[1999–00 Gib LR 283]

I. KRUGER SERVICE (GIBRALTAR) LIMITED v. IN-TOWN DEVELOPMENTS LIMITED

COURT OF APPEAL (Neill, P., Clough and Glidewell, JJ.A.): September 30th, 1999

Injunctions—Mareva injunction—court's discretion to grant injunction—injunction may, if appropriate, relate to trading receipts but may permit company to continue to trade

Arbitration—confidentiality—exceptions to obligation—material obtained from arbitration may be disclosed to third party if (i) parties expressly or impliedly consent, (ii) court orders disclosure, (iii) court authorizes disclosure to protect party's legitimate interest in bringing/defending other proceedings, or (iv) necessary in public interest to ensure judicial decision made on accurate evidence

Injunctions—Mareva injunction—non-disclosure—unauthorized use in Mareva application of evidence obtained from arbitration, without disclosing to court how obtained, is breach of confidence justifying discharge of injunction

The appellant applied to the Supreme Court for a *Mareva* injunction against the respondent's assets.

The respondent company had an agreement with the Gibraltar Government for the construction and operation of a municipal waste incinerator which would produce minimum annual quantities of electricity and drinking water. The operation of the plant was sub-contracted by the respondent to the appellant company. Both were Gibraltar subsidiaries of Danish parent companies. The operating agreement provided for a minimum payment to the appellant calculated on the basis of the anticipated income to be received by the respondent from the Government.

After three years of operation the respondent commenced arbitration proceedings in Denmark, claiming damages against the appellant for its failure to deliver drinking water and electricity. The appellant, which had received no payment from the respondent, counterclaimed for fees and equipment costs, relying in its defence on the respondent's failure to secure delivery of sufficient quantities of refuse.

The respondent also commenced arbitration proceedings in Gibraltar, claiming damages from the Government for its failure to provide a

minimum quantity of refuse for incineration. The Government had withheld payment for water and electricity produced and held the moneys in escrow pending the outcome of the arbitration. The Danish arbitration, which was to be held in Gibraltar, was stayed pending the outcome of the Government arbitration.

The appellant assisted the respondent in its preparation for the trial of the preliminary issue of the Government's obligations. Documents were exchanged and the appellant's representatives attended the arbitration with the Government's consent, on the condition that they undertook to be bound by the obligation of confidence as if they were a party to the arbitration. The arbitrators made an interim award in favour of the respondent that the Government was obliged to deliver a minimum annual quantity of refuse as set out in a Schedule to the agreement. The respondent sent a copy of the award to the appellant.

The appellant then obtained a *Mareva* injunction from the Supreme Court (Schofield, C.J.) in respect of the sums claimed, on the grounds that (i) it was owed very large sums by the respondent for fees and equipment under the operating agreement; (ii) the respondent and its parent company had negative cash balances and the incineration plant was virtually worthless without the benefit of the respondent's agreement with the Government; (iii) it was likely in view of the interim award that the sums held in escrow by the Government would be released to the respondent; and (iv) there was a real risk that those moneys would not be available to satisfy an award in its favour in the Danish arbitration, as they would be applied by the respondent to reduce its own losses.

The respondent obtained the discharge of the injunction by Pizzarello, A.J. on the grounds that (i) no risk of dissipation had been established; the parties had been aware from the outset that they had no assets in Gibraltar and were dependent on their operations here to generate capital, and furthermore each was part of a large international group; (ii) the appellant had delayed making its application for several years until funds had become available; (iii) the trading receipts represented by the funds in escrow were needed for the running of the respondent's business and should not be made the subject of an injunction; (iv) reliance on the interim award without the consent of the parties to the arbitration was a breach of confidence; and (v) the appellant had made no proper disclosure to the court as to who were the proper parties to the arbitration.

The appellant appealed against the discharge of the injunction. The court ordered that it would remain in place until the appeal had been determined.

Held, dismissing the appeal and discharging the injunction:

(1) The Supreme Court had erred in finding that the escrow funds, as trading receipts, could not be made the subject of a *Mareva* injunction. In appropriate circumstances, a company's trading receipts could be enjoined and, as had happened here, an exception could be made in the order to enable the company to continue to trade (para. 28).

