

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Mr Justice Hamblen

2010 Folio 222

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

LORD JUSTICE LAWS

LORD JUSTICE JACKSON

and

LORD JUSTICE TOMLINSON

Between :

CMA-CGM Marseille

- and -

Petro Broker International

(Formerly known as Petroval Bunker International)

Respondent

Appellant

John Russell (instructed by **Reed Smith LLP**) for the **Respondent**

Nicholas Craig (instructed by **Withers LLP**) for the **Appellant**

Hearing date : 30 March 2011

Judgment

Lord Justice Tomlinson :

Introduction and Overview

1. On 30 November 2010 Gloster J granted to the Respondent (“CMA”) without notice to the Appellant (“Petroval”) an injunction preventing Petroval from enforcing against CMA two final arbitration awards issued by London maritime arbitrators on 28 January 2010 and 18 August 2010 respectively. More specifically, the injunction prevented Petroval from enforcing the awards against a bank guarantee and a P. and I. Club guarantee provided for the very purpose of standing as security for the awards. The first award related to the non-payment by CMA for bunker fuel supplied by Petroval to CMA’s vessel “Fidelio” in October 2008 pursuant to a bunker supply contract made in January 2008. It was in the sum of US\$3,100,136.30. The bunker supply contract expressly incorporated the General Terms and Conditions of the BIMCO Standard Bunker Contract (“the BIMCO Terms”). Clause 8 of the BIMCO Terms headed “Payment” includes the following sub-clauses:-

“(b) Payment shall be made in full, without set-off, counterclaim, deduction and/or discount, free of bank charges.

(d) Any delay in payment and/or refund shall entitle either party to interest that the rate of two (2) per cent per month or any part thereof.”

In their reasons for making the first award the arbitrators considered at length, and comprehensively rejected, CMA’s objection that it would be inappropriate to make an award for the cost of bunkers supplied without regard to the prospect that CMA might in due course be unable to enforce any award which it might obtain against Petroval on the strength of its counterclaim for damages arising out of the supply of allegedly off-specification bunkers and wrongful termination of the supply contract. Petroval had, said CMA, “withdrawn to some Singapore holding entity in the context of various international litigations and investigations”. The second award was for the contractual interest due on the principal amount represented by the first award. As at 30 November 2010 when the injunction was obtained the amounts due under the two awards was about US\$4.5M. The security provided was in the sum of US\$1.8M and about US\$3.6M respectively – the latter guarantee was in fact denominated in Euros. The injunction, described as a freezing order, provided that it was not to come into effect until CMA had paid US\$4.5M into court. CMA gave an undertaking to the court to make that payment on or before 1 December 2010 and duly did so.

2. On 14 February 2011 CMA decided, apparently on the strength of information which it had had since 2 December 2010, that it did not intend to seek to maintain the injunction at the then forthcoming return date hearing due on Friday 18 February 2011. It so advised Petroval, noting that “instead, [it wished] to withdraw the injunction and apply for the monies paid into Court to be returned as a matter or urgency”. For good measure, CMA’s solicitors had the previous week advised Petroval, through its solicitors, that CMA was willing to pay the amount required to

satisfy the first award and asked for confirmation of the account to which payment should be made, adding that once confirmation was received that the payment would be appropriated to the first but not to the second award “we shall instruct our clients to make the payment”. Both of the confirmations required were given by Petroval on 9 February 2011 but no payment was made by CMA.

3. Unsurprisingly, as it might be thought, at the hearing on the return date, 18 February 2011, which came before Hamblen J, Petroval resisted CMA’s request that the US\$4.5M in court should be paid out to CMA forthwith. Petroval wished the money to remain in court so that it could enforce the awards against it as soon as it could obtain the leave of the court pursuant to s.66 of the Arbitration Act 1996 to enforce the awards in the same manner as a judgment of the court. On 16 February 2011 Petroval had issued an application in the action, returnable on 18 February 2011, seeking such leave. Petroval had taken the view that the injunction had hitherto prevented it from taking even this step, as arguably indeed it had. Hamblen J took the view that the logic of the requirement that US\$4.5M be paid into court was that it was as a quid pro quo for CMA obtaining an order that prevented Petroval from drawing down the guarantees. Since that impediment had gone, it was appropriate to go back to square one and to return the money to CMA. Petroval should not be allowed to “take advantage” of what had happened so as to be in a better position than it would have been in before CMA had obtained the injunction. The question on this appeal is whether Hamblen J was right to order the repayment of the money to CMA. Hamblen J stayed execution of his order for seven days to permit the making of an application to this court for permission to appeal. Aikens LJ extended that stay until after the determination of the application for permission to appeal. Subsequently, Aikens LJ granted permission to appeal and, in the light of the stay, which inferentially he continued, ordered an expedited hearing.
4. In one sense this is a somewhat arid dispute. CMA is, according to its own evidence, “a major container line owning and/or operating many container vessels” and, according to its counsel, Mr Russell, “it has plenty of assets”. However it has also, according to Mr Russell, chosen not to honour the awards. By the time the matter came before this court those awards were enforceable in the same manner as a judgment of the court. Indeed, judgment had been entered in terms of the awards, as permitted by s.66(2) of the Arbitration Act 1996. Hamblen J on 18 February 2011, without either opposition or consent from CMA, had given leave pursuant to s.66(1) reserving to CMA the usual fourteen days within which to apply to set aside the order – cf CPR 62.18(9) and (10). That period expired on 7 March 2010 but it was inconceivable that CMA could have made any such application, and Mr Russell did not before Hamblen J on 18 February suggest that any such application could be made. Challenges to the first award under ss.68 and 69 of the Arbitration Act had already been made and had failed in 2010. No challenge had been made to the second award within the time allowed. Thus in circumstances where Petroval has two unsatisfied judgments of the court in its favour in the total sum of about US\$4.5M, which CMA has shown every disinclination to honour, we are asked to sanction the payment out of court to CMA of the same amount, leaving Petroval to pursue enforcement elsewhere. I appreciate that we must look at the position as it was on 18 February 2011 when Hamblen J made the order which is the subject of the appeal, but the result for which CMA contends is deeply unattractive and, some might say, absurd. Particularly is that so in circumstances where CMA’s counsel told Hamblen J

