IN THE SUPREME COURT OF BERMUDA

Commercial Court
Civil Jurisdiction

2009: No. 113

BETWEEN:

FOUNDING PARTNERS CAPITAL (BERMUDA) LIMITED

Plaintiff

and

THE BANK OF N.T. BUTTERFIELD & SON LIMITED

Defendant

RULING

Date of Hearing: 8, 13 and 29 May 2009

Date of Ruling: 2 June 2009

Mr. Mark Diel, Marshall Diel & Myers, for the Plaintiff

Mr. Keith Robinson, Appleby, for the Defendant

Mr. Kulandra Ratneser, for the Financial Intelligence Agency

Introduction

1. These proceedings were commenced by writ dated 7 May 2009, and by them the plaintiff ("the Company") sought a mandatory order requiring the defendant ("the Bank") to release funds deposited into its operating account, and claimed damages for breach of contract. On the same day as the proceedings were issued, the Company issued an ex parte summons seeking a mandatory order requiring the Bank to release funds in its operating account for the limited purpose of allowing the Company to pay its local trade debts and employee salaries and remissions. That summons was supported by an affidavit sworn by Robert Hager, the Company's president, on 7 May 2009, and it is the terms of that affidavit which have given rise to an issue as to non-disclosure, canvassed in the affidavits and at the inter partes hearing on 29 May 2009.

The First Hearing

2. The matter came on for hearing before me on 8 May 2009, at which time Mr. Diel and Mr. Kevin Taylor appeared for the Company, and Ms. Tonya Marshall, the general counsel and board secretary of the Bank, was also present, having been given notice of the application. However, Ms. Marshall confirmed that she was present as an observer only, so that the hearing remained an ex parte one.

3. Mr. Diel began by handing to the Court extracts from the Proceeds of Crime Act 1997 ("the Act") and referred to the application as straightforward, relying upon the terms of Mr. Hager's affidavit. It is to be noted that at this time, the basis of the Bank's refusal to honour the Company's cheque was not known. Mr. Diel referred to the potential application of section 52A of the Act, but noted that there was no provision for notice in relation to that section, and advised that the Bank had simply declined to provide any information justifying the freezing of the Company's account.

4. Given the allegations which have now been raised by the Bank to the effect that Mr. Hager's affidavit did not satisfy the duty of the Company to make full and frank disclosure of all material facts, it is no doubt appropriate to set out the pertinent parts of Mr. Hager's affidavit, which are as follows:-

"3. On the morning of 23 April 2009, I received an email from an investor claiming that the Chairman of the Plaintiff, Mr. William Gunlicks, along with Founding Partners Capital Management Company, amongst others had been indicted by American authorities for securities fraud. Through further inquiries I was able to determine that a receiver has been appointed and the accounts in the U.S. have been frozen. To the best of my knowledge, the Plaintiff has not been named in any complaint in the U.S. Now produced to me and marked Exhibit **"RJH-1"** are true copies of the documents to which I refer in this affidavit. Tabs 1 – 7 of Exhibit "RJH-1" are those documents I have been able to obtain in relation to the U.S. proceedings.

4. At some point during the week of 27 April 2009, on a particular date of which I am unaware, the Plaintiff's operating account (2006-2010-5222121008400) with the Defendant, Butterfield Bank (the "Account") was frozen such that no transactions are permitted. This is the Plaintiff's sole account from which all of its expenses and obligations are met. This action was taken by the Defendant with no prior notice to the Plaintiff.

5. When I discovered that the Account was inoperable, I contacted representatives of the Defendant in an effort to understand why this had been done. The Defendant refused to provide any information whatsoever, but would only tell me that "they could not provide any details for legal reasons", or used words to that effect.

7. Without limited access to the Account, the Plaintiff is unable to pay employee wages, government taxes, lease payments on its office space and

local trade creditors (including the company's attorneys). I am able to summarize the near term expenses of the Plaintiff as follows:

(i)	Employees' Salary	$25,000	(due 15 May)
(ii)	Office Rent	$3,800	(due 15 May)
(iii)	Electricity	$220 (estimated)	(due 15 May)
(iv)	Telecommunications	$400 (estimated)	(due 15 May)
(v)	Legal Fees	$10,000	

8. Without immediate access to the limited funds from the Account, as set out above, I can no longer operate the Plaintiff company in an orderly manner. It is certainly not my desire to have unfettered access to the Account in the circumstances, however, I see it as imperative that limited ability to access the funds in the Account be granted so that local employees and trade creditors can be paid. I point out that the Plaintiff's attorneys have informed me that they require a retainer of $10,000 in relation to this matter, which account(s) for the figure in paragraph 7(v), above."

