# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 6 of 2018**

**IN THE MATTER OF THE COMPANIES ACT 1981**

**AND IN THE MATTER OF N-REN INTERNATIONAL LTD.**

**B E T W E E N:**

**ADRIA AKTIENGESCELLSCHAFT (also known as ADRIA AG)**
**Appellant**

**- v -**

**THE GOVERNMENT OF THE REPUBLIC OF SUDAN**

**-and-**

**SUDAN-REN CHEMICALS & FERTILIZERS LIMITED**
**Interested Parties**

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**Before:** **Baker, President**
**Bell, JA**
**Smellie, JA**

**Appearances:** Phillip Aliker and Orlando Smith, Milligan-Whyte & Smith, for the Appellant
Antony White QC and Ben Adamson, Conyers Dill & Pearman Ltd, for the Interested Parties

**Date of Hearing:** **7 June 2018**
**Date of Judgment:**

**JUDGMENT**

*Companies Act 1981 – application under section 240 for order vesting property which had passed to the Crown as bona vacantia in the applicant – the test for the requisite interest - whether applicant had a proprietary interest in the disclaimed property – whether proprietary interest established sufficiently for the jurisdiction to be exercised*

**BELL JA**

**Introduction**

1. This is an appeal from a ruling made by Hellman J on 25 January 2018, in which he refused an application made by the Appellant ("Adria") on an *ex parte* basis, seeking an order under section 240(4) of the Companies Act 1981 ("the 1981 Act") read in conjunction with section 263 of the 1981 Act, for the vesting in it of certain property ("the Property") owned by a Bermuda company, N-ReN International Ltd ("N-ReN") before its dissolution. Upon dissolution the Property, along with N-ReN's other assets, had become *bona vacantia*, and accordingly had passed to the Crown. On 28 November 2017, the acting Attorney-General signed a notice of disclaimer indicating that the Crown formally disclaimed all of its rights title and interest in such property as N-ReN had possessed immediately prior to its dissolution.

2. As part of the background facts, I should deal with the roles played by the parties, and in this regard, it is necessary to refer to the arbitration proceedings which Adria had taken before the International Chamber of Commerce ("the ICC") against Sudan ReN Chemicals & Fertilizers Limited ("Sudan ReN") and the Government of the Republic of Sudan (together, "the Interested Parties") to enforce its purported rights in relation to certain property, which I will describe in due course.

3. The application before Hellman J was, as mentioned, made on an *ex parte* basis. This was the case despite the fact that the interests of the Interested

Parties were clearly likely to be affected, and affected adversely, if Hellman J were to make the order which Adria was seeking.

4. According to the skeleton argument filed by the Interested Parties on their application for joinder to these proceedings, they first learned of these proceedings on 10 May 2018, more than three months after Hellman J's ruling, and less than a month before the proposed hearing date in this Court. They made an immediate application to be joined in these appellate proceedings, and on 18 May 2018, I made an order that they and each of them be joined in the appellate proceedings. It is to be noted that Adria did not object to the Interested Parties' application to be joined to the proceedings, although when asked why Adria had not chosen to serve its initial application on them, Mr Smith for Adria simply said that he had taken the view that such service was not necessary. On 28 May 2018, the Interested Parties applied for an adjournment of the date fixed for the appeal, and Adria indicated that it supported that application. The underlying evidence put in for the Interested Parties advised that although it would be possible to get up to speed by the scheduled time for the hearing of the appeal, they thought it preferable to have more time. Fixing the calendar of the Court is not always an easy process, and for that reason applications for adjournments are not dealt with on the basis of the parties' consent. In the event, I refused the application to adjourn, and the matter proceeded on the date originally scheduled.

**Background and the Judgment of Hellman J**

5. Hellman J described the application made by Adria as being both "interesting and unusual". Adria itself is a company incorporated under the laws of Liechtenstein. The underlying facts are complex, and rather than duplicate the summary contained in the learned judge's ruling, I would propose to set out this summary in full. Where appropriate in this judgment, I will use the defined

terms as contained in this extract, though I will use the terms Promissory Notes and Notes interchangeably.