(2) Furthermore, the Supreme Court's finding that the appellant had failed in its duty to disclose the identity of the parties to the Danish arbitration was open to question. The court had been referred to the pleadings, showing that there was more than one party on each side in the arbitration, and the appellant was obliged to disclose only those facts which the court might reasonably take into account in deciding whether to grant the injunction (para. 29).

(3) However, the Supreme Court had properly discharged the injunction on other grounds, namely that the appellant had made improper use of the interim award in the Government arbitration and had not fully disclosed to the court the circumstances of its involvement in that arbitration. The implied obligation of confidence was an essential corollary to the privacy of arbitration proceedings. Exceptions to the obligation existed where (a) the disclosure of material was made with the express or implied consent of the party from whom it came, (b) the court ordered disclosure, (c) the court authorized the disclosure to protect the legitimate interest of a party to the arbitration claiming against, or defending a claim by, a third party, or (d) disclosure was necessary in the public interest to ensure that a judicial decision was made on the basis of accurate evidence. The obligation applied even if the person to whom disclosure was contemplated was under the same beneficial ownership and management as the complaining party (paras. 32–34; para. 40).

(4) The appellant was bound by the obligation of confidence, notwithstanding that it had disclosed the interim award only to the respondent and to the court, since it had been admitted to the Government arbitration for a specific purpose and had been informed by the respondent of the award in that context. The communication of the award had not lifted the obligation, allowing the appellant to use that information for its own purposes, particularly purposes hostile to the respondent. Nor did the appellant fall within any of the established exceptions. Its undertaking to the Government did not invest it with a party's rights to use the material to initiate or defend other proceedings. Nor could it use the material to protect its interests in the Danish arbitration, and the fact that the Supreme Court exercised a supervisory jurisdiction over the Danish arbitration to be conducted here did not justify the disclosure to the court. The public interest exception did not apply to the disclosure of the interim award (paras. 35–39; para. 41).

(5) Since the appellant had not explained fully the context in which its Danish lawyers had received the copy of the interim award or mentioned the express undertaking that they had given to the Government, the Supreme Court had been denied the opportunity to consider the issue of confidentiality before taking into account the interim award. The appellant's non-disclosure was a serious matter which justified the discharge of the injunction (paras. 42–43).

(6) Finally, the Supreme Court had been entitled to conclude that there was no serious risk of the dissipation of the sums held in escrow by the Government if released to the respondent. The purpose of a *Mareva* injunction was not to provide the applicant with security for its claims, and the appellant had not shown that there was a real risk that a judgment or award in its favour would remain unsatisfied if an injunction were refused. The incineration project was a long-term one which would involve a continuing relationship between the corporate groups to which the parties belonged. The financial arrangements were typical for a project of its kind and the parties had understood them at the outset. The present impecuniosity of the respondent did not determine its ability to meet a future award in the Danish arbitration. The appeal would be dismissed (paras. 49–52).

Cases cited:
(1) *Ali Shipping Corp.* v. *Shipyard Trogir*, [1999] 1 W.L.R. 314; [1998] 2 All E.R. 136, applied.
(2) *Brink's Mat Ltd.* v. *Elcombe*, [1988] 1 W.L.R. 1350; [1988] 3 All E.R. 188.
(3) *Dolling-Baker* v. *Merrett*, [1990] 1 W.L.R. 1205; [1991] 2 All E.R. 890, *dicta* of Parker, L.J. applied.
(4) *Hassneh Ins. Co. of Israel* v. *Mew*, [1993] 2 Lloyd's Rep. 243.
(5) *Insurance Co.* v. *Lloyd's Syndicate*, [1995] 1 Lloyd's Rep. 272; [1994] CLC 1,303.
(6) *London & Leeds Estates Ltd.* v. *Paribas Ltd. (No. 2)*, [1995] 1 E.G.L.R. 102.
(7) *Ninemia Maritime Corp.* v. *Trave Schiffahrts G.m.b.H. & Co. K.G.*, *The Niedersachsen*, [1983] 1 W.L.R. 1412; [1984] 1 All E.R. 398; [1983] 2 Lloyd's Rep. 612, applied.

T.R. Mowschenson, Q.C. and *G. Licudi* for the appellant;
P.H. Gross, Q.C. and *A. Christodoulides* for the respondent.

