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Judgment: 23.6.88

HOUSE OF LORDS

DEUTSCHE SCHACHTBAU-UND TIEFBOHRGESELLSCHAFT MBH
AND OTHERS
(RESPONDENTS)

v.

SHELL INTERNATIONAL PETROLEUM COMPANY LIMITED
(TRADING AS SHELL INTERNATIONAL TRADING COMPANY)
(APPELLANTS) (FIRST APPEAL)

DEUTSCHE SCHACHTBAU-UND TIEFBOHRGESELLSCHAFT MBH
AND OTHERS
(RESPONDENTS)

v.

SHELL INTERNATIONAL PETROLEUM COMPANY LIMITED
(TRADING AS SHELL INTERNATIONAL TRADING COMPANY)
(APPELLANTS) (SECOND APPEAL)

Lord Keith of Kinkel
Lord Brandon of Oakbrook
Lord Templeman
Lord Oliver of Aylmerton
Lord Goff of Chieveley

LORD KEITH OF KINKEL

My Lords,

I have had the opportunity of considering in draft the speeches to be delivered by my noble and learned friends Lord Oliver of Aylmerton and Lord Goff of Chieveley. I agree with them, and for the reasons they give would allow the appeal in the garnishee proceedings and discharge the Mareva injunction.

LORD BRANDON OF OAKBROOK

My Lords,

For the reasons contained in the speeches of my noble and learned friends, Lord Oliver of Aylmerton and Lord Goff of Chieveley, with both of which I agree, I would allow these appeals.

LORD TEMPLEMAN

My Lords,

This appeal raises an important question: when there is a conflict between an order of an English court and an order of a court of a foreign state whereby a debtor is compellable under English law to discharge his debt by payment to a third party and is compellable under foreign law to discharge his debt by payment to his creditor, thus rendering the debtor liable to pay the same debt twice over, in what circumstances should the English court defer to the foreign court thus removing the danger of double payment but thereby preventing the third party from enforcing an English judgment debt against the creditor? In the present case the debtor is the appellant, Shell International Petroleum Co. Ltd. ("Sitco"), the creditor is the R'As al-Khaimah National Oil Co. ("Rakoil") and the third party is the respondent Deutsche Schachtbau-Und Tiefbohrgesellschaft m.b.H. ("D.S.T."). Sitco is an English company resident in England. Sitco admits and claims to owe Rakoil U.S. $4.8m. and interest for oil supplied by Rakoil to Sitco in the state of R'As al-Khaimah ("the State"). Rakoil was incorporated in the State and is resident in the State. Under English private international law rules the debt admitted to be due from Sitco to Rakoil is situate in England. D.S.T. is a judgment creditor of Rakoil for sums exceeding U.S. $4.8m. The only way by which D.S.T. can obtain any payment is by a garnishee order whereby Sitco will pay to D.S.T. the debt which Sitco owes to Rakoil. The payment by Sitco to D.S.T. pursuant to the garnishee order will, under English law, discharge to the extent of the payment, the debt owed by Sitco to Rakoil. The payment by Sitco to D.S.T. pursuant to the garnishee order will also discharge, to the extent of the payment, the judgment debt owed by Rakoil to D.S.T. A garnishee order has been made but not implemented and Sitco now ask for the garnishee order to be discharged because the Civil Court of the State has ordered Sitco to pay the State. If the garnishee order is discharged D.S.T. will not be able to enforce its judgment debt against Rakoil. If the garnishee order is not discharged Sitco may be obliged to pay twice over unless the Civil Court of the State relents or unless Rakoil pays the English judgment debt due from Rakoil to D.S.T. Sitco argue that a garnishee order should not be made if in the result Sitco may be obliged by the conjoint effect of the order of the English court and the order of the Civil Court to pay twice over. D.S.T. argue that it is the duty of the English court to enforce the judgment debt owed by Rakoil to D.S.T. under English law without taking into account the order of the Civil Court. This raises the question of principle. D.S.T. also argue in the alternative that having regard to the conduct of Rakoil, the State, the Civil Court and Sitco, it is proper that the English court should expose Sitco to the risk of paying twice rather than condemn D.S.T. not to be paid at all.

The State is an independent sovereign state situate on the southern shores of the Persian Gulf. The State is represented by the Ruler. All the issued share capital of Rakoil belongs to the Ruler; the affairs of Rakoil are supervised by the Crown [illegible] behalf of the Ruler. By an agreement dated 23 May 1973 [illegible]

concession agreement") the State granted a concession for the exploration and exploitation of oil in an area of the territorial waters of the State defined by the concession agreement. Pursuant to the concession agreement a well, known as B-1 was drilled and disclosed the presence of hydro carbons. Under the concession agreement the State through Rakoil was liable to contribute to the cost of the drilling of well B-1 but only if the well produced commercial quantities of oil defined as 15,000 barrels per day. Rakoil was not asked to contribute and did not contribute to the costs of well B-1. By an agreement ("the assignment agreement") dated 1 September 1976 which incorporated an operating agreement ("the 1976 operating agreement") the holders of the concession, then a consortium of companies represented in these proceedings by D.S.T., agreed to drill further wells and the State through Rakoil became entitled to interests in those wells and became liable to pay a proportion of the costs and expenses of exploration whether or not those wells produced oil. Further wells were drilled, some contributions to costs were paid by Rakoil, but in 1978 the State stopped all contributions towards exploration costs. The concession agreement to which the assignment agreement and other later agreements were supplemental and the 1976 operating agreement included the following arbitration clause:

> "1. All disputes arising in connection with the interpretation or application of this agreement shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the rules.
>
> 2. The arbitration shall be held in Geneva, Switzerland, and shall be conducted in the English language."

D.S.T. on behalf of the consortium accordingly referred to arbitration in Switzerland claims against Rakoil and the State in respect of contributions to the costs of exploration. The State and Rakoil challenged the jurisdiction of the arbitration tribunal on the grounds that the assignment agreement and the 1976 operating agreement and subsequent supplemental agreements ought to be set aside because, it was alleged, the holders of the concession in 1976 had falsely represented that commercial quantities of oil had been established and that substantial quantities of oil had been discovered as a result of the sinking of well B-1.

The rules of conciliation and arbitration of the International Chamber of Commerce which were incorporated in the relevant arbitration clauses provided, inter alia, that:

> ". . . the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistant provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistant or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas."

The arbitration tribunal appointed to determine the application made by D.S.T. determined that the tribunal had

jurisdiction, that the allegations of misrepresentation were unfounded, and awarded D.S.T. on behalf of the consortium, against the State and Rakoil jointly and severally U.S. $4,635,664. and interest from 30 June 1980 until payment. The final award was dated 4 July 1980.

Switzerland, where the award in favour of D.S.T. was made on 4 July 1980 is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958. Section 7 of the Arbitration Act 1975 defines an "arbitration agreement" as an agreement in writing to submit to arbitration present or future differences capable of settlement by arbitration and defines a "convention award" as an award made in pursuance of an arbitration agreement in the territory of a state, other than the United Kingdom, which is a party to the New York Convention. Section 3 of the Act of 1975 provides that:

> "(1). A Convention award shall . . . be enforceable -
>
> (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950; . . .
>
> (2). Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the United Kingdom; and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award."

By section 5 of the Act of 1975 enforcement of a Convention award shall not be refused except in certain specific cases none of which applies to the Convention award dated 4 July 1980.

By section 26 of the the Arbitration Act 1950:

> "An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

On 2 July 1986, Bingham J. granted D.S.T. leave to enforce against Rakoil the Convention award dated 4 July 1980 in the same manner as a judgment and ordered Rakoil to pay to D.S.T. the sum of U.S. $4,635,664 together with interest of U.S. $3,778,366.49 accrued to 30 June 1986. On 25 February 1987 Leggatt J. refused an application by Rakoil to discharge the order dated 2 July 1986 giving D.S.T. leave to enforce the Convention award as a judgment. An appeal against the decision of Leggatt J. was dismissed by the Court of Appeal [1987] 3 W.L.R. 1023 (Sir John Donaldson M.R., Woolf and Russell L.JJ.) on 24 March 1987. Accordingly for the purposes of this appeal D.S.T. must be treated

as a judgment creditor against Rakoil for the sums specified in the order made by Bingham J. on 2 July 1986.

In the meantime litigation in the State had taken place. Immediately after D.S.T. filed on 7 March 1979 their request for arbitration which resulted in the Convention award dated 4 July 1980, the State and Rakoil began proceedings dated 3 April 1979 against Vitol Exploration BV. (the original operator under the concession agreement) and against D.S.T. in the Civil Court of the State. On 3 December 1979 the Civil Court gave judgment in these terms:

"The court hereby decides to:

1. Rescind the agreement dated 23 July 1976 between the plaintiffs and the defendants (sic)

2. Order the defendants to pay the sum of U.S. $1,424,891.23 to the plaintiffs;

3. Order the defendants to pay the sum of Dirhams 110,687,339.61 to the plaintiffs;

4. The court further decides the defendants have no right to claim any amounts of money from the plaintiffs under any arbitration proceedings; . . . "

D.S.T. did not submit to the jurisdiction of the Civil Court. Section 32(1) of the Civil Jurisdiction and Judgments Act 1982 provides that a judgment given by a court of an overseas country in any proceedings shall not be recognised if:

"(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country;

. . . "

By section 32(2) of the Act of 1982:

"Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given."

On 25 February 1987 Leggatt J. applying the Act of 1982 and relying on other matters which it is unnecessary to particularise dismissed an application by Rakoil for leave to serve on D.S.T. a writ seeking to enforce against D.S.T. the judgment of the Civil Court. An appeal against this decision was dismissed by the Court of Appeal (Sir John Donaldson M.R., Woolf and Russell L.JJ.) in their judgment of 24 March [1987] 3 W.L.R. 1023. Rakoil have not appealed to this House. The order of the Civil Court is accordingly of no effect in this country.

D.S.T. seek to enforce the judgment [illegible] D.S.T. by Rakoil. By R.C.S., Ord. 49, r.1 of the Rules of the Supreme

Court where a judgment creditor has obtained a judgment for the payment of a sum of money by a judgment debtor and -

> "any other person within the jurisdiction (" . . . the garnishee") is indebted to the judgment debtor, the Court may, . . . order the garnishee to pay the judgment creditor the amount of any debt due . . . to the judgment debtor from the garnishee, or as much thereof as is sufficient to satisfy that judgment . . . "

By Ord. 49, r.8:

> "Any payment made by a garnishee in compliance with an order absolute under this Order . . . shall be a valid discharge of his liability to the judgment debtor to the extent of the amount paid. . . ."

