Neutral Citation Number: [2020] EWHC 697 (Comm)

Case No: CL-2019-000388

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 25 March 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

DAELIM CORPORATION	**Claimant**
- and -	
(1) BONITA COMPANY LIMITED	**Defendants**
(2) EASTERN MEDIA INTERNATIONAL CORPORATION	
(3) FAR EASTERN SILO & SHIPPING (PANAMA) S.A.	

- -

James Leabeater QC (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Stephen Phillips QC and Wei Jian Chan (instructed by **MFB Solicitors**)
for the **First Defendant**
Nicholas Kazaz of **Holman Fenwick Willan LLP** for the **Second and Third Defendants**

Hearing date: 16 March 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 was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11.00 am on 25 March 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. In June 2019, the claimant ("Daelim"), the first defendant ("Bonita") and the second and third defendants jointly ("EMIC") entered into a Termination and Settlement Agreement ("the TSA") by which they settled terms for the early termination of bareboat charters under which Daelim had let to Bonita and Bonita had sub-let to EMIC the Panamax bulker "*DL Carnation*". At the time, Daelim was owed c.US$1 million by Bonita in bareboat charter hire for April and May 2019. (I have rounded off the amounts referred to in this judgment as exact amounts do not matter for present purposes.) The TSA was dated 4 June 2019 and provided for redelivery after completion of discharge of the vessel's then current voyage to China, expected to mean redelivery on 10 June 2019. In the event, redelivery occurred on 13 June 2019.

2. The TSA provided for payments by EMIC of:

   i) c.US$6 million, directly to Daelim; and

   ii) c.US$½ million, to Bonita;

   as a "*full and final indemnity and settlement to any and all claims of loss, damage and/or incidental expenses with regard to the charter hire payable at the rate specified in the respective charter party and for the charter period not performed by EMIC and Bonita, and the costs of drydocking and damage repairs, if any, turned out to be required in respect of the Vessel's physical conditions upon its redelivery …*" (TSA, Clause 6).

3. Each bareboat charter provided for arbitration of disputes in London under LMAA Terms; the TSA provided for arbitration in Hong Kong in the following terms:

   > "*Disputes and Claims if any the parties may have which are arising out of and/or in connection with performance and enforcement of this Agreement shall be submitted to and settled by a single arbitrator appointed by the Hong Kong International Arbitration Center ("HKIAC"), to that English law and the rules and practice of the HKIAC shall be adopted and apply.*"

4. No dispute arose over the payment due from EMIC direct to Daelim under the TSA. However, in relation to the payment due to Bonita under the TSA:

   i) EMIC was ready, willing and able to pay whomever it was obliged to pay; however

   ii) Daelim and Bonita each asserted an entitlement to be paid, in Daelim's case by virtue of what it said was an assignment to it, under or pursuant to the terms of the head charter, of Bonita's rights, of which EMIC had notice; and

   iii) Daelim wished to pursue its asserted right as assignee since Bonita had not paid the April and May hire originally due under the head charter.

5. It is obvious that in those circumstances (and all things being equal):

i) A claim by Daelim against Bonita for the unpaid April and May hire was a claim to be brought in London arbitration under the head charter.

ii) A claim by either Daelim or Bonita against EMIC for the TSA debt was a claim to be brought in Hong Kong arbitration under the TSA, Daelim being bound as assignee (as it asserted) to pursue EMIC, if at all, only in accordance with the arbitration clause that bound Bonita and also being bound by that arbitration clause directly as a party to the TSA.

There are complications, to some of which I shall have to return below, in relation to both of those basic propositions.

6. Daelim was concerned that if EMIC paid Bonita, the funds paid would disappear before any final determination of whether EMIC should have paid Daelim. EMIC was willing to pay into a joint account if appropriate terms could be agreed, to leave Daelim and Bonita to argue out between them which had the better claim to be paid. Daelim supported the idea; Bonita did not. In the absence of a consensual, tripartite solution (interim or final), EMIC made it clear it would pay Bonita if not restrained from doing so.

7. In those circumstances, on 18 June 2019 Daelim sought and obtained from this court *ex parte* an injunction in respect of "*the Disputed Sum*", defined as "*the sum of US$474,100 payable by [EMIC] under the [TSA] and referred to in [Bonita's] Statement of Account dated 14 June 2019*". The injunction, granted by Jacobs J ("the June Order"):

   i) restrained EMIC from paying the Disputed Sum to Bonita, pending further order of the court (paragraph 5.1 of the June Order);

   ii) required EMIC to pay the Disputed Sum by 4 pm on 21 June 2019 (a) if possible into an agreed account subject to the joint control of Daelim's and EMIC's solicitors or as otherwise agreed by the parties, failing which (b) into court (paragraph 5.2 of the June Order); and

   iii) restrained Bonita, in these terms (paragraph 5.3 of the June Order), from pursuing EMIC under the TSA: "*[Bonita] shall not, until further Order of the Court, demand and/or take any steps to demand or to recover the Disputed Sum from [EMIC]*".

