Case No: 2013 Folio 1039 &1073

Neutral Citation Number: [2013] EWHC 3689 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2013

Before :

MR JUSTICE BURTON

- -

Between :

Mr Boris Bannai	**Claimant**
- and -	
Mr Eitan Shlomo Erez	**Defendant**
(Trustee in Bankruptcy of Eli Reifman)	

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Paul Key Q.C. and Jessica Wells (instructed by **Dallas & Co. Solicitors**) for the **Claimant**
Mr Eitan Shlomo Erez appeared in person

Hearing dates: 13 and 14 November 2013

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Judgment

Mr Justice Burton :

1. This has been the hearing of the application by the Defendant, Mr Eitan Erez, ("the Trustee"), the trustee in bankruptcy of Mr Eli Reifman ("the Bankrupt") in an Israeli insolvency proceeding (said to be the largest bankruptcy in Israel) recognised by the English courts pursuant to the Cross-Border Insolvency Regulations 2006, to set aside an ex parte injunction granted to the Claimant, Dr Boris Bannai, by Walker J on 31 July 2013, restraining the commencement or pursuance of legal proceedings in the Israeli courts or elsewhere in respect of any matters falling within the scope of the arbitration agreement contained in clause 9 of the agreement dated 17 February 2002 ("the 2002 Agreement") between the Claimant and the Bankrupt. This anti-suit injunction was expanded ex parte on 9 August 2013 by Hamblen J in favour of the Claimant (i) in respect of any such proceedings in relation to disputes or differences falling with the scope of the said Clause 9 against David Bannai, the Claimant's son, and (ii) in respect of any such proceedings falling within the scope of Clause 9 against ten companies ("the Companies") until after a final award in any arbitration commenced by the Trustee. The Claimant has been represented by Paul Key QC and Jessica Wells. The Trustee, an experienced Israeli lawyer, has represented himself.

2. The claims by the Trustee in the Israeli proceedings arise out of allegations that the Claimant has, in breach of the 2002 agreement, failed to account to the Bankrupt for 35% of the assets the subject matter of that agreement and 35% of the income derived from those assets, in respect of a number of companies and ventures, in various jurisdictions including Poland, Cyprus, South Africa and Namibia. The Trustee alleges that the Claimant has defrauded the Bankrupt, and must restore to the Bankrupt estate 35% of identified companies and assets which ought to have been transferred to a joint venture company (Nokotomi), "the JVC", in which the Bankrupt's estate ought to be declared to have such an interest.

3. The 2002 Agreement was governed (by clause 8) by English law, and contained (by clause 9) an arbitration agreement. The Claimant does not wish to arbitrate himself, but relies on the arbitration clause so as to assert that any claims against him by the Trustee can only be pursued in such arbitration insofar as they fall (which it is conceded that they do) within the arbitration clause. If it was not already clear, the fact that an arbitration clause contains within it a *"negative promise not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed"* is now clear at English law by virtue of **AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC** [2013] 1 WLR 1889 S.C, per Lord Mance. There is also no doubt that by English law (and as it happens, by Israeli law, as is made clear in the first expert's report by Mr Kehat for the Claimant at paragraph 11, and not disputed by the Trustee's expert, Mr Shachar) the Trustee is subrogated to the position of the bankrupt under the 2002 Agreement, and hence stands in his shoes, so far as enforcing contractual obligations by reference to the arbitration clause is concerned: see by analogy with insurance companies **DVA v Voest Alpine Intertrading GMBH** [1997] 2 Lloyds Law Rep 279 and, generally, **Raphael: The Anti-Suit Injunction** at 237ff. I shall return to this further below.

4. There was subsequently a further agreement between the Claimant and the Bankrupt, by which their respective obligations under the 2002 Agreement were waived or discharged ("the 2007 Agreement"). The 2007 Agreement has been set aside by the

Israeli courts, after the Claimant unsuccessfully took an appeal to the Israeli Supreme Court, and there is no longer any challenge to that position.

5. The Israeli courts declared the Bankrupt insolvent in March 2009, whereafter the Trustee was appointed as special administrator. The Claimant was then joined in the insolvency proceedings in 2009, when the Trustee issued a Request for Instructions in the Israeli District Court, on 1 October 2009. The Claimant applied to strike out, or alternatively to stay, the proceedings against him on 1 December 2009, relying upon the arbitration clause for a stay, and asserting that in any event the use of the Request for Instructions procedure was inappropriate. The Claimant was however required to reply to the Trustee's Request for Instructions, and a petition by the Claimant for leave to appeal to the Supreme Court was rejected on 25 January 2010. At that stage an arbitration claim form was issued by the Claimant in this Court dated 18 March 2011. Meanwhile on 22 June 2011 the Israeli District Court declared the 2007 Agreement void, but deferred the question of the validity of the arbitration clause in the 2002 Agreement to a later stage. The Claimant appealed the District Court decision to the Israeli Supreme Court.