6. The extract in question starts at paragraph 5 of the learned judge's ruling, and is in the following terms: -

> *"5. Adria entered into a consultancy agreement dated 20th October 1978 with N-ReN* ***("the Consultancy Agreement")****. The services which Adria provided under the Consultancy Agreement concerned a contract dated 30th December 1975 for the construction and operation of certain fertilizer plants in Sudan (****"the Project Contract"****) which N-ReN had entered into with a company incorporated under the laws of Sudan known as Sudan ReN Chemicals & Fertilizers Limited (****"Sudan ReN"****).*
>
> *6. The Property was as follows:*
>
> > *(1) 12 promissory notes issued by Sudan ReN to N-ReN (****"The Promissory Notes"****), representing unpaid retention monies payable under the Project Contract. The Promissory Notes were guaranteed by the Government of Sudan. The last payment under the Promissory Notes fell due on 3rd October 1988. However, no payments have in fact been made under any of the Notes.*
> >
> > *(2) Certain debts owed by Sudan ReN to N-ReN under the Project Contract, and the right to demand repayment thereof.*
> >
> > *(3) 403,900 shares in Sudan ReN (****"the Shares"****), which comprised a 35 per cent ownership interest in the company. These were issued to N-ReN's parent company N-ReN Corporation, which was incorporated in Delaware in the United States (****"N-ReN Delaware"****), under an agreement between N-ReN Delaware and the Government of Sudan dated 30th November 1975 (****"the Founders Agreement"****). N-ReN Delaware held the shares as nominee for N-ReN.*

*(4) The Property includes all rights, benefits and interests pertaining to the Promissory Notes and the Shares, including the right to arbitrate under the Project Contract and the Founders Agreement.*

*7. Pursuant to the Project Contract, Sudan ReN deposited the Promissory Notes in escrow with American Express International Bank ("Amex") in London. By an escrow agreement dated 8th March 1982 made between N-ReN, Adria and Amex (**"the Escrow Agreement"**):*

*(1) Amex agreed to hold in escrow any proceeds realised by discounting or payment of the Promissory Notes and to pay N-ReN's indebtedness to Adria out of such proceeds without further instruction from Adria (clause 4).*

*(2) Should any of the Promissory Notes not be paid or discounted and the proceeds thereof paid into the Escrow Account on or before 3 months after the due date of such Note, Adria would be entitled to issue proceedings against N-ReN for an amount equal to or in excess of the face value of the dishonoured Note (clause 5).*

*(3) In such event, ie if Adria did issue proceedings against N-ReN, the Bank would release to N-ReN from the Escrow Account, without further instruction from Adria, the dishonoured Promissory Note and further Notes to the approximate value of the proceedings issued against N-ReN by Adria (clause 5).*

*8. By a deed of power of attorney dated 1st August 1994 (**"the Power of Attorney"**), N-ReN appointed Mr Snyder and John J Kelley Jr ("Mr Kelley") as its attorneys in fact. The Power of Attorney authorised the attorneys in fact to dispose of any assets of N-ReN and to assign the benefit or burden of any contract to which N-ReN was a party. Mr Snyder explained in his affidavit that he was instructed to wind down N-ReN's affairs and to complete contracts with creditors, chiefly Adria.*

*9. By a deed of transfer dated 24th February 1995 between N-ReN (ostensibly) and Adria (**"the Deed of***

***Transfer"**), Mr Snyder, purportedly acting pursuant to the Power of Attorney, agreed: (i) following the procedure laid down in the Founders Agreement, to offer to sell the Shares to the Government of Sudan, and if the Government of Sudan did not exercise its right to purchase the Shares, to transfer them to Adria; and (ii) to instruct Amex to release the Promissory Notes to Adria. The purpose of these transactions was to discharge the debt which N-ReN owed to Adria for outstanding consultancy fees. The Deed of Transfer noted that as at 31st December 1994, the amount of the debt, including interest, was $3,050,914.00.*

