Neutral Citation Number: [2013] EWCA Civ 1512

Case No: A3/2013/1501

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE FIELD
2013FOLIO171

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 22nd November 2013

Before :

LADY JUSTICE GLOSTER

- -

Between :

CRUZ CITY 1 MAURITIUS HOLDINGS	**Respondent**
- and -	
(1) UNITECH LIMITED	**Appellants**
(2) BURLEY HOLDINGS LIMITED	
(3) ARSANOVIA LIMITED	

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Jonathan Hirst QC and Craig Morrison (instructed by **Skadden, Arps, Meagher & Flom (UK) LLP**) for the **Appellants**
Neil Kitchener QC and Nehali Shah (instructed by **White & Case LLP**) for the **Respondent**

Judgment
As Approved by the Court

Lady Justice Gloster :

Introduction

1. This is an application by the respondent (“Cruz City” or "the Respondent") that the permission to appeal granted by Moore-Bick LJ on 12 July 2013 to the appellants, Unitech Limited ("Unitech"), Burley Holdings Limited ("Burley") and Arsanovia Limited ("Arsanovia") (collectively "the Appellants") be made subject to the condition that the Appellants pay the whole or a substantial proportion of sums in excess of US $300 million, due under certain arbitration awards into court, or alternatively secure such payment by a written guarantee issued by a first-class bank with a place of business within England or Wales.

2. The application was originally made in a letter from Cruz City's solicitors dated 12 June 2013. By an order dated 24 July 2013 Moore-Bick LJ dismissed the application for conditions to be attached to the grant of permission and stated that such dismissal was:

> “without prejudice to the Respondent's right to make a formal application for such relief on notice to the appellants, if so advised.”

3. By his order dated 12 July 2013 Moore-Bick LJ also granted a stay of the disclosure order made by Field J.

4. At the end of the hearing I announced my decision that I would impose conditions on the permission to appeal which had been granted to the Appellants. Subsequently, by order dated 11 November 2013, I ordered that the conditions subject to which the appeal from the order of Mr Justice Field dated 23 May 2013 could be brought, was the payment by the Appellants into court within 28 days from 6 November 2013 of the sums of US$333,620,492 and £182,882, due under the relevant awards, failing which the appeal would be struck out and the stay of execution of the order of Mr. Justice Field would be lifted. The order also provided that any monies paid into court pursuant to this order would be held pending further order of the Court of Appeal. The order was made subject to an undertaking from Cruz City that, pending further order of the Court of Appeal, it would not seek to attach or freeze or in any way seek any form of enforcement against any money paid into court pursuant to the order.

5. These are the reasons for my decision and the order which I made on 11 November 2013.

Factual background

6. The background to these proceedings can be summarised as follows.

7. The appeal arises out of awards made in 3 London-seated arbitrations: LCIA Case No. 111791 (“Arbitration 1”), LCIA Case No. 111792 (“Arbitration 2”), and LCIA Case No. 111809 (“Arbitration 3”), all heard in January 2012.

8. The arbitrations concerned a joint venture arrangement ("the Santacruz Project”) between Cruz City and the Appellants for the commercial development, management and operation of certain land in Mumbai. In order to facilitate the parties’ investments

in the Santacruz Project, an SPV, Kerrush Investments Limited ("Kerrush"), was incorporated. Kerrush was (at the outset of the Santacruz Project) owned 50% by Cruz City and 50% by Arsanovia. The disputes arose out of a shareholders' agreement entered into between, *inter alios*, Cruz City, Arsanovia and Kerrush on 6 June 2008 ("the Shareholders' Agreement"), and a Keepwell Agreement between Cruz City, Unitech and Burley.

9. Cruz City issued the proceedings in Arbitration 1 against Arsanovia and Burley under the Shareholders Agreement and in Arbitration 2 against Unitech and Burley under the Keepwell Agreement. Arsanovia issued the proceedings in Arbitration 3 against Cruz City.

10. Before the arbitral tribunal Cruz City succeeded in each of the arbitrations. In summary, by partial final awards in the case of Arbitrations 1 and 2 ("Award 1" and "Award 2", respectively) and a final award in the case of Arbitration 3 ("Award 3"), each dated 6 July 2012, the Tribunal ordered the Appellants to pay Cruz City US$298,382,949.34 against delivery of the Cruz City's shares in Kerrush, and Cruz City's costs and legal fees and expenses of the arbitrations. In detail, the orders required the Appellants to pay:

    i) under Awards 1 and 2: US$ 298,382,949.34 (plus interest) against the delivery by Cruz City of its shares in a joint venture company; Cruz City's costs of the arbitrations of £165,000; and Cruz City's legal fees of US$ 2.9 million; and

    ii) under Award 3: Cruz City's costs of the arbitrations of £165,000; and Cruz City's legal fees of US$ 2.9 million.

