Neutral Citation Number: [2013] EWHC 2466 (Comm)

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

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 08/08/2013

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

(1) THAI-LAO LIGNITE (THAILAND) CO. LTD **(2) HONGSA LIGNITE (LAO PDR) CO. LTD**	**Claimants**
- and -	
GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC	**Defendant**
THE BANK OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC	**Third Party**

- -
- -

Thomas Sprange and Thomas Childs (instructed by **King & Spalding**) for the **Claimants**
Phillip Aliker (instructed by **Dentons UKMEA LLP**) for the **Defendant**
Robert Howe QC and Andrew Scott (instructed by **Sullivan & Cromwell LLP**) for the **3rd Party**

Hearing date: 2 August 2013

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell :

1. This is an application by The Bank of the Lao Peoples' Democratic Republic ("the Central Bank") to discharge a domestic freezing order granted by Simon J on 4 July 2013 ("the Freezing Order") against the Government of the Lao Peoples' Democratic Republic ("the Government"). The return date for the Freezing Order, as agreed by extension, was 2 August 2013. The Central Bank, as a non party, seeks to set aside the entirety of the Freezing Order, alternatively paragraphs 6 and 19 thereof, together with directions for an inquiry under the cross undertaking into the damages which it claims to have suffered as a result of the order and further fortification of that cross undertaking.

2. After hearing argument on the Central Bank's application I declined to discharge the Freezing Order, continued it in a form varied by deletion of paragraphs 6 and 19, and gave directions for an inquiry into damages under the undertaking. I refused the Central Bank's application that the Claimants be ordered to further fortify the cross undertaking for the purpose of such inquiry. These are the reasons for my decisions.

3. The background is that the Claimants are companies which were involved in a project to mine lignite coal reserves and develop an on site power plant in the Hongsa region of Laos, pursuant to a project development agreement with the Government dated 22 July 1994 ("The PDA"). Disputes arose and the Government purported to terminate the PDA. Article 14.1(i) of the PDA provided for the resolution of any disputes by arbitration in Kuala Lumpur, Malaysia under the UNCITRAL Arbitration Rules. On 4 November 2009 the tribunal issued an award granting the Claimants US$56,210,000 plus post award interest and costs as contractual compensation for the Government's termination.

4. In the several years since the award, the Claimants have been taking steps in a number of different jurisdictions, including England, New York, France and Singapore, to seek enforcement of the award against the Government. Article 14.2 of the PDA contained an express waiver of immunity from execution by the Government. Meanwhile, on 3 November 2010 the Government commenced proceedings in the High Court of Malaysia to set aside the award.

5. On 26 October 2012 Eder J heard an application by the Claimants for judgment on the award, together with an application by the Government for an adjournment pending the forthcoming hearing of its application to set aside the award in Malaysia. Eder J ordered the Government to pay the full amount of the award into court as a condition of adjourning the Claimants' application for judgment. His order provided that in the event that the Government failed to pay the amount into court, the Claimants could enforce the final award as a judgment of the High Court. The Government did not pay any part of the sums ordered into court. Accordingly on 19 November 2012 Field J ordered that judgment be entered against the Government in the sum then due, inclusive of interest, of US$ 71,594,600.

6. The High Court of Malaysia set aside the award by a preliminary judgment on 27 December 2012 and a full judgment on 1 March 2013. The decision is under appeal.

7. On 4 July 2013 the Claimants made a without notice application for the Freezing Order which was granted by Simon J after a hearing on that day. At that stage the Government had taken no steps to appeal or set aside the judgments of Eder J or Field J. Subsequently, on 15 July 2013, the Government issued an application to set aside the orders of Eder J and Field J. The Claimants maintain that the setting aside of the award by the Malaysian court is no bar to its enforcement and should not lead to the setting aside of either of those orders.

