there is a reasonable suspicion that such opacity will be used by a defendant to act in breach of a freezing order, it may well be the case that a receivership order is appropriate."

51. Appointment of a receiver may serve a similar purpose post judgment, as in the present case.

The parties' submissions

52. Mr Alain Choo-Choy QC for Cruz City submitted in summary that this is a classic case for the appointment of receivers in view of (a) the opaque manner in which Unitech holds its assets through multiple chains of companies, (b) the resulting difficulty in identifying and realising the value in the shares held by Unitech, (c) a real concern that such opacity will be used by it to act in breach of the freezing order, as evidenced by its deliberate non-compliance with the disclosure order and its refusal to disclose any information about the numerous subsidiaries, sub-subsidiaries and other assets of URRL, UOL, Nuwell and Technosolid, and (d) the difficulties of enforcement abroad (particularly in India, where the majority of Unitech's assets, including its 100% shareholding in URRL, are situated, but also in Cyprus and the Isle of Man where Technosolid, Nuwell and UOL are incorporated). In those circumstances, he submitted, the appointment of receivers is likely to provide significant assistance to Cruz City in securing satisfaction of the award.

53. Mr John Brisby QC for the defendants accepted that the court has jurisdiction to appoint receivers but submitted, again in summary, that the application should be refused for four principal reasons as a matter of discretion. The first was that receivership is an exceptional and far-reaching remedy, not to be imposed unless ordinary means of enforcement are impossible or impracticable, which is not the position here as it is open to Cruz City to seek to enforce the award in India or in any other jurisdiction such as the Isle of Man or Cyprus where Unitech itself has assets. The second was that the appointment of a receiver would to a large extent be fruitless because it would not be recognised by the courts in India or for that matter the Isle of Man or Cyprus. The third was that the order sought goes too far, in particular in requiring Unitech and Burley (a) not to impede the receivers from acting and (b) to appoint the receiver as their representative for the exercise of shareholder rights, which (the defendants say) would put the defendants in the position where they are either in contempt of this court or cannot resist enforcement with arguments that are properly open to them. Finally, the defendants say that payment of the award is impossible without the permission of the Reserve Bank of India, which there is no prospect of obtaining.

Discussion and conclusions

54. Applying the principles which I have stated above, and subject to further consideration below of the defendants' specific objections, I accept Mr Choo-Choy's submission that this is a classic case for the appointment of receivers for the following reasons.

55. First, Unitech holds its assets through multiple chains of companies located not only in India but in a variety of jurisdictions, many of which do not afford transparency as to the assets held even if company accounts are publicly available. While that is not unlawful or improper, it does mean that enforcement of any judgment or award is a highly complex process. It is impossible to tell from the information currently available what the underlying assets are which represent the value of the shareholdings held by Unitech or how the value of those shareholdings can best be realised. Without that information, processes of legal execution (assuming for the moment that they are available in the jurisdictions concerned) would at best be a blunt and ineffectual instrument. It might be possible to obtain an order for sale of Unitech's shares in its various subsidiaries (for example, pursuant to the charging order obtained over the UOL shares in the Isle of Man), but it would be difficult or impossible to attract buyers without considerably more information about the assets of the subsidiaries concerned and their current (as distinct from book) value. The evidence suggests also that there would at the very least be procedural complications in seeking such an order for sale in the various jurisdictions concerned. These are addressed at length in the parties' evidence, much of which is disputed, but it is unnecessary to detail them in this judgment. Moreover, an order for sale of the shares might well not be the most efficient way of realising whatever their value consists of. A sale of assets might be preferable. There may be tax considerations. Armed with proper information, all of which must be available to Unitech, receivers would be able to consider such matters properly and take appropriate steps to exercise Unitech's rights as a shareholder to realise maximum value from the shares. I do not accept Mr Brisby's submission that all that is required are orders for further disclosure to be made by Unitech. Even if provided, that would not avoid the limitations in what can be achieved by way of charging orders or similar forms of legal execution.

56. Second, recovery of the award debt by other processes of execution in the countries where the defendants have assets is not practicable, at least in any reasonable timescale. The defendants have made clear that they will do everything they can to frustrate such enforcement. The evidence shows that they are likely to be able to delay enforcement (depending on the jurisdiction concerned) for months or even years. If their position in the various proceedings abroad is correct, the award cannot be enforced in those jurisdictions at all. In such circumstances the need for the appointment of receivers goes well beyond mere convenience.

