Republic of Kazakhstan v Istil Group Inc

[2005] EWCA Civ 1468

COURT OF APPEAL, CIVIL DIVISION
SIR ANTHONY CLARKE MR, RIX AND RICHARDS LJJ
8, 9 NOVEMBER 2005

Arbitration – Costs – Security for costs – Agreement for security for costs – Parties agreeing security for entirety of proceedings – Change in circumstances and further application for security – Exercise of court's discretion – Whether further security only to be ordered in wholly exceptional circumstances.

The claimant brought an application challenging the findings of an arbitration tribunal made in favour of the defendant. The arbitration proceedings had arisen from alleged breaches of contract made between a Kazak state enterprise which was owned by the claimant, and the predecessor of the defendant in relation to the purchase of steel from factories owned by the claimant. The arbitration was brought after the defendant had failed to persuade the Commercial Court in Paris to accept jurisdiction in relation to the alleged breaches. The solicitors for the defendant sought security for costs and in October 2004 an agreement was reached by the parties in the sum of £30,000 'to cover the entirety of the Commercial Court proceedings'. In September 2005 the defendant applied for an order for further security for costs in the sum of £133,538·98 on the grounds of a material change in circumstances. These changes included an extension in the time estimate for the hearing and the subsequent permission given to the parties to adduce expert evidence of French and Kazak law. The judge dismissed the application on the basis of that there was an agreement between the parties as to the security for costs for the entirety of the application and rejected the submission that the agreement had been vitiated by mistake. He held that where the parties had agreed that a particular figure would be the security to be provided in respect of an application it would be wrong in principle, except perhaps in wholly exceptional circumstances, for the court to make an order for further security unless the agreement was void or voidable for mistake or misrepresentation, or was not applicable in the circumstances which had developed.

Held – The judge had been wrong to hold that the agreement between the parties was such that the court should only order further security in wholly exceptional circumstances. The general principle where the court had awarded security for costs in respect of the whole of an action or application was that it would not make a further order in the absence of a material change in circumstances. However it would or could do so if there had been a material change of circumstances, depending upon the circumstances of the particular case. If the parties wished the court to exercise its discretion on different principles they had to provide so in their agreement. That agreement had to be construed in accordance with the ordinary principles of contractual construction. The question in each case was therefore whether the parties had simply agreed that security would be provided in a particular sum, in which case the court would not order more security unless there was a material

change of circumstances, or whether they had gone further and agreed that the amount of security to be provided would not be increased even if there was a material change of circumstances. In the latter case further security would not be ordered unless the agreement was void or voidable for mistake or misrepresentation or was not applicable in the circumstances which had developed. There was a further residual discretion in the latter type of case, but this was only to be exercised in wholly exceptional circumstances. In the instant case the agreement reached between the parties was not that the defendant would not be entitled to further security even if there was a material change of circumstances. Accordingly the appeal would be allowed and on the basis that a material change of circumstances had been demonstrated, further security for costs would be ordered (see [32]–[35], [42], [49], [50], below).

Per curiam. Where parties wish the court to exercise its discretion contrary to the general principle that a change in material circumstances is required in cases where further applications for security for costs are made, they have to provide for this in their agreement. The agreement must be construed in accordance with ordinary principles of contractual construction. The court should not, however, be astute to hold that parties to such an agreement have departed from the general principle because it is important that the principle should be understood and applied and that the court should do nothing to discourage settlement or to increase satellite litigation (see [33], below).

Notes

For the power to order security for costs on a challenge to an arbitration award, *see 2(3) Halsbury's Laws* (4th edn reissue) para 76.

Case referred to in judgments

Kristjansson v R Verney & Co Ltd (18 June 1998, unreported), CA.

Appeal

Istil Group Inc, the defendant in proceedings brought by the Republic of Kazakhstan to challenge the final award of an arbitration tribunal given on 1 June 2004 appealed from the decision of Christopher Clarke J given on 18 October 2005 ([2005] EWHC 2309 (Comm)) where the judge dismissed its application to increase the amount of security for costs which had previously been agreed between it and the claimant. The facts are set out in the judgment of Sir Anthony Clarke MR.

Jonathan Harvie QC (instructed by *Penningtons*) for Istil.

Ali Malek QC and *David Quest* (instructed by *Richards Butler*) for the Republic.

