Galsworthy Ltd of the Republic of Liberia
v
Glory Wealth Shipping Pte Ltd

[2010] SGHC 304

High Court — Originating Summons No 337 of 2010
(Registrar's Appeal No 267 of 2010)
Choo Han Teck J
29 July; 12 August; 14 October 2010

Arbitration *— Enforcement — Foreign award — Party resisting award challenged final award in supervisory jurisdiction — Challenge in supervisory jurisdiction dismissed for failure to furnish security for costs — Whether party resisting award was entitled to make application to set aside order granting leave to enforce*

Arbitration *— Enforcement — Foreign award — Tribunal's finding on the market rate — Whether order granting leave to enforce final award should be set aside — Sections 31(2) and 31(4) International Arbitration Act (Cap 143A, 2002 Rev Ed)*

Facts

The defendants, Glory Wealth Shipping Pte Ltd ("GWS"), chartered a vessel from the plaintiffs, Galsworthy Limited of the Republic of Liberia ("Galsworthy"). In turn, GWS sub-chartered the vessel to a third party. Both charters were not performed and the disputes were referred to separate London Arbitrations, and each tribunal constituted to hear each arbitration comprised the same set of arbitrators. Two final awards were issued but only one set of reasons was issued. This case concerned the final award pertaining to the charter between GWS and Galsworthy.

Galsworthy's claim against GWS in the London Arbitration was for, *inter alia*, hire and damages arising from GWS's failure to perform the Head Charter, with damages to be quantified by the difference between the charter party rate and the market rate at or around the date of termination for the remaining approximate charter period. On 14 October 2009, the tribunal issued a final award against GWS for the sum of US$1,114,406.82 and US$39,393,745.03 for hire and damages respectively ("the Final Award").

On 23 December 2009, GWS applied to challenge the Final Award pursuant to ss 68(2)(a)–68(2)(c) and 69 of the Arbitration Act 1996 (c 23) (UK) ("the UK Act") in the English court. With respect to the s 68 application, Galsworthy applied on 26 January 2009 for security for costs, and its application was granted on 15 March 2010. GWS was ordered to provide £30,000 in security within eight days from the date of the order. GWS did not do so and their application challenging the Final Award was dismissed on 25 March 2010. There was no hearing on the merits. In so far as the s 69 application was concerned, GWS appealed against the Final Award on a point of law. That appeal was dismissed on 16 February 2010. The English High Court was of the view that the Tribunal's decision was right.

On 6 April 2010, Galsworthy came to the Singapore courts and obtained leave to enforce the Final Award. On 5 May 2010, GWS applied to set aside the order granting leave to enforce. The application was heard on 23 June 2010 and dismissed by the assistant registrar on 2 July 2010.

Dissatisfied with the decision, GWS appealed. Three grounds were raised. First, GWS argued that the Final Award contained a decision on the matter beyond the scope of the submissions to arbitration (see s 31(2)(*d*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA")). Second, the arbitral procedure was not in accordance with the agreement of the parties (see s 31(2)(*e*) of the IAA). Third, the enforcement of the Final Award would be contrary to the public policy of Singapore (see s 31(4)(*b*) of the IAA).

Held, dismissing the appeal:

(1) GWS was not entitled to make this application since it had elected to proceed in the English courts, and the application here to set aside the order granting leave to enforce amounted to an abuse of process. GWS had the opportunity in choosing either the supervisory or enforcement court to mount its challenge. It elected to proceed on the former, and the grounds relied on by GWS in the s 68 application in the English Court were exactly the same as those relied on by GWS in the appeal. As it turned out, Galsworthy successfully applied and obtained an order for security for costs in the amount of £30,000. Since security was not furnished, the s 68 application was dismissed. GWS' application was therefore a considered decision on their part to avoid the need to furnish security to the English court. GWS had elected their forum of challenge and they ought to be bound by it. GWS ought to have either furnished security as directed or appealed against that order. It was the principle of comity of nations that required our courts to be slow to undermine the orders made by other courts unless exceptional circumstances existed. None existed here. Furthermore, if the application here was allowed, it could result in a duplication or conflict of judicial orders: at [8] and [9].