NEILL, P.:

Introduction

1 This is an appeal by I. Kruger Service (Gibraltar) Ltd. ("Kruger") from the order of Pizzarello, A.J. dated May 7th, 1999, discharging a *Mareva* injunction in the sum of approximately £12,775,000 granted to the respondents, In-Town Developments Ltd. ("In-Town") by the order of Schofield, C.J. dated May 28th, 1998. Pizzarello, A.J. gave leave to Kruger to appeal to this court.

2 The appeal raises, among other questions, a question of some importance as to the nature and scope of the duty of confidentiality imposed by the law in relation to arbitral proceedings and in particular an arbitral award.

The background facts

3 By 1990 the Government of Gibraltar had become concerned about the disposal of refuse generated by the City. The incinerator in Devil's Tower Road had by then been in operation for over 15 years and it was unable to cope with the full quantity and range of the waste produced. The Government commissioned a study of the problem and, as a result, a contract dated November 16th, 1990 (the Government agreement) was signed between the Government and In-Town for the construction and operation of a new incinerator on Government land at Michael Dobinson Road, Gibraltar.

4 In broad terms, the Government agreement provided for the installation and operation for a period of 20 years of a new plant which was capable not only of dealing with all Gibraltar's waste but also of producing electricity and drinking water. The heat generated by the incineration of the refuse was to be used to generate steam. The high-pressure steam would drive a turbine, thereby producing electricity. The residue of the steam would then be used in a desalination plant to produce drinking water.

5 By a separate agreement dated November 2nd, 1990 ("the operating agreement"), the operation of the new incinerator plant for the whole of the 20-year period of the Government agreement was sub-contracted to another company. There is a dispute between the parties to the present proceedings as to the precise identity of the parties to the operating agreement but for the purpose of the present appeal it is accepted by In-Town that, save in relation to the issue of non-disclosure (to which I shall refer later), the parties to the operating agreement were, respectively, In-Town and Kruger.

6 In-Town is a company registered in Gibraltar. It was established as a single-purpose vehicle for the construction and operation of the new incinerator. It is now a subsidiary of Asgaard Finans A/S ("Asgaard"), a Danish company. The initial funding required by In-Town for the purpose of the Government agreement was provided by Asgaard (then Baltica Finans A/S). Kruger is also a company registered in Gibraltar. It is a subsidiary of Kruger A/S.

7 It is not necessary for the purposes of this judgment to refer in detail to the provisions of the Government agreement, which have been examined at some length by this court in its judgment in Civil Appeal No. 23 of 1999. It is sufficient to record that under the Government agreement it was provided that, in consideration of In-Town undertaking the construction and financing of the incinerator and arranging for its operation, In-Town was entitled to receive sums by way of income under three headings:

(a) £43 per ton for each ton of refuse received. This was described as the "gate fee." This amount was to increase at the rate by which the cost of living in Gibraltar, as defined by the Index of Retail Prices, increased in each year.

(b) £1.50 per cubic metre of drinking water which was supplied by the plant. This amount was to increase at the rate of 3.1% per annum from January 1st, 1991. Under the Government agreement In-Town was required to supply at least 650,000 cu. m. of drinking water per annum.

(c) £0.06 per kW. hour of electricity which was supplied by the incinerator. This sum was to increase at the rate of 3.1% per annum from January 1st, 1991. Under the Government agreement In-Town was required to supply at least 18,000 MW. hours per annum.

8 It was anticipated that the income to be received by In-Town from the Government under the Government agreement would be somewhat in excess of £3.25m. per annum. The operating agreement provided for a minimum payment from In-Town to Kruger in excess of £1m. per annum. In due course, the new incinerator was constructed and it commenced operation on January 31st, 1992.

9 On December 2nd, 1996, In-Town commenced arbitration proceedings against the Government of Gibraltar claiming damages for an alleged breach by the Government of its obligation to provide a minimum quantity of refuse pursuant to the Government agreement. By that time the Government had paid to In-Town a total sum of approximately £4m., representing the gate fee for the period from the commencement of operation of the plant until November 1995. Further amounts claimed by In-Town to be due under the Government agreement were held by the Government in escrow pending the outcome of the arbitration proceedings which had been threatened and which, as I have already mentioned, were commenced in December 1996. By the spring of 1998 the sum held in the escrow account was about £4.2m.