6. The Trustee had in the meanwhile applied for the Claimant's arbitration claim form in this Court to be set aside, in July 2011. Neither side in the event pursued their respective applications in the English Court at that stage. There were active proceedings in Israel leading up to the decision of the Israeli Supreme Court on 11 February 2013 to refuse the Claimant's appeal against the District Court's decision of 22 June 2011. The trustee had in the meanwhile commenced proceedings in Cyprus and Namibia.

7. Two months after the Israeli Supreme Court's decision, in April 2013, the Claimant returned to Israel from Namibia, where he had been living, and on 22 April 2013 the Trustee obtained from the Israeli District Court ex parte a stay of exit order and an order that the Claimant deposit his passport, and sought orders that the Claimant was in contempt by virtue of having failed to comply with orders made by the Israeli District Court on 22 June 2011 ("the June Order") and on 1 May 2013 commenced fresh proceedings in Israel (against the Claimant, his son and the Companies) by a new Request for Instructions in the Israeli District Court. The Claimant filed an application to stay these proceedings, again relying on the arbitration clause in the 2002 Agreement, and opposed the Trustee's case that he was in contempt. On 20 June 2013, the Court annulled the stay of exit order, and concluded that the Claimant was not in contempt of court, but ordered that the Claimant file a response in compliance with the June Order on three specific matters within 15 days. The Claimant filed an affidavit responding to those three matters on 27 June 2013.

8. On 2 July 2013, the Israeli District Court gave a ruling on the Claimant's application for a stay pending arbitration. It referred to the application for a stay as being an *"in Limine request"* i.e. as an application by way of a preliminary issue or for a preliminary ruling. Judge Alsheich ruled as follows (as translated):

> "*There is no room to initiate an additional front in a case that is already full of many responses. Therefore the In Limine request will be considered with the main request and therefore the Respondents are to reply to the merits within the dates set for it. As far as the Respondents wish, they can raise In Limine arguments within their response.*"

The court thus ordered the Claimant to put in his response on the merits to the Trustee's claim for transfer of, and/or declarations in relation to the bankrupt's entitlement to, the disputed assets under the 2002 Agreement. There is an issue as to whether such response was required by 2 August or 7 August. The Claimant put in an application to appeal to the Supreme Court on 23 July 2013.

9. The Claimant had in the meanwhile on 9 July 2013 instructed English solicitors, and on 30 July the Claimant issued the arbitration claim form in these proceedings seeking an anti-suit injunction, and applied at 2pm on that day before Walker J, having given notice to the Trustee in Israel at 9.30am London time of his intention to make such application, with only 27 minutes notice of the actual timing. The urgency, as explained to the Judge, was the imminence of the date, potentially 2 August 2013, when the Claimant would become in contempt of the Israeli court if he did not file his defence on the merits. As it happened, the decision of the Israeli Supreme Court was received that morning, rejecting his appeal, and hence his application for a stay, and although the actual judgment in translated form was not available to his English solicitors, the fact of the Supreme Court's decision was relayed to Walker J. The relevant passage of the decision, as translated, of Judge Danziger of the Supreme Court was as follows:

> "*9. I have seen the applicant's claim that there is a high chance, or at least a reasonable chance, that his claim regarding the foreign arbitration clause will be accepted and as such the proceedings in the district court will be stayed. In other words, it was claimed that this is an irregular situation where it is justified to split the hearing between the preliminary claims and the claims to the merits. This argument is based on the ruling of this court which determined that there may be irregular and extraordinary circumstances where it is worthy to split the discussion and allow a party an extension to file his claims to the merits, when two cumulative conditions exist: firstly, that it seems that there is a reasonable chance that the preliminary claim will be accepted; secondly, that the party will be required to invest considerable resources, non proportional under the circumstances, to defend on the merits [See section 9 in the* ***Bublil*** *matter and the references mentioned there]. Indeed, such extraordinary and irregular situations may exist that may justify split of the hearing between the preliminary claims stage and the stage of claims to the merits, but I do not believe the matter of the applicant falls into the category of these irregular cases. As these two terms are cumulative, I think it is worthy that I avoid at this stage to discuss the question if there is a reasonable chance as the applicant claims regarding the foreign arbitration clause in accordance with section 6 of the Arbitration Law and the judgments on this matter, as the district court has not yet decided on this matter. It is enough to rule that the applicant has not met the burden of proof that this case is an irregular case that will require him to invest considerable and non proportional resources to defend on the merits on this specific matter. Anyhow, I will stress out that if the preliminary claim of the applicant is accepted and it turns out that his defence on the*

