Neutral Citation Number: [2006] EWHC 2006 (Comm)

Case No: 2005 FOLIO 683

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2006

Before:

MR JUSTICE COLMAN

- -

Between:

A	**Claimant**
- and -	
B	**Defendants**

- -
- -

Ms Barbara Dohmann QC, Ms Clare Stanley, Mr Adrian Briggs and Mr Matthew Shankland (instructed by **Weil Gotshal & Manges**) for the **Claimant**

Mr Graham Dunning QC and Mr James Collins (instructed by **Allen & Overy**) for the **First Defendant**

Mr Michael Briggs QC, Mr Nicholas Lavender and Mr Toby Landau (instructed by **Lewis Silkin**) for the Second Defendant

Mr Shane Doyle QC (instructed by **Taylor Wessing**) for the Third and Fourth Defendants

Reasons for
Hearing dates: 5 to 12 April 2006

- -

Judgment

The Hon Mr Justice Colman:

Introduction

1. The applications now before me arise in the context of what is, without doubt, the most unusual arbitration dispute I have ever encountered, either personally or in the law reports.

2. The second, third and fourth defendants, to whom I refer as "C", "D" and "Company E" respectively, apply to set aside the claim and service of it upon them outside the jurisdiction (in the Bahamas) pursuant to an order of Mr

Justice Andrew Smith made in respect of C and D on 8 September 2005 and by Mr Justice Morison in respect of Company E on 21 October 2005.

3. The first defendant, to whom I refer as "B", applies for a stay of the claim which was served upon him within the jurisdiction.

4. In order to explain the grounds for these applications it is necessary to outline the nature of the claims and the unusual factual background on which they are based. I refer to the claimant as "A".

5. A is the younger brother of C. From 1992 to 2000 the two of them carried on a very successful trading business. There were several companies involved in their A Group, most of the profits being derived from those companies trading in the Bahamas and in London. Until May 2004 A was authorised to manage and control the group.

6. In 1984 there was set up a discretionary Bahamian trust – the A Trust - of which C and his and A's father were protectors. Until 2005 A and his children were the only beneficiaries. D was the sole trustee at all material times after July 2002. D was a well-established Bahamian lawyer who acted from time to time as legal adviser to the brothers in relation to their commercial interests. It is said by A that a large number of the companies involved in or connected to the A Group's activities were held as part of the property of the A.

7. In the course of 1999-2000 disputes arose between the brothers with regard to C's participation in the A Group and to his entitlement to financial benefit from it, from the A Trust, from various other trusts and from other commercial activities.

8. A claims that he approached B, a well-known solicitor, then a consultant to Firm A, and instructed him to contact C in order to attempt to settle the dispute. He claims to have revealed to B at that time certain confidential information about his position with regard to the dispute. A meeting took place with C and A claims that there was agreement in principle as to how the brothers would separate their interests.

9. A states that in November 2001 C, who was about to undergo major heart surgery, proposed to A that before his operation a payment should be made to him so that he could make provision for his family in the event of his death. Such payment was to be made by way of settlement of all claims by C in respect of the A Group. The agreed amount was US$88 million. It was further proposed that if C survived the operation, US$37.5 million would be repaid by C to A within three months plus additional amounts to be agreed following the taking of an account. It is said that the additional sums were to be such as were found on the taking of the account to be required to be paid by C so that A received in total 50 per cent of all profits of the A Group from January 1990 to November 2001. In consideration of such payment A was to give up all claims with regard to the A Group.

10. A claims that such agreement was finally concluded orally at a meeting between him, C's daughter, F, as C's agent, and B at Claridges on 14 November

2001 at which C intermittently participated by telephone. A also claims that B was to be appointed protector of a Liechtenstein trust to which most of the US$88 million was to be transferred.

11. A claims that in November 2001 such amount was paid in accordance with that agreement.

12. On 15 November 2001 C underwent heart surgery and this was successful.

13. On 22 July 2002 A sent to B a letter stated to be written on behalf of A, C, G and various A Group companies. Its purpose was to replace an oral retainer which had been given to B in 1998 and under which he acted as a consultant for a monthly fee. The effect of the letter was to increase the monthly retainer fee to £15,000 from 1 January 2002. The letter included the following passage:

> *"We have known for some time, and appreciate, your reputation as a solicitor and solicitor-advocate of skill and experience, and know that you are someone with great experience in the strategy and management of the resolution of business disputes, and in mediation and litigation.*
>
> *Our objective is that we should be in a position to have immediate access to you and your litigation and dispute resolution experience, your general counsel, so that you can give (or obtain) legal advice on any matter which we feel it is appropriate or necessary to have legal advice.*
>
> *We will from time to time communicate information to you about particular activities relating to our business and/or our personal affairs even though we might not then need legal advice from you upon those activities. This is because we wish to keep you informed of all current developments relating to certain areas of our business and/or our personal affairs so that you are able to give or procure legal advice at short notice if this is needed.*
>
> *The effect of your retainer has been, and continues to be, that all information given to you since the inception of the retainer by any of the companies or individuals identified above is confidential (while also of course being protected by privilege)."*

14. This was accepted by B.

15. At about the same time as this letter was sent, D was appointed by C and H as trustee of the A Trust.

16. Following C's recovery there were no major developments until November 2003 when in the course of a meeting at C's home in Palm Beach, Florida, A asked for repayment by C of US$37.5 million which he claimed to be due under the oral agreement of November 2001. C made no such payment.

17. On 26 April 2004 D executed two deeds the effect of which was to transfer various companies in the A Group previously owned by the A Trust to two other trusts which A had set up some three weeks earlier – the B Trust and the C Trust of which A was protector and D was sole trustee. D and C assert that A

induced D to transfer those assets out of the A Trust to the B Trust and the C Trust by untruthfully informing D that C approved of such transfers.

18. On 1 June 2004 A appointed his Bahamian lawyer, I of Firm B as sole trustee of the B Trust and the C Trust in substitution for D. On the same day A took steps to take control over Company J by causing the removal of its directors. Two weeks later A took steps to take control of the Board of Company K and Company L.

19. Meanwhile, proceedings had been brought by Company E against Company M in the Commercial Court in 2003. On 20 April 2004 B in conjunction with Firm A was instructed by A to advise Company E with the agreement of C and D. Thereafter A and Company E worked together on those proceedings. However, in May 2004, following the transfer of assets to the B Trust and the C Trust, it is alleged that D took steps to prevent A dealing with those assets, for example by giving notice to warehouses holding material on behalf of A Group companies that A was no longer authorised to deal with such property and to Deutsche Bank stating that A was not authorised to deal with the financial affairs of Company K. The relationship between C, D and A was thus seriously deteriorating. However, meetings were held on 14 and 16 June 2004 between A with his Bahamian lawyers and B to discuss the disputes between A and C. The meeting on 16 was attended by C's daughter, F. It is submitted by A that at these meetings B was acting for C and his daughter.

20. Then on 16 June 2004 the fraternal warfare sharply escalated.

21. On that day D entered a criminal complaint against A with the Bahamas Police, the substance of which was that A had stolen and/or fraudulently used share certificates in Company K and had caused the transfer of all the assets of the A Trust to the B Trust and the C Trust. On 18 June 2004 the Bahamian Police conducted a dawn raid on A's home seizing computers and other property.

22. On 18 and 22 June 2004 D in his stated capacity as trustee of the A Trust commenced proceedings in Holland and Belgium to freeze the assets of A Group.

23. On 28 June 2004 there was an attempt to commence a mediation before Mr David Shapiro, one of the most experienced mediators in London. This, however, got nowhere because Mr Shapiro took the view that as long as there was a pending criminal complaint there could be no chance of success.

24. In the course of June 2004 A continued his contacts with B and Firm A with regard to Company E's claim against Company M and in particular as to A putting up security for costs on behalf of Company E. A argues that here again B was acting for C's interests.

25. On 28 June 2004 H sent by fax to D a letter indicating that he resigned as a protector of the A Trust with immediate effect. This left C as sole protector. However, on 7 July 2004 A's Bahamian lawyers sent a fax to D enclosing a letter dated 1 July 2004 from H in which he stated that the letter of resignation was the result of his having been subjected to undue influence from C's wife,

daughter and son and others who had overborne his own free will, that he was not given time to obtain legal advice and that, having now obtained legal advice, he withdrew his resignation.

26. On 6 July C executed two notices by which, as sole protector of the A Trust, he purported to remove A, A's children and remoter issue and A's estate as beneficiaries of that Trust. They were replaced as beneficiaries by N. It is said that these notices were then placed in a sealed envelope and eventually delivered to D on 20 August 2004, the envelope being opened only in January 2005 at C's request.

27. On 7 July 2004 there took place a meeting in London between A, C and B. There is a sharp difference as to what happened at that meeting. According to A, he was assured by C and B that no steps had been taken by C to remove A or his children as beneficiaries of the A Trust. This is denied by both C and B. A claims that at the same meeting B advised A to enter into a settlement agreement with C or to agree that their disputes should be referred to arbitration. On the following day (8 July) A sent an email to B indicating that the meeting had been without prejudice and without A or C being legally represented with B acting as "independent honest broker" but that any agreement reached would be subject to review by A's legal team. From this point onwards B began to occupy a hybrid role one purpose of which was to facilitate the settlement of the brothers' disputes. However, the fraternal environment became increasingly stormy, at least according to A, who claims that at a meeting in London on 8 or 9 July 2004 C threatened that, if A did not agree to a settlement, C and D would continue to make criminal complaints against A, would seek to have him arrested and would bring about his financial ruin.

28. In the meantime, B was working on the terms of an arbitration agreement. However, it was necessary for there to be agreement between the brothers on the issues to be referred and this was done at a meeting between them and B on 16 July 2004. It is alleged that, at a further meeting between A and B on the same day, B told A that C would relish any opportunity to damage A by criminal proceedings or otherwise and that his arrangements for such criminal proceedings were well advanced, that A's only effective option was to enter into the proposed arbitration agreement naming B as sole arbitrator, that being the only appointment he was prepared to accept that any award made by him would be enforceable in any country where C had assets but that A and his children remained beneficiaries under the A Trust.

29. In the course of the period 16 July to 29 July 2004 B, A and C developed the terms and wording of the arbitration agreement which is central to the applications now before me. In the course of doing so A consulted Alan Steinfeld QC as to the form and content of the draft agreement and, as a result of advice given by him, it was decided that the agreement could not because of its unusual features safely be left to be governed by English law with the seat of the arbitration in London. Following that decision, B consulted O, a Swiss lawyer specialising in international arbitration and A attended a conference call on 28 July 2004 between B, O and others in the course of which she explained

the position under Swiss arbitration law with regard to a new draft arbitration agreement which she had prepared.

30. On 28 July 2004 it is alleged by A but denied by B that an agreement was entered into in the course of a meeting between A, C and B. There are said to have been four points all of which concerned the decisions which it was open to B to take in the arbitration with regard to certain assets of the A Trust. It is alleged by A but denied by B that the latter typed out the four points on his computer but declined to release a hard copy until the arbitration agreement had been executed, although he did undertake to read out the terms at the first arbitration hearing and to abide by its terms.

