ASM Shipping Ltd of India v TTMI Ltd of England

Arbitration – Arbitration award – Setting aside of award – Arbitral tribunal ordering defendant to pay claimant – Order enforced by court – Defendant refusing to pay – Defendant contending claimant effective debtor – Claimant applying for order to debar defendant from resisting application to remove arbitrators – Whether defendant debarred by failure to pay order for costs

[2007] EWHC 927 (Comm)

2005 FOLIO 45, (Transcript)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

CHRISTOPHER CLARKE J

16 MARCH, 20 APRIL 2007

20 APRIL 2007

S Zaiwalla and K Menns for the Claimant

S Croall for the Defendant

Zaiwalla & Co; Waterson Hicks

CHRISTOPHER CLARKE J:

[1] ASM Shipping Ltd of India, the owners of the vessel “AMER ENERGY” (“the Owners”), seek, pursuant to s 24 of the Arbitration Act 1996 (“the Act”) to remove Mr Bruce Harris and Mr Anthony Scott from their po-

sition as arbitrators in a reference pending between the Owners and TTMI Ltd, (“the Charterers”), which has already proceeded to an interim award. TTMI Ltd is now called City Shipping Services Ltd. The Owners have an application that I should debar the Charterers from (i) resisting the Owners' s 24 application and (ii) advancing their claims in the arbitration and (iii) to make an “unless” order. This is my judgment on that application. In order to address it I must set out something of the complicated procedural history.

[2] The underlying dispute between the parties arises out of a voyage charterparty on an amended Exxonvoy '84 form entered into on 11 December 2000. By that charter the Owners chartered the vessel to the Charterers for a single voyage from 1/2 safe ports/places Arabian Gulf to 1/2 safe ports/places Red Sea or Egyptian Mediterranean to carry a cargo of gasoil. At the time of the charter the vessel was laid up.

[3] In March 2001 the Charterers began an arbitration under the charter. The arbitrators appointed by the parties were Mr Harris and Mr Scott. I shall refer to them as “the original Arbitrators”.

[4] In the arbitration the Owners claimed freight and demurrage. The Charterers claimed damages arising out of a number of alleged breaches of charter the result of which was said to be that the vessel arrived late at her loadport (Kuwait). The vessel had been chartered in order that she should be provided to a company called Sempra Oil Trading Sarl (“Sempra Oil”) (It is as yet an undetermined issue in the main arbitration proceedings whether the Owners had been given notice before the fixture was concluded that the Charterers were chartering the vessel for Sempra Oil, or whether the agreement between Sempra Oil and TTMI had been disclosed during negotiation to the Owners.). Sempra Oil and the Charterers are both members of a group of companies. The Charterers' immediate parent company is Sempra Energy Trading Holdings Ltd, a substantial UK company.

[5] Because of the delays in loading Sempra Oil had, so it claims, to pay more than it would otherwise have done for the oil and Sempra Oil's buyers cancelled the purchase contract. The Charterers' claim is based on its liability to indemnify Sempra Oil in respect of the latter's losses as a result of breaches of the charterparty pursuant to an agreement which is at app V of the Charterers' Points of Claim in the arbitration.

[6] In accordance with that agreement, made between a number of Sempra companies, including (by amendment) Sempra Oil, collectively described as “Sempra”, Sempra are bound to put the Charterers in funds to pay freight or hire and demurrage, and all other expenses including any costs incurred by the Charterers in connection with and incidental to any charter made to meet Sempra's needs; and the Charterers are bound to indemnify Sempra against all losses which Sempra shall incur or suffer by reason of, inter alia, breach by any third party of any agreement which the Charterers have entered into for Sempra's benefit to the extent that the Charterers have an effective claim against such third party.

THE FREIGHT AWARD

[7] The Owners' claim in the arbitration is for freight and demurrage of over $200,000 with accrued interest. On 26 April 2002 the arbitral tribunal, then consisting only of the original arbitrators, made an award in Owners' favour in respect of the outstanding freight (“the freight award”). The tribunal ordered the Charterers to pay $640,100 plus interest at 7.5% compounded at quarterly rests.