8. The Freezing Order was in the standard Commercial Court form, so far as material to the present application, applying to the Government's assets in England and Wales up to US$ 74,463,620, save for two provisions:

> Paragraph 6:
>
> "This prohibition includes in particular any assets (including cash deposits and securities) held in an account in which the Defendant has a beneficial interest, whether maintained in its own name or the name of the Bank of the Lao PDR."
>
> Paragraph 19:
>
> "**Special instructions to bank and other financial institutions**
>
> (a) Any bank or other financial institution where an account in the name of the Bank of the Lao PDR is maintained is ordered to restrain all activity in the account unless and until it obtains a sworn declaration from an officer of the Bank of the Lao PDR stating that the Defendant has no beneficial interest in the account.
>
> (b) Any bank or financial institutions shall inform the Claimants of the existence of any such account and shall provide the Claimants with a copy of any such declaration."

Service of the Freezing Order and subsequent events

9. The Freezing Order was obtained following a hearing on 4 July 2013, and sealed on the following day, 5 July, which was a Friday. The Central Bank was not then, and has not since been, served with the Freezing Order, nor with the materials placed before the Court by the Claimants in support of their without notice application for it.

10. The Central Bank holds two London accounts with Wells Fargo Bank, N.A. ("Wells Fargo"), one Euro, one Sterling. These accounts are used for traditional central bank functions. Wells Fargo was served with the Freezing Order on 5 July 2013. Wells Fargo attempted to contact the Central Bank over the weekend of 6-7

July. It was not, however, until Tuesday 9 July 2013 that Wells Fargo informed the Central Bank's representatives that the two London accounts had been frozen.

11. The same day, 9 July 2013, the Central Bank, through its solicitors, Sullivan Cromwell LLP ("S&C") emailed the Claimants' solicitors, King & Spalding LLP ("K&S"). The email raised the Central Bank's concerns arising from the Freezing Order; in particular, S&C's email of 9 July identified the Central Bank's concern that the State Immunity Act had not been complied with, that the Freezing Order was preventing the Central Bank from conducting transactions in the ordinary course of its business and operations, of which details were given, and that substantial and immediate loss was likely to result from this. S&C accordingly requested that the Claimants consent by return to a variation to permit such transactions to take place.

12. The Claimants responded by K&S's letter of Wednesday 10 July 2013. K&S's letter set out their clients' position that they were willing in principle to consent to a variation and that any such variation be conditional on the Central Bank providing to the Claimants "*… sufficient details of the transactions so as our client and the Court may be satisfied that the transactions do indeed involve the [Central Bank] and third parties and do not involve directly held beneficial assets of the Defendant*". The Central Bank accordingly refused to submit to the Claimants' condition. Without prejudice to its contention that the Freezing Order ought not to have been granted, the Central Bank implemented the mechanism contemplated by paragraph 19(a) of the Freezing Order.

13. In these circumstances, it was not until 4.15pm on 10 July 2013 (some 5 days after Wells Fargo had frozen the London accounts) that the Central Bank was able to serve on the Claimants a witness statement, from its Acting Director General of the Banking Operations Department, Mr Oth Phonhxiengdy, declaring that the Lao Government had no beneficial interest in the Wells Fargo accounts.

14. Later on the 10 July, at 7.14 pm, the Claimants confirmed that they were satisfied with Mr Phonhxiengdy's statement (subject to its being sworn, as it duly was, at the British Embassy in Laos, the next day). At 10.32 am, on Thursday, 11 July 2013, Wells Fargo's solicitors, Mayer Brown International LLP, confirmed that the London accounts had been unfrozen.

15. The effect of the Freezing Order was therefore that the Central Bank's accounts at Wells Fargo remained frozen for over three working days. The evidence before me from Mr Storrs, an associate at S&C, was that the Central Bank has incurred substantial losses as a result. Mr Storrs explains that the Freezing Order disrupted a series of back-to-back foreign exchange transactions which the Central Bank had entered into prior to the date upon which the Freezing Order was made, under which large sums were due to be received into the accounts between 9 and 12 July, of which some £170 million was immediately required to settle foreign exchange transactions. The Central Bank had to unwind those transactions in order to meet its liabilities, and claims that as a result of such disruption it suffered losses which are currently estimated to amount to approximately US$4.5 million.