*10. I was referred to a letter dated 8th April 1994 from Mr Kelley to Mr Snyder proposing various insertions to the draft agreement that became the Deed of Transfer (**"the April 1994 letter"**). As appears later in this judgment, Adria invites the Court to attach considerable importance to this letter.*

*11. By a letter to Amex, also dated 24th February 1995, Mr Snyder, purportedly on behalf of N-ReN, informed Amex that N-ReN had modified its agreement with Adria (ie by the Deed of Transfer) and that this impacted on the Escrow Agreement. Mr Snyder instructed Amex that: (i) all proceeds received by Amex from Sudan ReN and/or the Government of Sudan in payment of the Promissory Notes should be paid directly on receipt to Adria; (ii) in accordance with the Deed of Transfer, Adria was now the exclusive owner of the Promissory Notes; and (iii) all the Promissory Notes should be released to Adria.*

*12. By a letter to N-ReN dated 7th July 1995, Adria stated that, in accordance with "the Contract between [Adria] and [N-ReN]", Adria confirmed the transfer to it of the Shares. On 11th July 1995, Mr Snyder endorsed the letter as signed and accepted by N-ReN.*

*13. Confusingly, the said contract for the transfer of the Shares (**"the Share Transfer Contract"**), which Mr Snyder signed purportedly on behalf of NReN, bears the subsequent date of 19th August 1995. Under this contract: (i) N-ReN agreed to transfer the Shares to Adria; (ii) Adria purportedly accepted the transfer; and (iii) N-ReN authorised the registration of the Shares in*

> *the name of Adria. I am not told whether registration in fact took place. The Government of Sudan had been invited by N-ReN in accordance with the Founders Agreement to purchase the Shares but had not done so.*
>
> *14. Custody of the Promissory Notes passed from Amex to Standard Chartered: it appears that Standard Chartered acquired all or part of Amex's business. Although the Promissory Notes were held by Standard Chartered Private Bank in London, they were governed by the Bank's US entity: Standard Chartered International (USA) Ltd. They were therefore subject to a United States sanctions regime prohibiting transactions with Sudan which prevented their release to Adria. The sanctions, which commenced in 1997, were not lifted until January 2017. The Promissory Notes were released to Adria on 16th March 2017.*

7. The learned judge then identified the problem which had led to the application being made before him, which arose following the commencement of the ICC arbitration proceedings by Adria against the Interested Parties, in which Adria sought to enforce its purported rights in relation to the Property. As the learned judge commented in paragraph 16 of his judgment, Adria was "in for a nasty shock". This was because the Interested Parties took the point that N-ReN had been struck off the Bermuda register of companies ("the Register") on 30 September 1994. Upon publication of the notice of such striking off, N-ReN was dissolved by operation of law. Section 261 of the 1981 Act sets out the appropriate procedure for striking defunct companies off the Register, and section 262 provides that "all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution… shall be deemed to be *bona vacantia* and shall accordingly belong to the Crown." It followed that the Deed of Transfer (which was dated 24 February 1995) and the Share Transfer Contract (dated 19 August 1995) were ineffective to transfer the Property to Adria, and the Interested Parties therefore submitted in the arbitration proceedings before the ICC that Adria had no standing to seek relief in relation to the Property.