THE ESCROW ACCOUNT

[8] In June 2002 an agreement was entered into between the parties whereby an amount of $707,500 was to be (and was) paid into a joint interest bearing escrow account of the parties' solicitors pending resolution of the remaining claims in the arbitration. This account accrues interest at less than the substantial rate of interest on the freight award. As a result there are, increasingly, amounts becoming due under that award which are not covered by the escrow account.

THE CLAIM FOR A DEMURRAGE AWARD

[9] On 18 November 2002 the tribunal declined to accede to the Owners application for an interim award in relation to the Owners' claim for $202,390 for demurrage. The Owners were ordered to pay the costs of the application in any event. Those costs have not been assessed or paid.

DISCOVERY

[10] On 16 July 2004 the tribunal made an order ("the July award") that the Owners bear their own and pay the Charterers' costs in respect of the Charterers' application for disclosure of the Owners' files. On 24 September 2004 the tribunal published an award ("the September award") which confirmed its previous order and ordered the Owners to pay the Charterers' costs in respect of the July award in the sum of £14,825.59 plus interest together with the costs of the September award of £9,085, which the Charterers had taken up.

[11] On 4 August 2004 Mr Duncan Matthews QC was appointed by the original arbitrators as third arbitrator.

PRELIMINARY ISSUES

[12] In early October 2004 a full hearing took place of a number of preliminary issues. The hearing lasted three days, during which the Owners were represented by Leading and Junior Counsel and the Charterers by Junior Counsel. On 23 December 2004 the tribunal published its award ("the December award") which was collected by the Owners. That award was substantially in the Charterers' favour. In effect the Charterers have succeeded on liability (subject to an outstanding attempt to raise a new defence of fraud). The December award reserved all questions of costs for later adjudication.

[13] The Charterers' claim is, they say, likely to exceed the amount in escrow. The Charterers' case is that they were (as at 1 March 2007) entitled to either $1,462,237.62 or $1,043,515.35 in respect of the principal amount due, interest and costs. The Owners dispute the Charterers' claim.

SECTION 68/69

[14] The owners challenged the December award under ss 68 and 69 of the Act. The s 69 challenge was abandoned a week before the hearing. The s 68 challenge consisted of complaints:

> (i) that Mr Matthews lacked the necessary independence to sit on the tribunal because he had been instructed by the Charterers' solicitors in an earlier arbitration in which serious allegations had been made against Mr Moustakas, a key witness for the Owners, in relation to the discovery of documents; and that his bias infected the original arbitrators;
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> (ii) that the tribunal had refused an application to adjourn made just over a week before the scheduled start of the hearing; and
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> (iii) as to the allegedly excessive fees of the tribunal.

The last ground was abandoned, and at the hearing it was made clear that no allegation of actual bias was pursued.

[15] On 19 October 2005, Morison, J, dismissed the Owners' application under s 68 with costs (which he assessed in the sum of £50,000). He rejected the application insofar as it was based upon the refusal of an adjournment. He concluded that there was apparent bias in respect of Mr Matthews the existence of which was a serious irregularity causing substantial injustice. But he concluded that the Owners had lost their right to object to that irregularity. He rejected the contention that the Owners had lost that right by reason of their failure to object to Mr Matthews on the first day of the hearing before Mr Moustakas had given evidence. But he held that after the conclusion of his evidence on the third day, and after Mr Matthews had declined to recuse himself, Counsel should have indicated that that decision was not acceptable and that an application would be made to remove Mr Matthews but that the hearing could continue without prejudice to Owners' rights (as s 24 contemplates). Thereafter an application should have been made under s 24. By taking up the award, at the very least, the Owners had lost any right they may have had to object to Mr Matthews' continued involvement.

[16] Mr Mathews resigned as third arbitrator in November 2005. The original arbitrators were also asked to stand down but, after an exchange of correspondence, saw no reason to do so.

