

Case No: 2011 FOLIO 143

Neutral Citation Number: [2011] EWHC 691 (Comm)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/03/2011

Before :

**THE HONOURABLE MR JUSTICE FLAUX**

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Between :

B

**Claimant/**  
**Applicant**

- and -

S

**Defendant/**  
**Respondent**

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**Andrew Wales and Josephine Higgs** (instructed by **Barlow Lyde & Gilbert LLP**) for the  
**Claimant/Applicant**  
**Jonathan Gaisman QC and Stewart Buckingham** (instructed by **Holman Fenwick & Willan**  
**LLP**) for the **Defendant/Respondent**

Hearing date: 11 March 2011

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Judgment

The Honourable Mr Justice Flaux:

## **Introduction**

1. The defendants (to whom I will refer as “S”) were the sellers under two contracts made in July 2010 for the sale to the claimant buyers (to whom I will refer as “B”) of consignments of sunflower seed oil which in each case were on the terms of FOSFA 54, one of the standard forms of the Federation of Oilseeds and Fats Associations (“FOSFA”). Disputes having arisen as a result of alleged default by S under those contracts, B commenced two arbitrations under clause 29 of FOSFA 54, the arbitration clause in each contract.

2. That clause provides as follows:

“29. ARBITRATION: Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant.

Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, umpire or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.”

3. The total amount claimed in the arbitrations is some US\$2,958,000. On 8 February 2011, B sought and obtained from Gloster J on a without notice application a worldwide freezing injunction over S’s assets up to US\$3,400,000 in support of its claims against S in the FOSFA arbitrations. That application was made pursuant to section 44 of the Arbitration Act 1996, which provides, so far as relevant:

### **Court powers exercisable in support of arbitral proceedings.**

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are—

....

(e) the granting of an interim injunction or the appointment of a receiver.

4. S now applies to set aside the injunction. The grounds of the application are:
- (1) The Freezing Injunction was obtained in breach of clause 29 of FOSFA 54 which is a **Scott v. Avery** clause which on its true construction prohibits the taking of any action or other legal proceedings, including the issue of a claim form to obtain a freezing injunction in this jurisdiction.
  - (2) There was no jurisdiction for a freezing injunction to be granted, the parties having by virtue of clause 29 agreed that the powers under section 44 of the Arbitration Act 1996 would not apply to these contracts.
5. Although Mr Wales for B contended that these two grounds are in some way analytically distinct, I agree with Mr Gaisman QC for S that they are not and that if, on the true construction of clause 29 and, as a matter of law, the clause is effective as an agreement that B will not bring proceedings in England seeking “security” for its claim by way of a freezing injunction, then the parties have “otherwise agreed” within the meaning of section 44(1) of the 1996 Act, so that, on that basis, the power of the court to grant an injunction under section 44(2)(e) is excluded. No special, more precise “agreement otherwise” is required, a matter to which I return below.
6. Thus the critical question in summary is whether, as Mr Gaisman contends, as a matter of construction a **Scott v Avery** clause in the form of clause 29 (which is in widespread use in commodity contracts) excludes any proceedings, including an arbitration claim form for a freezing injunction, unless and until an award has been issued, or whether, as Mr Wales contends, this clause is one in relation to which there is a settled meaning and construction derived from earlier cases which have considered this wording, albeit with one exception cases decided before the Arbitration Act 1996 came into force, such that its true construction is that ancillary proceedings in England which invite the court to exercise its powers under section 44 are not in breach of this form of arbitration clause.
7. Determination of this question will depend upon a careful analysis of the judgments of Donaldson J and the Court of Appeal in **Mantovani v Carapelli** [1978] 2 Lloyd’s Rep 63 and [1980] 1 Lloyd’s Rep 375 and of the cases which have followed and applied that case. However, with one exception, those cases were all decided under the regime of the Arbitration Act 1950, section 12(6) of which provided:

The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of—

....

(f) securing the amount in dispute in the reference;

....

as it has for the purpose of and in relation to an action or matter in the high Court.

8. That sub-section was in mandatory terms not permitting of exclusion (“The High Court shall have...the powers”) and, as discussed further below, it was an important aspect of the cases under the 1950 Act which considered **Scott v Avery** clauses in the form presently before the court, that there was no provision for contracting out of the supervisory powers which the court had under that Act over the conduct of arbitrations. The whole regime of the 1996 Act is different, with its emphasis on party autonomy and, as the terms of section 4 of the 1996 Act make clear, there are only certain provisions of the Act (of which section 44 is not one) which are mandatory:

(1)The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2)The other provisions of this Part (the “non-mandatory provisions”) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

9. Accordingly, clause 29 has to be considered against the background of the permissive or non-mandatory regime of section 44 of the 1996 Act, together with the whole philosophy underlying the Act of party autonomy, which is fundamentally different from the mandatory regime of the 1950 Act which it replaced, and, specifically, section 12(6).
10. The exception to which I referred earlier as being the one case under the 1996 Act which has considered the meaning and effect of **Mantovani v Carapelli** is the decision of Rix J (as he then was) in **Re Q’s Estate** [1999] 1 Lloyd’s Rep 931. However, as will be apparent from my analysis of the cases in this judgment, since the clause under consideration there was one which contained the first paragraph of the current clause 29 but not the second, it was not a **Scott v Avery** clause at all. It follows that the views expressed by Rix J were strictly obiter dicta and that the question I have to decide is strictly an open question, in relation to which there is no authority directly in point.
11. Having said that, for reasons which will become apparent, in my judgment Rix J expressed a clear view as to what the answer should be to the question in relation to a clause such as clause 29 in the present case which, unlike the clause he was considering, contained the **Scott v Avery** element of the relevant arbitration clause. Rix J having expressed that view after a careful analysis of the authorities, I would be loathe to reach a contrary conclusion, unless I felt that for some reason there was a flaw in that analysis which should compel me to a different conclusion. For reasons which I will develop, I do not consider that there is any such flaw in his analysis.
12. Before considering the various authorities, I should say at the outset that, untrammelled by any authorities, I would be of the very firm view that the opening words of the second paragraph of clause 29: “Neither party hereto, nor any persons

claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal...” were clearly wide enough and did, on their true construction, exclude all proceedings anywhere, including in England, whether substantive or ancillary or (as Mr Wales put it) supportive of the arbitration in which the substantive dispute will be decided. It seems to me that it is clear that, as a matter of language, proceedings are “in respect of a dispute” not just when they seek to determine the substance of the dispute, but also when they are ancillary to the dispute or are seeking security for it.