8. The return date under the June Order was 28 June 2019, when the matter again came before Jacobs J. It was agreed that the 1-hour listing was insufficient to deal with the arguments that were emerging, and that since EMIC's solicitors, HFW, had now received the amount of the TSA debt from EMIC into their client account it might be possible for an undertaking as to how those receipts would be dealt with to replace the injunctions against EMIC but the parties' positions in relation to the original propriety of the June Order should not be prejudiced by any order made to vary it pending fuller argument.

9. The order to be made on that hearing was debated at length in correspondence involving Mr Leabeater QC and Stephenson Harwood for Daelim, Jeremy Brier of counsel and MFB for Bonita, HFW for EMIC, and Jacobs J via his Clerk, until finally

the judge issued an order on 17 July 2019 ("the July Order"). The July Order deleted paragraphs 5.1 and 5.2 of the June Order upon an undertaking from EMIC and HFW concerning the balance standing on the HFW client account, but left paragraph 5.3 in place. Bonita was required to issue any application to challenge the June Order by 19 July 2019. Paragraph 6 of the July Order made clear that apart from the removal of paragraphs 5.1 and 5.2 (and consequent amendment of the Penal Notice in the June Order so as to be addressed only to Bonita), "*pending the determination of such application or further Order of the court, the [June] Order and in particular paragraph 5.3 thereof shall continue*."

10. This is my judgment upon Bonita's application, by Application Notice dated 19 July 2019 pursuant to the July Order, to discharge paragraph 5.3 of the June Order as thus continued. Mr Phillips QC for Bonita emphasised throughout that the sole issue now is whether the relief granted by paragraph 5.3 should have been granted (and, if so, whether it should still be continued). Not so, Bonita contends, on the basis that it was (a) not necessary, (b) not appropriate, and (c) obtained upon a presentation of the case to Jacobs J *ex parte* that was incomplete so as to be misleading and unfair to Bonita (or, if necessary, on the basis that it does not serve any proper or useful purpose now even if properly granted originally).

11. For Daelim, Mr Leabeater QC argued that the relief granted by paragraph 5.3 was a necessary and appropriate *quid pro quo* for requiring EMIC to pay into court, absent an agreed joint account arrangement; that it remains necessary and appropriate as a *quid pro quo* for the undertaking given by EMIC by the July Order; and that there was no unfairness in the *ex parte* presentation of the case. EMIC made submissions both in writing, and through Mr Kazaz at the hearing, in support of the original granting, and continuation now, of that relief.

Section 44(3)

12. The claim, for all three elements of injunctive relief, was founded upon s.44(3) of the Arbitration Act 1996, either directly (in support of what would be a London arbitration under the head charter) or indirectly via s.2(3)(b) of that Act (in support of what would be a Hong Kong arbitration under the TSA). There has been no challenge in the event, either by Bonita or by EMIC, to this court's jurisdiction over them to determine Daelim's s.44(3) claim as brought (although in EMIC's case that is complicated by the fact that it has never been served); and there is no challenge, as I have already indicated, to the granting on the merits of the relief granted *ex parte* by paragraphs 5.1 and 5.2 of the June Order.

13. Bonita does, however, challenge the court's jurisdiction to grant the relief granted by paragraph 5.3 of the Order in the different sense that it was not, says Bonita, an order falling within the scope of the court's power under s.44(3) to interfere in the arbitral process. That scope is narrow, entitling the court to act, in cases of urgency, without the permission of the relevant arbitral tribunal or the agreement of the other party or parties to the relevant arbitration agreement, so as to make "*such orders as it thinks necessary for the purpose of preserving evidence or assets*". No point was taken about urgency. The argument concerns the necessity, if any, of the relief granted by paragraph 5.3 of the June Order for the limited and exclusive statutory purpose of preserving assets (this is not a case about preserving evidence).

14. That the challenge to the June Order is limited to paragraph 5.3, together with the fact that paragraph 5.3 was and is sought to be justified only as ancillary to the primary relief granted by paragraphs 5.1 and 5.2, allows me in the main to pass over some basic concerns I have about the June Order. In short, I do not find it obvious, and should not be taken to have decided, that the principal relief sought and granted was appropriate:

    i) EMIC was a debtor under the TSA facing competing claims from Daelim and Bonita to be paid under the TSA. It decided to pay Bonita, at risk as to whether that would be a good discharge, rather than interplead (the obvious forum for interpleader being Hong Kong under the HKIAC Rules, in particular Article 23 (Interim Measures) and Schedule 4 (Emergency Arbitrator Procedures));