[17] On 23 May 2005 I had made an order for security for the Charterers' costs of the s 68/69 proceedings in the sum of £25,000: [2005] EWHC 1344. The manner in which that security was to be provided was by the Owners undertaking that the Charterers could deduct £25,000 from the amounts due under the freight award. I came to the conclusion that, whilst the Owners had a huge overall deficiency of assets against liabilities, they had an asset in England in the form of the freight award. The excess of the amount of that award over the amount standing to the credit of the escrow account was an asset of the Owners available to satisfy any order for costs provided that the Owners agreed that the costs ordered could be deducted from the freight otherwise due. I ordered the Owners to pay the Charterers' costs in the sum of £10,000.

[18] On 15 August 2005 the Owners issued an application to enforce the freight award to the extent of the amount due under that award less (i) the balance in the escrow account and (ii) the £25,000 security that I had ordered. The witness statement in support indicated (somewhat obliquely) that the Owners did not seek to recover in respect of the £10,000 costs that I had ordered on 23 May 2005. On 16 August 2005 Aikens J made an order granting permission to enforce the freight award subject only to a deduction of £25,000. That order did not refer to a deduction of the balance in the escrow account.

[19] On 5 December 2005 I varied that order so as to provide that the Owners should have permission to enforce the freight award, limited to the amount due under the award less:

> (a) the amount of the escrow account;
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> (b) £25,000 or its dollar equivalent, being the amount of the security for the Owners' costs of the s 68/69 application, and
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> (c) £10,000 plus interest or its dollar equivalent, being the amount that I had ordered the Owners to pay the Charterers in respect of the Charterers' security for costs application.

I also had before me on that occasion an application by the Charterers for a freezing order against the Owners in respect of the balance of the sums due under the freight award and any other assets of the Owners within the jurisdiction. I declined to make such an order.

THE COURT OF APPEAL

[20] Morison J refused permission to appeal from his judgment and I refused permission to appeal from mine. The Owners applied for permission to appeal to the Court of Appeal, which, on 16 October 2006, dis-

missed the application: [2007] 1 Lloyd's Rep 136. The Owners were ordered to pay the Charterers' costs. The Charterers estimate these at over £60,000, a figure which the Owners' dispute.

[21] The Charterers secured permission to appeal my judgment from a single Lord Justice. But this was an oversight. Under s 44(7) of the Act the leave of the Court, which means the High Court, was required, and I had refused it. When the Charterers appreciated this they abandoned their appeal. The Charterers were ordered to pay the Owners their costs of that appeal. The Owners estimate these at £ 32,962.50. The Court of Appeal ordered that there should be a set off of the two sets of costs.

[22] On 7 September 2006 I granted permission to enforce what is described as my order of 8 December 2005 (the date of the sealing of my order of 5 December) in the sum of £47,859.71 together with £1,500 costs. That sum was reached by deducting from the amount due under the freight award the following:

(i) the £50,000 costs ordered by Morison, J in respect of the s 68/69 application;

(ii) the sum of £14,825.59 being the costs awarded to the Charterers by the arbitrators in the September award;

(iii) the £10,000 ordered by me in respect of the Charterers application for security for costs of the s 68/69 application but adding back;

(iv) the £10,800 costs awarded to the Owners in respect of the unsuccessful application for a freezing order in December 2005.

[23] The £47,859 did not, however, take account of the Charterers' costs of taking up the September award namely £9,085. On 12 October Zaiwalla & Co, the Owners' solicitors, indicated that they would give credit for that amount in drawing up the writ of enforcement. They drew it up in the amount of £40,274.71 (ie £47,859 + £1,500 [the costs awarded to the Owners by the order of 7 September 2006] – £9,085).

[24] The Owners sought to levy execution against assets at 111, Old Broad Street, London EC2N 1SE, which is the registered office of the Charterers. There are currently interpleader proceedings in respect of some £12,000 of assets, which are claimed to belong to a Sempra company and not the Charterers.

