IN THE HIGH COURT OF JUSTICE 2013 Folio No 1051
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN AN ARBITRATION CLAIM
Neutral Citation Number: 2013 EWHC 2517(Comm)

Court No 28

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 9 August 2013

Before:

MR JUSTICE HAMBLEN

BETWEEN:

(1) BARNWELL ENTERPRISES LTD (as successor-in-title to Shivaan Enterprises Limited)
(2) RISHI LTD
(3) ALOK LTD
(4) G.N.R. REDDY

Applicants

-v-

ECP AFRICA FII INVESTMENTS LLC ("ECPA")

Respondent

MR IAIN QUIRK (instructed by Stephenson Harwood LLP) appeared on behalf of the Applicants.

MR VERNON FLYNN QC (instructed by Akin Gump LLP) appeared on behalf of the Respondent.

Friday, 9 August 2013

(10.00 am)

APPROVED JUDGMENT

MR JUSTICE HAMBLEN:

Introduction

1. This is an application for the continuation of an injunction granted ex parte on notice by Mr Justice Singh on 2 August 2013. The application is for interim relief under section 44 of the Arbitration Act 1996, and/or section 37 of the Senior Courts Act 1981.

Background

2. The parties are the shareholders in a Mauritian construction company called Spencon Services Limited ("Spencon"). It is said to be one of Africa's largest local privately owned construction companies, with branches in Uganda, Tanzania and Zambia.

3. The applicants include companies owned by the two founders of Spencon, who founded the company in 1979. The respondent, ECPA, is the African fund of a US private equity firm that invested US$15 million into Spencon by way of loan, later convertible into equity in 2006/7.

4. The parties are engaged in an LCIA arbitration (Professor Dr Albert van den Berg, Ms Nancy Turck and Mr Axel Baum) ("the Tribunal") with a London seat. The underlying claim in the arbitration is for US$22,446,525

under a Put Option Agreement dated 30 June 2011 ("the Put Option Agreement").

5. The parties also entered into a Share Pledge Agreement dated 30 June 2011, which has a Mauritian law and jurisdiction clause ("the Share Pledge Agreement").

6. ECPA has threatened to exercise its purported rights under the Share Pledge Agreement to transfer the applicants' shares to ECPA on the basis that there is a valid debt under the Put Option Agreement. This would give ECPA almost 100 per cent control of the business and would exclude the applicants. It is contended that the likelihood is that ECPA is going to sell the business to release the debt that it says is owing to it.

7. The applicants submit that exercising the share pledge rights would prejudge and determine the issue in the arbitration. If, as they contend, there is no valid debt, then ECPA is not entitled to exercise the pledge and take control of Spencon.

8. It is submitted that the consequences would be disastrous for the applicants and for Spencon.

9. Against that background, the applicants seek an interim injunction to restrain the exercise by ECPA of any rights or purported rights under or derived from the Share Pledge Agreement, pending the final determination of the arbitration proceedings. It is submitted that it is appropriate to preserve the status quo, and

that there can be no serious prejudice to ECPA as, at worst, its takeover of the company would be delayed by about six months, the arbitration being fixed to be heard in the period 18 to 22 November 2013.

The history of the applications

10. There has been a history of applications by the applicants for interim relief of substantially the same nature as that now sought.

11. The applicants' first application was made to the Tribunal on 18 March 2013. Paragraph 6 of that application sought a stay in the following terms:

> "The execution of the Put Notices dated 27.2.2013 and the closing of the put transaction within 90 days of delivery of the Put Notice including any claim for interest arising under clause 2.3 of the Put Option Agreement dated 23.10.2009 and **any enforcement in terms of** the demand for payment of the Put price in the sum of US$22,446,525, or **security in respect of such payment of the Put price under any Share Pledge Agreements**, guarantees or otherwise (and for the avoidance of doubt to include the demand for payment into an escrow for the benefit of the Claimant; or for the delivery of letters of credit to the Claimant; consenting to a lien on assets to the Respondents or executing one or more guarantee as set out in clause 2.3 of the Put Option Agreement) **be stayed pending a final determination** (including the expiry of any time permitted in law to appeal such a final determination) in this arbitration." **that the Put Option Agreement and the other**

agreements including the Share Pledge Agreements are valid and enforceable” (emphasis added)