(2) In the alternative, and assuming that GWS was entitled to make an application to set aside the order granting leave to enforce on the merits, GWS had not sufficiently established the three grounds they asserted on appeal pursuant to ss 31(2) and 31(4) of the IAA. For the first ground, GWS submitted that the award contained a decision on the matter beyond the scope of the submissions to arbitration. The essence of GWS's complaint was the Tribunal's eventual finding on the market rate of the charter for the purposes of quantifying the damages. There was no basis in their complaint. The issue of damages was submitted to the Tribunal for a decision which it duly made. It was GWS themselves who asked for damages to be assessed according to a figure of US$12,000 in the event that they were liable. The second ground raised by GWS was that the arbitral procedure was not in accordance with the agreement of the parties. GWS argued that the finding made by the Tribunal was based on evidence erroneously transposed from the Sub-Charter arbitration onto the Head Charter arbitration. There was no substance in GWS' complaint since GWS themselves requested for the reference they now complain about. GWS had agreed for the Head Charter arbitration and Sub-Charter arbitration to be heard concurrently, and that led to the Tribunal issuing an order for a

concurrent hearing of the two arbitrations. Furthermore, it was GWS themselves who had consistently adopted the submissions and evidence of the sub-charterer, and this practice was expressly extended to the expert evidence from the sub-charterer. Third, GWS argued that the enforcement of the award would be contrary to the public policy of Singapore. This ground was based on s 31(4) of the IAA but the substance of this ground was identical to those raised in the preceding two grounds. Those contentions made by GWS were without basis and it was unnecessary to consider the consequential issue of whether these contentions met the high threshold required under s 31(4). Even assuming that GWS's complaints had the necessary evidential basis, those complaints did not offend any notion of justice and morality, or amounted to exceptional circumstances to justify a refusal of enforcement: at [12], [14], [15] and [17].

[Observation: There were two stages regarding enforcement proceedings; the first stage of enforcement pertained to the initial grant of leave to enforce, and the second stage of enforcement whereby a party to whom an award was made against resisted the enforcement based on the grounds set out in the IAA. The reference in *Aloe Vera America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 to a "mechanistic process" referred to the first stage and not the second stage. With regard to the second stage, it was clear from the express wording of s 31(2) that a party ought to prove the grounds relied on a balance of probabilities, as was held in *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151 ("*Strandore*"). The comments made in *Strandore* endorsed the above bifurcated analysis, and standards required in each stage ought not to be conflated with each other. The law concerning the two-stage process was the same before and after *Strandore*: at [11].]

Case(s) referred to

Aloe Vera America, Inc v Asianic Food (S) Pte Ltd [2006] 3 SLR(R) 174; [2006] 3 SLR 174 (refd)

Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] 2 WLR 805 (refd)

Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd, Re *An Arbitration Between* [1995] 3 SLR(R) 354; [1996] 1 SLR 34 (refd)

Hebei Export Corp v Polytek Engineering Co Ltd [1999] 2 HKC 205 (refd)

Newspeed International Ltd v Citus Trading Pte Ltd [2003] 3 SLR(R) 1; [2003] 3 SLR 1 (refd)

Strandore Invest A/S v Soh Kim Wat [2010] SGHC 151 (refd)

Legislation referred to

International Arbitration Act (Cap 143A, 2002 Rev Ed) s 31(2) (consd); ss 31(2)(*d*), 31(2)(*e*), 31(4), 31(4)(*b*)

Arbitration Act 1996 (c 23) (UK) ss 33, 68, 68(2)(a), 68(2)(b), 68(2)(c), 69

Song Swee Lian Corina and Bryna Yeo Li Neng (Allen & Gledhill LLP) for the appellant/defendant;
Kevin Kwek and Corrine Taylor (Legal Solutions LLC) for the respondent/plaintiff.

