Neutral Citation Number: [2020] EWHC 2819 (Ch)

Case No: PT-2020-000587

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST

Royal Courts of Justice
The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 23 October 2020

Before :

SIR ALASTAIR NORRIS

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Between :

PDVSA SERVICIOS S.A.	**Claimant**
- and -	
(1) CLYDE & CO LLP **(2) PETROSAUDI OIL SERVICES (VENEZUELA) LIMITED**	**Defendants**

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Graham Chapman QC and Anthony Jones (instructed by **Gresham Legal**) for the Claimant

Charles Dougherty QC and Luka Krsljanin (instructed by **Clyde & Co LLP**) for the First Defendant

David Allen QC and Michael Ryan with James Lewis QC and Robert Morris (instructed by **Kerman Legal Limited**) for the Second Defendant

Hearing dates: 24,25 and 30 September 2020

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment is to be handed down by the judge remotely by circulation to the parties' representatives by e-mail and by release to Bailii. The date for hand-down via e-mail is 2.00pm on 23 October 2020.

Sir Alastair Norris

1. In September 2010 PetroSaudi Oil Services (Venezuela) Ltd ("POS") (a Barbadian company) contracted with the Claimant ("PDV") (a Venezuelan state-owned entity) to provide a drilling rig and associated drilling services on a day rate basis for a term of seven years ("the Contract"). The Contract contained an arbitration clause. The Contract was governed by Venezuelan law.

2. PDV had a long-established reputation for late payment or even non-payment of contractors. POS therefore regarded it as an essential precondition to entering the Contract that there should be a performance guarantee. This was provided by a Portuguese bank upon the application, not of PDV, but of an associated company. It took the form of a standby letter of credit ("SBLC") subject to English law and jurisdiction. In the event that PDV did not pay an invoice rendered by POS then POS could make demand upon the bank and obtain payment of the sum due under the Contract even if there were a dispute between the parties as to whether the invoiced sum was in fact due; and it was essential that PDV could not by action or inaction stymie the operation of the SBLC. (On this see the observations of Christopher Clarke LJ in other litigation between POS and PDV concerning the SBLC at [2017] EWCA Civ 19 at [55]-[57] and [70]).

3. In August 2015 an UNCITRAL arbitration was initiated by PDV, the seat of which was in Paris. PDV claimed US$0.934 billion as damages for breach of the Contract: POS defended that claim and counterclaimed for unpaid invoices.

4. In March 2017 POS made demand under the SBLC in respect of unpaid invoices. On 31 March 2017 the three arbitrators ("the Tribunal") made what has been called "a super-interim order" directing the creation of an escrow account into which the proceeds of that demand upon the SBLC should be paid. The holder of the escrow account was a firm of English solicitors, Clyde & Co LLP. They acted for POS in the arbitration; but their role as stakeholders is separate, and there is an information barrier between those at Clyde & Co overseeing the escrow account and those at Clyde & Co acting in the arbitration. In their role as escrow account holders I will refer to them as "Clyde". During the course of the arbitration there were authorised periodic debits (enabling POS to pay its operating expenses) and some sums were released to pay the costs of the arbitration and the legal fees of both POS and PDV. The escrow account now contains something in excess of US$300 million.

5. The terms of the escrow were varied from time to time. Final escrow terms were established by Procedural Order 62 ("PO62") of the Tribunal dated 17 June 2019 and fully implemented on 19 June 2019. At its commencement PO62 set the scene:-

> "It is… useful to recall that the English courts have found that [POS] was entitled to make presentations under the SBLC. The escrow regime was established and maintained, *inter alia*, to avoid the risk that, if it turned out that [POS] was not entitled under the Contract to keep all the amounts that it had drawn under the SBLC, [PDV] be left with no prospect of recovering such amounts."

It recorded that, by PO56 (dated 21 January 2019), the parties and Clyde had been directed to enter into a more detailed escrow agreement to regularise the

terms on which Clyde acted as escrow agent in the escrow regime ordered by the Tribunal's orders. It then contained an account of how those more detailed terms had emerged resulting in a tripartite agreement between Clyde, POS and PDV. PO62 then directed that the escrow regime was governed by the agreed terms contained in Annex 1 to the Order ("the Tripartite Agreement") and directed Clyde, POS and PDV to sign Annex 1.