13. Accordingly, although in subsequent cases, courts have expressed the opinion that absent contrary authority, **Scott v Avery** clauses in this form should be limited to prohibiting substantive proceedings and I understand the commercial rationale for that opinion, in my judgment it is simply not justified by the wording of the clause. It follows that if, as Mr Wales contends, the clause does not exclude or prohibit ancillary or supportive proceedings in England such as have been brought here, that must be because the effect of the decided cases is that clauses in this form have that more limited meaning despite the wide words of the clause. Mr Wales’ argument is that despite the introduction of the words: “unless otherwise agreed by the parties” in section 44 of the 1996 Act, the clause still has the more limited meaning ascribed to it by the cases under the 1950 Act.
14. That argument requires a close analysis of the precise reasoning upon the basis of which the courts reached the decisions they did under the 1950 Act. Considering first the decision in **Mantovani v Carapelli** itself, the contract of sale in that case incorporated the terms of one of the forms of the Grain and Feed Trade Association (“GAFTA”) which included an arbitration clause (clause 26) in materially identical terms to clause 29 in FOSFA Form 54 in the present case. The buyers there were in default and the sellers commenced arbitration, and as both parties were Italian, the sellers sought to obtain security for their claim in the Italian courts (essentially by way of some form of procedure akin to a Mareva or freezing injunction). This caused financial loss to the buyers and, in the arbitration, the buyers sought to recover that loss as damages for breach by the sellers of the **Scott v Avery** clause. The arbitrators found in favour of the sellers on all issues, including this one, but stated a special case, in which one of the questions of law raised was whether the sellers had been in breach of contract in starting the proceedings in Italy.
15. Donaldson J at first instance, having set out the buyers’ case that the proceedings in Italy were in breach of the arbitration clause, sets out the three arguments which Mr Hallgarten, counsel for the sellers, sought to advance in answer to that case. He rejected all three arguments, but only his conclusion on the first is relevant ([1978] 2 Lloyd’s Rep 63 at 72-3):

“Mr. Hallgarten for the sellers seeks to answer this claim in three ways.

First, he says that the arbitration clause does not bar all legal proceedings, but only those designed to settle the original dispute between the parties, i.e., whether the sellers or the buyers repudiated the contract, and that the Italian proceedings were not of that nature. I do not accept this submission. The

clause prohibits all legal proceedings in respect of the dispute before a final award has been obtained and the Italian proceedings to obtain security for the claim are proceedings in respect of the dispute even if they are not designed to determine it.”

16. Just pausing there, I agree with Mr Gaisman that in this passage the learned judge is saying in terms that the clause prohibits all legal proceedings and does not seem to be distinguishing as a matter of construction between security sought in Italy and security sought in England. It is true that, having considered and rejected Mr Hallgarten’s second and third arguments (to the effect that the buyers’ claim for damages was outside the arbitrators’ jurisdiction and that if there was a breach it did not sound in damages), Donaldson J then says this:

“For the avoidance of doubt, let me make it clear that the GAFTA arbitration clause does not prevent an application to the High Court for security made under s. 12(6) of the Arbitration Act 1950, because such an order, if made, is ‘for the purpose of and in relation to the reference’ and is an integral part of English arbitration.”

17. However, it seems clear that Donaldson J is saying the position is different in England not because of the construction of the clause (as to which he has just said in the earlier passage that it prohibits all legal proceedings) but because of the mandatory effect of section 12(6) of the 1950 Act. This is consistent with the earlier decision of Kerr J in **Mavani v Ralli Bros Ltd** [1973] 1 WLR 468 to which Mr Wales referred me, to the effect that the power of the court under section 12(6) could not be ousted by agreement of the parties. I would observe in passing that the position under the 1996 Act is fundamentally different for the reasons I have given in paragraphs 8 and 9 above.

18. The Court of Appeal upheld Donaldson J’s decision that the Italian proceedings for security were in breach of the arbitration clause and that the arbitrators had jurisdiction to award damages for that breach of contract. The main judgment was given by Lawton LJ. At [1980] 1 Lloyd’s Rep 377, 380 rhc he sets out Mr Hallgarten’s first argument for the sellers, which was the same as his first argument before Donaldson J, that the prohibition in the clause is only of proceedings as to the substance of the dispute, not of ancillary proceedings such as those in Italy, designed to obtain security. He refers to the point made by Mr Hallgarten that, if the buyers had had any assets in England, the sellers could have sought a Mareva injunction against them and that, as the buyers had no assets in England, they had sought equivalent relief in the jurisdiction where the buyers did have assets, Italy.

19. Lawton LJ agreed that that argument had its attractions and that, in the case of certain arbitration clauses, that sort of ancillary application for security may be permitted. However, he clearly thought this form of clause did not permit such applications. His reasoning was as follows (at 381):

“This Court is concerned with an arbitration clause of a particular type. Every word of that clause has to be looked at in order to find out what was the intention of the parties. The first

part of the clause is the part giving jurisdiction to the arbitrators [i.e. the first paragraph of what is clause 29 in the present case] ...it is in very wide terms indeed... It follows, therefore, that the arbitrators in this case were given a jurisdiction in about as wide terms as can be drafted.

The second part of the clause [i.e. the second paragraph of what is clause 29 in the present case] contains a specific prohibition of certain kinds of action against those who are submitting to arbitration, and ends with the making of an award a condition precedent to any cause of action which may arise under the contract itself.

...It is necessary to look particularly at some of these words. The prohibition is against bringing “any action or other legal proceedings”. The words “other legal proceedings” are wide enough to cover proceedings in Italy for the form of order which in England would be called a Mareva injunction. Clearly such proceedings were for relief in respect of the dispute...It follows, therefore, that the “other legal proceedings” were “in respect of” the wide form of jurisdiction with which the arbitration clause was concerned. For my part, I would construe the words as meaning that any form of application for ancillary relief, and in particular that sought in Italy, was within the arbitration clause.

...

For my part, I can see no reason at all for making any exception, under what I consider to be the plain meaning of the words in favour of the kind of sequestration proceedings which were taken by the sellers in the Italian Courts.”

20. I agree with Mr Gaisman that, at this point of his judgment, Lawton LJ is expressing himself in unequivocal terms, as had Donaldson J at first instance, that as a matter of construction, the second paragraph of the clause precluded all proceedings including ones for ancillary relief, suggesting that he thought (in so far as he considered the point) that as a matter of construction, even proceedings for ancillary relief in England were within that prohibition.
21. However, he then went on to consider Mr Hallgarten’s second submission, which was that, even if the proceedings in Italy were in breach of the arbitration clause, that would not sound in damages. It was in the context of that argument that he addressed at 382 the question of applications for ancillary relief in England in these terms:

“It seems to me obvious that, where a party to an arbitration clause does obtain a sequestration order in a foreign court, that sequestration order may cause the other party financial loss...I can see no reason in principle why such a loss cannot be said in principle to flow from the breach of the arbitration clause.

Mr Hallgarten pointed out, and with force that the reports do not seem to contain any reference to a similar kind of case...But the explanation is fairly simple. In the ordinary way, those who try to obtain ancillary relief through the Courts will do so in England, and if they do so in England then no question of damage can arise because under the terms of most arbitration clauses, and certainly under the terms of clauses providing for arbitration within the jurisdiction of the Supreme Court of Judicature, the Arbitration Act 1950 applies. In those circumstances, what the parties do if they seek ancillary relief within the jurisdiction of this Court is something which the arbitration clause and the Arbitration Act permits.”

22. Mr Gaisman submits that at this stage of his judgment Lawton LJ was not considering the present form of arbitration clause, a **Scott v Avery** clause, but the generality of arbitration clauses and that, in any event, this passage is obiter. I must confess that I find this part of the judgment somewhat obscure. The first paragraph in the passage I have quoted in the previous paragraph seems to have been focusing on the specific **Scott v Avery** clause in the case, albeit in the context of an application for security abroad, but equally the reference in the next paragraph to “most arbitration clauses” seems to be recognising that there will be other arbitration clauses than the “most” he is describing, of which a **Scott v Avery** clause would be the most obvious example, where even the seeking of ancillary relief in England, were it not for the Arbitration Act 1950, would be prohibited.