on Friday 18 February 2011 that subsequent to the obtaining of the freezing order Petroval had been sold to Baltic Oil Terminals, an English registered AIM listed company, and that “clearly in the circumstances [CMA is] no longer able to maintain any argument that there is a risk of dissipation of assets, the facts have changed entirely from the basis on which [CMA] obtained the freezing order”. Whilst Mr Russell submitted that “It is not the court’s role to police the payment of arbitral awards” it is certainly the court’s role to assist in and to facilitate so far as possible the enforcement of its judgments. Moreover there is and can be no suggestion that enforcement against the money in court would involve giving to Petroval some sort of preferential treatment to the disadvantage of other creditors of CMA.

Background

5. I have already indicated that the dispute arises out of a bunker supply contract made in 2008. Pursuant thereto Petroval made claims against CMA as follows:-

- 1) The unpaid invoice for the MV Fidelio supply of US\$3,100,136.30 and contractual interest thereon at 2% per month;
- 2) Contractual interest at 2% per month arising from CMA paying the MV Orfeo invoice approximately one month late;
- 3) Damages for breach of contract by CMA by cancelling the MV Rigoletto delivery, calculated by reference to a claimed loss on selling the fuel oil to a third party of US\$1,090,220.00 plus barge cancellation charges of US\$18,000;
- 4) Damages arising from CMA’s alleged repudiatory breach of the Supply Contract, estimated at US\$800,000.

CMA counterclaimed:-

- 1) US\$5,979,630 for losses arising from the supply of off-specification bunkers to the MV Norma;
 - 2) US\$218,000 for losses arising from the supply of 3,000 tonnes of off-specification bunkers to the MV Fidelio;
 - 3) US\$787,882.00 for losses arising from Petroval’s alleged wrongful termination of the supply contract.
6. In addition to the clause set out at paragraph 1 above, the BIMCO standard terms included a London arbitration clause. The claims and counterclaims were referred to arbitration.
7. Petroval sought an interim award in respect of the price of the approximately 8,500 tonnes of fuel oil supplied to the MV Fidelio.
8. CMA resisted the making of an interim award on various grounds. 3,000 tonnes of the fuel oil supplied was said to have been off-specification. Petroval denied that it was, but nonetheless removed and replaced the impugned parcel. There was no claim that the replacement fuel was off-specification, however it was suggested that BIMCO Clause 8(b) could have no application in respect of material supplied which was off-

specification. It was said that the terms of the Supply Contract had in any event been varied so as to derogate from Petroval's ability to rely upon Clause 8(b). It was said to be inappropriate to proceed to an interim award in respect of one item in a complex and interrelated series of claims and counterclaims. Furthermore, CMA expressed its concern that such a course would unfairly prejudice it, since if at the end of the day its counterclaim succeeded in full, rather than being able to net off any amount due to Petroval, it would have to attempt to recover from Petroval. I have also already referred to CMA's pejorative description of Petroval's status, which it sought to contrast unfavourably with its own "as a substantial operator of more than three hundred and fifty ships".

9. The arbitrators were invited to deal with this issue on the basis of written submissions. It was agreed that if the two party-appointed arbitrators, Mr Trevor Harrison and Mr Michael Baker-Harber, found themselves in agreement, they had no need to appoint a third arbitrator.
10. The two arbitrators issued an interim but final award dated 28 January 2010 in favour of Petroval as I have already described. Their open reasons for their award ran to 53 pages. In those reasons they considered but rejected all of the objections to the making of an award put forward by CMA. At paragraphs 13.12 to 13.22 they dealt comprehensively with the suggestion that the contract had been varied in a manner which precluded reliance by Petroval upon Clause 8(b). They found that no such agreement had been made. They considered the rival arguments in relation to Clause 8(b) both as a matter of construction and in the light of authority and concluded that it was effective and enforceable. Three paragraphs of their reasons deserve reproduction in full:-

"CMA's Point on Severability and Prejudice"

14.15 It is submitted by CMA in its Rejoinder Submissions of 10th November (see 10.11 above), that it is inappropriate for a single issue (payment in respect of the Fidelio Supply) to be carved out of a larger dispute and decided in isolation. For the various reasons given above, we disagree. In particular, sub-clause 8.(b) of the BIMCO Terms seems to us to countenance precisely such an occurrence.