16. The Central Bank remained concerned that paragraph 19 of the Freezing Order continued to risk impeding the Central Bank's day-to-day operations. The Central

Bank was uncertain what effect the Freezing Order would have if it were to open new accounts, in England, for the purposes of its traditional central banking functions; and regarded it as unclear, in particular, whether the Claimants could justifiably contend that paragraph 19 would apply to such an account unless the Central Bank declared that the Lao Government had no beneficial interest in it. It is also unclear what effect the Freezing Order would have if the London accounts (or any account opened in the Central Bank's name in England) were to receive a SWIFT payment order calling for onward payment to a Lao Government account maintained at the Central Bank in Vientiane, Laos. It is not evident to me that that would involve the Government having "a beneficial interest" in the money in the London account in the name of the Central Bank; but it appears from Mr McCoy's third witness statement at paragraph 64 that the Claimants contend that "*a SWIFT payment order that calls for onward payment to a GOL account in Laos does, without more, give the GOL "a beneficial interest in the account*"".

17. In these circumstances, the Freezing Order has seriously impacted the Central Bank's ordinary business and operations, and threatens to do so in future.

Paragraphs 6 and 19

18. The provision in paragraph 19(a) of the Freezing Order for a blanket freezing of a third party central bank's assets is novel and far reaching. It is not limited to UK accounts, is unlimited in amount and has none of the usual safeguards for a non party which are included in the standard order for a party. Mr Sprange on behalf of the Claimants argued that it was to be construed against the background of the domestic order in a limited amount made against the Government, and was not an order against the Central Bank, but merely a clarification for the benefit of banks holding accounts in the name of the Central Bank as to how they should respond to the order addressed solely to the assets beneficially owned by the Government. It is not, however, framed in those terms. It unequivocally tells a bank which is holding an account in the name of the Central Bank that it "is ordered" to freeze the account pending receipt of a sworn declaration. It is not surprising that this was how it was understood by Wells Fargo.

19. Mr Howe QC submits, and I accept, that no such order should have been made against accounts in the name of the Central Bank, because the Central Bank's property enjoys immunity from execution under the State Immunity Act 1978 ("SIA"). The relevant provisions are:

> "13. Other procedural privileges.
>
> …
>
> (2) Subject to subsections (3) and (4) below—
>
> …
>
> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes…;

14. States entitled to immunities and privileges.

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

the sovereign or other head of that State in his public capacity;

the government of that State; and

any department of that government, but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

(emphasis added)

20. Under Lao law, the Central Bank is a juridical entity, separate from the Lao Government. It carries on traditional central bank functions, is capable of holding its own property, and of suing and being sued. In particular, by Article 2 of Law No. 5 dated October 14, 1995 on the Bank of the Lao PDR ("Central Bank Law"): "[the Central Bank] *shall be a financial institution of the Government, shall have the equivalent status to Ministry, shall be the Central Bank of the country, shall be juridical person."* It was common ground that for the purposes of the Freezing Order and this application, the Central Bank had separate juridical personality and was a separate entity from the Government within the meaning of section 14(1).

21. Consequently, the Central Bank's property "*shall not be subject to any process for the enforcement of a judgment or arbitration award…"*, save upon the Central

Bank's giving its "*written consent*": sections 13(2)(b), (3) read with s. 14, and in particular s. 14(4).

22. The Central Bank has not so consented. The Claimants did not contend otherwise in support of their without notice application. It is immaterial whether (as the Claimants did contend), the Government gave its written consent to the English Court's enforcement processes: such consent could not affect the Central Bank's immunities and privileges as a separate entity. The privilege against the English Court's enforcement processes, conferred on a central bank which is a separate entity, is lost if and only if **that entity** gives its written consent. That follows as a matter of language, principle and authority:

    (1) The language of s. 14(4) requires sections 13(2) and (3) to be read as if for "State" one substituted the words "central bank". The relevant language is therefore that by section 13(2) (b) "the property of [the central bank]" enjoys immunity, and the waiver exception in section 13(3) applies where there is "the written consent of the [central bank] concerned."

    (2) That is consistent with principle. It is not normally possible for one person to waive another's rights, absent a relationship of agency. The scheme of section 14 is that a central bank which is a separate entity, unlike a State, enjoys complete immunity for its property even in respect of assets which are in use or intended for use for commercial purposes (see ***AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening)*** [2006] 1 WLR 1420 at [50]-[59]). It would undermine this scheme to treat prior waiver of immunity by a State as sufficient to remove the different immunity of a central bank.