6. The material terms of the Tripartite Agreement recorded in Annex 1 are as follows:-

i) Clause 1.3 recorded that Clyde would hold and administer any escrow monies in accordance with PO62 and its annexed agreed terms;

ii) Clause 2.1 declared

> "Subject to clause 5.1, and sufficient funds standing to the credit of the escrow account, Clyde shall, after receiving an order of this Tribunal, instruct the bank to remit the escrow monies in whole or part… in accordance with the orders of this Tribunal. If an order is subsequently revoked or varied by a further order of this Tribunal Clyde shall from then on proceed in accordance with that further order."

iii) Clause 5.1 reserved to Clyde the right to be satisfied that, in directing a transfer out of the escrow account, all applicable laws and regulations (including those relating to money laundering) had been complied with;

iv) Clause 6.1 recorded that Clyde's duties were administrative only and limited to instructing the bank to hold and deal with the escrow monies in accordance with the orders of the Tribunal;

v) By clause 6.3 PDV and POS waived all rights they had or might have against Clyde arising out of or in connection with any of the arrangements referred to in or contemplated by PO62 and gave a joint and several indemnity to Clyde (with an exception for fraud or wilful misconduct on the part of Clyde);

vi) Clause 6.12 provided that Clyde should not be required to take any action if in its discretion it determined that such an action would or might be contrary *inter alia* to the terms of PO62; but if it refused to act then it must inform the Tribunal (and the parties) of its decision and PDV or POS could ask the Tribunal to appoint a new escrow agent.

7. The parties have proceeded on the footing that the Tripartite Agreement is governed by English law (notwithstanding that the applicable procedural law of the arbitration was French law). I shall proceed on that basis.

8. By mid-July 2020 the Tribunal anticipated delivering its award. By PO74 (made on 14 July 2020) the Tribunal notified Clyde and the parties that its Final Award would order one party to pay to the other party a "net amount" as a result of the adjudication of the claims and counter claims, and that the Tribunal would instruct Clyde to take its own fees and expenses, pay the outstanding balance of the Tribunal's fees, pay any outstanding weekly payments and "thereafter to transfer the balance of the escrow funds to the order of counsel of record for the Party or Parties indicated as the beneficiary(ies) of the Final Award at the end of the Operative Part of the Final Award…"; and the Tribunal made an order in those terms.

9. On 16 July the Public Prosecutor in Malaysia obtained a Prohibition Order from the Malaysian Courts purporting to "freeze" the escrow account in Clyde's hands. In the most summary terms, there was in Malaysia a scandal in which it was alleged (with cause) that a government minister had conspired to procure the fraudulent diversion of billions of US dollars from the state entity 1Malaysia Development Berhad ("1MDB") to Jho Low, some of which Mr Low had invested in a joint venture with POS's holding company. Some narratives described that holding company as "a front" for the extraction operation. Many of the details had been uncovered by investigative journalists and published in what was known as "the Sarawak Report" in early 2015. PDV had known of the Sarawak Report since the early part of the arbitration but had not relied upon it in the arbitration to suggest that the Contract was tainted by illegality and was unenforceable. Such an argument formed no part of its pleaded case and it was not used as a platform for seeking any relief, though it was raised as a challenge to the credibility of some witnesses. POS's principal asset (the drilling rig) had been acquired with the proceeds of an international bond issue: so, its link (if any) to the 1MBD scandal was not straightforward. But the Malaysian court thought it sufficient to try and "freeze" the escrow account.

10. On 17 July 2020 the Tribunal delivered its Final Award. Over 950 pages (and in 2650 paragraphs) the Tribunal adjudicated upon each of the claims and counterclaims made and gave its reasons for making a net award of just under US$380 million in favour of POS (after adjusting for sums paid out by way of periodic payments). The net award exceeded the sum standing to the credit of the escrow account. At paragraph 2652 the tribunal recorded:-

> "Pursuant to the Parties' agreement in PO47, it was common ground that the net amount following set off would be paid, in whole or in part, from the escrow account. The escrow funds will thus be used to satisfy (in part) the net amount determined in [POS]'s favour. While all of the Parties' outstanding prayers for relief are decided in the present Award, the Parties' agreement discussed above… and further reflected in the Escrow Terms (Article 4) provides that the Tribunal should instruct the Escrow Agent to transfer the escrow funds to one or both Parties in accordance with the result of the Award. This part of the Tribunal's mission is clearly agreed between the Parties. It is not necessary to determine whether this instruction to the Escrow Agent is part of a jurisdictional or a contractual mission of the Tribunal, or a combination of both, since this mission is not contentious and agreed between the Parties "

The Tribunal then noted that the balance remaining in the escrow account was not sufficient to cover the amount of the net award so that, after the transfer of the balance in the escrow account to POS, PDV would still owe the difference between the net amount and that escrow balance plus interest. The final Award then set out the instructions that had been given to Clyde.

