Celtic Resources Holdings v Arduina Holding BV [2006] APP.L.R. 09/11

JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE: Commercial Court. 11th September 2006

1. I have before me an application by Celtic Resources Holdings plc ("Celtic") to continue a freezing injunction against Arduina Holdings BV ("Arduina") granted by me without notice on 27th March 2006 in the sum of £1.5 million and subsequently continued on the return date of 31st March. I also have before me an application by Arduina for further discovery.

2. The freezing order was granted in aid of the execution of a judgment entered by Celtic against Arduina. Arduina had brought a claim against Celtic in which it alleged that Celtic had induced it to enter into what was described as a "Framework Agreement" by misrepresentation and had broken that agreement. That claim was the subject of arbitration proceedings initiated by Arduina, which resulted in an Interim Award dated 12th December 2005. Under that award the arbitrator, Mr Christopher Style, held that Arduina's claim failed and Celtic's counterclaim succeeded.

3. On 22nd February 2006 the arbitrator made a Costs Award in which he ordered Arduina to pay Celtic £67,163.11 in respect of arbitration costs and £849,176.17 in respect of legal costs, a total of £916,338.28. Interest of some £36,000 has since accrued.

4. On 8th March Colman J gave Celtic permission to enforce Mr Style's Costs Award as a judgment and entered judgment in Celtic's favour in that sum. In giving permission to enforce the costs award, Colman J ordered that if an application was made within 14 days to set aside his order, then execution of the Award should be stayed until the disposal of the application.

5. On 31st March Arduina filed an arbitration claim seeking to challenge both awards under sections 67, 68 and 69 of the Arbitration Act 1996. On 11th April 2006 Arduina applied to set aside Colman J's order and judgment on the grounds that the underlying awards were being challenged. Arduina's application was made within the time specified by Colman J and accordingly the awards cannot be enforced until that application is determined. That cannot, in practice, be until Arduina's challenge to the awards is disposed of.

6. The basis of the challenge to Mr Style's awards is that he wrongly addressed matters of Russian law that were and are the subject of ongoing litigation in the Russian courts which had exclusive jurisdiction and, further, that there was serious misconduct on his part. At the very end of the hearing, counsel for Arduina confirmed that no complaint was made of the arbitrator's conduct of the hearing. Rather, the claim is made that the arbitrator should not have made findings as to the existence of a condition precedent (to which I am about to refer) and whether or not it had been fulfilled. There is also a complaint that, taken as a whole, his Interim Award is so deeply flawed as to its findings as to amount to a serious irregularity. I express no view as to the validity or otherwise of these complaints.

7. The Framework Agreement between Celtic and Arduina of 22nd November 2002 related to ten assignment agreements. Under those assignments, which were in form absolute and which were executed by Celtic, Celtic assigned to Arduina debts owed to Celtic by a Russian gold mining company named South Verkhoyansk Mining Company ("SVMC"). SVMC had a licence to exploit a goldmine in Russia, Nezhdaninskoye, one of the largest gold fields in the world. Celtic was, or was said by it to be, a 50% shareholder of SVMC.

8. The Framework Agreement provided:

> "(1) The parties hereby agree that the payment of any amount, and the obligations of the Parties under any of the Assignment Agreements, shall be subject to the condition precedent (the 'Condition Precedent') that the State Committee for Precious Metals of the Republic of Sakha (Yakutia) shall have agreed with the Assignee to transfer to the Assignee [Arduina] or its nominee or subsidiary all its shareholding in the Borrower (the 'Transfer') on terms and conditions satisfactory to the Assignee (the 'Terms') and that such Transfer has taken place and been duly undertaken, registered and recorded in the books and share register of the borrower.
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> (2) For the avoidance of doubt, (a) the Assignor shall take all steps and do all acts so as to encourage the State Committee for Precious Metals of the Republic of Sakha (Yakutia) to agree to transfer to the Assignee or its nominee or subsidiary its shareholding in the Borrower and to cause the due registration of such transfer in the books and share register of the Borrower and (b) the Assignee shall and may in its own discretion set the Terms and accept or decline the Transfer in whole or in part…
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> (3) If the Assignee does not notify the Assignor in writing that the Condition Precedent is wholly or partially satisfied (as the Assignee in its sole discretion shall decide) within twelve (12) months of the date hereof, this agreement and the obligations hereunder shall terminate and the Assignment Agreements shall be null and void and of no effect."

