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IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
APPLICATION FOR PERMISSION TO SET ASIDE
GRANT OF PERMISSION AND SECURITY FOR COSTS
APPLICATION FOR PERMISSION TO SET ASIDE THE
GRANT OF PERMISSION TO APPEAL, STAY OF
EXECUTION AND SECURITY FOR COSTS

Royal Courts of Justice
Strand
London, WC2

Friday, 4 April 2003

B E F O R E:

LORD JUSTICE CLARKE
and
MR JUSTICE RICHARDS

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OKTA CRUDE OIL REFINERY AD

Appellant

−v−

MOIL−COAL TRADING COMPANY LTD

Respondent

OKTA CRUDE OIL REFINERY AD

Appellant

−v−

MAMIDOIL−JETOIL GREEK PETROLEUM COMPANY SA and Another

Respondent

– – – – – – –

(Computer−Aided Transcript of the Stenograph Notes of
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Official Shorthand Writers to the Court)

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MR BERNARD EDER QC and **MR LUKE PARSONS** (instructed by Stephenson Harwood of London) appeared on behalf of the Applicant
MR DANIEL LIGHTMAN (instructed by Morgan Lewis Bockius of London) appeared on behalf of the Respondent

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J U D G M E N T
(As Approved by the Court)

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1. LORD JUSTICE CLARKE: There are before the court applications in two related appeals. In both appeals the appellant is Okta Crude Oil Refinery AD ("Okta"). In one appeal the respondents are Mamidoil−Jetoil Greek Petroleum Co SA ("Jetoil"), and Moil−Coal Trading Company Ltd ("Moil−Coal"). In the other appeal the respondents are Moil−Coal. There are two appeals because there were two actions. In the first action, the Jetoil action, Jetoil and Moil−Coal are the claimants whereas in the second action, the Moil−Coal action, only Moil−Coal is the claimant. Okta is the defendant in both actions. In the Jetoil action Jetoil claims damages for breach of contract made in 1993 ("the 1993 contract"). In the Moil−Coal action Moil−Coal claims damages for breach of contract made in 1998 ("the 1998 contract"). The actions were tried together before Mr Justice Aikens, who handed down judgment in both actions on liability and quantum on 4 November 2002 and gave judgment on interest and costs on 26 November 2002. He gave judgment in favour of the respondents in both actions.

2. The order which he made included the following: The 1993 contract: (1) a declaration that the 1993 contract was at all material times and is valid and binding (paragraph 1), (2) an order that Okta pay Jetoil US $8,418,323 by way of damages for breach of contract up to 4 March 1992 (paragraph 3), (3) a declaration that Okta is liable to Jetoil for damages for breach of the contract between 5 March 2002 and 5 March 2003, such damages to be determined at a further hearing after March 2003, if not agreed (paragraph 5), (4) an order that Okta pay Jetoil interest in the sum of US $1,030,039 up to 4 November 2002 (paragraph 10). The 1998 contract: (5) a declaration that the 1998 contract was at all material times valid and binding (paragraph 6); (6) an order that Okta pay Moil−Coal US $808,749 by way of damages for its failure to purchase a balance of 184,646 metric tons under the valid 1998 contract; (7) an order that Okta pay Moil−Coal interest of US $170,502 up to 4 November 2002 (paragraph 10). General: (8) an order that Okta pay 90 per cent of the respondents' costs in the two actions (paragraph 11); (9) an order that Okta pay the respondents £300,000 on account of costs (paragraph 12); (10) permission to appeal in both actions was refused (paragraph 13); (11) Okta's application for a stay of execution in the 1993 contract action pending an application to this court for permission to appeal was dismissed (paragraph 14).

3. Okta subsequently applied to this court for permission to appeal. On 23 December 2002 Lord Justice Potter granted permission to appeal and a stay of execution pending the hearing of the appeal in the 1993 contract action. He said that the appeal was "arguable on the grounds set out in the skeleton argument". He also said that he would not order expedition but an early date would be well merited. On 24 December he granted permission to appeal in the Moil−Coal actions in which no stay was sought. He said that the grounds were "arguable but unmeritorious" and that the appellant should not be optimistic. He directed that the appeals in both actions should be listed together. He gave a time estimate of two days in the first appeal and four hours in the second. Subsequently, on 5 February 2003 counsel for Okta gave the same estimate. In the meantime the appeals were fixed for 10/11 June. The present position is therefore that, other things being equal, these appeals will be heard in just over two months' time.