10 Meanwhile, difficulties had arisen between In-Town and Kruger. In-Town declined to make any payment to Kruger under the operating agreement, claiming that Kruger was in breach of its obligation under the agreement. In 1992 Kruger sought to determine the operating agreement on the grounds that the non-payment of the fee in December 1992 amounted to a fundamental breach. This issue was referred to arbitration pursuant to an *ad hoc* arbitration agreement. However, this arbitration concluded with the finding that the non-payment to Kruger of the operation and management fee for the first 11 months of the operation of the plant was not, under Danish law, a material default entitling Kruger to terminate the operating agreement.

11 In May 1995, following earlier arbitration proceedings brought by

In-Town or its holding company, In-Town instituted arbitration proceedings in Denmark before the Danish Arbitration Institute, claiming damages against Kruger. Arbitrators have been appointed in the Danish arbitration and in due course the arbitration will be held in Gibraltar as required by the operating agreement. The Danish arbitration, however, has been stayed pending the decision of the arbitrators in the Government arbitration.

The interim award in the Government arbitration

12 A preliminary meeting in the Government arbitration was held on May 16th, 1997, at which directions for the service of pleadings and in relation to other matters were given. Pleadings were then served, from which it emerged that an important issue between the parties was whether the Government was under a contractual obligation under the Government agreement to supply a specified minimum quantity of refuse every year.

13 On July 31st, 1997, at a further directions meeting, an order was made for the determination of three preliminary issues. The first of these issues was in these terms: "On the true construction of the agreement, what were the respondent's [the Government's] obligations with regard to the supply of quantity and quality of refuse?" Argument and evidence on this preliminary issue was heard in Gibraltar on February 23rd–25th, 1998.

14 A similar issue to that before the arbitrators in the Government arbitration arises in the Danish arbitration between In-Town and Kruger. Thus, in response to In-Town's claims for damages against Kruger for an alleged failure to deliver electricity and drinking water, Kruger relied on an alleged failure by In-Town to secure the delivery of minimum quantities of refuse.

15 It was at all material times apparent to the legal advisers of In-Town and the legal advisers of Kruger that Kruger had an interest in the outcome of the Government arbitration, including the outcome of the hearing of the preliminary issue. Accordingly, the legal advisers to Kruger gave considerable assistance to In-Town in the preparation for the trial of the preliminary issue. Documents were exchanged and in due course arrangements were made for representatives of Kruger to attend part of the hearing before the arbitrators in the Government arbitration. The attendance of these representatives, however, required the consent of the Government. This consent was sought and given, but the Government insisted that Kruger and those present should give an undertaking to be bound by an obligation of confidence in the same way as if they were parties to the arbitration.

16 On May 14th, 1998 the arbitrators in the Government arbitration issued their award. In this arbitration the Government had contended that its obligations to deliver refuse were limited to the quantity of refuse for which it was responsible and as defined in the Government agreement. In-Town, on the other hand, contended that in each year of the operation of the Government agreement the Government was obliged to deliver a minimum quantity of refuse in accordance with the formula set out in Schedule 6 to the agreement. By the interim award, the arbitrators determined the preliminary issue in favour of In-Town and held that, on the true construction of the Government agreement, an obligation was imposed on the Government to deliver a minimum quantity of refuse each year, as specified in Schedule 6.

The application for a *Mareva* injunction

17 In accordance with the previous policy of co-operation with Kruger and because it was recognized that Kruger had an interest in the outcome of the preliminary issue, In-Town sent to Kruger a copy of the interim award. On receipt of a copy of the interim award, Kruger decided that the time had come to apply for a *Mareva* injunction. The application came before Schofield, C.J. on May 28th, 1998. In accordance with the usual practice the application was made *ex parte*.

18 The application for an injunction was supported by a substantial affidavit sworn in Copenhagen on May 20th, 1998 by Mr. Peter Mosegaard, the general manager of Kruger. In this affidavit Mr. Mosegaard set out the history of the new incinerator plant and described the parties to the various agreements. I can summarize some of his other testimony as follows:

(a) Both In-Town and its parent company had a negative cash balance.

(b) Although the operating agreement provided for a minimum payment from In-Town to Kruger in excess of £1m. per annum, Kruger had not received any money at all, though it had continued to operate the plant. By the date of his affidavit, over £10m. was payable to Kruger under the operating agreement in fees alone, and a further sum, in the region of £2.4m., was due to Kruger in respect of the cost of ancillary equipment for the plant which should have been provided by In-Town. The claim by Kruger against In-Town in the arbitration was stated to be approximately £12,755,000.

