

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, COMMERCIAL COURT
Field J
[2011] EWHC 829 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2012

Before:
LORD JUSTICE CARNWATH
LORD JUSTICE LLOYD
and
LORD JUSTICE TOULSON

Between:

WEST TANKERS INC	<u>Respondent</u>
- and -	
(1) ALLIANZ SPA	<u>Appellants</u>
(2) GENERALI ASSICURAZIONE GENERALI SPA	

Mr Stephen Males QC and Miss Sara Masters (instructed by **MFB Solicitors**) for the
Appellants
Mr David Bailey QC and Mr Marcus Mander (instructed by **Ince & Co LLP**) for the
Respondent

Hearing date: 22 November 2011

Judgment

Lord Justice Toulson:

Introduction

1. The question for the court is whether there is power under section 66 of the Arbitration Act 1996 to order judgment to be entered in the terms of an arbitral award in a case where the award is declaratory in form and more particularly, as in the present case, where it takes the form of a negative declaration, i.e. a declaration that the successful party has no legal liability to the other party in respect of the subject matter of the arbitration.
2. Section 66 provides:
 1. An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
 2. Where leave is so given, judgment may be entered in terms of the award.
 - ...
 4. Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under the Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.
3. The underlying dispute is between the insurers of voyage charterers of the vessel *Front Comor* and the vessel's owners about responsibility for a collision during the voyage charter. The collision was with a pier owned by the charterers and caused extensive damage rendering the berth unusable for a lengthy period. The insurers were subrogated to any claims of the charterers against the owners. The arbitrators appointed under the charter party found that the owners had contractual immunity, under the terms of the charterparty, from responsibility to the charterers for the damage and made an award declaring that the owners were under no liability to the charterers' insurers in respect of the collision.
4. On 15 November 2010, on a without notice application by the owners, Simon J ordered that the owners should be permitted pursuant to section 66(1) of the Act to enforce the declaratory award in their favour and that:

“Pursuant to section 66(2) of the Arbitration Act 1996, judgment be entered against the defendants in terms of the said award, namely a declaration that the [owners] are under no liability (whether in contract or in tort or otherwise howsoever) to the [charterers and their insurers] in respect of the collision

between the vessel Front Comor and the pier (and mooring dolphins) at Erg Petroli's Installation at Santa Panagia, Sicily on 8 August 2000."

5. An application by the insurers to set aside the order of Simon J was dismissed by Field J in a judgment dated 6 April 2011 [2011] EWHC 829 (Comm) [2011] 2 Lloyd's Rep 117 but he gave the insurers leave to appeal. The arguments presented on both sides have been clear, succinct and well-focused.
6. The issue might at first sight appear to be arcane. Section 48 of the Act provides that an arbitral tribunal may make a declaration as to any matter to be determined in the proceedings. Section 58 provides that, unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them, which plainly includes a subrogated insurer. In those circumstances, an independent observer might think it a pointless question whether such an award can be turned into a judgment of the court, since it is binding as a declaration of rights in any event, and in most cases he would be right. But in this case the owners perceive that there may be a possible advantage to them in having the award in the form of a judgment and the insurers evidently perceive a risk that the owners may be right. The reason has to do with a jurisdictional battle which has already taken the case to the House of Lords (*West Tankers Inc v RAS Reunione di Sicurita Spa* [2007] UKHL 4, [2007] 1 Lloyd's Rep 391) and to the European Court of Justice (*Allianz Spa v West Tankers Inc*, Case C-185/07, [2009] 1 AC 1138).

The Italian proceedings

7. While the arbitration was proceeding, the charterers' insurers brought a claim against the owners in the Tribunale di Siracusa in respect of the same incident. Colman J granted an anti-suit injunction restraining the insurers from taking any steps to prosecute their claims except by way of London arbitration. The House of Lords referred to the ECJ the question whether it was consistent with the Brussels Regulation (EC Regulation 44/2001) for the court of a member state to make an order restraining a person from continuing proceedings before the courts of another member state on the ground that such proceedings would be contrary to an arbitration agreement. In making the reference Lord Hoffmann and Lord Mance set out reasons why they considered that it should be permissible to do so. Lord Hoffmann said at paragraph 17:

"People engaged in commerce choose arbitration in order to be outside the procedures of *any* national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broadly equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices."