57. Third, I am not satisfied that the appointment of receivers would be fruitless. On the contrary, such an order provides what is likely to be a highly effective remedy and, unless the defendants are prepared to disobey the order of this court and face the risk of proceedings for contempt, there is a real prospect that it will side-step the multiple obstacles which the defendants are determined to place in the way of other means of enforcement.

58. Fourth, it remains to be seen whether the defendants will be prepared to disobey the order of this court. So far they have shown themselves to be willing to do so, at any rate when they appeared to be able to get away with it. Mr Brisby says that there has been a change of heart. That may be so but, in any event, now that the consequences have been spelled out to the defendants, I would not necessarily expect the attitude of open defiance previously shown to persist. Any failure to comply with a receivership order will have to be open defiance, not easily capable of being concealed. Unitech is, however, a major public company in India. It is not some fly by night one man company which can easily disappear and reform itself in another guise. Its directors will at least wish to consider very carefully the implications of a calculated decision to act in contempt of an order of this court – a court, I emphasise, which the defendants have expressly accepted has jurisdiction in this matter. At all events, there must be a realistic prospect that wiser counsels than hitherto will prevail and that any order will be complied with. Even if that were not so, the court will act on the basis that its orders will be obeyed by those such as the defendants who are subject to its jurisdiction.

59. Fifth, the appointment of receivers in this case is also a valuable support for the freezing order. Without it, there must be a real concern in view of the defendants' conduct hitherto that they will disobey the freezing order if they think they can do so undetected. Although there is no evidence that the defendants have moved assets around in breach of the freezing order, the defendants have hitherto had the comfort, as a result of the arguments deployed by them in proceedings abroad, that there has been no imminent prospect of successful enforcement of the award by Cruz City in the various jurisdictions where that has been sought. That position may change if receivers are appointed. If receivers are not appointed, there must be a real prospect that the defendants will be able and willing to act in breach of the freezing order without detection if a crunch time appears to be approaching. Flaux J expressly found that there was a serious risk of dissipation of assets ([2014] EWHC 1323 (Comm) at [44] to [48]). I see no reason to reach a different conclusion.

60. Finally, the defendants say that there is no need for this court to order the appointment of receivers as such an appointment, of the same individuals, could be made by the courts in (at any rate) Cyprus and the Isle of Man if the right procedure is followed. That, they say, would avoid the need for what may be complex arguments about whether an order of the English court would be recognised in those jurisdictions. However, the defendants have offered no undertaking to co-operate in the appointment of receivers by the courts in those jurisdictions and it is apparent, despite what they say here, that they remain determined to place every possible obstacle in the way of any such appointment. In those circumstances I regard the argument that an appointment here is unnecessary as somewhat hollow.

61. To the extent that special circumstances are required before an order can be made, the circumstances which I have outlined demonstrate clearly that they are present here.

62. In my judgment the conclusion that an order should be made results from the application of the established legal principles to which I have referred above. But if an order for the appointment of receivers in this case were to represent an incremental development of the existing position, it is one which is well justified by the need to promote the ready enforcement of judgments and awards and to be "responsive to the demands of justice in the contemporary context".

63. I turn, therefore, to deal with the four specific arguments advanced by the defendants as to why an order should not be made.

64. The first argument is that receivership is an exceptional and far-reaching remedy, not to be imposed unless ordinary means of enforcement are impossible or impracticable, which is not the position here as it is open to Cruz City to seek to enforce the award in India or in any other jurisdiction such as the Isle of Man or Cyprus where Unitech itself has assets. As noted at the outset of this judgment, there is a tension here between the defendants' case in the various foreign jurisdictions concerned and the case which they advance here. It is apparent that the defendants are determined to resist enforcement abroad by any means available to them. Indeed, in India they propose to deploy numerous arguments which have already been finally determined against them in this court, for example in the judgment of Andrew Smith J ([2012] EWHC 3702 (Comm)), as well as a multitude of new arguments which they could have but did not run here. They even contend that the Indian court in Unitech's home state does not have jurisdiction to enforce the award, but nobody present in court could explain the basis of that objection. I asked Mr Brisby whether he was prepared to concede that the arguments to be deployed by the defendants in India are misconceived. At first sight many of them appear to be. Not surprisingly, however, he was not prepared to make that concession. In those circumstances it is simply not open to the defendants to contend here that enforcement abroad is not impossible or impracticable. Their case is that it is impossible, certainly in India which is Unitech's home jurisdiction, and they have shown themselves determined to ensure that it is impracticable anywhere.