14.16 CMA argues that if the preliminary award is in Petroval's favour but CMA subsequently succeeds on its counterclaim, there would be a greater amount due to CMA from Petroval than would otherwise be the case and that this increased risk is prejudicial to CMA. It may well be the case that there is such an increased risk but it is a foreseeable consequence of the terms the parties agreed in the supply Contract and CMA must therefore take its chances, as indeed depending on the final outcome of the dispute, must Petroval, that this and any further award or awards will be honoured.

...

16 FOOTNOTE

16.1 We have well in mind that this is an application for an interim or partial award and that there are other issues between the parties. Such applications as this are within the discretion of the tribunal. CMA are clearly concerned to hold money otherwise due to Petroval in respect of the Fidelio Supply as security for their counterclaim. It would be theoretically possible, we suppose, to exercise our discretion in favour of Petroval and require CMA to pay only on condition that Petroval provides security in a like amount. However we would be most uncomfortable in doing so; it would smack of using a procedural “device” to undermine Petroval’s substantive rights. Their right in this case is to be paid without set-off, counterclaim, deduction and/or discount. On the basis of our findings it would be wrong for us to exercise our discretion other than in favour of Petroval when faced with such clear and unequivocal wording. No doubt, if so advised, CMA will seek to secure their position by other means if they make payment in accordance with our order.”

11. The second award quantified the interest due under the first award.
12. Meanwhile on 24 February 2010 CMA commenced this action in the Commercial Court by issuing an Arbitration Claim Form. In it they sought the setting aside of the first award:
 - i) Under s.68 of the Arbitration Act 1996, on the ground of serious irregularity said to consist in the arbitrators determining the issue whether there had been an agreement to derogate from Clause 8(b) without giving to CMA a reasonable opportunity of putting its case and/or while adopting an unsuitable and unfair procedure;
 - ii) Under s.69 of the Act on the basis that the tribunal erred in law as to the proper construction and effect of Clause 8(b).
13. Even by the standards familiar to those whose lot it is routinely to consider such applications, particularly those under s.68, this was forlorn indeed. Leave to appeal under s.69 was refused by David Steel J on 16 June 2010, the judge observing:-
 - “1. Given the replacement of the bunkers alleged to be off-spec, the determination of the question as to the true construction of Clause 8(b) will have no substantial effect on the rights of the parties.
 2. In any event the question is not one of general public importance and the tribunal’s conclusion was not obviously wrong. To the contrary it was probably right:
 - (a) Such a clause was commonplace in the oil supply industry and merited a consistent approach.

(b) The clause was indeed analogous to that in *Totsa Total Trading v Bharat* [2005] EWHC 1641 (Comm).”

The s.68 application was dismissed by Simon J on 8 October 2010. His judgment is not before us, but Mr Russell was to tell Gloster J in due course that in rejecting that application one of Simon J’s observations “was that he didn’t think much of our evidence anyway that there was an agreement to [the] effect” that the anti-set-off provision would not apply.

14. Forlorn though it may have been, the application under s.68 was sufficient to frustrate or at any rate to delay Petroval’s attempts to enforce the first award in the Netherlands. Enforcement proceedings were begun in that jurisdiction in June 2010. As I have already mentioned briefly above, Petroval had as a result of taking conservatory attachment measures in the Netherlands, I believe on both occasions the attachment of bunkers belonging to CMA, obtained two guarantees as security for their claims. The detail does not matter but as I understand it the first guarantee, dated 26 November 2008, issued by Fortis Bank, potentially responds to an award in respect of all of Petroval’s claims under the bunker supply contract. It is limited to US\$1,810,462 and is subject to Dutch law and to exclusive Rotterdam jurisdiction. The second guarantee dated 1 April 2010 is furnished by the North of England P. and I. Association in the sum of €2.6M (about US\$3.6M) and, as I understand it, stands specifically as security for the first award but, arguably, as security also for the second. This guarantee also is subject to Dutch law but on this occasion to the non-exclusive jurisdiction of the Rotterdam court. It provides that the Club will pay the amount of the award, subject to the monetary limit, if the award has been declared enforceable in the Netherlands by a Dutch court having jurisdiction to decide on the enforcement of a foreign arbitral award.
15. On 18 June 2010 Petroval submitted to the Rotterdam court a petition in which it requested the Rotterdam court to recognise and to grant leave for enforcement of the award in the Netherlands. Pursuant to Article 1075 of the Dutch Code of Civil Procedure the petition fell to be decided in accordance with the principles contained in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, the “New York Convention” to which both the United Kingdom and the Netherlands are party. There was a hearing on 17 August 2010 at which CMA argued, inter alia, that the Petition should be refused or adjourned on the basis that the award had not yet become binding on the parties or its enforcement would be contrary to public policy because of the outstanding s.68 application which was in any event relied upon as a ground for adjourning the decision on enforcement – cf Articles V.1(e), V.2(b) and VI of the New York Convention. On 3 September 2010 the Rotterdam court acceded to the argument under Article VI, adjourning its decision on enforcement until 1 March 2011 awaiting the outcome of the s.68 application.
16. On 21 October 2010 Petroval requested the Rotterdam court to continue the procedure in the light of the dismissal of the s.68 application in London. CMA repeated its argument that it feared that after recognition and enforcement of the Award in the Netherlands Petroval would cease to exist. It argued that Petroval was no longer trading and placed before the court an extract from Petroval’s 2009 financial report, which related to the year ended 31 December 2009.