In the present case the garnishee, Sitco, is indebted to the judgment debtor, Rakoil. The judgment creditor, D.S.T., has obtained an order that Sitco pay D.S.T. the amount due from Sitco to Rakoil; payment under this order will discharge the liability of Sitco to Rakoil to the extent of the payment.

The debt from Sitco to Rakoil arose as a result of a purchase by Sitco of oil delivered f.o.b. to Sitco in the State. The purchase agreement incorporated Sitco's general terms and conditions for f.o.b. sales of products and feedstocks dated 1 January 1984. Condition 5 provided for payment to be made in United States dollars against Rakoil invoices to banks designated by Rakoil. By condition 14 -

> "The validity, construction and performance of the agreement shall be governed by the Law of England and any dispute or difference between the parties in connection with the agreement shall be referred to and determined by arbitration under the International Arbitration Rules of the London Court of International Arbitration."

By invoices dated 18 June 1986 and 29 June 1986 rendered in respect of oil supplied to Sitco payment of the aggregate sum of U.S. $4,843,051.23 was directed by Rakoil to be made by Sitco in four separate amounts to Brown Brothers Harriman & Co. of New York to accounts in the names of Rakoil, the State and the Gas Board of the State.

Applying English rules of private international law the debt due from Sitco under the invoices was situate in England and was subject to the jurisdiction of the English court because the debtor, Sitco, was a company incorporated and registered in England. Accordingly, the debt was liable to be the subject of a garnishee order in favour of D.S.T.

On 2 July 1986, Bingham J. made an order restraining Rakoil from removing outside the jurisdiction debts due to Rakoil from any person within the jurisdiction up to U.S.$8.5m. On 25 July 1986 the order was amplified by restraining Rakoil -

> "In particular from directing, accepting or receiving [illegible] of the debt or debts due or to become due to them from

Sitco or any other company or corporation resident in England and Wales."

As a result of that order it was unlawful for Rakoil to receive payment from Sitco of the sums totalling U.S. $4,843,051.23 and interest due under the invoices and it would have been a contempt of court for Sitco to make payment to Rakoil. The order made by Bingham J. was intended to prevent Sitco from paying Rakoil pending proceedings by D.S.T. for a garnishee order directing Sitco to discharge Sitco's debt to Rakoil by paying D.S.T. the sums due under the invoices in reduction of the judgment debt payable by Rakoil to D.S.T. Sitco informed Rakoil and the State and the Civil Court of the English proceedings and of the Order made by Bingham J.

On 30 March 1987 the State, represented by the Crown Prince, began proceedings in the Civil Court against Sitco, claiming U.S. $4,843,051.23, on the ground that Rakoil in selling oil to Sitco had been acting on behalf of the State. Sitco did not submit to the jurisdiction of the Civil Court but made representations to the Civil Court in which Sitco submitted that the Civil Court had no jurisdiction in view of the incorporation of English law and in view of the arbitration clause in the sale agreement and further represented that Sitco were unable to pay because of the order made by Bingham J. in the English court. On 12 April 1987 the Civil Court gave judgment against Sitco for the amount claimed by the State, interest and costs.

On 14 April 1987 the State advised Sitco:

"... that the Government is not prepared to consider any further dealings with Sitco until Sitco honours its obligation to pay for condensate already lifted and we do not accept that you are unable to pay these monies now long overdue.

I advise you that until such time as payment is effected the Government will not consider any further sales and will not enter into any commercial dealings with Sitco."

On 12 August 1987 the Civil Court arrested the vessel New London then in port in the State and announced that the vessel would be detained until Sitco paid to the State the sum of U.S. $4,843.051.23 interest and costs pursuant to the order made by the Civil Court. The New London is owned by a Panamanian corporation unconnected with Sitco and was mortgaged to a New York bank. The New London was under charter to Shell Trading (Middle East) Ltd. an associate of, but a separate company from, Sitco. The Charter expired about 15 October 1987. Shell Trading (Middle East) Ltd. protested to the Civil Court that State law did not permit the arrest of a vessel for a non-marine debt which was not the liability of the owner or charterer. In evidence in these proceedings it appears that Shell Trading (Middle East) Ltd. rely also on the Riyadh Agreement to which the State is party; the State lawyers reply that the English translation of the agreement is not accurate and that in any event the Riyadh agreement is subject to the customary law of the State. The "New London" remains under arrest.

On 7 July 1987 Hobhouse J. made a garnishee order directing Sitco to discharge its debt to Rakoil by making payment to D.S.T. in part satisfaction of the judgment debt due from Rakoil to D.S.T. Sitco appealed against the garnishee order; the appeal was dismissed by the Court of Appeal [1988] 1 Lloyd's Rep. 164 (Lloyd, Nourse and Woolf L.JJ) on 29 October 1987. Sitco now appeals to this House against the making of the garnishee order.

The present position is that Sitco have been ordered by the English court to pay D.S.T. and Sitco have been ordered by the Civil Court to pay the State. If neither the English Court nor the Civil Court gives way Sitco must either pay twice voluntarily or run the risk of both the English court and the Civil Court enforcing payment.

D.S.T. submit that the English court is bound by section 5 of the Arbitration Act 1975 to enforce the convention award dated 4 July 1980. Nevertheless the particular form of enforcement by garnishee order confers on the court a discretion to make or refrain from making the order. That discretion must be exercised judicially but one powerful reason for the court declining to make a garnishee order must be that compliance with the order will prejudice the garnishee. D.S.T. submit that prejudice arises not by virtue of the garnishee order but by reason of the oppressive conduct of the State and the Civil Court; for the purposes of the present proceedings the State uses the name of Rakoil or uses its own name whenever it suits the convenience of the State. D.S.T. allege that the State and Rakoil were in breach of contract by refusing to continue their contributions to the cost of oil exploration and were in breach of contract by refusing to submit to and accept arbitration; the allegations of misrepresentation were false and were found to be false in the course of the arbitration proceedings which resulted in the convention award; the threat to cease business with Sitco amounts to commercial blackmail and should be disregarded. D.S.T. further allege that the Civil Court lacks integrity and independence; its judgments are intellectually threadbare; the arrest of the New London amounts to hostage taking and should be disregarded. D.S.T. submit that it is in the long term interests of Sitco to resist the demands of the State; in the light of the labyrinthine relationship between oil producers and oil distributors it is safe to assume that the State and Sitco will come to terms; the reputation of the State will not be enhanced if the State continues to be brutal to Sitco and the reputation of Sitco will not be enhanced if Sitco are seen to give way to the State; in practice Sitco will not suffer as a result of the garnishee order. Sitco submit that if the garnishee order is enforced then the Civil Court at the behest of the State will by one means or another, secure that the State is paid. Sitco will pay twice. D.S.T. will not be paid by Rakoil but by Sitco. Sitco submit that in order to save Sitco, an innocent bye-stander from the danger of double payment the garnishee order must be discharged.

In my opinion where there is a conflict of law relevant to garnishee proceedings an English court should first decide whether the circumstances are such that English law requires the English court to assert exclusive jurisdiction or whether English law requires the English court to acknowledge the existence of concurrent jurisdiction exercisable by a foreign court. If by

English law the English court is required to assert exclusive jurisdiction then in my opinion the English court should proceed to reach a decision based exclusively on English law, ignoring the possibility that a foreign court may or will also assert jurisdiction and ignoring the consequences to the garnishee if the foreign court exercises its jurisdiction in a manner inconsistent with the garnishee order.

As an example of circumstances which would require the English court to assert exclusive jurisdiction, take the case of the Vice President of Ruritania who buys and takes delivery in England of British aircraft but defaults on the purchase price. In an action for payment the Vice President submits to the English jurisdiction but loses the action which results in a judgment debt being entered in favour of the British manufacturer and against the Vice President for the sum of £1m. The Vice President has opened an account in London with a branch of an English bank which also has a branch in Ruritania. The British manufacturer seeks to garnish the credit balance amounting to £2m. of the Vice President in the London branch of the bank. The President of Ruritania threatens to close down the Ruritania branch of the bank unless the bank pays to the Vice President in Ruritania the credit balance £2m. The Ruritanian Civil Court claiming jurisdiction because a resident of Ruritania is involved gives judgment against the British bank for £2m. The British bank does not submit to the jurisdiction of the Ruritanian court. In the event of this unlikely scenario, the English court, it seems to me, could not under English law decline to make a garnishee order. The only course open to the bank, if obliged to pay twice, would be to urge through commercial and diplomatic channels the need for Ruritania to accept that, consistently with the practice of friendly nations, Ruritania should not exercise its jurisdiction with regard to events which took place wholly in England. The assertion of exclusive jurisdiction by the English court in this case would be necessary in order to prevent the arbitrary frustration of an English order by a foreign resident. The claim to exclusive jurisdiction would be founded on five material circumstances; first the contract between the Ruritanian Vice President and the British Manufacturer is a contract made and to be performed in England; secondly the Vice President submits to the jurisdiction of the English court; thirdly the contract made by the Vice President with the London branch of the bank is a contract made and to be performed in England; fourthly the debt sought to be garnished is situate in England; fifthly the British bank does not submit to the jurisdiction in Ruritania.

In Martin v. Nadel (Dresdner Bank Garnishees) [1906] 2 K.B 26 a garnishee order was sought against the London branch of a German bank which held as security money deposited by a customer of the bank with the Berlin branch of the bank. The customer did not submit to the jurisdiction of the garnishee proceedings and the deposit constituting the debt from the bank was incurred, situate and payable in Prussia. The English court refused to make a garnishee order because it was the law of Prussia that if the customer sued the bank in Berlin they could not set up in answer to the action that they had paid the amount claimed under a garnishee order made by the English court. Vaughan Williams L.J. said at page 30:

"I must therefore decide this case on the ground that it would be inequitable to order the bank to pay the money to the execution creditor when that payment would leave them still liable to an action to recover the same debt brought in a competent court at the foreign place where the parties reside."

In Swiss Bank Corporation v. Boehmische Industrial Bank [1923] 1 K.B. 673, judgment having been recovered against a foreign corporation which submitted to the jurisdiction, a garnishee order was made attaching a debt due from a London bank to the foreign corporation. At pp. 681-682 Strutton L.J. said this:

"There is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. Does this debt of £9,000 arise in this country? It is a sum held by a banker, who is resident in this country, for his customer and not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country. I can understand the reluctance of a foreign court to acknowledge the validity of a judgment recovered in this country where the debtor is not subject, or where by the foreign law he is not subject, to the laws of this country. For instance, many foreign countries do not recognise the English method of service out of the jurisdiction. If a writ, or notice of the issue of a writ, is served upon one of their subjects they decline to recognise the writ or any proceeding based upon it; but if a foreigner appears to a writ, and takes part in an action and so submits himself to the jurisdiction of our courts and obtains a benefit by so doing, I am not aware that any foreign country declines to recognise the validity of a judgment recovered against him. That is what happened in this case."