    (3) This is supported by ***Banca Carige Spa Cassa di Risparmio di Genova e Imperia v Banco Nacional de Cuba*** [2001] 1 WLR 2039 at [23(4)]; Dicey, Morris & Collins on ***the Conflict of Law,*** (15th edn) at 10-016; and A Dickinson, & ors ***State Immunity, Selected Materials and Commentary***, (OUP, 2004) at 4.093.

23. The term "*property*" is to be construed broadly, and includes, as regards the central bank, any right or interest, whether legal, equitable, or contractual, in assets, including those in which other parties also have rights: see ***AIG Capital Partners v Kazakhstan*** (supra) at [45], [61], [89]–[91], [95]. Accordingly any order directed at execution against property in the name of the central bank would be permissible only if it could be said that the bank had no interest of any of these kinds. It is difficult to see how that could be said of a bank account in the name of a central bank, even as nominee, where at the least the central bank would have a contractual interest as the customer of the bank at which the account was held.

24. Mr Sprange contended that paragraphs 6 and 19 were intended to catch a particular type of asset, which had been described by Mr Oth Phonhxiengdy in a declaration sworn in the New York proceedings in the following terms:

    "The Lao central Bank also holds foreign currency accounts on behalf of the Lao Government outside of Laos. These accounts

are specially denominated with an indication that they are accounts held for the Lao Government."

25. I shall refer to these as "a/c Govt accounts" for convenience. At the hearing, Mr Sprange submitted that the Claimants were now content to have paragraphs 6 and 19 deleted from the form of the continued Freezing Order, but only because pursuant to the disclosure requirements of the Freezing Order itself, Mr Oth Phonhxiengdy had confirmed that the Central Bank did not hold any a/c Govt accounts in the UK. He maintained, however, that paragraphs 6 and 19 were justified at the time the Feezing Order was made by the potential existence of such accounts in London, which was their target. That submission falls to be rejected for two particular reasons:

    (1) Paragraphs 6 and 19 are not limited to such accounts. Paragraph 19(a) applies on its face to all Central Bank accounts, without limit as to type, location or amount. Nor is the breadth of the restriction saved by the proviso. As the Central Bank's evidence in this case suggests, the freezing of a bank account held by a central bank may cause immediate and serious disruption and serious financial and reputational losses. It was foreseeable, given the time differences between London and Laos, that the proviso might involve at best some delay in unfreezing accounts. The form of paragraph 19, being to freeze the accounts subject to a mechanism for demonstrating that they should not have been frozen, is wrong in principle. The Claimants could only justify freezing in the first place accounts which fell outside the immunity enjoyed by the Central Bank, and it was for the Claimants to frame an order which did so. Mr Sprange's submission that they need to be told about the accounts in order to enable them to do so put the cart before the horse. Moreover the use of the expression "beneficial interest" in a bank account was likely to be productive of much uncertainty, especially in the context of a State and its central bank.

    (2) In any event a/c Govt accounts, as described in paragraph 12 of Mr Oth Phonhxiengdy's declaration, would come within the very broad definition of property for the purposes of the immunity conferred by section 13(2)(b). Taking the description on its face, they would be accounts in which, whatever the extent or nature of the Government's interest, the Central Bank would have at least a contractual interest as the account holder. That is sufficient to confer immunity.

Full and frank disclosure

26. It might have been thought from the fact that ultimately the Claimants did not resist the deletion of paragraphs 6 and 19, that the previous analysis was unnecessary. But it sets the scene for the real battle between the parties, which was joined on the Central Bank's submission that Simon J had been misled into making the Freezing Order in these inappropriate terms by a failure on the part of the Claimants to fulfil their duty of disclosure, and that the consequence should be the discharge of the entire Freezing Order, and a refusal to continue it or grant a fresh order. This submission was supported by Mr Aliker on behalf of the Government, for whose benefit it was being made.

27. It is well established that an applicant for an injunction, applying without notice, has a duty to investigate facts and matters relevant to the application, and fairly to present evidence and submissions to the Court in relation to it. The applicant must disclose fully to the Court all matters relevant to the application, including all matters, whether of fact or law, which are, or may be, adverse to it. This is a high duty which requires the applicant to make full, fair and accurate disclosure of material information to the Court and to bring the Court's attention to all of the significant factual, legal and procedural aspects of the case. See e.g. ***Brink's Mat Ltd v Elcombe & ors*** [1988] 1 WLR 1350, 1356-1357; ***Memory Corporation Plc v. Sidhu (No.2)*** [2000] 1 WLR 1443, at 1459H – 1460B.