14 October 2010

Choo Han Teck J:

1 This was an appeal by the defendants, Glory Wealth Shipping Pte Ltd ("GWS"), against the decision of Assistant Registrar Peh Aik Hin ("the AR") dismissing their application made under ss 31(2) and 31(4) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") to set aside an order of court dated 6 April 2010. That order gave the plaintiffs, Galsworthy Limited of the Republic of Liberia ("Galsworthy"), leave to enforce an arbitral award in Singapore. I dismissed the appeal and now give my reasons.

2 By a time charter dated 7 May 2008 ("the Head Charter"), GWS chartered a vessel *Jin Tong* ("the Vessel") from Galsworthy for a period between 60 to 63 months and at a rate of US$35,500 per day. GWS in turn sub-chartered the Vessel to Worldlink Shipping Limited ("Worldlink") under a time charter dated 11 July 2008 ("the Sub-Charter") for a period between 14 to 16 months. Both charters were, however, not performed and this gave rise to the disputes that were referred to separate London Arbitrations; *ie*, between Galsworthy and GWS pursuant to the Head Charter and between GWS and Worldlink pursuant to the Sub-Charter. The Tribunal ("the Tribunal") constituted to hear each arbitration comprised the same set of arbitrators and although two final awards were issued by the Tribunal, only one set of reasons was issued because the Tribunal was of the view that many of the issues concerned were common to both arbitrations.

3 Galsworthy's claim against GWS in the London Arbitration was for, *inter alia*, hire and damages arising from GWS's failure to perform the Head Charter, with damages to be quantified by the difference between the charter party rate and the market rate at or around the date of termination for the remaining approximate charter period of four years and 10.5 months (17 December 2008 to 31 October 2013). The time charter and the dispute were governed by English law. No oral hearing was conducted and the arbitration was determined solely on written submissions. On 14 October 2009, the Tribunal issued the final award ("the Final Award") against GWS for the sum of US$1,114,406.82 and US$39,393,745.03 for hire and damages respectively. These figures were derived from the Tribunal's finding that that the applicable market rate for an equivalent fixture was US$11,000 per day.

4 On 23 December 2009, GWS applied to challenge the Final Award pursuant to ss 68(2)(a)–68(2)(c) and 69 of the Arbitration Act 1996 (c 23) (UK) ("the UK Act") in the English court. In so far as the s 68 grounds were concerned, counsel for GWS argued that the Tribunal's finding on the applicable market rate was wrong, and as a result, the Tribunal failed to comply with its general duty in s 33 (see s 68(2)(a)). Further, that the

Tribunal exceeded its powers (see s 68(2)(b)), and finally, that the Tribunal did not conduct the proceedings in accordance with the procedure agreed by the parties (see s 68(2)(c)). In response to the application, Galsworthy applied on 26 January 2009 for security for costs, and its application was granted on 15 March 2010. GWS was ordered to provide £30,000 in security within eight days from the date of the order, GWS did not do so and their application was thus dismissed on 25 March 2010. There was no hearing on the merits. In so far as the s 69 grounds were concerned, GWS appealed against the Final Award on a point of law. That appeal was dismissed on 16 February 2010. The English High Court was of the view that the Tribunal's decision was right.

5 On 6 April 2010, Galsworthy came to the Singapore courts and obtained leave to enforce the Final Award. On 5 May 2010, GWS applied to set aside the order granting leave to enforce. The application was heard on 23 June 2010 and dismissed by the AR on 2 July 2010.

6 GWS raised three grounds in the appeal before me. First, it argued that the Final Award contained a decision on the matter beyond the scope of the submissions to arbitration (see s 31(2)(*d*) of the IAA). Second, the arbitral procedure was not in accordance with the agreement of the parties (see s 31(2)(*e*) of the IAA). Third, the enforcement of the Final Award would be contrary to the public policy of Singapore (see s 31(4)(*b*) of the IAA).