8. In a lengthy and fully reasoned opinion Advocate General Kokott recognised the importance of party autonomy but she disagreed that an anti-suit injunction provided an appropriate mechanism for its enforcement.
9. The Advocate General cited, at paragraph 49, the statement of the ECJ in *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* (case c-391/95) [1998] ECR I-7091, para 24, that where parties have excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any state that have jurisdiction as to the substance of the case for the purposes of the Brussels Regulation. That statement, she observed, is certainly correct, but the justification for the exclusive jurisdiction of the arbitral body requires an effective arbitration agreement covering the subject matter concerned.
10. The Advocate General expressed concern that the effect of an anti-suit injunction would prevent the court of the member state in which litigation was commenced from considering the validity of the arbitration agreement and she was also concerned about the possible repercussions if member states were to issue anti-suit injunctions in such circumstances. At paragraph 71 she acknowledged the deficiency of the present state of the Brussels Regulation in that there is no mechanism to co-ordinate its jurisdiction with the jurisdiction of the national courts in relation to arbitration, since arbitration is not within the scope of the Regulation. She considered that a unilateral anti-suit injunction was not a suitable measure to rectify the situation, but she did stress that divergent decisions should be exceptional, because if an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the appointed arbitral body.
11. The Grand Chamber of the Court agreed with the Advocate General but stated its reasons much more shortly. It too recognised the importance of party autonomy, observing at paragraph 33 that its conclusion (that an anti-suit injunction was not compatible with the Regulation) was:

“...supported by article 2(3) of the New York Convention, according to which it is the court of a contracting state, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”
12. The anti-suit injunction preventing the insurers from prosecuting their claim against the owners in the Tribunale di Siracusa was therefore set aside. The independent observer might expect the principles recognised by the Advocate General and the Grand Chamber to result in the dismissal of the insurers’ claims in Italy, since (i) there has never been cause to doubt that the issue of liability between the owners and the charterers for the collision fell within the arbitration agreement, (ii) that issue has been determined by the arbitrators appointed under the contract and (iii) any subrogated claims of insurers are ex hypothesi dependant on the owners having a liability against the insured giving rise to subrogated rights in the insurer. However, that is not the view of the insurers, presumably based on advice which they have obtained, and they intend to proceed with their action against the owners. In these circumstances the owners want the arbitrators’ award to be made a judgment of the

court in order, they hope, to provide themselves with an additional weapon in the Italian proceedings and/or a shield against enforcement if those proceedings were to result in a judgment opposite to that arrived at by the arbitrators, i.e. a judgment that the owners were to blame for the collision.

13. Article 34 of the Brussels Regulation provides:

“A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

...

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought.”

Judgment of Field J

14. After reviewing the authorities Field J concluded:

“The purpose of s66(1) and (2) is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award. Where, however, as here, the victorious party’s objective in obtaining an order under s66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award.”

The insurers’ appeal

15. In their written grounds of appeal the insurers argued that the judge erred in law in his construction of section 66 and in holding that the court had jurisdiction to order that judgment be entered in the terms of the award. They also advanced a second ground that, even if the judge was correct in his construction of section 66, he ought to have held that the use to which the owners intended to put the judgment was not capable of securing the potential benefit which it sought, since the judgment would not be a judgment within the meaning of article 34(3) and therefore would not provide a shield against enforcement of any future Italian judgment.