    ii) there was no case put forward that EMIC could not or would not pay Daelim, if held to have been the proper payee, if it had first paid Bonita but *ex hypothesi* failed by doing so to obtain a good discharge (there was a passing observation *ex parte* that Daelim did not know anything about EMIC's financial position, but that is not the same thing at all);

    iii) Daelim's concern was that the proceeds of a payment by EMIC to Bonita would disappear (not in the ordinary course of business) before Daelim had a final arbitration award to enforce (if it had a good claim for the unpaid head charter hire), but that concern (if well-founded) should have been addressed, one might think, by a freezing order or other relief against Bonita (and indeed a freezing order was later obtained by Daelim against Bonita in Hong Kong), and not by an injunction against EMIC;

    iv) it is not easy to see how ordering EMIC not to pay Bonita preserved any relevant asset, so as to bring that order within s.44(3) of the 1996 Act, but it is only <u>that</u> interference (telling EMIC not to pay Bonita) that might arguably justify requiring EMIC to pay into court, and it is only that requirement that has been said to justify, as *quid pro quo*, the further injunction stopping Bonita from pursuing EMIC in Hong Kong. I shall have to consider this aspect further because whether that last injunction was needed for the purpose of preserving assets cannot be considered meaningfully without an identification of the asset that the primary relief under s.44(3) was designed to preserve.

15. The limited nature of the court's power under s.44(3) of the 1996 Act was confirmed and emphasised by the Court of Appeal in *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1 WLR 3555. Thus, the only orders that can be made under s.44(3) are orders judged to be necessary for the preservation of evidence or assets: see esp. at [37]-[38], [45]-[47]. Only such a necessity will justify intervention by the court, since the intention is that there be as little interference with the arbitral process as possible: *ibid*. In the normal way, precisely what orders may be justified on the specific facts of any particular case will turn on those facts. The court must be able to make such orders as on the particular facts are required to ensure it can give effect to a decision it has made that something must be done (or prohibited) for the statutory purpose. That, I think, is the point being made by Clarke LJ (as he was then) at [49], although it is not the easiest of paragraphs to understand. But come what may, any order made (either a primary requirement or prohibition, or an ancillary order to make

that primary order effective) must be justified by a judgment that it is necessary for the purpose of preserving evidence or assets.

The July Order

16. As I have said already (paragraph 9 above), the July Order lifted the injunction under the June Order preventing EMIC from paying Bonita under the TSA and the injunction requiring EMIC to pay into court in the absence of payment into an agreed joint account. That was done upon HFW having confirmed receipt from EMIC into their client account of the TSA debt amount (that receipt being defined as "the Sum Received") and upon an undertaking given by both EMIC and HFW "*that the Sum Received shall remain in [HFW's] client account and shall only be paid out, with interest earned thereon in the said account, …: (a) pursuant to a written agreement signed by or on behalf of all parties; or (b) if released from this undertaking by further order of this Court.*" There were seven numbered recitals to the July Order. Recital (2) recorded HFW's confirmation of receipt of (and defined) the Sum Received. Recital (3) recorded their and EMIC's undertaking.

17. The effect of that undertaking was to create, in effect, a secure fund under the control of this court, through HFW, against which Daelim or Bonita might be able to enforce its right under the TSA to be paid by EMIC, once it had an enforceable award against EMIC (or a tripartite agreement on whom EMIC should have paid). To be clear, I use 'secure' loosely and do not intend by it any decision as to whether the EMIC/HFW undertaking would give Daelim and Bonita priority over other creditors of EMIC were EMIC to fall into insolvency. Whatever the position as to that, the position generally was complicated by the other recitals to the July Order. They represented between them what can only be described as a messy, incomplete compromise after an inconclusive return date hearing and lengthy correspondence.

18. Recital (1) reserved Bonita's and EMIC's rights to contest this court's jurisdiction over them.

19. Recital (4) reserved all parties' rights to contend that EMIC and HFW should (or should not) be released from their undertaking "*in consequence of any developments that may take place hereafter, including but not limited to (i) any application [by Bonita to challenge the June Order] or (ii) any award by the tribunal constituted under [the head charter] or (iii) any award by a tribunal constituted under [the TSA]*." As indicated by the different wording ('the tribunal' in (ii), 'a tribunal' in (iii)), by mid-July 2019 a reference to arbitration had been made by Daelim under the head charter, but no arbitration had been commenced under the TSA.