17. On 24 November 2010 the Rotterdam court granted Petroval recognition of and leave for enforcement of the first Award in the Netherlands. This cleared the way for the guarantees to be called.
18. On 30 November 2010 CMA applied without notice to Gloster J for what Mr Russell described as “probably the least draconian freezing that’s ever been sought”. In the usual way the hearing was arranged at very short notice and was no doubt accommodated by the judge within her existing list. The judge was supplied in advance with two bundles of documents and a skeleton argument which suggested some pre-reading. In that list the Award and Reasons figure as the last item and are described as “for background”. I very much doubt if the judge would have had any proper opportunity to read all of the material suggested – the principal affidavit in support of the application itself ran to 29 pages and the Exhibit thereto to 289 pages, although the judge was not invited to read all of that. Furthermore Mr Russell told us that at the hearing the attention of the judge was not specifically drawn to the “footnote” to the arbitrators’ reasons for their award, paragraph 16 thereof as set out above.
19. In making these observations I do not however mean to suggest that CMA in any way misled the judge as to the circumstances in which the relief was sought. They did not. At paragraph 86 of his affidavit in support of the application Mr O’Neil, the partner in Messrs Reed Smith with responsibility for the application, observed:-

“I accept that in one sense a freezing order now might be seen as defeating the anti-set-off provision. However, for the reasons set out above I consider the order justified. Moreover, the reason why at this stage CMA limits its application to the proceeds of the Award (creating the impression that it is linked to the anti-set-off provision) is to avoid any disruption to Petroval’s business (to the extent that it is still trading at all). A general freezing order (which I believe CMA would be entitled to) could not be seen as being in any way connected to the application or otherwise of an anti-set-off clause in respect of a particular debt.”

No reference was made in the skeleton argument to the anti-set-off provision but at the hearing itself Mr Russell pointed out that because the purpose of the application was to freeze the proceeds of the award and the security that was in place for the award, it looked as though CMA was attempting to “get round the decision” of the arbitrators to the effect that Petroval was entitled to payment without regard to the unresolved counterclaim.

20. So far as concerns the possible dissipation of assets, the basis of the application was that it appeared to CMA that Petroval was no longer trading. CMA maintained that it had good grounds for believing that Petroval was only being kept alive for the purpose of receiving the proceeds of enforcement of the Awards. As Mr Russell put it in his skeleton argument, “If Petroval receives those proceeds CMA believes the money will vanish, and there will be nothing for CMA to enforce against if it obtains an Award in its favour on the counterclaim”. Mr O’Neil in his affidavit said that the most recent accounts for Petroval were those for the year ending 31 December 2008, which showed a small profit (in fact US\$ 800,000 odd) whilst Petroval was still

actively trading as a bunker supplier, which it was no longer doing. Its only ongoing economic activity was in relation to a lease of storage facilities.

21. Unhappily there appears to have been a breakdown in communications between CMA and its London solicitors. As recently as 11 November 2010 CMA had provided to the Rotterdam court Petroval's published audited accounts for the year ended 31 December 2009. These showed that the company had made an after tax profit in that year of US\$5.5M. True this had been achieved through sub-leasing storage tanks, the company having refrained in 2009 from taking any positions on trading marine fuels, but the prospects for 2010 were said by the directors to be very positive. The company's staff had been retained pending the outcome of discussions concerning the sale of the company. CMA did not furnish Reed Smith with the 2009 accounts. Mr Russell of course acknowledges that the up-to-date accounts should have been placed before Gloster J.
22. In fact Petroval had no intention of dissipating its assets. In December 2010 it was sold for US\$10.8M as a going concern to Baltic Oil Terminals plc. The sale was announced on 2 December 2010 by Regulatory News Service announcement of that day. This public announcement included the following:-

“Unaudited profit before tax for PBI [Petroval] for the ten months ended 31 October 2009 was approximately US\$3.5M and unaudited net assets of 31 October were approximately US\$10M. Net assets of PBI at completion are expected to be approximately US\$2.3M.

...

By acquiring PBI, the Company [Baltic] will gain access to an important new market, with opportunities to trade and trans-ship significant volumes of oil product out of a major global shipping hub. The addition of PBI to the Group's existing operations will also provide an additional immediate source of free cash flow for the Group, estimated to be approximately US\$0.5M per month . . .

...