5. In the event I made the order sought on 8 May 2009, to enable the Company to discharge the indebtedness which had been referred to in Mr. Hager's affidavit. I then adjourned the matter for an inter partes hearing on Friday, 15 May, 2009. With the benefit of hindsight, that was of limited utility, save in relation to any further sums which the Company might seek to have released; in relation to the payments specified in Mr. Hager's affidavit, the expectation was that those would be processed by the Bank before the inter partes hearing.

The Form of Order

6. The summons sought a mandatory order requiring the Bank to release the Company's funds, and my note recorded that I made the order sought, i.e. an order against the Bank. However, the form of order submitted for signature by the Company's attorneys was worded on the basis of the grant of an entitlement to the Company to discharge the indebtedness referred to in Mr.

Hager's affidavit. This led to correspondence between attorneys, in which Appleby for the Bank contended that the order granted had not required the Bank to take any action, whereas the attorneys for the Company contended that the Bank was in breach of the order. This in turn led to an application to have the matter re-listed for hearing before me, and a date was set for Wednesday, 13 May 2009 at 2:30 p.m. Mr. Hager filed a second affidavit exhibiting the relevant communications between attorneys, and by the time the hearing came on, Ms. Marshall had filed an affidavit sworn the same day, and there was also an affidavit filed on behalf of the Bank by Allison Baillie, the Bank's head of group compliance.

The Bank's Evidence

7. Ms. Marshall's affidavit referred to the enquiry which had been instituted by the US Securities and Exchange Commission ("the SEC") into Founding Partners Capital Management Company and William L. Gunlicks. The SEC filing exhibited to Ms. Marshall's affidavit referred to the Company (in its former name of Stewards & Partners Limited), and Ms. Marshall's affidavit records the Bank's view that the Company's account was clearly related to this SEC investigation. The Bank had consequently formed the view that it had a reporting obligation under the Act and had made a statutory report to the Financial Intelligence Agency ("the FIA") on 28 April 2009. It is to be noted that the SEC filing exhibited by Ms. Marshall, which makes references to the Company, was not included in the material exhibited to Mr. Hager's affidavit.

8. Ms. Marshall's affidavit next dealt with the fact that on the same day that the Bank's report to the FIA had been made, a cheque drawn on the Company's account in favour of Mr. Hager's personal account at the Bank in the sum of $145,000 had been presented. Since the Bank had taken steps to freeze the Company's account following its notification to the FIA, payment on the cheque in question had been blocked. It was Mr. Hager's failure to mention this matter in his earlier affidavit which had led the Bank to suggest that the

omission was a failure on the Company's part to disclose all relevant matters to the Court.

9. Finally, Ms. Marshall explained the subsequent contact between the Bank and the FIA, which had included the Bank providing the FIA with a copy of the order which I had made on 8 May 2009. The FIA nevertheless indicated that it did not consent to the Bank conducting any transactions in accordance with its normal business practices on the Company's account, pursuant to the provisions of section 44 and 45 of the Act.

The Hearing of 13 May 2009

10. At the time of this hearing Mr. Diel had only just received Ms. Marshall's affidavit, and had not been able to take instructions on it, with particular reference to Mr. Hager's presentation of the cheque in the sum of $145,000. Given the new factual matters which were disclosed in the affidavits filed on behalf of the Bank, I declined to amend the original order so as to require the Bank to process the cheques previously referred to. I ordered that the Company should file its evidence in reply to the Bank's evidence by close of business on 15 May 2009, vacated the hearing date scheduled for that day, and set an inter partes hearing for Thursday, 21 May, 2009 at 2:30 p.m. That date was later postponed until 29 May 2009.

Further Evidence

11. Mr. Hager's third affidavit was duly filed on 15 May 2009. In that affidavit Mr. Hager referred to the suggestions that he had not made full and frank disclosure, and his inference that there was "at least an implied allegation that somehow I attempted to wrongfully empty the Company's account". Mr. Hager carried on to take exception to that, pointing out that both Ms. Marshall's affidavit and the correspondence from Appleby which had been exhibited were silent as to why the alleged non-disclosure was material to the Company's application. The affidavit referred to the legal advice which Mr. Hager had obtained, and the reasons for his belief that he was entitled to the

sum of $150,000 by way of a severance payment, based upon his belief that he was entitled to assume that his employment had been terminated by the fact that the US parent company and other associated companies had been put into receivership by the SEC.