20. Still today there is no reference to arbitration under the TSA. Bonita stands enjoined by paragraph 5.3 of the June Order, as continued, from commencing any reference – any claim it might meaningfully refer to arbitration under the TSA would involve it, by referring that claim, in taking a step to recover the Disputed Sum from EMIC; and Daelim has chosen to focus its effort to date on the head charter reference. The arbitrators under the head charter reference issued a partial award in December 2019 upholding Daelim's claim for the unpaid hire of c.US$1 million, rejecting (a) an objection to jurisdiction by Bonita, contending that the head charter arbitration agreement was superseded by the arbitration agreement in the TSA, and (b) a defence asserted by Bonita that by the terms of clause 6 of the TSA (see paragraph 2 above)

there had been an accord and satisfaction discharging Bonita's debt (an argument, in other words, that the TSA compromised accrued hire liabilities as well as early termination liabilities). Bonita has issued an Arbitration Claim Form to pursue both of those contentions, under (a) s.67 of the 1996 Act and (b) s.69 of the 1996 Act respectively.

21. Recital (5) recorded acceptance by Daelim and Bonita that "*the said undertakings and payment thereunder*" (so that is the undertaking to retain the Sum Received in HFW's client account and payment out in due course (to whomever) under a tri-partite agreement or when the court released EMIC and HFW from the undertaking) "*in satisfaction of*" EMIC's obligation to pay the TSA debt "*under … the TSA or any assignment as the case may be, but otherwise without prejudice to the parties' rights under the TSA.*"

22. That recited acceptance, if it stood unqualified, would give EMIC a good defence to a claim against it by either Daelim or by Bonita for payment of the TSA debt. But it was qualified as follows:-

    i) By Recital (6), Daelim's acceptance was said to be conditional upon the Recital (3) undertaking remaining until the dispute between Daelim and Bonita over which of them was "*entitled to the Sum Received*" had been resolved, and so without prejudice to certain rights asserted in two identified emails. Those were, essentially, rights asserted by Daelim to pursue EMIC (or even HFW) if by reason of the undertaking being released the funds were not in HFW's client account when, if it did, Daelim in due course established in arbitration that EMIC had been its debtor.

    ii) By Recital (7), Bonita's acceptance was said to be "*without prejudice to any of its rights under the TSA.*" That would seem to include the right to be paid the TSA debt by EMIC if Daelim had not been entitled to that debt as assignee and EMIC's payment to HFW's client account together with its and HFW's undertaking had not discharged the debt apart from Recital (5) (as indeed, I apprehend, it had not).

23. In the normal way for an *ex parte* order, the June Order reserved costs to the return date. The July Order reserved costs again, except to provide that "*in the case of [EMIC], unless paid and discharged separately any amount of costs which may be agreed or assessed as due to them may be borne and paid out of the Sum Received … and the Undertaking by their solicitors is to be read accordingly.*" That has given rise to a certain amount of heat between the parties because Bonita has not conceded (but nor was it required to concede) either that HFW's costs have been reasonable in amount or that the court will not order Daelim to pay them so as to preserve entire the amount held on HFW's client account to be available (potentially) to Bonita. I do not need to say anything more about that aspect of the July Order in this judgment.

A Necessary *Quid Pro Quo*?

24. I return to the question aptly posed by Mr Phillips QC to frame the argument. Should the relief under paragraph 5.3 of the June Order have been granted (and/or should it now be continued)? That is to say, since it was an order under s.44(3) of the 1996 Act, was it necessary for the purpose of preserving assets to stop Bonita from pursuing

EMIC under the TSA (including, if so advised, by commencing arbitration in Hong Kong)?

25. Mr Leabeater QC's submissions for Daelim, in my judgment, did not identify any basis upon which that question could be answered in the affirmative. His argument, as I have indicated, was that preventing Bonita from pursuing EMIC was a 'necessary *quid pro quo*' for requiring EMIC to pay the amount of the TSA debt into court (which, in turn, was an order justified, if at all, on the basis that EMIC was being enjoined from paying Bonita). I do not agree. In my view the submission for Daelim betrayed a basic failure of analysis over what it had asked the court to do, and what it had no business asking the court to do.

26. The logic advanced by Mr Leabeater QC is that the primary relief granted (an injunction preventing EMIC from paying Bonita and (therefore) requiring it to pay into court) was akin to interpleader relief; and in an interpleader case, it may be appropriate by injunction to prevent the debtor, having paid into court, from being pursued (further) by the rival creditors: *The East India Company v Edwards* (1811) 18 Ves Jun 376. That logic, I agree with Mr Phillips QC, is simply out of place in the context of Daelim's application, because it springs from the fact that in an interpleader the court to whom the debtor pays is properly seized of the claim against the debtor on its merits, as between all the parties, either already or by virtue of granting the interpleader relief in a case where it could have been so seized without it.