12. At Paragraph 18 of their submissions, the applicants stated both that "the Share Pledge Agreement shall also be an issue in the arbitration", and that the stay was required to prevent the appropriation of the shares "as per the put rights and the Share Pledge Agreements by 28 May 2013". The application was plainly made on the basis that the Tribunal had power to grant it.

13. The Tribunal indicated in Order No. 1 that it would rule on that application by 28 May 2013.

14. At that stage ECPA's case was that the Tribunal did not have power to order the relief sought. It stated at paragraph 62 of its submissions as follows:

> "Article 25.1(b) of the LCIA Rules gives the Tribunal the power 'to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration'. The power to order preservation of property is analogous to a freezing injunction. However, neither head of the interim relief sought by the Respondents, (ie 'stopping the clock' and relief from enforcement), is in the nature of an order for preservation of property. Therefore Article 25.1(b) does not appear to apply."

15. In relation to the relief sought for "stopping the clock", it submitted at

paragraph 104 as follows:

> "Fifth, 'stopping the clock' amounts to an intervention to vary the terms of the parties' agreement, which the Tribunal has no power to do. Under Article 25.1(c) of the LCIA Rules, the Tribunal has power 'to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award'. But the Tribunal has no power to award variation of a contract as relief. Any variation to a contract is exclusively a matter for agreement between the parties and cannot be imposed by means of arbitral relief."

16. In relation to that part of the application relating to enforcement, ECPA said as follows at paragraph 112 by reference to the Share Pledge Agreement:

> "The fifth means of enforcement is under the Share Pledge Agreement, which provides that upon 'failure by [Respondents 1 to 4] to execute their obligations under the put agreement' the Claimant 'has the right to foreclose on the present Pledge' - which covers all of the Shares held by the Respondents 1 to 4 in the Company. Therefore, Citilaw's request for a stay of 'any enforcement in terms of (...) security in respect of such payment of the Put price under any Share Pledge Agreements' is directed to this. But the Tribunal does not have jurisdiction in respect of the Share Pledge Agreement. The Share Pledge Agreement contains no arbitration agreement and Clause 17 provides that: 'the civil courts of Mauritius shall have full jurisdiction of any difference or dispute arising or which may arise out of [the] contents of this document or any part thereof'.

> Therefore the Tribunal has no jurisdiction in respect of matters under the Share Pledge Agreement and has no jurisdiction to order interim measures restraining the Claimant from exercising its rights thereunder."

17. On 24 May 2013, the applicants sought substantially identical interim relief from the Mauritian court. The applicants submitted to the Mauritian court that the Tribunal was not seized, contending that they effectively sought a form of "bridging order" until the Tribunal could be seized.

18. The applicants' second application was supported by a second affidavit from Mr Jitendra Patel, CEO of Spencon and sole shareholder of applicant number 1, which stated at paragraph 33 that:

> "It is urgent and necessary that pending the determination of the arbitration proceedings, the Honourable Court issues ... an interim order ... preventing and restraining the [Respondent] from enforcing any of its rights under the Share Pledge Agreement in order to give effect to the Share Pledge Agreement."

19. On 28 May 2013, the Mauritian court issued an ex parte order restraining the Claimant 'from enforcing any of its rights under the Share Pledge Agreement', expressly on the ... basis that the Tribunal 'cannot be timely seized [and] is unable for the time being to act effectively'."

20. On 28 May 2013, the Tribunal ruled on the 18 March application. Its ruling, so

far as material, was as follows:

> “(P) "The Tribunal's view that the interim measures requested cannot be granted, as to do otherwise would prima facie be to modify the terms of what was previously agreed between the Parties."