9. By clause 4 the Agreement was to be governed and construed in accordance with English law and provision was made for arbitration in accordance with the rules of the London Court of International Arbitration.

10. The breach of the Framework Agreement relied upon by Arduina in the arbitration was a breach of the obligation under 1(a) to encourage the State Committee to agree to transfer its shareholding to Arduina.

11. The background to the Framework Agreement was that Celtic had invested heavily in SVMC. The Yakutian government, through its President, had apparently given indications that it might seek to impose on Celtic a new 50% shareholder in SVMC. Mr Foo of Celtic was introduced to a Mr Beny Steinmetz of a group called BSG and by him to a Mr Mashkevich, who is one of the beneficial owners of a group called Eurasian. Mr Foo and Mr

Steinmetz agreed an Outline Plan which involved BSG/Eurasian forming a new company, in the event Arduina, and Celtic selling SVMC's debt to the new company. In the event the assignments were made without consideration. The new company would approach the Yakutian authorities with a proposal to purchase their 50% share of SVMC and, as the plan put it, "*If resistance, use debt instrument, even threat of liquidation of SVMC, as lever*". Arduina would thus acquire 50% of SVMC, which would end up in Celtic, in which BSG/Eurasian would have a substantial stake, apparently through Arduina, which was intended, so it would appear, to be the vehicle for their investment in SVMC. As is apparent, the leverage was to be acquired by the appearance on the scene of Arduina as SVMC's new creditor by virtue of the assignments. Such leverage pre-supposed that the debts had in truth been assigned to Arduina, which, if the assignments were subject to an unfulfilled condition precedent, was not the case, at any rate in English law.

12. In his Interim Award Mr Style made the following declarations:

"(1) I declare that the Framework Agreement contained a condition precedent to the operation of the Assignment Agreements, such condition precedent being that SUE Komdragmetal shall have agreed with Arduina to transfer to Arduina or its nominee or subsidiary all its shareholding in SVMC on terms and conditions satisfactory to Arduina and that such transfer has taken place and been duly undertaken, registered and recorded in the books and share register of SVMC.

(2) I declare that the said condition precedent had not been fulfilled either wholly or partially by 22nd November 2003, and that accordingly the Framework Agreement terminated on 22nd November 2003."

13. The freezing order provided for Arduina to swear an affidavit of its assets above the value of £50,000. On 7th April Dr Sittard, the director of Arduina, signed a statement, which was verified by an affidavit of 10th May, which revealed that the assets of Arduina above £50,000 consisted of:

(1) $15,276,822.28 in receivables owed to it by SVMC pursuant to ten awards issued in its favour by arbitral tribunals which Arduina was in the process of enforcing. These were awards made by the International Commercial Court of Arbitration in Moscow in respect of the purportedly assigned loans.

(2) 27,233,406 shares in Emperor Mines Limited ("Emperor"), a company listed on the Australian Stock Exchange and held for it by a nominee; and

(3) €87,646 in IMG Bank.

14. It is now apparent from the statement of Mr Michael Wood, Arduina's solicitor, that Arduina built up its shareholding in Emperor in July 2004 from 1,228,482 to its present total, which allows for rights issues in November 2004 and December 2005, of 27,233,406. The total cost to it of acquiring this shareholding was Aus $20 million. Dr Sittard's affidavit revealed that the then current value of the Emperor shares was Aus $16,340,044, that they represented about 2.9% of the company, and that Emperor owns an interest in four gold mines, including 100% of two mines in Fiji. The current value of the shareholding is about Aus$9.3 million, or about £3.8 million.

15. On 12th March 2006 Celtic applied without notice to the Western Australian Supreme Court to register Colman J's judgment and to obtain a freezing order. On 21st March Hasluck J declined to make either order on the grounds that a foreign judgment could not be enforced in Western Australia if it could not be enforced in its country of origin and that a freezing order could not be made which had the indirect effect of enforcing such a judgment. A fresh application to Jenkins J was unsuccessful on the ground that the orders of this Court made on 27th and 31st March did not constitute a relevant change of circumstances.