65. The second argument was that an order for the appointment of a receiver would to a large extent be fruitless because it would not be recognised by the courts abroad. It is common ground that an order would not be recognised in India and there is a dispute as to whether it would be recognised in Cyprus or the Isle of Man. However, the authorities cited above show that this is no bar to the appointment of receivers and, for the reasons already given, I am not satisfied that such an order would be ineffective. On the contrary, I find it hard to believe that the parties would have devoted the significant resources which they have to this application if they thought that the appointment of receivers would make no difference. Indeed, in the short term, a receivership order may have real utility in helping to ensure that value that would otherwise flow to Unitech in India through its shareholding in URRL and Nuwell as a result of the sale by UCP of its shares in Candor (see [31] above) is made available to Cruz City.

66. The third argument was that the order sought goes too far in requiring Unitech and Burley (a) not to impede the receivers from acting and (b) to appoint the receiver as their representative for the exercise of shareholder rights, which would put the defendants in the position where they are either in contempt or cannot resist enforcement with arguments that are properly open to them in foreign jurisdictions. However, it is clear from the authorities cited above that the court will make appropriate ancillary orders to ensure that an order for the appointment of receivers is effective. Mr Brisby's own submissions demonstrated the positive need for such orders in this case when he submitted that appointing a receiver would achieve nothing in practice unless the appointment was coupled with the ancillary orders sought by Cruz City.

67. In the case of many of the arguments which the defendants propose to run in India, I am not persuaded that those arguments are properly open to them, at least so far as this court is concerned. It is well established in the context of the court's jurisdiction to grant anti-suit injunctions that conduct in a foreign court, even if permitted by the rules of that court, may be regarded here as vexatious and oppressive and may amount to an abuse of the process of this court. It may be that some of the arguments which the defendants propose to run in India could be so regarded. Be that as it may, however, if justice and convenience require, as I consider that they do, that receivers should be appointed, the same demands of justice require that this court should do what it can to make its order for their appointment effective.

68. The position might be different if there were clear evidence that the order would require the defendants to act in ways which would expose them to criminal liability in India. However, the defendants' evidence does not go that far and there was no suggestion in their written submissions that this would be a consequence of making the order. When the point arose in the course of argument, Mr Brisby acknowledged that the defendants' evidence does not go so far as to suggest that the order would require them to breach the Indian criminal law but submitted that it followed by implication from their evidence regarding exchange control regulations that, depending on what the receivers require them to do, they might be put in that position.

69. However, the position is that the receivers will be officers of this court and in exercising the powers given to them, for example to request information from Unitech or to require Unitech to deal with its assets, they will need to take such advice as they consider appropriate concerning Indian law and whether any step which they propose to take, or to require Unitech to take, will involve the commission of an offence under Indian law. That advice will be a legitimate expense of the receivership. If they are advised that it will involve such an offence, it seems inconceivable that the receivers would act contrary to Indian law or require Unitech to do so, at any rate without first seeking directions from this court. If they are advised that it will not involve any offence, they will be able to take the step in question if they consider it appropriate to do so. That leaves the possibility that Unitech may take a different view of the position under Indian criminal law. In that event, there would have to be an application to this court to resolve the position, applying the principles referred to at [39] above in the light of specific evidence as to a concrete step or proposed course of action. For this reason, the order which I made included an express liberty to apply in the event of any issue as to whether any step which the defendants might be required to take involved the commission of a criminal or regulatory offence under any relevant system of law. In my judgment that is a better way of dealing with this potential problem (and at present it is only a potential problem) than the inclusion (as suggested by the defendants) of a general proviso in the order to the effect that the defendants should not be required to take any step which would involve the contravention of any criminal or regulatory law. It is also more in accordance with the discretionary principles referred to at [39] above than such a blanket proviso, which would also be a recipe for endless disputes.

