Profilati Italia S.R.L. v. Painewebber International Futures Ltd. [2001] APP.L.R. 01/23

JUDGMENT : THE HONOURABLE MR. JUSTICE MOORE-BICK Commercial Court. 23rd January 2001

Background

1. This matter comes before the court by way of a challenge to an arbitration award under section 68 of the Arbitration Act 1996. The applicant, Profilati Italia SRL ("Profilati"), is an Italian company which carries on business as a manufacturer of aluminium extrusions. At the time with which this application is concerned it was one of a group of companies known as the Finleader Group which included, in particular, Alnor Alluminio Nord S.p.A., Tecnometal S.p.A. and Estrusione S.p.A. At all material times prior to mid-September 1993 the group was effectively run by Dr. Leonardo Rossetto who was the sole director of Profilati and President and a director of Alnor. The respondents (who, for the purposes of this application, can be regarded as one and to whom I shall refer simply as "PaineWebber") are brokers and traders in non–ferrous metals on the London Metal Exchange. Mr. Simon Underhill was a director of PaineWebber and had primary responsibility for dealings between PaineWebber and Profilati at the relevant time.

2. At some time in 1992 (the precise date does not matter for the purposes of this application) Alnor, acting through PaineWebber as its broker, entered into a number of options and futures contracts on the London Metal Exchange in order to provide for its requirements for aluminium during the coming three years. These included call options for 200 lots (5,000 tons) each month on prompt dates from July 1993 to December 1995. In December 1992 by agreement between Dr. Rossetto and Mr. Underhill these options were transferred from Alnor to Profilati by two back-to-back contracts under which they were sold by Alnor to PaineWebber and by PaineWebber to Profilati. These sales were carried out at a price which is accepted to have been substantially in excess of the market value of the options in question. Their effect was to transfer assets from Profilati to Alnor, but it is common ground that PaineWebber did not profit by them.

3. In June 1993 the declaration date for the first of the call options was approaching. At that time all the options with declaration dates in 1993 were "out of the money" and thus worthless. In these circumstances an agreement was reached between Dr. Rossetto and Mr. Underhill that the 1993 options would be "rolled over" to December 1995, by which time Dr. Rossetto hoped that the market price of aluminium would have recovered and the options would be profitable. The roll-over involved selling the options declarable in 1993 and buying fresh options for an equivalent quantity declarable with a prompt date in December 1995. The difference between the value of the 1993 options and the cost of the December 1995 options was US$ 435,000. It was agreed that this debt from Profilati to PaineWebber would be liquidated by 15th December 1993.

4. In order to effect the postponement of the debt which arose under the roll-over transaction the parties entered into a complex set of arrangements known as the "conversion transaction". This involved three elements: the sale by Profilati to PaineWebber for a premium of US$210.65 per ton of a call option on 83 lots of aluminium with a prompt date of 15th December 1993 and strike price of US$1,000 a ton; the sale of a put option by PaineWebber to Profilati for a premium of US$0.65 a ton on 83 lots with the same prompt date and strike price; and a futures contract under which Profilati bought 83 lots from PaineWebber on 15th December 1993 at a price of US$1,210 per ton. The effect of these contracts taken together was to produce an immediate credit in favour of Profilati of US$435,750 (thus extinguishing the debt of US$435,000 arising under the roll-over) and a debt in favour of PaineWebber of US$435,750 arising on 15th December 1993. The balancing put and call options meant that however the market moved in the intervening period the amount falling due on 15th December would be unaffected. In July 1993 some adjustments were made to these arrangements, but they are not material to the issues now before the court.

5. The roll-over transaction was evidenced by a letter from Profilati to PaineWebber dated 28th June 1993 signed by Dr. Rossetto and countersigned by Mr. Underhill. The letter does not deal with the details of the conversion transaction at all; it simply states

   "It is also understood:

   - within december 15th, 1993, we will transfer to you the amount of US$435,000 (fourhundredthirtyfivethousand)".

   The letter confirmed, however, that the business was conducted on PaineWebber's standard general conditions and the customary rules of the London Metal Exchange. It is common ground that these provided for the payment of margin calls in the usual way and gave PaineWebber the right to close out all open transactions on a client's account in the event of a failure to make margin payments when called upon to do so.