16. Arduina is a Dutch company. It has, according to the relevant filings, one director, Dr Johannes Sittard, and no employees. Its sole shareholder is a Swiss company, International Mineral Resources AG ("International"). International's HQ and operations (mining and smelting) are in Kazakhstan. The basis upon which Celtic claimed when seeking the freezing order that there was a risk of dissipation was essentially as follows:

(a) it was unclear who was behind Arduina. In the arbitration its pleaded case was that it was "indirectly a joint venture vehicle for two substantial groups, BSG Group and J & W Group". BSG is the group controlled by Mr Beny Steinmetz, an Israeli national. In his evidence in the arbitration Dr Sittard described Eurasian National Resources Corporation as the ultimate shareholder of Arduina and as itself owned by entities ultimately owned by a Mr Mashkevich, Mr Chodiev and Mr Ibragimov, but he said that Mr Steinmetz had no interest in Arduina. But the precise relationship between these individuals and Arduina was unclear.

(b) Arduina appeared to be a convenient "wrapper" in which the Emperor shares were held. It had no business to speak of to which the holding of Emperor shares was ancillary, and no assets to speak of save those shares. These could easily be removed to another company under the control of Mr Mashkevich, Mr Chodiev and Mr Ibragimov without Arduina being left with a commensurate asset against which Celtic could enforce any judgment. There was nothing to suggest that there was any particular reason for Arduina to continue to hold the shares if there was a reason to transfer them, or for Mr Mashkevich, Mr Chodiev and Mr Ibragimov to see that Arduina did so.

(c) Under the commercial arrangements made at the time of the framework agreements, if Arduina were to acquire a 50% interest in SVMC that interest would be transferred to Celtic in exchange for Celtic issuing

shares to BSG and Eurasian. Accordingly, Arduina would be nothing more, if that happened, than a vehicle through which the SVMC shares would pass.

(d) Arduina's claims in the arbitration were roundly rejected. Arduina did not fund the bringing of the arbitration. That was done by Alferon Management Limited, Dr Sittard's company. If Arduina did not fund its own costs, there could be no confidence that those behind it would suffer it to pay Celtic's costs. Arduina was involved in about 30 pieces of litigation in Russia, but it was unclear who was funding them.

(e) Arduina's solicitors, Michael Wilson & Partners Limited, had been heavily criticised by the arbitrator for having been willing to include in witness statements and expert reports facts and views which were not the evidence of the witness or expert concerned. Arduina, it was suggested, must have been complicit in their conduct.

(f) Arduina's conduct in the arbitration which it had started was one of delaying and protracting matters.

17. The witness statement filed by Mr Wilson of MWP on behalf of Arduina has given further details of the nature of the various interests involved. Arduina is an indirectly owned subsidiary of Eurasian National Resources Corporation ("Eurasian"), a Swiss corporation which and whose subsidiaries are loosely termed the Eurasian Group. The ultimate shareholders of Eurasian are the family trusts of Mr Chodiev, born in Uzbekistan and a citizen of Belgium, and Mr Ibragimov and Mr Mashkevich, both born in Kurdistan and citizens of Kyrgyzia and Israel respectively. These three were the founders of the group which Mr Wilson describes as a "*major and globally diversified mining group*" on a par with Rio Tinto plc, Anglo American and BHP Billiton. Eurasian, he states, ultimately "*holds the interests of International*". International, the immediate parent of Arduina, is said to own and operate significant mining and processing assets and businesses around the world through its indirect holdings in various group companies including a strategic stake in Samancor of South Africa, one of the world's leading ferro alloy and chrome mining and smelting companies, Chambishi plc, which owns and operates the Chambishi Copper and Cobalt Smelter in Zambia, the Luanshya copper mines in Zambia, mining and smelting operations at Feronikeli in Kosovo and Ferro Industry in Macedonia, the Baku Steel Mill, and various projects in China.

18. So far as Arduina is concerned, it is, in relation to gold and precious metal projects, in effect a joint venture between the ultimate principals of Eurasian and Mr Steinmetz of BSG. That evidence is consistent with the Outline Plan. BSG itself, according to Mr Wilson's evidence, is "*a very significant group which structures (sic) ultimately include Steinmetz Diamonds, the world's leading purchaser of rough diamonds and leading trader and processor of diamonds. BSG's structures also ultimately own and control a majority shareholding in the LSE, AIM-listed Bateman Engineering NV, and BSG also has significant real estate, private equity and other resource-related interests and investments*".

19. Mr Wilson's evidence is that he has been advised that Arduina's shareholding in Emperor is a strategic and financial investment which it intends to hold for the long term and of which it has no intention of disposing. No member of the Eurasian Group has gone into bankruptcy or administration.