21. The applicants submitted that this amounted to a ruling that the Tribunal had no power to grant the interim relief sought. It submitted that if it had been a ruling on the merits, it would have been given in more detail. It pointed out that the fact that the Tribunal was ruling it had no power was supported by the use of the word "cannot". It further submitted that this ruling reflected the submission made by ECPA in paragraph 104 of its submissions that the Tribunal had no power to vary the contract.

22. ECPA, on the other hand, submitted that this was a ruling on the merits of the application. It submitted that if the Tribunal had found that it did not have jurisdiction or power to make the order sought, it would have said so in terms. It submitted that the ruling reflected that making such an order would be inappropriate because it would interfere with the structure contractually agreed, including security rights and their enforcement. It further submitted that subsequent events make it clear that the applicants themselves plainly understood the ruling in this way.

23. Shortly afterwards, on 12 June 2013, Mr Nuvin Proag, Mauritian counsel for the applicants, applied to the Mauritian court for the ex parte injunction obtained

in the second injunction to be withdrawn. The minutes of that hearing record as follows:

> "Mr Proag states that the applicants have informally asked the court for the case to be called so that he may make the following motion.
> The arbitral tribunal has already adjudicated in the Interim and Conservatory Measures prayed for, declining to grant the said measures. So this case therefore no longer has any raison d'etre and he moves to withdraw the matter. In the circumstances, the court orders that the application be set aside with costs; the interim order is discharged."

24. ECPA submits with some force that had the applicants truly understood the Tribunal had ruled it had no jurisdiction or power, this would have strengthened the application in Mauritius. It would have supported a submission that the Mauritian court was the appropriate court.

25. Prior to the withdrawal of the second application, the applicants had already made a third application, on 2 June 2013, to the Tribunal. That application sought interim measures "preventing and restraining the claimant from enforcing any of its rights under the Put Option Agreement and, by necessary consequence, under the Share Pledge Agreement".

26. The third application was purportedly made on the basis of new developments or facts. ECPA submitted that it is hard to understand how it could have been made if the applicants understood the first ruling of the Tribunal to have been

a rejection of jurisdiction to entertain any application for such relief. The applicants say it was made in response to their understanding of the “bridging” nature of the Mauritian court order.

27. On 7 June 2013, by its Order No. 4, the arbitral tribunal rejected the third application. It stated as follows:

> "(G) The Tribunal's view that, while it has been presented with new information in Respondents 1 - 7's Second Application for Interim and Conservatory Measures, that information would not and does not lead ... to a decision different from those decisions taken in its previous Orders; and
>
> (H) The Tribunal's current view that the Claimant should be awarded its costs in connection with the Second Application for Interim and Conservatory Measures, but wishes to reserve its final decision in this respect to a future Award."

28. On 14 June 2013, ECPA served the notice of enforcement on the applicants with an expiry date of 29 June 2013. Prior to this date, it would not have been possible for ECPA to have taken any effective steps to enforce under the Share Pledge Agreement.

29. On 24 June 2013, shortly before the expiry of the enforcement deadline, the applicants sought an undertaking from ECPA that it "will not take any further steps whatsoever in respect of the SPA", failing which an injunction would be sought from the English commercial court "restraining ECPA from taking any

enforcement action under the SPA" – i.e. substantially the same relief as had been sought by the applicants in their previous three applications.

30. ECPA set out a full response by letter dated 25 June 2013.

31. The applicants made their fourth interim measures application on 28 June 2013. This was not to the commercial court in London but was an ex parte application to the Mauritian court for an order "preventing and restraining the respondent from enforcing or exercising any rights or purported rights under or derived from the Share Pledge Agreement and/or the notice of enforcement".

32. The applicants submitted this was a different relief to that which they had previously sought because it was exclusively made under the Share Pledge Agreement and because it relied on the notice of enforcement that had been served. The Mauritian court understandably disagreed.