6. Alnor and other companies within the Finleader Group also traded on the London Metal Exchange through PaineWebber. Until mid-September 1993 the positions of Alnor and Profilati, as well as another entity simply identified as "L/H", were combined for the purposes of calculating margin calls. However, in the middle of September Dr. Rossetto was dismissed from his positions within the Finleader Group and as from 13th September PaineWebber began to produce separate margin call statements for Alnor and Profilati. One can see from the combined margin call statements that until about the middle of August 1993 Profilati's own net position remained positive because the value of its long call options was more than sufficient to outweigh the negative position under its only remaining futures contract which was one of the elements making up the conversion transaction. However, the market was in decline and its net position deteriorated throughout August and September. On 16th September PaineWebber sent a margin call statement to Profilati requiring payment of US$14,669. By 20th September the position had deteriorated further and a call was made for a margin payment of US$193,671. No payment was made. On 27th September PaineWebber made a call for US$246,558 and by 30th September the call had risen to US$276,072. By 6th October Profilati's net position had deteriorated to US$302,674. No margin payment had

been made in response to the earlier calls and PaineWebber therefore closed out all Profilati's positions on that date. The net amount owing to PaineWebber as a result was US$235,468.15. The margin call statements on which calls for payments had been based reflected Profilati's position under all its open contracts for futures and options, including those which made up the roll-over contracts and the conversion transaction. At the time the positions were closed out Profilati's long call options still had a positive value, but that was not sufficient to balance the negative position on the remaining futures contract. At the time Profilati made no complaint about the way in which PaineWebber had closed out its open positions.

The arbitration

7. A dispute subsequently arose between Profilati and PaineWebber which was eventually referred to arbitration under the Rules of the London Metal Exchange in March 1998. Profilati made a number of claims arising out of the transfer to it of the options originally taken by Alnor. Allegations were made of improper conduct on the part of Dr. Rossetto and of collusion between him and Mr. Underhill, but these were rejected by the tribunal and have no direct bearing on the issues which I have to decide. Profilati also sought to recover damages from PaineWebber for breach of contract in improperly closing out its open positions. It contended that PaineWebber had, in effect, agreed not to require security in the form of margin payments for the debt which would accrue due in December 1993 as a result of the roll-over transaction and that since the only other transactions in the account were the long call options which could never have a negative value, PaineWebber had no right to call for margin payments or to close out its positions for failing to make them. The market in aluminium did pick up during 1994 and 1995 so that Profilati's call options for those years would have gained considerably in value. Profilati therefore sought to recover what it had lost as a result of PaineWebber's action in selling the options and closing its account.

8. It is this latter aspect of the dispute which has given rise to the present application. At the hearing before the tribunal counsel for Profilati relied on the letter of 28th June 1993 as containing the terms upon which it based this part of its claim. Despite the fact that the letter itself referred to a meeting between Dr. Rossetto and Mr. Underhill on 23rd June, Profilati did not seek to go behind the letter by adducing evidence of what had passed between the two men in the course of their discussions. That may well be because Profilati was unable to call Dr. Rossetto to give evidence, but whatever may be the reason, it contended that the question was to be approached simply as a matter of the construction of the letter of 28th June. Mr. Underhill, on the other hand, did give evidence on behalf of PaineWebber and he denied that there had been any agreement of the kind suggested by Profilati.

9. In the course of his final speech counsel for PaineWebber made a number of submissions in relation to this part of the case. In particular, he submitted that in the context of trading of this kind it was very unlikely that PaineWebber would ever have agreed to extend unsecured credit to Profilati by excluding the conversion transaction from the usual arrangements for margin payments. Basing himself on the evidence of Mr. Underhill and the terms of the letter of 28th June 1993 he invited the tribunal to reject the suggestion that PaineWebber acted in breach of contract by closing out Profilati's open positions on 6th October.

10. The tribunal decided this issue in favour of PaineWebber. It dealt with the matter shortly, simply finding that

"The tribunal is satisfied that the margin calls by Paine Webber were correct. These were caused by the rolling forward of unpaid differences previously protected by in the money options due during 1994/1995.

As the value of the options declined so the protection eroded and PaineWebber credit department insisted on the withdrawal of the credit line. This crystallised the losses and made the margin calls necessary.