28. There were essentially three elements to the allegation of non disclosure or unfair presentation:

    (1) The Claimants did not make clear to Simon J that the Central Bank was a separate entity so as to enjoy the immunity under section 13(2)(b); and that this was compounded by the incomplete quotation by Mr McCoy in his first affidavit of Article 2 of the Banking Law which omitted the words I have underlined above, stating that the Central Bank is a juridical person.

    (2) The Claimants did not adequately explain paragraph 19 or its effect on the property of the Central Bank, or how such an effect was contrary to the immunity conferred by the SIA.

    (3) The Claimants argued that the waiver by the State was sufficient to remove immunity from the Central Bank, without explaining how such waiver could be sufficient or drawing attention to the authorities I have identified above as supporting the contrary position.

29. As to the first of these, I do not regard the criticism as a fair one. The application was presented on the basis that the Central Bank was a separate entity with separate juridical personality, and that was the premise upon which all the arguments were advanced. The partial quotation of Article 2 of the Banking Law was not incomplete in a material respect. The Article was quoted in a section of the witness statement whose heading revealed its purpose: "The Defendant's Cash Deposits Located Outside Laos are Held in Accounts in the BOL's Name". It followed the quotation of paragraph 12 of Mr Oth Phonhxiengdy's declaration revealing the existence of a/c Govt accounts. It was quoted as one of the provisions of Lao law in support of the contention that the Government had power to deal with cash deposits held on its behalf by the Central Bank. As such, the relevant part of Article 2 was that quoted, not the part omitted relating to separate juridical personality.

30. As to the second, there is more substance in the criticism. Mr McCoy's Affidavit noted at footnote 16 to paragraph 36 and at paragraph 134 that the Government or the Central Bank might argue that accounts held by the latter in which the former had a beneficial interest were immune from enforcement, but did not articulate the argument or explain how it was to be met. In the 117 paragraph skeleton lodged in support of the without notice application, there was a passage at paragraph 60 which identified the terms of paragraph 6 of the draft order, referred to Mr Oth Phonhxiengdy's evidence of the existence of a/c Govt accounts, and explained that

the draft order contained a provision in the terms which became paragraph 19(a) because Mr Oth Phonhxiengdy's declaration did not indicate whether the banks or other financial institutions where such accounts were maintained had knowledge of that special denomination. That was an inadequate explanation or justification for the broad terms of paragraph 19, which was inappropriate for all the reasons I have identified. None were addressed in the skeleton argument. On the contrary, paragraph 84(1) asserted that the Central Bank's immunity was irrelevant because "the Claimants do not seek any relief against [the Central Bank] or its property". That was a misleading statement in the light of the terms of paragraph 19 and ***AIG Capital Partners v Kazakhstan***.

31. At the hearing before Simon J, the terms of what became paragraph 19 were not referred to during the argument as to the position of the Central Bank accounts. The judge was, however, addressed on the Central Bank's immunity and taken to the relevant sections of the SIA and to paragraphs [57] to [60] of ***AIG Capital Partners v Kazakhstan***. Mr Sprange drew his attention to [60] and the fact that a contractual right to a debt would constitute property. There then followed this passage in the transcript of the hearing:

> "MR SPRANGE :…Although it is an obvious point, in paragraph 59 he makes the point that if a central bank has no interest in the relevant property then section 14(4) does not apply. What all this means is several things. First of all if we were to get this freezing order and we were to freeze assets and then we were to seek to execute against them, an issue would arise as to whether they are held by a central bank and, if so, on what terms, and whether those terms give rise to property as envisaged by this decision. If it could be shown that it was a property of the central bank even if the 100 per cent beneficial ownership was to the state but the central bank has a property interest in some way, like a contractual right as referred to here, we would not be able to get our hands on those assets arguably. If that were the case we would take the position that there had been a waiver and that this decision can be distinguished or does not go on to consider the position that it is a waiver.
>
> The second point we would make is this. We do not necessarily need to go about things the way that AIG did here because we have a waiver from the state so we can get relief against the state. We have referred to two cases in our skeleton to support this theory. We may be able to get an order that the state tells any third party, including the central bank, "Pay this money to the judgment creditor in this case" so that would not involve us impending our needs(?) or an order could be made that the judgment debtor, the state, bring the money to itself and put the money into a different account and then pay it to us or pay it into court. We say there would be ways around that.
>
> The reason we go into it in such detail is more from the point of view of full and frank disclosure."