At the conclusion of argument, Sir Anthony Clarke MR announced that the appeal would be allowed for reasons to be given later.

9 November 2005. The following judgments were delivered.

SIR ANTHONY CLARKE MR.

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INTRODUCTION

[1] This is an appeal brought with the permission of the judge against an order of Christopher Clarke J made on 18 October 2005([2005] EWHC 2309 (Comm)) in which he dismissed an application for security for costs by the defendant.

[2] The judge dismissed the application because of an agreement between the solicitors for the parties under which the claimant agreed to provide security for the defendant's costs in the sum of £30,000. The issue in this appeal is whether the judge erred in principle in dismissing the application.

[3] We heard oral argument yesterday. At the conclusion of the argument we announced our decision that the appeal would be allowed, and said that we would make the following orders.

1. The appeal be allowed and paras 1 and 2 of the order made by Christopher Clarke J on 18 October 2005 be set aside.

2. The claimant give further security for the defendant's costs of the claim up to and including the hearing beginning on 12 December 2005 in the sum of £120,000 by paying the sum of £120,000 into the Court Funds Office by 4.30 pm on 1 December 2005 or otherwise to the satisfaction of the court.

3. Unless security is given as ordered (a) the claim is struck out without further order; and (b) on production by the defendant of evidence of default, there be judgment for the defendant without further order with the costs of the claim to be the subject of a detailed assessment.

4. The claimant do pay the costs of the application for security for costs before Christopher Clarke J and of this appeal.

5. The costs of the application before Christopher Clarke J are summarily assessed at £15,460·60 and the costs of this appeal are summarily assessed at £14,104·79.

6. The claimant to pay those costs to the defendant on or before 1 December 2005.

We adjourned giving our reasons for those orders until today. These are the reasons which persuaded me that those orders should be made.

THE PROCEEDINGS

[4] I can summarise the proceedings and the events which led to them from the judge's judgment. Like the judge I shall call the claimant 'the Republic' and the defendant 'Istil'. Istil is a steel trader whose predecessor in 1995 bought steel from SJC Karaganda Metallurgical Combine (Karmet), a Kazak state enterprise, which owned a very large steel mill in Kazakhstan. Karmet was or became in great financial difficulty. The Republic, which owned Karmet, insisted on Istil's predecessor, Metalsrussia Corporation Ltd, of the British Virgin Islands (BVI Metalsrussia), making advanced delivery of raw materials to the value of steel to be delivered to Istil.

[5] Proceedings were commenced by BVI Metalsrussia in the Commercial Court in Paris against the Republic in respect of a number of contracts for the purchase of steel from factories belonging to the Republic. The Republic contested jurisdiction on the ground that it was not a party to those contracts but that if it was then there was a binding LCIA arbitration clause and that, alternatively, it was entitled to sovereign immunity. BVI Metalsrussia contended that there was no claim against the Republic under the contracts themselves, together with their arbitration clauses, but only under separate undertakings

given during the proceedings relating to the insolvency of Karmet. The Commercial Court in Paris, and subsequently the Court of Appeal, rejected the contention that the Republic was party to any arbitration agreement, but declined jurisdiction on the grounds of sovereign immunity.

[6] BVI Metalsrussia then commenced LCIA arbitration proceedings under three contracts for the sale of rolled steel, dated 1994 and 1995, seeking to recover the advance payments that had been made and damages. The first contract was expressed to be between an entity named Kazakhstan Sauda as sellers and BVI Metalsrussia as buyers. The second and third contracts were between Oltex Trading Corporation as sellers and BVI Metalsrussia as buyers. The Republic contested the jurisdiction of the arbitrators. In the course of the arbitration it appears that BVI Metalsrussia had merged with its parent company which in turn had merged with Istil, the claimant. By a final award of 1 June 2004 in the sum of $6m the arbitrators found that Karmet was, as principal of the named parties, the seller and that it had made no delivery under two of the contracts and short delivery under the third.

[7] At issue in the arbitration were, first, whether BVI Metalsrussia were the buyers, or whether the true buyers were a Metalsrussia company which became known as HK (for Hong Kong) Metalsrussia; and, secondly, whether the Republic had become a party to the contracts and the arbitration clauses therein as successor to Karmet by virtue of certain provisions of the agreement by which the Republic had sold the mill to a company in the Mittal Group. On both of those issues Istil succeeded. The tribunal also held that Istil had succeeded to BVI Metalsrussia's claims as a result of the two mergers.