11. The operative Part of the Final Award then declared and ordered:-

> "1. The net amount owed by [PDV] to [POS] amounts to US$379,843,732 plus interest at 12% as from 10 July 2020 until full payment .
>
> 2. Upon receipt of a copy of this Award, together with confirmation from Clyde & Co LLP that it is an accurate copy, the Escrow Agent is instructed – subject to its regulatory, statutory and legal obligations and other constraints – to transfer the balance currently remaining on the escrow account to the order of the said counsel for [POS], after verification with said counsel of the method by which the monies may be safely transferred for the account of [POS], after having instructed the bank holding the escrow fund first to pay the Escrow Agent's fees and expenses in the amount of £26,300 and the outstanding balance of the Tribunal's fees in the amount of £9919.01 and any outstanding weekly payments up to the issuance of this Award.
>
> 3. [PDV] is ordered to pay to [POS] the amount corresponding to the net amount identified in paragraph 1 above less the

> balance remaining in the escrow account referred to in paragraph 2 above and transferred to the Respondent, plus interest at 12% as from 10 July 2020 on the outstanding amount until full payment ."

There followed orders relating to payment of the Tribunal's fees and the payment of legal costs of POS (both to be paid by PDV).

12. Faced with a unanimous and comprehensive rejection of its claim and with the overwhelming success of the counterclaim PDV determined to challenge the effect of the Final Award. On 22 July 2020 PDV applied to the Paris Court of Appeal to set it aside.

13. The expert evidence of the French Lawyers before me states:-

i) PDV has lodged with the Paris Court of Appeal on 22 July 2020 a "Declaration of Appeal" for annulment of the Final Award;

ii) That the permissible grounds of challenge are set out in article 1520 of the French Code of civil procedure, the fifth ground being that recognition or enforcement of the award is contrary to international public policy;

iii) The grounds of the challenge are not clear (but do not have to be given until five months after lodgement of the Declaration) but (relying on the evidence of Mr Kakkad for PDV in this case) include an assertion that the entry of the Contract and its performance involved money laundering, bribery and corruption and thus the recognition and enforcement of the Award would be contrary to international public policy;

iv) That under French law and procedure, an international arbitration award is deemed immediately enforceable and that (in accordance with article 1526 of the French Code of civil procedure) such an enforceability is not affected by the filing of a challenge (subject to the power of the French Court to direct a stay or to recognise a stay imposed by a foreign court);

v) That the French Court of Appeal may either reject the challenge or grant partial or total annulment of the Award; but given the ground of the challenge partial annulment is unlikely, and that if the whole Award is annulled then it is deemed never to have existed in the French legal order. What exactly this means is not clear and could not be explained by Mr Chapman QC: whether it is only the Award that is annulled, leaving in place all of the Tribunal's procedural and interim orders (including those establishing the escrow account) and leaving the Tribunal still seised of the arbitration; or whether the entire arbitral process is a nullity and is deemed never to have existed (so that the escrow account ceases to exist) and a fresh arbitration before a different panel must be commenced.

14. Because the French appeal does not operate as an automatic stay (and because PDV did not apply to the French courts for an order staying the enforcement of the Award) some other means needed to be found by PDV to hinder the execution of the final order of the Tribunal as regards the escrow money. (PDV has made no application to stay execution of the balance of the Award due to POS: some US$88 million).

15. On 4 August 2020 PDV applied to Zacaroli J (without notice to Clyde) for an order restraining Clyde from distributing any of the funds held by it in escrow (save for the periodic drawing to which POS was entitled under the arrangements existing before delivery of the Award). As a matter of procedure, the application was made under CPR 64.2, invoking the court's inherent jurisdiction to determine any question arising in the execution of a trust.

16. Zacaroli J was clearly troubled that the matter was brought before the Court without notice to Clyde, but he treated the application as "very much on the borderline" and dealt with it. The argument before him proceeded on the footing that the money in the escrow account was a trust fund in which PDV had a contingent interest, the contingency being (originally) that it won the arbitration and (now) that it won the French annulment proceedings and that there was a further arbitration which it also won. The only issue identified was "the construction of the escrow arrangements and whether the trust has effectively come to an end" (transcript of 3 August 2020 p. 33F). It was, I should note, acknowledged that the application was "not entirely standard and, indeed, potentially novel".