> *merits was unnecessary, the district court may order adverse costs in the favour of the applicant, and in this way compensate him for the unnecessary expenses he made [see section 10 in the* ***Bublil*** *matter].*
>
> *10. Therefore, the request is rejected. In light of the rejection of the request, also the request of stay of proceedings served by the applicant alongside with the request for appeal is rejected. As no response was required, no order for costs.*"

10. The basis upon which the ex parte order was granted by Walker J was that, the Israeli court having refused a stay pending arbitration, there was an imminent breach of the arbitration agreement contained in the English contract, by which the Trustee was bound as standing in the shoes of the Bankrupt, and which should be restrained by reference to authorities such as **The Angelic Grace** [1995] 1 Lloyds Law Rep 87 esp. per Millett LJ at 96, and in the light of **AES**. Walker J raised the question of whether there could be said to have been waiver, by virtue of the Claimant's participation in the Israeli insolvency proceedings, but it was, and indeed is, plain that the Claimant had from the beginning of the Israeli insolvency proceedings in 2009 sought to rely upon the arbitration clause, and to enforce it (unsuccessfully in the event) by seeking a stay in the Israeli courts.

11. There is no doubt that the English court would indeed expect a party seeking such an anti-suit injunction first to have taken such steps in the foreign court as would render it unnecessary subsequently to apply to the English court for an anti-suit injunction, and would certainly not hold the taking of such steps against that party, provided that there was no waiver. Contrary to the submissions of Mr Erez, it is plain that that course had been followed for some considerable time, in the event unsuccessfully, in the **AES** case. Mr Erez is also incorrect to state that there was in **AES** an express *negative* obligation not to bring foreign proceedings. This would not (as is made clear by Lord Mance at paragraphs 21-22) in any event make any difference, because such *negative* obligation would in any event be implied in a *positive* obligation to resolve all disputes by arbitration, but in fact there was no such distinction, and the arbitration clause enforced by the English courts in **AES** was to similar effect as the present one.

12. It is also now clear as a result of **AES** that a Claimant seeking to restrain proceedings being brought against him in breach of the arbitration clause does not need himself to contemplate or intend the bringing of arbitration proceedings, but he is simply entitled to restrain proceedings being brought against him otherwise than by arbitration (paragraphs 4, 21, 22 and 48 of Lord Mance's opinion in **AES**).

13. The Trustee immediately made clear in correspondence that he would not pursue any proceedings, in the light of the anti-suit injunction, against the Claimant, but he stated that he did not conclude that the injunction granted to the Claimant restrained him from pursuing proceedings against Mr David Bannai or the Companies. The relevant clause provides for arbitration in respect of *"any differences of opinions and/or disputes* [of] *whatever type or kind between the Parties and/or between the JVC and/or the Parties' Family Members (hereinafter: "the Dispute"), including in relation to the interpretation and application of the Agreement."* David Bannai is plainly a Family Member. The Claimant sought and obtained a further order, described above, from Hamblen J to cover his son and the Companies, on the basis, of which Hamblen J was

satisfied, that any claims against them would arise out of the 2002 Agreement, and any proceedings brought against them otherwise than within the arbitration would frustrate the effect of the arbitration clause and the order of Walker J.

The issues before me

14. These have been ably and thoroughly argued by Mr Erez himself, on his application to set aside both injunctions, and opposed by Mr Key QC:

(i) As to jurisdiction. There is no dispute as to the jurisdiction of Walker J to make the order he did. The only dispute is as to the jurisdiction of Hamblen J to grant the second injunction, on the basis that, as is plain, neither the Claimant's son nor the Companies were parties to the 2002 agreement: nor are they parties to these proceedings. I shall leave this issue until after I have resolved the question as to whether the injunction should be continued in respect of the Claimant.

(ii) As to discretion:-

a) It is not in doubt that, as in **The Angelic Grace** and **AES**, the English court can grant an anti-suit injunction, and indeed as Millett LJ states at 96: *"there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them…the jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."* Mr Erez submits that the existence of substantial insolvency proceedings in Israel, already in existence for some 4 years, in which the Claimant, albeit without waiver, has participated, is such a *good reason*, as is the respect that should be paid to a court-appointed trustee. He points out what Lord Mance says at paragraph 61 of **AES** namely that *"in some cases where foreign proceedings are brought in breach of an arbitration clause .. the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum."* Mr Key responds that in this case the foreign court has not been prepared to recognise or enforce that agreement.

b) As a fallback, Mr Erez asserts that the orders of Walker J and Hamblen J should be set aside (and not re-granted) on the basis of non-disclosure by the Claimant: and because inadequate notice was given of the application to Walker J for him to attend and lay before Walker J the matters now relied upon.