31. A alleges that on 28 or 29 July C and B again told A that criminal charges against him in the Bahamas were imminent.

32. On 29 and 30 July 2004 the final form of the arbitration agreement was signed by each of A, C, D and B.

33. That agreement is a very remarkable document. So many of its provisions are both interdependent and relevant to the issues raised on the applications that the full text of the agreement is set out in Appendix 1.

34. It is to be noted that in paragraph 3.1 the stakeholder was subsequently agreed to be B instead of Firm C.

35. It will at once be observed that the agreement has two closely inter-related functions:

    i) an agreement as to a relatively complex structure of preliminary steps to be taken in respect of the temporary disposition of disputed assets, the standstill of pending proceedings, the withdrawal of the criminal proceeding and the parties facilitating the work of the arbitrator and the procedures to be adopted in the arbitration;

    ii) an agreement that all outstanding disputes would be determined by B on the basis that he would be given extremely wide powers for that purpose and that the parties waived objections which they might otherwise have had to B acting or continuing to act in his capacity as sole arbitrator: see paragraphs 1.4, 1.5, 1.6, 1.8 and 1.9.

36. Clearly, an agreement in these terms could never have been entered into unless all parties reposed a very high degree of confidence in B's impartiality, objectivity and fairness in deciding on his ultimate award.

37. The arbitration immediately got under way. On 3 August 2004 there was a hearing by telephone conference in the course of which B made orders relating to the disclosure of information. On 5 August 2004 the first "live" hearing took place during which B made numerous orders recording directions and concessions in relation to matters of substance including trust assets as well as timetabling for hearings as to specific issues. On 10 August 2004 there was a further hearing in the course of which B made further orders on the location of

documents and the extension of time for A's provision of documents under the agreement.

38. Between 10 August and 14 September 2004 there passed between the arbitrator and the parties, including A, numerous submissions and requests for directions which were largely dealt with at a further hearing on 14 September 2004. A's time for complying with his disclosure obligations under paragraph 3.1 of the arbitration agreement was extended until 21 September 2004. There then developed a running dispute as to whether and, if so, to what extent A had failed to comply with these obligations. On 14 October 2004 B fixed a hearing for the week of 15 November 2004 to resolve all outstanding issues as to compliance with the arbitration agreement and orders made by B and as to the despatch of the letter to be sent by D to the Bahamas Police in accordance with paragraph 4 of the agreement. There followed in the course of October 2004 various communications between the parties and A and B leading to B issuing to the parties Procedural Note No.2 in which he proposed to introduce costs sanctions on a hearing by hearing basis.

39. By a message sent to B on 26 November 2004 C informed him that he had to undergo three operations over the next three months and that because he was very keen to see the arbitration proceed as quickly as possible (as it had been the only thing in his life) he would try his utmost to minimise any impact his health might cause to the timetable. However, B then appears to have suspended the arbitration procedures in response to C's health problem.

40. In January 2005 B is said by A to have terminated his retainer by A. He does not appear to have issued a similar termination to C. At the same time there was serious discussion as to whether, instead of proceeding with the arbitration, B might himself act as a so-called rabbi mediator. However, this idea was unproductive. According to D, early in January 2005 C instructed D to open the sealed envelope delivered to him on 20 August 2004. Inside he found the two notices dated 6 July 2004 and executed by C in his purported capacity as protector of the A Trust in which he removed A, his children and remoter issue from the class of trust beneficiaries. On 3 May 2005 B revived the arbitration by determining that stage 1 of the arbitration agreement had been completed and that therefore he as stakeholder would send D's letter withdrawing the criminal complaints to the Bahamian Police. This he did. On 25 May 2005 B confirmed to the parties that the Police had dropped their criminal proceedings against A as per paragraph 7.1 of the arbitration agreement and ordered that Stage 2 of the agreement had therefore come into effect and that he would therefore release the assets and documents as provided for in paragraph 7.3. This order evoked an immediate response from A's then solicitors, Lane & Partners, who by their letter of 26 May asked to see the letter from the Police stating that the proceedings had been dropped and further asked that the stakeholder property and documents should not be released under paragraph 7.3 of the arbitration agreement until A had the opportunity of satisfying himself that the Police really had terminated the proceedings and of taking legal advice. However, the letter went further and proposed that the release of the stakeholder property and documents should not take place until after B had made an award under the final stage of the arbitration so that A's interest in the

assets involved could be protected should C fail to honour such an award as A might eventually obtain in his favour. The letter asked B to convene a hearing in Geneva within the next 30 days. It added:

> *"We will write to you as soon as possible setting out our proposed directions, which will include a request that you make a determination as to whether or not you have jurisdiction in this matter, that you make a procedural order for the purpose of identifying clearly what the procedural rules in the arbitration are to be; that you make a procedural order identifying the factual and legal issues to be determined in the arbitration, subject to your prior determination (if any) that you do have jurisdiction; that you make a procedural order requiring the parties to the arbitration to file briefs on the merits of their cases exhibiting documents in support; to make such procedural orders as will be necessary for witness statements to be exchanged and for hearings at which those witnesses would give oral evidence both on jurisdiction and the merits."*

41. Predictably this letter led to strong protests both from C and from D.

42. On 1 June 2005 B rejected A's request to see the letter from the Police and for the paragraph 3 documents to be held as security for C's compliance with any future award.

43. B then released to D the stakeholder documents which he held under paragraph 7.3 of the agreement.

44. On the same day A commenced proceedings in this court whereby he claimed a without notice order from Gloster J. restraining G and D from disposing of or dealing with or communicating to Firm B in the Bahamas any of the English documents listed in the schedule. Leave was given to serve D outside the jurisdiction. Gloster J. made that order with a return date of 15 June 2005. Amongst the undertakings given to the Court on behalf of A was the following:

> *"As soon as reasonably practicable the Claimant will commence proceedings in Switzerland and serve such proceedings on such parties as may be required under Swiss law."*

45. Although B and C were stated to be intended defendants, no injunctive relief was applied for against either.

46. On 7 June 2005 A commenced proceedings against C and D in the Bahamas. Amongst the relief sought was an injunction restraining them from dealing with the documents released by B as was an order restraining C from exercising the powers of a protector under the A Trust as well as accounts and inquiries as to the trust property held by D and as to what appointments had been made by the protector or trustee of the A Trust.

47. On the same day matters took a fundamentally different course. Weil, Gotshal & Manges, to whom I refer as "WGM", acting on behalf of A, wrote to B stating that under the provisions of the Guide to the Professional Conduct of Solicitors 1999 his acting as an arbitrator or mediator in relation to a dispute in

which he had acted as a professional adviser to either party was prohibited and that he should accordingly now cease to act in that capacity. He was, at the same time as acting as arbitrator, also advising C in connection with the business of the trust companies and was acting on behalf of those companies themselves. He had concealed from A information received from the Bahamian Police which he should have disclosed to A as a former client. He had also taken advice about Swiss law from O of Firm D although A had previously told him that such firm had a conflict of interest. The letter also called for delivery up by 4pm on the following day of all documents which related to or were generated in consequence of B's retainer by A.

48. On 8 June 2005 Clifford Chance, acting on behalf of B, replied to WGM challenging the statements that B had ever acted for A in the disputes the subject of the arbitration or that he had advised C in relation to the business of trust companies or that he had acted for the companies themselves. Further, he had no obligation to disclose the Police letter and declined to do so. Moreover, it was not open to one party to the arbitration to remove an arbitrator unilaterally and B would not cease so to act. Meanwhile, on 7 June, the injunction in A's Bahamian proceedings was discharged on the grounds that the court had no jurisdiction to grant supporting relief for a Swiss arbitration.

49. On 10 June 2005 Gloster J. directed that A should issue proceedings in Switzerland to set aside B's orders by 20 June.

50. On 14 June 2005 WGM again wrote to Clifford Chance stating that B should resign as arbitrator, failing which, A would apply for his removal.

51. On 17 June 2005 Lane & Partners wrote to B on behalf of A stating that an application for his removal would be made in Switzerland and that he should take no further steps as arbitrator pending that application. On the same day by a consent order the English injunction was discharged unless by 4pm on 23 June 2005 A issued proceedings against B in Switzerland and provided copies of his application to B's solicitors.

52. On 22 June 2005 B wrote to A, C and D informing them that he was advised that there was no basis for his removal under either English or Swiss law, and that his present view was that he should proceed with the arbitration and asked for C's and D's views and that by 25 June the parties should make submissions in writing as to whether the Bahamian proceedings started by A were a breach of the arbitration agreement. I interpose that under paragraph 2.1 of the arbitration agreement the parties had agreed to "a standstill in relation to (a) beginning new proceedings." Accordingly, if the arbitration agreement were still in force, A's commencement of the Bahamian proceedings was indeed on the face of it a clear breach of that provision. C and D stated in response that B should continue with the arbitration. On 22 June 2005 Lane & Partners reiterated to B's solicitors that A would apply in Switzerland to have B removed on the basis of the invalidity of the arbitration agreement. However, for reasons which have not been explained A failed to issue any proceedings in Switzerland and on 24 June 2005 Weil, Gotshal & Manges informed B's solicitors that the English proceedings were to be discontinued.

53. On 27 June 2005 WGM, on behalf of A, wrote to B stating that he had no authority to decide whether A's Bahamian proceedings were in breach of the arbitration agreement. Matters relating to the assets of the A Trust were exclusively within the jurisdiction of the Bahamian courts. Further, the letter stated:

> *"As you are fully aware our client is about to challenge your appointment as alleged arbitrator in Switzerland and your ongoing breach of your professional duties is about to become the subject matter of proceedings in England. Furthermore, the agreement pursuant to which you are purporting to be acting is void, represents a breach of trust by D and is arguably being used as a potential engine for fraud on the A Trust. In the circumstances, colluding with C and D to further the ends of that agreement is not a bona fide act and we will not be party to it by condescending to make submissions in a process which is discredited and invalid in any event."*

54. On 1 July 2005 A's children began the Children's Action in the Bahamas. They claimed the removal of D as trustee and of C as protector of the A Trust and an order restraining D, C and A from taking any steps in the arbitration on the basis that by the terms of the A Trust the rights of all parties were subject to the exclusive jurisdiction of the Bahamian Court. Amongst the relief claimed was an order for an account and inquiry as to the property of the A Trust and D's dealings with it.

55. On 13 July 2005 at a hearing before Gloster J. A was given leave to discontinue the English injunction proceedings.

56. On 22 July 2005 D commenced further proceedings in the Bahamas for enforcement of orders previously made by B in the arbitration that A should release to D the documents stored in Building A in Nassau.

57. I interpose that at this point there were therefore currently in being three active proceedings in the Bahamian courts:- A's 7 June Action, the Children's Action and the Building A Action. The first two actions raised fundamental issues as to the operation of the A Trust the extent of the trust property and the title to and beneficial interests in the trust property. The last action was closely related to those issues in as much as it was in effect concerned with whether D as trustee or A controlled property represented by documents in Building A. That issue in turn depended on whether B's arbitration orders were valid and effective with regard to those documents.