[8] On 13 July 2004 the Republic issued applications in the Commercial Court in London under ss 67 and 68 of the Arbitration Act 1996. The application under s 67 contends that the arbitration tribunal lacked substantial jurisdiction on the grounds that neither Istil nor the Republic was a party to the arbitration agreements contained in the contracts in respect of which Istil was claiming in the arbitration; secondly, that Istil is bound by the decision of the Paris Commercial Court to the effect that it was not bound by those agreements; and, thirdly, that it repudiated any arbitration agreement by its contentions made before the Paris Commercial Court and the Paris Court of Appeal. The application under s 68 contends that there were serious irregularities affecting the arbitration and the award on the ground that the arbitration tribunal failed to give the Republic an adequate opportunity to deal with one particular allegation and that the tribunal, having held that the question of limitation was to be determined as a matter of Kazak law, wrongly applied French or Belgian law to the question of whether the limitation period had been interrupted.

THE AGREEMENT FOR SECURITY FOR COSTS

[9] On the same day as the applications were issued (13 July 2004) the solicitors for the Republic, Richards Butler, advised Penningtons, the solicitors for Istil, of the issue of proceedings. On 15 July Penningtons told Richards Butler by fax that they had instructions to accept service and suggested that the Republic should provide security for costs in the sum of £10,000 for any application for leave to appeal which they thought to be necessary, and £40,000 in respect of the appeal. In fact, contrary to what Penningtons thought, the Republic was not seeking leave to appeal against the award, but relief under ss 67 and 68 of the Act as I have described.

[10] On 22 July Richards Butler enclosed by way of service the claim form and other necessary documents. In the course of that letter they noted the comments made by Penningtons about security for costs and expressed the initial view that: 'Given the nature of the application, it is by no means clear that there is an entitlement to security', and also expressed the view that any application for security at that stage would be premature.

[11] On 5 August 2004 a without prejudice conversation took place between Mr David Warne of Richards Butler and Mr Henry Page of Penningtons in which, according to his attendance note, Mr Warne indicated that he did not accept that there was any right to security but that he would be prepared to recommend to the Republic that security be provided in the amount of £30,000 within 42 days. His note records that he thought that the £40,000 proposed was excessive, that this was a one-and-a-half to two-day hearing case and that on that basis it was clear that the Commercial Court could not accommodate the hearing before January 2005, which gave a relatively relaxed timetable for the provision of security.

[12] On 10 August Penningtons faxed Richards Butler a one-line fax, which read: 'We would accept securities for costs in the sum of £30,000.' There followed some without prejudice exchanges and, on 14 September, Richards Butler wrote to Penningtons confirming that their clients were agreeable to providing security for costs in that amount—that is, £30,000 within 42 days of final agreement being reached in respect of the entirety of the proceedings. Mr Henry Page faxed a copy of that letter to his client's counsel, Mr Hugo Page QC, with the manuscript question: 'Is this some kind of a trick? As far as I know, the entirety of the proceedings is the application to set aside.'

[13] On 23 September Mr Henry Page faxed a letter to Mr David Warne thanking him for 'your recent confirmation' of 14 September, and saying: 'We must of course reserve our position should our estimated costs prove to be insufficient.' The judge said that the fax of 14 September might either be regarded as an acceptance of the offer from Penningtons of 10 August to accept security in the sum of £30,000 for the entirety of the proceedings, or alternatively, if the reference to the entirety of the proceedings introduced a new element, as a counter-offer.

[14] To my mind the fax of 14 September was a counter-offer because the offer to accept £30,000 by way of security was not expressed to be in respect of the whole of the proceedings. The fax of 23 September was plainly subject to a reservation of the position of Istil if its estimate of costs proved to be insufficient.

[15] On 5 October Richards Butler faxed to Penningtons thanking them for their fax of 23 September, and saying this:

> 'It has been apparent from our earlier discussions regarding security that your clients' request was for security for costs in respect of the Commercial Court proceedings as a whole. It was not a request for security to any particular stage in the proceedings. Additionally our fax of 14th September makes it plain that the agreement in respect of the provision of security for costs in respect of the entirety of the proceedings; and in a matter of this nature one would not expect otherwise. Accordingly we cannot accept that it is now open to your clients to reserve their position "should our estimate of costs prove to be insufficient". Agreement has been reached on the terms set out in our fax of 14 September.'