This case illustrates the willingness of an English court to assert exclusive jurisdiction where the debtor against whom a garnishee order is sought has submitted to the jurisdiction.

In Sea Insurance Co. v. Rossia Insurance Co. of Petrograd [1924] 20 Lloyd's Rep. 308, 309 the Court of Appeal refused to make a garnishee order. Bankes L.J. distinguished the decision in Swiss Bank Corporation v. Boehmische Industrial Bank [1923] 1 K.B. 673 in these terms:

"The material distinction between that case and the present is that in the Swiss Bank case the debtor had submitted to the jurisdiction, and the judgment on that ground was one not only binding in this country but one which by the comity of nations would be accepted as binding by the courts of a foreign country. Not so the judgment on which the present garnishee proceedings are founded. Not only is it a judgment in default of appearance, but it is a judgment

which can be shown to have been obtained in the absence of any proper service upon the defendants. It is, therefore a judgment which would not be recognised as binding in the courts of any foreign country."

In the same case Scrutton L.J. at p. 312 said this:

"English courts do not recognise the validity of foreign judgments where the defendant is not a subject of, or found in, the foreign country, or has not recognised the foreign jurisdiction by appearing, or by express agreement. Nor do foreign tribunals recognise English service out of the jurisdiction on a foreigner where he has not appeared, or by agreement submitted, to the jursiction. In the case of the Swiss Bank Corporation to which we were referred, the defendants though out of the jurisdiction had appeared in the English courts and obtained advantages by their appearance. In this case the defendants have not appeared, and I do not think the fact that they have allowed judgment to be entered against them can bind persons in other countries who desire to assert that the English court had no jurisdiction to give judgment against them."

Finally, in Employers' Liability Assurance Corporation Limited v. Sedgwick, Collins and Company [1927] A.C. 95 this House decided that a Russian company taken over by the Soviet Government and put into liquidation had nevertheless submitted to the jurisdiction of the English court through an agent. This House granted a garnishee order in respect of a debt owed by an English insurance company to the Russian company and Lord Sumner dealing with the judgment obtained against the Russian company said at p. 106:

"The main question is whether the judgment is one to which, according to the current of English decisions, foreign courts of justice may expect it to give effect. The expectation is not one of fact depending on the probable conduct of the courts of this or that country, but is one of law, based upon the consideration for the judicial proceedings of other countries, which legal administration, wherever situated, ought to adopt and observe in the interest of justice generally."

Lord Sumner also said at p. 112:

"As for the view, that foreign courts generally cannot be expected to recognise judgments obtained here under specific legislation and particular circumstances, that raise an arguable doubt as to their validity, I do not think that this is a ground for a discretionary refusal to make the garnishee order absolute, when once it has been decided here that such judgments have been regularly obtained after an effective submission to the jurisdiction on the part of the defendants. In that case foreign courts ought to recognise the judgments, and we must presume that they will do so. It is not justice to the garnishor to deny him his regular remedy for fear that, somehow or other, the garnishee, having passed beyond the jurisdiction of the courts of this country and the protection which the

garnishee order will always here afford him, might find himself caught in some foreign court or country less willing than should be the case to recognise those obligations which arise under the so-called comity of nations. The risk to the garnishee, which it is inequitable to expose him to under a garnishee order absolute, must be a real risk. . . A mere speculative or theoretical hazard will not do."

[22] It seems to me that, consistently with the authorities, the English court must first determine whether the English court should assert exclusive jurisdiction over the debt sought to be made the subject of a garnishee order. If so, the garnishee order ought to be granted; but if the circumstances are such that the English court acknowledges the existence of concurrent jurisdiction and there is a real risk that a foreign court will exercise a concurrent jurisdiction and enforce payment in a foreign country against the garnishee, then in the exercise of its discretion, the English court may decline to make a garnishee order.

[23] In each case the English court must ask itself whether on principle and precedent the order it proposes to make is an order which the English court expects a foreign court to recognise and accept within the conventions of comity and International practice. If so the English court will assert exclusive jurisdiction. There is no escape from examining in each case the circumstances which give rise to a possible conflict of laws.

[24] The circumstances of the present case are disturbing and peculiar. It is clear that Rakoil is the servant of the State and that the Civil Court has shown no signs of independence from the State. In my opinion the English Court is entitled and bound to ignore the claims to jurisdiction put forward by the Civil Court. No plausible explanation was offered for the breach by the State and Rakoil of their obligation to accept arbitration of a dispute with D.S.T. which plainly fell within the jurisdiction of the arbitrators. Yet the Civil Court endeavoured to usurp the jurisdiction of the arbitrators. No plausible explanation was offered for the assumption by the State of the rights of Rakoil under the contract with Sitco or for the refusal of the State to recognise the arbitration requirements of that contract. Yet the Civil Court endeavoured to usurp the jurisdiction of the arbitrators. Finally, the order of the Civil Court for the detention of the New London, a vessel belonging to innocent third parties is contrary to the established laws and practices of maritime countries and appears to be contrary to the maritime laws of the State. Coercion threatened by the State against Sitco is matched by the coercion of the Civil Court in seizing the New London. In the light of all these facts I am not satisfied that the Civil Court is able or willing to assert its integrity or independence against the State and I conclude that the orders of the Civil Court should be ignored. I reach this conclusion with reluctance and regret because it involves inescapable strictures on the conduct of the Civil Court and creates difficulties for Sitco in view of the threats uttered by the State.

[25] Since drafting this speech I have read a draft of the speech to be delivered by my noble and learned friend, Lord Goff of Chieveley. I do not agree that the existence of a real risk of Sitco paying twice is the only or is a superior criterion; to accept

such a criterion would be to accept coercion by a foreign state and a foreign court. My noble and learned friend accepts that an order of a foreign court should be ignored if it could not "properly be regarded as an order by a court of law at all, but should rather be regarded as an act of executive power by the State and so should be categorised with commercial pressure and as such be irrelevant to the making of a garnishee order absolute." In my opinion, in deciding whether to claim exclusive jurisdiction and to ignore the jurisdiction claimed by the Civil Court, the exorbitant nature of the jurisdiction claimed by the Civil Court is relevant and the conduct of the Civil Court is relevant. The jurisdiction claimed by the Civil Court was exorbitant three times. First, in the order made against D.S.T. usurping the jurisdiction confided by Rakoil and the State to arbitration; secondly, in the order made against Sitco in favour of the State which was not a party to the contract with Sitco and in usurpation of jurisdiction; thirdly, in the order detaining the "New London" which was grossly exorbitant. In addition to these three instances of exorbitant claims, the conduct of the Civil Court is inexplicable save on the basis that the Civil Court is not independent of the State; there is nothing in the "rival affidavits" which presents a plausible case to the contrary. Of course there is a real risk that Sitco may be held liable to pay the debt a second time pursuant to the order of the Civil Court. But, for my part, I conclude that this House should not be influenced by the threats of the State or by the coercive detention of the "New London." I would uphold the orders made by the experienced commercial judges of the Queen's Bench Division and Court of Appeal and I would accordingly dismiss this appeal.

LORD OLIVER OF AYLMERTON

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. I gratefully accept and adopt their analyses of the facts and the issues raised by these appeals. The critical issue identified by Hobhouse J. in the garnishee proceedings was whether there was a real and substantial risk that Sitco might, if the garnishee order were to be made absolute, be compelled to pay the same debt a second time. As a matter of fact, it is beyond doubt that there is some risk. Whether rightly or wrongly as a matter of the comity of nations, the courts of the State quite clearly do not and will not recognise that the debt which is due to Rakoil and which the State claims as due to it is capable of discharge by payment under a garnishee order made in this country. Whether rightly or wrongly as a matter of internationally recognised maritime law and practice, the State has taken and continues to take steps by way of arrest in aid of the judgment which it has obtained against Sitco in its own courts. This is not a matter of theory or speculation. The risk has to this extent materialised.

In considering, therefore, whether, as a matter of discretion, the garnishee order should be made absolute there are two questions which require to be answered. First, having clearly

some risk of double jeopardy, does Sitco demonstrate a risk of sufficient substantiality to justify withholding the ordinary process of execution of a regularly obtained judgment in favour of D.S.T.? Secondly, even assuming the substantiality of the risk, does the circumstance that the jeopardy arises from a judgment against Sitco obtained only by the exercise of an exorbitant jurisdiction require that it should be ignored or discounted?

That Sitco does in fact have property capable of being identified and subjected to a process of execution in the Gulf states appears now to be clear, but there is an acute conflict of evidence with regard to the question of whether the judgment obtained by the State against Sitco will be recognised and enforced in other states of the Gulf. It clearly cannot be regarded as decisively established but I am not, for my part, convinced on the evidence that the risk can properly be said to be, as Lloyd L.J. put it [1988] 1 Lloyd's Rep. 164, 170, "a risk at a fairly low level." The arrest of the "New London" amply demonstrates the determination of the State to pursue any remedies which it regards as being available to it and I cannot in the circumstances regard the risk that Sitco may be compelled by legal process to pay under the judgment obtained against it as other than substantial.

What is entirely clear however, is that the risk, if it becomes translated into actuality, will be so translated as the result of an exorbitant claim to jurisdiction which transcends the bounds of what, at any rate in English law, are considered to be generally accepted norms and that the judgment is not one which has any prospect of being recognised or enforced in an English court or, I think, in any other court which accepts those principles of private international law which are applied in this country. Is it, therefore, to be ignored? To put the matter in another way, is there a conclusive presumption of law that the execution of a regularly obtained judgment which, according to accepted principles of private international law, would be generally recognised as effectively discharging the garnishee's obligation to his creditor will in fact be treated, whatever the evidence may show, as being universally recognised?