58. On 26 July 2005 WGM, on behalf of A, wrote to B, C and D stating that A declared the arbitration agreement to be rescinded on the basis that he entered into it under influence of material error, deception and duress. Specifically A alleged that B had failed to implement the 4-point memorandum of 28 July 2004 (see paragraph 30 above) and denied its existence and accordingly A had entered into the arbitration agreement under a fundamental error. The arbitration agreement was illegal and unconscionable because B was not independent from the parties to it and could not validly act as arbitrator or rely on the express waivers as to his impartiality in the arbitration agreement.

Further the arbitration agreement had been procured by deception and fraudulent misrepresentation by C made by himself and (non-fraudulently) through B as his agent that C had not removed A and his children from the class of discretionary objects of the A Trust. But for those misrepresentations he would not have entered into the agreement. Such misrepresentations were joined in by D. Further the arbitration agreement had been procured by duress by means of the commencement of the criminal proceedings against A in the Bahamas and threats to commence other such proceedings elsewhere. The misrepresentation both caused A to enter into the arbitration agreement and to participate in the arbitration and therefore all orders made by the arbitrator (B) and all transfers of documents and transfers of the control of companies were ineffective. Finally the arbitration agreement was induced by economic duress by C and D against A in June and July 2004 by acting together to exclude A from the management and control of A Group and Company K.

59. It was against that background that on 19 August 2005 A's claim form was issued in the present proceedings. The original three defendants were B, C and D. Company E was joined later.

60. As against B, C and D, A's claim can be outlined as follows.

61. A claims a declaration that the arbitration agreement is void and that it has been properly and validly avoided and in English and Swiss law rescinded and further that all orders or awards made or purported to be made by B are void and unenforceable. It is further claimed that the arbitration agreement is inoperative and incapable of being performed. A further claims against B an injunction preventing him from continuing to take any steps as arbitrator or otherwise under the arbitration agreement, holding himself out as having or exercising any jurisdiction to hear or decide any disputes between A and C and D and using or revealing any confidential information belonging or relating to A or his interests in A Group or the A Trust other than in accordance with his written instructions. Other injunctive relief includes orders that B should abide by the terms of the agreement reached on 28 July 2004 requiring B to deliver up to A house deeds which D had previously transferred by D to B. Further there were claims for orders requiring B and D to deliver up to A all the documents transferred to them under the arbitration agreement and to cease acting on the basis of any authority or power or right derived from the operation of the arbitration agreement.

62. There were also included claims for damages for breach of contract and/or duty and/or undertaking and/or pursuant to sections 2(1) and/or (2) of the Misrepresentation Act 1967 against each of B, C and D in respect of various misrepresentations said to have induced A to enter into the arbitration agreement, including representations made by C and D and representations made through the agency of B, amongst which was the representation that A and his children continued to be beneficiaries under the A Trust. The damages claims included claims against B for breach of his fiduciary duty as A's solicitor, there having been no informed consent by A to waiver of his rights against B as his solicitor as specified in the arbitration agreement. A further alleged specific breaches of duties or undertakings given to A in failing to abide by the 11 point memo or the 4 point memo of 28 July 2004 or to retain the

latter. A claims on the basis of these breaches of fiduciary duty that he is entitled both to avoid the arbitration agreement and to recover damages. It is also alleged against B that A is entitled to recover damages for breaches professional duty by acting contrary to Rule 1 of the Solicitors Practice Rules 1990 by entering into the arbitration agreement.

63. The claim against C is wide-ranging and the foundations of it are described in paragraphs 6.1 to 6.3 of the Particulars of Claim in these words:

> *"6.1 In the period from May 2004 until 26 July 2005 the Claimant was the victim of a fraudulent scheme carried on by the Second Defendant in which he was assisted directly or indirectly by the First and Second Defendants. Without discovery the Claimant cannot state whether the First Defendant was knowingly involved in the scheme. The aim of the Second Defendant's fraudulent scheme was to obtain total control of the A Group of companies and to exclude the Claimant from all rights and interests in it and A without paying any or any sufficient consideration. Significant elements of the said fraud were perpetrated in England.*
>
> *6.2 The scheme was (1) secretly to purport to remove the Claimant and his children from membership of the class of discretionary objects of the A Trust then (2) use unlawful, illegitimate and fraudulent means to cause the Claimant to enter into the Agreement with the effect that (3) control and direction of the A Group companies and A Trust would pass from the Claimant to the Second Defendant and the ownership thereof would pass to the Third Defendant as trustee of the A Trust by (4) fraudulently leading the Claimant to believe that no attempts had been made to remove him from the said class (and that his interests in the A Trust and underlying A Group were therefore secure) while (5) ensuring that his (the Second Defendant's) interests were secure against enforcement of any award by keeping them or moving them into jurisdictions where any ward made under the Agreement would be unenforceable (eg. Liechtenstein).*
>
> *6.3 The Claimant therefore contends that the Agreement is an instrument of, or is designed to facilitate, the Second Defendant's fraud and is therefore void and unenforceable as being contrary to public policy."*

64. In addition to those matters already referred to, it includes claims for damages for fraudulent misrepresentation, alternatively negligent misrepresentation, breach of the oral contract on November 2001 by failing to repay to A US$88 million or US$37.5 million and an inquiry to determine such further sums as would be required to be paid by C to A in order that A should receive a sum equivalent to 50 per cent of all profits of the A Group in the period January 1990 to November 2001 and payment of such sums to A.

65. It will at once be seen that these claims against C would be amongst those which fell to be determined under the arbitration agreement and, in as much as A was claiming the profits of the A Group, would overlap with the relief sought in his Bahamas Action and in the Children's Action by reason of the issues as to the A Trust and as to the party who owned the A Trust.

66. The claims made against Company E relate exclusively to moneys derived from or associated with the Company M proceedings brought by Company E. A provided security for costs in those proceedings and alleges that he was induced to do so by assurances given by B that, should the claim by Company E succeed A would be repaid his security first, that B's understanding was that the profits in Company E were held beneficially for A and C in equal shares and that P would remained a director of Company E. He alleges that on 9 July 2004 he put up security in the amount of £149,500 in the belief that he remain a beneficiary of the A Trust, that he would therefore ultimately benefit from Company E's damages claim and that B and Firm A would act exclusively on his instructions pursuant to the terms of an Instruction Agreement made in an email exchange in April/May 2004 and to which B, C and D, but not Company E, were said to be parties.

67. The real dispute with regard to Company E which emerges somewhat indistinctly from A's pleading is as to which of A or C is entitled to the assets of Company E, including in particular the amount of the moneys paid by way of Part 36 settlement payment and accepted in settlement by Company E and the amount of the security for costs. Thus A's sole claim for relief against Company E is for an inquiry as to and/or an account of all sums owing to him from Company E and/or D as the security or out of the proceeds of the Company M proceedings or otherwise and judgment for payment of the amount found to be due to him.

68. Service of these proceedings on C and D outside the jurisdiction was permitted by the order of Andrew Smith J. on the basis of A's claim that the oral agreement made at Claridges in anticipation of C's operation on 14 November 2001 was made in England and is governed by English law by application of Article 4.5 of the Rome Convention, England being the country with which the agreement was most closely connected. As to the claims for relief against C in respect of the arbitration agreement, that agreement was made in London and the torts committed in relation to its negotiation were committed by acts done in London causing damage to be sustained in England. Further, C was a necessary or proper party to the claim against B.

69. Leave to serve the proceedings on D in the Bahamas was granted on the basis that he is a necessary or proper party to the claim against B. Reliance also appears to have been placed on the arbitration agreement having been made in England, the proceeds of the Company M Action being in England, the breach of the agreement as to the proceeds of that action having occurred in England and misrepresentation as to those who were beneficiaries under the A Trust having been made in England as well as the tort of deceit having caused damage in England.

70. On 2 December 2005 A issued an application for an interim injunction against B restraining him from taking any further steps as arbitrator until the hearing of an application for a stay of these proceedings and/or for an order that this court had no jurisdiction. The hearing took place before David Steel J. on 19/20 December 2005 and on 12 January 2006 he rejected that application. Having held that the exercise of an injunctive jurisdiction with regard to a foreign arbitration must be dependent on wholly exceptional circumstances, he

concluded that A could not show that B had invaded or threatened to invade a legal or equitable right by proceeding with the arbitration or that B had behaved or threatened to behave in an unconscionable manner. Swiss law governed the relationship established by the arbitration agreement and, accordingly jurisdiction should be disputed before the arbitrator and thereafter in the Swiss court, the English court not being a natural or appropriate forum.

71. David Steel J. having refused leave to appeal, the application for permission and, permission having been given, the substantive appeal were heard by the Court of Appeal on 20 February 2006. Judgment was given on 8 March 2006 dismissing the appeal. The judgment of the court delivered by Lord Phillips LCJ rested on six essential grounds:

i) *"A and C, each of whom was receiving independent legal advice, expressly agreed that their disputes should be resolved by B under arbitration which would be governed by Swiss law and have its seat in Switzerland.*

ii) *The natural consequence of this Agreement was that any issues as to the validity of the unusual provisions of the Arbitration clauses would fall to be resolved in Switzerland according to Swiss law.*

iii) *This consequence accords with principles of the law of international arbitration agreed under the New York Convention and recognised by this country by the 1996 Act.*

iv) *For the English court to restrain an arbitrator under an agreement providing for arbitration with its seat in a foreign jurisdiction to which the parties unquestionably agreed would infringe those principles.*

v) *Exceptional circumstances may, nonetheless, justify the English court in taking such action. Whether such circumstances exist will be a matter to be resolved by Colman J. and nothing in these reasons is intended to influence his decision in that regard.*

vi) *No special circumstances have been shown which justify taking such action on an interim basis, pending the hearing before Colman J."*

B's Case

72. The substance of B's application for a stay is set out with commendable precision in Appendix A to the Application Notice in the following words:

> *"The First Defendant ("the Arbitrator") seeks an order that the action against him be stayed on the grounds that:*
>
> *1. the proceedings concern an arbitration the seat of which, as provided for in clause 1.3 of the Arbitration Agreement, is Geneva, Switzerland and which is expressly governed by Swiss law;*
>
> *2. the matters raised in the Particulars of Claim are all, or essentially, either (a) matters of substance that fall within the scope of the*

Arbitration Agreement and should accordingly be decided by the Arbitrator or (b) matters alleged to go to the jurisdiction of the Arbitrator which should be decided by the Arbitrator, at least in the first instance (subject to any review by the Swiss Courts);

3. accordingly, as they concern matters agreed to be subject to arbitration, the proceedings should be stayed under sections 2(2)(a) and 9 of the Arbitration Act 1996 and/or under the inherent jurisdiction of the Court;

4. insofar as, notwithstanding (1) to (3) above, any of the matters raised in the Particulars of Claim should be decided by any Court (as opposed to being decided by the Arbitrator), they should be decided either (a) by the Swiss Courts, being the Court(s) at the seat of the arbitration or (b) the Courts of the Bahamas, where certain proceedings are already pending between the parties and, accordingly, these proceedings should be stayed on the basis of forum non conveniens and/or lis alibi pendens;

5. further, in all the circumstances, the action against the Arbitrator should be stayed under the inherent jurisdiction of the Court because it is an abuse of process, vexatious and oppressive and/or an illegitimate attempt to invoke the jurisdiction of the English Court to disrupt a foreign arbitration."