27. There is an echo of that in s.10 of the 1996 Act, which provides that where interpleader relief has been granted and "*any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief shall direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.*" This assumes that as between the debtor and (at least one of) the rival creditors, the debtor's liability would be a matter to be determined by the court, so arbitration is only involved if the issue which of the creditors was entitled is covered by an arbitration agreement *between those creditors*, leading *prima facie* to a direction for an arbitration of that issue between them in accordance with that agreement. Indeed, the interpleader claim (under the CPR a 'stakeholder claim') is only available if the debtor is or could be sued in the court in which it brings that claim (see now CPR 86.2(2)); and by such a claim the debtor calls for the court to determine on the merits which of the rival creditors it should have paid (CPR 86.2(1)).

28. This was <u>not</u> an interpleader claim. Nor on the face of things could it have been, in this court. Nor in any event had EMIC attempted to interplead or in any other way sought the assistance of this court (although on 17 June 2019 it did say it was willing to make a payment into court in Hong Kong as another possible interim solution).

29. The starting point was (or should have been) that any claim against EMIC, the debtor facing competing demands, had to be a claim in HKIAC arbitration under the TSA, whether brought by Daelim or by Bonita (it could have been either). Since the TSA was a tri-partite contract, the rival creditor could have been named as a respondent, and I think naturally would have been, not only EMIC.

30. That brings me to one of the complications to which I adverted in paragraph 5 above. Daelim would say that as between itself and Bonita, any dispute over the effectiveness of the assignment provisions of the head charter to assign the benefit of the TSA debt to Daelim had to be referred to arbitration in London under the head charter arbitration provision. It might say that was so even for that issue as it arose in a tripartite arbitration under the TSA (whether commenced by it or by Bonita). If its stance were consistent with the stance it has in fact taken, Bonita would have disputed that, i.e. it would have said that even simply just between itself and Daelim but on any view if the outcome was to bind EMIC, any dispute about Daelim's entitlement to the TSA debt, by virtue of the head charter assignment provisions, was properly a matter for the HK arbitration. How that could and should best be dealt with would be a matter, initially, for the Hong Kong arbitrator. One particular consideration might be that EMIC would not be bound (unless it agreed to be bound) by a decision by London arbitrators in an arbitration between Daelim and Bonita.

31. That last consideration would not be relevant only to case management by an arbitrator in Hong Kong. An application to this court by Daelim or Bonita, for payment out of funds paid in by EMIC under the compulsion of the June Order, would require, on the logic of that Order, proof that EMIC was bound to some determination of entitlement to the TSA debt. Absent agreement, that would require an award of arbitration in Hong Kong under the TSA.

32. Meanwhile, Daelim would expect to commence arbitration in London against Bonita, as it did, to pursue its claim for the unpaid head charter hire for April and May 2019. I think it clear that Daelim did not realise Bonita might say the TSA terminated the head charter arbitration agreement. Had Daelim foreseen that point, however, I am confident it would have said it was a bad point and so would still have commenced the London arbitration, leaving Bonita to take the point before the arbitrators, if so advised, as in the event it did.

33. But none of that, concerning the possible London arbitration, is of any real relevance to the present issue. The claim Daelim brought in court concerned the TSA debt owed by EMIC under the TSA, not the prior hire instalments still owed (according to Daelim) under the head charter; and the one claim that Daelim could on no view bring in this court, or in London arbitration, was its claim for EMIC's debt.

34. I find it impossible to discern in those circumstances why it was necessary or appropriate to stop Bonita from commencing the substantive proceedings, *viz.* HKIAC arbitration proceedings, that were the proper, natural and contractual means for resolving on the merits, so as to bind EMIC, whether EMIC owed the TSA debt to Bonita. Nor can I identify how it might be said that stopping those proceedings from being commenced was required for the purpose of preserving some asset, let alone why it was necessary (or appropriate) for that purpose (or at all) to restrain Bonita from starting an arbitration under the TSA in Hong Kong but leave Daelim free to do so.

35. Upon analysis, it is not even true, as Mr Leabeater QC sought to suggest, that there was liable to be significant, let alone irremediable, harm or prejudice to EMIC if Bonita were free to pursue its claim to the TSA debt after EMIC had been required by the June Order to pay into court. When pressed, Mr Kazaz could identify no difficulty, from EMIC's perspective, about an arbitration in Hong Kong under the

TSA, after EMIC had paid into court, to which EMIC would need to be privy, to determine its liability. If it then transpired, as Mr Leabeater's argument assumed it would, that the only substantial point in dispute was the assignment issue between Daelim and Bonita, (a) EMIC might reasonably expect to be able to play little, if any, active role in the arbitration (if that is what it wanted), and (b) the issue I referred to in paragraph 30 above would have arisen; but each of those would have been matters for the arbitrator in Hong Kong to manage, not reasons for this court to interfere to prevent there being an arbitration in Hong Kong.