Had Profilati paid, rather than rolled forward its unpaid debts, no margin calls would have been necessary against them. Alternatively, had their margin calls been paid, no close out would have occurred."

The absence of any more detailed discussion probably reflects the fact that not a great deal of elaborate argument was directed to this particular question.

11. The award was published on 21st September 1999. On 11th April 2000 Profilati applied out of time to set aside the award or remit it to the arbitrators for their reconsideration under section 68 of the Arbitration Act 1996 on the grounds that part of it had been procured in a way which was contrary to public policy. The substance of its argument is that PaineWebber wrongly failed to disclose two material documents which would have supported Profilati's case in relation to the closing out of its positions and, having done so, allowed its counsel to make submissions to the tribunal which could not have been made in the same way or with the same force if those documents had been disclosed. To that extent, therefore, the award was improperly procured because the tribunal was effectively misled.

The documents

12. The documents which PaineWebber is said to have improperly withheld are an account summary dated 31st July 1993 relating to the account maintained with PaineWebber by Bluhara Inc., a company used by Dr. Rossetto as a vehicle for his personal trading, and the statement of claim served in July 1998 by Bluhara and another company operated by Dr. Rossetto, Essex Overseas S.A., in arbitration proceedings which they brought against PaineWebber in the United States under the auspices of the National Association of Securities Dealers. Of these the more important is the statement of claim in the N.A.S.D. arbitration. Dr. Rossetto had arranged for Essex and Bluhara to guarantee the obligations of Alnor to PaineWebber and in support of those guarantees to deposit the sums of about US$1.6 million and US$400,000 respectively with PaineWebber. The account summary shows that

on or about 29th July (the precise date is unclear) Bluhara deposited US$400,000 with PaineWebber "Re margin call". By the time it ceased trading Alnor had incurred a liability to PaineWebber in excess of the amounts deposited by Essex and Bluhara whose funds were therefore liable to be used by PaineWebber in partial satisfaction of that liability. The purpose of the N.A.S.D. arbitration was to establish that Essex and Bluhara were not liable under their guarantees, or, if they were, to recover an equivalent amount from PaineWebber by way of damages. The main thrust of their complaint was that PaineWebber had violated its duties to Essex and Bluhara as guarantors by closing out Profilati's positions in breach of contract or in a commercially unreasonable manner. Alnor and Profilati had guaranteed each other's trading liabilities so PaineWebber could make use of valuable positions in Profilati's account to offset Alnor's liabilities. Essex and Bluhara maintained that if PaineWebber had not wrongly closed out Profilati's positions, the value of its options would have exceeded Alnor's liabilities and rendered it unnecessary to call on their guarantees.

13. The statement of claim describes at length the history of the trading relationship between the Finleader companies and PaineWebber, including the roll-over of the 1993 options and the consequent creation of the debt of US$435,000. There then followed this paragraph: *"Critical to the June 1993 Agreement, Respondents specifically agreed that Profilati had until December 15, 1993 to pay Respondents the $435,000 additional debt to the Profilati account. This agreement by Respondents to permit Profilati to have until December 1993 to pay was an important element in the June 1993 Agreement due to the financial condition of Profilati and the poor condition of the world aluminium markets. In consideration of the June 1993 Agreement and the agreement by the Respondents to permit Profilati to defer payments until December 15, 1993, Mr. Rossetto agreed to arrange for $400,000 to be deposited as collateral into the account of Bluhara at PaineWebber ("the Bluhara Account"), and Mr. Rossetto caused Bluhara to guarantee the debts of Alnor."*

It is then alleged that the closing out of Profilati's open positions was a breach of the June 1993 Agreement because (as appears clearly from the first claim for relief) PaineWebber had agreed to allow Profilati until 15th December to pay the balance due on its account. Finally, in the sixth claim for relief Essex and Bluhara allege that in June 1993 PaineWebber represented that if Bluhara would provide collateral for Profilati's trading it would give Profilati until 15th December to pay the sum of US$435,000 and would not seek to liquidate the collateral.