23. In **Re Q’s Estate**, Rix J considered the last sentence in that second paragraph and said ([1999] 1 Lloyd’s Rep 931 at 935):

“Lord Justice Lawton appears there to have considered that an application, for instance for Mareva relief in England is done ancillary to and in support of arbitration, presumably at that time pursuant to s. 12(6)(f) of the 1950 Act, and not in breach of an arbitration clause, even of the **Scott v Avery** variety.”

I agree with Mr Gaisman, that in the light of Lawton LJ’s reference to “most arbitration clauses” this analysis of the particular passage in his judgment may not be right. However, ultimately, whether Rix J’s analysis is right may not matter, because, when one takes the various passages of Lawton LJ’s judgment together, it seems to me the better view is that he was not saying that, as a matter of construction of the **Scott v Avery** clause, it permits an application for a Mareva injunction in England, rather than that that is the effect of the mandatory provision in section 12(6) of the Arbitration Act 1950.

24. Browne LJ referred to Mr Hallgarten’s first question: “As a matter of construction, does cl. 26 operate as a bar to any legal proceedings at all, or only to such legal proceedings as go to the substance or merits of the dispute?” and said in relation to that first question:

“So far as the first question is concerned, the construction, I am bound to say that I can see practical arguments in favour of the result which would be produced by Mr Hallgarten’s

construction. If the buyers have assets in England, the sellers would be entitled to apply to the High Court, under s. 12(6) (f) of the Arbitration Act 1950, for provision for securing the amount in dispute. Where a party has no assets in England, I can see the argument that the other party ought to be able to proceed in the country where the assets are for the purpose of securing the amount in dispute... But I think that in the end the words of cl.26 of this particular contract are just too clear ... it seems to me quite impossible to say otherwise than that cl.26 does prohibit the taking of the proceedings in Italy for security which were taken by the sellers in this case.”

25. Mr Gaisman submitted that Browne LJ was really saying that, if it were not for section 12(6) of the 1950 Act, as a matter of construction of the **Scott v Avery** clause, any application for security, even in England, would be excluded. Mr Wales submitted on the other hand that, since this whole passage was dealing with the issue of construction, in the first part of the passage, Browne LJ was saying that, as a matter of construction of the **Scott v Avery** clause, the sellers would be able to apply for security. I am not sure about that. It seems to me that the better view is that, as in the case of Lawton LJ, he was recognising that, whatever the width of the **Scott v Avery** clause, section 12(6)(f) of the 1950 Act permitted an application for security, such as for a Mareva injunction, in England.
26. Megaw LJ agreed with Donaldson J on Mr Hallgarten’s first submission and cited the passage from his judgment which I set out at paragraph 14 above. However, he did not touch on the question of what the position would be in relation to an application for security in England or the effect of section 12(6)(f) of the 1950 Act. Thus, in conclusion on **Mantovani v Carapelli**, I do not consider that any of the judgments which dealt with the question of the effect of section 12(6)(f) of the 1950 Act (Donaldson J, Lawton LJ and Browne LJ) support Mr Wales’ submission that the case is authority for the proposition that as a matter of construction of the **Scott v Avery** clause in issue in that case (materially identical to the clause in the present case), applications for relief in ancillary proceedings in England are permitted. Rather, it seems to me that their reasoning was that the effect of section 12(6)(f) was to permit applications for security by way of a Mareva injunction in England, notwithstanding the wide words of the clause.
27. It is important to note that nothing in any of the judgments in **Mantovani v Carapelli** touches on what the position would be if the statute were in permissive rather than mandatory terms, in other words, if section 12(6) provided in terms (as does section 44 of the Arbitration Act 1996) that the parties could contract out of the court’s supervisory powers. By definition, no such statutory creature was known under the 1950 Act in relation to the powers of the court, as opposed to those of the arbitrators. This can be seen by contrasting the words in section 12(1) (2) and (3) referring to the powers of the arbitrators: “unless a contrary intention is expressed therein [in the arbitration agreement] with the words of section 12(6): “The High Court shall have ...the same power...as in relation to an action or matter in the High Court”.
28. Turning to the subsequent authorities under the 1950 Act to which I was referred which considered **Mantovani v Carapelli**, the first of these was the decision of Colman J in **Comdel Commodities v Siporex** [1997] 1 Lloyd’s Rep 424 at 425-9. In

that case, the sale contract contained a FOSFA arbitration clause in the same terms as the clause in the present case. The arbitration had been commenced as long ago as January 1985 and the buyers had obtained a Mareva injunction in May 1986. Little had been done by the buyers to progress the arbitration for some 10 years and in November 1995, the first tier FOSFA arbitrator struck out the claim for want of prosecution pursuant to section 13A of the Arbitration Act 1950.

29. Later the same month, November 1995, when an appeal to the Board of Appeal was pending, the seller's application to discharge the Mareva injunction was heard by Colman J. The principal ground for that application was that the delay in pursuing the proceedings, in particular an unexplained delay of 19 months, was such that the injunction should be discharged. Colman J held that, given the failure of the buyers to comply with their duty, once a Mareva injunction had been granted in their favour, to pursue the proceedings with proper expedition, it was appropriate to discharge the injunction. The ratio of his decision was clearly that the delay was such as to justify discharging the injunction.
30. However, Mr Havelock-Allen QC, counsel for the sellers, also submitted that a point which the court should take into account in exercising its discretion as to whether to discharge the injunction was that the application for a Mareva injunction had been in breach of the **Scott v Avery** clause. In support of that submission, counsel relied upon the decision of the Court of Appeal in **Mantovani v Carapelli**. Colman J regarded this as "a point of particular importance to commodity arbitration practitioners" and considered it in some detail. It is clear that he was inimical to the suggestion that the clause did have that effect. As he put it:

"It is easy to see that if this submission is correct it will have a major impact on the availability of Mareva injunctions whenever there is a **Scott v Avery** clause worded in this way in a contract which is being sued upon by the party applying for the Mareva injunction. It would be open to a defendant or respondent in every single case to challenge the application for a Mareva injunction by the assertion that it involved the commencement of proceedings in breach of contract."

31. Having set out the passages from the judgments of Lawton LJ and Browne LJ which I have cited at paragraphs 21 and 24 above, Colman J then set out the opening provision of the Rules of Arbitration and Appeal of FOSFA (in accordance with which the first paragraph of the arbitration clause said any dispute was referred to arbitration):

"Any dispute arising out of a contract subject to these rules, including any questions of law arising there with, shall be referred to arbitration in London or elsewhere if so agreed which shall be carried out in accordance with the Arbitration Acts 1950, 1975 and 1979 or any statutory modification or re-enactment thereof for the time being in force."