12. In reply, Ms. Baillie filed a further affidavit sworn on 19 May 2009, referring to the Bank's records in relation to the Company in its role as the Bank's customer, as well as confirmation that the FIA remained of the same position in relation to its unwillingness to give consent to the Bank's compliance with any order requiring the Bank to process the Company's cheques.

The Hearing of 29 May 2009

13. There are two matters to refer to before dealing with the argument which took place at this hearing. The first is that Mr. Diel's firm wrote to Appleby on 27 May 2009, copied to the Registrar, indicating that Mr. Hager, from whom they had been taking instructions, had committed suicide the previous day. Their letter was also copied to the FIA, with a view to ascertaining whether the matter might be compromised in some way, and this led to the second matter, which is that Mr. Ratneser for the FIA attended the 29 May 2009 hearing, having been served with the proceedings, and helpfully provided some authorities with a view to assisting the Court. Although Mr. Diel suggested that the FIA should be present as intervener, it had of course not made an application to intervene, and I made no order in this regard. Mr. Ratneser indicated that he would stay in case he could be of assistance to the Court, and on the basis that he would be making no application for costs.

Argument at the 29 May 2009 Hearing

14. I indicated to counsel at the outset that I would deal with the non-disclosure point first, then the application for an injunction on its merits, and lastly consider whether any findings which I might make on the non-disclosure issue would affect the grant or otherwise of an injunction.

Non-Disclosure

15. As indicated in paragraphs 4 and 8 above, the Bank based its complaint that Mr. Hager had not given full and frank disclosure of all material facts to the Court on the fact that he had not made any reference in his affidavit to the fact that he had sought to present the cheque in the sum of $145,000 referred to in paragraph 8. However, I indicated to Mr. Diel that there were two other aspects of Mr. Hager's original affidavit which concerned me. The first of these related to Mr. Hager's status as an employee of the Company. The more minor aspect of this was that Mr. Hager's first affidavit had, in paragraphs 7 and 8, referred to employees in the plural, when his third affidavit and the correspondence exhibited thereto made it clear that Mr. Hager was in fact the Company's only employee, and the entire salary figure was his. Much more serious, in my view, was that by 29 April, the date on which Mr. Hager wrote a letter to the Company's corporate administrators, which was exhibited to his third affidavit, he was of the view that he had been constructively dismissed, which was the basis for his seeking a severance payment of $150,000 pursuant to the terms of his employment contract. The cheque for $145,000 was in fact reduced from $150,000, because the Company's operating account did not contain this latter sum. I indicated to Mr. Diel that it seemed to me to be quite inconsistent for Mr. Hager on the one hand to be maintaining that his employment had come to an end by 29 April 2009, and that he was consequently entitled to a substantial severance payment, and on the other hand submitting in his first affidavit that he was entitled to his salary as of 15 May 2009, which entitlement would of course be premised on his continued employment with the Company.

16. The second matter is the suggestion which appeared to me implicit in paragraphs 7 and 8 of Mr. Hager's affidavit that the Company was continuing in operation, and particularly that it would be required to meet its office rent of $3,800 on 15 May 2009. Mr. Hager's letter of 29 April 2009 referred to the fact that the Company had generated no income since August 2008, to the receivership of the Company's major shareholders, and then indicated:-

"In addition, I will be obliged to give notice to the landlord of 73 Front Street that the office is closing."

So the implication in Mr. Hager's first affidavit that the Company would continue in operation is also in conflict with the reality of its position a week or so earlier.

Argument on the Non-Disclosure Point

17. Mr. Diel started from the position that there was no dispute that the money was the Company's money, and maintained that in relation to the presentation of the cheque for $145,000, this was not material in the context of an application to pay only those amounts identified in Mr. Hager's first affidavit. In relation to the question of Mr. Hager's employment, Mr. Diel confirmed that Mr. Hager was the only employee of the Company, but sought to rely on paragraph 12 of Mr. Hager's third affidavit, which referred to the fact that he had rescinded his instruction to the Company's administrator. Next, in relation to the lease, Mr. Diel submitted that even if notice had been given to the landlord (and there no evidence as the true position), the very strong likelihood was that rent would be due on 15 May. Finally, Mr. Diel maintained that there had been no intention on the part of either the Company or Mr. Hager to mislead the Court.