8. The learned judge then set out circumstances under which a Bermuda company, following dissolution, can be restored to the Register. Section 260(1) of the 1981 Act is in the following terms:

> ***"Power of Court to declare dissolution of company void***
> *260 (1) Where a company has been dissolved the Court may—*
>
> *(a) in the case of a dissolution pursuant to section 213, at any time not later than ten years from the date of such dissolution; and*
> *(b) in any other case, at any time not later than five years from such date,*
>
> *on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order declaring the dissolution to have been void.*

9. As appears from the wording of the provision, there is a time limit for this course to be followed, requiring the application to be made not later than five years from the date of dissolution. Where a company has been struck off the Register by reason of the Registrar of Companies believing that it no longer carries on business, section 261 of the 1981 Act pertains. Again, where the procedure has been followed in error, there is provision (section 261(6)) for the company to be restored to the Register on an application being made to the court, where the court is satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the Register. But again there is a time limit in the relevant subsection, this time one of twenty years from the date of publication of the notice evidencing the company's striking off. As the learned judge pointed out, neither of these sections availed Adria, because more than five years had passed since the dissolution of N-ReN, and more than twenty years had passed since the publication of the notice in an appointed newspaper.

10. The learned judge then identified the course which Adria had chosen to follow with a view to resolving the issue which had been raised against it by the Interested Parties in the ICC arbitration, which was an application for an order pursuant to section 240 of the 1981 Act that the Property be vested in it as "disclaimed" property. Section 240 is headed "Disclaimer of onerous property" and provides in material part: -

> *"(1) The liquidator of a company may with the leave of the Court disclaim any property belonging to the company whether real or personal including any right of action or right under a contract which in his opinion is onerous for the company to hold or is unprofitable or unsaleable.*
>
> *(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest and liabilities of the company, and the property of the company in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.*
>
> . . . . .
>
> *(4) The Court may, on an application by any person who … claims any interest in any disclaimed property … and on hearing any such persons as it thinks fit, make an order for the vesting of the property in … any persons entitled thereto … and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose."*

11. As the learned judge noted, there is no time limit for an application under section 240 of the 1981 Act, but to succeed on the application, the applicant must be both a person who claims an interest in the disclaimed property, and a person who is entitled to that property, as the learned judge pointed out in

paragraph 26 of his ruling. So the applicant must be entitled to the interest claimed.

12. The learned judge then reviewed the relevant English authorities, and concluded that the case of *Re Ballast Plc* [2007] BCC 620 ChD represented the law in England and Wales, and continued by taking the view that there was no principled reason why, in respect of a statutory provision that is in all material respects the same, the law of Bermuda should diverge from that of England and Wales.

13. By way of the next step in the process, the learned judge noted that the acting Attorney-General of Bermuda had signed a notice of disclaimer in relation to the Property which had vested in the Crown as *bona vacantia*, and the judge concluded that the court had jurisdiction to make a vesting order in favour of Adria, provided that Adria could establish that it had a proprietary interest in the Property.

14. Mr Smith sought to persuade the learned judge that this was the case on the basis that the April 1994 letter (referred to in paragraph 10 of the extract from the learned judge's ruling, set out in paragraph 6 above) represented a concluded contract as between Adria and N-ReN, despite the fact that the draft agreement to which this letter referred had led to a final agreement being executed on 24 February 1995, at a time when N-ReN had been struck off the Register. Mr Smith had submitted to the judge that the April 1994 letter was evidence that by that date there was an agreement on essentials with sufficient certainty to be enforceable, despite the references to insertions being made to the draft, and to keeping "negotiations" focussed on the principal issues involved. The learned judge had not been persuaded. Secondly, Mr Smith had submitted that the Escrow Agreement, as defined in the above extract, gave Adria an equitable charge over not only the proceeds of the Promissory Notes but over the Promissory Notes themselves, the rights under the Notes, and the

underlying debts. Again, the learned judge was not persuaded, and took the view (paragraph 39 of his ruling) that the Escrow Agreement gave Adria none of the other rights for which Mr Smith contended.

15. Finally, Mr Smith made an alternative submission that so as to do justice on the particular and highly unusual facts of this case, the court should adopt a "financial interest" test, on the basis that Adria had a financial interest in the Property in the sense that it was a creditor, indeed the only creditor of N-ReN. Again, the learned judge was not persuaded that there was any principled reason for requiring Adria to demonstrate a financial interest rather than a proprietary interest. He added that if the legislature had intended that the court should apply an "interests of justice" test, the legislation would have so provided. The learned judge accordingly concluded that since Adria did not have a proprietary interest in any part of the Property, the application should be dismissed, and so ordered.