The Company intends to take full advantage of the experienced management team within PBI to establish a single management team, responsible for managing all of the Group's trading and terminal activities both in Kaliningrad and Rotterdam.”

Although announced on 2 December 2010 the sale was not completed until 20 December 2010.

23. Insofar as it was necessary so to do, the information being in the public domain, Petroval by its solicitors told CMA of the sale as a going concern by letter dated 7 December 2010.

24. We have a transcript of the proceedings before Gloster J on 30 November 2010, although not a copy of the order which was sought. Gloster J was very unhappy at being asked to restrain drawdown under on-demand guarantees. She also observed that the draft order was coy about what actually was sought. Mr Russell indicated that it was intended that there should be a prohibition on drawdown. The judge required that that should be made clear in the wording. However the judge also pointed out that another way of achieving the same object without actually prohibiting drawdown was to say that drawdown was only to be done on terms that the money was paid into a joint escrow account. She later observed that an order in that form has the characteristics of a freezing order, whereas if drawdown was prevented it arguably could be said to be circumventing the anti-set-off clause, which she was concerned to avoid. Ultimately it was left that Mr Russell would prepare a wording for the judge's approval which would provide that drawdown under the guarantees was only to be done on terms that the money was paid into an escrow account or into court.
25. The judge was also concerned about the court's jurisdiction to make the order sought. She enquired why the arbitrators could not make an order that would prevent enforcement of the Award or something of that sort pending determination of the counterclaim. Evidently she had in mind s.44 of the Arbitration Act 1996, which so far as material provides:-
- “44(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
- (2) Those matters are –
- . . .
- (e) the granting of an interim injunction . . .
- (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
- . . .
- (5) In any case the court shall act only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”
26. The judge was told that the arbitrators had no power to make an order that would protect CMA's position in the arbitration. It is unfortunate that in this connection she was not referred to the arbitrators' "footnote", paragraph 16 of their Reasons.
27. Mr O'Neil's affidavit contained at paragraph 99 CMA's offer to undertake to pay into escrow forthwith the full amount due under the two Awards. It also contained, as a separate matter, an offer to fortify the usual cross-undertaking in damages by

provision of a bank guarantee in the sum of, say, £100,000. Mr O’Neil observed that it was difficult to see how the injunction requested would cause any damage to Petroval.

28. The rationale for the offer to pay US\$4.5M into escrow was not explained by Mr O’Neil, nor was this topic mentioned in Mr Russell’s skeleton argument provided to Gloster J. It was explained to the judge at the hearing in these terms:-

“One of the undertakings that we are giving is to pay the full amount into escrow. So once that is done, on one view the Respondent to this application, Petroval, is actually going to be in a better position than it would otherwise be because if, for the sake of the argument, they have lost the right to drawdown under the Fortis guarantees, the sum that will then be available [to abide] by the result of the determination of all of the claims in the arbitration will be greater than the sum that’s currently available for drawdown under the North of England guarantee.”

29. It was said that payment into escrow could be made within seven days. The judge replied that that was not good enough. If she was to stop Petroval from drawing down under a guarantee (still the proposal at this stage of the discussion) “the money has got to be there right now, has it not?” The compromise, at Mr Russell’s suggestion, was that the order should not come into effect until the money was paid into court.

30. The judge determined that it was just and appropriate that an order should be made and it was left that Mr Russell would redraft the Order and submit it to the judge for approval.

31. The operative parts of the Order made were as follows:-

“This order shall not come into effect until the Applicant has complied with the undertaking at paragraph 1 of Schedule B and has paid US\$4.5million into court.

1. This is a Freezing Injunction made against **PETROVAL BUNKER INTERNATIONAL BV** (“the Respondent”) on 30 November 2010 by Mrs Justice Gloster on the application of CMA-CGM MARSEILLE (“the Applicant”).

...

FREEZING INJUNCTION

6. Until the return date or further order of the court, save as set out in this order:

(1) The Respondent must not make demand on or in any way draw down monies pursuant to the 3 guarantees set out below unless any sums so demanded and drawn down are paid directly by the relevant guarantor into court or into an escrow account agreed by the Applicant:

(a) The guarantee from Fortis Bank dated 13 November 2008 in the sum of US\$500,000.

(b) The guarantee from Fortis Bank dated 26 November 2008 in the sum of US\$1,810,462

(c) The Letter of Undertaking/guarantee from the North of England Club dated 1 April 2010 in the sum of Euro 2,600,000.

(2) The Respondent must not assign or otherwise transfer or dispose of or deal with the benefit of the said guarantees.

(3) The Respondent must not assign or otherwise transfer or dispose of or deal with or diminish the value of its assets being the Interim Final Awards of the arbitral tribunal (Harrison, Baker-Harber) dated 28 January 2010 and 18 August 2010 and/or the proceeds of any enforcement of the said Awards.

...

PROVISION OF INFORMATION

8. (1) Within 3 working days after being served with this order, the Respondent must swear and serve on the Applicant's solicitors an affidavit setting out all of his assets worldwide exceeding £10,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

...