The Principles Governing Disclosure

18. In relation to the principles governing disclosure, it is important to bear in mind that the grant of a mandatory injunction upon an interlocutory application is a very exceptional form of relief, and that must be particularly so in relation to the grant of an interlocutory mandatory injunction on an ex parte basis. That said, the general principles are well known, and are set out fully in the White Book. I would refer to just one aspect of the obligation, which is that materiality is to be decided by the Court, rather than by the applicant or his legal advisors.

Finding as to Non-Disclosure

19. I should make it clear at this point that the issue is not whether Mr. Hager was entitled to the sum of $150,000 by way of a severance payment; the issue is whether the fact of his attempted withdrawal of virtually the entirety of the funds in the Company's account was a matter which should have been brought to the attention of the Court at the time of the original application as being material. In my view the answer to that question is clearly yes; the matters in question are plainly material. It is not only that Mr. Hager had sought to remove virtually all the funds from the Company's account, although I do think that that alone is material. What is more critical to my mind is that Mr. Hager had said in his affidavit "It is certainly not my desire to have unfettered access to the Account", when that was exactly what his intention had been just a few days previously. Even if he had changed his mind, it was incumbent upon him to set out the true position in full. It also seems to me that the timeline is such that Mr. Hager must have had concerns that the effect of the SEC action in the United States was such that the Company's account in Bermuda would likely itself be the subject of some action. Yet his affidavit referred to the actions of the SEC within the United States as if they were nothing whatsoever to do with Bermuda. It seems to me that Mr. Hager's haste in presenting the substantial cheque in his favour is inconsistent with his position that the SEC action within the United States did not or would not affect the Company in Bermuda. One would also expect that a transaction as significant as a payment of all of the Company's funds in Bermuda to the Company's president would be preceded by a meeting of the Company's directors, with a view to authorising the transaction, particularly when, as appears below, Mr. Hager was by then of the view that he was no longer an employee of the Company. Mr. Hager had also resigned as a director of the Company on 29 April 2009, although he had subsequently rescinded that instruction.

20. In relation to Mr. Hager's status as an employee of the Company, it does seem to me to be material that Mr. Hager had referred to employees in the plural when in truth there was only one such, being himself. But I would not regard that as being of the greatest materiality. The same cannot be said for Mr. Hager's failure to refer in his first affidavit to the fact that he had by then taken the view that his employment had come to an end, and that he was entitled to a substantial severance payment. To proceed on the basis that he was entitled to salary for the month of May, at a time when he had previously come to the view that his employment had come to an end, seems to me an omission of the greatest possible materiality. In the course of argument, I used the word "egregious" to describe my view of this failure, and I remain of that view. I should add that it would make no difference if Mr. Hager had subsequently changed his view of his employment status; it would still be incumbent upon him to bring these matters to the Court's attention. That said, I do not believe that paragraph 12 of Mr. Hager's third affidavit has the meaning for which Mr. Diel contended. It seems to me that the reference to "rescinding the instructions given in my previous letter" was a reference only to his previous resignation as a director and officer of the Company. No "instruction" was given in relation to Mr. Hager's employment status; he simply informed the administrators that he viewed his employment with the Company as being at an end, and that he had received legal advice that he was entitled to the severance payment.

21. Lastly, there is the question of the Company's future viability, and again, this is perhaps a less serious omission. That said, the impression given by Mr. Hager's first affidavit was that this was a company which was functioning in the normal way until its bank account was frozen, when the true position was that the Company had not received any income since August 2008, its only employee in Bermuda had taken the position that he had been constructively dismissed by the end of the previous month, and had also taken the view that he was obliged to give notice to the Company's landlord that the office was closing.

22. I do accept that at the time that Mr. Hager swore his first affidavit the Company had sufficient funds to continue to operate for some months. However, that would not have been the case had Mr. Hager succeeded in withdrawing the amount of his severance payment, an event which would have left the Company unable to discharge its local debts, even to the extent of paying the May rent.