33. The court held that:

> "It is evident from Exhibit 5 - Order No. 4 of the arbitral tribunal dated 7 June 2013 - that the arbitral tribunal was seized by the applicants in order to obtain Interim and Conservatory Measures. The applicants sought an order to prevent the respondent 'from enforcing any of its rights under [the] Put Option Agreement and by necessary consequence under the Share Pledge Agreement signed on 30 June 2011 in order to give effect to the Put Option Agreement under articles 25.1(b) and (c) of the LCIA rules

pending the determination of this arbitration by the Arbitral Tribunal' ...

Further, the applicants emphasise before the arbitral tribunal that their application, which was the second one for Interim and Conservatory Measures, was to 'prevent and restrain' the respondent from enforcing its rights under the Share Pledge Agreement, as well. In fact, the affidavit of the applicants and its exhibits and annexes show that the arbitral tribunal has rejected the interim measures sought by the applicants in that second application.

To put matters in perspective, the affidavit evidence shows that according to the respondent's submissions before the arbitral tribunal, the Share Pledge Agreement is to provide the respondent with security, that is, that under the Share Pledge Agreement the respondent 'holds executed share transfer certificates and in principle might exercise its security thereunder before a final arbitral award'. Therefore, when rejecting the applicants' second application, the Tribunal was aware of the stand of the respondent and of the likelihood that it might endeavour to enforce its rights under the Share Pledge Agreement. It also transpires from the respective submissions of the parties before the arbitral tribunal that while the applicants were submitting themselves to the jurisdiction of the arbitral tribunal for Interim and Conservatory Measures to prevent and restrict the respondent from exercising its rights under the Share Pledge Agreement, the respondent was asserting that the arbitral tribunal had no jurisdiction ...

It is evident therefore that the arbitral tribunal is fully seized of the issues

> that arise in the present application, and it must be emphasised that this Court can act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively. We are not here faced with a situation where the arbitral tribunal has not been constituted or for some reason or other is not able to act effectively, or does not have the power of a Judge or Court to issue a certain specific order."

34. The court then ordered, having regard to the fact that the notice of enforcement had been served since the last application before the Tribunal, that the interim measure should be granted only until such time as may be necessary for the matter to go back before the Tribunal, and allowed the applicants up until 2 August 2013 to do so.

35. The Mauritian court therefore allowed the applicants the opportunity to make a further application to the Tribunal for the relief sought. The applicants did not seek to do so. They seemingly failed to make any attempts to obtain a hearing before the Tribunal but have instead sought to invoke the jurisdiction of this court. The explanation given for that is that it was not possible to convene a hearing before the full Tribunal in time, especially given their respective locations in different parts of the world, and that they would have sought an oral hearing before the full Tribunal because of the complex history of the matter and the seriousness of the issues involved. In the light of those considerations, they appear to have made no attempt to bring the matter back before the Tribunal.

Jurisdiction

36. The primary basis of the application is section 44 of the Arbitration Act, which provides as follows:

"**Court powers exercisable in support of arbitral proceedings.**

44.

(1) Unless otherwise agreed in support by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are-

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) if the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such order as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section."

37. Although section 37 of the Senior Courts Act 1981 is also relied upon, it is recognised that it would only be in exceptional cases that the court would exercise its powers under section 37 in circumstances where the detailed statutory requirements of section 44 were not met. As Lord Mance stated in *Ust-Kamenogorsk Hydropower Plant JSC v AES* [2013] UKSC 35 at [60]:

> "The general power provided by section 37 of the 1981 Act must be exercised sensitively and, in particular, with due regard for the scheme and terms of the 1996 Act when any arbitration is on foot or proposed."

38. Of particular importance on the present application is section 44(5). ECPA's case is that not only does the Tribunal have the power to act, it has already acted effectively in rejecting the application: twice.