Then on the next page of the fax is the last paragraph, which reads: 'Please let us have your confirmation forthwith that this is accepted. When that is received we will come back to you with proposals as to how the security is to be provided.' On the same day Mr Henry Page of Penningtons wrote in manuscript on the first page of the fax the following words: 'We agree to the amount of costs as security for your application to the Commercial Court. Not any appeal therefrom – Penningtons, 5.10.04.' Still on the same day (5 October) he faxed the letter with that manuscript on it to Richards Butler.

[16] The judge held that in their fax of 5 October Richards Butler were inviting Penningtons to accept that it was not open to Istil to reserve its position and claim for more than £30,000 should the estimate of costs turn out to be insufficient, and that the security was to be provided on the terms set out in the fax of 14 September, namely that it covered the entirety of the Commercial Court proceedings.

[17] The judge further held that when Mr Henry Page wrote the words that he did on the first part of that fax he was giving the confirmation sought, namely that the £30,000, and not some other sum, would cover the proceedings and the whole of the proceedings, and that it would not be open to his clients to seek further sums should the estimate of costs prove to be insufficient. The judge expressly said that he did not accept that by reason of the positioning of the manuscript on the first page of the letter he was confining his assent to a reconfirmation of the terms of the 14 September letter, but leaving open the question whether it was open to Istil to claim some larger sum if the estimate should prove to be insufficient. The judge held that he should be taken as giving the confirmation that was sought in the last paragraph of the letter of 5 October.

[18] On 14 October Richards Butler faxed to Penningtons saying:

> 'Thank you for returning to us a copy of our fax to you of 5th October confirming, in manuscript, that the security of £30,000 is to cover the entirety of the Commercial Court proceedings. For our part we confirm that the security is not intended to extend to any proceedings by way of appeal from the Commercial Court decision. This is not to be taken as any acknowledgment that your clients would be entitled to security in respect of any such appeal. We look forward to receipt of your clients' evidence.'

Against that, Mr Henry Page wrote in manuscript: 'Thank you. This will be served tomorrow. Please confirm method proposed for security.' The judge held that, accordingly, the fact that £30,000 was to cover the entirety of the Commercial Court proceedings but not any appeal was thereby confirmed.

[19] With that notation the fax of 14 October was faxed back to Richards Butler for the Republic. On 23 November Richards Butler gave on undertaking limited to £30,000 by way of security.

THE APPLICATION

[20] By an application notice dated 9 September 2005 Istil applied for an order that the Republic provide further security for costs in the sum of £133,538·98 on the ground that there had been a material change of circumstances since the agreement for the provision of security in the sum of £30,000 in October 2004.

CHANGE OF CIRCUMSTANCES

[21] The application for further security was supported by the third witness statement of Mr Henry Page. He exhibited the faxes evidencing the agreement to which I have referred. His evidence was that, having discussed the position with counsel, he had formed the view that £30,000 would be sufficient security on the basis of a time estimate of one to one-and-a-half days. However, he relied upon a change of circumstances from early 2005.

[22] A case management conference took place before Morison J on 18 February 2005. He refused to order preliminary issues as to whether the tribunal's initial award on jurisdiction (which is not challenged under s 67 of the 1996 Act) was a valid award and as to whether the Republic had reserved the rights sufficiently to allow a s 67 application to be made.

[23] In relation to the Republic's application under s 67, Morison J directed:

> '(1) that trial shall be a full rehearing of the question of jurisdiction and shall not be restricted to a review of the arbitrator's decision; and (2) that the evidence shall not be restricted to that evidence which was before the arbitrators.'

He further directed that a date be fixed for the trial or hearing of the applications with a provisional time estimate of four days. That hearing has since been fixed to begin on 12 December 2005. Morison J gave both parties permission to adduce expert evidence of Kazak law. Neither party applied for permission to adduce expert evidence of French law.

[24] In April 2005 the Republic served a further witness statement (the fourth) from Mr Mackenzie-Smith with over 50 pages of exhibits relating to the French proceedings. It was accompanied by a statement by Mr Smagulovich of the Republic exhibiting a number of contracts between Karmet, Kazakhstan Sauda and Oltex which were in the Republic's files but which were not before the tribunal.