11. The Appellants challenged Awards 1 and 2 in the English Commercial court on jurisdictional grounds pursuant to section 67 of the Arbitration Act 1996 ("the 1996 Act"). The applications were heard by Andrew Smith J who handed down judgment on 20 December 2012. The Appellants' challenge to Award 1 under section 67 was successful, but the Appellants were unsuccessful in their section 67 challenge to Award 2, which was upheld. They did not pursue any challenge in respect of Award 3. Accordingly, Awards 2 and 3 are final and binding (not least by virtue of section 58 of the 1996 Act). The Appellants did not seek to appeal against the judgments of Andrew Smith J.

12. The Appellants have paid nothing towards satisfying Awards 2 and 3. Nor have they paid any sum in respect of costs orders, whether of the Tribunal or of the English court. Other than shareholdings identified in publicly available documents, Cruz City is unaware of what assets the Appellants may hold outside India or the full extent or nature of the Appellants' real estate assets (or other assets) in India or the manner in which they are owned.

13. It was common ground before me that the Appellants owe Cruz City the sum of over $300 million plus costs and that interest was accruing at 8% per annum compounded quarterly.

14. It was also common ground before me that the Appellants have sufficient funds with which to satisfy Awards 2 and 3. Unitech is a company incorporated under the laws of India. Its balance sheet, as contained in its audited accounts for the year ended 31

March 2013, and published in August 2013, shows a surplus of approximately US$1.6 billion. The consolidated balance sheet of the entire Unitech group as at the same date shows a surplus of approximately $1.8 billion. Mr Jonathan Hirst QC, leading counsel for the Appellants, accepted that there was no evidence before the court which could suggest otherwise.

15. At the end of January 2013, Cooke J granted orders under section 66(1) of the 1996 Act ("the Enforcement Orders"), permitting Cruz City to enforce Awards 2 and 3 in the same manner as judgments or orders of the court to the same effect. Cooke J also permitted service on Skadden, Arps, Slate, Meagher & Flom (UK) LLP ("Skadden"), the solicitors who had acted for the Appellants in the arbitrations and in the subsequent proceedings before Andrew Smith J. The Enforcement Orders were served on Skadden by hand on 31 January 2013, and no application was made by the Appellants to set them aside.

16. The chronology in relation to this application may be summarised as follows:

    i) By an arbitration claim form issued by Cruz City on 5 February 2013 Cruz City applied for:

        a) disclosure of the Appellants' assets, wherever located throughout the world, and over a specified value threshold, to be verified by an officer of each of the Appellants on affidavit ("the disclosure application"), pursuant to section 37 (1) of the Senior Courts Act 1981 and/or section 44 of the 1996 Act; and

        b) an order pursuant to CPR 6.15 for permission to serve the claim form and supporting evidence at the offices of Skadden, by means of alternative service, instead of upon the Appellants themselves ("the service application").

    ii) The service application was granted, ex parte, by an order of Cooke J dated 8 February 2013. The claim form and affidavit were served by hand on Skadden on the same date.

    iii) On 19 March 2013, copies of Cruz City's further evidence and skeleton argument in respect of the two applications were served at the offices of Skadden pursuant to an order of Andrew Smith J of the same date permitting service of these documents in this manner.

    iv) On 20 March 2013, Skadden served an acknowledgment of service (ticking the box "*I intend to contest this claim*", as well as the box "*I intend to dispute the court's jurisdiction*").

    v) On 21 March 2013, the Appellants filed an application notice seeking an order setting aside the orders of Cooke J and Andrew Smith J permitting service of documents at Skadden.

    vi) The disclosure application was ultimately heard by Field J on 10 May 2013. Field J refused to set aside the ex parte orders of Cooke J and Andrew Smith J permitting service on Skadden. Pursuant to an order dated 23 May 2013, he

ordered that the Appellants should provide the disclosure sought by Cruz City under section 37 (1) of the Senior Courts Act 1981. (The alternative basis for the application under section 44 of the 1996 Act had been abandoned by Cruz City.)

17. The Appellants' current appeal, in respect of which they have been given leave, is to set aside the order of Field J. They contend that:

i) Field J should not have dismissed the Appellants' application to set aside the orders permitting service on Skadden; and

ii) In any event the order for disclosure should not have been allowed insofar as it requires disclosure to be given (on pain of contempt proceedings) by officers of the Appellants that are not subject to the jurisdiction of the court; and in this respect they rely upon the decision of the House of Lords in *Masri v. Consolidated Contractors International (UK) Ltd (No. 4)* [2009] UKHL 43; [2010] 1 AC 90.