**Grounds of Appeal and the Appellant's Written Submissions**

16. Adria's submissions (and here I am dealing with the original submissions which were filed in accordance with the timeframe set by the Court of Appeal Registrar, dated 3 April 2018) first address the judge's finding that Adria needed to establish that it had a proprietary interest in the Property, (grounds of appeal numbered 1, 2 and 11), and the point made was that there is a distinction to be drawn between the language of the 1981 Act, which refers to "any" interest, and that of the equivalent UK legislation, now in the Insolvency Act 1986, where section 181 provides for an equivalent application by any person claiming "an" interest in the disclaimed property. The contention for Adria was that the Bermuda legislation provides for a broader test which should have led the judge to grant the relief sought.

17. The next grounds, 3 and 4, concern the judge's finding at paragraph 35 of his ruling, indicating that he was not satisfied that the draft agreement to which the April 1994 letter referred represented an agreement on essentials with sufficient certainty to be enforceable. The argument was that the April 1994 letter gave Adria an equitable charge in the proceeds of sale of shares to the Sudanese government (in the event that such a sale had been completed) and an equitable right in the shares together with the right to enforce the transfer of the shares from N-ReN.

18. Grounds 5 and 6 concern the Escrow Agreement. The learned judge did not accept the argument before him (paragraph 37 of his ruling) that this agreement gave Adria an equitable charge over not only the proceeds of the Promissory Notes, but the Notes themselves, the rights under the Notes and the underlying debt. He explained the reasons for his view in paragraphs 38 and 39, pointing out that the Escrow Agreement provided that the proceeds of the Promissory Notes should be paid into escrow and then paid out to Adria up to the value of the indebtedness owed to Adria by N-ReN. The judge indicated that in his view because Adria could have enforced payment of any monies received in escrow by an action for specific performance, it was arguable that the availability of specific performance gave Adria an equitable interest in any proceeds of the Promissory Notes. But he was of the view that the agreement did not give Adria any right or interest in relation to the Promissory Notes or the underlying debt.

19. The argument for Adria was that because the escrow arrangement was established for Adria's benefit, until payment had been effected, the Escrow Agreement created a trust for Adria's benefit, and gave Adria a beneficial interest in the rights under the Notes. Alternatively, it was said that Adria had a security interest by way of an equitable charge on the Notes.

20. Grounds 7 and 9 deal with the learned judge's unwillingness to make a vesting order in the alternative on the basis of the "interests of justice" test. The judge took the view that if the legislature had intended such a test to be applied by the court, it would have so provided. The submissions contend that the court has an inherent jurisdiction on the basis that Adria is the sole creditor of N-ReN, contending that because the legislature has left a gap in the law (in terms of not providing for a vesting order where the company in question has been dissolved for more than twenty years), the court has an inherent jurisdiction to "do justice and vest the Property in Adria".

21. Appeal ground 8 ties in with the grounds dealt with in paragraph 16 above, insofar as it was contended that the judge should have applied a "financial interest" test, rather than a proprietary one, relying on a first instance decision of Mr Gavin Lightman QC (as he then was), in *Re Vedmay Ltd* [1994] 1 EGLR 74. That case was referred to in the case of *Ballast*, on which the learned judge had relied, and the judge in *Ballast* (Lawrence Collins J, as he then was) noted that in another English case, *Vedmay* had not been followed, and an application for leave to appeal in that case had been refused, with reasons given, all of which led Lawrence Collins J to be "satisfied on the authorities and on principle that an applicant must have some sort of proprietary interest in the property in respect of which a vesting order is sought", a passage which the learned judge emphasised. The judge carried on to express the view set out in paragraph 12 above.