The law

20. In order to obtain or continue a freezing order an applicant must establish (so far as presently relevant) that, without it, there is a real risk that the defendant will dispose of his or its assets otherwise than in the ordinary course of business with the effect that the judgment will go unsatisfied such that it is just and convenient to make the order. It is the function of a freezing order to protect against that risk and not to provide security. In the ordinary case the applicant must also prove that he has a good arguable case, but where the applicant already has a judgment in his favour, even if it be one that could be set aside, the judgment itself establishes not merely a good arguable case but the existence of debt.

21. Miss Catherine Newman QC, for the applicant, suggested that in circumstances where a judgment had been obtained, the court would approach the task of determining the degree of risk to be established in order to justify an order in a manner somewhat more favourable to the applicant, but there is not, as it seems to me, any indication in the case of ***Deutsche Schachtbau v Shell International Petroleum Corporation*** [1990] 1 AC 295, on which she relies, that gives any indication that that is so.

22. Mr David Oliver QC, on behalf of Arduina, submits that in this case the test – in respect of which the standard of proof is, as I accept, relatively high – is, on the evidence, not satisfied. It is not sufficient to observe that Arduina could easily transfer the shares in Emperor to another company. It is common ground that it could. There must be solid evidence which affords reason to believe that it will do so, and there is not.

23. Before I deal with this central submission and Miss Newman's submissions as to why the injunction should be continued, it is necessary to deal with some considerations that have been urged on me as factors that I should take into account in exercising any discretion.

Non-disclosure

24. Arduina submits that the freezing order was obtained without proper disclosure. It is not suggested that I should refuse to continue it on that ground alone, but rather that that non-disclosure should influence me in the exercise of discretion. Non-disclosure was said to have been in the following respects:

1. The arbitrator found that, before the framework agreement was signed, Celtic had lost management control of the Nezhdaninskoye mine, that there had not been fair and adequate disclosure of this on the part of Mr Foo of Celtic, but that Arduina could not show that it had materially relied on his untrue statements of fact. This

should have been disclosed to the court in order to balance out the evidence filed in support of the freezing injunction.

2. Celtic failed to refer in its original application to the debts due to Arduina from SVMC which had been the subject of awards which had been upheld by the Russian courts.

25. I am not persuaded that it was incumbent on Celtic to disclose the arbitrator's findings about non-disclosure. That non-disclosure did not affect the costs award which was sought to be enforced. The point appears to have been largely raised to show that Celtic's complaints of Arduina's conduct were a case of the pot calling the kettle black.

26. So far as the Russian debts of $15,276,822 are concerned the position is more complicated. According to the Interim Award, the condition precedent for the assignment of these debts to Arduina had not been satisfied. Accordingly, as between Celtic and Arduina the assignments are ineffective. Nevertheless, arbitration awards have been obtained by Arduina against SVMC in Moscow and the time for any appeal from those awards has expired. Arduina's attempts to enforce those awards in the Republic of Sakha (to give Yakutia its modern name), where SVMC is located, have, however, so far either failed, either at first instance or on appeal, or not been determined.

27. My attention has been drawn to one of the Russian awards which appear to be in similar form, in which the question of the condition precedent and its effect was considered. The tribunal said the following:

> *"3.5 In order to ensure correct understanding of the nature of the relations, which occur as a result of the assignment of the rights of claim, one should clearly distinct (sic), on the one hand, the relations, from which the assigned rights have arisen (in this case, the relations under the Agreement, which originally were formed between the debtor and the initial creditor, and afterwards – between the debtor and the new creditor, which replaced the initial creditor in the liability) and, on the other hand, the relations between the initial creditor and the new creditor in respect of the assignment of the right of claim on the basis of agreement(s) between them. Each of the specified types of legal relationship is based upon different legal grounds, while the entities being parties in such relations, as well as the scopes of such legal relationship differ from each other.*
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> *In this dispute, the debtor refers to invalidity of the Assignment Agreement made between the initial creditor and the new creditor, which, as asserted by the Defendant, is linked to another Framework Agreement between the initial creditor and new creditor. In other words, when substantiating its legal position, the Defendant refers to relations under certain agreements, to which it is not a party.*
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> *In the opinion of the Tribunal, such a reference falls outside the scope of the lawful rights and interests of the debtor that are protected by the civil law, for the reasons set out above and below."*

28. I find it very difficult to understand how Arduina can be entitled to claim as assignee when (as the arbitrator has held) the condition precedent for the assignment to become effective has not occurred, or how the debtor can be precluded from contending that the assignee's title is defective. Nevertheless the Russian arbitral tribunal appears to have so found.