14. On behalf of Profilati Mr. Geoffrey Vos Q.C. submitted that the wrongful withholding of the account summary and statement of claim had enabled PaineWebber's counsel to submit without risk of contradiction that PaineWebber would never have agreed to postpone the debt of US$435,000 without security of some kind and that it had no security for the debt other than its right to call for margin payments in the ordinary way. Had those two documents been disclosed, he submitted, not only could those submissions not have been made, but there was a strong probability that Mr. Underhill would have accepted in cross-examination that there had been an agreement of the kind alleged by Profilati and that the sum of US$400,000 had indeed been deposited specifically as security for the payment of the US$435,000. There is every likelihood, therefore, that Profilati's case on this point would have succeeded.

The law

15. Section 68 of the Arbitration Act 1996 (so far as is material to the present case) provides as follows:

"(1) A party to arbitral proceedings may . . . . . apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

. . . . . .

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

. . . . . .

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy."

16. In ***Deutsche Schachtbau und Tiefbohr-Gesellschaft m.b.H. v Shell International Petroleum Co. Ltd*** [1990] 1 A.C. 295, Sir John Donaldson M.R. commenting on public policy as a ground for refusing enforcement of an award under section 5(3) of the Arbitration Act 1975 said at page 316: *"Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. . . . . It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."*

17. It would be unwise in my view to attempt to define the circumstances in which an award might be set aside or remitted on public policy grounds, but in the light of that comment and of the language of subsection (2)(g) as a whole I think that where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in his favour. Moreover, I do not think that the court should be quick to interfere under this section. In those cases in which section 68 has so far been considered the court has emphasised that it is intended to operate only in extreme cases. Lord Goldsmith Q.C. on behalf of PaineWebber drew my attention to the now familiar passage in paragraph 280 of the Report of the Departmental Advisory Committee on Arbitration Law on what was then the Arbitration Bill where the Committee said in relation to clause (now section) 68

"Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has occurred simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 is really designed as a long stop only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

This passage has since been adopted and applied in a number of cases to which I was referred including ***Egmatra A.G. v Marco Trading Corporation*** [1999] 1 Lloyd's Rep. 862, ***Conder Structures v Kvaerner Construction Ltd*** [1999] ADRLJ 305, *Sanghi Polyesters Ltd v The International Investor (KCFC)* [2000] 1 Lloyd's Rep. 480 and *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co.* (Thomas J., unreported, 19th April 2000). None of these decisions concerned an application under section 68(2)(g), but each in its own way emphasises the fact that the expressions "*serious irregularity*" and "*substantial injustice*" are intended to be reserved for only the most serious cases.

18. Against this background Mr. Vos submitted that it is sufficient in a case such as the present to show (i) that the successful party in the arbitration wrongfully failed to disclose a document not otherwise available to his opponent which the court considers would probably have had a substantial effect or an important influence on the outcome of the proceedings *and* (ii) that the document in question was deliberately withheld in the knowledge that it ought to have been disclosed, *or* that the successful party persuaded the tribunal to make a material finding in respect of which the undisclosed document would probably have had a substantial effect or an important influence.

19. Where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favour the court may well consider that he has procured that award in a manner contrary to public policy. After all, such conduct is not far removed from fraud. The position is more difficult, however, where there has been a failure to disclose a document as a result of negligence or a simple error of judgment. Mr. Vos submitted that in such a case the award is also procured in a way contrary to public policy and that the vice lies not simply in failing to disclose the document but in the combination of failing to give disclosure and making use of the document's absence in order to advance the case – in other words, in taking advantage of one's own wrongdoing in order to obtain a favourable award.

20. Lord Goldsmith submitted that the test proposed by Mr. Vos was far too wide and I think there is much force in that objection. Since one can fairly assume that each party will have put forward his best case on the basis of the material before the tribunal, one can assume that the successful party will have made submissions which he could not have made with the same force, if he could have made them at all, had the relevant document been disclosed. In virtually every case, therefore, where there has been a failure to disclose an important document the wrongdoer will have made use of its absence to his own advantage. This would lead inexorably to the conclusion that the court can, and indeed should, remit or set aside the award in virtually every case where there has been a failure to disclose a document of this kind, despite the fact that the successful party has acted innocently.