4. On 18 February 2003 the respondents issued three types of application. First, they issued applications in both appeals under Part 52.9.1 of the CPR that permission to appeal be set aside and/or, in the 1993 contract appeal, that appropriate terms be imposed. Second, they issued an application for an order discharging the stay granted by Lord Justice Potter in the 1993 contract appeal. Third, they issued applications for security for costs in both appeals. Very recently, I think on 28 March, Moil−Coal abandoned their application to set aside permission to appeal so that in the Moil−Coal appeal there remains only an application for security for costs.

5. CPR Part 52.9 provides:

> "(1) The appeal court may −
>
> (a) strike out the whole or part of an appeal notice,
>
> (b) set aside permission to appeal in whole or in part,
>
> (c) impose or vary conditions upon which the appeal may be brought.
>
> (2) The court will only exercise its powers under paragraph (1) where there is compelling reason to do so."

In Volume I of the Civil Procedure Rules 2002 (the White Book) paragraph 52.9.2 is in these terms:

> "Cautionary note: this tempting provision should not lure advocates into tactical skirmishing or into the designs to wear down the opposition. Save in exceptional circumstances it is a misuse of the court's resources and a waste of costs for the court to consider the substance of an appeal on some intermediate claim between the permission hearing and the full appeal ..... "

6. The relevant principles have been considered in a number of cases. It is sufficient to refer to Barings Plc (in liquidation) v Cooper & Lybrand [2002] All ER (D) 278 (JUL). In that case Lord Justice Jonathan Parker said this:

> "34. 'Compelling reason', in this context, connotes ..... something which is sufficiently serious to be in the nature of an irregularity in the grant of permission. In Nathan v Smilovitch [2002] EWCA.Civ 759 Longmore LJ said, at paragraph 9 .....
>
> 'For my part, unless the nature of the application shows that some decisive authority or decisive statutory provision has been overlooked by the Lord Justice granting permission to appeal, an applicant would normally have to show that the single Lord Justice had actually been misled in the course of the presentation of an application'.
>
> 35. .....
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> 36. The fact that the appeal is now relevant on costs only is a matter which can (and no doubt will) be brought to the attention of the court hearing the substantive appeal, and the court will give that factor such weight as it sees fit indisposing of the appeal. But it cannot in my judgment amount to a compelling reason for setting aside the grant of permission.
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> 37. In my judgment the power conferred by para 91) of r 52.9 is emphatically not a power to, in effect, entertain an appeal against the grant of permission. Yet that, in substance, is what Mr Butcher has invited this court to do in relation to the bonuses issue. In my judgment the power to set aside a grant of permission to appeal is not available for the purpose of second−guessing the single judge who granted the permission and thereby generating satellite litigation: rather, its purpose is to enable the court to do justice in those rare cases where something in the nature of an irregularity has occurred in the granting of permission, whether by reason of the single judge having been misled or for some other like reason.
>
> 38. .....
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> 39. I would ..... dismiss this application, and in doing so I would express the hope that in future practitioners will think twice before launching an application of this kind, in the knowledge that only in very limited circumstances will such an application be likely to succeed."

Lord Justice Laws agreed with Lord Justice Jonathan Parker. He said this in paragraph 43:

> "I add only this. It seems to me to be of the highest importance that the court should very firmly discourage the bringing of satellite litigation under the guise of an application under CPR Part 52.9. The rule is there to cater for the rare case in which the Lord Justice granting permission to appeal has actually been misled. If he has, the court's process has been abused and that is of course a special situation. There may also be cases where, as Longmore LJ indicated in Nathan v Smilovitch ..... some decisive authority or statute has been overlooked by the Lord Justice granting permission. But where such a state of affairs is asserted, the learning in question must in my view be plainly and unarguably decisive of the issue. If there is anything to argue about, an application to set aside a grant of permission will be misconceived.
>
> 44. This application should not have been made."

It is not in dispute that those are the relevant principles.

7. Mr Lightman submits that it is incumbent on a respondent to an appeal seeking an order under CPR Part 52.9 to do so as soon as practicable. He draws attention to the strict time limits for the prosecution of appeals. An appellant, if not granted permission to appeal by the court below, must ordinarily file an appellant's notice within 14 days of the date of the decision sought to be appealed − Part 52.4 (2) (b) − and the appellant's notice must be served on each respondent as soon as practicable and in any event not later than seven days after it is filed (Part 52.4 (3)).