39. If that is correct, then that would provide strong grounds for saying that the court should not grant any relief. On any view it would mean that the only possible grounds upon which an application under section 44 could be made would be that

the Tribunal was unable for the time being to act effectively. As such, the only relief that could be appropriate would be short term relief so as to enable the matter to go before the Tribunal, rather than the relief which is sought on the application, which is an injunction up until the determination of the arbitration proceedings.

40. The applicants' case is that the Tribunal have ruled that they have no power to act. They submit that is the better construction of the ruling made, considered against the background of the relevant surrounding circumstances.

41. If that is correct, then the court would have power to grant interim relief pending determination of the arbitration proceedings, provided the other requirements of section 44 were satisfied and it was an appropriate case as a matter of discretion to grant interim relief.

42. What the Tribunal have decided is, therefore, critical to what the court can and should do. Both sides made detailed submissions to the effect that the court should accept their interpretation of the Tribunal's ruling. Having carefully considered those submissions and the relevant documents, I have concluded that the Tribunal’s ruling is ambiguous. That ambiguity needs to be clarified before the court can consider the possibility of granting relief "until after final determination" of the arbitration proceedings, as the applicants seek.

43. In my judgment, the proper course is for the matter to go back to the Tribunal for

it to be made clear whether this is a case where they are saying that they have no power to act, or whether they are saying this is not an appropriate case to exercise a power to act.

44. If the Tribunal say the former, then the matter may come back before the court. However, even if the Tribunal have ruled that they have no power to act, they may wish to consider whether that is still so in the light of the current position of the parties. In particular, ECPA now accept that the Tribunal has power to grant relief in the terms sought. This will be a matter for the Tribunal to consider.

45. If the Tribunal say the latter, then they may simply reaffirm the decision already made. However there is nothing to stop the applicants urging on the Tribunal all the more detailed arguments urged on this court to seek to persuade them otherwise. The regard to be had to any such submissions would be a matter for the Tribunal.

46. I accordingly consider that the appropriate course is for the issue of interim relief to be put back before the Tribunal. The question which then arises is whether the court should grant short term interim relief to hold the ring pending that. I am satisfied that I have jurisdiction so to order because this is a case where the Tribunal may have ruled that they have no power to act and/or because they are unable for the time being to act effectively and there is urgency.

Discretion

47. The usual discretionary factors as laid down in the leading case of A*merican Cyanamid* apply to the grant of relief under section 44. The main factors are:

    (1) whether there is a serious issue to be tried;

    (2) whether damages would be an adequate remedy for the applicants if the injunction is refused;

    (3) whether damages on the cross undertaking would be an adequate remedy for the respondent if the injunction is granted;

    (4) where the balance of convenience lies.

(*1) whether there is a serious issue to be tried*

48. The applicants submit, as set out in the statement of defence in the arbitration, that there is no valid debt claim and, if so, there are no lawful grounds upon which the put notices could have been issued.

49. In summary, the applicants say:

    (1) as a matter of New York debtor and creditor law, being the applicable law of the Put Option Agreement, ECPA was at all material times and remains a creditor of Spencon. Similarly, ECPA became a creditor of the applicants as of the date of the Put Option Agreement.

    (2) ECPA's purported exercise of the put rights on 27 February 2013 is classified under New York law as a demand for repayment.

    (3) Under New York law it is inequitable for a person in the position of a lender to accelerate a loan in response to a trivial or inconsequential

breach of an agreement, especially where either such breach does not occasion the lender any damage or loss or his personal security is not impaired. Further, the US courts have widely held that a demand for the return of a loan must be regarded as non-exercisable if it is made in bad faith.