73. In essence therefore the basic issue raised by this application is whether, given that the seat of the arbitration is indisputably Geneva, this court should decline to exercise the jurisdiction which it unquestionably has over B in respect of the claims against him as an appropriate arbitrator under a void or rescinded arbitration agreement and as to the various personal claims for damages for breach of his various alleged duties to A.

74. It is to be noted that this is not an application for a stay under Section 9 of the Arbitration Act 1996. It is very properly conceded by Mr Graham Dunning QC on behalf of B that although B is indeed a party to this most unusual arbitration agreement, nonetheless Section 9(1) does not apply to a claim brought by one of the parties to the arbitration agreement, whose disputes have been referred to arbitration, against the arbitrator for a declaration or injunction on the grounds of the invalidity of the agreement or of his appointment.

C's Case

75. C relies on three bases for his application:

i) A's failure to comply with his duty of full and frank disclosure upon the without notice application;

ii) the Court has no jurisdiction; and

iii) if, contrary to (ii), the Court does have jurisdiction, it should not exercise that jurisdiction on forum non conveniens grounds.

76. Further, A had no reasonable prospect of success on any of his arbitration claims. In summary, as to non-disclosure, C's submissions are as follows.

i) There was a failure to disclose that A had already commenced and discontinued a claim in his first English action for an order preventing B from acting as arbitrator.

ii) A did not disclose that he had already given to this court, and failed to abide by, an undertaking to bring proceedings in Switzerland to challenge B's orders.

iii) Nor did he disclose that he had repeatedly threatened to bring proceedings in Switzerland to have B removed as an arbitrator.

iv) He did not disclose that in his first English proceedings he had submitted that paragraph 1.9 of the arbitration agreement (waiver of the right to challenge an award) was invalid whereas his evidence upon the application to serve out was that it was valid.

v) He did not disclose that his case on the terms of the oral agreement of November 2001 advanced on this application was inconsistent with that put forward in the arbitration and in the first English proceedings.

vi) He failed to disclose that it was his own lawyers and not C's who proposed that the arbitration agreement be governed by Swiss law.

vii) He did not disclose paragraph 2.1(a) of the arbitration agreement which imposed an immediate standstill on new proceedings, including, arguably, the present action.

viii) A failed to disclose that in A's Bahamian action and in the Children's Action he and the other claimants had introduced matters relating to the arbitration, for example, the contention that B's sending documents of transfer to D was in breach of Swiss law and the claim for an inquiry as to which property was held on the terms of the A Trust or the B Trust and the C Trust which involved an investigation as to the effect of the release by B of the transfer documents on 1 June 2005 and had failed to disclose that in the Children's Action allegations were made that D acted in breach of trust or fiduciary duty entering into the arbitration agreement.

ix) There was failure to disclose the Building A action and the fact that there had previously been reliance by A on the validity of the arbitration agreement.

x) A failed to disclose that as regards the misrepresentations now relied on he had changed his case by comparison with what he had originally put forward in WGM's letter of 26 July 2005. In that letter it had been alleged that the misrepresentation made at a meeting in July 2004 that A and his children remained beneficiaries of the A Trust had been that of B on behalf of C and by C by his conduct, whereas in the Particulars of

Claim it was now alleged that C himself and B had orally made the misrepresentation.

77. It was said that these facts were all material to the decision of this Court on the without notice application and ought to have been disclosed in accordance with the principles set out in Brink's Mat Ltd v. Elcombe [1988] 1 WLR 1350. Consequently, the order giving permission to serve out ought to be set aside.

78. C's case as to jurisdiction is as follows.

i) He can only be a necessary or proper party (CPR 6.20(3) in respect of the claims relating to the arbitration provided that this court assumes jurisdiction over B. However, given that the seat of the arbitration is Geneva, such jurisdiction should not be assumed.

ii) As to CPR 6.20(5)(a) – contract made within the jurisdiction, the arbitration agreement was not made in London but the Bahamas when the final draft was signed by D on 30 July 2004. The oral agreement of November 2001 said to have been made at Claridges was never entered into – either by C or by his daughter as C's agent. The agreement with C with respect to security for costs provided by A in the proceedings brought by Company E against Company M, having been made by email exchanges, had not been proved by A's evidence.

iii) As to CPR 6.20(5)(c), agreement governed by English law, this is relied on only with regard to the oral agreement of November 2001 and, even if, which is in issue, it was ever entered into, it was not impliedly subject to English law, having been made by two Israeli citizens both of whom were residents of the Bahamas, A, having until very recently been living there.

iv) As to the claim in tort, C's case is that it is incredible and that there is not a serious issue to be tried.

79. C's case as to forum non conveniens is as follows.

i) All the claims against C other than the arbitration claims fall within the scope of the arbitration agreement, including the claims under the November 2001 oral agreement and claims with regard to Company E.

ii) The seat of the arbitration was Geneva and the agreement was expressly governed by Swiss law. Therefore the only appropriate courts for determining the validity of that agreement were the Swiss courts which had supervisory jurisdiction over the arbitration, including a jurisdiction to consider whether an award or order or arbitration agreement should be set aside, whatever the arbitrator might have decided pursuant to kompetenz kompetenz.

iii) By paragraph 1.10 of the arbitration agreement the parties agreed to submit to "the jurisdiction of any court in which they or any of them are sued to enforce any determination or award". D has commenced

proceedings in the Bahamas (the Building A action) to enforce orders made by the arbitrator in the arbitration in respect of delivery up of the documents stored in Building A.

80. In view of the fact that the seat of the arbitration was Geneva and that many of the issues raised in these proceedings fell within the scope of the arbitration and also fell to be determined in the pending proceedings in the Bahamas, - A's Action, the Children's Action and the Building A Action – all of which raised issues as to or connected with the Bahamian Trust, the A Trust – England was the least appropriate forum, after the arbitration and the Bahamas.

D's Case

81. D relies on material non-disclosure at the time of A's original application for leave to serve out, want of jurisdiction, forum non conveniens and lack of any reasonable prospect of success on the arbitration claims.

82. As to jurisdiction under CPR 6.20, D makes the following submissions.

i) Necessary or proper party. If B successfully challenges the court's jurisdiction, D cannot be a necessary or proper party.

ii) CPR 6.20(2) – the claim for a mandatory injunction that D confirm in writing that A is authorised to instruct Firm A in relation to the Company M action has no prospect of success.

iii) CPR 6.20(5)(a) – contract made within jurisdiction. The arbitration agreement was not made in England but in the Bahamas where D initialled the final draft. The claim as to agreement with regard to the Company M case has no prospect of success.

iv) CPR 6.20(6) – breach of contract within the jurisdiction. The only claim is with regard to the agreement in respect of Company M as to which there is no prospect of success.

v) CPR 6.20(8) – misrepresentations within the jurisdiction. While submitting that the case in deceit against D is not sufficiently pleaded, it is submitted that the representations that A and his children were beneficiaries under the A Trust allegedly made in a petition to the Preliminary Injunction Court in Rotterdam on 18 June 2004 and to the Court of First Instance of the District Law Court of Antwerp on 22 June 2004 were not made within the English jurisdiction. They were made before the date (6 July 2004) of the notices which C is said to have placed in a sealed envelope handed to D and long before the date (January 2005) on which the sealed envelope was opened which was the earliest date when the notices could have become effective. The repetition of those representations by Q on 11 October 2004 was made after the parties had entered into the arbitration agreement and so could not have induced it. Accordingly, the English court either has no jurisdiction over such claims against D or the claims are untenable.

Company E's Case

83. It is said that as D has undertaken to hold the proceeds of the Company M proceedings pending the determination in the arbitration of A's claim to a 50 per cent share, there is no basis for permitting this claim to continue unstayed. The underlying issues fall well within the scope of the arbitration agreement and the disposition of the moneys is not imperilled as held by D. In these circumstances the English court is an appropriate forum and if the arbitration is not an available forum, it is more appropriate that the issues should be resolved in the same forum as other issues as to A's assets, namely the Bahamas.

Discussion

84. There can be no doubt, in my judgment, that the key to the jurisdictional contest presented by these applications is the disposal of that by B. For, if this court reached the conclusion that a stay of the claims against B ought to be ordered, the consequence would be that, unless it was prepared to permit parallel proceedings against C, D and Company E in respect of the same issues both in the continuing arbitration and in this court, the claims against C and D should, as a matter of discretion, not be permitted to proceed and that against Company E should be stayed. Indeed, in as much as many of the claims against C and D could be advanced only on the basis that they were necessary or proper parties to the proceedings against B, were the latter proceedings to be stayed, there would be no jurisdiction to entertain those claims against C and D. Furthermore, if and to the extent that a jurisdictional basis under CPR 6.20 could be made good for those claims, and assuming that each presented a serious issue to be tried, one factor in the exercise of this court's discretion as to whether to permit service outside the jurisdiction would be the likely outcome of either or both of C and D subsequently applying to stay these proceedings under Section 9 of the Arbitration Act 1996. If at the stage of the hearing of an application such as this to set aside a without notice order for service out, it can confidently be assumed that the parties so impleaded will subsequently apply for and obtain a Section 9 stay, it would be a completely futile exercise to permit them to be joined. That this would be so has long been recognised in this court which has consistently taken the approach identified in the judgment of Mustill J. in A & B v. C & D [1982] 1 Lloyd's Rep 166. In that case the court had to decide how to exercise its discretion under RSC Order 11 where a basis for jurisdiction had been made good but the claimant and intended defendant were parties to an arbitration agreement to which section 1 of the Arbitration Act 1975 applied, namely an international agreement in relation to which the parties were entitled to a mandatory stay of proceedings in respect of any matter agreed to be referred to arbitration. It was argued on behalf of the plaintiff that, in effect, the application to set aside service should be kept insulated from any future application under the 1975 Act. In rejecting this argument Mustill J. said this (at pages 171 – 172).

> *"If this argument were correct, the plaintiffs would be in a strong position as regards the discretion, for the dispute between the plantiffs and C could, as I have already suggested, most conveniently be dealt with as part of the action which is already on foot against D. This would avoid duplication of the evidence and argument and the risk of inconsistent decisions in two*

separate proceedings. There would also be important procedural advantages, since oral evidence and discovery adduced by one party would form part of the material in the proceedings against the other. I am, however, of the opinion that the plaintiff's objection is not well-founded. I quite agree that the presence of an arbitration clause in the contract sued upon is not a bar to the initial grant of leave under RSC O.11; for the defendant may choose not to rely on the clause, or (in cases falling within s.4(1) of the 1950 Act) the Court may decline to exercise its discretion in favour of granting a stay. Indeed, one not infrequently finds that a London arbitration clause is relied upon to found jurisdiction under RSC O.11 on the ground that the presence of the clause signifies an implied choice of English law. The position is, however, quite different where the defendants is entitled to a stay, as of right, under the 1975 Act, and makes it plain that this is a right which he intends to assert. Here, the upholding of the leave granted ex parte is an empty formality as it will immediately be followed by a successful application to stay. The difference between accepting jurisdiction over the claim and then renouncing it in favour of arbitration, and renouncing it directly, is one of form alone; in this instance there is no practical distinction between a summons to set aside a leave granted ex parte, and a summons to stay under the 1975 Act.