32. Colman J then continued:

“Those who consent to arbitration under the FOSFA rules therefore do so in respect of arbitrations which are to be carried out in accordance with the English Arbitration Acts as set out in the rules. The carrying out of an arbitration in accordance with the Arbitration Acts seems to me to involve not merely that the procedure which is followed in the course of the arbitration shall be that laid down in the Acts but those provisions of the Arbitration Acts which relate to the conduct of the arbitration itself, and indeed to the supervisory jurisdiction of the Court in relation to English arbitrations, will automatically be incorporated and applicable to any arbitration which is commenced in accordance with the FOSFA rules. That must necessarily import, in my judgment, the provisions of s. 12 of the Arbitration Act 1950 including, in particular, s 12(6) which provides for the party to evoke the jurisdiction of the High Court by way of application for security for the amount in dispute in the reference. That is clearly a provision within which application can be made for a Mareva injunction.

In my judgment, on the proper construction of the FOSFA standard form arbitration clause, the parties have agreed both that resort shall not be had to the Courts for the purpose of enforcing the claims advanced in the arbitration but also to the applicability of the supervisory and ancillary jurisdiction of the English Courts to the arbitration which they have commenced... accordingly, for one party to a FOSFA arbitration to apply to the English Courts for the purpose of evoking the jurisdiction set out in s. 12(6) is not, as I see it, a breach of [the **Scott v Avery** clause].”

33. That case went to the Court of Appeal on the issue of whether the delay was such as to justify the discharge of the Mareva injunction, on which the Court of Appeal upheld Colman J. The judgment of the Court of Appeal does not touch upon the point about whether the obtaining of the injunction was in breach of the **Scott v Avery** clause.
34. Mr Wales placed particular reliance upon the passage in the judgment of Colman J which I have quoted, in relation to which he submitted that, although the passage was obiter, the learned judge dealt head on with the point as to whether the obtaining of the Mareva injunction was a breach of the **Scott v Avery** clause and concluded that it was not, as a matter of construction of the language of the clause together with the FOSFA Rules of Arbitration. Mr Wales submitted that nothing suggests that Colman J was driven to this conclusion by the mandatory nature of section 12 of the 1950 Act. He went on to submit on the basis of this case that it demonstrated that the **Scott v Avery** clause I am considering comes forward from these earlier cases with an understanding that it was never a breach of that clause to make an application to the English court.
35. It seems to me that, on analysis, it is precisely because of the mandatory nature of section 12(6) of the 1950 Act that Colman J reached the conclusion he did. He referred to the sub-section twice in this passage and the reference to “automatic

incorporation” in the first paragraph has echoes of Donaldson J’s reference in **Mantovani v Carapelli** to orders under section 12(6) being “an integral part of English arbitration”, in other words this paragraph of Colman J’s judgment, like the judgments in **Mantovani v Carapelli** is saying that it is the mandatory effect of the statutory provision that permits a party to apply for a Mareva injunction, rather than the language of the clause.

36. It is true that, in the second paragraph, Colman J goes on to say that, on the proper construction of the FOSFA arbitration clause, the parties have agreed to the applicability of the supervisory and ancillary jurisdiction of the English Courts including section 12(6). I am puzzled by this as I do not see how the language of the **Scott v Avery** clause allows for a construction which distinguishes between foreign ancillary proceedings (which it prohibits) and English ancillary proceedings (which it permits). This was the point which troubled the Court of Appeal in **Toepfer v Cargill** [1998] 1 Lloyd’s Rep 375, which I will consider below. As a matter of language it seems to me that, for the reasons I gave in paragraph 12 above, the words in the second paragraph of the clause “any action or other legal proceedings against the other of them in respect of any such dispute” exclude all proceedings, whether substantive or procedural.
37. Equally I do not see how, as a matter of construction, the fact that the clause provided for the arbitration to be subject to the FOSFA Rules which referred (at that time) to the Arbitration Acts 1950 to 1979, can have made any difference to the construction of the language of the clause, if that is what Colman J is saying. The FOSFA arbitration clause was an “arbitration agreement” within the meaning of section 32 of the 1950 Act (“a written agreement to submit present or future differences to arbitration”) so that any arbitration in London under that clause would have been subject to Part I of the 1950 Act (which included section 12) in any event, irrespective of whether there was any express reference in the clause or in the FOSFA Arbitration Rules to the Arbitration Acts.
38. Thus, the problem with **Comdel v Siporex**, as I see it, is that the conclusion the learned judge reached cannot be justified by the language of the clause. The conclusion can, however, be justified on the basis that the reference to “automatic incorporation” of the supervisory jurisdiction of the English courts is to the mandatory effect of section 12(6) of the 1950 Act, permitting an application to the English courts for a Mareva injunction. I also agree with Mr Gaisman that, whatever the correct analysis is of Colman J’s reasoning in **Comdel v Siporex**, nothing in that judgment is dealing with what the position would be if section 12(6) had been in permissive terms allowing the parties to contract out of the court’s supervisory powers, for the same reason as I gave in paragraph 27 above in relation to **Mantovani v Carapelli**.
39. The next decision in relation to this form of **Scott v Avery** clause was that of Colman J again in **Toepfer International v Societe Cargill France** [1997] 2 Lloyd’s Rep 98. That case concerned three contracts of sale made in February 1994 on GAFTA terms, including the **Scott v Avery** arbitration clause (clause 32). A dispute arose and in flagrant breach of the arbitration clause the buyers commenced proceedings on the merits before the French courts. The sellers commenced arbitration and when the buyers refused to discontinue the French proceedings, the sellers commenced proceedings in the Commercial Court in London seeking, inter alia, an anti-suit injunction to restrain the buyers from continuing in France. The application was heard

and decided by Colman J in December 1996, just before the Arbitration Act 1996 came into force on 31 January 1997, although since the contracts containing the arbitration clauses were made in 1994, the 1950 Act would have applied to them in any event.

40. One of the arguments raised by the buyers in opposition to the application was that the Scott v Avery clause precluded the sellers from bringing any proceedings until they had obtained an arbitration award. As Phillips LJ said in the Court of Appeal: “This was a submission not lacking effrontery, having regard to their own conduct in bringing proceedings in France. Mr Justice Colman gave it short shrift.”

41. Colman J held (at 107 lhc):

“This submission is, in my view, quite unsustainable. The disputes to which clause 32 applies are, on the proper construction of that clause, clearly substantive disputes and not disputes as to compliance with the very clause itself. The obvious purpose and meaning of the clause is that neither party can have resort to any action or legal proceedings in respect of substantive disputes unless and until the disputes have been referred to arbitration and an award obtained. A dispute as to whether an anti-suit injunction should be granted in order to cause one party to comply with the clause cannot have been intended by the parties to have been covered by the words “any dispute arising out of or under this contract”. The arbitrators could not grant such an injunction.

An award is therefore not a condition precedent to the claim for an injunction nor for the claim for declarations. Those declarations sought merely express the factual bases which must be established in order to obtain the injunctions. The determination of the existence of those facts for the purpose of obtaining the injunctions would not, if in issue, fall within clause 32. The fact that the plaintiffs claim declarations as relief ancillary to the injunctions does not take (sic) issues as to those facts within clause 32.”

42. The GAFTA terms incorporated in the contracts of sale in that case also included at clause 31 the so-called Domicile provision in these terms:

31. DOMICILE - Buyers and Sellers agree that for the purpose of proceedings either legal or by arbitration this contract shall be deemed to have been made in England and to be performed there any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding and the Court of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to

the law of England, whatever the domicile, residence or place of business of the parties to this contract may be or become.