18. I am satisfied on the evidence before me that the Appellants will take all steps as may be available to them to avoid any payment of the sums due under Awards 2 and 3. In this context I refer to:

i) the statement in Unitech's Annual Report dated 30 May 2013 as published in August 2013 that:

> "The Company received an arbitral award dated 6th July 2012 passed by the London court of International Arbitration (LCIA) wherein the arbitration tribunal has directed the Company to invest USD 298,382,949.34 equivalent to `16,218,605,211 in Burley Holdings Ltd. (Mauritius) so as to enable it to purchase the investments of Cruz City 1 Mauritius Holdings (Mauritius) in the joint-venture Company, Kerrush Investments Ltd ("Mauritius"). The High court of Justice, Queen's Bench Division, Commercial court London has confirmed the said award. **Based on the legal advice received by it, the Company believes that the said award is not enforceable in India on various grounds including but not limited to lack of jurisdiction by the LCIA appointed arbitral tribunal to pass the said award.** Nevertheless, in case the Company is required to make the aforesaid investment into Burley Holdings Limited, its economic interest in the SRA project in Santacruz Mumbai shall stand increased proportionately thereby creating a substantial asset for the Company with an immense development potential." (Emphasis added);

ii) the evidence of Mr Jason Yardley, a partner in White & Case LLP, Cruz City's solicitors; and

iii) the evidence of Rajan Gupta, the in-house counsel for Unitech, which makes it clear that those in control of the Appellants consider, based on Indian law

advice, that it is their duty to avoid payment of the Awards and that the Awards are not enforceable in India.

19. It is also clear that the Appellants intend, in any enforcement proceedings in India, to raise the jurisdiction arguments which were rejected by Andrew Smith J in the context of the section 67 challenge.

20. Moore-Bick LJ granted a stay of execution of the order made by Field J. The hearing of the appeal is listed for 17 February 2014. In the intervening period, Cruz City will not have the benefit of the disclosure order. I am satisfied, on the evidence before the court, that Cruz City, as a result, will be hampered in its efforts to identify assets belonging to be Appellants for the purposes of execution and enforcement of Awards 2 and 3.

The court's power to impose conditions on the grant of permission to appeal

21. It was common ground that the court's power subsequently to impose conditions upon which an appeal can be brought, in circumstances where such conditions were not attached to the original grant of permission to appeal under CPR 52.3(7)(b), is set out in CPR 52.9(1)(c). CPR 52.9(2) further states that:

"The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so."

A "compelling reason" was thus required if Cruz City's application were to succeed.

Cruz City's submissions

22. Mr Neil Kitchener QC and Miss Nehali Shah appeared on behalf of Cruz City. Largely for reasons which reflected the arguments advanced in their written and oral submissions, I decided to impose the conditions on the Appellants' permission to appeal. In those circumstances I do not propose to rehearse their submissions separately.

The Appellants' submissions

23. Mr Jonathan Hirst QC, who, together with Mr Craig Morrison, appeared on behalf of the Appellants, submitted that the required standard of demonstrating "a compelling reason" for attaching conditions, was not met in the circumstances of this case. In particular Mr Hirst submitted as follows:

i) As Moore-Bick LJ had concluded on the application for permission to appeal, the Appellants' appeal was a serious appeal with a real prospect of success. In circumstances where an appeal had merit, conditions should not be imposed which would prevent it from being heard.

ii) The authorities cited by Cruz City in its written submissions, namely *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ *2065; Bell Electric Ltd v Aweco Appliance Systems GmbH & Co* [2002] EWCA Civ 1501; [2003] 1 All ER 344 and *Day's Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWCA Civ 993, were of limited or no relevance on the facts of the present appeal. Those were cases in

which conditions were imposed in circumstances where (a) an appeal was brought against a judgment for a sum of money and/or costs, and (b) there was no stay of execution. This was not an appeal against a judgment requiring payment of a money sum. Rather, it was effectively an appeal against an order for service and an order for requiring disclosure of assets. There was therefore no prospect of compliance with those orders being ordered as a condition of the appeal being allowed to proceed; indeed this was not what was sought by Cruz City. On the contrary, Cruz City sought to argue, in effect, that conditions should be imposed to ensure compliance with awards/orders made in *separate* proceedings (i.e. the awards in Arbitrations 2 and 3 and, possibly, the section 66 orders permitting enforcement of those awards) as a condition of this appeal being allowed to proceed. The conditions sought by the Respondent had no relevance to the issues in the appeal and were designed to improve its position overall.