7 In the hearing before the AR below, a preliminary dispute arose between the parties as to whether the defendant was entitled to apply to set aside the order granting leave to enforce the arbitration award since GWS had already made an application in the English courts; *ie*, a s 68 application under the UK Act challenging the award on grounds of irregularity, and a s 69 application under the UK Act for an appeal on a point of law. As pointed out by the parties, a party seeking to challenge an arbitration award has two courses of action open to him; he can either apply to the supervising court to set aside the award, or, he can apply to the enforcement court to set aside any leave granted to the opposing party to enforce the award. These options were alternatives and not cumulative. See *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR(R) 1, which was later cited with approval in *Aloe Vera America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 ("*Aloe Vera*"). In the present case, GWS chose to challenge the Final Award (see [4] above) and applied to set it aside before the supervising court. It was not disputed that the grounds stated in the s 68 application were similar to those in this appeal. That application before the English court was not heard because GWS did not furnish security. The s 69 application was dismissed. The AR at the hearing below was of the view that the GWS was still entitled to take up the application to set aside the leave to enforce the award and he proceeded to hear the application on the merits.

8 On this point, however, I was of the view that GWS was not entitled to make this application since it had elected to proceed in the English courts, and the application here to set aside the order granting leave to enforce amounted to an abuse of process. Although Galsworthy did not appeal against the AR's findings on the preliminary dispute, I was entitled to review that decision *de novo* and furthermore during oral submissions, Galsworthy argued that this was an additional ground to dismiss GWS's appeal. GWS had the opportunity in choosing either the supervisory or enforcement court to mount its challenge. It elected to proceed on the former. As it turned out, Galsworthy successfully applied and obtained an order for security for costs in the amount of £30,000. Since security was not furnished, the s 68 application was dismissed. Two affidavits were filed in support of its application here to set aside the leave to enforce, but they did not explain why security was not furnished in the English court. Counsel for Galsworthy pointed out that the grounds relied on by GWS in the s 68 application in the English court were exactly the same as those relied on by GWS in the present appeal.

9 I was therefore of the view that the GWS application to set aside the order granting leave to enforce was a considered decision on their part to avoid the need to furnish security to the English court. This was not a case where the party resisting an award voluntarily withdrew its appeal at the supervising court to mount a challenge at the enforcement court. GWS had elected their forum of challenge and they ought to be bound by it. GWS ought to have either furnished security as directed or appealed against that order. It is the principle of comity of nations that requires our courts to be slow to undermine the orders made by other courts unless exceptional circumstances exist. None existed here. Furthermore, if the application here was allowed, it could result in a duplication or conflict of judicial orders. Obviously, if GWS's s 68 application was heard on the merits and failed, they would be entitled to challenge the enforcement of the final award in the enforcement court if the grounds and standards between the supervising and enforcement jurisdiction are different.

10 In the alternative, and assuming that GWS was entitled to make an application to set aside the order granting leave to enforce on the merits, I was not convinced that GWS had sufficiently established the three grounds they asserted on appeal pursuant to ss 31(2) and 31(4) of the IAA. In so far as the s 31(2) grounds are concerned, it is clear from the express wording of the statutory provision that GWS, a party resisting the enforcement of the foreign award, bore the burden of proving to this court that the grounds they relied on had been proved. Both counsel agreed on this, but they disagreed as to the standard applicable for such an application. Counsel for GWS submitted that the enforcement of the Final Award is not automatic and that a full hearing of the relevant issues before our courts ought to be allowed. In support of this view, she cited Quentin Loh JC's decision in

Strandore Invest A/S v Soh Kim Wat [2010] SGHC 151 ("*Strandore*"), which adopted the English Court of Appeal decision in *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] 2 WLR 805 ("*Dallah*"). In contrast, Galsworthy took the view that our jurisdiction adopted a "mechanistic" attitude towards the enforcement of these foreign awards and that our courts should not consider the merits of the foreign award. Counsel for Galsworthy cited Judith Prakash J's decision in *Aloe Vera* in support.