EXCEPTIONS TO THIS ORDER

9. (4) The order will cease to have effect if the Respondent -

- (a) provides security by paying the sum of US\$4.5million into court, to be held to the order of the court; or
- (b) makes provision for security in the sum by another method agreed with the Applicant's legal representatives.

SCHEDULE B

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

(1) The Applicant shall on or before 1 December 2010 or as soon as possible thereafter pay the sum of US\$4.5million into court.

..."

32. There are three preliminary points to be made about this Order. First, the reference to a guarantee from Fortis Bank dated 13 November 2008 simply reflects a misunderstanding, possibly as to the status of a draft. There was, as I understand it, only one Fortis Bank guarantee.
33. The second and more substantial point is that paragraph 6(3) of the Order is not easy to understand. Mr Russell told us that the purpose, never I think discussed with the judge, was to ensure that if the Awards were enforced by any means other than drawing down of the guarantees, there would be no dissipation of the proceeds of enforcement. Mr Russell suggested that the sub-paragraph might more happily have provided:-

“The Respondent must not assign or otherwise transfer or dispose of or deal with or diminish the proceeds of any enforcement of the Interim Final Awards of the arbitral tribunal (Harrison, Baker-Harber) dated 28 January 2010 and 18 August 2010.”

The wording of the order is of course very different. It prohibits “dealing with” the Awards. Mr Russell accepted that the wording adopted had inadvertently prevented Petroval from enforcing the Awards by means other than drawing down the guarantees.

34. The third point is that the requirement, imported from the standard form, that Petroval provide information concerning its assets, a point never apparently discussed with the judge, is simply inappropriate. The purpose of the injunction was simply to prevent the dissipation of the fruits of enforcement of the Awards. Neither the purpose nor the effect of the Order was to impose a freezing order on Petroval’s assets generally. There was a further contested hearing before Gloster J on 8 December 2010 at the culmination of which she directed that Petroval was not obliged to comply with paragraph 8 of the Order until after the effective hearing of its application to set aside the freezing order, then expected to take place on 10 December, and only then if the judge hearing such application determined that an order in terms of paragraph 8, or a similar order, should be made. During this hearing Gloster J observed more than once, without being contradicted, that Petroval’s judgment debt was secured by the money paid into court.
35. Thereafter the return date was, for reasons of practicality concerned with the likely volume of evidence to be produced and the time-scale involved, by consent adjourned until January 2011. Petroval was agreeable to this because the sale to Baltic had still not completed. However on 16 December 2010 Petroval pointed out to CMA that the fact that it was being sold to a publicly listed company was of itself sufficient to justify the setting aside of the freezing order as there could be no risk of dissipation. CMA nonetheless insisted on service by Petroval of evidence in support of its application to set aside. The return date was set for 18 February 2011. Petroval served its evidence on 4 February 2011. On 7 February 2011 CMA gave the indication to which I have already referred that it would honour the first award. On 14 February 2011, as again I have mentioned above, CMA said that in the light of the evidence produced on 4 February it did not intend to seek to maintain the freezing order but instead wished to withdraw the injunction and to apply for the monies paid into court to be returned as a matter of urgency.

36. No formal application was made for the payment out of the money in court. On 17 February 2011 both sides served skeleton arguments for the hearing the next day. Unsurprisingly for a routine and for the most part uncontested application in a busy Friday Commercial Court application list, the judge was not asked to undertake extensive pre-reading. The judge did not have the advantage that we have had of having the single issue isolated for decision against the background of the entire history of the arbitral proceedings.
37. Paragraphs 3 and 4 of Mr Russell's skeleton argument read:-

- "3. On 2 December 2010 it was announced that the defendant company was being acquired by Baltic Oil Terminals plc.
4. In the light of the new ownership of the defendant, the Claimant does not seek a continuation of the freezing order."

In the light of this observation it is apparent that steps should have been taken by CMA to discontinue the injunction at the latest when they became aware that the sale had been completed, although it may be that they were unaware of this until 4 February 2011. However nothing turns on this.

38. Paragraphs 13-17 of Mr Russell's skeleton argument read:-

"Section 66 Application/US\$4.5M paid into court

13. On very short notice the Defendant has issued an application under s.66 of the 1996 Act. The Claimant has had no proper opportunity to consider or respond to this application and therefore its hearing should be adjourned.
14. The Defendant also wishes to enforce any judgment obtained pursuant to s.66 against US\$4.5M which was paid into court by the Claimant.
15. The payment into court was volunteered by the Claimant of its own motion when it obtained the freezing order ex parte. Now that the freezing order is not being pursued, it should be paid back out to the Claimant.
16. It would be inequitable for the Defendant now to be in a better position with regard to enforcement than it would have been had the application for the freezing order not been made at all, in particular where the reason that the order is no longer pursued is the fact of the sale to Baltic, which post-dated the obtaining of the original order.
17. The Defendant still has the benefit of the three guarantees which it obtained to secure its claim."