iii) It was a well-recognised principle of international commercial arbitration that a party was not only entitled to challenge the tribunal's jurisdiction in the courts of the arbitral seat, but also in the court before which an award was brought for recognition and enforcement. That was of course subject to the point that in some cases a determination as to jurisdiction by the court of the seat might give rise to an issue estoppel or other preclusive effect in the court in which enforcement was sought; see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763; per Lord Mance at [29]; Lord Collins at [84-86], and [98]. Thus, in the context of international commercial arbitration, there was nothing unusual or deserving of censure in the Appellants' intention of resisting enforcement of the award in India (where Unitech was incorporated and where its assets were principally located), or indeed elsewhere. The Appellants' opposition to enforcement did not provide any "compelling reason" for the attachment of conditions to the permission to appeal.

iv) Furthermore, compliance with the order of Field J (both as regards the substantive order and the order for costs) has been stayed by order of Moore-Bick LJ. No application had been brought to set aside that stay. By contrast, in each of the cases cited by the Respondent a stay of execution had been refused. The Respondent sought to avoid the practical consequences of this stay by means of its application for conditions.

v) The conditions sought by Cruz City would inevitably stifle the appeal. There was clear authority that conditions should not be imposed where they would stifle a meritorious appeal: *Blue Sky One Ltd v Mahan Air* [2011] EWCA Civ 544 at [38]. While this authority specifically related to circumstances where the financial consequences of the imposition of conditions would stifle the appeal (because the appellant had not the means to pay), the principle must be a general one. In the present case, the attachment of conditions as sought by the Respondent would inevitably stifle the appeal, by rendering it otiose. If the amount of the Awards were to be paid into court as a condition of pursuing the appeal, then there would be no point in pursuing the appeal at all (or, for that matter, the claim that is subject to the appeal). If the conditions were complied with, the Respondent would have a fund against which it could enforce the

Awards forthwith. The Respondent would have thereby obtained indirectly what it sought to obtain by the claim itself: namely, the payment of the Awards. There was no doubt that imposing the conditions sought by the Respondent would mean the end of the appeal. Accordingly the application for conditions should be refused on this ground alone.

vi) An analogy could be drawn with the jurisprudence of the Commercial court in relation to applications made under section 70(7) of the 1996 Act for an order that money payable under an award should be brought into court or otherwise secured pending the determination of an application or appeal under sections 67, 68 or 69 of the 1996 Act. In *A v B* [2011] 1 Lloyd' s Law Reports 363 Flaux J held:

a) that (in section 67 cases, where one party was challenging the jurisdiction of the arbitral tribunal) there was a "threshold requirement" that the other party, who was making the section 70(7) application, demonstrated that the section 67 challenge by the other party was "flimsy or otherwise lacks substance."; see [11]-[32]; and

b) that there was a general principle that the jurisdiction to order a payment pursuant to section 70(7) would only be made in circumstances where the applicant could demonstrate that the challenge to the award would prejudice its ability to enforce; thus at [50] Flaux J said:

> "50. Thus, whilst it would not be advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under section 70(7), it seems to me that as a general principle the court should not order security unless the applicant can demonstrate that the challenge to the award (whether under section 67 or, indeed, either of the other sections) will prejudice its ability to enforce the award. Often this will entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced."

To similar effect was the judgment of Teare J in *X v Y* [2013] 1 Lloyd's Law Reports 230. A similar approach should be taken to the application in the present case.

vii) The various complaints made by Cruz City about the Appellants' conduct did not give rise to a "compelling reason" for imposing conditions, and in any event were misconceived. For example:

a) The Respondent's submission that the Appellants should not seek to challenge enforcement of the awards in India was misconceived. If the Awards were not enforceable in India, under Indian law, then it was legitimate for the Appellants to take that point if enforcement in India were sought. There was nothing reprehensible in the statement made in Unitech's audited accounts that it intended to challenge jurisdiction in India, but that it would meet the Awards if this argument were to be

unsuccessful. Nothing in this stated course of action, which Unitech had fully publicised, was surprising or improper.

b) Nor was there any substance in the inference drawn by the Respondent that the Appellants were "repatriating" funds to India with a view to resisting enforcement. The allegation was baseless: it was founded on a single proposed sale of an asset which was majority-owned by Unitech Corporate Parks which was a company, independent from the Appellants, publicly listed on the London Stock Exchange's AIM market, and incorporated in the Isle of Man. The sale in question would be made in the ordinary course of business of Unitech Corporate Parks, for full value, and had been publicly reported for more than a year.