8. There are a number of other time limits in connection with the appeal process. It is however right to say that CPR Part 52.9 does not lay down any specific timetable for a respondent to make an application under that rule. Mr Lightman submits however that a respondent should do so as soon as practicable and within a short period of time commensurate with the timetable laid down by Part 52. He submits that a reasonable time should not exceed 14 days and that any application made more than 14 days after the respondent has been served with the appellant's notice should only be entertained if the court is satisfied that the respondent has provided a cogent explanation for the lateness of the application and the delay has caused the appellant no prejudice.

9. Finally, Mr Lightman made these submissions: (1) application under CPR Part 52.9 should only be made if properly formulated and thought out at the time the application is issued; (2) a respondent should not be permitted to file and serve a pro forma application under Part 52.9 and subsequently to seek to maintain the application on a different or contradictory basis; (3) an application calculated to shut out an appeal ought to proceed with urgency, in particular, where the appellant is likely to proceed on the basis that the appeal would proceed in the interim. An appellant should not be put in a position where he proceeds in the preparation of an appeal on the footing that permission to appeal has been granted unconditionally by the Lord Justice but is subsequently made subject to onerous conditions on the basis of an application made in a dilatory manner or re−formulated after the application is made.

10. For my part, subject to one overriding consideration, I would accept those submissions. It is to my mind of considerable importance that in the rare cases in which it is appropriate to make an application, an application to set aside the grant of permission to appeal or to impose conditions on the grant of permission should be made promptly; otherwise there may be significant costs, all to no avail. Once permission to appeal has been granted the court does its best to provide hearing dates for appeal. It tries to conduct its business fairly to the benefit of litigants generally. That business is likely to be interrupted if applications to set aside or to impose conditions on the permission granted are not made promptly.

11. The overriding consideration to which I have referred is the overriding objective of the CPR, namely that applications should be disposed of justly or fairly. There may be considerations of justice which lead to a different approach on the facts of a particular case. Such circumstances are to my mind however likely to be rare.

12. As already indicated, the judge made the orders complained of on 26 November 2002. Lord Justice Potter granted permission to appeal and a stay of the Jetoil action on 23 December 2002. As I understand it, the respondents became aware that permission had been granted at the very beginning of January 2003. Subsequently, the respondents obtained a number of extensions for the submission or filing of their respondent's skeleton argument in relation to the appeal because their counsel were extremely busy at the time. No notice was given of the applications with which we are concerned before the relevant application notice was issued, namely on 18 February. Previously the only indication given was that the respondents' skeleton arguments for both appeals were being prepared.

13. The grounds of the application, as stated in the application notice, were:

> "The defendant/appellant does not have a real prospect of success on appeal. As the case raises issues of fact and not immediate principle and/or that it is appropriate to impose terms on any condition."

The applications in both matters were supported by a statement of Mr Angus Johnson, dated 18 February. He said at paragraph 3:

> "(i) The trial judge when refusing leave to appeal stated that the case did not raise issues

> of legal principle, whether the clause applies depends on the facts of a one−off case and that in his view the appellants would not have a reasonable prospect of reversing any significant findings of facts. In any event, Okta instigated the 'force majeure' letter.
>
> (ii) In respect of terms of appeal, on Okta's own case there is no defence to damages in the sum of US $1,203,492 plus interest. These damages arise during the period prior to the appellants receiving the first alleged force majeure letter (which is the subject of the appeal). "

14. In paragraphs 60 to 62 of the statement Mr Johnson said:

> "60 ..... appellants must show that they have a real prospect of success on appeal. Permission to appeal in this case had been granted by Lord Justice Potter on the grounds (in both cases) that Okta's appeals are 'arguable'. In my respectful submission, this is not the same test .....
>
> 61 The trial judge, Mr Justice Aikens, having sat through approximately ten days of trial, and having heard detailed arguments on both sides, concluded that this was not a case where it was appropriate to grant permission to appeal. As emphasised in his judgments, his conclusions on both cases were based on facts.
>
> 62 Counsel will develop these arguments further at the hearing, but the respondents consider that permission to appeal in both actions should be set aside. The appellant does not have a real prospect of success in either case as the force majeure letters were instigated by Okta in any event and there is no other compelling reason why the appeals should be heard."