17. It is therefore unsurprising that Zacaroli J's judgment also proceeds on the footing that Clyde is a trustee and that the only issues relate to the terms of that trust:-

> "… The argument put forward is that if the award is to be set aside under French law then that would result in there having been no instruction under the terms of the escrow agreement from the panel, because the only instruction is that contained in the award and the setting aside of the award sets aside the

> instruction. Thus, it is said that the claimant has at least a potential entitlement to the funds in escrow sufficient to justify seeking an order against the trustee preventing the funds being paid out, in circumstances where that might defeat their (potential) beneficial interest…. It seems to be at least arguable that because the French proceedings are sought in order to overturn the award, the claimant does retain a sufficient potential or contingent interest in the escrow fund justify seeking their retention and preventing the trustee from acting on what at the moment appears to be a valid instruction of the tribunal to pay to POS. I did raise a concern that what the claimant in practice is trying to do is to extend or amend the terms of the escrow agreement which, on its face, lasts only until the tribunal has issued its final award. In essence the claimant is seeking to continue the escrow arrangement pending a challenge to the award. As against that, however, Mr Chapman points out that although the escrow account was the product of an agreement between the parties, it was something they were directed to enter into by the tribunal. I am told the tribunal now has no function having given their final award. This is unlike, therefore, an order of the court where a party might be able to seek a stay of an order pending appeal. Moreover, I am informed that it is not in practice possible to get before a French court… so as to seek any interim relief in the context of the pending application to annul the award. In those circumstances I consider there is just about a serious issue to be tried that there exists a cause of action against Clyde & Co as trustees sufficient to found an application such as this for an interim injunction. ”

18. Accordingly Zacaroli J ordered that until the return date or further order Clyde must not distribute any of the funds held by it in escrow pursuant to the escrow arrangement established in the course of the arbitration, save for (i) the periodic payments which had been permitted before delivery of the Final Award and (ii) the recovery by Clyde of its fees and costs (“the Interim Injunction”).

19. PDV issued its Claim Form on 5 August 2020, with Clyde as the sole defendant (notwithstanding that on its analysis POS was the only other party with a contingent beneficial interest and was directly affected by the direction to Clyde that was being sought). The relief sought was an order pursuant to

CPR 64.2(a) to restrain Clyde from distributing the funds held in the escrow account pending the determination of PDV's application to challenge the Award. Its Application Notice seeking the continuation of the Interim Injunction sought its continuation "until trial or further order". But in oral submissions to me Mr Chapman QC confined the relief he was seeking to an injunction for a period of three months, by which time the battle lines in the French Court of Appeal would have been drawn.

20. The principles upon which interim injunctions are granted are so familiar and so well established that I do not need to set them out. But it is worth highlighting one aspect of applying the American Cyanamid [1975] AC 396 guidelines. The Court must be satisfied that ultimately there is a serious issue to be tried (i.e. the claim is not frivolous or vexatious so that the applicant has a real prospect of succeeding in its claim for permanent relief at trial). But if the claim rests upon a point of construction which is not dependent upon some contentious factual context, then the Court can decide the point and determine that there is not a serious issue to be tried. Indeed, in such a case it would wrong for the Court not to decide the point and so to dispose of the case: see Associated British Ports v TGWU [1989] 1 WLR 939 at 979-980 per Lord Goff.

21. There followed applications before Trower J (on 14 August 2020) and before Snowden J (on 19 August 2020) to which it is not necessary to refer (save to observe that as a result of them POS was added as an additional defendant, and the National Crime Agency was not so added).

22. On 21 August 2020 Clyde applied for PDV's claim to be struck out or dismissed, with the interim orders being discharged in their entirety. The principles upon which the Court acts in relation to such an application are also familiar:-

    i) I must consider whether PDV's case has a realistic as opposed to fanciful prospect of success, one that carries some degree of conviction and is more than merely arguable;

    ii) I must not conduct a "mini trial" or be drawn into resolving conflicts of fact more properly undertaken at trial;

    iii) If I consider that the application gives rise to a short point of law or construction and that I have before me all the evidence necessary for the proper determination of the question and that the parties have had adequate opportunity to address it then I should "grasp the nettle" and decide it.

23. The hearing before me was the return date of the Interim Injunction when PDV's application for a continuation and Clyde's application for striking out the proceedings (supported by a like application by POS) fell to be considered. At the conclusion of the hearing (including the further written submissions upon cases not cited to me but which I thought might be relevant) I was satisfied that PDV's claim against Clyde turned upon a point of construction which did not depend upon some contentious factual context and that I should grasp the nettle and decide it.