The Israeli proceedings

15. Mr Key's primary case is that all that matters is English law, the law of the contract and the law of the arbitration forum, whose court is entitled to enforce the arbitration clause. There is a dispute, and the Trustee's assertions as to the strength of his case and the alleged frauds committed by the Claimant are of no account where at English law the Trustee and the Claimant are bound to resolve those issues in arbitration. It is clear that an English court will not assess the merits of such dispute – see **The Halki** [1998] 1 Lloyds Law Rep 465 upholding Clarke J at [1998] 1 Lloyds Law Rep 49 and e.g.

Arbitration Law by Robert Merkin at 8.35-8.42. Nevertheless, particularly as Israeli law also accepts the subrogation of the Trustee to the arbitration clause and the primacy of the New York Convention, he is content in the alternative to engage with Mr Erez's argument by reference to the Israeli courts, and to assert that nothing that Mr Erez submits amounts to a *"good reason"* for the English court not to enforce the arbitration clause.

16. Mirroring the international position, Israeli arbitration law has two different provisions applying to the stay of court proceedings, s.5 of the Israeli Arbitration Law 5729-1968 relating to domestic proceedings, whereby the court *will stay the proceedings but "may refrain from staying of proceedings, if it sees a special reason why the dispute should not be dealt with by arbitration"*, and then s.6, relating to *"stay of proceedings under international convention"* whereby:

> "*When an action is brought before Court in a dispute which had been agreed to refer to arbitration, and an international convention to which Israel is a party applies to the arbitration, and that convention lays down provisions for a stay of proceedings, then the Court will exercise its power under section 5 in accordance with and subject to those provisions.*"

17. I have had the benefit of expert evidence from Mr Kehat for the Claimant and Mr Shachar for the Trustee. I consider that I was given rather more independent help by Mr Kehat than by Mr Shachar, who seemed (e.g. at pages 14-15, 19 and 22-23 of his report) rather more partisan and (particularly as he had not read the evidence) conclusory so far as the merits are concerned than was entirely helpful. As it happens, in relation to the most significant Supreme Court decision in the area, to which I shall return, the case of **Lavenberg v Bikur Holim-Hospital** 4956/07 April 2 2009, I do not feel that either of the experts gave me a full picture of the case, which I only obtained when a rough translation of the judgment was produced for me during the hearing. By reference to what has occurred in the Israeli courts, as described above, and from the experts' reports, of which I prefer that of Mr Kehat, I can reach the following conclusions.

18. The Israeli court has refused a stay. That is clear from the decision of the Supreme Court upholding that of the District Court: I have set out the relevant parts of both judgments above, but the crucial fact is that the order of the District Court dismissing the *In Limine* application has been upheld. This means that the proceedings, in breach of the arbitration agreement, are continuing in Israel, and to that extent the opportunity to which Lord Mance referred in **AES** for the foreign court to make an order in that regard has not been taken up.

19. The Trustee submits that all that has happened is that the Claimant has been required to put forward his defence on the merits, and prepare his case for trial, and that, as postulated by the decision of the Supreme Court, the District Court could still make a decision at a later stage upholding his case by reference to the arbitration clause: it may be that there could be some pre-trial hearing, once the evidence on the merits is gathered in, so the Israeli court has thus left open the possibility of enforcing the arbitration clause. However:

(i) Mr Shachar, the former Israeli Official Receiver, is quite clear as to the context and the intention of the Israeli court, when he says (at page 11 of his report):

> *"There is a possibility that when Bannai responds on the merits this will shed light on the whole matter and this may lead to the matter of the arbitration clause becoming redundant. This is because if the Court finds that in reality there is no dispute (for instance because, having been interrogated, Bannai might admit that he holds the Bankrupt's assets) the Court can then exercise its power under s.60(c) to order Bannai to transfer the assets to the Trustee and there will be no need to hear a dispute relating to the agreement".*

And at page 20:-

> *"The courts wish to hear the entire dispute and claims of Banai and determine if indeed there is a dispute to be resolved in arbitration".*

I for my part cannot see the relevance of the evaluation of the merits to the contractual entitlement of the Claimant to enforce the arbitration clause. All the more so if there are allegations of fraud involved in the dispute, the Claimant is contractually entitled to have those allegations resolved in arbitration, and not to have to lay out his case in court proceedings for its merits to be examined.