22. That leaves only ground 10, which characterises the learned judge's comments in paragraph 42 of his ruling as representing a "prudent creditor" test. What the judge in fact said was no more than that a prudent creditor would have made enquiries from time to time to ascertain whether N-ReN was still in existence, a suggestion which, in the circumstances of this case, seems hard to fault.

**Written Submissions of the Respondent**

23. The Interested Parties dealt firstly with grounds 1, 2, 8 and 11, pointing out the reason for the Bermuda legislation having used the words "any interest" (based on the English Companies Act of 1948), but maintaining that there was no substantive difference between the two tests. They then maintained that the "proprietary interest" test applied, citing textbook authority for that contention.

24. Next come grounds 3 and 4, and the argument regarding the April 1994 letter. The Interested Parties set out the differences to be found between the terms of the April 1994 letter and the later deed of February 1995 to contend that the former does not contain the requisite essential terms.

25. Next are grounds 5 and 6, concerning the effect of the Escrow Agreement, and the Interested Parties maintain that Adria did not have any rights thereunder capable of being enforced, while pointing out that if it had such rights, it could have enforced them directly as a party to the Escrow Agreement.

26. Lastly are grounds 7, 9 and 10, and the argument that the learned judge should have made an order on the basis of the interests of justice, noting the judge's comment regarding the "generous" period provided for by the legislation, and supporting the notion that a creditor who goes to sleep on its rights during that twenty year period cannot reasonably expect the court to bend the law to come to its aid.

27. So in essence, the Interested Parties supported the ruling and the reasons given by the judge for refusing the relief sought by Adria.

**Commencement of the Appeal**

28. When the appeal came on for hearing on 7 June 2018, considerable further material was produced on Adria's behalf. As well as two binders of authorities, there was a new skeleton argument, of some 19 pages, all produced for the first

time minutes before the scheduled start of proceedings. In one sense, the new positions taken by Adria reduced the scope of the appeal. Adria now took the position that the "proprietary interest" test found by the judge to have been a pre-requisite for an applicant to succeed on a section 240(4) application was indeed the correct test, rather than the "financial interest" test for which it had previously contended. Mr Aliker said that Adria was able to establish a proprietary interest by reason of the Escrow Agreement, and that the judge had been wrong to find to the contrary. Mr Aliker did not formally abandon the "financial interest" test, but advised that he would not be arguing the point.

29. Adria's next change in position came in relation to the basis upon which it argued that there had been a complete and enforceable agreement between Adria and N-ReN. Mr Smith had argued before the judge that this could be established on the basis of the April 1994 letter, a contention which the judge had rejected at paragraph 35 of his judgment, saying in the following paragraph that he was satisfied that "judged objectively, the parties intended that the agreement which they were negotiating should not give rise to legal relations between them until it was finalised and executed". Mr Aliker accepted that there was a difficulty in maintaining that there had been a concluded agreement in April 1994, but said that the parties had been ad idem in September 1994. As he put it, the dates had changed, but not the argument.

30. The problem which Mr Aliker then faced was that there had been no evidence before the judge in relation to the September 1994 agreement contended for. To shore up his case in this regard, Mr Aliker sought to adduce further evidence in the form of affidavits from the two deponents who had sworn affidavits in December 2017, which affidavits had been before the judge, in support of the argument that there had been a final and binding agreement in April 1994. It is convenient to deal with this aspect of matters at this stage although the application came later in the argument. We took the view, applying standard *Ladd v Marshall* [1954] 3 All ER 475 principles, that the evidence in question

(all of which related to communications in 1994) could reasonably have been obtained so as to be put before the judge, as the affidavit evidence filed in support of the contention that there had been an agreement in April 1994 had been. If Adria had been focussing on September 1994 and not April 1994 at an earlier stage of proceedings, no doubt the material filed late could have been filed before the judge. Accordingly, we ruled that the new affidavits should not be admitted at this late stage.