36. It appears to be Daelim's view – at any rate it was Mr Leabeater QC's firm submission – that Bonita has behaved unreasonably in this case, starting with its refusal to agree to EMIC's suggestion to pay into escrow. But a view as to the reasonableness of that choice by Bonita is not a substitute for a serious and careful analysis of whether it was necessary or appropriate for this court to interfere, either at all, or in particular so as to stop Bonita commencing an arbitration in Hong Kong.

37. Whilst there are complexities to the wider case here, it should have been plain to Daelim that if EMIC chose to pay Bonita, it would do so at its own risk. Such a payment (i) could not prejudice Daelim's claim against EMIC, if it wanted to pursue that claim in the future, and (ii) could not prejudice Daelim's claim against Bonita under the head charter that it intended to pursue in London arbitration. The only qualification to that (if it is a qualification at all) is the rather indirect point that if Bonita was entitled to be paid by EMIC, that payment would turn a debt in Bonita's hands that Daelim might have sought to attach to enforce an award against Bonita into cash at bank for Bonita which was liable to disappear before such an award could be obtained.

38. That brings me back to the identification of the asset the purpose of preserving which might be said to have justified the primary injunction under the June Order, restraining EMIC from paying Bonita, that underpinned everything. It can only have been the debt (if it existed) owed by EMIC to Bonita under the TSA. That is the only asset the continued existence of which was threatened in any way by EMIC's intention to pay Bonita. But there are then real oddities:

    i) If the injunction were perceived to be in support of Daelim's intended London arbitration claim, on the basis that a question as to that asset would arise there because Daelim would refer the assignment dispute and not just its head charter hire claim, it was an injunction granted to preserve an asset at the behest of a claimant wishing to pursue a claim to prove that the asset did not exist, and it was an injunction sought and granted against a third party not privy to the arbitration agreement.

    ii) If the injunction were perceived to be in support of an intended Hong Kong arbitration claim concerning that asset, paragraph 5.3, in theory ancillary to that injunction and serving the same purpose, in fact prohibited Bonita from bringing exactly that claim, i.e. exactly the claim the primary injunction was supposed to support.

    iii) The purpose stated by Daelim (for the *ex parte* application generally and therefore, implicitly, for paragraph 5.3 in particular) was <u>not</u> the preservation of that asset (the TSA debt, if owed to Bonita), it was "*to protect Daelim's*

argument that it is entitled to [that debt]" (and then "*to hold the ring*" pending its resolution). But EMIC paying Bonita at risk that it should have been paying Daelim could not harm the argument that it should have paid Daelim (see paragraph 37 above); and no explanation to the contrary was given to Jacobs J.

iv) There was no discussion in Mr Leabeater QC's *ex parte* skeleton of the limited nature of the jurisdiction of s.44(3); *Cetelem v Roust Holdings* was not cited; and as a result, no proper asset-preservation analysis was attempted. The nearest the skeleton got was an argument that:

a) the power the court could exercise here in support of arbitration, via s.44 of the 1996 Act, was the power under CPR 25.1(1)(l);

b) Daelim accepted, citing *Myers v Design Inc (International) Ltd* [2003] EWHC 103 (Ch), [2003] 1 WLR 1642, that CPR 25.1(1)(l) required the target of the order (here, EMIC) to have title to, or possession or control of, an identifiable fund where there was a dispute as to a party's proprietary entitlement to or interest in that fund; and

c) "*In this case there does not seem to be any doubt that there is an actual identifiable fund, because EMIC has agreed to pay it into an escrow account*" and then "*… there is a dispute about Daelim's and Bonita's proprietary entitlement or interest to that fund.*"

But that is, with respect, hopeless. Any agreement by EMIC to make a payment was conditional upon Bonita and Daelim both agreeing, and Bonita had not agreed. Had there been an agreement to make a payment into an escrow account, it would not bring any identifiable fund into existence prior to payment. Jacobs J seems to have been persuaded by Mr Leabeater's oral submissions to contemplate that there might have been already an identifiable fund over which Daelim might somehow have acquired rights if (as it claimed to be) the TSA debt had been assigned to it by Bonita. But there was no basis for any such analysis. (Certain uses of language by HFW in correspondence as to EMIC's willingness to fund an escrow account were alighted upon by Mr Leabeater, but they do not begin to demonstrate the existence of an earmarked, specific fund, let alone one over which Daelim or Bonita might arguably have rights.)

39. The prohibition imposed upon Bonita by paragraph 5.3 of the June Order was, in substance, an anti-arbitration provision preventing Bonita from pursuing EMIC pursuant to the arbitration agreement between them under the TSA, an arbitration agreement to and by which, what is more, Daelim was also privy and bound. It unjustifiably left Daelim free to pursue EMIC under the TSA and that same arbitration agreement while precluding Bonita from doing so. It effectively arrogated to Daelim the decision, or at least the initiative, over whether and when the assignment issue should be referred to any head charter arbitration in London, to which EMIC would not be privy, and deprived Bonita of the right to have an arbitrator in Hong Kong duly appointed under the TSA consider what to do about that issue and its possible importance to the competing claims of Bonita and Daelim to be paid by EMIC (both of which were matters for such an arbitrator, not for this court or

for any London arbitrators, to determine). All against a backdrop of EMIC's decision to pay Bonita at risk as to whether it should be paying Daelim rather than interplead.