c) The Respondent's allegation that the Appellants had engaged in "cynical" use of the English Courts was without foundation. It was entirely appropriate for the Appellants first to seek to challenge the awards in the court with supervisory jurisdiction over the arbitrations; indeed they were partially successful in doing so. Having not succeeded in overturning the remaining Awards, any further challenge had now to be limited to points that could be taken on enforcement, in the jurisdictions in which enforcement was sought. There was nothing reprehensible in such conduct.

d) There was nothing in the Respondent's further contention that it was somehow inappropriate for the Appellants to have challenged the validity of service in this case, in circumstances where Skadden had formerly acted in the arbitrations and now act in this appeal, and that service should have been accepted by them in the intervening period when they were not instructed by the Appellants. That assumed the very point in issue on this appeal and on which Moore-Bick found that the Appellants had a real prospect of success.

viii) Moore-Bick LJ had been right to dismiss, on the papers, the Respondent's application to attach conditions.

ix) None of the matters relied upon by Cruz City, even if established, would justify (or provide a compelling reason for) the imposition of conditions on the bringing of this appeal. The imposition of any such conditions, even on the basis of an undertaking from the Respondent that it would not, pending appeal, seek to attach, or freeze, or in any way seek any form of enforcement against money paid into court, would confer a wholly disproportionate benefit on the Respondent.

Discussion and determination

24. It is clear that, in similar situations to the present (i.e. in cases where a liability judgment has been given, that is no longer subject to appeal, and the relevant appeal relates to subsequent enforcement orders or orders in aid of execution), courts at all levels have been prepared, in appropriate circumstances, to require an appellant to pay into court the amount of the judgment debt as a condition of the grant of permission to appeal. Prior to the current hearing, I drew counsel's attention to certain cases decided

in the context of the *Masri* litigation where the court indicated that it was prepared to make such an order or referred to the fact that the House of Lords had already done so; these were *Masri v CCIC* [2008] EWCA (Civ)1367 at [21] and [33]; *Masri v CC(OG)CI* [2009] EWCA (Civ) 36 at [6] and [27-32]; and *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 409 (Comm) at [22(vi)].

25. The circumstances in *Masri* were briefly that, after initially and unsuccessfully objecting to the jurisdiction of the English court, the defendants expressly submitted to the jurisdiction and participated fully in the liability and quantum proceedings in the Commercial court, and in all subsequent proceedings before other courts, regularly exercising all rights of appeal open to them (except where a pre-condition of their obtaining leave was payment into court of the judgment debt). Numerous judges concluded in the course of various hearings that there was no doubt that the defendants, who were judgment debtors in excess of US$ 75.6 million, (a) were solvent, and had more than sufficient funds to meet the judgment debt without imperilling their ability successfully to carry on business, but (b) had no intention of paying the judgment debt and were determined to do everything possible to frustrate the judgment creditor's efforts to enforce the judgment in whatever jurisdiction such efforts might be made. After judgment, on 20 December 2007, I, as a judge of the Commercial Court, made various orders in aid of execution, including the appointment of a receiver over certain of the defendants' assets, freezing orders and orders requiring that the defendants disclosed information about their assets. The defendant judgment debtors then appealed the receivership order and certain of the freezing orders to the Court of Appeal. On 4 April 2008, the Court of Appeal (Lord Neuberger MR, Ward LJ and Lawrence Collins LJ (as he then was)) dismissed their appeal and confirmed the appointment of the receiver and the freezing orders; [2008] EWCA 303 (Civ); [2008] 2 LLR 128. The House of Lords gave the defendants leave to appeal from the Court of Appeal's decision, but *only* on condition that the defendant judgment debtors paid the *entire* amount of the judgment debt then outstanding, in the sum of US $63,365,957.40 into court. The defendant judgment debtors failed to comply with that provision so their appeal was struck out; see *Masri v CC(OG)CI* [2009] EWCA (Civ) 36 at [6] and [27-32]; *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 409 (Comm) at [22(vi)].

26. In *Masri v CCIC* [2008] EWCA (Civ) 1367 the defendant judgment debtors applied for permission to appeal from further post-judgment receivership orders made by Tomlinson J by way of enforcement. Lawrence Collins LJ, with whom Goldring LJ agreed, stated at [2] that:

> "As Tomlinson J said in this case, there is no doubt that the [defendants'] group in general, and the judgment debtors in particular, have available to them substantial funds out of which they could easily pay the judgment debt without in any way imperilling their ability to carry on their successful businesses. But they have made it absolutely clear that they had no intention of paying the judgment debt. They have commenced proceedings in the Yemen for a declaration that they are not liable…. They have commenced proceedings both in the Lebanon and in Greece, from where they are run, for

> declarations that the judgment of the English court is not enforceable in those jurisdictions."