43. In dealing with one of the buyers' other arguments about the impact of the French Courts being "first seized" within the meaning of Article 21 of the Brussels Convention, Colman J said this about the effect of that provision:

"The effect of that clause, read together with clause 32, is that the English courts are to have exclusive jurisdiction in all matters except those falling within the ambit of the arbitration agreement and relating to enforcement of awards. That would include applications for injunctive relief to enforce the arbitration agreement."

44. The buyers challenged the learned judge's conclusions in relation to both clauses before the Court of Appeal. The appeal was heard by what can only be described as an extremely powerful Court (Staughton, Phillips and Robert Walker LJJ), the judgment of the Court being given by Phillips LJ. In relation to the **Scott v Avery** clause, counsel for the buyers submitted that the decision of the Court of Appeal in **Mantovani v Carapelli** demonstrated that, in the passage I have quoted in paragraph 40 above, Colman J had been in error in confining the application of clause 32 to substantive disputes.

45. In considering that submission, Phillips LJ set out first the passage in the judgment of Lawton LJ which I have cited above where he said ([1980] 1 Lloyd's Rep 375 at 381):

"For my part, I would construe the words as meaning that any form of application for ancillary relief, and in particular that sought in Italy, was within the arbitration clause"

46. Phillips LJ then said: "He [Lawton LJ] went on to observe, however" and quoted the later passage of Lawton LJ's judgment where he had said:

"In the ordinary way, those who try to obtain ancillary relief through the Courts will do so in England, and if they do so in England then no question of damage can arise because under the terms of most arbitration clauses, and certainly under the terms of clauses providing for arbitration within the jurisdiction of the Supreme Court of Judicature, the Arbitration Act, 1950, applies. In those circumstances, what the parties do if they seek ancillary relief within the jurisdiction of this Court is something which the arbitration clause and the Arbitration Act permits. In other cases it may be convenient for the parties, and probably would be, to restrain what was being done in foreign Courts by means of an injunction."

47. Phillips LJ continued:

"We have not found very satisfactory an approach which, as a matter of implication, applies a Scott v. Avery clause to ancillary proceedings outside England but not to ancillary

proceedings within the English court. Be that as it may, we are satisfied that, as a matter of construction, a Scott v. Avery clause cannot apply to injunctive proceedings brought for the purpose of enforcing the clause itself. Insofar as an issue arises, it is likely to be as to whether or not the substantive dispute falls within the jurisdiction of the arbitrators, which is not a suitable issue for determination by the arbitrators themselves. More significantly, an injunction does not fall within the relief that arbitrators are in a position to provide. For these reasons, which are narrower than those of the Judge, we hold that the Scott v. Avery clause in Clause 32 did not preclude Colman J. from entertaining the claim for relief that was before him.”

48. In relation to the Domicile or exclusive jurisdiction clause, Phillips LJ set out the passage from Colman J’s judgment which I have quoted above. He continued:

“Mr. Tselentis challenged this conclusion. He submitted that Clause 31 provided alternative jurisdictional regimes, applicable to all disputes covered by that clause. We agree. Just as we would, if permitted, construe Clause 32 as relating to disputes of substance, rather than in relation to ancillary relief, so also we are of the view that Clause 31 applies to disputes of substance. We do not consider that Clause 31 must be construed as tailored to fit with Clause 32. If the draftsman had wished to apportion jurisdiction between the Court and arbitrators we do not believe that he would have done so in this way. We consider that Clause 31 is designed to apply where the contract provides for arbitration and also where it does not. Where, as here, the Contract includes Clause 32, the alternative provision in Clause 31 for exclusive jurisdiction of the English Court does not take effect. Thus we differ from the conclusion of Colman J. that proceedings to enforce the Arbitration clause were, by Clause 31, agreed to be subject to the exclusive jurisdiction of the English Court. The present proceedings are not subject to an agreed exclusive English jurisdiction.”

49. Phillips LJ went on to summarise the consequence of their findings on clauses 31 and 32 in these terms:

“Our finding in relation to the Scott v. Avery clause rejects the argument that the English Court is precluded, by the terms of the contracts, from entertaining the present proceedings. Our interpretation of Clause 31 (the exclusive jurisdiction clause) has the result that Article 17 is of no benefit to Toepfer.”

50. In fact, the case was referred by the Court of Appeal to the European Court, although not on a point which matters for present purposes. Before me, both counsel sought to rely upon the decision of the Court of Appeal as supporting his client’s case. Mr Gaisman submitted first that, at first instance Colman J had made the same mistake as he had made in Comdel v Siporex and that this had been corrected in the Court of Appeal in Toepfer v Cargill. Certainly it is correct that in his judgment in Toepfer v

**Cargill**, Colman J seems to have decided that the **Scott v Avery** clause only precluded resort to the courts in respect of substantive disputes, which expressed that widely was not open to him given the decision of the Court of Appeal in **Mantovani v Carapelli**. As Phillips LJ said, their reasons for reaching the same conclusion were more narrowly expressed than those of Colman J. However, I agree with Mr Wales that Colman J did not make the same “mistake” in **Comdel v Siporex** as alleged by Mr Gaisman. His reasoning in that case was different and he does not suggest that the **Scott v Avery** clause only precluded substantive proceedings.

51. However, I agree with Mr Gaisman that, in their treatment of Lawton LJ’s judgment in **Mantovani v Carapelli**, particularly the use of the word “however” between the two citations from that judgment and the sentence “We have not found very satisfactory an approach which, as a matter of implication, applies a **Scott v Avery** clause to ancillary proceedings outside England but not to ancillary proceedings within the English court”, the Court of Appeal in **Toepfer v Cargill** were making it clear that they did not consider that the distinction between ancillary proceedings abroad which are prohibited and ancillary proceedings in England which are permitted could be justified as a matter of construction.
52. Having said that, I accept that, as Mr Wales submitted, the later passage in the judgment where, albeit in the context of dealing with clause 31, Phillips LJ says: “Just as we would, if permitted, construe Clause 32 as relating to disputes of substance, rather than in relation to ancillary relief, so also we are of the view that Clause 31 applies to disputes of substance” makes it clear that, untrammelled by the authority of **Mantovani v Carapelli**, the Court of Appeal in **Toepfer v Cargill** would have resolved what they regarded as an unsatisfactory approach in the earlier case by concluding that the **Scott v Avery** clause only precluded proceedings which went to the substance not ancillary or supportive proceedings.
53. In that context, Mr Wales posed the rhetorical question in argument, which is the anomaly, prohibiting foreign ancillary relief or permitting English ancillary proceedings? He submitted that, because it was clear that the preference of the Court of Appeal in **Toepfer v Cargill** would have been to do away with the ancillary prohibition altogether, that decision was not a justification for me to resolve the anomaly by extending the prohibition to an application for a freezing injunction pursuant to section 44 of the Arbitration Act 1996.
54. It seems to me that there are two answers to that submission. One was the answer which Mr Gaisman gave in reply submissions that, having said that the distinction made in **Mantovani v Carapelli** between foreign ancillary proceedings and English ancillary proceedings “as a matter of implication” was unsatisfactory, the Court of Appeal in **Toepfer v Cargill** did not go on to say that it was better than nothing. The reference to a matter of implication seems to me only explicable as a criticism of the shift between what Lawton LJ had said initially, that the construction of the clause was such as to preclude any form of application for ancillary relief, and what he subsequently said (the quotation from which Phillips LJ prefaces with the words: “He went on to observe, however”) about the arbitration clause permitting an application for ancillary relief in England. In other words, what the Court of Appeal found unsatisfactory in **Toepfer v Cargill** was the suggestion that the distinction between the position abroad and the position in England could be justified as a matter of construction of the **Scott v Avery** clause.