[25] In July 2005 the Republic served a second, longer, more detailed and wider ranging Kazak law report dealing not only with limitation but with issues of legal personality, agency and assignment. Istil accepts that those points are central to the s 67 application and provided its own expert evidence on the subject in September 2005.

[26] In the meantime on 28 May the Republic applied for permission to adduce expert evidence on French law. Istil resisted the application but the judge granted permission on 16 September. The issue of French law is whether previous unsuccessful proceedings brought by Istil against the Republic in France give rise to any res judicata.

[27] The judge rejected the submission that the agreement that the Republic would provide security for costs in the amount of £30,000 was vitiated by common mistake. He expressed his conclusion in summary as follows (at [31]):

> 'The reality of the matter, as it seems to me, is that Mr Page made a bargain with Mr Warne in relation to security for costs for the entirety of the application at a time when the scope of the application had not been mapped out at any case management conference, which has turned out, from Istil's point of view, to be a poor one.'

The judge held that Istil should be kept to its bargain.

[28] The principle he applied is clearly stated as follows (at [23]):

'The discretion of the court is, subject to the provisions of the second half of s 70(6) of the Arbitration Act 1996, in terms unfettered. But, in my view, when the parties have, through their solicitors, agreed that a particular figure shall be the security to be provided in respect of the application, it is wrong in principle for the court, save perhaps in wholly exceptional circumstances, to make an order for further security unless the agreement that they have made is void or voidable for mistake or misrepresentation or is not applicable in the circumstances that have developed.'

[29] The judge, however, held that but for the agreement he would have held that there was a significant and relevant change of circumstances since October 2004 justifying the provision of further security. He put his reasons thus:

'[32] I have considerable sympathy, therefore, with the position in which Istil find themselves, particularly since, but for that agreement, I would have taken the view that there had been a significant and relevant change of circumstances since October 2004 justifying the further provision of security. Since then, it has become apparent that the sort of figures that were then in play are quite inadequate in the light of the form that the hearing of the applications is now to take, involving a full hearing of the issues with expert evidence of Kazak and French law and with the hearing likely to take twice as long as then anticipated. I do not regard the fact that it was foreseeable that the Republic and indeed Istil might rely on further factual and expert evidence, the latter to be given orally, as meaning that there was no relevant change in circumstances when they came to indicate that they would do so. The shape and format of this application has grown over the months that followed the agreement in 2004. The case management conference hearing made it clear that there was to be a rehearing, not a review. The issues have appeared more clearly from the experts' reports, and even though the overall issues have not changed, the formulation and presentation of the case has significantly altered. That seems to me to constitute a sufficient change of circumstances to justify an order, absent the agreement to which I have referred.

[33] I would also have thought it appropriate to make such an order as a matter of discretion. It seems to me that Istil is likely to have very serious difficulties in enforcing any order for costs in Kazakhstan. Kazakhstan has a troubled financial history. In view of the history of these proceedings and similar proceedings brought by MNR Metals Sweden, where judgment has been granted on appeal without a stay, and a substantial sum of money has been unpaid for a considerable period of time (albeit that in November an application was made to the Supreme Court for a review which has still not been addressed) I have grave doubts whether or not Istil will be able to recover costs awarded to them in the absence of security being provided. It seems to me reasonable to anticipate that every possible argument of immunity, jurisdiction, state decree, and the like, is likely to be put in their way, and indeed that they could spend as much as they have incurred in costs in chasing those costs in Kazakhstan, particularly in the absence of any reciprocal enforcement treaty.'

The judge added that he would not have refused relief on the ground of lateness and would probably have ordered further security in the sum of £120,000.

THE PRINCIPLES

[30] In the absence of an agreement as to security for costs the principles are not in dispute. Section 70(6) of the Act provides:

> 'The court may order the applicant or appellant [that includes an applicant or appellant under s 67 and s 68] to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.
>
> The power to order security for costs shall not be exercised on the ground that the applicant or appellant is—(a) an individual ordinarily resident outside the United Kingdom, or (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.'

[31] As the judge observed, that jurisdiction is not dependant on the applicants or appellants being resident anywhere. It is not in dispute that the court had jurisdiction to make an order for security for costs against the Republic under the first paragraph of s 70(6). The court is not, of course, bound to make such an order but has a discretion whether or not to do so. In exercising that discretion, the court must, of course, act justly in accordance with the overriding objective in CPR Pt 1.