24. The starting point is that the monies paid to POS under the SBLC were undoubtedly the property of POS alone. PDV (which was deliberately not a party to the SBLC) had no proprietary interest in them. If the monies were an overpayment of an invoice subsequently found not to be due, then POS had a contractual obligation to return them or to make an allowance for the overpayment on the final settlement of accounts. As the Tribunal held (in paragraphs 1963-1964 of its Final Award):-

> "The SBLC was intended to provide security for the payment of specific invoices following a call on the SBLC… The link between each invoice and the corresponding proceeds is not severed when the proceeds are placed in escrow even though the settlement of the corresponding invoice is suspended until it is awarded. The proceeds remain proceeds referable to the invoice to which the SBLC call related. The key consideration is that the escrow funds represent and secure the payment of those invoices for which they were drawn from the SBLC. "

25. It follows that any proprietary interest of PDV in the SBLC monies must have been created by the mere fact that POS entered into the Tripartite Agreement and paid them to Clyde as "escrow agent". That is when the trust which PDV asserts must have been created.

26. On its face the Tripartite Agreement appears to contemplate an entirely conventional escrow arrangement. An escrow account is one species of stakeholder arrangement, where a third party receives money for which it must account pending a triggering event and is then required to pay it out in response to that event. The arrangement is generally (as here) embodied in a tripartite contract. It is well established that such arrangements do not of themselves create a trust of the monies so received.

27. In Manzanilla Limited v Corton Property and Investments Ltd (13 November 1996) (unreported but cited in Gribben v Lutton [2002] QB 902 at 911 [19]) Millett LJ said:-

> "The relationship between the stakeholder and the depositors is contractual, not fiduciary. The money is not trust money; the stakeholder is not a trustee or agent; he is a principal who owes contractual obligations to the depositors: Potters v Loppert [1973] Ch 399, 406 and Hastingwood Property Ltd v Saunders Bearman Anselm [1991] Ch 114, 123. The underlying relationship is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer."

28. In Bristol Alliance Nominee No1 Ltd v Bennett [2013] EWCA Civ 1626 Rimer LJ quoted that passage at the beginning of his summary of the principles to be derived from the authorities and continued:-

> "(3) Until the event happens the stakeholder holds the money to the order of both depositors and is bound to pay it (strictly an equivalent sum) to them or as they may jointly direct…
>
> (4) Subject to the above, the stakeholder is bound to await the happening of the event and then to pay the money to one or other of the parties according to the event. The money is payable to the party entitled on demand, and if the stakeholder fails to pay in accordance with the proper demand he is liable for interest from the date of the demand… "

29. That passage also makes clear that customarily the arrangement is entirely contractual (see in particular the reference to the stakeholder's obligation being to make payment of *an equivalent sum*). It does not create property rights in a segregated fund.

30. I began by noting that the Tripartite Agreement appeared to contemplate just such a conventional escrow or stakeholding arrangement, and I have examined the consequences of that. But it is necessary to examine the Tripartite Agreement to see whether upon its true construction its apparent effect is,

indeed, its true effect in law. As was pointed out by the Master of the Rolls in Tradegro UK Ltd v Wigmore Street Investments Ltd [2011] EWCA Civ 628 (which concerned an undertaking by a solicitor to hold the money) at [15]:-

> "The Undertaking is an arrangement negotiated for a commercial purpose, and therefore must be interpreted according to well established principles, namely by considering the words of the Undertaking, in the context of the factual matrix and taking into account commercial common sense. … As I see it, this exercise may result in the Undertaking being interpreted in such a way as to give rise to a trust, a stakeholder arrangement, a solicitors undertaking, or a personal contract (*and not all of these are by any means mutually exclusive*), but that is merely a result of the interpretation exercise" (Emphasis supplied).

31. To look first at the words of the Tripartite Agreement, there is no hint in them that POS intended, by signing the Tripartite Agreement, to create a trust of the SBLC monies then held by its solicitors. The courts are not very ready to hold that, where A and B agree an arrangement whereby A's money is held by a third party to protect a prospective claim by B (here a claim for re-imbursement of an overpayment of specific invoices), the money is to be treated as held on trust for B, or as security for B's claim. Clear words are needed to show that this was the intention of the arrangement before the court will hold that that is its effect: see Tradegro (*supra)* at [36]. There are no such "clear words" and Mr Chapman QC did not seek to identify any.

32. Indeed, the wording of the Tripartite Agreement points away from the creation of a trust of the escrow account. The words used are entirely those of personal obligation, not of the creation or transfer of property interests. The terms of clause 6.1 (that Clyde's duties were "administrative only" and limited to instructing the bank to hold and deal with the escrow monies in accordance

with the orders of the Tribunal) seem to rule out the assumption or imposition of the fiduciary obligations of a trustee. The terms of clause 6.3 (whereby PDV and POS waived all rights they may have or acquire against Clyde arising out of or in connection with any of the arrangements referred to or contemplated by PO62) are difficult to square with the existence of the core obligations of a trustee.

