Neutral Citation Number: 2016 EWHC 2327 (CH)

Case No: HC-2016-002321

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMMERCIAL COURT

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

Date: 21st September 2016

Before :

Mr Justice Leggatt

- -

Between :

Gerald Metals S.A	**Claimant**
- and -	
Timis & Ors	**Defendant**

- -
- -

Philip Marshall QC and James Mather (instructed by **Signature Litigation**) for **Gerald Metals**
Simon Salzedo QC and **Gerard Rothschild** (instructed by **Pinsent Masons**) for **Safeguard Management Corp**
Benjamin Strong QC and **Alexander Brown (**instructed by **Stevens & Bolton)** for **Vasile Frank Timis**

Hearing date: 21st September 2016

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Mr Justice Leggatt Wednesday, 22nd September 2016

(10.59 am)

Ruling by MR JUSTICE LEGGATT

1. In this action, begun in the Chancery Division on 8 August 2016, the claimant has applied for a worldwide freezing order against the defendant, Mr Timis. The claimant, Gerald Metals SA, is a Swiss company which is part of a group of companies engaged in commodities trading. Mr Timis is a businessman whose principal interests are in the mining industry.

The factual background

2. The background in brief is as follows:

3. On 14 November 2014, Gerald Metals entered into a contract referred to as an Offtake Contract with a company called Timis Mining Corp (SL) Limited, which owns an iron ore mine in Sierra Leone. This contract was a form of financing arrangement, whereby Gerald Metals advanced US$50 million to the company to finance the development of a mine called the Marampa Mine. The company agreed to sell iron ore extracted from the mine to Gerald Metals, and to deliver it in monthly shipments. The sum advanced by Gerald Metals was to be repaid, with interest, in monthly instalments which were to be deducted from the price of the iron ore shipments.

4. Mr Timis told Gerald Metals that the companies through which his business interests were pursued were owned or ultimately owned by a trust called the Timis Trust. The Timis Trust is a discretionary trust, established by a declaration of trust dated 31 May 2000 and governed by the law of the Cayman Islands. The beneficiaries or potential beneficiaries are Mr Timis and other members of his family. The trustee has changed since the Trust was originally established. The current trustee is Safeguard Management Corp. Safeguard is a Panamanian company but its directors are professional trustees based in Switzerland.

5. Before agreeing to enter into the Offtake Contract Gerald Metals insisted on two things. The first was a letter from Safeguard giving details of the assets held by the Timis Trust. Such a letter was provided on 13 November 2014 and listed shareholdings said to have a total value of over $2

billion. Secondly, Gerald Metals required a guarantee to be given by the trustee. Such a guarantee was given in the form of a deed executed on 14 November 2014. By the deed of guarantee Safeguard guaranteed payment of all sums due to Gerald Metals under the Offtake Contract up to a maximum amount of $75 million. The guarantee is governed by English law and provides for disputes to be referred to arbitration in London under LCIA rules.

6. From around March 2015 there were defaults under the Offtake Contract consisting both in failure to make shipments of iron ore and failure to pay sums due to Gerald Metals. Instead of seeking immediate enforcement, however, Gerald Metals entered into discussions with Mr Timis to explore alternative arrangements. Those discussions focused on the provision of additional security to Gerald Metals for the sums payable under the Offtake Contract in return for the agreement of Gerald Metals to postpone enforcement.

7. On 15 October 2015 agreements were made under which certain shares held by the Timis Trust were provided as security and Gerald Metals agreed to a standstill on enforcement until 29 February 2016.

8. On 26 February 2016 a meeting took place between Mr Timis and representatives of Gerald Metals. At the conclusion of this meeting a document was signed by Mr Timis and by a representative of the Gerald Group. The document records what are said to be binding terms agreed between the Gerald Group and Mr Timis acting both personally and "on behalf of the Timis Trust where applicable". The terms record in paragraph 1 the current outstanding amount under the Offtake Contract as being at that date US$77 million, with the Trust guarantee capped at US$75 million. The document then specifies certain assets which were to be provided to the Gerald Group. Paragraph 4 reads as follows:

"Senegal Oil Block: [Mr Timis] to commit to use best endeavours to ensure the grant of $75m worth of shares in the oil blocks. Shares to be transferred to Gerald until such

time as Gerald is repaid. [Mr Timis] to be granted a US$1 buy back option on these shares once Gerald is repaid."