29. So far as the attempts at enforcement are concerned, in six cases – five before the Federal Arbitration Court of East Siberia (an appellate tribunal) and one before the first instance arbitration court of the Republic of Sakha – enforcement has been refused on the ground of a want of evidence in the case material before the Russian court that Celtic ever transferred any money or assets to CVMC. In the remaining four proceedings the Federal Arbitration Court has remitted the cases back to the first instance arbitration court on the ground that the case files did not include the duly signed and executed resolutive part of that arbitration court's ruling. Appeals from the decision of the Federal Arbitration Court in the first five cases to the highest arbitration court of the Russian Federation are pending. Celtic contend that it was not incumbent on them to disclose the existence of so-called assets of Arduina when those assets were debts supposedly owed to Arduina which, according to the Interim Award, were not debts owed to Arduina at all and which have so far proved unenforceable. Even if they were, they say that SVMC would not be able to pay them in full. They also draw attention to the fact that in Arduina's accounts for the year ending 31st December 2004 the loans do not appear as assets at all. True it is that the awards had not by then been obtained, but if these were assets of Arduina they did not become so because of the awards.

30. I have considerable sympathy with this approach. I also entertain considerable doubts as to whether these assets or potential assets should have been disclosed at all. At any rate, I do not find the fact of their existence or the fact that Celtic failed to disclose them of any significance in deciding whether the freezing order should continue.

31. I should record that I was told that Tomlinson J has given permission on a without notice application to enforce all these awards as a judgment and that ten final judgments were issued on 25th August 2006 after SVMC had been served and had not challenged the orders.

Delay

32. The next matter that I was invited to consider in relation to discretion was the question of delay, although again it was not suggested that I should refuse relief on that ground alone. The original application to me was made at the end of March 2006. That was over three months after the Interim Award and one month after the Costs Award of 22nd February. There was, however, some reason for the delay. The Costs Award was received on 23rd February. Celtic was then in contact with lawyers in Western Australia with a view to obtaining relief there where the Emperor shares are located. The outcome of that was an appreciation of the need to register a judgment in

England. That was done by Colman J on 8th March. There was then an application in Australia that failed, followed by an application to me.

33. I regard that delay of itself of limited significance so far as the exercise of discretion is concerned. More significance attaches to the sequence of events in respect of proceedings relating to security before the arbitrator.

34. On 21st October 2004 the arbitrator dismissed an application by Celtic for security for costs. That application had been made on the basis that Arduina was a "shell" company with no assets. Arduina responded, saying that it held 14.99% of Emperor (as it then did). The arbitrator refused to order security. On 21st December 2005, i.e. after the making of the initial award, Celtic asked the arbitrator, pursuant to Rule 25(1)(c) of the Rules of the London Court of International Arbitration, to preserve some £1.5 million pending the making of a costs order in Celtic's favour on the ground that Arduina had conducted the arbitration dishonestly or had been complicit in MWP's dishonest conduct of the arbitration and that, according to his evidence, it was Dr Sittard's company, Alferon Management Limited, that had paid Arduina's bills.

35. On 3rd January 2006 the arbitrator sent an email saying the following: "*There is at the very least a question whether English law allows an arbitrator to decide such an application ex parte; but, whatever the legal position as to jurisdiction, I would decline to do so in the exercise of my discretion.*"

36. In those circumstances, it is submitted that what Celtic is seeking to do is, in effect, to review the exercise by the arbitrator of his discretion in relation to security and that the Court should be very wary of so doing. I entertain very considerable doubt as to whether what the arbitrator was saying was that, if he had jurisdiction to grant the order sought, he would refuse to do so on the merits. What I take him to have been saying was that he would decline to determine the matter *ex parte* even if he had jurisdiction to do so in the exercise of his discretion. I note, however, that in their email of 4th January Kerman & Co (Celtic's solicitors) interpreted the arbitrator as having given an indication of what he would decide if the jurisdiction point was addressed, and the arbitrator did not in terms correct them.

37. In any event, if I am wrong on that, I am quite satisfied that it is open to me to grant and continue a freezing order whatever the arbitrator's decision. Events have moved on since the application to him. His functions are now over and his Costs Award has become a judgment of the court. The Court is entitled to consider whether, on ordinary principles, Celtic, as a judgment creditor, is entitled to a freezing order and to do so on the evidence put before it. That is not, to my mind, a review of the exercise of the arbitrator's discretion but the exercise of an independent jurisdiction. At the same time, it would seem to me relevant to have regard to a decision of the arbitrator not to grant relief similar to that now sought by the applicant, not least because the arbitrator was the person whom the parties agreed should resolve their dispute.