My Lords, I know of no authority which has gone to this extent. When, in Employers' Liability Assurance Corporation Ltd. v. Sedgwick, Collins & Co. Ltd. [1927] A.C. 95, 106 Lord Sumner referred to the expectation of recognition of an English judgment as being not one of fact but of law "based upon the consideration for the judicial proceedings of other countries, which legal administration, wherever situated, ought to adopt and observe in the interest of justice generally" and observed (at p. 112) that foreign courts ought to recognise regularly obtained judgments and that "we must presume that they will do so," I do not read him as propounding anything more than a rebuttable presumption or as postulating a rule that evidence of the actual stance taken by a foreign court is irrelevant and to be ignored in the assessment of what he evidently regarded as the principal question, namely, whether there is a real risk that the garnishee will be compelled to pay twice over. Had he had that intention, the answers which he gave (at p. 111) to the doubts which had been propounded by Scrutton L.J. in the Court of Appeal would have been both inappropriate and unnecessary, for it could not then have mattered at all that the risk might be self-sought or that it was practically

incapable of estimation. Thus in Swiss Bank Corporation v. Boehmische Industrial Bank [1923] 1 K.B. 673, 683, the garnishee order was made absolute not because there was a presumption that the regularly obtained judgment against a party who had submitted to the jurisdiction would be recognised by the courts of Czechoslovakia but because the evidence was "quite insufficient to show that the garnishees run any serious risk of being obliged to pay over again in Prague or elsewhere".

The actual existence of proceedings elsewhere for the recovery of the debt sought to be garnished is one of the features which renders this case unique. Were those proceedings such as would, in accordance with the recognised principles of English private international law, be recognised and enforced by the courts of this country, there could, I conceive, be no doubt that the court's discretion should be exercised against the making of a garnishee order absolute. Does it make any difference that the foreign judgment of which the garnishee stands in peril is one which, according to English domestic jurisprudence, has been irregularly obtained as a result of the exercise of an exorbitant jurisdiction? Certainly so far as the garnishee is concerned it does not. However irregularly, he will, as a result of the order being made absolute, be compelled to pay the same debt twice over and it sweetens the pill not at all to be told that one such payment has been irregularly extracted from him. On the other hand, there is a natural reluctance to recognise that the ordinary process of execution of a judgment regularly obtained in this country can be frustrated by the action of the judgment debtor in subjecting the garnishee to pressure in another jurisdiction in a manner which our jurisprudence does not recognise as legitimate. For my part, however, I do not think that it would be right to allow a disapprobation of the conduct of the judgment debtor to outweigh the consideration of the injustice likely to be suffered by the garnishee, who is no party to the dispute between the debtor and the garnishor and whose involvement arises simply from the accident of residence in this country which has provided the requisite element of situs for the debt which is sought to be garnished.

It has to be recognised that a debt is a species of property which may be recoverable by legal process from a debtor in more than one jurisdiction and it would be entirely inequitable that the garnishee should, by process in different jurisdictions properly conducted in accordance with the local law, be compelled to pay twice over in order that a judgment with which he has no connection whatever should be satisfied at his expense. If the reality is that this is likely to be the result, the fact that the particular foreign legal process is not one which commends itself to our jurisprudence is really immaterial. It cannot, in my judgment, simply by virtue of its non-conformity with the accepted norms of private international law, be equated with mere commercial pressure.

The feature of the case, however, which has given me most concern - and it is a second feature which renders this case unique - is the virtual identification of the judgment debtor with the State in whose courts judgment against [illegible] has been obtained. The circumstances in which [illegible] proceedings against Sitco were commenced and in which judgment was obtained and

the fact that the proceedings were in breach of a clearly expressed arbitration clause, inevitably raise a serious doubt whether the court which pronounced judgment can in any real sense be regarded as independent of the judgment debtor itself, a doubt by no means allayed by judicial reasoning which, to English eyes, appears rather less than convincing, to put it no higher. It is, indeed, by no means clear that the judgment obtained by the State in its own courts has been regularly obtained even in accordance with the law by which those courts are regulated. The possibility has, therefore, to be faced that what the court in England is confronted with is no more than illegitimate executive action under the cloak of legitimate legal process. In my judgment, however, that cannot, on the evidence, be regarded as clearly established and in these circumstances the critical consideration, as it seems to me, is that there is and remains a serious risk that the legal process, whether legitimate or not, will be recognised and given effect to in other states in the Gulf where Sitco carries on its business and that it will result in its property being subjected to process of execution there. If that occurs, then D.S.T. will have satisfied its judgment at the expense of Sitco, an innocent third party which has absolutely no connection with the dispute between D.S.T. and Rakoil and whose only involvement results from the accident that it happens to have traded with Rakoil and is resident here. That seems to me a wholly inequitable result and one which I cannot regard with equanimity. Even accepting, therefore, that the jurisdiction of the Civil Court is, as my noble and learned friend, Lord Templeman, has observed, three times exorbitant, I am unable to agree that disapprobation of the exercise of such jurisdiction should weigh more heavily than the real and substantial risk to the garnishee and should lead to that risk, because resulting from exorbitant jurisdiction, being simply ignored. I accordingly agree that Sitco's appeal in the garnishee proceeding should be allowed. I would also discharge the Mareva injunction for the reasons given by my noble and learned friend, Lord Goff of Chieveley, and I agree that the implied undertaking for which the appellants have argued, is not a matter which is open for consideration on this appeal.

LORD GOFF OF CHIEVELEY

My Lords,

The facts of the present case have already been set out in the speech of my noble and learned friend, Lord Templeman. I would be guilty of repetition if I were again to explain the background of the case. What I propose to do is to refer to the relevant facts as I come to consider each issue in the case. But before I come to those issues, I wish to set out in some detail the course of litigation between the parties, and the grounds of decision in the courts below. I should also state that I propose to adopt the abbreviations used by noble and learned friend, Lord Templeman, to describe the various parties involved.

As appears from the speech of my noble and learned friend, there have been three lines of litigation in the present case, first, which is now largely of historical interest, was concerned

with the award made by the arbitration tribunal, dated 4 July 1980, whereby the arbitrators awarded D.S.T., on behalf of the consortium, a sum of U.S.$4.635,664 against the State and Rakoil jointly and severally, together with interest from 30 June 1980. On 2 July 1986, Bingham J. gave leave to D.S.T. to enforce the award against Rakoil in the same manner as a judgment, and ordered Rakoil to pay to D.S.T. a sum of U.S. $8.414,10.49, being the amount of the principal sum awarded together with interest accrued to date. Rakoil applied to discharge the order. On 26 February 1987, Leggatt J. refused the application; and on 24 March 1987, the Court of Appeal dismissed an appeal by Rakoil from that decision.

The purpose of D.S.T. in obtaining the order of Bingham J. was to set the scene for a garnishee order, whereby the debt of Sitco to Rakoil could be garnisheed and so applied in part satisfaction of the judgment debt of Rakoil to D.S.T. The litigation which then ensued was in two parts, which have finally converged before your Lordships' House. The first part has been concerned with proceedings for an injunction, sought by D.S.T. to ensure that the debt of Sitco to Rakoil was not discharged and so remained available to be garnisheed. The second part has been concerned with the garnishee proceedings themselves.

On 2 July 1986, when he granted leave to D.S.T. to enforce the award against Rakoil in the same manner as a judgment, Bingham J. issued an injunction restraining Rakoil from removing outside the jurisdiction debts due to Rakoil from any person within the jurisdiction up to U.S. $8.500,000. It was then however considered by D.S.T. that this injunction might not be in sufficiently wide terms to prevent Sitco from paying its debts to Rakoil, and so a few days later, on 25 July 1986, D.S.T. obtained from Bingham J. an order that the injunction applied in particular to restrain Rakoil from directing, accepting or receiving payment of the debt or debts due or to become due to them from Sitco or any other company or corporation resident in England and Wales. D.S.T. gave notice to Sitco of the injunction granted on 2 July, and of the order of 25 July. It is not in dispute that the injunction as so framed was effective to prevent Sitco from paying its debts to Rakoil, because any such payment with knowledge of the injunction would have constituted a contempt of court. An application was made by Rakoil to discharge the injunction. The application was heard by Bingham J. The ground upon which it was made was that, on the basis of affidavit evidence placed before the judge, the debt payable by Sitco was payable outside the jurisdiction, and that (relying in particular on the decision of the Court of Appeal in Intraco Ltd. v. Notis Shipping Corporation [1981] 2 Lloyd's Rep. 256) such an injunction should not be granted if the debt is payable out of the jurisdiction. Bingham J. rejected that argument. He considered that, since the debtor (Sitco) was registered in England, the situs of the debt, which is determined not by the place where the debt is payable but by the place of residence of the debtor, was also in England. Accordingly, there was an asset in England to which an injunction could attach; and the Intraco case did not require him to decide otherwise. He therefore dismissed the application. That decision was also the subject of an appeal to the Court of Appeal, which was heard by them at the same time as the appeal from [illegible] Leggatt J. refusing Rakoil's application to discharge Bingham J.'s order

granting leave to D.S.T. to enforce the award in the same manner as a judgment. On the hearing of the appeal, Sitco appeared as intervener, and introduced evidence which clarified the position with regard to the two shipments of oil which were the subject matter of the relevant debts, and the arrangements for payment of those debts.

The judgment of the Court of Appeal was delivered by Sir John Donaldson M.R., with whom Woolf and Russell L.JJ. agreed. He briefly dismissed a suggestion that the debts in question were not or might not have been assets of Rakoil. He said [1987] 3 All E.R. W.L.R. 1023, 1038:

> "Shell say that the supply agreement under which they took the oil was between them and Rakoil and the invoices were raised by Rakoil. There may indeed be contractual arrangements between Rakoil on the one hand and the government of R'As al-Khaimah and the R'As al-Khaimah Gas Commission on the other, whereby Rakoil is accountable to the government and to the commission for part of the receipts of Shell, but the evidence does not give rise to any doubt but that Shell's indebtedness was to Rakoil as a principal."

He then turned to consider the question whether the indebtedness of Sitco constituted an asset of Rakoil situated within the jurisdiction. He held, applying the English law governing conflict of laws, that it was; and he also held that, if the garnishee order were to be made absolute and payment was to be made to D.S.T. thereunder, the indebtedness of Sitco would be discharged for all purposes. At that stage, of course, the Civil Court of the State had not yet given judgment against Sitco in respect of the relevant debt. It followed that, on the issue of discretion, Sitco could, before the Court of Appeal, only rely upon the commercial pressure being exercised upon them to pay the debt to Rakoil. This was rejected by the Court of Appeal as irrelevant. The Master of the Rolls said at p. 1040:

> "Commercial pressure is to be distinguished from double jeopardy by legal process and does not, in my judgment, provide any reason to refrain from upholding the injunction."