**The New Skeleton Argument**

31. The summary appearing at the start of the skeleton put matters in the following way. It started by setting out the basis on which Adria contended that it had a proprietary interest in the assets of N-ReN which had been disclaimed by the Crown. First, it was contended that Adria had an established proprietary interest in the Promissory Notes, by two alternative means. Next, it contended that it had such interest in N-ReN's shares in the second Interested Party, and in the Promissory Notes by an alternative route. The skeleton then moved on to the details of the original underlying contract, dating back to 1975. These were not matters which appear to have been canvassed before the learned judge, and the purpose of going into them appears to have been to meet a concern that the Interested Parties should not be able to "hijack" the application before the learned judge so as to resolve the disputes in the ICC arbitration.

32. There followed submissions as to the effect of a successful appeal of Hellman J's ruling in the ICC arbitration, and Adria contended that the objective of the Interested Parties was to advance their position on issues referred to arbitration. The submissions then took positions on behalf of Adria in relation to the ICC arbitration which were not before Hellman J, and which, with respect, do not seem to me to be issues falling to be determined on this appeal. It may or may not be the case, as Adria contends, that the arbitration proceedings should not determine the issues in dispute between the parties.

But those are matters which fall to be determined in the arbitration proceedings. These proceedings, both at first instance and in this Court, are concerned with Adria's application made under section 240(4) of the 1981 Act. And as Adria's submissions contend, the appeal now raises a very narrow issue as to whether the learned judge was correct when, in paragraph 37 of his ruling, he disagreed with Mr Smith's submission that the Escrow Agreement gave Adria an equitable charge over not only the proceeds of the Promissory Notes, but over the Promissory Notes themselves, the rights under the Notes and the underlying debt.

33. That brings one to the real issue; whether Adria does indeed have a proprietary interest in the Promissory Notes. Mr Aliker contended that the ascertainment of Adria's interest was achieved by a two-stage process, and that the judge had erred by going directly to the second stage without first construing the contractual scheme as a whole, and the fact that the Escrow Agreement derived its value from the commitments of each of the Interested Parties in the security arrangements found in the Promissory Notes. Adria's argument continued that the appropriate candidates for characterisation of Adria's proprietary interest were trust, pledge, and equitable charge, and these were dealt with in turn. At this point the skeleton argument turns back to the contention relating to the existence of the September 1994 agreement, something which cannot at this stage be established on the evidence.

34. Adria closed by saying that N-ReN's residual assets "must vest somewhere", and that Adria as N-ReN's only creditor is the only candidate. For instance, Mr Aliker contended in argument that title in the Promissory Notes vested in Adria by virtue of their having been delivered to Adria by the escrow agent, purportedly in keeping with the terms of the Escrow Agreement. Whether that is so was not raised before Hellman J, and so was not an issue properly before this Court as a matter to be decided on this appeal. The task of this Court is not to answer the question posited by Mr Aliker. It is to determine whether

Hellman J's conclusion regarding the application before him was the correct one.

**The Argument**

35. Mr Aliker conceded that success on this appeal was not necessary for his clients to succeed in the ICC arbitration. He advised that Adria (which is now in possession of the Promissory Notes) pursued this appeal in case the Notes do still belong to N-ReN, although he maintained that Adria already had the beneficial interest in the Notes, while contending that the legal title reposed in the trustee under the Escrow Agreement. That trustee was originally American Express International Bank, which held the Promissory Notes pursuant to a Deed of Authority dating back to 13 February 1979, but at a later date the trustee became Standard Chartered Bank. Mr Aliker contended for Adria's proprietary interest on the basis set out in the second skeleton argument, repeating the question referred to in paragraph 34 above - if Adria did not have the beneficial interest in the Promissory Notes, where was it? He maintained that the shares, the debt and the Promissory Notes all formed part of the transfer of assets, and the judge had been wrong to reject the argument that the Escrow Agreement did not give Adria the rights for which Mr Smith had contended.