[32] The correct approach, which is the same as that under CPR 25.12 and 25.13, is again not in dispute and would have been known to experienced solicitors like Richards Butler and Penningtons. It is that where the court has awarded security in respect of, say, the whole of an action or application, it will not make a further order in the absence of a material change of circumstances. However, it will or may do so if there has been a material change of circumstances, depending, of course, upon the circumstances of the particular case: see, for example, *Kristjansson v R Verney & Co Ltd* (unreported), a decision of this court made on 18 June 1998. That principle applies where a court makes an order for security for costs and is asked to make a further order. Moreover, it applies whether the first order is made with or without the consent of the parties. Thus it applies, for example, where the parties consent to an order. Subject to the express terms of the agreement it also applies where the parties agree that security will be provided and security is provided pursuant to an agreement without an order.

[33] In my view, if parties want the court to exercise its discretion on different principles they must so provide in their agreement. The agreement must of course be construed in accordance with the ordinary principles of contractual construction. The court should not, however, be astute to hold that parties to such an agreement have departed from the general principle because it seems to me to be important that that principle should be understood and applied and that the court should do nothing to discourage settlement or to increase satellite litigation.

[34] Thus the question in each case is whether the parties have simply agreed that security will be provided in a particular sum, in which case the court will not order more security unless there is a material change of circumstances, or whether they have gone further and agreed that the amount of security to be provided will not be increased even if there is a material change of circumstances. If they have made an agreement of that kind, then I agree with the judge that the

correct approach is that stated in [23] of his judgment which I have already quoted but which it is convenient to set out again in this part of the judgment:

> 'in my view, when the parties have, through their solicitors, agreed that a particular figure shall be the security to be provided in respect of the application, it is wrong in principle for the court, save perhaps in wholly exceptional circumstances, to make an order for further security unless the agreement that they have made is void or voidable for mistake or misrepresentation or is not applicable in the circumstances that have developed.'

[35] Since the court retains a discretion to do what is just in all the circumstances, it retains a residual discretion to vary the security even if the parties have made an agreement that the security will not be varied even if there is a material change of circumstances. But the court should only exercise that residual discretion in, as the judge put it, wholly exceptional circumstances.

THE APPEAL

[36] Mr Harvie QC submits on behalf of Istil that the judge was wrong to hold that further security should not be ordered because of the agreement made in this case. He submits that the judge should have held that the agreement was complete on 14 September. In any event he submits that the agreement was that the Republic would provide £30,000 security for the entirety of the Commercial Court proceedings without more.

[37] I have already referred to the relevant documents. I do not think that the agreement was made on 14 September because the fax of that day was the first document to contain a reference to the entirety of the proceedings. In my opinion, which seems to me to be consistent with that of the judge, the agreement was made when Penningtons sent their fax on 5 October which contained their acceptance of the contents of Richards Butler's fax of 5 October. There is no doubt that it was agreed that the Republic was to provide £30,000 security for costs for the proceedings as a whole, excluding an appeal. There is however an issue between the parties as to whether there was a further term of the agreement and, if so, what it was. The issue arises out of the terms of Penningtons' fax of 23 September, Richards Butler's reply of 5 October and Penningtons' notation on that fax which was faxed back to Richards Butler on the same day.

[38] The relevant parts of the faxes which I have already quoted in full were these. Penningtons said: 'We must, of course, reserve our position should our estimate of costs prove to be insufficient.' Richards Butler replied:

> 'Accordingly we cannot accept that it is now open to your clients to reserve their position "should our estimate of costs prove to be insufficient." Agreement has been reached on the terms set out in our fax of 14th September.'

The manuscript notation did not expressly refer to those parts of either fax and simply read: 'We agree to the amount of costs as security for your application to the Commercial Court. Not any appeal therefrom ...'