9. It is common ground that the "Senegal Oil Block" referred to certain offshore oil concessions in Senegal in which Timis Corporation Limited owned a 30% interest. This asset had been among the assets listed in the letter provided on 13 November 2014 as assets ultimately held by the Timis Trust. It is also common ground that at the meeting on 26 February 2016 Mr Timis told the Gerald Group representatives that the Senegal oil interests were not held by the Timis Trust but were in a separate trust over which he had no control. According to representatives of the Gerald Group who were present and who have made witness statements for the purpose of this application, Mr Timis said that the Senegal oil interests had never been held by the Timis Trust and that their inclusion in the letter of assets had been a mistake. Mr Timis denies making such statements. His evidence is that he said that the Senegal oil interests had been transferred out of the Timis Trust since the letter of assets had been provided. At the meeting the Gerald Group representatives were not prepared to accept that Mr Timis had no control over the Senegal oil interests. They insisted on, and obtained, his commitment to use best endeavours to ensure that shares in the oil blocks were provided as security to the Gerald Group.

10. Although the document signed on 26 February 2016 does not mention any consideration given by Gerald Metals in return for the commitments made by Mr Timis, Gerald Metals contends that there was consideration given by way of forbearance from taking proceedings to enforce the guarantee.

11. On 13 April 2016 a share transfer deed was executed, pursuant to which 75% of the shares of Timis Mining Co, the parent of the company which owned the Marampa iron ore mine, were transferred to Gerald Metals, and Gerald Metals agreed not to take any enforcement action under the Trust guarantee provided that certain conditions were met. Gerald Metals has subsequently

claimed that the conditions specified in that deed have not been met and has commenced arbitration proceedings against Safeguard under the guarantee.

12. The arbitration was commenced on 8 August and since then each party has appointed an arbitrator. Under the LCIA rules, the two party-appointed arbitrators have until 1 October to appoint the third arbitrator, failing which the LCIA will appoint one. At that point the tribunal will be fully constituted.

13. Gerald Metals has applied to the LCIA for the appointment of an emergency arbitrator, with a view to seeking emergency relief, including an order to prevent Safeguard from disposing of the Trust's assets. Safeguard responded to that application by giving undertakings not to dispose of any assets other than for full market value and at arm's length, and to give seven days' notice to Gerald Metals before disposing of any asset considered to be worth more than £250,000. After those undertakings had been given, the LCIA rejected Gerald Metals' application for the appointment of an emergency arbitrator.

14. On 22 August Gerald Metals issued proceedings in the Commercial Court seeking urgent relief under section 44 of the Arbitration Act 1996. That application will be heard today after this judgment has been given.

The application for disclosure of assets

15. The last part of the history that I will mention is that when this action was commenced Gerald Metals applied for an order for disclosure of information. That application was heard on 12 August by Mrs Justice Rose, who ordered Mr Timis to give disclosure of his assets and to identify the current owner of the Senegal oil interests. Pursuant to that order Mr Timis made an affidavit dated 18 August 2016, which disclosed personal assets consisting mainly of interests in some property in Romania, with a total value of less than US$2 million. In relation to the Senegal oil interests the affidavit was, in the light of Mr Timis' subsequent evidence, economical with the truth, to put it at its best, regarding his knowledge of the ownership of that asset.

16. Mr Timis, for his part, contends that the application to Mrs Justice Rose was made on a basis which Gerald Metals' own subsequent evidence shows to have been false: namely, that the first occasion when Mr Timis said that the Senegal oil interests were not held by the Timis Trust was at a meeting on 6 July 2016. The impression given to the court, in circumstances where Mr Timis had been given insufficient notice of the application to serve evidence in response, was that what Mr Timis said at the meeting on 6 July came as a bombshell and prompted Gerald Metals to take urgent action. In fact, according to the evidence subsequently served by Gerald Metals, what Mr Timis said about the Senegal oil interests at the meeting on 6 July was more or less exactly the same as he had said at the meeting on 26 February 2016 over four months earlier.