15. In a letter to the respondents' solicitors, Stephenson Harwood, dated 21 February, Okta's solicitors, Morgan Lewis, asserted that the respondents' stance was unsatisfactory. They referred to the statements of Lord Justice Laws and Lord Justice Jonathan Parker in Barings and invited Stephenson Harwood: (1) to give them full details of any decisive authorities or decisive statutory provisions which they allege were overlooked by Lord Justice Potter and any material respect in which they allege that Lord Justice Potter was misled; and (2) to confirm that the respondents did not allege that Lord Justice Potter had overlooked any decisive authorities or decisive statutory provisions or that he was misled. Stephenson Harwood, it has to be said, initially declined to provide that information.

16. In the meantime, in my capacity as supervising Lord Justice in relation to commercial appeals, I had been asked by the Civil Appeals Office to consider the application in the light of Barings, which is what I did before I saw a copy of Morgan Lewis's letter of 21 February. As a result, I gave certain directions which were communicated to the parties by letter of 28 February. I there indicated my concern as to the way in which the applications had been formulated and referred to CPR 52.9.2 and to paragraphs 34, 35 and 43 of the judgments in Barings. I also indicated that it then seemed to me that the applications were not based upon the considerations which Lord Justice Jonathan Parker and Lord Justice Laws had in mind.

17. I also stressed a point which I would like to reiterate today, namely that the court relies upon solicitors and counsel in commercial cases to assist the court by avoiding applications to set aside permission wherever possible. On the other hand, I would also like to stress the importance of solicitors and counsel for applicants putting applications for permission to appeal fairly before the single Lord Justice. It is very difficult for a single Lord Justice to sort out the wheat from the chaff in these complex commercial cases, and considerable reliance is placed on the parties and their representatives.

18. After some further correspondence, on 11 March, Stephenson Harwood wrote to the Civil Appeals Office. That letter included this:

> "The grounds for the application to set aside permission to appeal are set out in paragraph 3 (1) (ii) of page 3 of the statement and in particular that Okta instigated the force majeure letter. It is not open to Okta to rely on it themselves or produce force majeure. This a short point."

Subsequently both applications were listed to be heard on 4 April, that is today.

19. As I indicated earlier, it was only on 28 March that Moil−Coal abandoned its application to set aside permission to appeal in the Moil−Coal action. It appears to me that the basis upon which Jetoil now seeks to set aside the permission to appeal granted by Lord Justice Potter is very different from that originally put forward in Mr Johnson's statement of 18 February. I remain of the view expressed in the Civil Appeals Office letter of 28 February that the grounds originally put forward were very much broader but, no doubt, include those advanced.

20. The submissions made on behalf of Jetoil in the skeleton argument in support of this application summarise the matter substantially as follows: (1) Jetoil entered into the 1993 contract with Okta, who run the oil refinery in Skopje, FYROM, giving Jetoil an exclusive right for a period ending March 2003 to manipulate own account not heated crude oil and to have the right of first refusal in respect of that oil. (2) There were no problems with the contract until the major shareholding in Okta was acquired by Elpet, a consortium headed by Hellenic Petroleum − Hellenic was one of Jetoil's principal commercial rivals − in July 1999 as part of the privatisation process of the refinery. (3) In July 1999 the new chairman of Okta, Mr Karachalios (who was described as Hellenic's place man and now chairman), deliberately decided, for commercial reasons, to breach the 1993 agreement by obtaining oil supplies through Hellenic and permitting them to manipulate the oil. (4) Various issues on construction of the contract were heard by Mr Justice Thomas in the Court of Appeal in December 1999 and March 2001 and decided in Jetoil's favour. It is said there was no defence to the claim for substantial sums. (5) In June 2001, after the Court of Appeal decision had been handed down, Okta for the first time served three letters from the Government of Macedonia dated 16 November 1999, 26 November 1999 and 30 May 2001 which they said were requests not to comply with the 1993 contract and the force majeure events within clause 4 of annex 1 to the 1993 contract. Clause 4 provides as follows:

> "Neither party shall be responsible for damage caused by delay or failure to perform in whole or in part the stipulations on the present agreement, when such delay of (sic) failure is attributable to earthquakes, acts of God, strikes, riots, rebellion, hostilities, fire, flood, acts or compliance with the requests of any governmental or EC authority, war conditions or other causes beyond the control of the parties affected, whether or not similar to those enumerated.
>
> The party claiming force majeure, shall give prompt notice to the other party by fax, telex followed by registered letter stating the kind of force majeure."