11 The submissions implied that the decisions in *Strandore* and *Aloe Vera* ([7] *supra*) were in conflict since the former seemed to have made some reservations on the latter. However, the material portions of those decisions actually concerned different issues and I did not see any conflict as a result. The relevant portions of *Strandore* are as follows:

> 22 I now turn to the law. *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 ('*Aloe Vera*') lays down the rule that the enforcement of a foreign arbitration award under s 30 IAA and O 69A r 6 RSC, is a mechanistic process. All the applicant seeking enforcement has to do is to produce the arbitration agreement, prove that the defendant was mentioned in the arbitration agreement exhibited by the applicant, and that an Arbitral Tribunal had made a finding that the defendant was a party to that agreement and that the Arbitral Tribunal had made an award against him, exhibiting the duly authenticated original award or a duly certified copy thereof. It does not require a judicial investigation by the court enforcing the award under the IAA, the examination that the court must make of the documents under O 69A r 6 RSC is a formalistic and not substantive one. Section 31(1) IAA supports this approach. This approach has also been endorsed recently in *Denmark Skibstekniske Konsulenter A/s I Likvidation (formerly known as Knud Hansen A/S) v Ultrapolis 300 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd* [2010] SGHC 108, ('*DSK v Ultrapolis*'). A distinction is drawn between the first stage under s 30 and the second stage under s 31.
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> 23 With great respect to two very experienced judges, I have my reservations, especially on *Aloe Vera*, and how far the approach that is advocated is consistent with other cases, including the recent English Court of Appeal decision in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, ('*Dallah Estate*'). The judge at first instance stated that when a party is challenging the jurisdiction of an arbitral tribunal under s 103(2) of the English Arbitration Act 1996, (which is the equivalent of our s 31(2) IAA), and that party is, by the very words of that section, required to 'prove' a matter, that must mean prove the existence of the relevant matters on a balance of probabilities. That exercise is, to that extent, a rehearing, not a review.

As correctly pointed out by both counsel and the AR below, there are two stages regarding enforcement proceedings; the first stage of enforcement pertains to the initial grant of leave to enforce, and the second stage of

enforcement whereby a party to whom an award was made against resists the enforcement based on the grounds set out in the IAA. The reference in *Aloe Vera* to a "mechanistic process" referred to the first stage and not the second stage. With regard to the second stage, it is clear from the express wording of s 31(2) that a party ought to prove the grounds relied on a balance of probabilities, as was held in *Strandore*. The comments made in *Strandore* endorsed the above bifurcated analysis, and standards required in each stage ought not to be conflated with each other. I agree. The law concerning the two-stage process was the same before and after *Strandore*. The standards submitted by counsel for GWS and Galsworthy were both correct but they were examining different provisions. In so far as this appeal was concerned, both sides acknowledged that the enquiry involved the second stage of the enforcement proceedings, and it cannot be disputed that GWS bore the burden of proving the grounds in s 31(2) it relied on, on a balance of probabilities.

12 Three related grounds were raised, but all without basis. Under the first ground, GWS submitted that the award contained a decision on the matter beyond the scope of the submissions to arbitration. The principal complaint was that the Tribunal was presented with evidence by Galsworthy in the arbitration that there was no market existing for the Vessel at the date of the termination of the Head Charter. Counsel for GWS argued that the Tribunal acknowledged the absence of a market in its Reasons for the Award (at [28] to [29] of the Tribunal's decision), it nevertheless proceeded to find that the applicable market rate was US$11,000 daily. GWS argued that Galsworthy had the burden of proving damages, and since the normal measure of recovery in cases of premature termination of a charterparty is the difference between the contractual rate for the balance of the charter period and the market rate, Galsworthy's failure to establish a market and market rate was naturally fatal to its claim for damages. GWS was thus compelled to claim that the Tribunal's decision was based on facts or arguments not presented by or discussed by parties.

13 In response, counsel for Galsworthy argued that one of the issues to be determined by the Tribunal was the amount of damages to be awarded and it was GWS (and affirmed by the Tribunal subsequently) that submitted that the market rate of US$12,000 on a daily basis be used in the event that the Tribunal was to hold that Galsworthy was entitled to damages. Galsworthy made the observation that GWS was attempting to re-litigate the issues in dispute and were asking the Singapore court to determine the merits of the Final Award.