38. Of more significance is the sequence of events before the arbitrator. The arbitrator refused to order security in October 2004, having received letters from both parties. Kerman & Co's application in December 2005 was made without notice to Michael Wilson & Partners ("MWB"). When, on 3rd January 2006, Mr Style refused to act without notice, he told Kerman & Co in his email of that date that, subject to any submission of theirs in the meantime, he intended to copy the correspondence to MWP on 9th January. On 4th January Kerman & Co asked him not to. On the same day the arbitrator said that he saw no reason to adopt a different course and that if Kerman & Co wished to apply to court they could do so then. No such application was made and on 9th January the arbitrator sent the correspondence to MWP.

39. Arduina were thus put on notice that Celtic had sought security without notice and been rebuffed by the arbitrator and might go to court. They took no steps to dispose of their holding in Emperor thereafter. Further, in March 2006 Arduina was well aware, because they were parties, of the attempts of Celtic to obtain a freezing order in Western Australia, but they still took no steps to dispose of their shares. So, as Mr Oliver submits, when they could have disposed of the Emperor shares free of any freezing order or the equivalent they did not do so, although they knew that Arduina had been seeking one.

40. In addition, after the freezing order was granted in March 2006 Arduina offered, by a letter of 26th May 2006, to pay into court two-thirds of the amount of the Costs Award. That offer was turned down by Celtic, but the fact that it was made, albeit at a time when the freezing order was in place, is some indication that Arduina was not the sort of defendant likely to dispose of its assets so as to defeat a judgment.

Merits

41. Against that background, I turn to Miss Newman's submissions. She submits that the freezing order should be continued for the following reasons. Arduina's only significant assets, namely the Emperor shares, could easily be disposed of, whether to some company in the Eurasian stable or outside it. Such a disposition could be for a consideration against which execution might be difficult, or for no consideration at all. According to its financial statements for the year ending 31st December 2004, Arduina's assets, being principally the Emperor shares, were matched by a long-term loan which could be called in by three months' notice as from November 2006. Arduina might, as the time when the judgment became enforceable drew nearer, charge the shares with repayment of the loan. Arduina had no financial standing or credit record. It was simply a vehicle formed in 2002 for the purposes of the framework agreement. It provided no consideration and was never going to acquire 50% of SVMC, save when financed by others. It had never had any business, let alone a long-term business, except that of holding the Emperor shares. Its only "asset" apart from those shares was a claim against SVMC which was invalid, so far

unenforceable and, if enforceable, worthless. Its connection with other substantial companies in the Eurasian Group was unclear and of no significance unless companies with demonstrable assets were shown to be willing to stand behind it. It itself had no credit record. It was Dutch, owned by a Swiss corporation, itself owned ultimately by individuals from Uzbekistan and Kurdistan. Such expressions as had been made about its intentions in relation to Emperor shares had been given by Mr Wilson, advised by whom he did not say, and not by its only director, Dr Sittard, or those who ultimately owned it. Arduina's behaviour in the arbitration had been evasive and tricky. The arbitrator had criticised the solicitors it chose to use and Arduina's attitude towards the arbitration had been unacceptable.

42. So far as the criticisms of WMP are concerned, the arbitrator, after setting out a number of matters, said this:

"72. *Taken in isolation, each of these considerations give rise to suspicion. Taken together, they lead me to conclude that Michael Wilson & Partners have been willing to include in witness statements and Expert Reports facts and views which are not the evidence of the witness or expert concerned. I have therefore found it necessary to treat these statements and reports with some caution.*"

43. On 2nd March MWP sent emails to a number of individuals enclosing an application to extend time for challenging the arbitration award. They sent the copy for Kerman & Co to the wrong email address, namely JKE@kerman.com. It did not arrive with Kerman & Co. Their correct email address is JKE@kermanco.com. MWP received (according to Mr Wilson) no notification of failure of delivery. According to him, the wrong email address was used because of a typographical error, explicable in that "Co" is not normally put at the end of the name of an email addressee. Kerman & Co say the error is surprising, given that the two firms had been in communication for two years.