27. Lawrence Collins LJ took the view that in the circumstances of the case no permission to appeal should be granted. However he went on to say at [33] that:

> "But if I had considered that there were arguable grounds for appeal I would have taken the view that this court should impose a condition of payment in [sic] of the whole of the judgment debt on conditions similar to those imposed by the House of Lords when granting leave to appeal in the receivership appeal, conditions which were not complied with by the judgment debtors with the result that the appeal was struck out."

28. Likewise in *Masri v CC(OG)CI* [2009] EWCA (Civ) 36 at [6] and [27-32], the Court of Appeal took the view that permission should only be given to the defendant judgment debtors to cross-appeal against another enforcement order (namely a declaration by David Steel J as to the reasonableness of a letter sent by the court-appointed receiver) on condition that the entire outstanding judgment debt was paid into court within 28 days. At [31]-[32] Sullivan LJ (with whom Mummery and Rimer LJJ agreed) said:

> "31. In these circumstances I will say only that Mr Layton has persuaded me that the grounds of the Respondent's proposed cross appeal are properly arguable. However, in view of the particular characteristics of this long-running litigation, I am firmly of the view that permission to appeal should be granted only on the terms which Lawrence Collins L.J. would have imposed had he granted permission to appeal against the Orders made by Tomlinson J., although for my part I would extend the time for compliance with the conditions from 14 days to 28 days.
>
> 32. I would therefore grant permission to appeal if the outstanding judgment sum of US$63,365,957.40 is paid into court within 28 days of the date of our order following the handing down of our judgment."

29. The *Masri* cases demonstrate that, in circumstances where a judgment debtor (in respect of a debt that is no longer subject to appeal), who has participated in liability proceedings in this jurisdiction, is able to pay a judgment debt, but has no intention of doing so, and is taking all possible steps to avoid enforcement of the judgment against its assets, whether in this jurisdiction or elsewhere, the courts may well consider that it is appropriate to attach a condition of payment in full of the judgment debt, to the grant of any permission to appeal against a post-judgment enforcement order. Although there was (unsurprisingly) no discussion in the *Masri* cases of what amounts to a "compelling reason" for the purposes of CPR 52.9(1)(c) - since the payment condition was, or would have been, attached, to the original grant of permission, in relation to which no such requirement is imposed - the *Masri* cases, in my judgment, are nonetheless instructive examples for present purposes as to the type of

circumstances in which there will be a "compelling reason" for the imposition of such conditions.

30. As Clarke LJ (as he then was) noted in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at [39], the requirement that there must be a "compelling reason" in order for the court to exercise its powers under CPR 52.9(1)(c) to impose a condition *after* the first instance judge, or a single Lord Justice has granted permission to appeal on the papers, as will ordinarily be the case, without imposing conditions,

> "…is curious if it is intended to create a higher threshold than would have been applicable to the exercise of discretion of a judge considering the matter on an application [for permission to appeal] on notice or of any Lord Justice considering the matter on an application [for permission to appeal] without notice whether or not to impose a condition. "

Certainly so far as the power to impose conditions is concerned (as opposed to the power to strike out on appeal, or set aside permission), it appears illogical that any higher threshold should be required.

31. Be that as it may, the cases referred to by Mr Kitchener in his written submissions likewise show that, in circumstances where a judgment debtor is attempting to appeal the original judgment imposing liability upon him, is well able to pay the judgment debt, but is taking all steps open to him to avoid enforcement, there may well be a compelling reason for the imposition of a payment condition.

32. Thus, for example, in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd supra* the Court of Appeal required the defendant to pay into court the amount of the judgment debt plus costs as a condition of proceeding with its appeal. The appellant was a foreign company, which appeared (a) to have ample assets overseas (so that the new condition would not stifle the appeal), but (b) to be unlikely to honour the original judgment if its appeal failed. Clarke LJ said at [41] that the court had concluded there was a compelling reason for making the appellant pay the judgment debt or secure it as a condition for it to proceed with the appeal, including:

i) because the appellant was an entity against whom it would be difficult to exercise the normal mechanisms of enforcement, and there was a real risk that if the appeal failed the respondent would be unable to recover the judgment debt and costs;

ii) the appellant plainly either had the resources or had access to resources enabling it to both instruct solicitors and leading and junior counsel to prosecute its appeal and make an application to court for a stay of execution and to provide a substantial sum by way of security;

iii) there was no convincing evidence that the appellant did not have either the resources or access to the resources which would enable it to pay the judgment debt and costs as ordered, and it was in breach of those orders;

iv) the discovery which the appellant had provided of its financial affairs was inadequate and gave the court no confidence that it had been shown anything near the truth, and it had wealthy owners and there was no evidence that, if they were minded to do so, they could not pay the judgment debt including the outstanding costs orders;

v) the court was not persuaded that the appeal would be stifled if the order was made as sought; and

vi) the court found it unacceptable that, absent any other orders of the court, the appellant was intending to prosecute the appeal (and was willing to put up security for costs in order to do so) whilst at the same time continuing to disobey the orders of the court to pay the judgment debt and costs, as well as seeking to persuade the court that it could not do so.