16. In his oral submissions Mr Males QC did not pursue the second ground of appeal, recognising that if the judge had jurisdiction to make the order which he did it would be hard to persuade an appellate court that he erred in principle in the exercise of that discretion. (Mr Males did not accept that a judgment entered under the judge's order would be a judgment within the meaning of article 34(3), but accepted that it was an arguable point which it was not appropriate to decide at this stage.)
17. Accordingly, the only issue before this court is the question of construction whether the judge had jurisdiction under section 66 to direct that judgment be entered in the terms of the award. That is a pure question of construction of a domestic statute and it is not a question with a distinctively European flavour. Section 66 applies generally to any arbitration under the Act, the parties to which may or may not come from EU member states.
18. Mr Males submitted that the judge erred in the following respects:
 1. He failed to distinguish between the general purpose of section 66 and the meaning of the word "enforced" in section 66(1), and in doing so misinterpreted the word "enforced".
 2. He gave to the word "enforced" an unnaturally wide meaning, whereas he should have held that a declaratory judgment especially a negative declaratory judgment (which does not require anybody to do anything), is incapable of being "enforced".
 3. He lost sight of the fact that the section is concerned only with the enforcement of an award "in the same manner" as a judgment.
 4. He ignored the well established distinction between the recognition of an award and the enforcement of an award.
19. Mr Males submitted that a judgment can only be "enforced" in its ordinary and natural meaning if it is coercive in form, i.e. it orders a party to do something or not to do something. It is, he submitted, a well recognised characteristic of a declaratory judgment that it is not one which can be enforced. Therefore an arbitral declaratory award cannot be "enforced in the same manner as a judgment" since a declaratory judgment cannot be enforced.
20. Mr Males submitted that there is no good reason giving to the word "enforced" in section 66 a wider meaning than its ordinary meaning. On the contrary, he submitted that the terms of the Act and the authorities support the interpretation that a judgment or award can only be "enforced" if it is coercive in its form. As to the Act, Mr Males drew attention to the fact that sections 101 and 102 refer separately to "recognition" and "enforcement" of an award in the context of New York Convention awards and show that the drafter was well conscious of the different concepts of recognition and enforcement. As to authorities, Mr Males relied particularly on *Margulies Brothers Limited v Dafnis Thomiades and Co (UK) Limited* [1958] 1 Lloyd's Rep 205 as a

decision of the Court of Appeal that under the equivalent provision (section 26) of the Arbitration Act 1950 the court could not “enforce” an award of arbitrators in declaratory form or enter judgment in the terms of the award.

21. Mr Bailey QC submitted that the purpose of section 66 is to support the arbitral process and to provide a simpler procedure ensuring compliance with the award than having to bring an action on it. There are, he submitted, various ways in which a declaratory judgment can be enforced in the ordinary sense of the word and that it would be contrary to the purpose of the statute to give the word the narrow meaning contended for by the insurers. A declaratory judgment can be enforced, for example, by the victorious party setting up the award as to support a plea of *res judicata* and a court may, in an appropriate case, enforce it by an injunction. Mr Bailey submitted that the distinction between “recognition” and “enforcement” is immaterial in the context of an English arbitral award because section 58 makes it automatically binding. In the case of foreign arbitrations there are conflict of law rules which govern the question whether an English court will recognise a foreign award, and the sections of the Act to which Mr Males referred (sections 101 and 102) relate specifically to New York Convention awards. In his submission they are irrelevant to the construction of section 66. As to the case law, Mr Bailey referred to a number of authorities as supporting his approach and he submitted that *Margulies*, properly understood, was not an obstacle.