33. In the absence of clear words creating a trust arrangement and the presence of words giving a contra-indication Counsel for PDV drew upon the context: not so much upon the commercial context (as described by the Tribunal in the passages quoted in paragraphs [5], [10] and [24] above) but more upon what people said about the arrangement.

34. The first contextual matter relied on by PDV was the existence of the interim funding arrangement for the payment of its legal fees incurred in the arbitration. PDV applied for this relief in September 2018, asserting that

> "A denial of justice will also occur if the Application is denied. A great deal of [PDV's] money is now frozen in escrow. These funds should be used to pay [PDV's] legal fees…."
>
> and
>
> "... using a small share of [PDV's] own money for its own legal costs cannot possibly prejudice [POS]…"

The relief was granted (with the consent of POS which was concerned that the arbitration should proceed without delay). It was submitted by PDV that this grant of relief was a recognition that PDV had a contingent proprietary interest in the escrow monies. I was referred to PO54 of 18 December 2018 addressed those funding arrangements. This recorded:-

> "It is common between the Parties that they each have a sufficient likelihood of success on the merits to warrant an interim funding mechanism (that as a result, *the funds in escrow might belong to either Party* or in part to each Party), that the interim funding mechanism has been necessary to allow both Parties to pursue the Arbitration, that without such funding neither Party was in a position to defend properly its substantive rights through the Arbitration, and that only the quantum of the funding has been disputed. " (Emphasis supplied).

PO54 preceded PO62 (which recorded the terms of the Tripartite Agreement applicable at the date of the Tribunal's award). So that is why PO54 is relied upon as establishing a context rather than as a direct aid to construction.

35. In my judgment neither the interim funding arrangement nor the terms of PO54 assists. In saying that the funds in escrow "might belong to either Party" the Tribunal was doing no more than saying that they might become payable to either party (or be shared) depending on the terms of the Final Award. This is, I think, clear from the terms of the Final Award itself where the Tribunal said at [2625] (in relation to the payment of its own fees out of the escrow account):-

> "…these payments have been financed by the escrow funds, which are monies of [POS] placed in escrow to secure a contingent obligation of [POS] to reimburse paid invoices insofar as they were rightly disputed by [PDV]…"

There is no acknowledgment (by POS or by the Tribunal) that PDV is a contingent beneficiary entitled under a trust of the escrow account.

36. The second contextual matter relied upon was the response of the parties to a claim by Stephenson Harwood ("SH") to a lien over the escrow funds in respect of unpaid costs. Stephenson Harwood had acted for PDV and associated companies in the arbitration and other matters but were unpaid. In

December 2018 SH sought an order that no monies should be paid out of the escrow account (other than the periodical payments in favour of POS and any award in favour of POS) without notice to them. The legal ground for the claim was the decision in Halvanon Insurance Co v Central Reinsurance Corporation [1988] 1 WLR 1122. This decided that where a solicitor, whilst acting for a client, secures a fund which may inure to the benefit of its client, then the solicitor has an interest in the fund in circumstances in which it no longer acts but has outstanding fees and the fund is to be paid to the solicitor's former client. SH argued in evidence:-

> "I believe that… the correct analysis of the current situation is that the money held in escrow belongs to [POS], but [PDV] has an equitable charge over it or an interest which is analogous to an equitable charge."

SH were therefore not arguing that the escrow account was a trust fund: indeed, they were asserting that it belonged to POS. But in his evidence in response to the SH claim the solicitor for Clyde observed:-

> "Again, while it is a matter for submission, it is unclear how [SH] can have a lien over a fund where *the contingent beneficiary in the fund*, or part of it, is an entity which is not contractually liable to pay the solicitor's fees." (Emphasis supplied).

37. This observation preceded the Tripartite Agreement and was made at a time when Clyde, PDV and POS were being directed to enter into a detailed agreement relating to the escrow account and were in negotiation to do so. The loose description of PDV as a "contingent beneficiary" by the solicitor for one of the parties to those negotiations cannot provide material context for the interpretation of the Tripartite Agreement, such that the language of personal obligation must be read as creating a trust. The fact that nobody challenged

SH's assertion that PDV had an equitable charge over what was acknowledged to be POS's money does not avail PDV in the slightest. If (and it is a big "if") an equitable charge existed, then that might give rights against POS; but it would not enable PDV to invoke the Court's inherent jurisdiction over trustees to give directions to Clyde.