33. In *Bell Electric Ltd v Aweco Appliance Systems GmbH & Co* [2002] EWCA Civ 1501; [2003] 1 All ER 344, the Court of Appeal required the appellant defendant to give security for the judgment debt as a condition of prosecuting its appeal, despite the absence of any perceptible problems in enforcing the judgment debt, because of the appellant's deliberate breach of an earlier order to pay the judgment sum. The defendant had indicated to the claimants in correspondence that if attempts were made to enforce the judgment prior to the appeal, steps would be taken to frustrate the enforcement process. Potter LJ said, at [22]:

> "The question posed in this case, to which the judgment in the Hammond Suddard case provides no answer, is whether, where there is no reason to suppose that vigorously pursued steps by way of enforcement will ultimately prove fruitless if the appeal fails, there may none the less be a 'compelling reason' meanwhile to make an order staying the appeal if the interim order is not complied with, or a payment into court made or other security provided in respect of the judgment sum. Depending upon the overall circumstances, I see no reason in principle why that should not be so in a case where (i) the appellant is in deliberate breach of the order to pay the judgment sum; (ii) he has applied for and been refused a stay; (iii) his failure or delay in payment is due not to any financial difficulty but is cynically based upon the practical difficulties for the respondent in seeing enforcement in a foreign jurisdiction."

34. In *Day's Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWCA Civ 993, there was no stay of execution pending the defendant's appeal, but the defendant (a Taiwanese company) had failed to comply with the judgment. The Court of Appeal made it a condition of permission to appeal that the defendant paid to the claimant the judgment sum plus costs and interest. The claimants relied upon the facts that defendants were in deliberate breach of the order, the application for a stay of execution was refused, and the defendant's failure to pay was not due to any financial difficulty. Additionally, there was evidence of potential difficulties facing the claimants in enforcement, the principal place for which was in Taiwan. The claimants also relied upon the defendants' behaviour as indicative of the fact that they were likely to be as obstructive as possible if the matter came to enforcement (e.g. in respect of the claimants' application under CPR 71, the defendants refused to instruct

solicitors in England to accept service notwithstanding that they retained English solicitors for other proceedings). Dyson LJ held, at [25], that he was in no doubt that conditions should be imposed, because of the points relied upon by the claimant. Dyson LJ noted that the 3 requirements identified by Potter LJ at paragraph 22 of *Bell* were satisfied, accepting that these were not in themselves decisive, but cogent. At [29], Dyson LJ stated that:

> "the defendants' conduct in refusing to comply with court orders that have been made, without explanation, and their behaviour in relation to the CPR 71 matter, strongly suggests that they will place whatever obstacle they can in the path of any attempt by the claimants to enforce the judgment."

35. Logically two questions are posed by CPR rule 59.9(1)(c). The first is whether there is in the instant case a compelling reason for making the continued prosecution of the appellants' appeal conditional upon the payment into court of the judgment debt and costs (or those debts being secured in some satisfactory way within the United Kingdom), and the second is whether the court should exercise its discretion to make the order; see per Clarke LJ in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd supra* at [40].

36. So far as the first of those two questions is concerned, 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 fortiorii* 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, supra,* 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. If, in circumstances where there is no longer any challenge to the arbitral award, or liability judgment, a judgment debtor wishes to invoke the appeal procedures of the English court, and to seek permission to challenge enforcement orders adverse to its interests, it cannot, in my judgment, at the same time, lightly cock a snook at other English court orders requiring it to pay the award or judgment debt. That in my judgment provides a compelling reason why an appellant, in the position of the Appellants in this case, should be required, as a condition of exercising its appellate rights, to pay the judgment debt into court.

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. Any monies paid in will be held to the order of the Court of Appeal, and it will be a matter for the exercise of its discretion as to whether, upon determination of the appeal, the funds are returned to the Appellants, an order is made for their payment out to the Respondent, the latter is relieved from its undertaking not to attach the funds, or some other order is made. The fact that the Appellants may not wish to take the risk as to what the Court of Appeal may ultimately order in relation to any funds paid into court to satisfy the conditions, does not seem to me to amount to a "stifling" of the appeal. For these reasons I do not accept Mr Hirst's submission that, if the conditions were complied with, any appeal would be otiose and effectively "stifled".