Authorities

22. A declaratory judgment or award decides some question as to the respective rights and obligations of the parties. It is not “executory” in form in that it does not formally order either party to do or to refrain from doing anything. I include the words “in form” because the practical as distinct from the formal effect may be compulsive. If, for example, a court declares a deportation order to be unlawful, everyone knows that such a judgment is prohibitive in effect though not in form.
23. If authority were needed for this, Judge LJ said in *Saint George’s Healthcare NHS Trust v S* [1999] Fam 26, 60:

“Non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate: see *Webster v Southwark London Borough Council* [1983] QB 698.”
24. *Webster’s* case was indeed exceptional. In that case the court made a declaration as to the plaintiff’s right to use a hall belonging to a local authority for an election meeting. It refrained from issuing an injunction because it was under the impression from those representing the local authority that the hall would be made available if a declaratory order were made, but the local authority then refused to do so. In effect, the court had been misled and in those circumstances Forbes J decided that the interests of justice required the issue of a sequestration order.
25. Ordinarily speaking, however, a declaration cannot be enforced by the ordinary methods of execution provided under the Civil Procedure Rules. Mr Males submitted that *Margulies* is binding authority for the proposition that the word “enforced” is

used in this sense in section 66, and that a declaratory award cannot therefore be converted into a judgment under that section.

26. In *Margulies* an arbitral award took the form of a decision that certain cocoa contracts were to be set off against other contracts and that the resulting differences plus interest were to be paid by one party to the other. The amount to be paid was not quantified. An order was made under section 26 of the Arbitration Act 1950 giving leave for the award to “be enforced in the same manner as a judgment or order to the same effect”, but the order was set aside by the Court of Appeal. It was argued successfully by the appellant that the award “was not an award of a sum certain, and was not, therefore, one capable of being “enforced” within the meaning of section 26”. Lord Evershed MR said in a short judgment with which the other members of the court agreed:

“...you cannot enforce a document which merely says by way of declaration (in effect) that certain contracts with three numbers should be set against certain other contracts with three other numbers and that [the appellant] ought to pay the differences between them.”

27. In *Tongyuan (USA) International Trading Group v Uni-Clan Limited* unreported 19 January 2001 Moore-Bick J said of *Margulies*:

“That case is authority for the proposition that an award which is effectively couched in purely declaratory terms cannot be enforced as a judgment, and for the wider proposition that, in order to be enforceable as a judgment under s66 of the Arbitration Act 1996 (as it now is), the award must be framed in terms which would make sense if those were translated straight into the body of a judgment. It highlights the fact that, on an application of this kind, the court is concerned in this respect with the form of the award, not with its substance.”

28. Mr Bailey submitted that it was the lack of certainty of the effect of the award which was the essential problem in *Margulies*. That was the conclusion of the Court of Appeal of the British Virgin Islands in *IPOC International Growth Fund Limited*, unreported, 18 June 2007. It was also the view of Field J in the present case and Beatson J in the more recent case of *African Fertilisers and Chemicals NIG Limited v BD Shipsnavo GMBH and Co Reederikg KG (“the Christian D”)* [2011] EWHC 2452 (Comm), [2011] 2 Lloyd’s Rep 531. Beatson J said at paragraph 22:

“Notwithstanding the words used by Lord Evershed and the statement by Moore-Bick J..., it is the uncertainty or ambiguity that resulted from the fact that the award was not an award of a “sum certain” which has been regarded by the commentators as rendering the award in that case incapable of enforcement: see Mustill and Boyd, *Commercial Arbitration*, 2nd edition page 419; Russell on *Arbitration*, 23rd edition, 2007, para 8-012; Merkin on *Arbitration*, loose leaf edition, updated to July 2011, para 19.11. The 2003 edition of Russell on *Arbitration* stated (para 8-006 note 61) that in the light of Moore-Bick J’s

observation it was “doubtful” whether an award couched in purely declaratory terms can be enforced under section 66 but also doubted that the observation “has general application”. But the current, 23rd edition “suggests” (para 8-012) that “previously expressed doubts” are “no longer applicable” and that “provided the terms of the award are sufficiently clear there is now no reason why a declaratory award cannot be enforced under section 66”.

Beatson J added at paragraph 26 that he agreed with Field J’s approach to *Margulies* and to the approach of the commentators. His helpful summary makes it unnecessary to refer to the text books in greater detail.