(4) ECPA's demand for repayment was made in bad faith because such demand was intended to favour its own interest irrespective of the impact on the applicants, in particular, as set out in the defence: (a) ECPA's only interest has always been to maximise its investment in Spencon at any cost; (b) ECPA has never had any genuine interest in the well-being of Spencon; (c) after accepting that Spencon was in financial difficulties, the reaction of ECPA was to accelerate its exit from Spencon as quickly as possible by engineering a situation in which Spencon was reduced to deadlock and saddled with a cash crisis until such time as the three-year period had passed before ECPA could exercise the Put Option under the Put Option Agreement; (d) ECPA's aim has always been to achieve the return of its investment, it has no long term goal of running any particular business; (e) the purported service of the Put Notices was made with that aim and that aim alone in mind, either directly and with a minimum of more than US$22 million from the applicants or indirectly by enforcing its rights under the Share Pledge Agreement, thereby requiring 100 per cent or thereabouts of the shares in Spencon before selling its entire shareholding to a third party.

50. In those circumstances it is submitted that ECPA's purported notice to exercise the put right had no effect in law.

51. ECPA points out that this is not the first case advanced by the applicants. The applicants' initial case was that the agreements were invalid on grounds of "abuse"; the second case was that they were invalid for lack of consideration, and this is now, therefore, their third case.

52. As addressed in paragraphs 49 to 55 of Mr Williams' witness statement, they contend that the case advanced is not consistent with New York law. If it were, they submit that it would amount to saying that no lender could demand repayment of a New York law loan unless repayment were in the best interests of the borrower. In particular, they contend that an allegation of bad faith cannot be founded upon conduct which accords with the intention of the parties as expressed in the contract. Here the parties agreed that a put right can be exercised for up to three years. The right was exercised in accordance with the contract. There is no room for the implication of a term that the right can only be exercised if it were in the best interests of Spencon. They accordingly submit that it cannot be shown that there is a serious issue to be tried.

53. I am conscious of the fact that the merits of these issues are a matter for the Tribunal and not for the court. I bear in mind that the threshold of serious issue to be tried is a relatively low threshold. I also bear in mind that the

arguments advanced involve disputed issues of New York law which will be a matter of evidence. Having had regard to the parties' submissions and the case as put in the defence, I am satisfied that the relatively low threshold of serious issue to be tried has been met in this case.

(2) whether damages have been an adequate remedy for the applicants if the injunction is refused

54. The applicants submit, for the reasons set out in Ms Lillyman's first witness statement, that damages would not be an adequate remedy. They say that the appropriate action by ECPA would exclude the applicants from the business and take their shares, and that there is no mechanism for this to be reversed. They submit it would be very difficult to calculate the full extent of possible losses that would flow from this, putting aside the fact that if ECPA were to enforce its rights under the Share Pledge Agreement and seize virtually 100 per cent of Spencon's shares, this would deprive the applicants, including the founders of Spencon, of their business permanently.

55. I am satisfied that, for the reasons outlined in Ms Lillyman's statement, it has been sufficiently shown that damages would not be an adequate remedy for the applicants.

(3) whether damages are an adequate remedy for the respondents if the injunction was granted

56. The applicants say that it would, and that ECPA would, at most, be prevented

from taking action for a period of six months or so, pending the outcome of the London arbitration. They say that it is unlikely that they would suffer any damages because Spencon's fortunes are on the up, but, if they did, they could be compensated in damages, including by way of proceeds of final sale of Spencon if ECPA succeeded in the London arbitration.

57. This is very much in dispute. ECPA, as set out in paragraphs 56 to 67 of Mr Williams' statement, dispute the assertion that the fortunes of Spencon will improve over the next six months. They say there are very substantial reasons to believe that a six-month delay would render any award worthless. They point out that it is common ground that there is a lack of working capital and very high interest costs which are being suffered by the business.

58. Mr Williams sets out the history in paragraph 61 of his statement and identifies various factors which he says bear out the likely financial difficulties which Spencon will face in the forthcoming six months. In particular he relies on an e-mail dated 6 August 2013, from the head of internal audit at Spencon, which states:

> '"My conclusion following the issues raised above, is that unless;
>
> (a) the company realises any of the old debts, particularly the claims (Mombasa and Bagamoyo) which has proved extremely difficult, or
>
> (b) shareholders inject new capital.
>
> the ability of the company to continue as a going concern beyond 6 months is in my opinion doubtful."'