(c) Mr. Mosegaard believed that the principal assets of In-Town were the benefit of the Government agreement and its entitlement to receive any fees payable under that agreement. The plant, though an asset belonging to In-Town, was virtually worthless without the benefit of the

Government agreement, or the co-operation and agreement of the Government to allow the importation of waste and its agreement to take supplies of electricity and water.

19 It seems to be quite clear that the reason why no earlier application had been made by Kruger for a *Mareva* injunction was because it was thought that In-Town had no readily-available assets. The funds in the escrow account were thought likely to remain there until the conclusion of the Government arbitration. The interim award, however, changed the position. In his affidavit Mr. Mosegaard said: "I believe that it is now extremely likely, following the handing down of the award on May 14th, 1998, that the whole or part of the funds held by the Government in escrow will be released to the respondent." From this it is clear that the award, and Kruger's knowledge of the award, provided the trigger for the making of the application to the Chief Justice.

20 In his affidavit Mr. Mosegaard set out the reasons why he considered that there was a real risk that if any sums were received by In-Town from the Government they would be dissipated and would not be made available to satisfy any award or judgment which might be made against In-Town in the Danish arbitration. He said: "Instead, any moneys received by [In-Town] will be applied to reduce its losses in the Gibraltar operations of itself or the group." Earlier in his affidavit Mr. Mosegaard referred to the Government arbitration. He said this:

> "A hearing of certain preliminary issues in the Government arbitration took place in Gibraltar in the week of February 23rd, 1998. [Kruger's] lawyers in Denmark . . . have been provided with a copy of the award dated May 14th, 1998 made following this hearing."

A copy of the award was then exhibited to the affidavit.

21 On May 28th, 1998, after hearing counsel instructed on behalf of Kruger and having read the affidavit of Mr. Mosegaard, Schofield, C.J. granted an injunction restraining In-Town from dealing with its assets up to a value of approximately £12,755,000. The order contained the usual exceptions relating to proper business expenses and any reasonable and proper legal expenses. The order also incorporated in a schedule the undertakings given to the court by Kruger. These undertakings included an undertaking by Kruger that it would proceed with its counterclaim in the Danish arbitration.

22 On being served with a copy of the *Mareva* injunction, In-Town made an application for its discharge. This application was adjourned by the Chief Justice on June 25th, 1998 to a date to be fixed.

The hearing before Pizzarello, A.J.

23 The application to discharge the *Mareva* injunction first came before Pizzarello, A.J. in November 1998. A large number of issues were raised before him and at that stage he gave directions that each party should file further evidence and that the injunction should continue until an adjourned hearing on February 25th and 26th. At the adjourned hearing Pizzarello, A.J. had before him no less than 14 affidavits and a number of exhibits thereto. He heard argument by Queen's Counsel for both sides.

24 On May 7th, 1999 Pizzarello, A.J. delivered his judgment discharging the *Mareva* injunction. However, the judge gave Kruger leave to appeal to this court and ordered that pending the determination of the appeal the *Mareva* injunction should remain in place. In his judgment Pizzarello, A.J. gave a number of reasons for discharging the *Mareva* injunction. These included:

(a) Both companies were single-purpose companies which were well aware of each other's limitations in that they had no assets in Gibraltar and could only carry on business with money raised by their own operations. The two companies were also aware that they were attached to parent companies which were part of large international organizations. The learned judge therefore considered that no danger of dissipation had been established. He also drew attention to the fact that the parent of In-Town had an on-demand guarantee which it had not called upon.

(b) Kruger had delayed making any application. The learned judge said that the applicant had never made an application until it was thought that there were some funds available. "It had waited several years. So again no injunction should go."

(c) The moneys held by the Government in the escrow account represented trading receipts which were needed for the running of the business and should not be the subject of an injunction.

(d) Kruger had relied upon the interim award, which the judge regarded as a breach of confidence. He said:

> "Another reason why the injunction should be discharged arises from the view I have formed that this application was triggered off by the release of the interim [award] in the Government arbitration. It follows that [Kruger] has put to use that which was obtained by it in confidence, in other words, it has breached the undertaking of confidentiality given to the parties to the Government arbitration. I agree with [counsel for In-Town] that the interim award is granted on a separate and different arbitration and should not have been relied on without the consent of the parties or a court order. There is no consent and no court order."