21. I am unable to accept that section 68(2)(g) is directed to this kind of situation. That is partly because I do not think that proceeding with a reference following an innocent failure to disclose a document, even one of importance, can properly be described as acting contrary to public policy. If anything, the withholding of a document under these circumstances can more nearly be equated to what used in some cases to be described as 'procedural mishap' and its subsequent discovery to the discovery of fresh evidence. Under the Arbitration Act 1950 the court had a wide jurisdiction to set aside or remit an award and would sometimes do so, for example, where fresh evidence came to light or there had been some misunderstanding not amounting to misconduct. Under section 23(2) of that Act the court had an express power to set aside an award which had been "improperly procured".

22. The scheme embodied in section 68 of the Arbitration Act 1996 is quite different. An application to challenge the award may only be made on the grounds of serious irregularity which is itself carefully defined in subsection (2). The court has no general jurisdiction to interfere with the working of the arbitral process and some of the grounds on which the court would formerly have acted find no place in section 68. One such ground, which is particularly relevant to the present case, is the discovery of new evidence: the court no longer has the power to remit an award simply on the grounds that new evidence has come to light. I agree with Lord Goldsmith that to allow a challenge to the award to be made on the grounds of an innocent failure to give proper disclosure would be contrary both to the spirit and to the wording of the Act.

Disclosure

23. I turn next to consider whether there was a breach on the part of PaineWebber of its duty to give proper disclosure in this case, and if so whether that was deliberate or innocent. There has been a tendency in recent years to limit the scope of the duty of disclosure in civil litigation generally and it is no longer considered necessary or desirable to require a party to disclose documents which do not have a direct bearing on the issues in the case. The present arbitration was conducted under the rules of the London Metal Exchange. Accordingly, each party served with its pleadings copies of the documents on which it relied. Although the rules permit applications to be made to the tribunal for further disclosure, the parties dealt with the matter in correspondence. On 3rd December 1998 Profilati's solicitors, Theodore Goddard, wrote to PaineWebber's solicitors, Richards Butler, putting forward a number of requests for specific information and documentation by reference to identified paragraphs in the points of defence. These included a request for evidence of the matching transactions with the market which Theodore Goddard assumed PaineWebber had entered into to balance the conversion transaction. On 8th January Richards Butler agreed to provide the information requested as far as they were able

to, but said that PaineWebber did not have any documents relating to matching transactions because none had been entered into. On 13th January 1999 Theodore Goddard responded, noting the absence of any transactions with the market and asking for copies of

"all documents . . . . . recording or relating to the transactions in . . . . . June and July 1993 and the closing out of the positions in October 1993."

In the same letter Theodore Goddard rejected a request from Richards Butler for disclosure of "all documents which relate to the transactions which are in issue" as being "inappropriately wide-ranging" and "a fishing expedition designed to find out if our client has any further material which might be of assistance to your client's case". When the matter came before the tribunal for directions on 14th January 1999 counsel were able to agree a form of order under which PaineWebber were to give disclosure of "documents recording or relating to transactions in . . . . . June and July 1993 and the closing out of the positions in October 1993", the word "all" in Theodore Goddard's letter of 13th January having been deleted.

24. Mr. Vos submitted that the statement of claim in the N.A.S.D. arbitration was a document which "related to" the transactions in June 1993 and there was at one time a suggestion that those at Richards Butler who were responsible for dealing with disclosure on behalf of PaineWebber could not have been telling the truth when they said that they did not consider it to be relevant. However, for the purposes of this application affidavits have been sworn by all those who were concerned in any way with the preparation of the case on behalf of PaineWebber confirming that the failure to give disclosure of the statement of case was not the result of any conscious attempt to suppress a document which was considered to be relevant or disclosable. There was no application to cross-examine any of the deponents and in the light of that evidence Mr. Vos very properly recognised that he could not invite me to find that there had been any deliberate breach of duty on the part of Richards Butler or PaineWebber. He therefore expressly disclaimed any suggestion that the award had been procured by fraud or conduct of a similar kind.