29. In Australia section 8 of the International Arbitration Act 1974 is in substantially the same terms as section 66 of the 1966 Act. In *AED Oil Limited v Puffin FPSO Limited* [2010] VSCA 37 it was argued before the Court of Appeal of the Supreme Court of Victoria that the section could not be relied on to enforce an arbitral award in declaratory form and the court was referred to *Margulies* and the judgment of Moore-Bick J in *Tongyuan International*. The court preferred the view that *Margulies* could be distinguished on the ground that in *Margulies* the award was not merely in declaratory form but was unclear in its terms as to the payment which was to be made, and it cited the passage in Russell on Arbitration referred to by Beatson J.
30. Mr Bailey also submitted that the understanding of the courts about the means of “enforcement” available to parties to an arbitration has developed over the last 50 years. Declaratory judgments, including negative declarations, have become much more common and assumed much greater commercial significance. *Margulies* was decided before the entry into force of the New York Convention. Sections 101 and 103 of the 1996 Act would not permit the court to decline to give leave to enforce a New York Convention award on the grounds that the award was declaratory (as the BVI Court of Appeal held in *IPOC*) and it would be surprising if the court had jurisdiction to give leave to enforce a declaratory award under section 101 but not under section 66.
31. In support of his argument that a declaratory award is capable of being “enforced” by the courts, Mr Bailey referred to the judgment of the Privy Council given by Lord Hobhouse in *Associated Electric and Gas Insurance Services Limited v European Reinsurance Co of Zurich* [2003] 1 WLR 1041. The immediate issue was the proper interpretation and effect of a confidentiality clause in an arbitration agreement which provided, among other things, that the arbitration result would not be disclosed at any time to any individual or entity which was not a party to the arbitration. Two disputes arose between the parties under a reinsurance agreement containing an arbitration clause. The disputes were referred to two different arbitral panels but in both arbitrations the same issue arose as to the proper interpretation of the arbitration clause. The victorious party in the first arbitration wanted to rely on the award in order to establish an issue estoppel which it proposed to plead in the second arbitration. The losing party in the first arbitration obtained an injunction to prevent the victorious party from doing so on the ground that this would be a breach of the confidentiality clause. The Privy Council set aside the injunction. Delivering the judgment of the Board, Lord Hobhouse said:

“9. ...The essential purpose of arbitration is to determine disputes between the parties to the arbitration. Historically this was what the function of the arbitrators was – to say who was right. The decision of the arbitrators could, as a result of the authority given to the arbitrator by the parties’ agreed submission to arbitration, declare what were the rights and liabilities of the parties and bind the parties by that declaration. Enforcement lay with the courts...

...

13. ...The result of the arbitration is embodied in the award or awards of the arbitrator. If the winner is precluded from referring to the award, he cannot enforce it *whether as a declaration of his rights* or as a monetary award. This would be fundamentally inconsistent with and frustrate the purpose of the arbitration. [Emphasis added]

14. ...the decision [in the first arbitration] was a decision which decided as between *Aegis* and *European Re* what was the correct construction of article X of the reinsurance agreement. It established what were the rights of the parties under that article. Ex hypothesi, *Aegis* are seeking in the second arbitration to dispute that the parties have those rights, contrary to the earlier award. How can *European Re* enforce the earlier decision? The answer is by pleading an issue estoppel.”

32. Mr Males argued in reply that enforcing an award is different from enforcing the rights declared by an award and that the Privy Council was using language loosely when it referred to enforcing the award. In paragraph 15 of the judgment Lord Hobhouse referred to pleading an issue estoppel as “a species of enforcement of the rights given by the award”, which was a fuller and accurate way of expressing the matter, but it was not the same thing as enforcement of the award itself.

33. Mr Bailey also referred to *National Ability SA v Tinna Oils and Chemicals Limited (the “Amazon Reefer”)* [2009] EWCA Civ 1330, [2010] 1 Lloyd’s Rep 222 in which the court considered the history and purpose of section 66 and its predecessor, section 26 of the 1950 Act. Thomas LJ said:

“5. It is necessary to say a little more about the two methods of enforcing awards obtained under the Arbitration Act 1950 (which continue to apply under the Arbitration Act 1996).