44. On 15th March 2006 MWP sent to Kerman & Co what purported to be a copy of the email sent on 2nd March but which, i.e. the 2nd March copy, had the correct email address on it, whereas the original had not. The suggestion is that the copy sent on 15th March was doctored in order to make it appear as if Kerman & Co must have received the 2nd March email when they had not, or at any rate that it was no fault of MWP that they had not. Mr Wilson accepts that on 15th March he re-sent the email of 2nd March with the corrected address, but his witness statement says nothing about why the copy of 2nd March email now had the correct email address.

45. It seems to me clear that the 2nd March email was in fact sent with the wrong address, because it was also sent to other recipients with that wrong address on it. On the present evidence, I decline to hold that the use of the wrong address was anything other than a simple error. I cannot tell whether on 15th March the 2nd March copy was altered with the illicit purpose suggested for want of evidence as to how that alteration came about. But this seems to me somewhat unlikely, given that the original email was demonstrably sent to the wrong address, as appears from the copy sent to the LCIA, who forwarded it to Kerman & Co on 22nd March, and given that on 21st March MWP re-sent the 2nd March email now containing the wrong Kerman & Co address.

Merits

46. Looking at the matter in the light of all the evidence, Celtic has not, in my judgment, despite the cogency of Miss Newman's submissions, satisfied the relatively high burden of establishing a real risk that Arduina will dissipate its assets in the sense that I have described. I have reached that conclusion for the following reasons.

    1. Arduina is part of the Eurasian Group, which is a group of considerable substance. Whilst that group has, like many such, a moderately complicated structure (the full details of which are not clear), it does not appear to me to be a structure which of itself should cause me to think that Arduina is likely to dissipate its assets. Arduina is, in effect, the group's vehicle for holding its stake in Emperor.

    2. Arduina is a Dutch company owned by a Swiss company. There are some jurisdictions the use of whose corporations of itself sounds a warning bell. Holland is not one of them. It is said that there is no obvious reason for choosing a Dutch corporation as the repository of the shares, but there may well be tax benefits in so doing.

    3. It is true that Arduina has no business except that of owning the shares in Emperor, but it has built up its shareholding and done so during the course of the arbitration, which was commenced in January 2004, although it has not increased its holding since either of the two awards. That it has done so does not seem to me to be the hallmark of a company which intends to dispose of assets in an unjustifiable way so as to avoid having to pay the costs of any award made against it. The holding could easily have been built up in some other company.

    4. On the evidence, Arduina has neither disposed of nor charged nor mortgaged any of its shareholding.

    5. No pattern of default in honouring awards or judgments is shown either in the case of Arduina, for whom the current awards are, however, the only relevant ones, or the Eurasian Group. There is no evidence of bankruptcy or administration. I well appreciate that one company in a group is only as good as its own assets unless its obligations are secured on the assets of other members of the group. Nevertheless, the record of the group itself is not without significance.

    6. Arduina has had the opportunity to dispose of its shareholding at a time when (a) there was no freezing order in place but, (b) there was an award requiring it to pay a large sum in costs and (c) it was apparent that Celtic was seeking a freezing order. That seems to me positive evidence that it was not likely to dissipate its assets so as to avoid having to honour the judgment.

7. I accept that Arduina could easily dispose of its shares, but the fact that such an opportunity exists does not mean that there is such a risk of the defendant availing himself of it as would justify a freezing order. There is, in my judgment, no solid evidence to believe that Arduina will make an unjustifiable disposition of its shares, and there is positive evidence in the form of what Arduina has not done when it had the opportunity which points in the opposite direction. So also does its offer of security.

8. There is force in Miss Newman's point that in applications of this kind the important evidence is from the person sought to be restrained as to what his intentions are, although that is not a circumstance that can reverse the burden of proof. Here there is no direct evidence from Arduina's only director or its principals, by which I mean the ultimate beneficial owners. Miss Newman submits that, in view of the arbitrator's finding about the conduct of MWP and also the observations of Lawrence Collins J in ***ICS Incorporation Limited v Michael Wilson & Partners Ltd*** [2005] EWHC 404 (Ch) that there were genuine issues about Mr Wilson's evidence in that case, I should not be prepared to take his word for anything or to accord to it the credence that the Court would normally give to the statement of one of its officers as to what he had been told, not least because Mr Wilson does not state the source of his advice. I should, in fairness to Mr Wilson, record that he rejected any suggestion of impropriety in the conduct of the arbitration and that, having referred to issues about his evidence, Lawrence Collins J said no more than that they raised some serious matters for cross-examination if the matter should go to trial.