38. The third contextual matter relied upon was the fact that under clause 2.1 of the Tripartite Agreement the money deposited with Clyde had to be paid out to satisfy the award. This (it was said) showed that that money had been *appropriated* to satisfy the award so that PDV and POS each had a contingent property interest (dependent on the terms of the award). I do not accept this submission. The escrow money was the proceeds of demands under the SBLC arising from specific unpaid invoices and notwithstanding the payment into the escrow account remained referable to the invoice in respect of which the call had been made. In relation to each of those invoices the Tribunal would either say (i) that it had been properly paid to POS (and must therefore be released to POS) or (ii) that it was not properly payable, that POS had been overpaid and was contractually bound to reimburse PDV, and that the outcome of the accounting exercise was that the overpayment should be paid to PDV. Assuming (and I do not intend to decide the point) that the entry into this arrangement immediately created an equitable charge in favour of PDV over an unascertained portion of the escrow account, the creation of such a charge is not the creation of a trust fund of the entire escrow account which both PDV and POS are contingent beneficiaries, nor is it the creation of a trust of an unascertained sum of which PDV is a contingent beneficiary.

39. As regards commercial common sense (so far as of assistance) this points away from the Tripartite Agreement creating a trust. PO62 was made in the course of an arbitration with a French seat arising out of a commercial contract between a Venezuelan state entity and a Barbadian company which was itself governed by Venezuelan law. Nothing in that context suggests that as a matter of commercial common sense the parties to the Tripartite Agreement must have intended to introduce the English law of trusts into their commercial arrangements.

40. In an endeavour to sustain the invocation of the inherent jurisdiction of the Court to give directions to trustees Mr Chapman QC submitted that the Court would give directions even if the very existence of the trust was in doubt. He relied on four cases. They do not establish the proposition. But in any event, I do not think that there is an element of doubt about whether a trust exists or not. I am clear in my mind that upon the true construction of the Tripartite Agreement there is no trust of the escrow money.

41. In Finers v Miro [1991] 1 WLR 35 a solicitor held assets on behalf of his client (C): but it appeared that a liquidator might have a claim to those assets. The solicitor sought the directions of the Court. C argued that no trust in favour of the liquidator had been established so that the Court had no jurisdiction to give directions. The Court of Appeal held that the absence of any established trust in favour of the liquidator

> "... does not avail [C] if there is a trust for the benefit of [C] against which the liquidator…might be entitled to claim."

Such was the case. The solicitor was undoubtedly a trustee (although for whom was a matter of doubt). He could seek directions. The case says nothing

about whether the liquidator (who was not demonstrated to be a beneficiary under a constructive trust) could have asked the court to give directions to the solicitor. Since the existence of a trust was not in doubt the case does not assist PDV.

42. In Bank of Scotland v A [2001] 1 WLR 751 the bank thought that it might be constructive trustee for X of money held in its customer A's account. It sought directions. The Court of Appeal thought that it might have been right so to do (since there was a real risk of the bank incurring liability in equity as an accessory to a breach of trust) but declined to decide the point. The bank was not a trustee of the money in customer A's account and its correct course was to seek as against the SFO (not as against A) an interim declaration. The case says nothing about whether X (the putative beneficiary) could ask the Court to give directions to the bank.

43. Barclay v Smith [2016] EWHC 210 was the decision of a Master on an uncontested application concerning the appointment by the Court (under its inherent jurisdiction) of new trustees where the relevant provision in the trust's constitution had not been followed. Appointments of the original trustees expired by effluxion of time, but they continued to be the legal owners of trust property. The Master held that as such legal owners the original trustees whose appointments had lapsed were still in an important sense "trustees" although they would have to hand over the assets to trustees appointed in their place when called upon to do so. There was an express trust. I do not see that this case is relevant to the issue in this case, which is whether a trust was created by the Tripartite Agreement.

44. The fourth case, Keays v Parkinsons Executors [2018] EWHC 1006 (a decision of a Master on costs), was acknowledged by Mr Chapman QC to be of no real assistance to me because the relevant question was not in issue: I shall not consider it further.

45. I am clear that there is no real prospect of PDV establishing at any hearing of the Part 8 claim that upon its true construction the Tripartite Agreement constituted Clyde a trustee to whom directions might be given. The construction of the Tripartite Agreement is clear. Neither the words used in the Tripartite Agreement nor the context in which those words fall to be construed (nor yet commercial considerations) leave room for any realistic argument that a trust was created of POS's money paid under the SBLC.