The judge rejected the argument that the principle of confidentiality did not apply because Kruger and In-Town had joined forces against the Government.

(e) Kruger had failed to make a proper disclosure to the Chief Justice about the issue as to who were the proper parties in the arbitration.

(f) The judge should have been told that there was an issue as to whether or not the court in Gibraltar had jurisdiction.

25 It is plain from the judgment that he attached particular importance to the failure of disclosure in regard to the confidential nature of the interim award.

The arguments in this court

26 In this court counsel for Kruger accepted that the decision of Pizzarello, A.J. was a decision made in the exercise of his discretion, but he argued that none of the reasons given by the judge was sufficient to entitle him to discharge the injunction. In doing so he was plainly wrong and had erred in principle.

27 It is not necessary for me to say more than a few words about the jurisdiction of the court. Counsel for In-Town accepted, for the purposes of this appeal, that the courts in Gibraltar had jurisdiction although the arbitration was a Danish arbitration. Moreover, we were not addressed on the question of whether Kruger should have made a fuller disclosure to the Chief Justice that there was an issue on jurisdiction. Accordingly, I say no more about this point.

28 I can also deal shortly with the question of whether the fact that In-Town is entitled to the money in the escrow account as income means that the money could not properly be made the subject of a *Mareva* injunction. With respect to the judge, I feel bound to disagree with him on this point. It seems to me that trading receipts can in appropriate circumstances be made the subject of a *Mareva* injunction, though, as has happened in this case, exceptions can be included in the order so as to enable the company enjoined to carry on trading.

29 I have also been troubled by the judge's decision on non-disclosure in relation to the parties. Counsel for Kruger rightly reminded us of the decision of the Court of Appeal in England in *Brink's Mat Ltd.* v. *Elcombe* (2), in which members of the court warned that applications to discharge injunctions on the basis of non-disclosure should not be made on slender grounds. The duty to disclose is a very important one but it is limited to "the facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application." The duty does not extend to disclosing all documents or information which

would come to light on discovery in the action. In the present case I understand that the judge was referred to the pleadings in the Danish arbitration from which it was apparent that there was more than one party on each side. However, in the light of the firm conclusion which I have reached on what I regard as the most important aspect of this case, I do not find it necessary to decide whether or not this court would be justified in interfering with the judge's decision with regard to the parties.

30 I turn, therefore, to the questions whether, in the circumstances, Kruger made proper use of the interim award and whether Kruger made proper disclosure to the Chief Justice of the circumstances in which it had been made privy to the Government arbitration. Before considering the facts, however, I should say something about the relevant law.

The law

31 In the course of the hearing we were referred to several authorities relating to the obligation of confidence which throws a screen of protection round arbitration proceedings. One can start with the judgment of Parker, L.J. in *Dolling-Baker* v. *Merrett* (3), in which he said ([1991] 2 All E.R. at 899):

> "As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must . . . be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award—and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration—save with the consent of the other party, or pursuant to an order or leave of the court."

32 The duty of confidence was further examined by Colman, J. in two valuable judgments in the Commercial Court in *Hassneh Ins. Co. of Israel* v. *Mew* (4) and *Insurance Co.* v. *Lloyd's Syndicate* (5). I do not think it necessary, however, for me to refer to these judgments in detail because the matter has been the subject of recent consideration by the Court of Appeal in England in *Ali Shipping Corp.* v. *Shipyard Trogir* (1). From this decision one can extract the general principle that *prima facie* arbitration proceedings are cloaked with an obligation of confidence. As Potter, L.J. explained in that case ([1998] 2 All E.R. at 146), the obligation is implied as a matter of law and "arises as an essential corollary of the privacy of arbitration proceedings . . ."

33 There are a number of recognized exceptions to the general principle which entitle a party to the proceedings to make use of documents

obtained in the proceedings or of the award. In *Ali Shipping Corp.*, Potter, L.J. identified the exceptions on the basis of the present decisions as being as follows (*ibid*., at 147):

> ". . . (i) consent, i.e. where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception, i.e. the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy between bank and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party . . ."