14 In my view, the essence of GWS's complaint was the Tribunal's eventual finding on the market rate of the charter for the purposes of quantifying the damages. The issue of damages was submitted to the Tribunal for a decision which it duly made. It was GWS themselves who asked for damages to be assessed according to a figure of US$12,000 in the

event that they were liable. I therefore found no basis in their complaint. In counsel's closing submissions for GWS to the Tribunal, it was submitted:

> 19. *Further or alternatively, if (which is denied) it is held that Owners are entitled to damages*, Charterers submit that Owners' damages should be assessed in accordance with a market rate of US$12,000. In this regard, Charterers refer to the supplementary report of Lewis Chartering Limited (Bundles pages 438 – 441) which concludes that if Owners had taken action earlier in November 2008 when the Vessel was first rejected, it would have been possible to secure a fixture at a higher rate than that which Owners obtained when the Vessel was only refixed in January 2009. Accordingly, Owners have failed to properly mitigate their loss in waiting until December 2009 to offer the Vessel for fixture. [emphasis added]

In my view, since GWS had already addressed this issue before the Tribunal, they cannot now say that the eventual decision was outside the scope of the parties' case.

15 The second ground raised by GWS was that the arbitral procedure was not in accordance with the agreement of the parties. This argument was similar to the first point, GWS argued that the finding made by the Tribunal was based on evidence erroneously transposed from the Sub-Charter arbitration onto the Head Charter arbitration. The Tribunal relied on a supplementary report prepared by Worldlink's expert in the Sub-Charter arbitration pertaining to the market rate to be used to calculate the appropriate damages. GWS also argued that the supplementary report was confined solely to the issue of mitigation of damages, and that the Tribunal grossly misinterpreted and wrongly accepted that report as evidence from GWS of the market rate. Galsworthy's case was that GWS had agreed for the Head Charter arbitration and Sub-Charter arbitration to be heard concurrently, and that led to the Tribunal issuing an order for a concurrent hearing of the two arbitrations. Furthermore, it was GWS themselves who had consistently adopted the submissions and evidence of the sub-charterer Worldlink, and this practice was expressly extended to the expert evidence from Worldlink. In my view therefore, there was no substance in GWS' complaint since GWS themselves requested for the reference they now complain about.

16 GWS also took the alternative position on appeal that this US$12,000 submission ought to be confined to its submission that Galsworthy had failed to mitigate its losses. I found this argument to be also without basis because GWS' submission (as set out in [14] above) clearly referred to it as damages and not mitigation. The only reason GWS could make this argument on appeal was that they consolidated their arguments on the quantification of damages and the failure to mitigate in a single paragraph. In any event, the issues of assessment of damages and the duty to mitigate were inextricably linked, and GWS could not argue one and not the other.

17 Third, counsel for GWS argued that the enforcement of the award would be contrary to the public policy of Singapore. This ground was based on s 31(4) of the IAA but the substance of this ground was identical to those raised in the preceding two grounds; namely that the Tribunal failed to decide the matter in accordance with the facts and evidence presented by the parties, and additionally, that the Tribunal erroneously transposed the evidence used in the Sub-Charter arbitration. As I have held above, those contentions made by GWS were without basis and it was unnecessary for me to consider the consequential issue of whether these contentions met the high threshold required under s 31(4). Even if I were to assume that GWS's complaints had the necessary evidential basis, I did not find that those complaints offended any notion of justice and morality (see *Hebei Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205), or amounted to exceptional circumstances to justify a refusal of enforcement (see *Re An Arbitration Between Hainan Machinery Import and Export Corp and Donald & McArthy Pte Ltd* [1995] 3 SLR(R) 354 at [45]). As I saw it, GWS's unhappiness was with the amount of damages awarded by the Tribunal, and not their liability arising from the failed charter. GWS had the opportunity to, and did address the Tribunal on the appropriate quantification of damages and the Tribunal had taken their submissions into account. Even if I had accepted that there was no existing market to determine the market rate, the Tribunal could not be faulted for attempting to find the best evidence on record to determine the market rate to be used in the quantification of damages. In my view therefore, GWS's unhappiness with the Tribunal's decision, without more, was not a sufficient basis to prevent an application for the enforcement of the foreign award.

18 On account of the above, I dismissed GWS's appeal and ordered costs fixed at $2,000 with reasonable disbursements to be awarded to Galsworthy.

Reported by Darryl Soh.