(6) The question whether those letters amounted to force majeure was the central issue at trial. In the circumstances in which they were produced the judge held that Okta were not protected by clause 4 for these reasons. (a) Since Okta had already deliberately decided to breach its contract and had no intention in any event of performing the contract the failure to perform the contract was not attributable to any government request. A party relying on a clause must show that the effective cause of the non−performance is the request. (b) The request had to be "one that is made independently of the parties affected". In this case Okta had instigated the request and had even provided drafts of the letters. (c) The request had to be governmental in character, in the sense of being for a public as opposed to a private purpose, and not solely or predominantly to enable a party relying on the clause to avoid its contractual liabilities. He further concluded that clause 4 required the giving of prompt notice as a condition of reliance. It was common ground that prompt notice had not been given in the case of the November 1999 letters.

21. Jetoil further submits that in order to succeed on appeal Okta has to overturn all three of the first three matters to which I have just referred, and the fourth in respect of the 1999 letters. Counsel submits that much of Okta's skeleton argument on appeal addressed the third matter. However on their appeal (1) Okta does not challenge the finding that in about July 1999 they decided that for purely commercial reasons Okta would break the contract; (2) they accepted before the judge that they had no defence whatsoever for breach of contract between July and November 1999; (3) Okta does not challenge the finding that it instigated the letters in order to avoid having to perform the contract; (4) Okta does not challenge the finding it supplied the information for preparing the final draft of the November 1999 letters; and (5) it has always been Okta's case that the government is ultimately responsible for paying the damages awarded as a result of these shared purchase agreements.

22. Accordingly, to succeed on appeal Okta must establish that on the true construction of the contract they were entitled to rely on the clause, even if (1) the request was not outside their control but had been instigated by them in order to avoid the payment of damages, and (2) they had already decided not to perform the clause of the contract and are unable to show that they were otherwise willing to perform it. It is further submitted that that argument is contrary to the general principle that very clear words would be required to permit a party to allow a force majeure event where that party has instigated the event and it is contrary to all appeal authority.

23. Jetoil relies on Channel Island Ferries v Sealink [1988] 1 Lloyd's Rep 323 at page 327 and The "Super Servant Two" [1990] 1 Lloyd's Rep 1 at page 7 together with The "Super Servant Two" [1989] 1 Lloyd's Rep 148 at page 160 (per Mr Justice Hobhouse). It is finally submitted that when seeking permission to appeal Okta did not refer to those authorities.

24. The skeleton argument contains this further statement which has been emphasised on a number of occasions today by Mr Eder. This is a case, he says, where litigation has been continued for four years after a deliberate and cynical breach of contract instigated by Hellenic to obtain a windfall where Okta have no defence. Proceedings should therefore be brought to an end by overturning the grant of permission to appeal or alternatively Okta should be required to pay the disputed sums into court or provide other appropriate security as a condition of permission to appeal.

25. It appears to me that in the skeleton argument the only complaint of the type referred to by Lord Justice Jonathan Parker and Lord Justice Laws is that Okta failed to draw the attention of the Court of Appeal to the principles in the two cases to which I have just referred, namely Channel Island Ferries and The "Super Servant Two". It is said that they are crucial decisions.

26. However in the course of Mr Eder's oral argument this morning, Mr Eder has put the matter slightly differently. The essential thrust of the argument is the same as before. Mr Eder has forcefully drawn our attention to many of the key paragraphs in judgment, including paragraphs 52, 53, 55, 89, 103, 104, 106 and 108. Mr Eder submits, to my mind with great force, that the judge was plainly right. However Mr Lightman submits that the application is now put very differently from the way in which it was originally put on 18 February or indeed on 11 March. Now it appears to me that there is considerable force in those submissions. As to the suggestion that Channel Island Ferries and The "Super Servant Two" were not referred to in the material before the Court of Appeal, Mr Lightman draws attention to the fact that they are referred to in the written submissions prepared for trial, which were part of the bundles provided to the Court of Appeal. That is true, but I am bound to say that if there is a key authority which is crucial or potentially crucial to the prospective success of an appeal it should be referred to clearly by the proposed appellants in the skeleton argument and not left in some document annexed to it.

27. In real life it is quite impossible for a single Lord Justice to read every word of the skeleton arguments prepared for the trial. However having said that, it is right to say that the judge, Mr Justice Aikens, did not find it necessary to refer to either of those cases in the course of his judgment. He expressed the relevant principles in this regard in paragraph 53 of his judgment where he said:

> "I accept the submission of Jetoil that, generally, force majeure clauses are concerned to excuse performance of contractual obligations in circumstances where the events giving rise to the failure to perform are outside the control of the contractual party wishing to rely on the clause and their effect could not have been avoided or mitigated by reasonable steps by the contracting party concerned. A particular clause could be broader than those general confines. However in the present clause I note that after the particular events are set out there is a general phrase: '..... or other causes beyond the control of the party affected, whether or not similar to those enumerated'. That suggests that in this case the parties contemplated that the events enumerated in the clause on which a party might wish to rely should be ones that were beyond the control of the party concerned."