Accordingly, I think it legitimate to decide the present application by asking whether if it had taken the shape of an application to stay, C would have been entitled to succeed."

85. Accordingly, if the appropriate order is that the arbitration claims against B should be stayed to enable the arbitration to proceed, the continuation of proceedings in this court against C and D could not be appropriate in the interests of justice. Further, if either or both of them would be entitled to a stay under Section 9 of the 1996 Act if they became parties to these proceedings, there could be no justification for the exercise of this court's discretion so as to enable them to be joined, even if it might otherwise have jurisdiction.

86. The two threshold questions are therefore:

    i) Should there be a stay of these proceedings against B?

    ii) If C and D were allowed to be served and to become parties, could they successfully apply for a stay under Section 9 of the 1996 Act.

Should these Proceedings be stayed as against B?

87. It is argued by Ms Barbara Dohmann QC on behalf of A that, following the decision of the European Court in Owusu v. Jackson [2005] QB 801, because B is domiciled in England, which is not disputed, even if the most appropriate forum is in a non-member state by reason of Article 2 of the Lugano Convention and Judgments Regulation, to both of which I refer as "the Regulation", the English Court cannot decline jurisdiction on forum non conveniens grounds. It is submitted that the arbitration exception under Article 1 of the Regulation does not apply to the claim against B for the following reasons.

i) The claim against B is primarily to enforce B's civil obligations which arise out of the contractual and fiduciary relationship of solicitor and client which is governed by English law.

ii) The arbitration exception in Article 1 of the Regulation applies to proceedings only if arbitration is the "principal object" of such proceedings, as indicated in The Ivan Zagubanski [2002] 1 Lloyd's Rep 106, approved by the Court of Appeal in Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co Ltd [2005] 1 Lloyd's Rep 67.

iii) In order to identify for this purpose the principal object of the proceedings the court must consider the entire claim. It is not permitted to take an application or issue which arises within that claim and to ask whether, in isolation, that application or issue would appear to fall inside or outside Article 1. Reliance is placed on Owens Bank Ltd v. Bracco [1999] ECR 1-117 at paragraphs 34-37.

iv) Further one looks exclusively at the claim in order to identify the principal object and not at the defence or the reply.

88. The application of these principles leads to the conclusion that the principal object of the claim in this case was not arbitration.

89. As appears from paragraph 58 above, the preponderance of the claims against B are founded on the allegation that A is entitled to have the arbitration agreement avoided ab initio by reason of A having been induced to enter into it by fraudulent misrepresentations made by C and non-fraudulent misrepresentations made by B, as well as on the grounds of duress. These claims are the basis upon which A claims a permanent injunction restraining B from taking any further steps as arbitrator or under the arbitration agreement or holding himself out as having jurisdiction to hear or decide disputes under the arbitration agreement or using or revealing information confidential to A which he would otherwise have been entitled to use without A's consent under the terms of the arbitration agreement. Further, A claims a mandatory injunction for the delivery up to A of all documents transferred to B and D under the arbitration agreement and an injunction to cease acting on the basis of any authority, power or right derived from the operation of the arbitration agreement. A also claims that he is entitled to avoid the arbitration agreement by reason of breaches by B of undertakings in relation to the so-called 11 point memo and the 4 point memo and of breach by B of fiduciary duty to A. Thus, if any of A's claims as against B to avoid or rescind the arbitration agreement succeed, the arbitration will be terminated and, if the agreement is avoided ab initio, all the arbitrators' orders will be set aside. Although, as explained in paragraph 58 above, there are various additional claims for damages against B, for none of these does not relief claimed engage the future operation of the arbitration. I refer to them as "the Personal Claims against B".

90. In considering whether any of these claims are excluded from the operation of the Regulation by Article 1.4 it is important not to lose sight of the hybrid nature of the arbitration agreement, its function being both as a settlement

agreement and a dispute resolution agreement. However, its core consisted of the arbitration provisions and all that had passed between A, C and D up to their entering into that agreement was, if and in so far as it gave rise to disputes, within the scope of the reference. What was not within its scope were personal damages claims against B.

91. In the Schlosser Report prepared with regard to the Accession Convention applicable to the accession of the United Kingdom and others to the EU, it is stated at paragraph 64:

> *"The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law in the procedure known as "statement of a special case" (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention".*

92. Clearly, with regard to the last sentence, if a judgment as to whether an arbitration agreement was valid falls outside the application of the Regulation, so also must proceedings the purpose of which is to obtain relief to that effect.

93. In Van Uden Maritime BV v. Kommarditgesellschaft in firma Deco-Line [1998] ECR 7091 the European Court referred to and adopted this Report stating:

> *".. that the Convention does not apply to judgments determining whether an arbitration agreement is valid or not or, because it is invalid, ordering the parties not to continue the arbitration proceedings, or to proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards."*

94. In the English courts in The Ivan Zagubanski [2002] 1 Lloyd's Rep 106 Aikens J., following the substance of the reasoning of the European Court and of the opinion of A-G Darmon in Marc Rich v. AG Societa Italiana Impianti [1992] ECR 1-3855 and of my own judgment in Toepfer International Gmbh v. Societe Cargill France [1997] 2 Lloyd's Rep 98, identified the key analysis applicable to the scope of the arbitration exclusion in these words:

stated, at paragraph 71, as follows: *"In my respectful view the opinion of Mr. Advocate-General Darmon [in the Marc Rich case] is comprehensive and its analysis compelling. The theme and overall conclusion of it is that the Brussels Convention does not apply to any Court proceedings or judgments in which the principal focus of the matter is "arbitration". That includes proceedings concerning the validity or existence of an arbitration agreement; the appointment of arbitrators; ancillary assistance to arbitration proceedings and the recognition and enforcement of awards".*

95. In Through Transport Mutual v. New India Assurance Co Ltd [2005] 1 Lloyd's Rep 67, Clarke LJ stated at paragraph 47:

> *"In the result Mr Justice Aikens, in our opinion correctly, held that the question in each case is whether the (or a) principal focus of the proceedings is arbitration. Another way of putting the same point is to ask the question posed by Mr Justice Rix in The Xing Su Hai, namely the essential subject matter of the claim concerns arbitration."*

96. While accepting that, as submitted on behalf of A, in order to identify the principal object of the proceedings it is necessary for the court to consider the entire claim, as distinct from any defence and further that one cannot deploy a sub-issue or application within a claim to characterise the claim as falling inside or outside the Regulation, I have no doubt that the claims in the present proceedings have as their object the avoidance of the arbitration agreement and the setting aside of the orders already made by B in his capacity as arbitrator and that looked at as a whole they are claims the principal object or focus of which is arbitration in the sense that they are designed to impugn the validity or existence of the arbitration agreement and the jurisdiction of the arbitrator.

97. I therefore hold that all those claims against B which are for relief the effect of which is to set aside the arbitration agreement, permanently stop the arbitration and/or to set aside B's arbitral orders are within the arbitration exclusion in Article 1(4). The balance of the claims against B personally – the non-arbitration claims – do not fall within the exclusion.

98. It is then submitted on behalf of A that this court should not stay the proceedings against B in exercise of its inherent jurisdiction. The essence of this submission is that the English court should exercise its inherent jurisdiction to stay those proceedings analogously to the manner in which it would decide whether to grant a stay under Section 9 of the 1996 Act if that provision applied to B as a party to the arbitration. For this purpose in a case where, as in this case, there is an issue whether the arbitration is "null and void, inoperative or incapable of being performed", as in the proviso to the mandatory stay under Section 9(4) of the 1996 Act, the court will not grant a stay under its inherent jurisdiction unless it has first determined whether there is a valid and extant arbitration agreement and that the issue between the parties falls within its scope. Accordingly, no stay should be granted until this court has determined that issue. The fact that under Swiss arbitration law an arbitrator would have

jurisdiction to determine such matters as the validity of the arbitration agreement going to his own jurisdiction and that his decision would be subject to review in the Swiss Court is nothing to the point. That is simply a matter of Swiss procedural law which has no part to play upon an application for a stay in this court for here it is English procedure which exclusively applies and under English procedure no stay can be granted unless the court has first determined the issue of validity of the arbitration agreement raised by A.

99. In support of this submission Ms Dohmann relies on the observations of Woolf LJ. in Etri Fans Ltd v. NMB (UK) Ltd [1987] 1 WLR 1110 at page 1114 with regard to the residual nature of the English court's inherent jurisdiction in parallel with its statutory stay jurisdiction under Section 9.

> "*I prefer the submission of Mr Boyd that there is such an inherent jurisdiction in the court. In particular, in order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However, as Mr Boyd concedes, because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory provision, but where it could or would not do so in exercise of its statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions."*

100. Ms Dohmann also refers to the following passage in the judgment of Waller LJ. in Ahmed Al-Naimi v. Islamic Press Agency [2000] 1 Lloyd's Rep 522 at p525.

> "*The only other point I would make so far as the above approach is concerned is that it must not be overlooked that the Court has an inherent power to stay proceedings. I would in fact accept that on a proper construction of s.9 it can be said with force that a Court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the Court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the Court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first. If for example, the Court thinks that it would take a trial with oral evidence to decide whether matters the subject of the action were actually within the scope of an arbitration clause, but that it was likely that on detailed inquiry the subject matter of the action will be found to be covered by the arbitration clause; and particularly if an arbitration was bound to take place in relation to some issues between the parties, and where having explored the details necessary to found jurisdiction, it would only be a short step to deciding the real issues, it will often be sensible for the Court not to try and resolve that question itself but leave it to the arbitrator."*

101. Further Ms Dohmann draws attention to the fact that in that case the Court of Appeal approved the decision of HHJ Humphrey Lloyd QC in Birse Construction Ltd v. St David Ltd [1999] BLR 194 in which that judge rejected

an argument that upon an application for a stay a court must necessarily refer to the arbitrators a dispute as to whether or not an arbitration agreement exists: it was a matter to be decided in each case whether the issue should be determined by the court or left to the arbitrator but the court should determine the issue unless it considered it "virtually certain" that there was an arbitration agreement or if the dispute was merely about the ambit or scope of the arbitration agreement.

102. In further support of her submission Ms Dohmann refers to an observation of Gross J. in Anglia Oils Ltd v. Owners of the Marine Champion [2002] EWHC 2407 to the effect that, upon an application for a stay on the grounds of a (disputed) binding agreement to arbitrate in New York the granting of a stay to enable the issue of whether there was a binding agreement to arbitrate to be decided by the arbitrator "would be inappropriate [as] in practical terms it involves determining the issue by the back door."