That judgment was delivered on 24 March 1987. On 12 April 1987, the Civil Court of the State gave judgment against Sitco in favour of the State, in respect of the relevant debt. On 6 May, the matter came back before the Court of Appeal, and their attention was drawn to the changed circumstances, on the basis of which the court was invited to discharge the injunction. This it declined to do and it declined also to make the continuation of the injunction subject to the giving by D.S.T. to Sitco of a secured undertaking in damages; but it decided (contrary to its previously expressed intention) to grant leave to Sitco to appeal to your Lordships' House, though it considered that the garnishee proceedings should be considered by your Lordships' House at the same time. To achieve that objective, it was decided that a stay of execution imposed on D.S.T.'s judgment against Rakoil should be lifted to enable D.S.T. to continue the garnishee proceedings against Sitco, but that the stay should be reimposed if the garnishee order should be made absolute. It was

further ordered that the garnishee proceedings, and any appeal therefrom to the Court of Appeal, should be heard with expedition. Accordingly, D.S.T. commenced the garnishee proceedings. They obtained a garnishee order nisi on 14 May 1987. Staughton J. made an order on 19 May that, if the State claimed to be entitled to the debt due from the garnishee, it should attend the hearing and state the nature of its entitlement; but the State has not responded to that order. Sitco's application that the garnishee order nisi should not be made absolute was heard by Hobhouse J., who gave judgment on 7 July, exercising his discretion in favour of making a garnishee order absolute. An appeal to the Court of Appeal by Sitco against that judgment was heard in the Long Vacation. On 29 October, the Court of Appeal (Lloyd, Nourse and Woolf L.JJ.) [1988] 1 Lloyd's Rep. 164 dismissed the appeal. Sitco now appeals to your Lordships' House against both decisions of the Court of Appeal, in the injunction proceedings and in the garnishee proceedings.

It is of some importance and interest to observe the grounds upon which Hobhouse J. decided to make a garnishee order absolute, and upon which the Court of Appeal dismissed Sitco's appeal from that decision. I take first the judgment of Hobhouse J. He recognised, at the outset, that the judgment of the Civil Court of the State had no validity in English law: it had no jurisdiction over Sitco in international law or in English law: it was purporting to exercise an extra-territorial jurisdiction it did not possess: and it was exercising jurisdiction contrary to an agreement to arbitrate, despite the fact that the State was seeking to take advantage of a sale contract made by their agent Rakoil, and at the same time ignoring the arbitration clause in that agreement. Against that background, he considered two submissions: (1) that he had no jurisdiction to make the order, and (2) that, if he had jurisdiction to make the order, he should exercise his discretion not to do so. On jurisdiction, the principal argument advanced was that Rakoil were trustees for the State of any money received from Sitco as the price for the oil, because the oil was up to the moment of delivery the property of the State (and/or the Gas Commission of the State), and on that basis the court had no jurisdiction to make a garnishee order, because the debt was not beneficially owned by Rakoil but by the State. Hobhouse J. however concluded that the relationship between Rakoil and the State did not invalidate the debtor and creditor relationship between Rakoil and Sitco, as indeed the Court of Appeal had held on the injunction appeal. He therefore held that the agreement between Rakoil and the State did not deprive him of jurisdiction.

On the issue of discretion, he reviewed the authorities (to which I shall refer later) and concluded, on the basis in particular of Lord Sumner's speech in Employers' Liability Assurance Corporation Ltd. v. Sedgwick, Collins & Co. Ltd. [1927] A.C. 95, 106, 121, that:

> "The garnishee, if he is to resist the order absolute, must show that he is exposed to a real risk of being required by a foreign court to pay the debt again. If he can do so, as opposed to raising a mere speculative possibility, he has established the ground for exercising the discretion in his favour, even though the judgment of the foreign court might

not be one which the English courts would recognise or regard as a proper application of the recognised rules of private international law."

Applying these propositions, he evaluated the risk that Sitco could be compelled by execution to satisfy the judgment of Civil Court of the State. He concluded that there was no real risk of execution in the State itself, Sitco having no property in that Emirate. With regard to other parts of the United Arab Emirates and the other states and kingdoms which form part of the Gulf Co-operation Council, he accepted that there was a risk that the Civil Court's judgment would be recognised and accepted as enforceable by the courts of one or more of those territories; but he regarded the risk of execution as marginal and, in particular, he relied upon the fact that, on the evidence before him, oil lifted by Sitco in these territories was bought on f.o.b. terms; for long-term contracts they sold on f.o.b. terms and, for spot contracts, he was not satisfied on the evidence that it was impracticable for Sitco to avoid themselves having title to the cargo. He expressed his conclusions as follows:

> "There clearly is a risk, which is not negligible, that the judgment would be recognised and accepted as enforceable by the courts of one or more of the other United Arab Emirates or G.C.C. States.
>
> There is, therefore, a risk to Sitco which arises from a combination of the risk of such recognition and the risk that a cargo belonging to Sitco might be found. I cannot say that there is no risk. However, I consider that the risk is at a very low level. The obstacles in the way of the Government are considerable. I do not, on balance, consider that the risk is correctly described as 'serious' . . . , though I would not describe it as 'merely speculative' . . . ."

Before the Court of Appeal [1988] 1 Lloyd's Rep. 164, the same two arguments were advanced by Sitco. The Court of Appeal, like Hobhouse J., dismissed the argument on jurisdiction. The only point raised on this aspect of the argument was that Rakoil were trustees of the debt in question, and that therefore the debt fell outside R.S.C., Ord. 49, r. 1. Lloyd L.J. (with whom Nourse L.J. agreed) rejected the argument on the facts, considering that the evidence was insufficient to justify a finding that Rakoil were trustees of the proceeds of sale of the oil. Woolf L.J. considered the point in greater detail. He reviewed the authorities, observing that some support for Sitco's argument was to be derived from Hirsch v. Coates (1856) 18 C.B. 757, 764, per Willes J., and from Harrods Ltd. v. Tester [1937] 2 All E.R. 236, 242, per Scott L.J. Nevertheless, having regard to the terms of Order 47, r. 1, he concluded that all that was required for the court to have jurisdiction was that there should be a debt due to the judgment debtor from the garnishee, and that the question of beneficial entitlement to the debt went only to the exercise of discretion. On the issue of discretion, Woolf L.J., like Lloyd L.J., considered that the evidence was insufficient to justify the conclusion that Rakoil were constituted trustees of the proceeds of sale for the State.

On the general issue which was regarded as Sitco's main argument, Mr. Johnson Q.C. for Sitco did not criticise Hobhouse J.'s approach on the law, viz. that he had to ask himself whether there was a real or serious risk that the State would succeed in executing the judgment which it had obtained in the Civil Court. His attack was mounted against the judge's conclusion on the facts because, in this kaleidoscopic case, fresh evidence introduced by Sitco showed that over one third of all the Middle East oil lifted for resale was sold to customers on c.i.f. and c. and f. terms, of which over half was sold under long-term contracts. It therefore became clear that the judge's finding that there was no significant risk in respect of long-term contracts could not stand, and that his discretion was exercised (through no fault of his) on the basis of an erroneous finding of fact.

The Court of Appeal had therefore to exercise its discretion anew. Lloyd L.J. (with whom Nourse L.J. agreed) approached the matter as follows. He rejected a submission by Sitco that, if there was any real or serious risk to the garnishee of having to pay twice over, that was sufficient to persuade the court to exercise its discretion against making the garnishee order absolute. Relying upon a passage from Lord Sumner's speech in the Sedgwick, Collins case [1927] A.C. 95, 112, he concluded that the fact that there was such a real risk was only a factor to be taken into account in all the circumstances of the case. Looking at the case as a whole, he concluded that the risk, although real, was still at a fairly low level, and (even taking into account the circumstances relied upon by Sitco) was outweighed by other factors in the present case, in particular (1) the fact that the judgment obtained by D.S.T. was impregnable, and (2) the fact that the judgment obtained by the State in the Civil Court would have no validity in English law, or under internationally accepted principles of private international law. Woolf L.J. concluded that, if the garnishee can establish that there is a serious risk that it will have to pay twice over, the court will not normally make a garnishee order absolute. Nevertheless, as he said [1988] 1 Lloyd's Rep. 164, 174:

> "While the English courts must recognise that within the area of conflicts of law the approach in different jurisdictions can legitimately differ, the English courts are entitled to assess the basis upon which it is alleged that the garnishee is at risk in another jurisdiction. For this purpose the English court can examine that basis upon which the foreign court would seek, or has sought, to exercise jurisdiction, and consider whether in a broad sense it is a legitimate exercise of jurisdiction. If the English court comes to the conclusion that the basis upon which the foreign court has or would act is wholly without foundation because it amounts to the exercise of an exorbitant jurisdiction, it would be wrong for the English court to give countenance and encouragement to such action by the foreign court."

He therefore concluded that, in deciding upon the weight to be given to the risk to which Sitco was subject, the court had to consider the legitimacy of the judgment of the Civil Court; and in view of the criticisms to which that judgment was subject, and for the other reasons given by Lloyd L.J., he too concluded that the garnishee order should be made absolute.

Such are the decisions against which Sitco now appeal to your Lordships' House. In his argument before your Lordships, Mr. Johnson Q.C. for Sitco attacked first the judgment of the Court of Appeal on the injunction appeal, advancing submissions why the injunction should not have been granted or continued. Next, no doubt with an eye to the future, Mr. Havelock-Allan, junior counsel for Sitco, submitted that Sitco was entitled to the benefit of an implied undertaking as to damages from D.S.T. in the event of the injunction being discharged. Finally, Mr. Johnson turned to the garnishee appeal, and submitted that the garnishee order should not have been made absolute, first because, on the evidence, Rakoil were not beneficially entitled to the debt, and second because there was a serious risk that Sitco would have to pay the debt twice - once to D.S.T., and once to the State - either because of the risk of execution of the judgment of the Civil Court, or to avoid commercial and financial prejudice.

I have to confess that, although Mr. Johnson no doubt considered that there were good reasons for making his submissions to your Lordships' House in that order, I feel that logically he was putting the cart before the horse. To me, this case is essentially about the process of execution through the making of a garnishee order, and the principles upon which the court should exercise its discretionary power to make a garnishee order absolute. The injunction was granted in the present case in aid of execution by garnishing the debt owed by Sitco to Rakoil. For these reasons, I shall consider first the garnishee appeal, and I shall then turn to consider, so far as may be necessary, the injunction appeal.