23. In summary, Mr. Hager's affidavit was seriously inadequate, first in relation to his attempts to cash a cheque on the Company's account in his own favour in the sum of $145,000, secondly in relation to his status as an employee of the Company, and thirdly in relation to the Company's future existence. It did not comply with the duty owed by the Company to make full and frank disclosure of all material facts. While I have noted that Ms. Marshall exhibited SEC material relating to the Company which Mr. Hager did not exhibit, I make no finding in this regard, since I have no evidence as to the ease or difficulty of locating the document exhibited by Ms. Marshall.

The Renewed Application for an Injunction

24. Mr. Diel started by reiterating his position that the Company was entitled to the funds in its bank account, and carried on to draw a distinction between the regime operating in Bermuda pursuant to the provisions of the Act, and those in operation in the United Kingdom under its equivalent 2002 legislation, with particular reference to the moratorium provisions operative under the UK act. Mr. Diel attached weight to the fact that the English legislation provided for a notice period of 7 working days, starting with the first working day after disclosure to the regulator, with a moratorium period of 31 days starting with the day on which the person receives notice that the consent to the particular act is refused. This contrasts with the position in Bermuda where, as Mr. Diel pointed out, the position of "non-consent" could exist indefinitely. Mr. Diel then referred to the fact that under the Rules of the Supreme Court 1985, a body corporate may not begin or carry on proceedings otherwise than by an

attorney. Hence he said that if a non-consent letter was in place, the consequence was that the particular company could not instruct attorneys, and he maintained that in relation to the Company, this led to a breach of the Bermuda Constitution on the basis that the Company was effectively denied the protection of the law by reason of the effect of the Act.

25. Mr. Diel referred to the case of *Squirell Ltd –v National Westminister Bank PLC* [2005] EWHC 664, and sought to distinguish that relatively strong authority (against him) on the basis of the difference between the Bermuda and the UK legislation. In that case, as in the case before me, the consequence of the company's account having been frozen was that it was not able to pay lawyers to appear on its behalf. Laddie J had some sympathy for parties in the position in which the company, Squirell, found itself, noting that if, as it said, Squirell was innocent of any wrongdoing, this could be viewed as a grave injustice. He carried on to say;

> "It is not for the courts to substitute their judgment for that of the legislature as to where the balance should be drawn. If, as he says is the case here, the legislation is clear, the courts cannot require a party to contravene it."

Laddie J reached his conclusion in these terms:

> "In my view the course adopted by Natwest was unimpeachable. It did precisely what this legislation intended it to do. In the circumstances there can be no question of me ordering it to operate the account in accordance with Squirell's instructions. To do so would be to require it to commit a criminal offence. Even if I had power to do that, which I doubt, it could not be a proper exercise of my discretion. Sympathy for the position in which Squirell finds itself does not override those considerations."

26. The only ground on which Mr. Diel could distinguish this strong authority was on the basis of his argument that the Bermuda legislation was unconstitutional, and he maintained that the Bank should have taken that position. When it was suggested (both by Mr. Robinson and the Court) that it should be the Attorney-General who argued the question of

unconstitutionality, Mr. Diel accepted that the Attorney-General might need to argue the point.

27. In reply, Mr. Robinson maintained that it was not incumbent upon the Bank to take the view that a particular piece of Bermuda legislation was unconstitutional, and he said that it would be "startling" for the Court to grant a mandatory injunction on an interlocutory application, on the basis of a view as to the constitutionality of a particular piece of Bermuda legislation, in this case the Act. Mr. Robinson also submitted that by virtue of Mr. Hager's death, the urgency had gone from the application, and he expressed doubt as to whether the Company could properly give instructions through Mr. Gordon Howard (something which Mr. Diel's firm had indicated in correspondence), when Mr. Hager had referred to Mr. Howard as being the Company's other director. He suggested that Mr. Hager's death would leave the Company with only one director.

28. Mr. Robinson also relied upon the case of *K Ltd –v- National Westminister Bank PLC* [2006] EWCA 907. Longmore LJ, giving the judgment of the Court of Appeal, put matters in very much the same terms as Laddie J did in *Squirrell*, saying:

> "[10] If the law of the land makes it a criminal offence to honour the customer's mandate in these circumstances there can, in my judgment, be no breach of contract for the bank to refuse to honour its mandate and there can, equally, be no invasion (or threat of an invasion) of a legal right on the part of the bank such as is required before a claimant can apply for an injunction. If that is right, there would be no issue to be tried in any later legal proceedings and any application for an interlocutory mandatory injunction has to be dismissed.
>
> [11] It could be said that this puts the matter over-legalistically or over-dramatically in the sense that it is not usually a defence to a claim for a breach of contract that the contract-breaker would, by performing the contract, be in breach of the criminal law. That is not, however, correct. The conventional view is that, if a statute renders the performance of a contract illegal, the contract is frustrated and both sides are discharged from further performance. In a case, however, where a statute makes it temporarily illegal to perform the contract, the contract will only be

suspended until the illegality is removed. That still means that, during the suspension, no legal right exists on which any claim to an injunction must depend.