70. In the end the defendants' objection to the ancillary orders proposed comes to this – the defendants say that it is unfair that they should be faced with sanctions for contempt of court here if they act in ways which will frustrate and render ineffective the appointment of receivers; Cruz City says that, on the contrary, the contempt

sanction is precisely what is needed to ensure compliance with an order which (*ex hypothesi*) it is just and convenient to make. I accept the latter submission.

71. Finally, the defendants say that payment of the award is impossible without the permission of the Reserve Bank of India, which there is no prospect of obtaining. Flaux J was sceptical about that submission (see [25] above) and, despite the further evidence now adduced on the point, so am I. In summary:

a) The defendants were advised by Indian lawyers, Amarchand & Mangalas & Suresh A Shroff & Co, before entering into the transaction. Those lawyers provided an opinion to Cruz City that its performance would involve no breach of any law. They cannot have failed to give careful consideration to exchange control issues.

b) The defendants failed to take the point in the arbitration even though, if what they now say is correct, it was a critical point. Like Tomlinson J in *Masri* ([2008] EWHC 2492 (Comm) at [16]), I have the strong impression that this too was a dispute in which no stone was left unturned.

c) The defendants' current position contradicts the stance which they adopted before the Court of Appeal at an earlier stage of this case (see [22] above). There has been no explanation of why they took that stance.

d) It is abundantly clear that the defendants have not applied, and have no intention of applying, to the Reserve Bank of India for permission to honour the award.

e) Mr Malhotra, the witness on whose evidence the defendants relied at the hearing before Flaux J, says merely that:

> "… if Unitech Limited were to approach the RBI to seek its approval for payment pursuant to the Awards, the RBI will not merely review the relevant Award alone (and the terms therein) but will also scrutinise and review the underlying transaction documents to ascertain the legality of the transaction under FEMA, and the regulations thereunder, prior to granting its approval. Under Indian law the RBI is the arbiter of compliance with FEMA, and accordingly, given that practitioners in this are of the opinion that the RBI will adopt a restrictive approach to such questions, there is no certainty that it would deem the transactions compliant with FEMA and regulations thereunder."

That is a very tentative conclusion, expressed in weak terms.

f) The witness on whose evidence the defendants now rely, Mr K Ramasubramanian, states in terms that:

> "the RBI enjoys a fair degree of discretion when considering and providing approvals generally under FEMA. Further, certain parameters for approvals to be accorded by RBI either

> under FEMA or under the relevant regulations are not in public domain and the RBI considers the matters for approval on case-by-case basis, depending on the facts and circumstances of each matter."
>
> It must follow that great caution must be exercised before accepting dogmatic statements about what the RBI will or will not do when that question has never been properly put to the test.

g) It is to be expected that one factor to which the RBI would wish to give considerable weight is the importance of compliance with international arbitration awards, India being a party to the 1958 New York Convention, and the damage which may be done to the reputation of Indian business generally if such awards are not complied with. It is apparent that, despite his conclusion that the RBI would refuse permission to pay the sum awarded, this is a factor to which Mr Ramasubramanian has simply not applied his mind. His failure to do so undermines his evidence.

h) I am not at all persuaded that if Unitech were to make a serious effort to persuade the RBI to give permission to honour the award, emphasising the importance of such compliance and the international obligations undertaken by India in the New York Convention, such permission would be refused. Since it is determined not to do so, and any application which it were now to make would obviously be half hearted at best, we may never know.

72. In any event, whether payment of the award would infringe Indian exchange control regulations, or whether any necessary permission would be given, is irrelevant on the present application. The order for appointment of receivers over Unitech's shares in URRL, UOL, Nuwell and Technosolid does not involve any such infringement. There is no reason to suppose that any step which the receivers may require the defendants to take will do so either but, if that does happen, the order provides a mechanism for that issue to be addressed (see [68] and [69] above).

73. Accordingly the four specific arguments advanced by the defendants do not cause me to doubt the provisional conclusion reached above that an order for the appointment of receivers is appropriate.

Proportionality

74. There was some reference at the hearing to the question whether the appointment of receivers is a proportionate remedy, having regard to its likely expense. In view of the amount at stake and the defendants' obstructive attitude to enforcement, I have no doubt that it is.

Conclusion

75. For these reasons I was satisfied that it was just and convenient to make an order in the exercise of my discretion for the appointment of receivers, and that it was necessary and appropriate to include the ancillary orders required in order to render that order effective.