(ii) In any event it is quite clear that the stay application was not "*adjourned*", but dismissed, so that the case should proceed on the merits.

20. Mr Shachar suggests that the Israeli Insolvency Court could override the arbitration clause by refusing a stay in its discretion, and he refers to the decision of the Supreme Court in **Teva Pharmaceutical Industries Ltd v Pronauron Biotechnologies Inc** 1817/08 11 October 2009. However:

(i) Mr Kehat points out that **Teva** was not an insolvency case. It was a case where the court disregarded an arbitration clause in an agreement due to reasons of public policy, because it was important in the view of the court for the issues raised, relating to medical experiments performed on humans in Israel, to be dealt with in open court.

(ii) Mr Kehat points out that **Teva** was itself described as an exceptional case, and the discretion was emphasised by Chief Justice Procaccia to be *"very narrow"*: moreover **Teva** was a s.5 case and not an international s.6 case, where the existence of any discretion will be even more limited.

(iii) In any event, whether or not this case might be equated to the very exceptional **Teva** case simply by reference to its being in an insolvency proceeding, neither the District Court nor the Supreme Court has in fact given a decision (or even heard any argument) as to disregarding this clause, or refused a stay by reference to the **Teva** principle.

21. It is then said by Mr Shachar that the concept of disclaimer by a trustee of an onerous asset might arise. S.115 of the Israeli Bankruptcy Ordinance (new version) of 1980, *"Disclaimers of an onerous asset"*, provides:

> "*(a) In this section and subsequently, 'onerous assets'* [means] –
>
> *(1) land burdened with onerous conditions;*

(2) not fully paid up shares or stock in companies;

(3) unprofitable contracts;

(4) any other asset that cannot easily be sold at all or readily, because it requires the person who holds it to perform an onerous act or to pay an amount of money.

(b) If any one of a bankrupt's assets is an onerous asset, then the trustee may – subject to the provisions of sections 116 and 122 and with the approval of the Court – disclaim the onerous asset.

(c) When giving approval under this section, the Court may require notice to be given to interested persons, and it may attach conditions to the approval."

22. Mr Kehat points out, by reference to paragraph 33 of the Israeli Supreme Court's decision in **Cochavi** 673/89 24 August 1989, that before the court can consider the question of disclaimer of an onerous asset there must be a motion submitted to the court in advance by the Trustee, and there has been no such application. The Trustee responds that there could be such an application, and that he had mentioned in one of his early submissions in the Israeli courts in March 2010 (which I have not seen) the question of *onerous asset*. There is also an issue as to whether the disclaimer procedure arises except in the Request for Instructions procedure (adopted by the Trustee in this case) and whether in fact in this case such procedure is apt. There is no dispute between the experts that the use of such procedure must meet three conditions (including that they must not necessitate a complicated factual examination), and Mr Kehat's opinion is that in this case, where there are going to be serious allegations of fraud and wide-ranging evidence involving a number of different jurisdictions, the Trustee himself indicating that he intends to adduce evidence from at least three different factual witnesses, such form of proceedings is not appropriate. I am unable, and do not need, to resolve this issue. However:

(i) It is clear that the wording of s.115(4), which I have set out above, does to the English eye appear inapt to a situation where the Trustee wishes to rely upon the contract containing the arbitration clause: plainly the Trustee could disclaim the contract because it was - if the arbitration clause can be regarded as onerous - burdened with an onerous condition, but the statute only appears to allow the Trustee to disclaim the whole asset (the contract), not the burdensome, unprofitable or onerous part of it. Mr Kehat refers to this as impermissible *"picking and choosing"*. Insofar as Mr Shachar relies on **Cochavi**, Mr Kehat points out that this is an entirely different case, nothing to do with arbitration, and one where in the event the liquidator was not entitled to disclaim an agreement between tenants in an apartment building and the contractor, which was said to contain onerous entitlements for the tenants, and in any case there was no question of his keeping the benefit of the agreement without those entitlements.

(ii) Mr Shachar suggested that the case of **Lavi** 001708/04 19 April 2005 was a precedent and of assistance. Mr Kehat points out (and the Trustee now accepts) that **Lavi** is not a precedent, because it was a District Court decision, which is at best

guidance and not precedent, but in any event that any materiality in it has been overtaken by the significant Supreme Court decision in **Lavenburg,** to which I have referred above. By reference to the rough translation of that decision before me, the Supreme Court was dealing (paragraph 5) with the question whether there was room to stay the procedure, in accordance with s.5 of the Arbitration Act, by reference to the question whether the arbitration clause was considered an *onerous asset*:

(a) In paragraph 5, the Supreme Court inclined to the presumption that there could in general be no 'shaking off' of the arbitration clause by way of using the authority to forfeit an onerous asset. A receiver was not entitled to forfeit only a part of a contract; and prima facie the receiver is not allowed to shake off the arbitration clause whilst adopting the rest of the contract's conditions.