103. Ms Dohmann further relies on the judgment of Mann J. in Law Debenture Trust Corporation v. Elektrim Finance BV [2005] 2 All ER (Comm) 476 in which he stated:

> "*…if a claimant is saying, on good grounds, that he never agreed to arbitrators deciding a particular dispute, then it seems rather unfair that he should be compelled to have that very dispute decided by the arbitrators whose very authority he is disputing".*

104. Reliance is also placed on behalf of A on the nature of his case for impugning the validity of the arbitration agreement, namely C's fraud, B's misrepresentations in breach of fiduciary duty and on the general principle, reiterated by Lord Bingham in HIH Casualty and General Insurance Ltd v. Chase Manhattan Bank [2003] 2 Lloyd's Rep 61, at paragraphs 15 and 16:

> "*[15] For as Lord Justice Rix observed more than once in his judgment (paras 160, 169), fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that that fraud unravels all: fraus omnia corrumpit. It also reflects the practical basis of commercial intercourse. Once fraud is proved "it vitiates judgments, contracts and all transactions whatsoever": Lazarus Estates Ltd v. Beasley [1956] 1 QB 702 at p712, per Lord Justice Denning. Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such assumption they would not deal. What is true of the principal is true of the agent, not least in a situation where, as here, the agent, if not the sire of the transaction, plays the role of a very active midwife. As Lord Justice Bramwell observed in Weir v. Bell (1878) 3 Exch D 238 and p245. I think that every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he make the contract."*

> *"[16] It is clear that the law, on public policy grounds, does not permit a contracting party to exclude liability for his own fraud in inducing the making of the contract…"*

105. It is argued that in as much as the arbitration agreement was on A's case, induced and initiated by fraud, it would be wrong in principle for this court to hold, provisionally, which it would, were it to grant a stay, that the arbitration agreement was valid.

106. Ms Dohmann also relies as persuasive authority on the decision of the Supreme Court of the United States in Buckeye Check Cash Ltd v. Cardegna 546 US (2006) in which Scalia J. stated that where the issue was whether a contract incorporating an agreement to arbitrate was vitiated by fraud, that was to be determined by the arbitrator, but where fraud was said to vitiate only the arbitration agreement as a separate agreement, the issue fell to be determined by the judge.

107. There can, in my judgment, be no doubt that the court retains an inherent jurisdiction to stay English proceedings in favour of arbitration in a case where there is an issue whether the parties entered into a binding agreement to arbitrate or whether the subject matter of the action was within the scope of the arbitration: see the observations of Woolf LJ. in Etri Fans Ltd v. NMB (UK) Ltd, supra, cited in paragraph (99) and of Waller LJ. in Ahmad Al-Naimi v. Islamic Press Agency, supra, cited at paragraph 100 above. Section 72 of the 1996 Act provides for a statutory right to apply for relief in such cases where a person who has taken no part in the arbitration, challenges the validity of the arbitration agreement. That provision applies only to cases where the alleged arbitration is an English arbitration. Where, however, the alleged arbitration agreement would provide for a foreign arbitration, one must look for a stay to the inherent jurisdiction of the court.

108. The arbitration claims against B have certain characteristics which are directly material to the exercise of the court's inherent jurisdiction.

i) The relief sought against B includes an injunction prohibiting him from proceeding with the arbitration and orders directing him to restore A to the position he would have been in if the arbitration had never commenced by returning to A documents which had been provided to B in his capacity as arbitrator/stakeholder. As such A seeks direct intervention by the court in the conduct of the arbitration, not merely by restraining the opposite party from proceeding with it, but by directly restraining the arbitrator himself from doing so and further by requiring him to restore A to his position before the arbitration commenced.

ii) The seat of the arbitration is expressly agreed to be in Switzerland, so, although Section 9 of the 1996 Act applies to it, none of sections 31, 32, 70, 72 or 73 do so. It is also expressly governed by Swiss law.

iii) The claims against B are brought many months after the arbitration has already commenced and after its settlement agreement dimension has

been partly performed for the benefit of A, the criminal compliant in the Bahamas having already been withdrawn.

iv) The basis of the case impugning the enforceability of the arbitration agreement is not that A never entered into such an agreement, for it is quite obvious that he did so, or that the disputes between him and the opposite arbitrating parties, C and D, do not fall within the scope of the arbitrator's jurisdiction, but that the agreement should be rescinded and avoided ab initio on the grounds of fraudulent misrepresentation by the opposite arbitrating parties and non-fraudulent misrepresentation and/or duress by B and the opposite arbitrating parties. Superadded to this basis however is the claim that B himself has been instrumental in passing on misrepresentations and has therefore partly been the cause of the voidability of the agreement appointing him arbitrator. If the issue of voidability fell to be determined by him he would therefore be judge in his own cause. He would also have a financial interest in continuing to act as arbitrator and, therefore, in the continuation of the arbitration. There is also the allegation that from the outset he has acted in breach of the professional conduct rules for solicitors who accept appointments as arbitrators.

109. This combination of characteristics is unique compared with any of the authorities relied on by either party. In particular, none of the English authorities relied on by A involved an application for a stay of English proceedings where, although an arbitration agreement binding on its face had clearly been entered into, the applicant for the stay had induced the other party to enter into the contract containing the arbitration agreement by fraudulent misrepresentation allegedly rendering the agreement void. Further, in none of these authorities was there an application to restrain the arbitrator himself from proceeding with the arbitration on such grounds. Nor was there any authority in which application had been made to restrain an arbitrator from proceeding with an arbitration in a foreign seat. Indeed, the authorities relied upon are concerned with the issue whether there ever had been a concluded agreement to arbitrate binding on the party against whom a stay of English proceedings had been sought. In the context of Section 9(1) of the 1996 Act this is a threshold point which is normally decided by the courts, although the authorities such as Etri Fans and Ahmed Al Naimi support the proposition that circumstances may sometimes justify a stay under the inherent jurisdiction of the court so as to enable the arbitrator to decide this issue.

110. In this connection the observation by Gross J. in Anglia Oils, supra, at para 16 of his judgment that to grant a stay, leaving it to the arbitrators to decide whether the defendant was a party to the arbitration clause in the bill of lading would be inappropriate for in practical terms it involved determining the issue (which in that case was crucial to the substantive liability of the defendant as a party to the bill of lading) "by the back door" has to be read in context. In other words, the grant of a stay would allow the arbitrators to determine the underlying privity issue by permitting them to decide the jurisdiction issue. He then decided that the Section 9(1) threshold was crossed and stayed the proceedings in favour of the arbitration. He was therefore making no

observation relevant to the issue now before the court. Nor was he making any statement of general principle with regard to the granting of a stay under the inherent jurisdiction.

111. At this point it is necessary to consider Swiss law and the consequences of the parties having designated Geneva as the seat of the arbitration. That part of their agreement had two consequences.

i) Not only was the meaning of the terms of the arbitration agreement to be determined in accordance with Swiss law but so also was the effect of the alleged misrepresentation and duress or breach of the fiduciary duty on the enforceability of the arbitration agreement and the question whether, if proved, such misrepresentation, duress or breach of duty avoided the previous orders of the arbitrator;

ii) Whether it should be the arbitrator or the court that decided in the first instance whether the arbitration agreement should be avoided ab initio or rescinded and, if the arbitrator, what right of recourse to the Swiss courts might be available to either party who wished to challenge the arbitrator's decision would be determined in accordance with Swiss law exclusively in the Swiss courts, Geneva being the place of the seat of the arbitration. For an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration. It is thus not merely, as was stated by Lord Phillips in the Court of Appeal judgment in this case, that the "natural consequence" of the arbitration agreement was that any issue as to the validity of the arbitration provisions would fall to be resolved in Switzerland according to Swiss law, but that it would be a breach of agreement to invite the courts of any other place to resolve such an issue or at least to order a remedy founded on such resolution. This analysis reflects international arbitration practice over the entire period since the coming into effect of the New York Convention. The provisions of Article V of that Convention rest on that basis. In Naviera Amazonica Peruana v. Compania Internacional de Sequros del Peru [1988] 1 Lloyd's Rep 116 Kerr LJ. observed at page 119:

> "*English law does not recognise the concept of a 'de-localised' arbitration (see Dicey & Morris at pp.541, 542) or of 'arbitral procedures floating in the transnational firmament, unconnected with any muncipal system of law' (Bank Mellat v Helliniki Techniki S.A. [1984] QB 291 at p.301 (Court of Appeal). Accordingly, every arbitration must have a 'seat' or locus arbitri or forum which subjects its procedural rules to the municipal law there in force ... Prime facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also the law of the 'seat' of the arbitration. The lex fori is then the law of X and, accordingly, X is the agreed forum of the arbitration. A further consequence is then that the Courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X.*"

112. Accordingly, anything done by any party which was contrary to this second consequence of the agreement whereby supervisory jurisdiction was vested exclusively in the Swiss courts would in substance equally amount to a breach of the agreement to arbitrate. In such a case, the parties having agreed not only on the jurisdiction of the arbitral tribunal over their substantive disputes but also on the jurisdiction of the court of the seat over such issues as whether the arbitrator's jurisdiction was wholly or partly impeached by the alleged fraud or duress or breach of professional duty, either party would be in breach of contract in litigating any such matters in the English courts. Just as an application for an foreign anti-suit injunction in the English courts in the face of a foreign exclusive jurisdiction clause is tested by the principles set out in The El Amria [1981] 2 Lloyd's Rep 119 and Donohue v. Armco [2002] 1 Lloyd's Rep 425: there must be strong "cause" or "reasons" in the interests of justice for the English courts to retain jurisdiction in the face of a contract to refer disputes to a foreign tribunal so also must an application directly to restrain a foreign arbitral tribunal from proceeding with the reference in circumstances where the courts of a foreign jurisdiction have been agreed to be exclusively vested with that function.

113. In order to determine whether strong cause exists in the present case to justify this court assuming jurisdiction, in the face of an apparently binding arbitration agreement providing for a foreign arbitral seat, with regard to the issues underlying A's arbitration claims against B and in particular as to the extent, if any, to which the arbitration agreement is enforceable, it is first necessary to consider Swiss law.

114. The evidence as to Swiss arbitration law is to be found in reports prepared by Dr Jur Georg Naegeli (relied on by A), Professor Francois Knoepfler and Dr Philippe Schweizer, an attorney specialising in arbitration cases relied on by C) and Prof Eugen Bucher (relied on by B). I have also considered Mr Curtis's witness statements. From this evidence I find as follows.

    i) The Kompetenz-Kompetenz principle is applied in Swiss arbitration law to the effect that the arbitrator is under a duty to determine any challenge to his jurisdiction in a separate award. He cannot resign of his own volition.

ii) The fact that he is a witness as to the issue of the voidability of the arbitration award or is alleged to be biased is irrelevant: he is not thereby disabled from deciding those matters. He is as well able to recuse himself as any judge hearing such an application.

iii) If a party is dissatisfied with the arbitrator's conclusion on jurisdiction, his award may be challenged in the Swiss Supreme Court under Article 190 of the Swiss Private International Law Act. In such a hearing the Supreme Court will have full power to review whether the arbitrator has correctly asserted jurisdiction and whether he has correctly considered and assessed the alleged causes of nullity or voidability of the arbitration agreement.

iv) It was originally open to A to apply to the Cantonal Court of Geneva without delay challenging B's continuing to act as arbitrator on grounds of lack of impartiality under Article 180(3) of the Swiss Private International Law Act.

v) The justification for the arbitrator having jurisdiction to determine these matters is that it is not the validity of the arbitration agreement which enables the arbitrator to determine his own jurisdiction but its existence, as per Article 186(3) of the Swiss Private International Law Act, which reflects section 16(1) of the 1985 Uncitral Model Law.