It appears to me that the propositions of law set out in the first part of that clause are well known propositions of law. It is no doubt for that reason that Mr Justice Aikens did not think it necessary to refer to the cases. It further appears to me that the issue that Okta raise by way of appeal is not by way of challenge to those principles but by the application of the principles to the particular clause with which the appeal is concerned, namely clause 4.

28. In these circumstances I do not, for my part, think that the failure to refer to those cases comes anywhere near the kind of irregularity referred to in Barings, to which I have referred.

29. In the course of his oral argument today Mr Eder has put the suggested failure to put the matter fairly before the Court of Appeal somewhat differently. He submits that the key issues were not fairly put in paragraphs 65 and 66 of the skeleton argument which was put before this court and the single Lord Justice. It appears to me that those paragraphs have to be put in their context. Part of the context includes paragraph 47 which says:

> "It is inappropriate, as a breach of international comity, for the English court to investigate and adjudicate on the motives or purposes of the acts of a foreign government, acting within its own territory. Aikens J, having found that the Letters constituted requests by a foreign government, should not have attempted to examine the purposes or motives of the requests or to categorise them."

Paragraphs 65 and 66 say:

> "As to the learned judge's requirement that the government's request must be made 'independently of the party that is requested', this too entails an impermissible investigation of the government's motives. Again, there is no warranty for implying such a term in clause 4. The judge's formulation does not define the degree of independence necessary. At the time the 1993 contract was entered into Okta was wholly owned by the Macedonian Government to the knowledge of Jetoil. Further, it was always possible that the Greek government could take control of Jetoil. Subsequently, Okta was privatised, but the existence of an implied term must be determined as at the date of contracting. It is pointed out that the 1993 contract, including clause 4, was negotiated and drafted by John Kardamakis of Jetoil.
>
> 66 Further, it is respectfully submitted that Aikens J was wrong to conclude that the wording of clause 4 'taken together contemplates that each of the potential force majeure events will be something which is beyond the control of the party affected' (para 55 (3) of his judgment). On the proper construction of clause 4 neither acts or requests of a governmental authority nor compliance with such requests are required to be outside the control of the parties. Only 'other causes' than those listed are required to be 'beyond the control of the party affected'. If that was not the case then everything within the clause other than the words 'causes beyond the control of the party affected' becomes redundant and valueless."

It is, to my mind, significant however that there then follows a section headed "Causation".

30. Mr Eder submits that the point in paragraph 47 is entirely different from the point which he makes in reliance upon the findings in the section of the judgment which begins at paragraph 104 where the judge asks the question:

> "In the light of the findings so far, was Okta's admitted failure to perform the 1993 contract ..... a failure that that is attributable to an act or compliance with a request of a governmental authority (ie the FYROM government) and so within the meaning of the force majeure clause?"

The judge then answered that question in a way entirely favourable to Jetoil in paragraphs 105 to 108 in particular. Mr Eder relies on the findings of fact which he says are unchallenged (paragraph 106) and the conclusion in paragraph 108, namely that −

> "Okta's failure to perform was not attributable to the FYRO M government's request, even in part. The reason Okta was in such an invidious position after the second injunction was granted on 11 November 1999 was its own decision in July 1999 not to perform the 1993 contract ..... "

A little later the judge said:

> "In my view, therefore, the only effective cause of the non−performance of the 1993 contract was not the 'government request'. It was the pre−existing decision of Okta to break the 1993 contract and its desire to continue doing so after Jetoil had obtained the 11 November injunction."

Mr Eder submits that the judge was plainly right so to hold.

31. In the section on causation (at paragraphs 67 to 70 of the skeleton argument) Okta plainly challenges the judge's reading of the phrase "attributable to" as departing from the notion of sole effective cause. There is, to my mind, a challenge to the judge's view expressed in paragraph 108 of the judgment to which I have just referred. Mr Eder is probably right that Jetoil has a very strong case. But, for my part, I am not persuaded that Okta misled the Court of Appeal in any way in relation to the causation part of the case.