[39] The judge, to my mind correctly, rejected Istil's submission that the manuscript notation left open its reservation of its position should the estimate of costs prove to be insufficient. What then was the position? Mr Malek QC

submits that Penningtons agreed that Istil would not apply for further security even if there was a material change of circumstances. However in my opinion it is not possible to read the faxes as having that meaning. There is no reference to 'change of circumstances' in any of them. As I see it, there are two possibilities. The first is that which (as I read his judgment) attracted the judge. The judge said this (at [18]):

> 'The upshot of that, as it seems to me, is that by 14 October 2004 Richards Butler had agreed with Penningtons, each of them acting for their respective clients, by way of compromise of a disputed question as to whether security should be provided and, if so, in what amount; that the Republic would provide security in the sum of £30,000 to cover the entirety of the Republic's application to the Commercial Court but not any appeal therefrom and that the purported reservation of Istil's position should that estimate prove insufficient was inoperative.'

By 'inoperative' I understand the judge to mean that the purported reservation of Istil's position in the fax of 23 September was inoperative, leaving the agreement without reference to a reservation of Istil's position at all. In that event the agreement must be construed as a simple agreement to provide security for costs in the sum of £30,000 for the entire proceedings. I will call that the first possibility.

[40] The second possibility is that it was agreed that it was not open to Penningtons to apply for the further security 'should our estimate of costs not be sufficient'.

[41] I am bound to say that I prefer the first possibility because I agree with the judge that the effect of the fax of 5 October to which Penningtons agreed was simply that there was no reservation of Penningtons' position. However that may be, I have reached the clear conclusion that on either basis there is nothing in the agreement to prevent Istil from seeking further security in the event of a material change of circumstances.

[42] In the case of the first possibility the agreement is simply an example of the ordinary case where parties agree without more that security in a particular sum should be provided to the end of the trial. In the case of the second possibility the only further agreement was that Istil would not be entitled to further security if their estimate of costs was not sufficient. In my opinion the agreement was not that Istil would not be entitled to further security, even if there was a material change of circumstances. As I see it, it follows that the judge was wrong to hold that the agreement between the parties was such that the court should only order further security in wholly exceptional circumstances.

[43] If the principles discussed above are applied to the agreement construed in either of the ways I have described, the correct approach would have been for the court to make an order for further security if it concluded that there was a material change of circumstances and if it thought it right to make such an order in all the circumstances of the case.

[44] As I explained earlier, the judge considered the question whether there was a material change of circumstances in some detail and held that there was. The Republic challenges that conclusion by way of respondent's notice. Mr Malek submits that the judge was right to hold, as he did at para [31] of his judgment, that the truth was that Penningtons made a poor bargain and that, having held at para [32] that it was reasonably foreseeable at the time of the

agreement that the Republic and indeed Istil might rely on further factual and expert evidence, there was no material change of circumstances and the judge was wrong to hold that there was.

[45] However, whether there was a material change of circumstances was essentially a matter for the judge involving a consideration of the faxes. It is a decision of a kind with which this court will very rarely interfere. The judge made no error of principle or indeed fact that I can see in this regard. He correctly held that whereas both parties, including the Republic, were originally proceeding on the basis that the scope of the trial or hearing was such that it would last at most one-and-a-half to two days, by the time of the application its scope was such that it was estimated to last twice as long.

[46] As appears from the order made by Morison J on 18 February to which I referred earlier the reason for that was the extended scope of the issues under s 67. In addition, the Republic subsequently sought and obtained permission to adduce evidence of French law. I see no basis upon which this court could properly interfere with the judge's decision that there was a material change of circumstances. Nor can I see any basis upon which it could interfere with his conclusion that on that basis it would be appropriate to order further security. The considerations at para [33] of the judge's judgment quoted above are to my mind compelling.

[47] As to amount, although it is submitted that any extra securities should be limited to, say, £15,000 to cover the evidence of French law, the judge plainly thought that the amount should reflect the overall position. I see no reason to disagree with him or to fix any figure other than the £120,000 which he said that he would probably have ordered.

CONCLUSION

[48] It was for these reasons that I concluded that the appeal should be allowed with costs and further security in the sum of £120,000 ordered. The costs were summarily assessed in amounts which were not disputed. Finally I should note that although the order provides for the security to be paid into court it also contemplates that security to the satisfaction of the court can be provided in some other form. Such security would however have to be provided before the time specified in the order failing which the claim will stand struck out without further order.

RIX LJ.

[49] I agree with Sir Anthony Clarke MR's judgment and with the reasons he has given.

RICHARDS LJ.

[50] I also agree.

Appeal allowed.

Rukhsana Ali Barrister.