[12] Even if, for any reason, the above analysis is open to objection, the fact still remains that during the seven-working-day or 31-day period, as the case may be, the bank would be acting illegally by processing the cheque. It would be entirely inappropriate for the court, interlocutorily or otherwise, to require the performance of an act which would render the performer of the act criminally liable. As a matter of discretion any injunction should be refused."

Conclusion on the Grant of the Injunction

29. Quite apart from the very strong authorities to which I was referred, I would have been quite unwilling to make an order which would have required the Bank to put itself at risk by ignoring an instruction from the regulator and thereby prima facie committing a criminal offence, subject only to an argument which the Bank would have to put in its defence of the criminal case against it that the Act was unconstitutional. I agree with Mr. Robinson; it is not for the Bank to take a view that a particular piece of legislation is unconstitutional. Indeed, I find it highly unattractive that the Company should be taking the position that a particular piece of legislation is unconstitutional, and expect someone else to argue that position on its behalf.

30. I do therefore take the view, therefore, paraphrasing the words of Longmore LJ in *K –v- Natwest*, that it would be entirely inappropriate for this Court, whether interlocutorily or otherwise, to require the performance of an act which would render the Bank criminally liable, and I therefore decline to grant the injunction sought.

31. I do appreciate that in doing so, I have not addressed Mr. Diel's argument that the Act is unconstitutional. In my view it would be quite wrong for the Court to address that issue on an interlocutory application for an injunction. For this reason I did not adjourn so that service could be effected on the Attorney-

General, a course which I would certainly have followed had it been necessary for me to determine that issue.

32. I would, however, just make one further reference to the difference between the present UK legislation, and the position as it is in Bermuda under the Act. I was advised by counsel that the Bermuda act followed the form of the earlier UK legislation, and it does appear that the notice period of seven working days and the moratorium of 31 days thereafter were introduced in the United Kingdom by the 2002 act. Those provisions caused Longmore LJ to comment in *K –v- Natwest* that many people would think that a reasonable balance had been struck between controlling the undoubted evil of money laundering and interference with the freedom of trade. Longmore LJ commented that that reasonable balance avoided the difficulties which had been raised by the previous statutory provisions contained in the 1998 act, where no time limits were incorporated. At the same time, I am conscious of the words used by Laddie J in *Squirell*, when he made the first comment which I set out in paragraph 25 above. I do not think it is a matter for this Court to substitute its judgment for that of the legislature as to where the balance should be drawn.

The Court's Discretion to Continue its Order

33. The references in the White Book to which I referred above are taken from the case of Brink's Mat Ltd –v- Elcombe [1988] 1WLR 1350, at pages 1356 and 1357. The case is also authority for the proposition that a court has the jurisdiction, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of an ex parte order, nevertheless to continue the order, or to make a new order on terms. In this case the issue is academic because of my firm view that an injunction should be refused. If I were to be wrong in that regard, I would be strongly of the view that the non-disclosure in this case was sufficiently serious to warrant the immediate discharge of the ex parte order (had that not become academic, as was the case

here), and also to decline to make any new order. As I indicated to Mr. Diel in argument, there would have been no question of my granting the injunction on an ex parte basis had Mr. Hager made disclosure of all material matters at the outset.

Costs

34. I indicated that I would deal with costs in this ruling on a nisi basis, which I now do. As I have said, Mr. Ratneser had indicated that he would not be seeking costs. In relation to the principal parties, it seems to me that costs should follow the event, and I therefore make an order for costs in favour of the Bank, to be taxed on the standard basis if not agreed. The nisi basis on which I make that order is that either party may apply to be heard on the issue of costs, but that if no such application is made within 14 days the order nisi will become absolute.

35. I recognise that for so long as the Company's account remains frozen, that award of costs may be academic in practical terms, but so be it.

Dated this day of June 2009.

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Hon. Geoffrey R. Bell
Puisne Judge