25. It follows from what I have already said that under these circumstances this application must in my view fail. Nonetheless, since this represents an important part of the case which was fully argued before me, I think it right to deal fully with the arguments which were put forward in relation to the duty of disclosure. I can say at once that I am not persuaded that PaineWebber was in breach of its duty to give disclosure. The tribunal's order reflected, and must be understood in the context of, the correspondence between the parties. This was not a case in which the parties were obliged to give, or can have expected to receive, disclosure on the very wide basis set out in the *Peruvian Guano* case. On the contrary, the approach which had been accepted on both sides was one under which the onus lay on the party seeking disclosure to identify at least in a general way the documents it was seeking. Richards Butler quite properly understood the request for disclosure contained in Theodore Goddard's letter of 13th January 1999 as relating to the market arrangements relating to the conversion transaction. Theodore Goddard could have asked for documents which had a bearing on the discussions between Dr. Rossetto and Mr. Underhill on 23rd June and the terms on which the debt created by the roll-over transaction was deferred, but did not do so, no doubt because it was Profilati's case that the matter turned entirely on the terms of the letter of 28th June. The argument is even more difficult to sustain in relation to the Bluhara account summary which does not naturally fall within any of the categories of documents of which disclosure was sought. In these circumstances I do not think that PaineWebber or Richards Butler can be criticised for the way in which they dealt with the request for disclosure.

Substantial injustice

26. Even if there had been a deliberate failure to give disclosure of the two documents in question it would still be necessary for Profilati to satisfy the court that it had suffered substantial injustice as a result. As both parties recognised, this requires some consideration of the likely impact of the documents on the minds of the tribunal. It was common ground that the applicant need not go so far as to satisfy the court that the documents would necessarily have led the tribunal to reach a different conclusion and given that the evaluation of the evidence is ultimately a matter for the tribunal alone, I think that must be right. However, there was some disagreement between the parties as to the proper approach to take. Mr. Vos submitted that it is enough for there to be a *"strong likelihood"* that the documents would have led the tribunal to reach a different conclusion, applying a test similar to that found in ***Ladd v Marshall*** [1954] 1 W.L.R.1489. Lord Goldsmith, on the other hand, submitted that it is appropriate to apply a stricter test of the kind applied in ***Hunter v Chief Constable of the West Midlands*** [1982] A.C.529 because an application of this kind is more analogous to a collateral attack on the award than to an appeal by way of rehearing. A variety of tests for the introduction of new evidence has been put forward in different contexts as was noted by Waller L.J. in ***Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd*** [2000] 1 Q.B. 288. Section 68 is a new provision, however, and for my own part I think it preferable not to put a gloss on it but simply to ask oneself whether in the circumstances of the case the applicant has suffered substantial injustice.

27. Mr. Vos submitted that Profilati has suffered substantial injustice in this case because the documents which PaineWebber failed to disclose would probably have had a decisive effect on the outcome of the arbitration. He did not put the matter in quite those terms, but that was the substance of his argument because he submitted that if Profilati had been able to confront Mr. Underhill in cross-examination with the statement of claim in the N.A.S.D. arbitration, he would have confirmed not only that he had agreed with Dr. Rossetto that payment of the roll-over debt should be deferred until 15th December, but that if US$400,000 were paid into one of the Finleader

accounts as security for that obligation the conversion transactions would be excluded from Profilati's margin accounts. This argument depends, however, not only on the assumption that Mr. Underhill would have told the truth in cross-examination (which I readily assume in his favour) but, more importantly, on the assumption that there was in fact an agreement between him and Dr. Rossetto in the terms alleged by Profilati. However, there is little or no evidence that that was the case. Mr. Vos submitted that the amount and timing of the payment into Bluhara's account gave rise to an overwhelming inference that it had been provided as security for the roll-over debt, and indeed he even submitted that even if Mr. Underhill had continued to deny the existence of the agreement there was a very real likelihood that the tribunal would have rejected his evidence and found in favour of Profilati nonetheless.

28. It is convenient at this stage to digress a little in order to mention another document which has played a prominent part in these proceedings, namely, a memorandum submitted by PaineWebber's Italian lawyer, Avv. Aulo Cossu, to the Civil Court of Appeal of Rome in connection with proceedings brought by PaineWebber against Alnor to recover the amount due on its trading account. PaineWebber succeeded at first instance in recovering judgment against Alnor for nearly US$3 million. Alnor appealed against that decision and sought a stay of execution pending appeal. Mr. Cossu filed a memorandum opposing Alnor's application in which there appears the following paragraph:

"ALNOR's defence appears to forget it has no right at all to the guarantee given by Essex to [PaineWebber], concerning ALNOR for the amount of 1,600,000 US$ (the remaining 400,000 US$ concern as a matter of fact Profilati's position).