17. I do not find that the court was deliberately misled; rather, it appears that, of the two witnesses who made statements on behalf of Gerald Metals for the purpose of the application for disclosure, one had forgotten about what was said at the meeting on 26 February and the other had not been present at the meeting; and neither had made adequate enquiries so as to ensure that the court was given accurate information. I have no doubt, however, that a material misrepresentation was made, which influenced Mrs Justice Rose. That is clear from her judgment. On the other hand, this is not a case in which a freezing order has been obtained on the basis of misrepresentation or non-disclosure, as the only order sought at the hearing on 12 August was an order to provide information. Moreover, Gerald Metals has since served evidence correcting the false impression given. In these circumstances, I do not accept a submission made on behalf of Mr Timis that Gerald Metals does not come with clean hands in making the present application for a freezing order, such that I should dismiss the application even if it is otherwise well-founded. I propose to consider the application on its merits.

Good arguable case

18. In applying for a freezing injunction, the first requirement is for the applicant to show a sufficient likelihood that it will obtain a money judgment which it will be looking to enforce against the respondent. The test applied for this purpose is whether the applicant has a good arguable case.

19. In the particulars of claim served in this action on 24 August 2016 four separate claims are pleaded. The first three claims are claims for damages against Mr Timis. The fourth claim is for a declaration. One of the claims advanced is a claim in deceit and because of the seriousness of that allegation I will take it first.

The claim in deceit

20. That claim is pleaded in two alternative ways. The first is that the letter provided to Gerald Metals in November 2014 listing assets held by the Trust was represented by Mr Timis to be accurate but was in fact, to his knowledge, materially inaccurate in stating that the Trust assets included the Senegal oil interests. The evidence indicates, however, that the Trust did own the Senegal oil interests in November 2014, so that the representation made by Safeguard and any representation made by Mr Timis to that effect was true. The only basis for suggesting otherwise is evidence from Gerald Metals' witnesses, alleging that at the meetings on 26 February and 6 July 2016 Mr Timis made statements that the inclusion of the Senegal oil interests in the letter of trust assets had been a mistake. Mr Timis, however, denies making such statements and, whether he made them or not, his evidence on this application, supported by the evidence of Ms Benkert who provides services to the trustee, is that the Senegal oil interests were held by the Trust in November 2014 but were transferred to a separate trust in August 2015. Although no documentary evidence of the transfer has been provided, I see no reason on the material before the court to doubt the correctness of that information. It follows that there is no reasonable basis for the first way in which the claim for deceit is put.

21. The alternative way in which the claim is put is to contend that on 26 February 2016, when Mr Timis committed to using his best endeavours to ensure the grant of shares in the Senegal oil

blocks to Gerald Metals, he impliedly represented that that asset was still held by the Trust. That contention is quite hopeless in the face of the evidence of Gerald Metals' own witnesses, who say that at the meeting on 26 February Mr Timis was insisting that the Trust did not own the Senegal oil interests. In those circumstances there is no scope for alleging that some implied representation was made – and made fraudulently – that the Trust still owned the Senegal oil interests.

22. In argument Mr Marshall QC on behalf of Gerald Metals sought to advance a third version of the claim in deceit. This is that the representation made in November 2014 that the Senegal oil interests were held by the Trust was a continuing representation, repeated on later dates by Mr Timis, and that it became a misrepresentation after the assets were transferred out of the Trust in August 2015. It is said that Gerald Metals relied on this representation in agreeing terms with Mr Timis on 26 February 2016.