40. None of that was needed for the purpose of preserving EMIC's indebtedness (if any) to Bonita, once EMIC had been enjoined from paying Bonita pending a determination in arbitration of whether EMIC was indeed indebted to Bonita or was indebted, rather, to Daelim. Paragraph 5.3 of the June Order should never have been sought or granted. It should be discharged.

41. I should mention for completeness two alternative solutions suggested by HFW on behalf of EMIC in their skeleton argument for the hearing that were pressed by Mr Kazaz. Firstly, it was suggested that Recital (7) could be deleted from the July Order. But Recital (7) merely recorded the qualification to Recital (5) that Bonita had in fact stipulated. Bonita could withdraw that qualification (but they did not do so and have not done so since). Neither the other parties nor the court could pick and choose whether that qualification had been stated. Although Jacobs J made a passing comment when settling the terms of the July Order that may have contemplated the possibility of a free-standing application to remove Recital (7), in my judgment there could be no such application. Recital (7) is an integral part of the messy compromise. To 'delete' it (unless it be with Bonita's consent) would be to unravel that compromise. Secondly, it was suggested that if paragraph 5.3 were lifted it should be on terms that any Hong Kong arbitration claim commenced by Bonita should name only Daelim as respondent. There is no basis for this court to interfere in that way; and the suggestion that such interference might be called for (if this court might contemplate it at all) was undermined entirely by Mr Kazaz's frank (and realistic) concession referred to in paragraph 35 above.

Unfair Presentation?

42. That makes it unnecessary to deal with Mr Phillips QC's submission that even if properly justified, paragraph 5.3 should be discharged on the ground that the case for it was not fairly presented to Jacobs J *ex parte*. I shall therefore take the points he made relatively briefly.

43. Firstly, Mr Phillips QC contended that there was no proper discussion of the jurisdictional basis for paragraph 5.3. For his part, Mr Leabeater QC accepted that there was no separate, independent discussion of paragraph 5.3 (whether as to jurisdiction or indeed at all). His submission was that it was so obviously a necessary *quid pro quo* that it did not warrant separate thought. It will be clear from the main part of this judgment that I disagree. However, I could not say that that is not how Daelim in fact saw things, even if (in my view) misguidedly, and I could not say that what I have found to be the better view of the matter was identified but kept from the court. So if after full argument I had been persuaded that paragraph 5.3 was a necessary *quid pro quo*, I would not have discharged it for Daelim's failure to identify and draw to the court's attention the different way of looking at the matter advocated (unsuccessfully, it would then have been) by Bonita.

44. Secondly, Mr Phillips QC said there was no proper discussion of the fact that by paragraph 5.3 Daelim was asking the court to deprive Bonita of its contractual dispute resolution mechanism with a third party or (if this is not just saying the same thing) that the relief sought amounted to an anti-suit (anti-arbitration) injunction. Mr

Leabeater QC's response was materially the same, my assessment of that response likewise. What Mr Phillips described was not, said Mr Leabeater, what Daelim saw itself as seeking. But the description is accurate: that *is* what Daelim, by paragraph 5.3, was seeking. If paragraph 5.3 had been justified under s.44(3) nonetheless, I would not have discharged it for Daelim's failure to identify and draw to the court's attention that its effect might be analysed as Bonita has analysed it.

45. Thirdly, Mr Phillips QC argued that there was no proper discussion of whether in the court's discretion the additional injunction under paragraph 5.3 should be granted. This does not add anything to the debate. If it was necessary, as a *quid pro quo* for preventing EMIC from paying Bonita, to prevent Bonita from pursuing EMIC, there was in reality no separate discretionary exercise to that of deciding that that primary relief was necessary for the purpose of preserving an asset and appropriately granted to that end. As it is, there was in my view no relevant discretion to exercise as regards paragraph 5.3. Either way, this unfair presentation complaint adds nothing.

46. Fourthly, and finally, Mr Phillips QC said that Jacobs J was given an incorrect and misleading answer concerning the TSA. In the context of Daelim's position that it had a good *prima facie* claim for the unpaid head charter hire notwithstanding the TSA, there was this question and answer:

"*JACOBS J.: Is there anything in the termination and settlement agreement which refers to, if you like, the obligation to pay outstanding hires?*

MR LEABEATER QC: No, I don't think there is."