32. Those submissions did not adequately address the inappropriate features of paragraph 19 which I have identified. They did not draw attention to those features, or identify them for the Judge as giving rise to potential objections to making an order in those terms. They did not identify or address the width of paragraph 19, applying to accounts unlimited by type or location or amount. They did not draw to the Judge's attention that he was being asked to make a novel order, under which banks were to be ordered to freeze a central bank's accounts subject to a locus poenitentiae to provide a declaration which would render them immune, rather than an order which would be drafted to protect and give effect to the central bank's important entitlement to immunity. They did not draw to the Judge's attention the fact that the subject matter of the sworn declaration required by paragraph 19, namely absence of "beneficial interest" in the Government, was not the only circumstance in which the accounts ought not to remain frozen; or that what mattered was not the interest of the Government, but the interest of the Central Bank, in circumstances where they might both have an interest. They did not explain what the argument was which, contrary to ***AIG Capital Partners v Kazakhstan***, would mean that they could only "arguably" not get their hands on the assets "if it could be shown that it was a property of the central bank even if the 100 per cent beneficial ownership was to the state but the central bank has a property interest in some way, like a contractual right". They did not explain the foreseeable risk of disruption and the practical difficulties which the sworn declaration mechanism might cause to normal central bank functions, coupled with the time difference between London and Laos. There was no attempt to marry the wording of the proposed terms of paragraph 19 with the submissions on the Central Bank's immunity. In summary there was not a fair presentation to the Judge of the nature and consequences of the relief sought in paragraphs 6 and 19, how they could be justified, and what the countervailing arguments would be.

33. As to the third allegation of unfair presentation, the above passage shows that the Claimants' ultimate justification for attaching the Central Bank's accounts was waiver. This had been the subject of an earlier exchange before Simon J in the following terms:

> "MR SPRANGE: There are two pieces of subsection 4. The first piece effectively says that property the state bank is just deemed not to be for commercial use or commercial purpose. (pause) The second piece of it says where a central bank or similar authority is a separate entity, because obviously some central banks are organs of the state and some are separate, where they are separate, the provisions of (1) to (3) of section 13 apply. So effectively that separate legal entity central bank will get the benefit of section 13(2) and if it is going to give those up or if they are to be given up then there needs to be a waiver of the sort referred to in (3).
>
> MR JUSTICE SIMON: Does it have to be a waiver of the state?
>
> MR SPRANGE: That is an issue that may be relevant in this case. We have not been able to find any authority on it. We have our views on what they should be.

> MR JUSTICE SIMON: You say the state's waiver is sufficient?
>
> MR SPRANGE: We say it is sufficient.
>
> MR JUSTICE SIMON: The banks may not be [bound by] the state.
>
> Mr SPRANGE: Yes I am sure that if the central bank was here today they would say: No that is wrong, on the basis of the second piece of 14(4) you effectively delete the word "State" in (2) and (3) and you put "central bank" and that would mean that the central bank would also have to give a waiver as well as the State". That would be their argument. (pause).

34. Having correctly identified the argument, Mr Sprange did not state what answer there might be to it, or what the "views" were that "we have". In saying that they had found no authority on it, they represented that a suitable search had been undertaken without results, whereas the authorities I have identified, including the leading textbook Dicey Morris & Collins, suggest that the waiver would need to be that of the central bank itself. Mr Sprange explained that in this passage, and the later passage I have quoted, he was referring to waiver by the State, not the Central Bank, and had in mind the argument that an order could be addressed to the Government whose interest in an account, including an a/c Govt account, might be capable of being subjected to execution by orders addressed to the Government despite the immunity of the Central Bank under s. 13(2)(b). If that was what was in mind it was not apparent from the passages I have quoted. The Judge was not given a fair presentation of the issues in this respect.