39. Hamblen J acceded to the request that the money be paid back out to the Claimant, for the reasons set out at paragraph 3 above. He gave no formal judgment, having made clear in argument why he took the view he did. The judge was told that the guarantees, still thought to be three in number, remained available in a sum in excess of the US\$4.5M due. Mr Craig was not in a position to say that the guarantees were unavailable. Although raised in his skeleton argument, at no point in his oral argument before the judge indicated his decision did Mr Craig suggest that it was relevant to the exercise of the judge's discretion that the injunction had been obtained improperly. It was therefore a surprise to the judge when Mr Craig later asked for permission to appeal, relying inter alios upon that very ground. The judge then indicated that he would put into writing his reasons for refusing permission to appeal. Those reasons helpfully contain a succinct summary of his reasons for exercising his discretion in the manner which he did. The operative part reads:-

- “1. The Respondent has two arbitration awards against the Claimant in the sum of about US\$4.6 million. It has 3 guarantees in its favour as security for its claims which exceed this amount.
2. On 30 November 2010 Gloster J made a freezing order against the Respondent. Due to her concern that the effect of the order would be to prevent enforcement of the guarantees US\$4.5 million was offered and required to be paid into court as a condition of the grant of the order.
3. The Claimant now accepts that the freezing order should be discharged. It says this is because the Respondent's new ownership means that there is no longer a real risk of dissipation. The Respondent contends that the order should never have been granted in the first place.
4. The discharge of the order means that the Respondent can now enforce its claims against the guarantees. In those circumstances the Claimant contends that the US\$4.5 million should be released. The Respondent contends that it should remain in court so as to be an available fund against which they can enforce their claims.
5. In the exercise of my discretion I consider that the US\$4.5 [million] should be released. In particular:
 - (1) The rationale for requiring the payment of the US\$4.5 million into court no longer applies;
 - (2) On discharge of the freezing order the Respondent is in a position to enforce its claims under the guarantees;
 - (3) It does not apply for a freezing order against the Claimant and no principled reason has been advanced as to why it should be secured for its

claims (and, moreover, secured over and above the guarantee security it already has);

- (4) It is suggested that the fact that the order allegedly should not have been obtained is a reason why there should be no payment out. However, the Respondent has the protection of the Claimant's secured undertaking in damages should it be established that some loss has been suffered as a result of the order for which they should be compensated. No such loss has so far been identified.
- (5) In effect the Respondent is seeking to be put in a better position than it was in before the freezing order was applied for. No justification for this has been made out.
- (6) . . .”

Discussion

- 40. Mr Craig suggests that the court lacked jurisdiction to grant the freezing order in the first place, since the arbitrators could have declined to make an award in Petroval's favour pending resolution of the counterclaim. I reject this argument. The arbitrators plainly had no power to make a freezing order. It is true that they had the power to decline to make an interim award, although had they done so they would in my view have failed properly to apply and to give effect to the contractual provision. But having decided to make an interim award, the arbitrators plainly had no power to impose a freezing order upon the fruits of its enforcement. Pursuant to s.44(5) of the Arbitration Act therefore, the court had the jurisdiction which it was invited to exercise. I would note in passing that I also regard as unpersuasive the counter-argument, insofar as it was pressed, that had the court lacked jurisdiction to make the freezing order, then it is axiomatic that the money paid in as a condition of its making should be returned. I doubt the soundness of that proposition, but need express no concluded view about it.
- 41. I also regard as irrelevant to the discretion which Hamblen J had to exercise my own view on the question whether the freezing order ought in any event to have been granted on the without notice application. I do not think that I would myself have granted it, because I consider, albeit with the benefit of much more time for reflection than was afforded to Gloster J, that it deprived Petroval of its contractual entitlement to payment in full without set-off, counterclaim, deduction or discount. Indeed I suspect that had Gloster J's attention been drawn to the arbitrators' footnote, she might have come to the same conclusion. Mr Russell did not suggest that the arbitrators had in mind by their last sentence an application for an injunction to prevent the payment reaching Petroval's hands. The injunction was, I think, the very sort of procedural device which the arbitrators regarded as capable of undermining Petroval's substantive rights. However I agree with Mr Russell that the remedy in case of an injunction which ought not to have been granted lies with the undertaking in damages. So I leave my view in that regard out of account.

42. For the same reason it is unnecessary further to address the allied but distinct question whether the injunction was improperly obtained. The remedy again lies in the undertaking in damages. However it is only fair that I should record that whilst I am surprised that the injunction was sought I do not regard CMA as having acted improperly in obtaining it. The failure to produce the most recent published accounts was a result of an unfortunate breakdown in communications and could even in other circumstances have led to the injunction being set aside, but it is of no relevance to the question which we have to decide.
43. The rationale for requiring the payment into court was, as I see it, that, to all intents and purposes, Petroval was being prevented from drawing down the guarantees which had been provided, under compulsion, for the very purpose of standing as immediately available security against which Petroval could enforce its awards, and the money in court was the quid pro quo. It achieved the result that Petroval remained fully secured even though it could not enforce against the guarantees. For that reason, payment in was required as a condition of the grant of the order. I think that both Gloster J and Hamblen J saw the payment in in that light.
44. Mr Russell submits that the payment in should be seen not as the price of obtaining the injunction, but rather the price for maintaining it in force. He suggests that the rationale was that in the event that the injunction was maintained until final resolution of all the claims and counterclaims in the arbitration, the payment in should stand as a fund against which Petroval could enforce so that it would not be prejudiced if the guarantees had meanwhile become unavailable by reason of the delay in their being called. Both guarantees contain terms as to the circumstances in which they will expire. So, submitted Mr Russell, once CMA had lost the freezing order, it should no longer be required to pay the price of its maintenance in force.
45. This ex post facto rationalisation is in my view something of an over-elaboration of the rationale for requiring the payment in. I accept however that whatever was the rationale for requiring the payment in to be made, it is no longer of application if, as is assumed to be the case, the guarantees are as available now as they were on 30 November 2010, and certainly the contrary has not been shown. Where I part company with Hamblen J is in thinking that the circumstance that the rationale for requiring the payment in to be made is no longer applicable is not in itself conclusive of the question whether the money should simply without more be returned to CMA.
46. In this regard Hamblen J was not reminded of CPR 3.1(6A) upon which Mr Craig relied before this court. That provides:-