(b) In the same paragraph the Court further concluded that, on the face of things, the considerations needed by the court in the face of a request to forfeit an arbitration clause as an onerous asset should not be materially different from the considerations it has to weigh from the angle of staying the procedure according to (in that case) s.5 of the Arbitration Act.

(c) In paragraph 7, the Court considers that the mere collision with the tendency of the concentration of procedure (that is within insolvency proceedings) does not justify shaking off the arbitration agreement. It concluded that there was a potential difference between a claim against a company in liquidation, where the tendency not to enforce the arbitration agreement should be greater, whereas (paragraph 8) claims brought by a company in receivership are subject to normal limitation periods, and there should be a greater tendency to enforce arbitration agreements.

(d) Where (paragraph 8) it was appropriate to proceed by way of the Request for Instruction procedure, referring the issue to arbitration instead of having it in the insolvency court might burden the bankruptcy proceedings and complicate them; nevertheless when an arbitration clause exists the starting point is that it should be upheld, and it is not enough that the arbitration process burdens the liquidation or imposes an expensive burden upon it in order to be free of it.

(e) (Also paragraph 8), each case would depend upon its own facts, but there would be a justification to set aside an arbitration agreement in a claim concerning a cause of action unique to insolvency law.

(f) In the **Lavenburg** case itself, where the Court concluded (paragraph 9) that it was appropriate to be brought within the Request for Instructions procedure, there was a special insolvency question to be resolved (namely whether the cost of renovations gave rise to a set-off claim against the claim for rent), and consequently in the view of the Court this raised a unique issue of insolvency law, and in those circumstances the tendency prevailed to make sure the procedure should be in front of the insolvency court, even at the cost of not honouring the arbitration agreement.

Even assuming in the Trustee's favour that this is an appropriate case for the Request for Instructions route, there is no suggestion that a unique issue of insolvency law arises in this case. I prefer the submissions of Mr Key, and the opinion of Mr Kehat, that it is unlikely that this would be a case in which the Israeli court would uphold an application to disclaim if it were made, and if it were appropriate to be made. In any event, as can be seen, the Supreme Court itself makes clear that in an arbitration case the discretion would have to be weighed in accordance with the ordinary jurisprudence of stay

according to the Arbitration Act. In **Lavenburg** it was a domestic arbitration and s.5 applied. It seems to me very unlikely that the same result would arise in this case, where it is an international arbitration, and the more stringent provisions of s.6 would require to be considered.

23. In any event, and significantly, not only has the question of disclaimer of the arbitration clause as an onerous asset not yet arisen (save apparently in one mention in one pleading) but the Israeli courts have not made their decision on that basis. They have simply dismissed the application for a stay for the reasons set out above, without any mention of disclaimer of an onerous asset, not least because the Trustee has made no such application. The Trustee's submission to me is that he should be given the chance of doing so.

24. It is in any event far from clear to me why the provision for arbitration is or would be an onerous asset capable of being disclaimed, nor why the existence of insolvency proceedings should be sufficient to mount an application under s.6 of the Israeli Arbitration Act, with its important background of being mandatory save as permitted by the international conventions; and the New York Convention makes no exception for insolvency proceedings.

25. The Trustee relies on two matters, which could be said to be *forum non conveniens* matters, not normally relevant in the context of an anti-suit injunction, particularly where there is either an exclusive jurisdiction clause or an arbitration clause, and certainly not even encouraged by the Supreme Court in paragraph 7 of **Lavenburg**:

    (i) First the Trustee refers to the fact that it would be considerably more expensive for him to bring proceedings in a London arbitration than within the Israeli insolvency proceedings, where, particularly if he is permitted to continue to operate the Request for Instructions procedure, he will have himself no legal or court expenses to outlay. In London arbitration, there will be fees, which he estimates to be some £200,000, and what he asserts to be the need for instruction of English counsel and solicitors, although, as I commented to him, not intending in any way to flatter, as a lawyer and an advocate he is plainly of a calibre not to need such assistance, and his English is impeccable. In any event I am unpersuaded by the suggestion that such costs make arbitrating onerous. In this case it is not entirely inapt to note, given the existence of the arbitration clause and the fact that the Claimant has been seeking to rely on it since the very beginning of the Israeli proceedings, that a good deal of expense might have been saved had those arbitration proceedings been commenced some time ago, and without the need for the anti-suit injunction. But in any event the claim (for some $150 million) is sufficiently large, and the pool of creditors apparently supporting the trustee sufficiently available, to render the additional expenditure less material.