The first matter which falls for consideration by your Lordships relates to the submission originally made by Rakoil and now adopted by Sitco, that Rakoil was acting as agent for the State in selling the oil to Sitco and furthermore that Rakoil had no interest in the oil, but the State alone (and/or the Gas Commission of the State) were solely entitled to it and so were beneficially entitled to the debt owed by Sitco to Rakoil and to any money received by Rakoil from Sitco in discharge of that debt. On this basis, Sitco advanced two arguments: (1) that there was no jurisdiction in the English court to make a garnishee order absolute under R.S.C., Ord. 49; or (2) if there was such jurisdiction, nevertheless the court should not in the exercise of its discretion make an order adverse to the beneficial owner.

In the courts below both Hobhouse J. and Woolf L.J. rejected the argument that proof of the existence of a beneficial ownership of the debt had the effect that the court had no jurisdiction to make a garnishee order absolute. True, Mr. Johnson was able to pray in aid some authority to the contrary (referred to in the judgment of Woolf L.J. in the Court of Appeal); but in the end the point has to be decided as a matter of construction of R.C.S., Ord. 49. Rule 1 of the Order is, as Woolf L.J. pointed out, unqualified in its terms - so far as relevant, all that has to be proved is that "any other person within the jurisdiction is indebted to judgment debtor." There is no doubt that, even if it were to be established that the State is beneficially entitled to the debt, nevertheless Sitco is indebted to Rakoil. Accordingly, on the terms of Ord. 49, r. 1, the court has the necessary jurisdiction. The matter is taken further by r. 6, concerned with claims of third persons, which provides as follows:

"(1) If in garnishee proceedings it is brought to the notice of the Court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have charge or lien upon it, the Court may order that person to attend before the Court and state the nature of his claim with particulars thereof.

(2) After hearing any person who attends before the Court in compliance with an order under paragraph (1) the Court may summarily determine the question at issue between the claimants or make such other order as it thinks just, including an order that any question or issue necessary for determining the validity of the claim of such other person as is mentioned in paragraph (1) be tried in such manner as is mentioned in rule 5."

Of course, if it were to be established under this procedure that a person other than the judgment debtor was legally entitled to the debt, that would be the end of the matter. It appears however that the procedure under this rule applies where the garnishee suggests not that the debt is due to a third person, but that the debt is payable to the judgment debtor as trustee. If that was found to be so under the procedure laid down by the rule, or indeed otherwise, the court would be bound to take that matter into account in exercising its discretion under rule 1: no doubt it would normally not make a garnishee order absolute (see Roberts v. Death (1881) 8 Q.B.D. 319), but in my opinion it would not be deprived of jurisdiction to make such an order if in the circumstances it was just to do so.

I turn therefore to the relevance of the beneficial ownership of the debt which Rakoil, and now Sitco, suggests was at all times vested in the State. There is a considerable body of affidavit and documentary evidence available on the point: there was more evidence before the Court of Appeal than was available before Hobhouse J. The Court of Appeal however concluded, even on the expanded evidence, that there was no evidence to support the conclusion that Rakoil were trustees of the debt for the State. Mr. Johnson took your Lordships carefully through the relevant material; and I strongly suspect that your Lordships had a greater opportunity to consider the matter in detail than did the Court of Appeal. As they were taken through the material, it struck me that this was exactly the kind of case in which a claim that a third party was entitled to beneficial ownership of the debt ought to be considered and decided upon an enquiry, for example under the procedure established by R.C.S., Ord. 49, r. 6. The only reason why the issue was not so decided was that, although Staughton J. directed that the State should attend before the Court and state the nature of its claim, it has (no doubt for good tactical reasons) failed to do so. The effect has been, therefore, that the appropriate procedure has been frustrated.

However, it seems to me that this does not preclude a just solution of the matter. For the solution in the present case is, as I see it, as follows. Rakoil is claiming that the State is beneficially entitled to the debt. D.S.T. however ripostes that, even if the State is beneficially entitled to the debt, nevertheless the court should not exercise its discretion against making a

garnishee order absolute because there is in existence an arbitration award, valid by English law, under which the State is liable with the judgment debtor, Rakoil, and which has never been honoured, and in the circumstances the existence of the State's beneficial interest (if any) should be disregarded. I can see no answer to this submission, which was accepted by Hobhouse J. The only reason why Woolf L.J. did not accept it was that he considered that, before D.S.T. could rely on their award against the State, they should take the same steps to enforce that award in England as a judgment as they took in relation to Rakoil. I do not however agree. As it seems to me, D.S.T. are not seeking to make the State a judgment debtor; they are simply seeking to assert, in garnishee proceedings as against Sitco, that, by reason of the award alone, it would not be inequitable to make the garnishee order absolute, despite the existence of beneficial ownership (if any) of the debt by the State. For that purpose, I cannot see that it is necessary for D.S.T. to do more than prove the existence and the legitimacy of the award as against the State. I need only add that, had I not thought that the matter could and should be disposed of in that way, I should have been unwilling to determine the issue of the State's beneficial ownership on the material before your Lordships' House; I would have considered it more appropriate that an order should be made for the trial of the issue, and that the money should be paid into court pending the outcome of that trial. However, in the circumstances of the present case, this is not necessary; and indeed I cannot help observing that these circumstances provide a useful illustration of the appropriateness of the Rules of the Supreme Court providing that there is jurisdiction to make a garnishee order absolute, despite the fact that a third party is beneficially entitled to the debt, though no doubt it will only be in rare cases that in such circumstances an order absolute will be made.

[2] I turn next to the matter which I, like the Court of Appeal, consider to be the principal issue in the case, which is whether, having regard to the risk of execution upon their assets pursuant to the judgment of the Civil Court against Sitco, or alternatively, the commercial pressure to which Sitco is being subjected, it is appropriate to make a garnishee order absolute. However I can say at once that, consistently with the view expressed by Hobhouse J., I consider that, as a general rule, commercial pressure cannot of itself be enough to render it inequitable to make an order absolute. There is, so far as I am aware, no authority to support the submission of Sitco on this point, and I am unable to improve upon the reasoning expressed by Hobhouse J. when he said:

> "Any process of enforcement makes life more complicated for the garnishee. It may even lead to the judgment debtor venting his wrath in some way on the innocent garnishee. It may seriously damage the trading reputation and relationships of the garnishee in a particular trade or part of the world. But the administration of justice should not, without more, defer to such considerations. Just as Mareva injunctions or giving evidence on subpoena, etc., may cause such problems for the party affected, which he would much prefer to avoid, so here the mere commercial interests of Sitco cannot be allowed to defeat the ends of justice. There are obvious practical reasons which support this policy. The measure of commercial advantage and

disadvantage, particularly in an international field, is very difficult to investigate and evaluate with any accuracy and depends upon the expression of opinions, which have to make assumptions about events which, ex hypothesi, have not yet occured. Further, if the court were to allow such considerations to affect the administration of justice, it would provide obvious encouragement to defaulters to try and frustrate execution by imposing just such commercial pressures on the garnishee."

It is therefore upon the effect of the judgment of the Civil Court against Sitco that I have to concentrate.

[3] For this purpose, it is necessary to identify the applicable principles. I turn therefore to the authorities for guidance. In considering the authorities it is, I think, important to bear in mind that the question at issue is whether it would be inequitable in the circumstances to make a garnishee order absolute, and that it is generally considered inequitable so to do if the garnishee would, in the circumstances, be compelled to pay the relevant debt twice over. So we can see, in the cases, the question being posed whether there was any real or substantial risk that the garnishee, having paid the judgment creditor under a garnishee order absolute in this country, would be required to pay the amount over again in proceedings in a foreign country (see, e.g., Swiss Bank Corporation v. Boehmische Industrial Bank [1923] 1 K.B. 673, 678 per Bankes L.J., and p. 681 per Scrutton L.J.; and Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co. Ltd. [1927] A.C. 95, 112, per Lord Sumner).

[4] However, it is appropriate that I should turn first to a statement of principle by Bovill C. J. in Ellis v. M'Henry (1871) L.R. 6 C.P. 228, 234 which has long been treated as authoritative. He said (at p. 234):

" . . . there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries."

[5] That principle appears to lead to the conclusion that the English courts should act on the basis of an assumption as to how the foreign court will proceed. That this is indeed so is stated perhaps most clearly in the speech of Lord Sumner in the Sedgwick, Collins case when he said [1926] A.C. 95, 106:

"The main question is whether the judgment is one to which, according to the current of English decisions, foreign courts of justice may be expected to give effect. The expectation is not one of fact depending on the probable conduct of the courts of this or that country, but is one of law, based upon the consideration for the judicial proceedings of other countries, which English administration, wherever situated, ought to adopt [illegible] in the interest of justice generally."

Furthermore, the cases have established the criteria which must be fulfilled before the English judgment is regarded as one to which foreign courts of justice may be expected to give effect. These appear to be threefold. (1) The underlying judgment entered by the English court in favour of the judgment creditor against the judgment debtor has been entered by a court which is, by generally accepted principles of international law, a court of competent jurisdiction. (2) The situs of the attached debt, owing by the garnishee to the judgment debtor, is England. (3) Payment of the attached debt by the garnishee pursuant to the garnishee order absolute has the effect of discharging that debt. Of these three criteria, there can really be no difficulty about the third, because that is the effect of the English legislation, now embodied in R.C.S., Ord. 49. The litigation has therefore been concerned with the first two criteria. For example, the English court is usually rendered competent, in cases where the judgment debtor is resident overseas, by his having submitted to the jurisdiction (as in Martin v. Nadel Dresdner Bank Garnisheesl [1906] 2 K.B. 26 and in the Swiss Bank Corporation case [1923] 1 K.B. 673, but not in Sea Insurance Co. v. Rossia Insurance of Petrograd (1924) 20 Lloyd's Rep. 308, where judgment was entered in default of appearance against the judgment debtor, resident overseas, who had not submitted to the English jurisdiction); and sometimes there may be considerable argument whether the judgment debtor has in fact submitted to the English jurisdiction (this was the main issue in the Sedgwick, Collins case [1926] A.C. 95). The second criterion was clearly established in the Swiss Bank Corporation case, which clarified the earlier decision of the Court of Appeal in Martin v. Nadel and distinguished the latter case on the basis that, whereas there the situs of the attached debt was Germany, in the Swiss Bank Corporation case the situs was England.