115. Accordingly, if the English proceedings are now stayed B will be obliged to decide the challenge to the enforceability of the arbitration agreement, including all issues as to his own participation in the events relied upon for avoidance of the award. Whichever party loses may then apply for the award to be reviewed by the Swiss Supreme Court. Since the parties expressly agreed that this dispute resolution regime should apply under the arbitration agreement, upon what grounds, if any, should A be permitted to go back on this agreement and to shift the determination of jurisdiction and with it of some of the substantive issues in the arbitration from the arbitrator to the English courts?

116. This is not a case where the significant issues between A and B are closely related to issues between either of them and any other party over whom the English courts have jurisdiction. For this purpose it is as a matter of logic necessary to exclude from the equation both C and D, for both of them are before this court only on a contingent basis, having both applied to set aside service, and not because either of them are present within the jurisdiction and sued as of right. If an injunction is not granted restraining B from proceeding with the arbitration there is no question of there being parallel proceedings in this country against any other party than C or D. The claim against Company E could not be pursued in isolation for the claim against it totally depends on the outcome of at least some of the substantive issues in the arbitration.

117. Further, contrary to the submission on behalf of A, the substance of his application for an injunction and declaratory relief against B does not reflect the substance of the English court's function under the statutory provisions of the 1996 Act, particularly Section 9. A is in a totally dissimilar situation to a respondent to an application for a stay. In particular his position is not analogous to a respondent to a Section 9 application not least because he has

already taken part in the arbitration for ten months and derived a benefit from it in the shape of the withdrawal of the Bahamian criminal complaint. Moreover, section 31 provides:

> *"(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction ...*
>
> *(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.*

118. Sub-section (1) does not in my judgment apply to a case where, as here, one party alleges that he did not know pre-existing facts going to the substantive jurisdiction on which he now wishes to rely in order to collapse the arbitral proceedings. It applies to a case where the opposite arbitration party or the arbitrator attempts to introduce a new matter for determination not hitherto raised.

119. Nor is there anything in this case analogous to section 32 which provides:

> *"(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.*
>
> *A party may lose the right to object (see section 73)*
>
> *(2) An application under this section shall not be considered unless –*
>
> *(a) it is made with the agreement in writing of all the other parties to the proceedings or*
>
> *(b) it is made with the permission of the tribunal and the court is satisfied –*
>
> *(i) that the determination of the question is likely to produce substantial savings in costs,*
>
> *(ii) that the application was made without delay, and*
>
> *(iii) that there is good reason why the matter should be decided by the court."*

120. The other parties to the proceedings do not agree that an injunction to stop the arbitration or for negative declaratory relief should be applied for. Nor does the arbitrator give permission.

121. That said, the exercise of the inherent jurisdiction to restrain the arbitrator or grant negative declarations as to his jurisdiction in the course of an arbitration in which the applicant has already taken part would be inconsistent in substance with the provisions of sections 70(2), 72 and 73 which provide:

> *"(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted-*
> *(a) any available arbitral process of appeal or review, and*
> *(b) any available recourse under section 57 (correction of award or additional award)."*

Section 72 provides as follows:

> *"(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question-*
> *(a) whether there is a valid arbitration agreement,*
> *(b) whether the tribunal is properly constituted, or*
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,*
> *by proceedings in the court for a declaration or injunction or other appropriate relief.*
> *(2) He also has the same right as a party to the arbitral proceedings to challenge an award-*
> *(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him ...*
> *and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case*

Section 73:

> *"(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith of within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-*
> *(a) that the tribunal lack substantive jurisdiction ...*
> *he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection"*

122. Section 73 does not provide for a facility for halting an arbitration once the applicant has taken part in it. There is merely a requirement that objection to substantive jurisdiction must be raised as soon as he knows of fresh grounds and, if not, the objection cannot be relied on later, for example, in order to challenge the award under section 67. This reflects the 1996 Act's limited facilities for raising a challenge to the arbitrator's substantive jurisdiction. Such challenge can thus be raised only at the outset or after an award has been made.

123. Further, the very limited availability of a stay under the inherent jurisdiction in favour of arbitration proceedings has been the subject of judicial discussion in English authorities all of which have been concerned with the jurisdictional issue whether an arbitration agreement was ever entered into or whether an issue was within the scope of the reference. There are apparently no cases where consideration has been given to granting an inherent jurisdiction stay where it is argued that an arbitration agreement binding on its face is unenforceable or ought to be avoided ab initio because the agreement containing it had been induced by fraudulent misrepresentations. In such a case the effect, if any, of the misrepresentation on the arbitration agreement itself would have to be determined by the law governing the agreement. That determination would, at least in English law, more readily attract a stay under

the inherent jurisdiction because it might go to impugning the substantive rights of the parties and, if the contract were governed by a foreign body of law and provided for the arbitration in a foreign seat, it would seem sensible to avoid the English court having to usurp the function of the court of the seat of the arbitration in applying its own law to determine the issue of the arbitrator's jurisdiction.

124. It is therefore impossible to say that the 1996 Act includes features which provide some kind of analogy for the granting of an anti-arbitration injunction or the arrest of arbitration proceedings in circumstances similar to those arising in this case. Indeed, the provisions of the 1996 Act point away from the exercise of the court's jurisdiction in that manner and towards a stay of English proceedings in favour of an arbitration. For the English courts to interfere with the jurisdiction of a foreign arbitrator in a case such as this to determine the threshold issue of jurisdiction where his award can be challenged in the courts of the seat on grounds of error, lack of independence and bias would be not only contrary to the agreement of the parties as to the seat of the arbitration but also represent a serious judicial invasion of international arbitral territory as reflected in the Uncitral Model Law section 16(1) of which provides:

> *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."*

125. It would thus require extremely strong grounds for this court to interfere with the arbitration by trying the issue whether under Swiss law, for that would be the relevant body of law, A was entitled to avoid the arbitration agreement, to have all the arbitrators' orders rescinded and to restrain him from proceeding further with the references. Apart from the fact that B lives in London and A, although he lives in the Bahamas, has a property in London, a good many of the relevant documents may be here and the November 2001 oral agreement is said to have been made at Claridges and the Company M Action agreement is said to have been made here, there is little or nothing of weight which in the discretionary balance can be said to off-set the weight to be attached to the fact that this is a Swiss law arbitration agreement and that it has, by providing for the arbitral seat to be in Geneva, introduced an exclusive reference to the Swiss courts of all issues regarding the operation and supervision of the arbitration and the arbitrator. Whether B was or was not in breach of fiduciary or professional duty in acting as arbitrator is a matter of English law but the relevance of any such breach to the enforceability of the arbitration agreement or his continuing to act as arbitrator is essentially a matter of Swiss law which would have to be determined by the Swiss court if A invoked Swiss jurisdiction to impugn the agreement or remove B.

126. In these circumstances, A's arbitration claims against B in this court must be stayed for there is no strong cause or reason why they should proceed. Further, the discretionary balance is very heavily weighted against ordering a trial of the Section 9(4) issue for the reasons which I have explained.

127. As to the personal claims against B, these are not claims which fall within the reference or which B can decide in his capacity as arbitrator. However, they are

in many ways inextricably bound up with the main substantive issues in the arbitration which remain to be decided. It clearly would be unsatisfactory for the English courts to attempt to determine these personal claims in proceedings parallel to the arbitration. If that were to happen, there would be a serious risk of conflicting decisions on underlying issues as between B as arbitrator and the English court in relation to the personal claims.

128. In order to avoid this, I have no doubt that the correct course is for me to order a temporary stay of the personal claims in this court on case management grounds pending determination of the substantive claims in the arbitration. If matters have not by then been settled, these proceedings can be restored in order to determine the outstanding personal claims.

Should Service on C be set aside?

129. This question has to be approached on the basis that the proceedings in this court against B in respect of the arbitration claims have been stayed and that consequently B will proceed to conduct the arbitration in Geneva subject to such remedies in the Swiss courts as may be available to the parties. Accordingly, the application by C to set aside the order giving leave to serve him outside the jurisdiction is an application which is in substance that all existing disputes with A should be determined only by B as arbitrator. By clause 1.2(b) of the arbitration agreement B has been given a discretion to determine such further issues or disputes as may arise during the arbitration. The various issues raised by A as to the arbitration agreement being induced by fraud and/or duress clearly fall within the scope of that provision. There is no reason to infer that B will exercise his discretion against the determination of those disputes and every reason to infer that he will determine them. If this court were to permit the order giving leave to serve C to stand or order a trial of the Section 9(4) issues, the position would be that B would continue with the arbitration, making such interim awards as he considered appropriate and, ultimately, a final award and this court would simultaneously be required to resolve some of the same issues between the same parties, probably coming nowhere near to a trial by the time B had produced his final award. Although it is perfectly true that B might conclude that the arbitration agreement was unenforceable, that outcome can certainly not be assumed for present purposes. The result would therefore be what Diplock LJ. in The Abidin Daver [1984] AC 398, described as "an unseemly race for judgment" on at least some key issues. Without treating that unattractive prospect as in itself determinative of the issue as to exercising jurisdiction over the claims against C, it is certainly a consideration to which this court must attach some weight in relation to the discretionary balance.

130. The unusual features of these applications have led me to conclude that it is quite unnecessary for present purposes to consider whether the order giving A leave to serve C should be set aside for material non-disclosure or whether A's claims represent serious issues to be tried or even whether there had been made out a good arguable case that any of the claims advanced against C fall within the CPR 6.20 connecting factors. That is because in my judgment, even if A's submissions on all these points are accepted as correct, this court ought not to exercise its discretion in favour of allowing the order to stand.

131. If the order were allowed to stand, it would be open to C to apply under Section 9 of the 1996 Act for an order staying these proceedings in favour of the pending arbitration in Geneva. On that application there would be placed before the court all the evidence relating to the arbitration that has been placed before me. A's case would be that, although he had entered into an arbitration agreement and although he had brought legal proceedings in respect of matters agreed to be referred or at least some of them, the court should be satisfied for the purpose of Section 9(4) of the 1996 Act that the arbitration agreement was "null and void, inoperative or incapable of being performed".

132. It is important to appreciate at the outset that, although the agreement between A, C, D and B has been referred to as the "arbitration agreement", it is a composite contract consisting of provisions relating to the arbitration and of provisions imposing on all parties rights and duties from which the parties had agreed to form a structure conducive to a determination and settlement of their disputes by the arbitrator. Sections B, C, D and E represent this structure. The pre-existing disputes were referred to arbitration and the arbitrator was given various powers to decide whether the parties had performed the structural duties and in his discretion to determine other disputes which arose during the arbitration (clause A1, 2(1))

133. There could be no issue upon such an application as to whether the parties had entered into an arbitration agreement for the purposes of Section 9(1) of the 1996 Act. The essential issue would be whether the court should, as would be submitted by A, withhold a stay either because it was satisfied that the agreement to arbitrate was null and void, inoperative or incapable of being performed by reason of the alleged fraudulent misrepresentation and duress or because, as Ms Dohmann realistically accepts would be more probable, the court ordered an issue to be tried so as to enable it to decide conclusively whether it was satisfied of any of the Section 9(4) matters. If upon the trial of that issue the court was not so satisfied, it would give effect to Section 9(4) by ordering a stay.