35. My conclusion, therefore, is that the second and third aspects of the Central Bank's allegation of breach of duty are made out. These were, in my view, serious failures fairly to explain and justify the relief sought against bank accounts in the Central Bank's name. It should have been apparent that any potential interference with a central bank carrying out its central bank functions required careful consideration and justification. It could readily be anticipated that interruption of those functions even for a short period of time could potentially have serious adverse consequences.

36. I turn to consider the consequences of that breach of duty. On the return date the Government sought to resist the continuation of the Freezing Order being sought by the Claimants, arguing amongst other things that there was no good arguable case, no risk of dissipation and that there were other material non disclosures. There was no time to hear those arguments on 2 August. The parties agreed that, subject to the effect of the breaches of duty I have been discussing in relation to the Central Bank's accounts, the Freezing Order should be continued, without paragraphs 6 and 19, until the hearing of the application by the Government to set aside the orders of Eder J and Field J, when the merits of the Claimants' arguments that they should remain unaffected by the setting aside of the award in Malaysia will be determined, not just to the threshold standard of a good arguable case. The issue, therefore, is whether the just consequence to visit on the Claimants' breaches in relation to paragraphs 6 and 19 of the Freezing Order is a

discharge of the Freezing Order and a refusal to continue it or to grant it afresh against the Government.

37. In ***Brink's Mat Ltd v Elcombe & ors*** [1988] 1 WLR 1350, Ralph Gibson LJ included the following amongst his summary of the applicable principles:

> "(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in Bank Mellat v. Nikpour , at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners' case [1917] 1 K.B. 486 , 509.
>
> (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented."

38. Although I regard the breaches of duty as serious, it would not in my view be just to deprive the Claimants of the continuation of the Freezing Order against the Government as a result of them. The breaches relate solely to paragraphs 6 and 19 of the Order. The Claimants derived no benefit from those paragraphs, which will not be part of the continued Freezing Order. The breaches have no logical relevance to the continuation of the Freezing Order in all its other respects against the Government. The breaches were not deliberate. I accept, as Mr Sprange submitted, that paragraph 19 was intended to apply only to any a/c Govt accounts which might exist in London, despite its inept drafting, and that the Claimants and their legal advisers intended the Freezing Order to be addressed to the Government only, not the Central Bank, even in relation to the accounts in the name of the Central Bank, so that the Government's waiver was the relevant one. The presentation was muddled and inadequate, but was not intended to mislead. To deprive the Claimants of an order against the Government ancillary to a judgment for over $74 million by reason of such conduct would in my view be disproportionate.

Inquiry under the cross undertaking

39. Mr Sprange submitted first that there should only be an inquiry if the order was wrongly granted. I have held that it was, although I do not agree that such is a necessary condition to the ordering of an inquiry. The Central Bank is a third party affected by the Freezing Order, and as such comes within the intended class of beneficiaries of the third party undertaking.

40. Mr Sprange also submitted that the evidence of loss put forward by Mr Storrs was not sufficient to warrant an inquiry being ordered, at least yet, and that the Central Bank should be required to advance a more detailed claim with supporting material attesting to loss which could be seen to have been caused by the Freezing Order. I was referred to ***Yukong Line Ltd v Rendsburg Investments Corporation*** [2001] 2 Lloyd's Rep 113, in which Potter LJ said at [35]:

> "So far as evidence of loss is concerned, upon an application for an inquiry, the applicant must adduce some credible evidence that he has suffered loss as a result of the making of the order. The court will not order an inquiry if it appears to be pointless to do so because the intended claim for damage is plainly unsustainable. That may be because it is clear that the order is no more than the factual context for loss which would have been suffered regardless of the loss….."

41. This is not a high threshold. The Court is concerned to ensure that an inquiry is not an exercise in futility because the alleged claim for loss is doomed to failure. It may be that the proportionality of the exercise may sometimes also have to be taken into account, so that the Court will consider the expense and scale of the inquiry by comparison with the nature and size of the loss claimed, and this may have a bearing on the degree of credibility and cogency of the evidence of loss put forward when applying for an inquiry. But once it is decided that the applicant should be compensated for losses caused by the order, generally all that will be required will be credible evidence which is sufficient to show that an inquiry is not clearly futile or disproportionate. The evidence adduced on behalf of the Central Bank is sufficient to meet this test.