23. This case is not pleaded in the particulars of claim and, more significantly, no adequate notice of this further allegation of deceit has been given in advance of this hearing. That said, this proposed case also does not seem to me at the moment to have any merit. I see no reason to interpret the letter of assets provided to Gerald Metals as making a continuing representation, if by that is meant that Mr Timis owed a duty to inform Gerald Metals if any asset mentioned in the letter subsequently ceased to be owned by the Trust. The letter did not purport to be anything other than a statement of assets held at a particular date. There was no undertaking sought, or given, not to transfer assets out of the Trust or to tell Gerald Metals if any asset was transferred. I was not shown any document after August 2015 which contained a representation by Mr Timis that the Senegal oil interests were still held by the Trust. In any event, even if there was such a representation, it did not continue up to the time when the document dated 26 February 2016 was signed, because at the meeting which preceded the signature of that document Mr Timis told

Gerald Metals in unequivocal terms that the Trust did not hold the Senegal oil interests and that they were held in a separate trust.

24. I conclude that Gerald Metals has not made out a good arguable case of deceit and, indeed, that on the evidence currently before the court there are no reasonable grounds for asserting such a case.

The claim for breach of contract

25. I turn to the second and, I think, principal claim made by Gerald Metals against Mr Timis. This is a claim for breach of contract. It is said that the commitment to use his best endeavours to procure the grant of shares in the Senegal oil blocks to Gerald Metals was a contractual obligation undertaken by Mr Timis and that Mr Timis breached that obligation by not using such endeavours or indeed any endeavours.

26. Both those matters are disputed by Mr Timis, but I am satisfied that on each of them Gerald Metals has shown a good arguable case. Establishing such a breach of contract at a trial, however, will not result in a judgment against Mr Timis for substantial damages unless three further conditions are also met. They are: (1) it is shown that if Mr Timis had used his best endeavours he would have procured a transfer of the shares; (2) Gerald Metals succeeds in its claim against Safeguard for breach of the guarantee; and (3) Safeguard fails to pay an arbitration award in favour of Gerald Metals.

27. Those last two conditions must be fulfilled because it is not suggested that the shares in the Senegal oil blocks were to be transferred to Gerald Metals for Gerald Metals to keep come what may. The intention was that the shares, if transferred, would serve as security for the sums outstanding under the Offtake Contract and guarantee, to be transferred back for $1 when Gerald Metals was paid.

28. Taking the first requirement, I see no reason to suppose that Mr Timis could have procured a transfer of shares in the Senegal oil blocks to Gerald Metals after 26 February, whatever endeavours he had used. As mentioned, the evidence is that the relevant shares were by then held

in a separate discretionary trust, having been transferred out of the Timis Trust in August 2015. Little information has been provided about this trust, save that Mr Timis' wife is one of the beneficiaries, unlike the Timis Trust of which the only other beneficiaries apart from Mr Timis are their son and daughter. I cannot see any reason, however, why the trustees of the trust holding the Senegal oil interests should consider it in the best interests of the trust and its beneficiaries to transfer trust assets to Gerald Metals as security for monies owed by one of the Timis companies and by the Timis Trust. I cannot even see that it would have helped Mr Timis or the Timis Trust if they had agreed to do so, since Gerald Metals was prepared, by the share transfer deed dated 13 April 2016, to agree not to enforce its claim under the guarantee without shares in the Senegal oil blocks being provided as security. In any event, it seems to me that such a transfer of shares would have been clearly contrary to the interests of the beneficiaries other than Mr Timis.

29. Turning to the second of the three conditions that I mentioned, it is by no means clear that Gerald Metals will succeed in its claim against Safeguard under the guarantee. That depends on Gerald Metals establishing a failure to meet one or both of the two conditions to which its agreement not to enforce the guarantee was subject. There is a dispute about that, and there is insufficient information to enable me to form any view as to the merits of the parties' respective positions beyond the fact that both parties accept that there is an issue to be tried.

30. Finally, there is the question whether, if Gerald Metals succeeds in its arbitration claim against the Trust, the Trust has sufficient assets to pay an award in an amount of US$75 million.

31. Safeguard and Mr Timis have adduced evidence that the Trust holds assets worth substantially more than that amount. Those assets comprise:

    (1) Shares in African Petroleum Corporation Limited. Those are listed shares, and there does not appear to be any dispute that they are worth over $8 million.