“(6A) Where a party pays money into court following an order under paragraph (3) or (5), the money shall be security for any sum payable by that party to any other party in the proceedings.”

CPR 3.1(3)(a) contains the general power that a court may, when it makes an order, make it subject to a condition to pay a sum of money into court. Rule 3.1(6A) contains, as it seems to me, at any rate the starting point of the enquiry whether the money paid in should simply be paid out to CMA. Mr Craig was at first inclined to argue that this rule in fact deprived the court of a discretion in this regard, since it is expressed in mandatory terms. Mr Russell for his part countered that the sum payable

by CMA to Petroval could only be said to be payable “in the proceedings” by virtue of Petroval having headed its s.66 application with the Folio Number of CMA’s extant Action rather than issuing a new Arbitration Claim Form. However Mr Russell also pointed out that CPR 3.1(7) provides that “a power of the court under these rules to make an order includes a power to vary or revoke the order”. In these circumstances it became common ground that the court has a power simply to revoke the requirement to make the payment in, so that it is unnecessary to decide whether Mr Russell’s approach to the expression “payable by that party to any other party in the proceedings” is correct, either as a matter of construction of the rule or in the circumstances of this case. Nonetheless, CPR 3.1(6A) should I think inform the exercise by the court of its discretion. In my view it indicates that the predisposition of the court ought to be that the money should be available as a secured fund against which one party to litigation can enforce against the other payment of such sums as may become due in connection with the litigation.

47. In my view therefore Hamblen J erred in asking why should Petroval be put in a better position than it was before the application for the freezing order was made. Petroval was not asking to be put into a better position, it had been put into a better position as a result of CMA bringing into court the money it owed pursuant to the awards. Hamblen J castigated this as “trying to take advantage of what had happened” but for my part I cannot see why Petroval should not be allowed to take advantage of its debtor having brought the money into court. CMA has demonstrated that it intends to put every possible obstacle in the way of Petroval enforcing the awards. Having paid into court the amount which is indisputably due pursuant to the now no further challengeable awards, I can see no reason why Petroval should not be allowed to enforce against it.
48. In the circumstances of this case the judge was in my view wrong to regard Petroval as simply seeking further security for its claims. The claims had been converted into unchallengeable and enforceable awards. The awards were in turn in principle enforceable as judgments of the court, subject only to the leave of the court which the judge had already granted pursuant to s.66 of the Arbitration Act. True CMA had the right within fourteen days to apply to set aside that order, before expiry of which Petroval could not enforce, but the order permitting entry of judgment had already been made. In truth there was nothing further upon which CMA could rely in order to resist enforcement – its s.68 and 69 challenges had already failed and it had acknowledged that it could no longer suggest that Petroval would dissipate the fruits of the awards in order to defeat enforcement against it in due course of CMA’s unresolved counterclaims.
49. I appreciate that it is not shown that the other security is not equally available in The Netherlands, but I see no reason why Petroval should be required to go to the trouble and expense of further proceedings in that jurisdiction when there is here a fund in court available for immediate execution. Although none has yet been raised, there may be further problems in that jurisdiction. If the approach which I favour results in the Fortis guarantee remaining available in part to serve as security for Petroval’s further claims in the arbitration, that is as it seems to me simply Petroval’s good fortune. I see nothing unfair or inequitable in such a result.
50. I accept that there may be circumstances in which it is necessary to consider the competing claims of other creditors and whether it is appropriate to prefer one to

another. No such consideration applies here. CMA is a large and solvent organisation, well able to meet its obligations.

51. In my judgment Hamblen J erred in principle in his approach to the exercise of his discretion. I would allow this appeal and set aside his order to the effect that the sum of US\$ 4.5M paid into court, together with any interest thereon, be paid out to the Claimant, CMA, forthwith. I would invite written submissions on the order which should be substituted therefor. Since Petroval now has enforceable judgments in its favour for a total amount in excess of the amount in court together with accrued interest, I can see no reason why that money should not now be directed to be paid to Petroval in partial satisfaction of the two judgments.

Jackson LJ

52. I agree.

Laws LJ

53. I also agree.