THE APPLICATION TO DEBAR

[25] The Owners' claim to debar the Charterers in the two respects that I have described is based on the contention that they are in wilful contempt of court by reason of their failure to comply with the order of 7 September.

[26] The first question is whether the Charterers are in breach of the order of 7 September 2006 at all (The Charterers were in breach of the order to pay £ 10,800 costs made in December 2005. But that amount has been deducted by the Owners in calculating the amount of the order of 7 September. In those circumstances I decline to regard that non compliance as a sufficient foundation for debarment. In any event the application notice is based on failure to comply with the order of 7 September.). Save, perhaps, as to para 2 which orders the charterers to pay £1,500 costs, it does not seem to me that they are. Even treating para 1 of the order as an order granting permission to enforce the freight award in the sum of £47,859.71, that is all that it does. The order is not a judgment against the Charterers for £47,859.71 nor is it an order requiring the Charterers to comply with the order made by the tribunal: cp s 42(1) of the Act. Under s 66(2) of the Act judgment may be entered in terms of the award, but the order of 7 September 2006 is an order under s 66(1). These sub-sections are distinct, and have a different provenance, s 66(1) being derived from s 12 of the Arbitration Act 1889, and s 66(2) from s 13 of the Arbitration Act 1934. The former sub-section permits

the Owners to use the Court's enforcement mechanisms for the purpose of enforcing payment of the freight award. The latter enables a party to obtain a judgment of the Court itself in terms of the award. Technical though that distinction may be, it seems to me that, where Owners seek to debar the Charterers on the footing that they are in contempt, a strict approach should be taken.

[27] So far as the £1,500 costs are concerned, even on the assumption that they are not to be treated as set off, at least in part, against the reduction of £9,085, the sum is too insignificant to lead to a debarment.

[28] In case I am wrong on that I shall consider the position upon the footing that, by reason of their failure to pay the £40,274.71 the Charterers are in breach of my order of 7 September.

CONTUMACY

The Owners' Case

[29] The Owners' accept that a failure to honour a money judgment is not of itself such a contempt as would lead to the debarring of a litigant. The judgment debtor may simply have no means of satisfying it. The Owners are right to take this approach. In *Leavis v Leavis* [1921] P 299, 90 LJP 302, [1921] All ER Rep 266 Hill J held that in considering whether to refuse to hear a summons it was material to consider whether the circumstances of the contempt were due to the fault or the misfortune of the party applying. In *Gower v Gower* [1938] P 106, [1938] 2 All ER 283, 107 LJP 43 Henn Collins J granted a decree nisi even though the husband who sought it had not paid the costs because the respondent's failure to do so was on account of his inability to do so and was not contumacious.

[30] But here, the Owners submit, the Charterers have deliberately failed and refuse to pay. Such an attitude to the orders of the Court is properly described as contumelious and should attract the debarment that they seek, or such other sanction, commensurate with the gravity of the contempt, as the Court thinks fit.

THE CHARTERERS' CASE

[31] The Charterers say that they are owed a sum larger than £40,274.71. In particular, they are owed (i) their costs of the application for an interim award in respect of demurrage; (ii) the costs awarded to them in the Court of Appeal; and (iii) their claim in the arbitration. They say that on the balance of the account between them and the Owners it is the Owners that are the debtors. The amount that they claim for the costs awarded to them in the Court of Appeal itself comfortably exceeds £40,274.71. Since the Owners have, so far as is known, no assets within the jurisdiction other than the freight award, and a large deficiency overall, any payment to them is never likely to be recovered and any recovery from the Owners will have to come, if it is to come at all, by deduction from the freight award. That is what has been done in practice with costs accruing due, either at the Owners' suggestion or with their consent (See, in particular, the passage from the witness statement of Mr Zaiwalla set out at para 17 of my judgment of 23 November 2005.), as appears from the orders of Aikens, J and myself, and the Owners' deduction of £9,085 from the amount of the warrant of execution.