9. In the light of these considerations, I have approached Mr Wilson's evidence with a degree of caution, but the considerations that have led me to the conclusion that I have reached are, for the most part, not dependent on his testimony or are corroborated by matters outside it. Thus, his statement as to the intentions of Arduina in relation to the Emperor shares, which I see no reason to reject out of hand, might, without more, have been of limited weight, but it gains cogency in the light of what has actually happened and not happened with Arduina's shareholding in Emperor.

10. I do not regard the allegation that Arduina and MWP have dragged out the arbitration proceedings by excessive requests for discovery and the like, matched, as they are, by counter assertions that Arduina was simply availing itself of the normal process and that Celtic was reluctant to produce important documents, as of much assistance in determining whether the freezing order should continue.

11. I have taken account of the fact that the arbitrator disbelieved some of Arduina's witnesses and that some of those concerned appear to have thumbed their noses at the arbitrator. Dr Sittard did not, I was told, turn up on the day fixed for his evidence on the ground that it was not worth his doing so on that date, although he appeared later. Mr Steinmetz failed to appear to be cross-examined on his statement at all and Mr Mashkevich did not give evidence. But again I find this of limited significance on the central question that I have to decide. Accordingly I do not propose to continue the order.

47. I now turn to the application for discovery.

48. Arduina's challenge to the arbitrator's awards is due to be heard on 9th and 10th October. Arduina has become aware that in certain court rulings in Yakutia reference has been made to statements of claim and accompanying documents issued by Celtic against Arduina, either seeking recognition of the arbitrator's interim award or seeking to recover from SVMC the assigned debts. One of those rulings refers to what appears to be a backdated amendment of all of the ten loans vesting jurisdiction over any disputes in the Yakutian courts.

49. Arduina wished to obtain discovery of these documents in order to show that Celtic has been exploiting what they claim to be the jurisdictional error on the part of the arbitrator in entertaining Celtic's counterclaim for a declaration in relation to the condition precedent that forms the first part of its challenge to his awards. The relevance of this material is said to be that it will show what the arbitrator may not have appreciated when at the very end of the evidentiary hearing he allowed Celtic to make an amendment to counterclaim the declaration that in the event he made, namely that the declaration would be used to attempt to influence litigation in Russia and Yakutia and that it trespassed on matters of Russian law which were beyond his remit. I should be very surprised if Mr Style did not well appreciate that the purpose of seeking the declarations was to deploy them in any action based on the efficacy of the assignment agreements. I was not surprised to be told that he apparently referred to the declarations that were sought as "*anti-missile missiles*".

50. Discovery is also sought of copies of submissions made by Celtic, Dabney Holdings Limited and others to the Supreme Arbitration Court of the Russian Federation in relation to the appeal to it by Arduina from the decisions of the Federal Arbitration Court of Eastern Siberia refusing to allow enforcement in Yakutia of the ICAC awards. Dabney Holdings Limited is a company in the British Virgin Islands to whom Celtic has purported to assign the loans to SVMC. These are proceedings to which Arduina is a party.

51. I do not propose to accede to this application for a number of reasons. Firstly, the validity of the challenge to the arbitrator's awards is not affected by the use which Celtic has sought to make of them. Either the arbitrator exceeded his jurisdiction and made errors of law, or was guilty of serious irregularity, or not. The answer to those questions depends on what happened in the arbitration and the contents of his award. If he did err in any of these respects, it will not be because of what Celtic has done with his awards. If he did not, the position will not have been altered by any such use.

52. Secondly, I would expect any court to assume that Celtic would seek to make use of the declarations that they sought in proceedings in Russia and Yakutia in order to demonstrate that the assignments had not taken effect and that any action based on them must fail.

53. Thirdly, insofar as it is relevant to know the type of use which Celtic has made of the declarations, the contents of the court rulings give a sufficient indication and I see no need or benefit in any further detail.

54. Fourthly, insofar as the proceedings involving Dabney Holdings Limited are concerned, Arduina is a party. According to the witness statement of Mr Sergey Treshchev, the letter to the Supreme Court of the Russian Federation attached to Arduina's application notice is a draft that was never sent and which Arduina has obtained in unexplained circumstances. Whatever the rights or wrongs of that, it seems to me singularly inappropriate to order discovery of documents filed in an action to which Arduina is already a party.

55. In short, I regard further discovery as unnecessary for the fair disposition of the challenge to the awards, disproportionate and inconsistent with the overriding objective, and I decline to order it.