32. In short, it appears to me that what Jetoil are essentially doing today is much the same as was done in Barings. They are seeking to persuade us to say that Jetoil has no real prospect of success. They are inviting us to reach a conclusion different from that reached by Lord Justice Potter. It is not appropriate for us to seek to do that for all the reasons given by Lord Justice Jonathan Parker and Lord Justice Laws. Therefore, for my part, I would not embark on any detailed analysis of the underlying merits. I certainly see the strength of the case put by Mr Eder and I certainly understand and respect the feeling on the part of his clients, but for those reasons I would decline to set aside the permission to appeal granted by Lord Justice Potter.

33. The second part of the order made by Lord Justice Potter was the stay he granted of the judgment or order made by Mr Justice Aikens. He was not informed of the true position as he ought to have been. Again, it is of the utmost importance that this court should be fully informed of the true position before a party seeks a stay. As Jetoil correctly says, before the judge Okta accepted they had no defence to a claim for damages in the sum of US $1,203,492 plus interest for breach of contract between July and November 1999 since the first of the letters relied upon was not written until November 1999. Okta also accepted before the judge that they could not seek a stay in respect of damages in that amount. That was not drawn to the Court of Appeal's attention. Further, Okta relied on the fact that Elpet had obtained an injunction from a Macedonian court to prevent Okta paying anything to Jetoil. However the judge rejected that as a basis for granting a stay. He said he would only consider a stay if the damages were paid into court or other security was provided. In fact, the junction has, as I understand it, now been set aside by the Macedonian Court of Appeal.

34. I further understand that as recently as 20 March Elpet again applied for an injunction from the Macedonian court to prevent Okta from paying damages, but the application was unsuccessful.

35. In these circumstances it appears to me that the stay granted by Lord Justice Potter should be set aside and that we should now consider afresh whether it would be appropriate to impose a stay and, if so, on what terms. It is, first, appropriate to consider the submission made on behalf of Jetoil that the permission to appeal should be made subject to the provision of an appropriate guarantee securing the whole of the amount of the judgment debt. The conditions originally suggested are these: either the full amount of the damages awarded by the judge should be brought into the jurisdiction and paid into court or the whole of the amount should be secured by appropriate bank guarantee.

36. Jetoil relies upon two statements of Mr Johnson. It relies, first, upon his first statement where he recites Jetoil's belief that it will have difficulties in enforcing a judgment. That belief is supported, it says, by Okta's attitude towards Jetoil and Moil−Coal since privatisation in about May 1999. In particular, it relies upon the fact that Okta took a commercial decision in July 1999 to ignore the 1993 agreement and deliberately broke the 1998 agreement, and that Okta has taken all steps it can to try to legitimise those breaches, especially by reliance on the force majeure clause. It commenced proceedings for its shareholder in Macedonia in order to try to avoid paying money to Jetoil. Further it relied on the jurisdiction clause and has been reluctant and slow to pay sums so far. I will return to the sums which Okta has in fact paid.

37. It is common ground, as I understand it, that the court has jurisdiction to impose conditions on the grant or continuation of permission to appeal (see for example Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA.Civ 1915. It will sometimes be appropriate to impose such

conditions and sometimes it will not (see by contrast CIBC Mellon Trust Co v Mora Hotel Corporation NV [2002] EWCA.Civ 1688, [2003] 1 All ER 564).

38. In the course of argument this afternoon Jetoil has maintained its submission that as a condition for the continuation of permission to appeal formal security should be given. It has also made the specific suggestion, I think for the first time, that Hellenic should provide a guarantee. Mr Eder submits that the effect of Okta's decision to refuse to perform the 1993 contract was that it carried out the same arrangements with Hellenic so that it is Hellenic that has made the profit which forms the basis of the $9 million or so damages awarded to Jetoil. Mr Eder submits that in these circumstances justice requires that the court should impose a term on the permission that fully secures Jetoil and that there is no reason why that should not be done because − even if there are difficulties in Okta doing it themselves which in truth there are not, having regard to their assets as opposed to their cash flow position − there is no reason why Hellenic should not provide the guarantee.