55. True it is that the later passage in the judgment of the Court of Appeal **Toepfer v Cargill** indicates pretty clearly that, untrammelled by any earlier authority, they would have wanted to decide that as a matter of construction that the **Scott v Avery** clause only precluded proceedings as to the substance of the dispute, as opposed to ancillary or supportive proceedings. However, as they recognised, in the light of previous Court of Appeal authority, that construction of commodity trade **Scott v Avery** clauses all in essentially identical terms, was not open to them. This is a point which emphasises that, as Mr Wales accepted, the argument that the clause did not apply to ancillary, supportive or procedural applications at all and was limited to substantive disputes, was not open to his clients other than in the Supreme Court.
56. Nonetheless, I agree with Mr Gaisman that there is nothing in the Court of Appeal judgment to suggest that merely because their hands were tied by earlier authority preventing them from holding that the **Scott v Avery** clause does not preclude ancillary or supportive proceedings, the unsatisfactory approach to construction they refer to could be countenanced in some way. That must follow from their concern about the distinction between English and foreign proceedings which, as I have said, cannot be justified as a matter of the language of the clause.
57. The second answer to Mr Wales' submission is the one to which I have referred in considering the other earlier authorities, namely that nothing in the decision of the Court of Appeal in **Toepfer v Cargill** deals directly with the specific question I have to decide, which is the correct construction of the **Scott v Avery** clause, given that the mandatory regime of section 12(6) of the 1950 Act no longer applies and the powers of the court under section 44 of the 1996 Act are qualified by the possibility that the parties have "otherwise agreed" to exclude those powers. Although the decision of the Court of Appeal was in November 1997, when the 1996 Act had come into force, the underlying arbitration, as I have said, was commenced in 1994 and governed by the regime before the 1996 Act. Nothing in the decision of the Court of Appeal touches upon how the position in relation to the issues they had to decide might be different under the 1996 Act.
58. The last decision in this line to have considered **Mantovani v Carapelli** in the context of the issues which arise in the present case is the decision of Rix J in **Re Q's Estate** [1999] 1 Lloyd's Rep 931, the only case where the 1996 Act applied in relation to the arbitration. In that case, a dispute under a retainer of a firm of solicitors was referred to arbitration. The arbitration clause was not a **Scott v Avery** clause, in other words it did not contain wording equivalent to the second paragraph of clause 29 in the present case, but only wording equivalent to the first paragraph, what might be described as a standard arbitration clause. The solicitors had obtained a Mareva injunction against their client, on whose behalf Mr Beazley advanced the somewhat ambitious argument that the arbitration clause amounted to "agreement otherwise" within section 44 of the 1996 Act so that the power of the court to grant such an injunction had been excluded. He relied upon **Mantovani v Carapelli**, contending that it had a "double ratio": not only did ancillary proceedings fall within the phrase "other legal proceedings" in clause 26(b) but such proceedings were themselves "in respect of any such dispute" within clause 26(b) and thus in respect of "Any dispute arising out of or under this contract" within clause 26(a). Accordingly he submitted that **Mantovani v Carapelli** was authority for the proposition that the words in the arbitration clause in **Re Q's Estate** "any dispute deriving [from] or in connection

with” the retainer embraced a dispute as to the granting of a Mareva injunction and precluded resort even to the English court for such relief.

59. In response to that argument, Mr Nicholas Hamblen QC on behalf of the solicitors submitted that the reference to “any dispute” in a standard arbitration clause of this kind is to be construed as relating only to disputes as to the merits and that if it were otherwise, every arbitration clause would have to be construed as excluding the court’s powers in relation to ancillary matters. **Mantovani v Carapelli** was to be understood as limited to the particular type of **Scott v Avery** clause under consideration there, as opposed to a standard arbitration clause.
60. Rix J rejected Mr Beazley’s submission as a non sequitur which would lead to the surprising results which Mr Hamblen had alluded to. He examined in detail the judgments at first instance and in the Court of Appeal in **Mantovani v Carapelli**, holding that there was nothing in **Mantovani v Carapelli** to suggest that the courts would have reached the same conclusion if clause 26(a) in that case [i.e the standard arbitration clause] had stood alone without the **Scott v Avery** provision in clause 26(b).
61. In view of the arguments in the present case, it is necessary to look at Rix J’s reasoning on that point in a little more detail:

“In my judgment, however, there is nothing in **Mantovani v Carapelli** to require me to reach the view that the result in that case would have been the same even if cl. 26(a) had stood by itself. Granted that the question had also to be asked and answered, whether the obtaining of ancillary relief was “in respect of any such dispute” [ the wording of cl 26(b)] such as was covered in cl. 26(a). Granted also that Lord Justice Lawton, in answering that question, placed stress (at p 381) on the width of the phrase “Any dispute arising out of or under this contract”. Nevertheless. I do not think that the question lends itself to much doubt, and certainly neither Mr Justice Donaldson nor Lord Justice Megaw saw any difficulty in it. It is, however, another and primary question whether merely ancillary proceedings, which do not put the substantive merits of the parties’ dispute in issue, are within the arbitration clause. That question, it seems to me, was determined on the language of cl. 26(b) and in particular on the extended phrase “any action or other legal proceedings”. Mr Justice Donaldson, in dealing with Mr Hallgarten’s first submission, fastened on the words “legal proceedings” and held that “proceedings to obtain security for the claim are proceedings in respect of the dispute even if they are designed not to determine it”. Lord Justice Lawton expressly stated that “The words ‘other legal proceedings’ are wide enough to cover proceedings in Italy for the form of order which in England would be called a Mareva injunction.” Lord Justice Browne and Lord Justice Megaw both agreed with Mr Justice Donaldson. Lord Justice Browne agreed with Lord Justice Lawton’s reasons and said that cl. 26 “does prohibit the taking of proceedings in Italy for security”, and

Lord Justice Megaw quoted Mr Justice Donaldson verbatim. In my judgment the ratio of **Mantovani v Carapelli** is not that ancillary proceedings in the Courts are always a breach of an arbitration clause, but that they were in that case by reason of the wide language of cl. 26(b).”

62. In my judgment, there is considerable force in Mr Gaisman’s submission that if Mr Wales were right that the ratio of **Mantovani v Carapelli** is that a **Scott v Avery** clause in the present form only precludes foreign ancillary proceedings and, as a matter of construction, can never apply to English ancillary proceedings (even now the Arbitration Act 1996 is in force), then none of this detailed analysis would have been necessary. Rix J could simply have held that, since its ratio was limited to foreign ancillary proceedings where a **Scott v Avery** clause was present, it could be easily distinguished in the case before him, a fortiori given that the arbitration clause he was considering did not have a **Scott v Avery** element. If that easy solution to the problem had been available, it is surprising that neither Rix J nor Mr Hamblen QC spotted it. I agree with Mr Gaisman that Rix J seems to have had in mind in the passage I have quoted and particularly in the last sentence that, as a matter of construction, a **Scott v Avery** clause such as the one in **Mantovani v Carapelli** does exclude ancillary proceedings. This also seems clear from a later passage in his judgment, to which I refer below.