29. Mr. Vos submitted that this reflects not only Mr. Cossu's own understanding of the position but the true facts of the case, namely, that it had been agreed that the sum deposited by Bluhara was to stand as security for Profilati's account alone. Mr. Cossu, however, has sworn an affidavit in which he says that he did not intend to suggest that PaineWebber accepted that the sum of US$400,000 was referable to Profilati's account alone and he has drawn attention to the fact that there was exhibited to that memorandum an affidavit sworn by PaineWebber's lawyers in New York which stated clearly that Bluhara had guaranteed Alnor and that the US$400,000 had been deposited in support of that guarantee. His explanation of that passage in the memorandum is that it was a point he had included on his own initiative having shortly before received a copy of a letter from Theodore Goddard to Richards Butler in which Theodore Goddard alleged that the money deposited by Bluhara was intended to stand as security for Profilati's liabilities alone. In the Italian proceedings Alnor was saying that the US$400,000 was intended to stand as security for its own liabilities and he wished to draw the attention of the court to the inconsistency between what Alnor was saying and what Profilati was saying.

30. Mr. Vos invited me not to accept Mr. Cossu's explanation and to find that the paragraph in question correctly reflected his understanding of the position. If that were so, he submitted, there must have been some foundation for his belief which in turn tends to support the case which Profilati seeks to make. I accept that if Mr. Cossu was intending to highlight a discrepancy between the positions being taken by Alnor and Profilati that paragraph could have been worded better, though I bear in mind that I am reading it in translation and not in the original. Nonetheless, both his evidence and that of PaineWebber's New York lawyer is quite clear: Mr. Cossu was not instructed to say that PaineWebber accepted that the US$400,000 was deposited to secure Profilati's liability. In the light of the evidence as a whole I can see little here of any real substance to support Profilati's case. I think it likely that having just seen Theodore Goddard's letter Mr. Cossu decided to throw the point back at Alnor without choosing his words too carefully. It is just possible that at the time he did accept the assertion at face value, but, even if he did, there is nothing to suggest that he derived his understanding from anyone at PaineWebber or those who were acting on its behalf either here or in New York. In a reply memorandum filed on 26th April 2000 Mr. Cossu went out of his way to emphasise that the point made in the earlier memorandum related to the position adopted by Profilati and was not intended to contradict what PaineWebber had said elsewhere. In these circumstances the choice is between accepting the explanation given by Mr. Cossu or finding that PaineWebber and its lawyers have systematically concealed the truth and have attempted to cover up an embarrassing revelation on his part. In my view the evidence does not begin to justify that conclusion and I do not therefore find anything in the memorandum which, in the light of all the evidence before me, supports the case which Profilati now seeks to make.

31. Viewed as a whole, therefore, I do not think that the evidence carries the matter nearly as far as Mr. Vos suggested or that Mr. Underhill would have accepted that there was agreement in the terms put forward by Profilati. He was questioned about his discussions with Dr. Rossetto on 23rd June and denied the existence of any agreement of that kind. The statement of case itself, of course, is nothing more than assertion, but even assuming that it could properly be regarded as Dr. Rossetto's account of the agreement, it still falls short of the case which Profilati was seeking to make. It does not allege in terms that the sum of US$400,000 was provided as security for Profilati's debt; it asserts merely that Dr. Rossetto agreed to arrange for a sum to be deposited as collateral into Bluhara's account and that Bluhara would guarantee Alnor (as indeed it did). Although Alnor itself had guaranteed Profilati, this was not the most obvious way to provide funds as security for Profilati's trading and if that was the nature of the agreement, it is surprising that it was not more clearly spelled out. Until the middle of September combined margin accounts were maintained for the companies in the Finleader group and at the time of the hearing Profilati knew from the margin call statements dated 21st July and 11th August 1993 that a cash sum of a little over US$400,000 had been credited to the group's account during the latter part of July or early in August. It did not know at that time that that sum had been provided by Bluhara or precisely when, but if any