    (ii) The other matter upon which the Trustee understandably relies, again in effect by way of *forum non conveniens*, is that the Bankrupt is for the foreseeable future imprisoned in Israel, and, while able to attend an Israeli court room under close security, he would not be able to travel to London for arbitration proceedings. Plainly matters of video links, the taking of depositions and the admission and admissibility in London arbitration proceedings of written witness statements as opposed to oral evidence would need to be considered and

might well ameliorate this problem. But I do not consider that any of it either impinges upon my discretion or, in the light of what the Israeli Supreme Court has said, would be likely to tip the balance in favour of *onerousness*, or to amount to sufficient justification under s.6 of the Israeli Arbitration Act to oust the mandatory impact of the New York Convention.

26. For all these reasons I do not consider that the existence of the Israeli insolvency proceeding amounts to a sufficient *good reason* for the English court not granting, or not continuing, an anti-suit injunction. Even the Israeli Supreme Court did not consider that in the ordinary case the *'tendency of the concentration of procedure'* would justify shaking off the arbitration agreement, and at best the Trustee asks me to allow him to take the chance of applying to the Israeli court. I conclude that I can and should resolve the matter now. I see no reason why the issues between the Claimant and the Bankrupt should not be adjudicated in arbitration, and the result of the arbitration proceedings, which could, as with all arbitration proceedings, be concluded relatively speedily, can then inform the outcome of the insolvency proceedings. It suffices to add that that is what would occur in this jurisdiction, by reference to the provisions of s.349A of the Insolvency Act 1986, which applies where a bankrupt was party to a contract containing an arbitration agreement, before the commencement of his bankruptcy:

> *"(2) if the trustee in bankruptcy adopts the contract, the arbitration agreement is enforceable by or against the trustee in relation to matters arising from or connected with the contract."*

27. I can deal shortly with a few other arguments which were raised:-

(i) The fact that the allegations will include fraud by the Claimant does not prevent the operation of the arbitration clause or the validity of arbitration proceedings.

(ii) The existence of a requirement prior to arbitration of a mediation period in clause 9.3 of the 2002 agreement is of no materiality. Either there has already been mediation (there has been a number of unsuccessful meetings between lawyers), or there can be such an attempt prior to the commencement of arbitration by the Trustee.

(iii) The Trustee points out that he is not a personal party, but he is acting in the interests of the Israeli court, and the principles of comity and the requirement of cooperation within the Cross-Border Insolvency Regulations (and in particular Article 25) should be taken into account: such cooperation should encourage the grant by the English court of a stay of English proceedings by virtue of the existence of the Israeli insolvency. But it seems to me that it does not require the English court not to grant an anti-suit injunction where the Israeli court has failed to grant a stay where there is a valid and binding arbitration clause. Of course this court will always exercise caution before granting an injunction which may indirectly interfere with proceedings in a friendly court, but in my judgment this is a clear case for the grant of an anti-suit injunction, and provided, as I am sure will be the case, that the arbitration proceedings are commenced and concluded speedily, there ought not to be any material delay in the conclusion of the insolvency proceedings.

<u>Non-disclosure/Short notice</u>

28. The principles are well known, and I need not recite authority. When making an ex parte application, a claimant is obliged to make full and frank disclosure of any matters that might affect the mind of the judge in making an order. If there is such non-disclosure, then, even if the judge would still have made the same order, there is a jurisdiction in the court to set aside that ex parte order, even though the court may, if necessary after an interval and taking into account the impact of costs, re-grant the order. Although various matters were raised prior to the hearing, at the hearing only three matters remained relied upon by the Trustee:

(i) That there was insufficient disclosure of the existence or extent of the Israeli proceedings. There was an assertion in the Defendant's witness statements that the Claimant had been found in contempt, but I am satisfied such was not the case, and at best the Trustee at the time when the order was sought from Walker J was considering issuing proceedings for contempt in relation to what he considered to be the inadequate answers of 27 June. Indeed on 20 June the District Court had found that the Claimant was not in contempt of court prior thereto. I am satisfied that there was sufficient disclosure to Walker J of the Israeli proceedings, and indeed sufficient for him to query the position as to possible waiver, as to which he was reassured (and the matter has not been subsequently revisited).