63. Rix J goes on to consider the decision in **Toepfer v Cargill**. He does not refer to **Comdel v Siporex** in his judgment, so that it is unclear whether he was referred to it in argument. Having set out passage from the judgment of the Court of Appeal in **Toepfer v Cargill** which I quoted in paragraph 46 above and the later passage where they said “we would, if permitted, construe Clause 32 as relating to disputes of substance, rather than in relation to ancillary relief”, Rix J said:

“That indicates that the Court in **Toepfer v Cargill** had doubts about the correctness of the decision in **Mantovani v Carapelli** while recognising that it was bound by it: but it does not affect the ratio of the latter case, and it gives no impetus towards broadening its rationale wider than is necessary.”

64. He went on to consider cases decided both before and after **Mantovani v Carapelli** which had considered in the context of arbitration clauses (without a **Scott v Avery** element) and exclusive jurisdiction clauses the distinction between proceedings on the merits which were a breach of such a clause and ancillary proceedings solely for security, which were not. Rix J then concluded:

“**Mantovani v Carapelli** was not cited in either **Petromin v Secnav** or **Ultisol v Bouygues (No 1)** but those cases, as well as **The Rena K** [1978] 1 Lloyd’s Rep 545, illustrate the good sense, in my judgment, of confining the decision in **Mantovani v. Carapelli** to its true ratio, which depends on the width of language found in its Scott v. Avery clause and its reference to “other legal proceedings”. It would follow that in the absence of similar language in the arbitration clause in this case, this Court is not deprived of jurisdiction to grant a Mareva

injunction in support of arbitration between the parties to these proceedings.”

65. Mr Gaisman relies upon that passage and particularly the last sentence, as Rix J indicating that the use of **Scott v Avery** language in an arbitration clause will deprive the English court of jurisdiction to grant a freezing injunction under section 44 of the Arbitration Act 1996. Mr Wales recognises that the passage presents problems for his argument, but submits that Rix J cannot have been intending to broaden the scope of **Mantovani v Carapelli** having just concluded that it should be confined to its true ratio.
66. However, as I see it, this submission is essentially circular, because it assumes that Rix J had decided at an earlier point in his judgment that the true ratio of **Mantovani v Carapelli** was that, as a matter of construction, the **Scott v Avery** clause found in GAFTA and FOSFA contracts only precluded proceedings anywhere as to the substance of the dispute and **foreign** ancillary proceedings. For the reasons I gave above, if that were right, none of the analysis of **Mantovani v Carapelli** in which Rix J engaged earlier in his judgment would have been necessary. He could simply have distinguished that case on the basis that the case he was considering was not concerned with foreign ancillary proceedings, but with ancillary proceedings in England.
67. Accordingly, I agree with Mr Gaisman that in that passage, Rix J was saying that if the arbitration clause he was considering had included the **Scott v Avery** element present in GAFTA or FOSFA forms, the court would have been deprived of jurisdiction under section 44 of the Arbitration Act 1996. It seems to me that although what he said was obiter, as I indicated earlier, I should follow it unless, having considered the various arguments advanced by B in the present case, I consider that there was some flaw in his analysis so that his conclusion was wrong.
68. As previously indicated, the principal thrust of Mr Wales’ submissions was that, at least prior to **Re Q’s Estate**, there was a settled meaning and construction placed by the English courts upon the **Scott v Avery** clause used in the GAFTA and FOSFA forms, that the clause did not preclude ancillary proceedings in England and the introductory words of section 44 of the 1996 Act do not extinguish the relevance of that view.
69. In my judgment that contention falls down for two main reasons. First, as I have indicated, I do not consider that on a close analysis **Mantovani v Carapelli** and the cases under the 1950 Act which followed it were saying that, as a consequence of the language of the clause, applications for Mareva injunctions in England were permitted where ancillary proceedings for security abroad were not. Rather those cases recognised the width of the wording of the clause, but considered that the mandatory terms of section 12(6) of the 1950 Act were such that the power of the court to grant a Mareva injunction in an appropriate case could not be excluded by the agreement of the parties.
70. Second, even if my analysis of the cases before the decision of the Court of Appeal in **Toepfer v Cargill** were wrong and there was, as Mr Wales put it, a “long-standing judicial view” that, as a matter of construction, the GAFTA/FOSFA **Scott v Avery** clause permitted ancillary proceedings in England, it is quite clear that the Court of

Appeal in that case were unhappy with that view. They clearly thought that the distinction between ancillary proceedings in England and ancillary proceedings abroad made in Mantovani v Carapelli could not be justified as a matter of construction of the clause. This is an unsafe base on which to found a submission that there was a settled judicial view that ancillary proceedings in England could be justified as a matter of construction of the clause.

71. At this point of his argument, Mr Wales posed another rhetorical question. How could it be that a provision which had a particular meaning on 30 January 1997, the last day the 1950 Act was in force came to have a radically different meaning, as it would on S's case, the next day when the Arbitration Act 1996 came into force? It seems to me that there are two related answers to that question.
72. First, that as I have already held, the correct analysis of the law as to ancillary proceedings in England when the 1950 Act was in force was that, despite the wide wording of the Scott v Avery clause, the jurisdiction of the English courts under section 12(6) of the 1950 Act could not be ousted by the agreement of the parties. Second, once the Arbitration Act 1996 had come into force with its radically different concept of party autonomy and its specific provision in the opening words of section 44 that the parties could agree to exclude the supervisory powers of the court, the whole statutory landscape had changed. Given that the mandatory provision in section 12(6) of the 1950 Act has been repealed and replaced with a permissive section, it seems to me that there is no obstacle, either as a matter of law or as a matter of construction, to giving the wide words of the Scott v Avery clause their full meaning and effect.
73. At the time of the without notice application for a freezing injunction before Gloster J, Mr Wales also seems to have contended that the FOSFA Scott v Avery clause had been understood in the market for years as permitting access to the English courts to obtain injunctive relief. This submission clearly influenced Gloster J, who is recorded, in the note of the without notice hearing on 8 February 2011, as having said that:

“she saw the force of Counsel’s own submission and that it would be surprising if such words which had been understood in the market as not doing so for many years were able to exclude the court’s supervisory jurisdiction”.
74. It was evidently to challenge any suggestion that there was a settled understanding in the market, that S produced a short statement from Mr Anthony Scott, a well-known commodity arbitrator with many years experience in the market, who said that the understanding of those who use the FOSFA and GAFTA forms is that the Scott v Avery clause is effective to exclude the powers of the court under section 44. B challenged the relevance and admissibility of that evidence, but produced a statement from Mr Lloyd-Lewis of its solicitors, Barlow, Lyde & Gilbert, setting out his experience and that of his colleagues that, on a number of occasions since the 1996 Act came into force, the English courts have granted freezing injunctions in cases where the contract was subject to the FOSFA Scott v Avery clause, without there having been any jurisdictional challenge of the kind now being made.
75. I had considerable doubts as to the relevance or admissibility of any of this evidence and Mr Gaisman certainly did not place any reliance on Mr Scott’s opinion in support

of his submissions on construction. He limited himself to submitting that to the extent that Gloster J had thought that there was a settled understanding in the market that the **Scott v Avery** clause permitted applications to the English courts for ancillary relief, that was mistaken and that, taking account of the differing views of Mr Scott and Mr Lloyd-Lewis, at the lowest there are differing views within the market on the question. I agree with that submission.