(2) Shares in London Pharma Limited. The trustee has declined to give a value for these shares because of commercially sensitive negotiations which are ongoing but says that they have "significant value".

(3) Shares in Pan African Minerals Limited. The Trust holds approximately 48% of that company, for which shareholding the trustee gives an estimated value of $400 million.

32. In relation to the shares in Pan African Minerals, Safeguard has obtained a professional valuation of the company from Hannam & Partners, a merchant bank with expertise in mining businesses. Hannam & Partners has valued Pan African Minerals at $814 million on a cash and debt free basis. 48% of that amount is approximately $400 million.

33. Gerald Metals in response has served a report from its own expert, Medea Capital Partners, which criticises the Hannam & Partners valuation and identifies a number of risk factors which Medea says are not sufficiently reflected in that valuation. Notably, however, neither Medea nor any of Gerald Metals' witnesses has expressed an opinion that the Trust's interest in Pan African Minerals is worth less than the amount of Gerald Metals' claim against the Trust. Furthermore, there is a further internal valuation prepared by Gerald Metals, dated August 2016, which gives an enterprise value for the main project of Pan African Minerals, taking debt into account, of $145 million. This valuation has been arrived at on the basis of what are clearly extremely conservative assumptions. I infer that this valuation represents Gerald Metals' own view of the minimum value of the Trust's shareholding in Pan African Minerals. On that view, when the other assets of the Trust are taken into account, the Trust assets are likely to be sufficient to satisfy any arbitration award which Gerald Metals may obtain.

34. Ultimately, it seems to me I must look not just at the individual conditions which would have to be met before Gerald Metals obtains a judgment for substantial damages against Mr Timis, but at the cumulative effect of those conditions. Considered overall, I regard that prospect as too contingent and remote to satisfy the requirement of a good arguable case.

The claim for procuring a breach of contract

35. The third claim advanced by Gerald Metals against Mr Timis is a claim for procuring a breach of contract. It is said that the Timis Trust was and is in breach of contract in failing to pay the sum of $75 million claimed under the guarantee and that Mr Timis procured that breach of contract.

36. There does not seem to me to be any reasonable basis for this claim. In particular, there is no evidence that Mr Timis has done anything at any stage to procure a breach of the guarantee. There is no doubt that the failure to perform the Offtake Contract resulted in Safeguard being in breach of obligations under its guarantee. But there is no evidence that Safeguard had cash available to make any payment under the guarantee, and would have made such a payment had it not been for some action taken by Mr Timis. So far as the evidence shows, the situation is simply one of a failure to perform contractual obligations. There is no evidence that Mr Timis did anything to prevent performance and to procure a breach.

37. In any event, Gerald Metals from October 2015 agreed, in return for valuable consideration provided to it, not to enforce its rights under the guarantee. The trustee takes the position that, because of the most recent such agreement, made in April 2016, it has no liability to make any payment under the guarantee. There is nothing to suggest that Mr Timis has procured the trustee to take that position, nor that either Safeguard or Mr Timis does not believe that Safeguard has a genuine defence to the claim. On this claim too, Gerald Metals has in my view not shown a good arguable case.

The claim for a declaration

38. The fourth claim put forward is not a claim for damages but for a declaration that the Timis Trust is a sham. I can take this allegation shortly because I am unable to see any reasonable basis for it. The matters relied on by Gerald Metals in support of this allegation consist almost entirely of evidence that Mr Timis sometimes acted or spoke as though assets ostensibly held by the Trust

were his to deal with as he chose, though on other occasions he told Gerald Metals that he was constrained in what he could do by what the trustees would agree to.