[32] The Owners for their part reply that:

> (i) the costs of the interim award have never been assessed;
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> (ii) the costs awarded to the Owners in the Court of Appeal are not properly to be assessed at £64,000 or anything like it and the set off of costs awarded by the Court of Appeal is likely to extinguish any claim by Charterers for their costs;

(iii) their entitlement to recover the £40,721 for freight and interest cannot await the eventual outcome of the arbitration; and

(iv) their deductions of accrued costs have been made as a matter of practicality and do not represent any agreement that the amounts due to them under the freight award can be regarded as held in abeyance.

[33] The fact that the Charterers have the three claims referred to in para 31 and, whilst they have those claims, are understandably reluctant to make a payment to the Owners which they may never recoup, means that their conduct cannot be characterised as that of someone who flouts the order of the Court for no reason other than that he does not care to obey them. It is not, however, a good reason for failing to honour the freight award to the extent of £40,721. That amount is due to the Owners. It is due as freight; and I have declined to grant a freezing order restraining the Owners from disposing of it. If, therefore, the Court had given a money judgment against the Charterers, and the Charterers were able to make payment, but persisted in refusing to do so, that would be a serious contempt.

[34] The Charterers have, however, filed evidence, in the form of the witness statement of Mr Wisdom of 6 March 2007 that they have no assets other than their claim in the arbitration. Subject to one qualification I do not doubt that that is now so. The position as revealed by the evidence is that the Owners are a service company, part of a group of companies in which various companies are used from time to time; capital is provided to them when they are so used, and is then taken out by way of dividend when the relevant company is no longer required for immediate purposes. In the present case the Charterers paid a dividend of $550,000 in the autumn of 2006 which appears to be substantially the whole of its net assets (which as at 31 December 2005 were $531,589).

[35] The qualification is that the Charterers are the beneficiaries of the agreement described in paras 5 and 6 above. That agreement entitles the Charterers to require Sempra Oil, at any rate, to put them in funds to pay freight. The benefit of that agreement is an intangible asset of the Charterers. Mr Croall submitted that any claim by the Charterers to enforce that agreement would be met by a cross claim, greater in amount, for the loss suffered by Sempra Oil on account of the Owners' breach of charterparty. That would certainly seem to be so in the case of a claim by the Charterers against Sempra Oil.

[36] “Sempra” is used in the agreement of 19 January 2000 as a collective expression to cover a number of companies including not only Sempra Oil but also Sempra Energy Trading Corp (“Sempra Energy”), the ultimate holding company, which has very substantial assets. It is, therefore, arguable that Sempra Oil would have a claim against any one of the entities collectively referred to as “Sempra”, such as Sempra Energy, but that there could be no set off by Sempra Energy against such a claim, since Sempra Energy, as opposed to Sempra Oil, has suffered no loss from the breach of charter.

[37] This argument was not raised during the course of the hearing and I do not propose to consider it at any length since it is far from apparent to me that it is right. An alternative construction, which seems to me likely to be correct, is that the agreement is to be read so as to apply, in relation to each charter, as an agreement between the Charterers and whichever Sempra company is the company for whose benefit the charter has been entered into. It is somewhat unrealistic to suppose that the Charterers were chartering the vessel on behalf of some five Sempra companies. Another possible interpretation, if the agreement is to be regarded as requiring “Sempra” to be regarded as all of the named companies is that the liability and entitlement of those companies is joint and that any liability and entitlement can, therefore, be set off.

[38] It is sufficient, for present purposes to hold, as I do, that the Charterers do not have so clear a present entitlement to recover the amount of the freight (without set off) as makes their failure to pay the £40,721 a breach of such a character as should lead the Court to debar them from resisting the s 24 application or to make an unless order.

[39] Owners contend that, in effect, the Charterers have disabled themselves from satisfying the order for costs and that, for that reason, they should not be entitled to rely on an apparent want of assets to support a contention that their contempt is not grave enough to warrant disbarment. Further, as they submit, the Charterers are, if they choose, well able to honour their obligations, as is apparent from the fact that they have been able to run up bills of costs, including the costs of resisting this application and the application to remove the arbitrators which, together, the Charterers put at more than £30,000.