36. Mr White referred to some of the factual background which had not previously been clear, which included the fact that Adria now had the Notes and that it was only after Adria had secured possession of the Notes from Standard Chartered Bank that it had completed the detail in regard to the dates of payment under the Notes, as well as the interest rate of 10%, and the fact that interest was to be compounded half yearly. As Mr White pointed out, the interest element forms the lion's share of the total sum claimed by Adria in the ICC arbitration.

37. Mr White then concentrated on the terms of the Escrow Agreement and their effect, contending that the judge had been right to distinguish between the Promissory Notes themselves, and the proceeds thereof. The second recital in the Escrow Agreement noted that payment under the Notes occurred only "as and when" the Notes became able to be released under the Deed of Authority, and at that point the proceeds of the Notes were to be paid into the escrow account provided for in the agreement. But that release depended on joint written instruction from N-ReN and Adria. Such a step never having occurred, Mr White argued that there is now no mechanism pursuant to which Adria can procure the proceeds of the Notes. He further argued that the fact that the requisite condition had not been fulfilled was an end of the matter. Adria had no mechanism pursuant to which it could secure title to the Promissory Notes and no means of securing their proceeds. And in my view the different ways in which security can arise under English law which Mr Aliker referred us to do not advance Adria's case. This case turns on the underlying security documents.

**Conclusion**

38. There were other arguments, and I trust that I can be forgiven for not exploring them further. It seems to me that the issue is indeed the narrow one for which Mr Aliker contended, but the fact is that in my view the Escrow Agreement gives Adria neither the Promissory Notes, nor their proceeds, and certainly not the other component parts of the Property. There were other matters referred to in argument, for instance the fact that Mr Aliker mentioned that there had at some stage been a payment made under the Notes. But that is not relevant to the issue which now falls for determination. Neither do I find it productive to explore the different ways in which Adria contended that the escrow agent held the assets on trust for Adria by reason of some equitable interest arising through trust, pledge or otherwise. As the judge pointed out, it was arguable that the effect of Adria possibly having a remedy in specific performance might give Adria an equitable interest in the proceeds of the Promissory Notes, but

that did not give Adria any right or interest in the Notes or the underlying debt. In my view the learned judge was absolutely correct to rule as he did, and to reject the contention that Adria had a proprietary interest sufficient to justify the making of a vesting order under section 240(4) of the 1981 Act.

39. There remain the argument under the interests of justice, which Mr Aliker advised was not vigorously pursued, and the argument for an order under the inherent jurisdiction of the court which can effectively be treated the same. For the avoidance of doubt, I am of the view that the judge was correct on the first of these issues, and while the second does not appear to have been argued before him, I would reject the argument for the reasons set out in the Interested Parties' written submissions.

40. Finally, I would just refer to the material submitted by counsel for Adria after the close of argument, purportedly as indicated during argument. This material referred to the nature of security interests and various issues concerning them. For my part, I did not find these helpful. This case turns on its own particular facts and the true construction of the underlying documents.

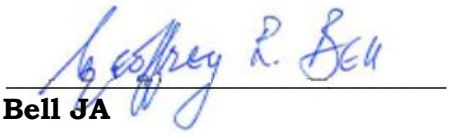
41. It follows that I would dismiss this appeal and uphold the ruling of Hellman J. I would expect costs to follow the event, and would so order in the absence of any application being made within 21 days.

**BAKER P**

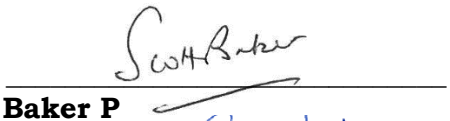
42. I agree.

**SMELLIE P**

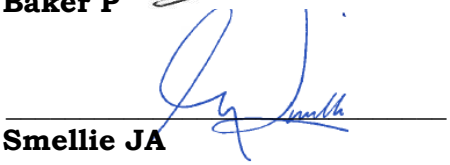
43. I agree and would also dismiss the appeal



**Bell JA**



**Baker P**



**Smellie JA**