39. Mr Lightman submits however that it is not appropriate to make any such order. He submits that it is now too late to make these submissions in relation to Hellenic and that applications of this kind should be made promptly and not when there is only a comparatively short time before the hearing of the appeal. He submits that that is an important consideration in relation to the problems of transferring large sums, for example, out of Macedonia. He also relies upon the fact that Okta has paid substantial sums to the respondents since the beginning of the year. They are these: first, the sum of $979,251 plus interest of some $12,000 to Moil−Coal; second, $60,000 by way of interim costs to Moil−Coal; and, third, £240,000 by way of interim costs to Jetoil. Those payments have been made on 21 January and 24 March. He also relies on the fact that Okta has offered to pay Jetoil the undisputed judgment debt of $1.2m. We were told that that was to be paid in three equal monthly instalments in April, May and June. Mr Eder submitted that it would be more appropriate for the sum of $1.2m to be paid in two instalments, each of $600,000, on 30 April and 30 May respectively and that interest should be added to the second of those two instalments. Mr Lightman draws attention to the fact that Okta offered £90,000 by way of security for costs up to yesterday and confirms that Okta increased the offer to £100,000 although in the way of these things, Jetoil says it should be more. Mr Lightman further submits that Okta does not have the resources to pay $1.2m plus interest in full.

40. Against that, Mr Eder says that Jetoil is asking not to pay it but to secure it. Mr Eder says that the financial materials available to the court, even if accepted on their face, while they may indicate problems of cash flow they show that the underlying asset position is sound and that there are ample assets against which security could be given.

41. Applications of this kind involve the court trying to hold a fair balance between the parties. This seems to me to be a very different case from Hammond Suddard. I do attach some significance to the fact that this application was not made promptly, which has undoubtedly added to Okta's difficulties if very draconian conditions are now attached to the permission to appeal. We are now concerned with only two months between now and the appeal. It is undoubtedly a draconian measure to put the judgment creditor Jetoil in a far better position than they would have been if the appeal were not to go ahead by taking steps which may have the effect of providing security for a very substantial claim which, if the appeal were to succeed, would be held not to be owed. It may sometimes be appropriate to make such an order.

42. I have however reached the conclusion that it would not be just to go so far as Jetoil would like. It appears to me that we should impose as a term of the continuation of the permission to appeal the obligation to pay two sums of money, that it would be appropriate if those two sums were $600,000 to be paid on 30 April and $600,000 to be paid on 30 May. I would include in the order, as a term of the continuation of the stay, an order that $600,000 should be paid, that is received into a bank account of Jetoil by 1600 hrs on 30 April, and, second, payment of US $600,000 by 1600 on 30 May failing which the permission to appeal would lapse. So if the first $600,000 is not in the designated bank account by 1600 on 30 April, the appeal will automatically lapse. The same is true as to the other instalment, the second. I would also grant a form of freezing injunction as a further condition. However it is not necessary to take that step because, as I understand it, Okta are willing to undertake to the court not to take any step to dissipate any of its assets other than in the ordinary course of business pending the determination of the appeal.

43. Mr Eder did submit that that undertaking might be formulated more widely, but it appears to me an undertaking in those terms ought reasonably to meet the case. I will leave the precise form of the

wording to be agreed between the parties. It follows that this order will be made on that undertaking, namely the order refusing to set aside the permission to appeal and the order that permission to appeal should be continued only provided that two figures set out of $600,000 are paid. Again, I would rely on counsel to draw the appropriate form of words.

44. That leaves two further matters. The first is the stay. There is, I think, much to be said for the submission that a stay should be refused. Mr Lightman submits that a stay should be granted unless Jetoil is willing to undertake not to enforce the judgment against oil cargoes or, indeed, oil generally which is being used in the ordinary course of Okta's business. Mr Eder has indicated that Jetoil is not willing to give such an undertaking. He says there is no need for it. He recognises the problem of disrupting the trade of any company. But he submits essentially the same as he did earlier, that the matter can be resolved by Okta providing appropriate security either themselves or through Hellenic, for whose benefit all this trading is taking place.

45. I have found this difficult but, on balance, given that there are only two months between now and the hearing of the appeal, I have decided that it would be appropriate to impose a stay in that period.

46. Finally, security for costs. It is agreed in principle that Okta will provide security for the costs of both Jetoil in this appeal and Moil−Coal in the other appeal. It is not quite clear to me whether Moil−Coal are also respondents in this appeal. However, in the 1993 action it is appropriate that security for costs should be given for the costs of both respondents. The current position is that Okta have offered £100,000, and so far Jetoil have come down to £125,000. It appears to me that the appropriate course is approximately to split the difference. I would order security for costs be provided by payment into court within a period to be discussed of £110,000.

47. MR JUSTICE RICHARDS: I agree, on the basis that for the avoidance of doubt two payments should follow, as one of the terms for continued permission to appeal, of US $600,000.

Order: Applications refused