59. ECPA submits that the evidence shows that Spencon is on the blink of insolvency and that in those circumstances damages would be an inadequate remedy if an injunction was granted.

60. This is very much in dispute on the evidence. The applicants submit that the issues raised above in the e-mail of 6 August do not support the conclusion that was there set out, and they rely in particular on evidence provided by a South African alternative asset management and financial advisory firm, known as Sovereignty Capital, which analyses the financial position and prospects of Spencon in the forthcoming period and concludes that it faces a positive future and a "win-win" scenario.

61. It is not necessary to deal in detail with the rival contentions and evidence relating to this aspect of the case. The ruling contemplated by the court is a short term ruling, and the evidence does not suggest that the insolvency of Spencon is something that is likely to occur in the next few weeks. In the short term, at least, it would appear that damages would be an adequate remedy for ECPA.

(4) where does the balance of convenience lie?

62. The applicants submit that the balance lies in favour of the grant of an injunction. In particular they say:

    (1) ECPA has now said in terms that it wishes to exercise its rights under the Share Pledge Agreement to protect the transfer of shares to it and

to take 98 per cent control of the business and may do so before the arbitration award adjudicates on the validity of a debt in respect of which it would be exercising its rights.

(2) That action will determine the case in the arbitration against the applicants and exclude them from the company. This includes the two founders of Spencon who founded the business in 1979. There is no mechanism for recovery of those shares by the applicants.

(3) As to Spencon, such action by ECPA would be likely to be disastrous. Spencon's client and supplier relationships and the relationship with the banks are built on strong personal relationships with the two founders. Once it was known that they were no longer shareholders, the clients would panic, the suppliers would demand immediate payment, the banks would lose confidence, and it would not be an overestimate to say this could potentially destroy the business.

(4) ECPA's past conduct has suggested as and when it has control of the company, it will simply seek to sell it to recover the alleged debt. If it does so, then, so far as the applicants are concerned, all is lost.

(5) On the other hand, the grant of the injunction will preserve the status quo pending, and it is difficult to see what real prejudice would be suffered by ECPA.

63. ECPA submits that the balance of convenience is in favour of the refusal of the injunction for the reasons set out in Mr Williams' statement and, in particular, their concerns as to the financial prospects of Spencon and, therefore, the value of

shares and the viability of achieving any return on their investment if matters are held over for a matter of months.

64. In my judgment, in the short term it has not been shown on the evidence that there is likely to be serious prejudice to ECPA, and that therefore, for the reasons given by the applicants, the balance of convenience does favour the grant of relief so as to preserve the status quo, at least for the moment.

65. ECPA also submitted that there has been delay in this case, which is relevant to the exercise of the court's discretion, and in particular drew attention to the fact that the applicants have already been provided with an opportunity by the Mauritian court to take the matter back before the arbitrators, an opportunity which they chose not to take, and that this court should not provide them with a further such opportunity.

66. Whilst there is some force in that criticism, I do not consider it is such a weighty consideration as to outweigh the other factors which favour the granting of a holding injunction.

67. ECPA also point out there has been no offer to fortify the undertaking in damages, and that given the financial position, that is a matter of serious concern and potential prejudice. Again, in the short term, that does not seem to me to be a matter of great weight, although if an injunction was to be granted for a longer period, then different considerations might well apply.

Conclusion.

68. I am therefore satisfied that this is an appropriate case for the grant of interim relief as a short term measure to preserve the status quo so as to enable the matter to be put back before the Tribunal.

69. I would envisage that the matter would only come back to the court if the Tribunal rules that it has no power to order the interim measures sought. If it does come back to the court, the court would then need to consider the appropriateness of granting interim relief up to the time of the determination of the arbitration proceedings, and nothing that I have said should be regarded as prejudging that question.

70. I will hear counsel as to the terms of any order, but I anticipate that it should include an undertaking to bring the matter back to the Tribunal forthwith and to proceed with expedition.