(i). Enforcement of an award by action is by an ordinary action brought in the High Court. The procedure is not subject to any statutory

provision, but it has long been established at common law as an action founded upon the implied promise to pay the award. It is given statutory recognition in section 66(4) of the 1996 Act.

- (ii). Enforcement of the award in the same manner as a judgment is a statutory process.

...

- 6. The procedure for enforcement by action is little used in practice. For many years it has been the practice of parties who seek to use the enforcement mechanism of the court in England and Wales to use the procedure under section 26 of the 1950 Act and section 66 of the 1996 Act to enforce an award ...

- 7. The procedure under sections 26 and 66 had its origins in earlier legislation and was a summary form of proceeding intended to dispense with the full formalities of the action to enforce an award. The summary procedure was originally intended only to be invoked in reasonably clear cases – see *Boks and Co v Peters, Rushton and Co limited* [1919] KB 491 at page 497 where Scrutton LJ made clear it was only to be invoked “in reasonably clear cases”. However, procedures were developed so that the court could decide summarily questions of law which did not involve issues of fact. By the 1980s courts were prepared to deal with all applications under the summary procedure provided objections could be disposed of without a trial: see, for example, *Middlemiss and Gould v Hartley Corporation* [1972] 1 WLR 1643 and *Hall and Wodehouse Limited v Panorama Hotel Properties Limited* [1974] 2 Lloyd’s Rep 413.”

- 34. In the *Christian*, Beatson J observed rightly, at paragraph 14, that one of the remedies available to the court where a successful party brought an action on a declaratory award would be for the court itself to make a declaration.

Discussion and conclusion

- 35. The question is whether the phrase “enforced in the same manner as a judgment to the same effect” is confined to enforcement by one of the normal forms of execution of a judgment which are provided under the rules or whether it may include other means of giving judicial force to the award on the same footing as a judgment.
- 36. The broader interpretation is closer to the purpose of the Act and makes better sense in the context of the way in which arbitration works. Ultimately the efficacy of any

award by an arbitral body depends on the assistance of the judicial system, as Lord Hobhouse observed. Judges may give force to an arbitral award by a number of means, including by applying the doctrine of issue estoppel. The argument that in such cases the court is not enforcing an award but only the rights determined by an award is an over subtle and unconvincing distinction and sits on a shaky foundation. For the enforcement of any judgment or award is the enforcement of the rights which the judgment or award has established. As with any judgment or award, so in the case of a monetary judgment or award its enforcement is the enforcement of the right (a right to payment) which the award has established. In the present case, as in *AEGLIS v European Re*, the owners want to enforce the award through *res judicata*, and for that purpose they seek to have the award entered as a judgment.

37. At common law a party to an arbitration who has obtained a declaratory award in his favour could bring an action on the award and the court, if it thought appropriate, could itself make a declaration in the same terms. The purpose of section 66 is to provide a simpler alternative route to bringing an action on the award, although the latter possibility is expressly preserved by section 66 (4). I cannot see why in an appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award.
38. I use the words “in an appropriate case” because the language of the section is permissive. It does not involve an administrative rubber stamping exercise. The court has to make a judicial determination whether it is appropriate to enter a judgment in the terms of the award. There might be some serious question raised as to the validity of the award or for some other reason the court might not be persuaded that the interests of justice favoured the order being made, for example because it thought it unnecessary. But in this case the insurers have not challenged before this court the propriety of the exercise of the judge’s jurisdiction, if he had any, to make an order under section 66. Their argument has been limited to contending that he had no jurisdiction to do so.
39. For the reasons which I have given, I agree with the judgment and reasoning of Field J, and more recently Beatson J, and I would dismiss the appeal.

Lord Justice Lloyd:

40. I agree.

Lord Justice Carnwath:

41. I also agree.