plausible inference could be drawn from the amount of the deposit and the broad coincidence of timing, the material for doing so was there. Bluhara's guarantee of Alnor (which, although it had not been disclosed, Profilati was aware of by the time of the hearing) was dated 28th June 1993; the deposit, which was made available as security for the obligations of the group as a whole, was not provided until late July when the market had already begun to fall. I do not find the coincidence of timing on which Mr. Vos laid such emphasis as powerful as he suggested and the fact that no case of this kind was put forward by Profilati at the hearing only tends to undermine this part of his argument. The reference to "margin call" in the account summary is of little significance given the fact that the deposit appeared in the combined margin call statement dated 11th August.

32. Moreover, other evidence which was before the tribunal points strongly against the existence of an agreement of the kind alleged by Profilati. At the time Bluhara deposited the sum of US$400,000 with PaineWebber Profilati's own margin account was substantially in credit. Alnor's account, on the other hand, was in debit to the extent of about US$2.8 million and the combined margin account was in debit even after taking into account Profilati's credit position. At that stage, therefore, there was no immediate need for security to be provided for Profilati and the additional deposit effectively secured the indebtedness of Alnor. This remained the position until 24th August when Profilati's own margin account slipped into debit for the first time. A few days later Mr. Underhill spoke to Dr. Rossetto apparently to chase a margin payment of US$82,443 due in respect of Profilati's account. That sum was paid early in September and is reflected in the increase in Profilati's ledger balance shown in the margin call statement dated 7th September. During the first half of September further margin calls were made as Profilati's account deteriorated.

33. By the time these calls were made Profilati had stopped trading through PaineWebber and the only transactions which could affect its position for the purposes of margin calls were the options maturing during 1994 and 1995. While these remained in the money they provided credit to offset against the debit balance of US$435,000 arising under the conversion transaction. If that had been the subject of a separate security arrangement, as Profilati alleges, no margin payment could have fallen due even if the value of the options had declined to nothing. The only basis on which margin calls could be made was that the options were providing security for the conversion transaction and their market value had fallen below the amount due under the conversion transaction. On the face of it, therefore, the making of these margin calls by PaineWebber and the payment by Profilati are inconsistent with the existence of any agreement between Dr. Rossetto and Mr. Underhill of the kind which Profilati now says was made.

34. Mr. Vos suggested that these calls and payments can be explained on the basis that Dr. Rossetto, whose position within the Finleader group was already under attack, was anxious to protect his own funds which had earlier been provided to bolster the group's position. Therefore, it was suggested, he preferred to allow Profilati to make margin payments which were not due rather than to risk losing his own funds. I do not find this very persuasive. In the ordinary way, if there had been an agreement of the kind suggested, one would not expect to find margin calls being made on Profilati at all or, if they were made, one would expect them to excite some form of protest. The argument being made by Mr. Vos assumes, first of all, that Dr. Rossetto did not mention the agreement to anyone at Profilati so that those who saw documents relating to margin calls or to whom relevant correspondence was copied remained completely unaware of it. More importantly, however, it assumes that Mr. Underhill was dishonest and co-operated with Dr. Rossetto by allowing PaineWebber to make margin calls which he knew were not due, presumably in collusion with Dr. Rossetto. For that to be done, however, it would have been necessary for Mr. Underhill to have suppressed the existence of the agreement within PaineWebber as well. I can see no basis whatsoever for thinking that he acted in that way and indeed this whole argument seems to me to be little more than a speculative attempt to find some explanation for these events which can be put forward in place of the most obvious one, namely, that no such agreement had been made.

35. In these circumstances I do not think that there is any substantial likelihood that disclosure of the these two documents would have resulted in the tribunal's reaching a different conclusion on this issue. Accordingly, even if I am wrong in holding that there was no failure to give proper disclosure in this case, I do not think that Profilati suffered substantial injustice as a result.

36. For all these reasons this challenge to the award must be dismissed and it is unnecessary to consider whether it would be appropriate to extend the time allowed for making this application.

Mr. Geoffrey Vos Q.C. and Mr. Andrew Twigger instructed by Theodore Goddard appeared for the applicant.
Lord Goldsmith Q.C. and Mr. Dominic Dowley instructed by Richards Butler appeared for the respondents.