46. There is an additional hurdle in the way of PDV. In order to seek on 5 August 2020 from the Court directions to Clyde, PDV would have to show that the escrow arrangement survived the Final Award delivered on 17 July 2020. Again, this involves construing PO62 and the Tripartite Agreement.

47. On their face these documents are clear. By agreement between PDV, POS and Clyde the escrow monies were to be dealt with in accordance with the orders of the Tribunal and not otherwise. By its Final Award and consequential Order the Tribunal instructed Clyde to transfer the balance currently remaining on the escrow account to POS. After delivering its Final Award and making that order giving effect to it the Tribunal is (it is common ground) *functus officio*. There will be no further orders of the Tribunal. The triggering event or the contingency has occurred. The credit balance on the escrow account must be dealt with in accordance with that final order of the

Tribunal (as the parties have agreed it shall be) and the escrow account dependent upon a contingency has ceased to exist. The credit balance is confirmed as belonging to POS. It is common ground that under French law the Tribunal's order remains in full force and effect and is not subject to any stay.

48. To avoid this consequence PDV argues that there is to be implied into the Tripartite Agreement a term to the effect that the escrow account is not to be dealt with in accordance with the final order of the Tribunal if that final order is subject to an application to annul it. There are at least four difficulties in the way of that submission.

49. First, the basis for the implication of such a term was never spelt out. It is certainly not necessary to give business efficacy to the Tripartite Agreement. It is certainly not so obvious as not to require expression. It is one thing for Clyde to agree to administer a bank account subject to the orders of the Tribunal pending the determination of the current arbitration. It is quite another for Clyde to agree to administer a bank account pending the determination of an application to the Paris Court of Appeal for annulment, any further French appeal and any further arbitration (possibly going into 2024 and beyond), in circumstances where no one can say (i) what the actual effect of an annulment of the Final Award would be or (ii) upon whose orders Clyde was to act in its administration of the account (which the Tribunal has held now belongs to POS, to which holding the French courts will currently give effect).

50. Second, the content of the implied term was never spelt out. It is all very well to say that there is an implied term that the final order of the Tribunal should not be executed if the final award is subject to an application to annul. But suppose the Final Award is indeed annulled so that the triggering event has not occurred: the triggering event can now never occur (because it is common ground that the Tribunal is *functus officio* and cannot issue any further orders). How are the words of the Tripartite Agreement then to be read? As expressed, the contractual provisions cannot be implemented. So, are more terms to be implied which keep the escrow account in being but require Clyde to act on some other orders? If so, this is not to imply terms into the Tripartite Agreement which were unexpressed because obvious or are required to give business efficacy. It is to construct an entirely new agreement which the parties never made.

51. Third, such an implied term is contrary to the express terms of an agreement carefully negotiated between experienced commercial parties and incorporated into the order of a very highly qualified Tribunal. PDV is attempting to stop Clyde performing its contractual obligation as clearly spelt out in the Tripartite Agreement.

52. Fourth, PO62 was made in exercise of the power conferred by Article 26 of the UNCITRAL Rules. This enabled the Tribunal to put in place a temporary measure to maintain the status quo pending the determination of the dispute or to provide a means of preserving assets out of which a subsequent award may be satisfied. Such orders lapse or expire with the delivery of the Final Award.

53. It is no answer to say (as PDV submitted) that the parties must be taken to have known that French law permitted the annulment of the Final Award and the Tripartite Agreement must be construed in the light of that possibility. On that footing the parties must also be taken to have known that French law permitted an application for a stay on the execution of the Final Award and that it would remain in full force and effect absent such an application.

54. In my judgment there is no argument with any real prospect of success that under PO62 and the Tripartite Agreement the escrow account survived the Final Award and can be dealt with otherwise than in accordance with the orders of the Tribunal.

55. For these reasons I will not continue the Interim Injunction and I will give summary judgment for Clyde and for POS on the Part 8 claim brought by PDV. As both Zacaroli J and I observed in the course of the hearings before us, what PDV is really seeking is a "freezing order" against POS to preserve the sum received by it from the escrow account pending PDV's attack upon the Final Award by virtue of which POS became entitled to it. But PDV seeks to avoid the rather more stringent requirements for the grant of such relief by the use of CPR 64. However, the arguments for the existence of the trust relationship upon which CPR 64 depends are fanciful.

56. I will hand down this judgment remotely in accordance with the current practice. I will receive short written submissions on costs and any consequential matters from Clyde and from POS by 4.00pm on 30 October 2020 and from PDV by 4.00pm on 6 November 2020.