39. The impression said to have been given to Gerald Metals by Mr Timis is summarised by one of its executives, Mr Wilde, in his witness statement, as follows:

> "His standard practice during the course of our discussions and meetings on this contract and the subsequent default was that he would in most circumstances deal with us as if he was the person who could exert influence over the trust; my own dealings were with Mr Timis and never with the trustees. He would often say that he would be able to control the family side of his trust but that in respect of other beneficiaries, if he was asking them to dilute their position, he would have to provide compensation to obtain waivers or whatever else may have been required. I assumed that the trust assets were his and therefore that he could ultimately achieve what was required. However, we often found that he would use the trustees as a shield. It was not uncommon for Mr Timis to imply that certain individuals at what I would now describe as the trust level were the cause of the delays in the performance of promises and commitments which he had previously made."

40. This evidence, and the evidence of particular incidents relied upon by Gerald Metals, comes nowhere near to providing a basis for alleging that the Trust was or is a sham. Taken at its highest, all it indicates is that in discussions Mr Timis generally gave the impression or sought to give the impression that the trustees would do his bidding. That does not begin to show that there was no genuine trust and that Mr Timis in truth owned the relevant assets.

41. As a matter of law, to show that a trust is a sham it is necessary to show that, when the trust was constituted, both the settlor and the trustee intended the settlement to be a sham: in other words, they had a common intention that the assets would not be legally owned by the trustee and held on

trust for the beneficiaries in accordance with the trust document, but that the settlor would remain the legal and beneficial owner of the assets: see eg Shalson v Russo [2005] Ch 281, paras 188 and 190; and A v A [2007] 2 FLR 467, paras 34 and 41-44. As Munby J explained in the latter case, as a matter of principle, a trust which is not initially a sham cannot subsequently become a sham because, if valid legal obligations were created, the effect of a subsequent common intention to treat the trust as a sham gives rise, and can only give rise, to a breach of trust. Legal obligations cannot be unmade merely by intending that they should not exist.

42. There is no evidence whatever which would support an inference that, when the Timis Trust was established in 2000, the original trustee, or indeed Mr Timis, did not intend to create a valid trust but intended the trust deed to be a sham; nor for that matter is there evidence capable of showing any subsequent common intention of Mr Timis and the trustee at any time to treat the Trust as a sham.

43. Mr Marshall submitted that, even if the Trust is not a sham, there is evidence from which it can be inferred that Mr Timis has de facto control over the Trust assets and that this provides a basis for granting a freezing order, even if there is no claim against Mr Timis for which a good arguable case has been shown. He relied on the case of JSC Mezhdunarodniy Promyshlenniy Bank v Sergei Viktorovich Pugachev [2016] 1 WLR 160, in which the Court of Appeal held that assets placed in a discretionary trust by the respondent to a freezing order, even if not legally or beneficially owned by the respondent, will be treated as his assets for the purpose of the freezing order if the respondent retains effective control of the assets.

44. I certainly accept that principle but I cannot see that it has any application in this case. Safeguard has given, or has offered, undertakings not to dispose of the Trust assets while the arbitration claim is pending. I see no reason to suppose that such undertakings will not be sufficient or that there is a risk that Mr Timis might seek and be able to procure the disposal of Trust assets unless an injunction is granted against him.

45. It is apparent that the real object of this freezing order application is the Senegal oil assets. However, I do not consider that there is evidence from which I could reasonably infer either (1) that Mr Timis has effective control of those assets or (2) that those assets are still owned by or could be restored to the Timis Trust so as to be amenable to execution if Gerald Metals obtains an arbitration award against the Timis Trust.

Conclusion

46. In these circumstances and for these reasons I conclude that the application for a freezing order against Mr Timis has not been made out and must be refused.

47. I have not dealt directly in this judgment with the further application made by Gerald Metals to join Safeguard as an additional defendant to the claim against Mr Timis but, subject to any submissions which I will now hear, it seems to me to follow from my conclusions that that application must also be rejected.

Mr Justice Leggatt Wednesday, 22nd September 2016

(15.41 pm)

Ruling by MR JUSTICE LEGGATT

1. I address now the application that Gerald Metals has made for orders under section 44 of the Arbitration Act 1996 for a freezing injunction against the Trust, with an upper limit of $80,000, and for the provision of information by the Trust consisting of: (1) details of all the assets of the Timis Trust worldwide, giving the value, location and details of all such assets; and (2) full details of the current owner of the Senegalese oil interests and the nature of those assets, how they are held and their net value.