37. Once the court has concluded that there is a compelling reason to make the order sought, it then has to go on to consider whether, in the exercise of its discretion, such an order should be made. There is little doubt in my mind as to how the discretion should be exercised in the circumstances of the present case. Contrary to Mr Hirst's submissions, I do not think the imposition of a condition of payment into court is in any way disproportionate. It seems to me that a case such as the present, where there is no longer any outstanding appeal against the award, is, as Mr Kitchener submitted, *a fortiori* the position in cases such as *Hammond Suddard Solicitors, Bell Electric Ltd,* and *Day's Medical Aids Ltd supra.* As the conditions imposed in the *Masri* litigation show, the fact that the imposition of conditions seeks to ensure compliance

with earlier liability judgments or orders, which are not themselves the subject matter of the current appeal, in respect of which permission is sought, is irrelevant. Nor is there anything in Mr Hirst's point that in the present case the relevant awards and orders were technically made in separate proceedings. In my judgment, there is nothing unjust or inconsistent with the overriding objective in requiring the Appellants to comply with those awards and court orders as a precondition to the prosecution of any appeal. Indeed such an order furthers the overriding objective that orders of the court should be complied with, and, where a defendant has available funds with which to do so, that judgment debts should be paid.

38. Contrary to Mr Hirst's submissions, it was also in my view irrelevant to the issue of imposition of conditions that: Moore-Bick LJ had stayed compliance with the order of Field J (both as regards the substantive order and the order for costs); that no application had been brought to set aside that stay; or that, by contrast, in each of the cases cited by Mr Kitchener a stay of execution had been refused. The critical point here was that the awards, now incorporated in an order of the court, were final and that there had been no stay of their enforcement. Nor was there any validity in Mr Hirst's point that reliance should be placed upon Moore-Bick LJ's refusal on the papers of the request made in the Respondent's solicitors' letter dated 12 June 2013 for the attachment of conditions. Moore-Bick LJ's order dismissing the application clearly envisaged that the Respondent would be free to make a formal application for such relief on notice to the Appellants. Moreover Moore-Bick LJ gave no reasons for such refusal, from which it may be inferred that he simply considered that such an application was one which needed to be made formally and on notice.

39. Nor was I persuaded by Mr Hirst's attempt to draw an analogy with the approach of the Commercial Court in relation to applications made under section 70(7) of the 1996 Act for an order that money payable under an award should be brought into court or otherwise secured pending the determination of an application or appeal under sections 67, 68 or 69 of the 1996 Act. In the present case no, and certainly no realistic, analogy could be drawn as between the current appeal and a section 70(7) application made in the context of a section 67 challenge by the other party to the jurisdiction of the arbitral tribunal. The facts of such a case and the present were entirely different. In the present case, such challenge has long since been finally determined and there was a final order requiring payment of the sums due under Awards 2 and 3. In my judgment there was no logical basis for requiring the Respondent, as a condition for obtaining an order for the attachment of conditions, to demonstrate that the Appellants' appeal was "flimsy or otherwise lacks substance." Nor was there any justification for importing into CPR 52(9) by way of analogy any such general principle as that articulated by Flaux J at [50] that the jurisdiction to order a payment as a condition of any appeal would only be exercised in circumstances where the applicant could demonstrate that the prosecution of the appeal would prejudice its ability to enforce. As the cases which I have cited show, there are all kinds of reasons that might be justified as "compelling" reasons for the imposition of conditions, which might include, but are not limited to, demonstrating prejudice of ability to enforce.

40. For all the above reasons I considered that it was appropriate in the exercise of my discretion to require the Appellants to pay the full amount of the sums due under Awards 2 and 3 into court. In all the circumstances, 28 days from the date on which I

announced that I would attach conditions to the grant of permission appears to be a reasonable time to allow the Appellants to comply with this order. If that is not sufficient time, then the Appellant will need to support any application for an extension of time with evidence which, at the very least, explains (a) the nature and value of the Appellant's assets outside India; (b) why such assets are not sufficient and/or readily available to produce funds for the payment into court; and (c) in adequate detail what steps they have taken to date to obtain Indian exchange control permission for the transmission of funds out of India, what response(s) have been received from the relevant Indian authorities, and what are the relevant statutory and/or regulatory procedures governing such applications. The information currently contained in paragraph 17 of Mr Rajan Gupta's first witness statement is inadequate in this respect.