47. The first suggestion on behalf of Bonita that the TSA gave it some defence to Daelim's claim for the unpaid April and May 2019 head charter hire instalments was in its Hong Kong solicitor's witness statement dated 19 July 2019 served in support of the present application to discharge paragraph 5.3 of the June Order. At all times prior to that, Bonita had acknowledged Daelim's entitlement to that hire and had sought to explain (if not excuse) non-payment by claiming that it was the victim of delays in the banking system that there is reason now to think may have been invention.

48. In those circumstances, and given the wording of Clause 6 of the TSA and the evident purpose of the TSA, I find it unsurprising that it should not have occurred to Daelim or its advisors that Bonita might make a serious suggestion that the claim for the accrued and unpaid head charter hire had been affected by the TSA. I certainly could not find it a misstatement by Mr Leabeater QC that he told the judge that he (Mr Leabeater) did not think the TSA referred to the obligation to pay the accrued April/May hire. All the more so when, just prior to the particular exchange relied on by Mr Phillips QC, Mr Leabeater had added to his submission that the TSA did not supersede the charters, "*but then there may I suppose be an argument as to whether and if so the extent to which some obligations under the charterparty survive that termination [i.e. the termination pursuant to the TSA]*." I would not have said this final aspect of the matter involved any unfairness in the presentation of the case *ex parte* to Jacobs J.

Continued Purpose?

49. The alternative analysis advanced by Mr Phillips QC was that paragraph 5.3, if justified at the time of the June Order, should now be discharged as no longer serving any useful purpose. The difficulty with that submission is the messy nature of the compromise effected by the recitals to the July Order.

50. The starting point has to be an assumption, contrary to my acceptance of Mr Phillips QC's primary argument, that it was necessary, under the June Order, for the purpose of the asset-preservation that was its target, to prevent Bonita from pursuing any claim under the TSA; and that target can only have been the keeping alive of EMIC's debt under the TSA (if it was a debt owed to Bonita rather than Daelim). If Recitals (3) and (5) to the July Order had been unqualified, then by that Order:

    i) EMIC's debt under the TSA would have been extinguished;

    ii) there would have been no need to stop Bonita from pursuing a claim against EMIC in arbitration under the TSA in order to preserve the new asset that had come into existence, namely the proportionate share in the credit balance standing on HFW's client account representing the Sum Received (plus accrued interest), held by HFW on trust for EMIC (the client in question) but subject to the undertaking under Recital (3); and so

    iii) I may well have had sympathy with the submission that paragraph 5.3 was no longer required or justified.

51. However, the messy compromise means that none of that has been secured unequivocally. Without labouring the point by going through all the possible permutations resulting from Recitals (4), (6) and (7), in substance the July Order substituted EMIC/HFW's undertaking concerning the Sum Received for the primary injunctions of the June Order concerning the Disputed Sum – and despite observations in the correspondence leading to the July Order, the Sum Received and the Disputed Sum were and are <u>not</u> the same thing – but did so only for so long as the messy compromise held. There was thus built into the July Order the prospect of a future reinstatement of paragraphs 5.1 and 5.2 of the June Order. If the relief under paragraph 5.3 of the June Order had been properly granted by the June Order, consequent upon paragraphs 5.1 and 5.2, then it would have been proper to continue it for so long as paragraphs 5.1 and 5.2 might make a return.

52. Regrettably, there appears to be significant distrust between (at least) Daelim and Bonita in this case. I do not need to make any finding about where any fault (or greater fault) lies for that. But there is no escaping the fact that a clean and unequivocal agreed interim solution here was going to require a level of trust between the parties that has been absent. That the July Order did not achieve such a solution means, in my judgment, that if paragraph 5.3 had been justified originally, it was equally justified to continue it under the July Order, and nothing has changed since to affect that.

Conclusion

53. For the reasons I have set out above, upon Bonita's primary argument, I find that paragraph 5.3 of the June Order should never have been granted. It was not by itself necessary for the statutory purpose under s.44(3) of the 1996 Act of preserving assets. Nor was it necessary as a *quid pro quo* for the primary relief granted under s.44(3), the injunction preventing EMIC from paying Bonita with its associated mandatory injunction requiring EMIC to pay the amount of the TSA debt into court. On that basis, this application succeeds and I shall order that paragraph 5.3 of the June Order be discharged.

54. Had I not accepted Bonita's primary argument, I would have rejected its other arguments, namely that if otherwise properly part of the June Order, paragraph 5.3 should now be set aside or discharged because of unfair presentation of the case to Jacobs J *ex parte,* or should now be discharged as no longer serving a useful purpose.

55. Daelim's application leading to the June Order was driven by a view that Bonita was unreasonably standing in the way of what might have been a good, tripartite, interim solution. However, it was the wrong application by the wrong applicant in the wrong forum, possibly generally, but on any view as regards paragraph 5.3 of the June Order.