[6] So much is, I think, established law. But the question arises whether cases of this kind are to be solved by exclusive reference to this assumption. The point may arise in two ways. First, let it be supposed that one or other of the two criteria is not fulfilled, i.e. that the English court is not, by accepted principles of international law, competent with regard to the underlying judgment against the judgment debtor, or alternatively that the situs of the attached debt is not England. Will the English court in such circumstances automatically decline to make the garnishee order absolute, on the ground that there is a real risk that a foreign court may, despite payment by the garnishee pursuant to such a garnishee order absolute, nevertheless enforce the attached debt against the garnishee overseas? Second, let it be supposed that both criteria are fulfilled. Will an English court, in such circumstances, make a garnishee order absolute in accordance with the assumption, and exclude as irrelevant and inadmissible any evidence that a foreign court will nevertheless not recognise payment under the English order as effective to discharge the attached debt?

[7] I have mentioned that there are these two questions, for the sake of completeness; but I doubt whether the answer to the first question has much bearing on the answer to the second question with which your Lordships' House is here concerned. In fact, Martin v. Nadel indicates that, in that case at least, there was consideration whether the courts in Berlin (the situs of the

attached debt) would or would not recognise a payment under a garnishee order absolute in England as effective to discharge the attached debt. It was taken to be the fact that they would not, though this was by admission. In any event, the court was there concerned with a situation where the assumption was not available to provide a solution with reference to the position in this country. All that can be said of the case is that the question whether there was a real risk of the garnishee being compelled to pay twice over was being answered by reference to the factual situation.

[5] Here we are concerned with the situation where both criteria are fulfilled. Will the English court, in such circumstances, automatically assume that any relevant foreign court will recognise payment under the English garnishee order as effective to discharge the attached debt? Or will it admit, and if appropriate act upon, evidence that a relevant foreign court will not do so? Having considered this question with care, I doubt whether it is susceptible of a logical answer. Powerful arguments of policy can be advanced in favour of either solution - the one favouring the interests of the garnishor in levying lawful execution upon the property of the judgment debtor, and the other favouring the interests of the garnishee. On the one hand, it can be said that the garnishee must ordinarily have to bear the consequences of any commercial pressure which may be inflicted upon him by a powerful judgment debtor, which may have serious financial consequences for him; it is not unreasonable, it may be argued, that he should likewise bear the consequences of action by some foreign court, invoked by the judgment debtor, which departs from the accepted norms of private international law. On the other hand, it can be said that the principle which is here being applied is that a garnishee order absolute should not be made where it is inequitable to do so, and further that it is accepted in the authorities that it is inequitable so to do where the payment by the garnishee under the order absolute will not necessarily discharge his liability under the attached debt, there being a real risk that he may be held liable in some foreign court to pay a second time. To deprive the garnishee of the benefit of this equity merely because the court which may hold him liable a second time is not acting in accordance with accepted principles of international law would not be right, especially bearing in mind that the garnishee is a wholly innocent party who has been dragged into somebody else's dispute, and that the judgment creditor has the opportunity of seeking elsewhere for assets of the judgment debtor which he may seize in satisfaction of the judgment debt.

[6] Faced with such nicely balanced arguments, the guidance of authority is especially helpful. Now it is true that the question has not arisen in earlier cases in the stark form which it has taken in the present case; and it is also true that the judgments in the cases (perhaps for that very reason) do not appear to speak with a united voice on the point. But, having read and re-read them, I have come to the conclusion that they favour the second solution which I have mentioned, i.e. that which favours the garnishee and so does not require an automatic application of the assumption. I say this for, in particular, two reasons. First, the test has been authoritatively stated as being whether there is a real (or substantial) risk that the garnishee will be compelled to

pay the attached debt twice over (see, e.g. the Swiss Bank Corporation case [1923] 1 K.B. 673, 681, per Scrutton L.J., and the Sedgwick, Collins case [1927] A.C. 95, 112 per Lord Sumner). A test so stated is essentially one of fact, not susceptible of being satisfied by a conclusive assumption of law. Second, there are instances in the cases of judges considering factual evidence as bearing on the question whether there is such a real risk (see, e.g., the Swiss Bank Corporation case [1923] 1 K.B. 673, 683, per Scrutton L.J.; Sea Insurance Co. v. Rossia Insurance Co. of Petrograd (1924) 20 Ll.L.Rep. 308, 309, per Bankes L.J.; and the Sedgwick, Collins case [1927] A.C. 95, 111-112, per Lord Sumner). The propositions which I derive from the authorities are these. First, if it appears that there is a real risk that the garnishee will be compelled by some other court to pay the attached debt a second time, it will generally be inequitable to expose him to that risk by making the garnishee order absolute. But, second, in the absence of evidence establishing such a real risk, the assumption I have referred to will be applied. In particular, as appears from the Sedgwick, Collins case [1927] A.C. 95, it is not enough to establish such a real risk that "foreign courts generally cannot be expected to recognise judgments obtained here under specific legislation and particular circumstances, that raises an arguable doubt as to their validity . . . when once it has been decided here that such judgments have been regularly obtained after an effective submission to the jurisdiction on the part of the defendants" (see [1927] A.C. 95, 112, per Lord Sumner).

16. I wish to add, in case it should be thought that I have overlooked them, that I have studied with interest and respect the affidavits put in by D.S.T. relating to the position under Swiss, French and German law, and the law of the State of New York. I would only make this comment on these affidavits, that, although the laws of those countries, as stated in the affidavits, bear a remarkably close resemblance to the law of this country, they do not cast very much light on the crucial problem in the present case. I must confess that I am not surprised. I suspect the reason to be the practical one that it will be very rare for evidence to be available that a foreign court will not act in accordance with the accepted principles of international law, with the effect that in this country the assumption to which I have referred will usually be applicable.

17. It follows that, in the present case, the crucial question is whether it appears that there is a real risk that the appellants, Sitco, may, if the garnishee order is made absolute, be required to pay the debt twice over. This was the question which the judge identified in his judgment as being the crucial question which he had to decide.

18. Here it is asserted by Sitco that there is indeed a real risk that they will be required, by execution upon their assets pursuant to the judgment of the Civil Court, to pay the debt a second time. We are not, of course, here concerned with the question of risk whether a judgment may be entered by a foreign court requiring the debt to be paid; that has already been done, and indeed was done on 12 April 1987, before the garnishee order nisi was made on 14 May 1987. (I add in parenthesis that the fact that that judgment was entered in favour not of Rakoil United States does not appear to me to be of any materiality, since the

debt in question is the same debt). The relevant risk which has to be evaluated is therefore the risk of execution upon the assets of Sitco pursuant to the judgment of the Civil Court.

[13] Hobhouse J.'s conclusion that there was no real risk of such execution was plainly coloured by his misapprehension that there were no assets of Sitco available for execution. That misapprehension was corrected by the Court of Appeal, on the basis of fresh evidence; even so they decided to affirm Hobhouse J.'s decision to make the order absolute, for the reasons which I have already set out. I, for my part, feel unable, with all respect, to accept the approach of Lloyd L.J., who considered that the risk to Sitco (such as it was) was outweighed by two other factors, the impregnability of the English judgment obtained by D.S.T., and the flawed nature of the judgment obtained by the State in the Civil Court.

[14] I feel bound to say, first, that the "impregnability" of D.S.T.'s judgment against Rakoil does not seem to me to have been a material consideration for the court to take into account. The exercise of the discretion to make a garnishee order absolute presupposes the existence of a judgment in this country in favour of the judgment creditor against the judgment debtor; but the simple fact that the judgment is impregnable cannot of itself weigh against the exercise of the discretion not to make a garnishee order absolute. I can see that aspects of the English judgment might form part of the evidence supporting an argument that the judgment will not be recognised by a particular foreign court (subject always to the decision in the Sedgwick, Collins case). But the fact that the English judgment is "impregnable," if it be the case, merely deprives the garnishee of that argument; it must, in my opinion, be wholly irrelevant where, as here, the foreign court has previously entered judgment against the garnishee, and has subsequently sought to enforce the judgment by the arrest of a ship.

[15] There remain the criticisms made by the Court of Appeal of the jurisdiction exercised by the Civil Court. These are, to English eyes, no doubt serious. Even so, I cannot see that it is right to balance what are perceived to be flaws in a foreign judgment against the virtues of the English judgment. It is not to be forgotten that there are many countries in the world which exercise what are, in the eyes of international law, an exorbitant jurisdiction; indeed, in some cases the jurisdiction exercised by the courts of this country can be so regarded. But I cannot accept that the mere fact that the exercise of jurisdiction by the foreign court is regarded as exorbitant, or even as very exorbitant, can of itself affect the exercise of the English court's discretion to make a garnishee order absolute. I find myself in agreement with the view expressed by Hobhouse J. that, if the garnishee shows that he is in fact exposed to a real risk of being required by a foreign court to pay the debt a second time, it does not of itself matter that the risk which the garnishee shows to exist is one of being so required by a foreign court which does not have, by English law, or by generally accepted rules of international law, jurisdiction to make such an order. This is because the crucial feature is the reality of the risk. It seems to me, as it did to Hobhouse J., that this is implicit in the speech of Lord Sumner in the Sedgwick, Collins case. I am not of course saying that the absence of such

jurisdiction in the foreign court is necessarily irrelevant; because it may go to the reality of the risk in the sense that it may, for example, reduce the likelihood of such a judgment being executed upon assets of the garnishee. This is, I think, what Woolf L.J. had in mind [1988] 1 Lloyd's Rep. 164, 174 when he said that:

> " . . . in deciding the weight which would be given to this risk when it comes to exercise its discretion as to whether or not to make the garnishee order absolute, this court has to consider the legitimacy of that judgment."

But if, for example, there is a real risk that the foreign court will enter judgment against the garnishee in respect of the same debt, and there are assets of the garnishee available for execution of this judgment, that would constitute good grounds for declining to make a garnishee order absolute, notwithstanding that the jurisdiction of the foreign court to enter the judgment was exorbitant in the sense that it did not accord with English ideas, or ideas generally accepted in private international law, or indeed that it was, to English eyes, erroneous in point of law.

[6] In the present case, D.S.T. made the forthright allegation that the judgment of the Civil Court was not merely an exorbitant exercise of jurisdiction, or erroneous in point of law: they asserted that it was a sham, in the sense that the court was acting not in accordance with the law as understood in the State, but as a tool of the executive of the State. I wish to state that, had those facts been established, they would have raised a difficult question whether such an exercise of power by a court could, on the facts of the case, properly be regarded as an order by a court of law at all, but should rather be regarded as an act of executive power by the State and so should be categorised with commercial pressure and as such be irrelevant to the making of a garnishee order absolute. I wish also to state that, in cases such as the present, the courts of this country must not shrink from the task of making the necessary assessment of the situation, reluctant though they will be to do so. I have therefore considered the evidence in the present case with great care. But, having done so, I have come to the conclusion, especially having regard to the rival affidavits placed before the courts below as to the law applicable in the State, that this allegation advanced by D.S.T. fails on the evidence.