34 Later in his judgment (*ibid.*, at 148) Potter, L.J. also approved a further exception suggested by Mance, J. in *London & Leeds Estates Ltd.* v. *Paribas Ltd. (No. 2)* (6), that in some cases evidence given at an arbitration hearing can be disclosed in the interests of justice so as to ensure that a judicial decision is reached on the basis of accurate evidence.

35 It was argued on behalf of Kruger that in the particular circumstances of this case the duty of confidence had no application at all. Thus, it was said that the duty only related to disclosure to a third party, whereas here the disclosure was only to In-Town itself and to the supervising court. A court which had a supervisory jurisdiction in arbitration proceedings could not be regarded as a third party. But this argument appears to me to be based on a misunderstanding of the nature of the duty. The admission of Kruger into the arbitration proceedings was for a specific purpose. The disclosure of the award was to inform Kruger of the result of the proceedings to which it had been privy. The screen of confidence was not lifted, however, so that Kruger could later use the acquired information for its own purposes, particularly when those purposes were hostile to the disclosure of the information.

36 Next it was said that if the duty of confidence had any relevance, Kruger could rely on one or more of the recognized exceptions to the general principle. The undertaking given to the Government was that Kruger would respect the duty of confidence as if it had been a party to the arbitration proceedings. No similar undertaking was given to In-Town. Accordingly, it was said, if Kruger was to be treated as a party to

the arbitration proceedings, it could make use of the award and of any information obtained in the course of the arbitration either to initiate proceedings or defend itself against proceedings brought against it in the same way as any other party to the arbitration proceedings.

37 Here again, however, I consider that Kruger's argument is based on a misapprehension. The express undertaking given to the Government that Kruger would respect the confidentiality of the arbitration proceedings in the same manner as a party imposed a duty of confidence on Kruger but it did not invest Kruger with the rights of an actual party to the proceedings. It remained a stranger to the Government arbitration, though admitted for a limited purpose behind the confidential screen.

38 Thirdly, it was argued, Kruger could make use of the award to protect its own interests. But the right to protect one's interests is a right given to the parties to the arbitration in question. Here Kruger is seeking to make use of information obtained relating to arbitration A to protect its interests in arbitration B. In my judgment, this is impermissible.

39 Finally, it was argued that Kruger could rely on the special public interest exception recognized by Mance, J. But this exception can at best only relate to the issue as to the parties to the Danish arbitration. It has no relevance to the propriety of the disclosure of the interim award.

40 In this context I would draw attention to a passage in the judgment of Potter, L.J. in *Ali Shipping Corp.* (1). In that case it was suggested that there was a further exception to the confidentiality rule where the parties to whom disclosure is contemplated are in the same beneficial ownership and management as the complaining party. Potter, L.J., however, rejected this argument in these terms ([1998] 2 All E.R. at 149):

> "I do not think [a further exception should be created]. I say that for two particular reasons. First, whatever the position in this case, it is possible to envisage a situation where, despite the feature of common beneficial ownership between them, one entity may wish to keep private from another the details of materials generated in an earlier arbitration. Second, where the problem arises in relation to disclosure in later proceedings, to propound such an exception is to leave out of account that (as appears to be the position in this case) the real interest of the objecting party is to withhold disclosure of such materials from the subsequent decision maker. In this context the latter is the 'third party stranger' in respect of disclosure to whom the objecting party seeks protection. While such motives may not be 'worthy' in the broad sense, and certainly do not assist the course of justice, there may yet be a permissible tactic in advancing or protecting the interests of the objecting party. The fact that the arbitrator in the subsequent proceedings will in turn be bound by

> duties of confidentiality is no cure for the damage which the objecting party perceives may be caused to his interests from an adverse decision resulting from, or influenced by, the disclosure sought to be made."

41 It follows, therefore, that the fact that the Gibraltar court has a supervisory jurisdiction over the conduct of the Danish arbitration does not entitle a party to the Danish arbitration to disclose to the court information obtained as a result of being privy to quite separate arbitration proceedings.