2. Section 44 gives the court powers to make orders in support of arbitral proceedings about matters which include the preservation of evidence and the granting of an interim injunction. Subsection (3) provides:

> "If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."

That is subject to subsection (5), which states:

> "In any case, the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."

3. It is common ground that the test of urgency under subsection (3) is to be assessed by reference to whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale: see Starlight Shipping v Tai Ping Insurance [2008] 1 Lloyd's Rep 230, paras 22, 24, 27.

4. Pursuant to Article 9A of the LCIA rules, in a case of exceptional urgency, any party may apply to the LCIA court for the expedited formation of the arbitral tribunal. In addition, Article 9B states at paragraph 9.4:

> "In the case of emergency, at any time prior to the formation or expedited formation of the arbitral tribunal any party may apply to the LCIA court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the arbitral tribunal."

In the event that such an emergency arbitrator is appointed, Article 9B gives that arbitrator powers to decide claims for emergency relief.

5. Paragraph 9.12 states:

> "Article 9B shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the arbitration tribunal and it shall not be treated as an alternative to or substitute for the exercise of such right."

6. It is common ground that there can be situations where the need for relief, for example in the form of a freezing injunction, is so urgent that the power to appoint an emergency arbitrator is insufficient and the court may properly act under section 44 of the Arbitration Act – for example if the application is one that needs to be made without notice. On behalf of Gerald Metals, Mr Diwan QC submits that there is a further gap in the LCIA rules which exists in cases which are not emergencies or of such exceptional urgency as to justify the expedited formation of the tribunal but which are nevertheless cases of urgency within the meaning of section 44(3) of the Arbitration Act.

7. I accept the submission of Mr Salzedo QC on behalf of the trustees that it would be uncommercial and unreasonable to interpret the LCIA rules as creating such a gap. The obvious purpose of

Articles 9A and 9B is to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. It seems to me that to make commercial sense of the provisions a similar functional interpretation of Articles 9A and 9B needs to be adopted as has been given to section 44(3) of the Arbitration Act. In other words, the test of exceptional urgency must be whether effective relief could not otherwise be granted within the relevant timescale – the relevant timescale for this purpose being the time which it would otherwise take to form an arbitral tribunal. Likewise, under Article 9B the test of what counts as an emergency must be whether the relief is needed more urgently than the time that it would take for the expedited formation of an arbitral tribunal. That, in my view, is the rational interpretation of these rules.

8. Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44.

9. Mr Diwan made a submission that the LCIA, in rejecting an application made by Gerald Metals for the appointment of an emergency arbitrator and/or the expedited formation of an arbitral tribunal, has taken a narrower view of the extent of its own powers. Therefore, even if this interpretation of the LCIA rules is correct, there is a gap in the practical ability of a party in the position of Gerald Metals to obtain relief. However, I do not think it possible or right to infer from the fact that the relief sought was refused that the LCIA did take a more restrictive view of its own powers than the one I consider to be correct. Amongst other considerations, when assessing the urgency of the matter the LCIA must have had in mind the fact that in response to the application made by Gerald Metals the trustees had given undertakings not to dispose of assets other than for full value and on arm's length terms with all such value to be retained by the Timis Trust, and to provide written notice to Gerald Metals at least seven days prior to executing any material transaction or disposal of any asset which the trustees consider have a value of £250,000

or more. In the circumstances the only inference that can in my view be drawn from the refusal of Gerald Metal's application is that the LCIA was not persuaded that the application was so urgent that it needed to be decided before the arbitral tribunal is constituted in the ordinary way, and not that there was no power under the LCIA rules to act in a case of such urgency.

10. I also do not accept that paragraph 9.12 of the LCIA rules affects the position. That rule makes it clear that Article 9B is not intended to prevent a party from exercising a right to apply to the court, for example under section 44 of the Arbitration Act; but it does not prevent the powers of the court on such an application from being limited as a result of the existence of Article 9B – as they are pursuant to the terms of section 44 itself. In any case this rule does not extend to Article 9A.