Fortification of the Cross Undertaking

42. When the Freezing Order was sought, the Claimants undertook to fortify the cross undertaking by paying £100,000 into K&S's client account to be held to the order of the Court. The Central Bank now seeks an order for the substantial further fortification of the undertaking in the light of its current estimate of the size of the losses allegedly caused by the Freezing Order.

43. In ***Commodity Ocean Transport Corporation v Basford Unicorn Industries Ltd ("The Mito")*** [1987] 2 Lloyds Rep 197, Hirst J refused to order fortification of a cross undertaking by the claimant in favour of the defendant following discharge of a Mareva injunction. So far as my experience goes, this has represented the settled practice in the Commercial Court since then. Hirst J's main reasoning expressed at pp 199-200 was:

> "When such security is originally sought it is sought as a condition for the grant of the injunction, in other words the plaintiff is told if you want this injunction you have to pay the price by fortifying the undertaking to damages. The plaintiff can then either agree or disqualify himself in obtaining the injunction ……. Mr McClure says that the plaintiff has already paid a price here when the cross undertaking was given, which is perfectly correct as far as it goes. The plaintiffs did not

> ever agree nor were they ever asked to pay the extra price that is the fortification of the undertaking. If they had been asked to do so, it may very well be that they would ……. have declined to take an injunction. Of course Mr McClure accepts, as he must, that the court has no power to impose an undertaking on the plaintiffs and herein I think if I were to make this order I would in essence ex post facto be imposing a conditional term to the undertaking without any knowledge one way or the other as to what the situation would have been if it had been sought by the defendant in the first place. That is something which I think is wrong in principle to do."

44. This reasoning was cited with approval by Neuberger J in ***Miller Brewing Company v The Mersey Docks and Harbour Company*** [2005] EWHC Ch 1606, [2004] FSR 5 at [49]. It applies with equal force to the Central Bank's application in this case for further fortification of the cross undertaking at a time when the Freezing Order is being, in effect, discharged as regards the Central Bank. It is true that in this case the Freezing Order is being continued against the Government. But the Claimants are not being asked to fortify the cross undertaking as the price for the continuation of the Order against the Government, or by reference to any potential losses to be suffered by the Government (which has said that there are no assets here to be caught by the Order).

45. The Court cannot require a claimant to give an undertaking. When fortification of a cross undertaking is required, it is not imposed by an order of the court that it must be given. It is part of the undertaking offered by a claimant, and the grant of the order is conditional upon the undertaking being complied with. This is reflected in the standard wording of the Commercial Court freezing order. Requiring fortification is an adjunct to the undertaking offered by a claimant, and is only "required" in the sense of being the price which the claimant will have to pay if he wants his order to operate in futuro. The fortification now sought by the Central Bank is an adjunct to the undertaking originally voluntarily given by the Claimants, and to attach a fortification requirement to such undertaking now, after the Central Bank accounts have been removed from the scope of the Freezing Order, would be in substance to impose upon the Claimants an undertaking they did not give. Moreover it would be to impose a retrospective burden upon the Claimants whilst at the same time depriving them of the opportunity of considering whether to assume that burden as the price of obtaining the Freezing Order over the Central Bank accounts.

46. Mr Howe QC argued on behalf of the Central Bank that because fortification of a cross undertaking is no more than the exercise of rendering it effective in circumstances where the amount needed will always be uncertain, the court should adjust the extent of the fortification in the light of the knowledge it acquires from time to time about the nature and size of the losses which the undertaking may realistically be required to meet. That ignores the fact that requiring fortification is a process of making relief conditional on a voluntary undertaking. Mr Howe QC also argued that it would be anomalous to refuse to order fortification, because it is a matter of happenstance whether his fortification application came on after or before his discharge application; and in the latter case, the court would have had

jurisdiction to order fortification. This does not, however, meet the reasoning in ***The Mito***. Had that occurred, the Claimants could have made the decision whether to volunteer to provide such security as the price for the continued application of the Freezing Order to the accounts in the name of the Central Bank.

47. Accordingly I decline to "order" fortification of the cross undertaking.