[7] I turn finally to the question whether Sitco has established a real risk that it may be held liable to pay the debt a second time pursuant to the order of the Civil Court. The judge thought not, but on the basis of a misapprehension of the facts. The Court of Appeal thought not, though on the basis of a balancing operation which weighed the impregnability of the English judgment against the legitimacy, or illegitimacy, of the judgment of the Civil Court of the State, a balancing operation which I do not regard as correct in law. Once again, therefore, as I see the case, your Lordships' House must, like the Court of Appeal, exercise its discretion anew on the evidence now before them.

[8] In considering how the discretion should be exercised, I of course take into account the view expressed by Lloyd L.J. [1988] 1 Lloyd's Rep. 164, 170 that, despite the fresh evidence placed before the Court of Appeal, notably the arrest of the [illegible]

London," the risk of execution, though higher than Hobhouse J. thought, was still a risk "at a fairly low level." Even so, it is not to be forgotten that the garnishee does not have to establish a certainty, or a very high degree of risk, of being compelled to pay the debt twice over; he has only to establish a real risk of being required to do so. Here, there are the following factors to be taken into account:

(1) A judgment has already been entered against Sitco in the Civil Court of the State (which in fact antedates the garnishee order nisi in this country).

(2) Since the judgment of Hobhouse J. (in which he expressed some scepticism about the State's readiness to enforce that judgment) the State has shown, by the arrest of the "New London," some determination to do so.

(3) Since the judgment of Hobhouse J., it has become apparent that there are assets of Sitco available for execution within the jurisdiction of other members of the Gulf Co-operation Council, in the form of cargoes sold on c.i.f. or c. and f. terms under long-term contracts. On this basis, it was held by the Court of Appeal (rightly, in my opinion) that the judge's finding that there was no significant risk in respect of these contracts could not stand.

(4) Rival affidavits were placed before Hobhouse J. on the question whether the judgment of the Civil Court of the State would be enforceable in other Gulf States. His conclusion was as follows:

> "Since I am solely concerned with a question of risk, I do not consider it necessary or appropriate that I should try to decide which argument would prevail. Without hearing the witnesses and seeing them cross-examined, any such decision would be one in which one would have little confidence. There clearly is a risk, which is not negligible, that the judgment would be recognised and accepted as enforceable by the courts of one or more of the other United Arab Emirates or G.C.C. States."

This affidavit evidence was supplemented by further affidavit evidence placed before the Court of Appeal. Lloyd L.J. expressed his conclusion on this aspect of the case as follows:

> "I accept, as did the judge, that there is some risk that the Government will succeed in enforcing its judgment by executing on Shell assets in the Gulf - or elsewhere. A great deal of evidence has been put before us on this aspect of the case since the hearing. But I do not regard it as decisive."

I can see no reason to interfere with this conclusion.

On this basis, I ask myself whether Sitco have established that there was a real risk. Hobhouse J., on the evidence before him, decided the point against Sitco "by a narrow margin." Lloyd L.J. considered that there was a risk, though at a fairly low level. The difficulties faced by Sitco relate to (1) a question mark over

the State's determination to enforce the judgment of the Civil Court; (2) possible difficulty facing the State in identifying cargoes of Shell available for execution in other Gulf States; and (3) doubts whether the State would succeed in enforcing the judgment of the Civil Court in another Gulf State. As to the first point, as I have said, the arrest of the "New London" has provided some evidence of the State's determination to enforce the judgment, since the time when the judge considered the case. As to the second, there must, I consider, be a risk that this practical difficulty will be overcome. As to the third, the affidavit evidence on Gulf law put in on behalf of Sitco, though clearly not decisive, is sufficient to establish the existence of a risk that the State will succeed in enforcing the judgment in another Gulf State. Looking at the matter as a whole, and bearing in mind that it is enough that Sitco establishes a real risk, I am satisfied that Sitco has discharged the burden upon it to establish the existence of such a risk.

[20] For these reasons, I would allow the appeal of Sitco against the order of the Court of Appeal making the garnishee order absolute.

I turn next to the question whether the injunction ordered by Bingham J. on 2 July 1986, and clarified by him on 25 July 1986, must also be discharged. As I have already recorded, Mr. Johnson put in the forefront of his submissions an attack on the injunction, submitting that, for a number of reasons, the injunction should never have been granted. In his submissions on behalf of D.S.T., Mr. Grabiner submitted that the injunction appeal was only relevant if your Lordships' House should hold that the garnishee order absolute should not have been made; but that, if that were to be your Lordships' conclusion, the injunction should not be discharged but should be allowed to stand in order to maintain the status quo pending the invocation by D.S.T. of other powers of enforcement in respect of Sitco's indebtedness. He canvassed the following possibilities:

> (1) If Sitco were to succeed on their "trust" argument in relation to the existing garnishee order, it would be open to D.S.T. first to seek leave to enforce the award against the State in the same manner as a judgment, and then to take fresh garnishee proceedings in respect of Sitco's indebtedness to the State.
>
> (2) On the same assumption, D.S.T could seek leave to enforce the award against the State and then proceed to seek a charging order, or to seek the appointment of a receiver in respect of Sitco's indebtedness.
>
> (3) Even though the garnishee order absolute was set aside, it would still be open to D.S.T to seek a winding-up order against Rakoil, in which event the relevant asset (Sitco's indebtedness to Rakoil) would be recoverable by the liquidator.

For my part, I do not consider that it would be right to continue the injunction in effect for these purposes. So far as (1) is concerned, a garnishee order against Sitco in respect of its indebtedness to the State should in my view be refused as

inequitable, on precisely the same ground that the garnishee order in respect of Sitco's indebtedness to Rakoil should be discharged, i.e. that there would be a real risk that Sitco would be required to pay the debt twice over. So far as (2) and (3) are concerned, it is true that under these proposed courses of action, D.S.T. would be proceeding to execution not by way of garnishee proceedings, but by a charging order, or by appointment of a receiver, or by a winding-up order. But the fact remains that, as the present proceedings to date have demonstrated, the natural mode of execution in the present case is by way of garnishee proceedings; and that mode of execution has been held not to be available to D.S.T. because it would be inequitable to make a garnishee order absolute. In the circumstances of this case, I cannot think that it would be right for the court to maintain the injunction in existence to enable D.S.T. to pursue some other method of execution in respect of Sitco's indebtedness (whether to the State or Rakoil) bearing in mind that an injunction is itself an equitable remedy. For this simple reason, I would order that the injunction be discharged.

I turn finally to the argument advanced by Mr. Havelock-Allan on behalf of Sitco, which was as follows. The injunction granted by Bingham J. on 2 July 1986 (and subsequently clarified by him on 25 July 1986) recorded an undertaking by D.S.T. to abide by any order the court or judge might make as to damages in case Rakoil suffered any by reason of the order which the court should thereafter be of the opinion that D.S.T. ought to pay, and further to pay the reasonable costs of any third party in complying with the order. It was the submission of Mr. Havelock-Allan that there must be implied a like undertaking by D.S.T. in respect of any such damages suffered by a third party by reason of the order; or alternatively that such an undertaking must be implied by reason of the service of the order upon Sitco by D.S.T.'s solicitors. There was before your Lordships an appeal against the refusal by the Court of Appeal, on 6 May 1987, to order that the continuation of the injunction should be subject to an express undertaking by D.S.T. to indemnify Sitco "against any loss or liability caused by or arising from the said injunction or their compliance with it," and that such undertaking should be secured. In their printed case, it was asked by Sitco that the injunction should be discharged or varied so as to permit Sitco to pay Rakoil, and that the garnishee order should be set aside; or alternatively that the injunction should be varied by the insertion of an express undertaking in the form previously asked for, but refused by the Court of Appeal. However, as I understood Mr. Havelock-Allan's submission before your Lordships, it was his argument that such an undertaking should in any event be treated as implied, so that Sitco could seek to take advantage of it if the injunction was in fact discharged by your Lordships. On this basis, the existence of the implied undertaking does not arise by way of an appeal from the refusal of the Court of Appeal to make the continuation of the injunction dependant upon the giving by D.S.T. of an express, secured, undertaking to Sitco. On the contrary, it was argued that your Lordships should hold that such an undertaking was impliedly given by D.S.T. to Sitco, at least from the time of the service of the injunction upon Sitco. Furthermore, Mr. Havelock-Allan, at a subsequent stage in his argument, was at pains to stress that he was not relying upon any automatic implication so to indemnify third parties affected by an injunction of any such

protection will be afforded to all third parties affected by injunctions. From this it must follow that any such implied undertaking, if it exists, must depend upon the circumstances of a particular case.

In these circumstances, I must confess to being troubled as to how your Lordships should deal with this particular submission. There appears to have been no issue or decision in the courts below whether there was any implied undertaking by D.S.T. to Sitco, which could properly be the subject-matter of an appeal to your Lordships' House. The only relevant decision which could be the subject of an appeal to your Lordships was the refusal by the Court of Appeal, on 6 May, to refuse to make the continuation of the injunction conditional upon the grant by D.S.T. of an express, secured, undertaking in favour of Sitco in the form then asked for by Sitco. Let it be supposed, however, that your Lordships were to consider that the Court of Appeal should have made a continuation of the injunction depend upon such an express, secured, undertaking being given, what order is your Lordships' House now to make? If the injunction were now to continue in existence, I can understand that your Lordships could (if they thought right) now order that the continuation of the injunction should depend upon the giving of such an express, secured, undertaking. But the primary submission of Sitco is that the injunction should be discharged; and in these circumstances I find it difficult to perceive the mechanism whereby anything should be made conditional upon the grant of the undertaking. In other words, Sitco were in my opinion correct in asking, in their printed case, that the express undertaking should only be required as a condition of the injunction being continued, as alternative relief to the injunction being discharged. In these circumstances, if (as I consider) the injunction should be discharged, the point on the express undertaking does not arise.

That leaves the question of the implied undertaking. In my opinion, that matter is not open for consideration by your Lordships on this appeal, there being no decision on it by any court below. If Sitco wish to pursue the matter, they must take such fresh steps as they are advised.

For these reasons, I would allow the appeals of Sitco in both the garnishee appeal and the injunction appeal, with costs to Sitco before your Lordships' House and below, and I would order that the garnishee order absolute and the injunction be discharged.