[40] If the Charterers had not paid the dividend in September, they would have been able to pay the £40,721. But it was not suggested that the payment of the dividend was unlawful. Further, it did not have the effect that the Charterers would be unable to honour their obligations to the Owners if it should turn out that the ultimate debit balance is owed to them. The arrangement between "Sempra" and the Charterers is that the latter are bound to indemnify Sempra in respect of loss arising to Sempra from any breach of charterparty and Sempra are under an obligation to put the Charterers in funds to pay freight and demurrage. The Charterers are thereby enabled to shoulder their obligations to Owners in respect of freight and demurrage, less any counterclaims.

[41] It is clear that the Charterers' solicitors have either been put in funds to resist this application or are content to extend credit. It is equally clear that the same applies to the Owners. I do not regard the former circumstance as justifying the order sought, or supporting the Owners' contentions about contumacy.

[42] Owners place reliance on a letter written by Waterson Hicks ("WH"), the Charterers' solicitors, to the arbitrators dated 8 January 2007 in which they state that their clients had repeatedly offered to secure in full their opponents' claims provided that they were themselves counter-secured. Mr Wisdom has explained that the client their referred to is not the Charterers but Sempra Oil, which is also one of WH's clients and has a direct interest in the Charterers succeeding in the arbitration. I do not doubt that explanation.

[43] What Owners can say is that payment of the dividend has had the effect of making it impossible for the Owners immediately to recover the sum that is the subject of my order of 7 September. I do not, however, regard that of itself as a sufficient ground, in all the circumstances, for making an order to debar. In particular I am not persuaded that the payment of a dividend was a payment otherwise than in the ordinary course of business made in order to render nugatory any judgment obtained by the Owners.

[44] Accordingly I am not persuaded that the Charterers have been guilty of such a contempt of court as should cause the Court to debar them from resisting the application made under s 24.

FURTHER AUTHORITIES

[45] In *Hadkinson v Hadkinson* [1952] P 285, [1952] 2 All ER 567, [1952] 2 TLR 416 Denning LJ referred to the rule that the court will not entertain an application by a person who is in contempt of court until he has purged himself of that contempt as traceable to an ordinance of Lord Bacon in 1618 which laid down that "*they that are in contempt are not to be heard neither in that suit nor in any other except the court of special grace suspend the contempt*".

[46] In *Bettinson v Bettinson* [1965] Ch 465, [1965] 1 All ER 102, [1965] 2 WLR 448 Plowman J observed that the practice of the court in applying that ancient rule had changed in the course of time and became much restricted in scope. One of the ways in which, as he said, it was restricted was that the Court confined its operation to contempt *in the same suit* as that in which the application was made:

> "Thus in Daniell's Chancery Practice 7th ed, vol 1, at p 725, the practice is stated as follows:

> 'A party in contempt for non-obedience to an order in one cause will not be thereby prevented from making an application to the court in another cause relating to a distinct matter, although the parties to such other cause may be the same.'
>
> And in Oswald on Contempt, 3rd ed, at p 248, this is said: 'A plaintiff in one contempt may, it seems, proceed in other proceedings, even though they are between the same parties'."

[47] In *The Messiniaki Tolmi* [1981] 2 Lloyd's Rep 595, [1982] Com LR 106 Brandon LJ reviewed a number of earlier authorities and concluded that:

> "while the general rules is that a Court will not hear an application *for his own benefit* by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which had put the person concerned in contempt."

Templeman LJ did not dissent from Brandon's LJ expression of general principle but thought that there was no absolute rule which entitled or disbarred a party in contempt from prosecuting an appeal against the order with which he has failed to comply.

[48] In *X Ltd v Morgan Grampian* [1991] 1 AC 1, [1990] 2 All ER 1, [1990] 2 WLR 1000 a journalist had indicated that, whilst he sought to appeal the order requiring him to name his source, he had no intention of complying with any such order if the appeal should be unsuccessful. He declined to place the name of the source in a sealed envelope pending the final determination of his appeal. The Court of Appeal had refused to hear Counsel on his behalf. Lord Bridge cited with approval the observations of Denning LJ in *Hadkinson* to the effect that it is:

> "a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."