11. I conclude that this case is not one in which the court may at this stage make orders of the kind sought by Gerald Metals.

12. Even if I am wrong about that, however, I do not think it appropriate to grant the orders sought by Gerald Metals for the provision of information by the trustee in circumstances where the trustees have given the undertakings which they have given in the arbitration proceedings.

13. In response to a request for information about the trust assets, the trustees voluntarily provided, in letters dated 18 August 2016 and 2 September 2016, a list of the companies or assets in which the Timis Trust has an interest or ultimate interest, together with more detailed information about certain assets which in the trustee's opinion are worth well in excess of the amount for which a freezing injunction has been sought. I see no reason to conclude that further information is needed in order effectively to police the undertakings which the trustees have given, let alone in order to do so between now and the time when an application for further information can be made to and decided by the arbitral tribunal, after the tribunal is constituted in the ordinary course. As to that, I accept the estimate given by Mr Diwan that the likely timescale within which the tribunal would in practice be able to decide such an application would be by around the end of November.

14. I also see no foundation on the evidence currently before the court for the contention that there is, notwithstanding the undertakings which have been given, a real risk of unjustifiable disposal of assets by the trustee.

15. The main basis on which that contention has been advanced in these proceedings is on the footing that Mr Timis has effective control over the Trust's assets. However, in the Chancery action I have found that there is no reasonable basis for that contention.

16. Safeguard is a professional trustee and, in circumstances where it is under the spotlight, as it now is in this litigation, and where no evidence has been adduced of any specific conduct by Safeguard justifying such an inference, I can see no reasonable basis for the contention that, unless prevented by an injunction, there is a real risk that it will take steps to put trust assets beyond the reach of execution or that such assets would be unjustifiably placed beyond the reach of execution such that they will be unavailable if Gerald Metals obtains an arbitration award.

17. Likewise, on the evidence before the court I see no reasonable basis for the fear that, unless steps are taken to prevent it, the Senegalese oil interests will be disposed of or dealt with while the arbitration is in train, let alone within the period between now and the end of November, so as to put them further beyond the reach of any possible attempt to execute against those assets. The grounds on which it is suggested that, if the trustees are identified, steps might be taken at this stage to seek a freezing order against the trustees of the trust in which those assets are currently held seem to me, as a matter of first impression, to be thin indeed. But regardless of the strength or otherwise of those grounds, I am not persuaded that there is any substantial basis for the alleged risk of dissipation if relief is not granted.

18. Mr Marshall made a submission that the balance of prejudice favours an order for disclosure of information about the current trustee of the Senegalese oil interests. His argument was that any prejudice caused to the trustee by an order for disclosure of such confidential information is outweighed by prejudice that could potentially be caused to Gerald Metals if no such order is

made. The relevant legal test, however, is not simply one of balancing prejudice; there is a threshold which an applicant needs to surmount of providing some concrete basis to infer a real risk of dissipation of the relevant asset. In this case I do not consider that that threshold has been surmounted. In my view, what is said in that regard amounts to no more than speculation.

19. If I had concluded that I had power under section 44 to grant a freezing injunction agaisnt Safeguard and were considering the adequacy of the undertakings offered by Safeguard in those circumstances, I think I would have taken the view that the financial threshold of £250,000 for notification of asset disposals, is too high, and that a lower threshold, perhaps of the order of £50,000, would be more appropriate. However, given the conclusion I have reached on the question of jurisdiction under section 44, that is not a matter for me to decide and it would also be wrong to accept the undertakings which the trustee offered to give to the court to cover the period between now and when an arbitral tribunal would be constituted. In any event, I agree with Mr Salzedo's submission that it would be pointless to require undertakings to be given to the court alongside the contractual undertakings that have already been given in the arbitration for this period, when on any view the undertakings to the court would lapse within a short time after the arbitral tribunal has been constituted.

20. For those reasons, the application under section 44 of the Arbitration Act will be dismissed.