(ii) The Trustee asserts that there was inadequate disclosure by the Claimant of what the Trustee submits to be a trail of alleged fraudulent activity by the Claimant, including proceedings in Poland, the United States and Namibia. Given that this was an anti-suit injunction in support of an arbitration clause, and in particular given what I have said at paragraph 15 above about the irrelevance of merits to the grant of a stay, I am satisfied there is nothing in this point.

(iii) The Trustee complains about the fact that the Israeli Supreme Court judgment of 30 July was not itself put before the court, albeit that its substance, namely its dismissal of the application for permission to appeal the refusal of the stay, was put before the court. The Trustee does not now pursue this case, given that the Claimant's English lawyers did not actually have the translated copy of the judgment, but he complains that it was not put before Hamblen J, by way of an update of the Israeli proceedings. Given the nature of the application to Hamblen J, which I have described in paragraphs 1 and 13 above, in regard to its simply being a supplementation of the earlier order by Walker J, I do not conclude that the precise terms of the Supreme Court judgment would have been of any relevance to Hamblen J. What seems to me to be the only relevant question is whether, in the light of the full content of the Supreme Court judgment once assimilated, the Claimant's advisers ought to have gone back to Walker J on the basis that there was something material to report which might have affected his judgment in granting the original order. I do not conclude that the fact that, when upholding the District Court's refusal of a stay, the Supreme Court gave as its reason that the Claimant had not satisfied the second limb in the case of **Bublil** and/or that the Supreme Court may have left open the possibility of a later application for a stay once the merits were fully before the court, would have, or indeed might have, affected Walker J's mind in any way.

29. It is obviously unfortunate that the Trustee in Israel was not given the opportunity to attend or to instruct counsel, given the very short notice before the application was made at 2 pm on 30 July. I accept the evidence, given in some detail by Mrs Dallas of the Claimant's solicitors, as to how, after her being instructed on 9 July she needed to understand the case, to contact the Claimant's former solicitors, to take instructions from the Claimant and to obtain Mr Kehat's report. By the time she was ready to make an application to the court, it was almost the end of the summer term (the last day being 31 July), and in any event any application needed to be made before 2 August (see paragraph 8 above). After finding out from the Commercial Court, through counsel's clerk, when, it being the end of term, a judge could be available, and having received that morning Mr Kehat's report, she and the Claimant only then made the decision to proceed that afternoon, and gave very short notice to the Trustee. Neither do I criticise her in those circumstances, nor do I conclude in any event that giving slightly longer notice to the Trustee would have made any difference to the outcome.

30. I therefore decline to discharge the injunction granted by Walker J, and for the reasons I have given I shall continue it until further order.

The order of Hamblen J

31. I turn finally to the issue with regard to David Bannai and the Companies. As the Trustee points out, they were not parties to the 2002 Agreement (David Bannai was then a minor and many, if not most, of the Companies did not yet exist), nor are they parties to the proceedings. It is the Claimant who has sought an injunction to restrain the Trustee from suing them in respect of matters forming part of the dispute between him and the Trustee arising out of the 2002 Agreement. It is not suggested that there are any disputes between the Trustee and them which arise otherwise: but if there are they would not be caught by the injunction.

32. David Bannai is of course a Family Member, and there was no real issue before me as to his inclusion in the injunction. The dispute before me related to the Companies. I am satisfied, as was Hamblen J, that there is jurisdiction to make such an order in order to avoid the arbitration clause being frustrated and circumvented. It is obvious, not least from the fact that the Trustee wished to continue with the very same Request for Instruction proceedings, to which the Companies and David Bannai had been joined, against them, even after the grant of the injunction by Walker J, that if no such order is made and the arbitration proceedings commenced between the Trustee and the Claimant, the Israeli proceedings would continue against the Companies in parallel, for the relief which the Trustee seeks in relation to transfers of ownership and declarations of interest in the assets, leading to oppressive litigation on two fronts and to no purpose. There is an analogy that can be drawn with the case of the **The Hornbay** [2006] 2 Lloyd's Law Rep 44 (where there was not an arbitration clause but an exclusive jurisdiction clause), where the Claimants were entitled to restrain proceedings not only against them but against their agents.

33. The order of Hamblen J does not, and my order continuing it would not, prevent:

    (i) any interlocutory relief capable of being obtained in any relevant jurisdiction in support of the arbitration proceedings, and by order either of the arbitrators or of this Court as the court supervising the arbitration.

(ii) any proceedings against those who are not party to the arbitration clause, once the arbitration is concluded.

34. The Claimant's application to continue the injunctions is consequently granted, and that by the Trustee to discharge them is dismissed.