[49] It is thus apparent that, on the assumption that the Charterers are in contempt, I have a discretion as to whether I should hear them in opposition to the s 24 application. The Court has a wide power to do what is just.

[50] I am satisfied that I should hear the Charterers for a number of reasons, in addition to the considerations set out in para 43.

[51] Firstly, the application that is made is not an application for the Charterers' benefit; it is an application made by the Owners the success of which would be adverse to Charterers' interests. I regard it as both unjust and unsatisfactory that I should hear only what the Owners seek to say about apparent bias of the arbitrators, and whether, if it exists, it has been waived, and that I should decide whether to remove them without hearing what the Charterers say. Shutting the Charterers out would impede rather than promote the course of justice.

[52] Secondly the application for permission to enforce the freight award and the s 24 application seem to me sufficiently different proceedings to make it inappropriate to refuse to hear the Charterers in relation to the latter because of a failure to comply with an order made in respect of the former.

[53] Thirdly, to debar the Charterers' from defending the s 24 application (or the arbitration) would be disproportionate. The amount of the freight award that has been neither honoured nor secured consists of interest. Some, possibly the majority of that, is matched by the order in Charterers favour made by the Court of

Appeal (even allowing for the set off). On 5 July 2005 the Charterers offered to put into the escrow account $60,000, representing the difference between the interest due on the freight award less sums due to the Charterers by way of (i) security for costs (£25,000), (ii) the September award, and (iii) the Charterers' costs (£10,000) of the security for costs application together with $250,000 in respect of demurrage. That offer was repeated in Mr Wisdom's statement of 31 August 2005.

DEBARRING CLAIMS IN THE ARBITRATION

[54] So far as debarring the Charterers from advancing their claims in the arbitration is concerned, I do not accept that I have any power to do so. The jurisdiction of the arbitrators derives from the agreement of the parties. Under the Act the tribunal enjoys certain powers in the event of non compliance with its orders: see s 41(7). Under s 44 the court has certain powers in relation to the evidence of witnesses, the preservation of property, the sale of goods the subject of the proceedings, the granting of injunctions and the appointment of a receiver. These are only available – see s 44(5) – to the extent that the arbitrators do not possess these powers or are unable to act. But the Act confers on the Court no power to debar a party from appearing in arbitral proceedings, in which the arbitrators' jurisdiction is founded upon the agreement of the parties.

[55] The Owners place reliance on *Richco International Ltd v International Industrial Food Co SAL* [1989] 1 All ER 613, [1989] 2 Lloyd's Rep 106, [1988] NLJR 271. In that case Hirst J made an order that the defendant buyers should bring into Court US$1,820,000 representing the goods the subject of a GAFTA arbitration with an additional sanction that the buyers should be debarred from defending the arbitration unless they complied.

[56] In that case the Court had under s 12(6) of the Arbitration Act 1950:

> "the same power of making orders in respect of:
>
> (f) securing the amount in dispute in the reference;
>
> (g) the detention, preservation or inspection of any property or thing which is the subject of the reference . . .
>
> as it has for the purpose of and in relation to an action or matter in the High Court."

[57] Hirst, J, held that, although the court had no inherent jurisdiction to make the order sought (see *Bremer Vulkan Schiffbau und Maschinenfabrik Corporation Ltd v South India Shipping Corporation Ltd* [1981] AC 909, [1981] 1 All ER 289, [1981] 1 Lloyd's Rep 253) he could make that order because s 12(6) of the 1950 Act gave him the same power as the High Court, which had the power to make such an order for the purposes of an action. There is, however, no statutory power which would enable me to make the orders now sought.

[58] For these reasons I decline to debar the Charterers from resisting the Owners s 24 application or from pursuing their claim in the arbitration.

Judgment accordingly.