76. Mr Wales' further line of argument was that before the powers of the court under section 44 could be excluded by "agreement otherwise", the parties must have made an agreement which is clearly directed towards the powers of the English court and which specifically excludes those powers. He relied in support of that proposition on the decision of Dyson J (as he then was) in **Macob Civil Engineering v Morrison Construction** [1999] BLR 93. That concerned section 42 of the Arbitration Act 1996 which has the same opening words as section 44 and provides that "Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by an adjudicator".

77. In that case, one party argued that the parties had otherwise agreed by agreeing to refer to arbitration disputes arising out of the decision of an adjudicator. Dyson J rejected that argument in these terms:

"In my view the arbitration clause is not an agreement of the kind envisaged by s 42(1). What that subsection contemplates is an agreement expressly directed to the s 42 power. Ordinarily, this would be an agreement expressly excluding that power, although I accept that there may be other ways of achieving the same object. A general reference of disputes to arbitration is surely insufficient."

78. I agree with Mr Gaisman that that case simply does not support the proposition which Mr Wales advances. Indeed the words: "although I accept that there may be other ways of achieving the same object" clearly acknowledge that it is not necessary for there to be an express exclusion of the court's powers under section 42 or 44. Nor, as I see it can there be any justification for placing a gloss on the language of the statute, as it seems to me Mr Wales' argument does, by requiring some sort of "very clear express" agreement to oust the powers of the court. It seems to me that would be to carry over into section 44 of the 1996 Act some sort of presumption deriving from section 12(6) of the 1950 Act that the court's powers should not be ousted save in a very clear case.

79. As I see it, all that the words "unless otherwise agreed by the parties" is a perfectly standard process of construing the contract to see whether, on their true construction, they amount to an agreement to exclude the powers the court would otherwise have. A standard form of arbitration clause without a **Scott v Avery** element is not sufficient to exclude the powers under section 44 (**Re Q's Estate**) any more than it would be under section 42 (**Macob**), but there is no requirement for a special form of words. Rix J clearly thought that the GAFTA/FOSFA arbitration clause with the **Scott v Avery** element amounted to an agreement to exclude the court's jurisdiction to exercise ancillary or supervisory powers under section 44 and I have formed the same view.

80. Mr Wales relied upon the fact that the opening words of the FOSFA Arbitration Rules provide (similarly to the Rules in force when Comdel v Siporex was decided but with the statutory reference changed):

“Any dispute arising out of a contract subject to these rules, including any questions of law arising there with, shall be referred to arbitration in London or elsewhere if so agreed which shall be carried out in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof for the time being in force.”

81. However, to the extent that Mr Wales seeks to argue that, by parity of reasoning with the decision of Colman J in Comdel v Siporex, I should conclude that the submission to arbitration in these terms is inconsistent with an intention to agree to exclude the powers of the court under section 44, it seems to me that there are a number of problems with that argument. First, for the same reasons that I gave above when considering Comdel v Siporex and why I could not accept Colman J’s reasoning, it does not seem to me that this provision in the FOSFA Arbitration Rules justifies giving the Scott v Avery clause some narrower meaning and effect than its wide words bear. Irrespective of this provision, a FOSFA arbitration in London would be subject to the Arbitration Act 1996 by virtue of section 2 of the Act.

82. Second, the Arbitration Act 1996 itself distinguishes between mandatory provisions and non-mandatory provisions as set out in paragraph 8 above. Of course section 44 is a non-mandatory provision, so that the provision in the FOSFA Rules that any arbitration will be in accordance with the 1996 Act is saying nothing which could begin to be construed as rendering non-mandatory provisions mandatory. It has no impact on whether, in their arbitration clause or elsewhere, the parties have “made their own arrangements.”

83. Mr Wales also advanced submissions to the effect that it would be surprising if the parties to international commodity arbitrations under FOSFA Rules, which can be for very substantial sums of money, were intending to exclude the powers of the courts under section 44, given that, apart from sampling, none of the powers in that section are given to the arbitrators by the FOSFA Rules. Accordingly, he submitted that it would be undesirable for the court to reach the conclusion that clause 29 in the present case had the effect of excluding those powers, although he stopped short of contending that such a construction would be so unreasonable that the court ought to strain against it.

84. Mr Gaisman sought to meet head on any suggestion that the undesirability of excluding the court’s ancillary powers meant that the parties must necessarily have intended those powers to apply. He submitted that there was perfect sense in the parties having agreed that there should be exclusive recourse to arbitration until that process had concluded. FOSFA arbitration is intended to be informal, to be conducted with expedition and to keep the involvement of lawyers to a minimum. Neither party would know at the time of entering the contract which party the Scott v Avery clause excluding the powers of the court would favour.

85. It seems to me that there is considerable force in that submission. I also agree with Mr Gaisman that Mr Wales’ submission essentially begs the question, in the sense that it

really proceeds on the assumption that the powers of the court are a very good thing out of which the parties would not wish to contract. However, party autonomy and section 44 itself make it clear that the parties can contract out of the court having those powers and it seems to me that, in those circumstances, there can be no presumption that the powers are a very good thing.

86. The other submission which Mr Gaisman made was that, unless the court were to do violence to the language of the clause, the bargain which the parties had made in clause 29 was one which excluded the powers of the court under section 44. As Mr Gaisman submitted, there is no evidential basis for saying that the parties must have intended to preserve security measures and the difference of views between what Mr Scott said and what Mr Lloyd-Lewis recounts essentially demonstrate that.
87. Mr Wales also submitted that to conclude that the powers of the court to support an arbitration by granting a freezing injunction were excluded by clause 29 would be to frustrate the parties' bargain because it would mean that continuing with the arbitration would be pointless for B as it would have nothing against which it could enforce any award without the freezing injunction in place. I agree with Mr Gaisman that this submission overlooks that the purpose of the supervisory powers in section 44 is to regulate the dispute the subject of arbitration, not to assist the successful party in execution of any award. The exclusion of those powers by agreement, expressly contemplated by the opening words of the section, in no sense frustrates the purpose of the arbitration clause.
88. Finally, the fact that a conclusion that the FOSFA/GAFTA **Scott v Avery** clause does amount to an agreement to exclude the court's powers under section 44 may be surprising to some of those who trade in the commodity markets, is no reason not to give the words of the clause their clear meaning and effect. Any concerns in the market or of individual trading parties can be addressed by amendment of the clause, if that is thought desirable.
89. As I said earlier in the judgment, whilst limitation of the clause to the exclusion of substantive proceedings and not ancillary proceedings has been regarded by some (for example, the Court of Appeal in **Toepfer v Cargill**) as commercially desirable, I do not myself think that construction is justified by the wording of the clause. In my judgment, on its true construction clause 29 excluded any application for a freezing injunction such as was made in the present case. Furthermore, in any event, any such limitation of the clause is certainly not open to a judge at first instance and probably not open short of the Supreme Court.
90. For all these reasons, S's application succeeds and the freezing injunction must be discharged.