42 I have already referred to the principal arguments advanced on behalf of Kruger. In addition it was contended that the court should take account of the reality of the position and consider whether, had he been asked, Schofield, C.J. would have declined to look at and give effect to the interim award. It was suggested that had the full facts been explained to him, it was more than probable that Schofield, C.J. would have admitted the interim award in evidence. The problem with this approach, however, is that the Chief Justice was never given the opportunity to consider whether he should look at the award or not. Kruger should have appreciated that an issue of confidentiality arose and have put the full facts before him. In fact, he had a single sentence in Mr. Mosegaard's affidavit stating that Kruger's lawyers in Denmark had been provided with a copy of the award. A copy was exhibited without any further explanation. Furthermore, it is to be remembered that an express undertaking of confidentiality had been given by Kruger to the Government.

43 I am satisfied that Pizzarello, A.J. was entitled to come to the conclusion that Kruger should not have made use of the interim award without either obtaining the consent of In-Town or the Government or an express direction from the court. Furthermore, I am satisfied that the learned judge was entitled to treat the non-disclosure of the circumstances surrounding Kruger's knowledge of the award as a serious matter. Accordingly, on this ground alone I would decline to interfere with the judge's decision.

44 I must return again, however, to the question of whether the judge was entitled to rule that no serious risk of a dissipation of assets had been established.

The risk of dissipation

45 At the hearing before the court, counsel for Kruger placed great emphasis on the risk that In-Town might dissipate its assets so that none would be available to meet any award. The following matters were relied upon in particular:

1. In-Town was insolvent.

2. In-Town had received in excess of £4m. from the Government in respect of the operation of the plants from which sum Kruger had received nothing.

3. In-Town's stance in the litigation indicated that it would pay any moneys which it received from the escrow account or elsewhere to its parent.

46 In support of the argument on dissipation, counsel for Kruger referred the court to a passage in the affidavit of Mr. Bierfreund sworn on June 22nd, 1998. This paragraph in the affidavit and the succeeding ones were introduced under the heading: "If In-Town obtains sums from the Government, is it likely to transfer the funds in such a way as to defeat Kruger Gibraltar's claims?" Under this heading Mr. Bierfreund continued:

> "Mr. Mosegaard does not pose the question in these terms in his affidavit, because it exposes one of the basic fallacies in his case, which is that In-Town has no contractual connection with Kruger Gibraltar, and its business and activities cannot be controlled by Kruger Gibraltar. What In-Town does with its money is its concern alone."

47 Counsel for In-Town accepted that the final sentence there was unfortunately expressed but he explained that the language used was a measure of the annoyance which Mr. Bierfreund felt at the suggestion that In-Town would not pay its debts. In the two subsequent paragraphs of the same affidavit Mr. Bierfreund pointed out that single-purpose project companies are almost always in a poor financial position if looked at in isolation. He suggested that if there was a real fear that Kruger or its parent would not receive the money then it should go to the court in Denmark and ask for an injunction against the parent.

48 It should be remembered that this part of the affidavit has to be read in the light of the fact that Mr. Bierfreund took a different view from Kruger as to the proper parties to the operating agreement.

49 It is important to emphasize that the machinery of a *Mareva* injunction cannot be invoked for the purpose of providing a party with security for its claims. The question whether a *Mareva* injunction should be granted involves the consideration of whether "on the whole of the evidence then before the court it concludes that the refusal of a Mareva injunction would involve a real risk that a judgment or an award in favour of the plaintiffs would remain unsatisfied": see *Ninemia Maritime Corp.* v. *Trave Schiffahrts G.m.b.H. & Co. K.G., The Niedersachsen* (7) ([1983] 2 Lloyd's Rep. at 617).

50 The judge in the present case considered the evidence and came to the conclusion that a serious risk of dissipation had not been proved. He took account of the fact that both companies were members of large groups and that the mere impecuniosity of In-Town at the present time was not determinative of the matter. The financial arrangements, the judge considered, were typical of a project of this kind. Furthermore, as counsel for In-Town pointed out in his skeleton argument, the "asset (or no asset)" position of the two parties was known, understood and bargained for from the outset. In addition, it is relevant to take account of the fact that the project is one which will extend over a number of years and indicates a long-term relationship between the two groups of companies of which the present parties form part.

51 I therefore consider that the judge was entitled to conclude that no substantial risk had been established that an award or judgment would not be satisfied.

52 Accordingly, for the reasons which I have endeavoured to outline, I would dismiss this appeal and discharge the injunction.

CLOUGH and **GLIDEWELL, JJ.A.** concurred.

Appeal dismissed.