134. In deciding what course to take upon such a Section 9 application the court would take into account the following matters.

i) Before it could be satisfied that the agreement to arbitrate had ceased to be enforceable a number of substantial factual issues would have to be resolved, those issues being factually related to the substantive issues in the arbitration. It would probably be necessary for the main participants in the agreement to give oral evidence.

ii) Whether the conduct of the parties as found by the court led to the conclusion that the agreement had wholly or partly ceased to be enforceable would have to be determined as a matter of Swiss law because that was the proper law of the agreement.

iii) In determining what effect the conduct of the parties had on the enforceability of the agreement the court would have to determine whether the effect was that the arbitration provisions of the agreement remained enforceable, even though the settlement structure provisions had been

rendered unenforceable, to the effect that B still retained substantive jurisdiction to determine the substantial issues and/or had Kompetenz-Kompetenz jurisdiction, in other words, how far the principles of separability applied in this case. These would also be matters of Swiss law.

iv) The arbitration was continuing in Geneva on the basis that B had jurisdiction at least to determine his own jurisdiction. Any decision by this court upon the issue to be tried that the arbitration agreement was unenforceable would therefore cause serious procedural dislocation.

v) Geneva was the seat of the ongoing arbitration and the Geneva or Swiss courts were therefore agreed by the parties to be the court having sole supervisory jurisdiction over the arbitration. Resort to the English court for the purpose of rescinding the arbitration agreement and discharging the arbitrator was therefore at least on the face of the agreement in breach of the agreement itself.

vi) The commencement of the present proceedings was, on the face of it, in breach of the standstill agreement in clause B2.1 of the agreement.

135. Further, the court would have to take into account that one of the grounds for A maintaining that the arbitration agreement was unenforceable was that it had been induced by fraud and that fraud unravels everything; including agreements to arbitrate and agreements as to the seat of an arbitration and further that B himself was said to have participated in the misrepresentation and to have acted in breach of fiduciary and professional duty.

136. Against this background, I feel sure that an English court would decide that it could not fairly conclude on the materials before it at the application that it was satisfied of any of the Section 9(4) matters and further that it would be an inappropriate exercise of its discretion to order a trial of the issue. It would reach that conclusion having regard to the considerations set out above. Given that the scope of B's Kompetenz-Kompetenz is that which I have held him to have under Swiss law and that Geneva was the agreed seat of the arbitration, I can see no reasonable prospect of the court taking upon itself the conclusive determination by a full trial of the unresolved issue as to whether it should be satisfied of the Section 9(4) matters. As the authorities to which I have referred in paragraphs 99 and 100 above demonstrate, particularly Ahmad Al Naimi v. Islamic Press Agency, supra, there may even be cases where the court in the exercise of its inherent jurisdiction will refer to an arbitral tribunal issues under Section 9(1) as to whether an applicant has proved the essential foundations for a stay, in that case the existence of the arbitration agreement. Further, as appears from Joseph, Jurisdiction and Arbitration Agreements and their Enforcement, 11.24 – 11.26, where a less strict approach to resolution of Section 9 issues is proposed, in a number of other jurisdictions, notably Ontario and British Columbia, a stay has been granted where the applicant for a stay has established a prima facie case of substantive jurisdiction so as to refer the issue to the arbitral tribunal. In Hong Kong a stay has been granted where the applicant has established a prima facie case or a strongly arguable case. The

French Cour de Cassation has indicated that a stay is appropriate unless it is "manifest" that the arbitration agreement is inapplicable.

137. The structure of Section 9 of the 1996 Act leaves no doubt that once the existence of an arbitration agreement has been established by the applicant, a stay will be granted unless one of the section 9(4) matters is established. The respondent to the application must therefore make good the existence of one of those matters. If the court is unable to determine whether it is so satisfied on the witness statements before it, consideration has to be given to whether to order a trial of the issue or whether a stay should be granted and the question of substantive jurisdiction under Section 9(4) left to the arbitrators. Whether the latter course is adopted may in many cases depend heavily on the extent to which the resolution of that issue will involve findings of fact which impact on substantive rights and obligations of the parties which are already in issue and whether in general the trial can be confined to a relatively circumscribed area of investigation or is likely to extend widely over the substantive matters in dispute between the parties. If the latter is the case the appropriate tribunal to resolve the jurisdictional issues is more likely to be the arbitration tribunal, provided it has Kompetenz-Kompetenz.

138. Section 9 applies both to domestic and foreign arbitrations. In the latter case there is likely to be the conjunction of a foreign seat and an arbitration agreement governed by the law of that seat. It follows that the section 9(4) matters will probably have to be determined by reference to that body of law. In such a case where the arbitral tribunal has Kompetenz-Kompetenz, this court should be slow to displace the regime which the parties have agreed for the determination of such matters of jurisdiction. The emphasis in modern international arbitration law is to maximise the arbitrators' opportunity to determine their own jurisdiction: see in particular the judgment of Thomas J. in Vale do Rio Doce Navegacao SA v. Shanghai Bao Steel Ocean Shipping [2002] 2 Lloyd's Rep 1.

139. In the present case there could be no fair resolution of the issues raised by A with regard to the enforceability of the arbitration agreement without the conduct of a trial of the issue with oral evidence. Such a trial would involve consideration of facts also relevant to the substantive disputes between the parties and referred to arbitration. Resolution of the issues would be determined by Swiss law. In this case the arbitrator would have Kompetenz-Kompetenz, in relation to these jurisdictional issues and his decisions would be subject to supervision and review by the Swiss courts. This is therefore a typical case where the English court, being unable to resolve to its satisfaction the Section 9(4) matters, should stand back and allow the arbitrator to proceed to determine his own jurisdiction.

140. I conclude therefore that a stay of the proceedings against C would have been ordered if leave to serve out had been upheld contrary to this application. Accordingly, this application must succeed.

141. I would add that even if I had disregarded the probable fate of a Section 9 application hypothetically made after the order for service out had been upheld, I should have reached the same conclusion on forum non conveniens grounds.

As already observed, the prospect of the Section 9(4) issues being tried in this court in parallel with the determination by the arbitrator of his own jurisdiction subject to review by the Swiss courts is deeply unsatisfactory. It represents a serious risk of conflicting decisions and of procedural dislocation. It also involves this court having to apply Swiss law to a jurisdiction issue where the parties have agreed that the seat of the arbitration and the source of judicial regulation will be Geneva.

Should Service on D be set aside?

142. Although the claims by A against D are in important respects similar to those against C, there are claims against him which are unique, namely those concerned with the agreement with regard to the claim by Company E against Company M and to the repayment of security for costs and the distribution of the proceeds of the settlement.

143. Here again I do not find it necessary to consider either the allegations of material non-disclosure upon the application for leave to serve out or the submissions that A has failed to establish a serious issue to be tried in relation to any of the claims or has failed to establish a good arguable case that the claims are covered by the CPR 6.20 connecting factors.

144. D stands, as regard jurisdiction in essence in a similar position to C. His position has to be tested on the same hypothesis as that of C, namely that B continues to sit as arbitrator in Geneva and that, in that capacity under Swiss law he has Kompetenz-Kompetenz to determine the very issues which would have to be determined by this court if the trial of an issue were ordered under Section 9(4) of the 1996 Act. Determination of those issues which have arisen with regard to the implementation of the agreement with particular regard to the Company E v. Company M case is within the jurisdiction of the arbitrator. Indeed, all the claims against D are related in one way or another to the A Trust in as much as they involve consideration of which parties have title to or a beneficial interest in the Trust assets. It is thus inconceivable that the claims against D should be permitted to proceed in the English courts unless C were also a party to the proceedings. All these matters are in issue not only in the pending arbitration but in the children's Bahamas Action and in A's June 2005 Bahamas Action. For the English court also to become a forum for resolution of some of these issues would simply multiply the risk of inconsistent decisions due to parallel litigation of overlapping issues.

145. If my conclusion allowing C's application to set aside service is correct, it would make no sense for A to pursue his claims against D alone in London in proceedings to which C was not a party, for different conclusions might be arrived at in the Bahamas. Although the obviously convenient forum for the determination of any dispute involving the assets of A is the Bahamas, the issues between A and C and A and D now before the arbitrator do involve that Trust and the trust assets. For this court at this stage to assume jurisdiction over any of those disputes would, in my judgment, be contrary to the interests of justice.

146. Accordingly, this court should not entertain these proceedings against D. Either all the extant claims should be determined by B or, if it is determined by him or the Swiss courts that the arbitration cannot proceed, all those claims relating to the A Trust assets will have to be determined in the present Bahamas proceedings.

147. I conclude, therefore, that even if I were satisfied that A's submissions as to material non-disclosure, serious issues to be tried and CPR 6.20 connecting factors were correct, the order giving leave to serve D outside the jurisdiction should in principle be set aside as a matter of discretion. A has failed to establish that there is any significant personal or judicial advantage in having the claims against D tried in this court which is of such importance that it would cause injustice to A if he were prevented from proceeding here.

Should Service on Company E be set aside?

148. The dispute as to the so-called "instruction agreement" and the circumstances in which on 9 July 2004 A put up security in the Company E v. Company M proceedings and, in particular, whether B gave A the assurances relied on in paragraph 12.6 of the Amended Particulars of Claim covering A's entitlement to a share in the proceeds of the action and his right to give instructions regarding those proceedings to Firm A and B, clearly raise issues which fall, in my view, within the scope of those disputes referred to B under the arbitration agreement. Although Company E was not a party to the arbitration agreement or the instruction agreement, the relief claimed by A against Company E – namely an enquiry or account of all sums owing to A from Company E whether out of the proceeds of the Company M Action or otherwise and payment of any sum found on the inquiry or account – raises the issue as to whether and, if so, on what basis A is entitled to the whole or, as he appear latterly to have conceded, 50 per cent of the proceeds of the Company M Action. It also indirectly raises the issue whether D is properly in control of Company E and those proceeds of the action. The underlying issue is thus really between A and D and, indirectly, C, as to who rightfully controls the assets of Company E. This falls within the scope of the arbitral reference and, accordingly, there are extremely strong grounds for setting aside the order for service of these proceedings on Company E. It has after all been joined in this action so as to bind it into the determination of the underlying issues and so that in particular it will be bound by this court's determination as to the beneficial ownership of the proceeds of the Company M Action and, more immediately, to bind it into the injunction originally obtained by A from Gloster J. on 30 September 2005 restraining C and D from instructing Firm A to pay out of their accounts any monies received by or paid to that firm consequent to or as a result of the Company M Action. On 21 October 2005 upon A's application Morison J. made an order (i) continuing the injunction against C and D until the hearing of their applications to contest jurisdiction or further order and (ii) giving leave to serve the proceedings outside the jurisdiction on Company E and to serve it with the orders of Gloster J. of 30 September 2005 and of Morison J. of 7 October 2005, thereby effectively imposing that injunction upon it.

149. I have no doubt that, against the background outlined above, the order of Morison J. giving leave to serve out ought in principle to be set aside.

150. The underlying issues relevant to the relief claimed against Company E are within the scope of the arbitral reference. Like C and D, Company E could successfully apply for a stay of the claims against it under Section 9 of the 1996 Act. Further, given that the orders giving leave to serve C and D are to be set aside, leaving it to B to resolve the substantive issues between them and A, there can be no question but that hearing, isolated within this jurisdiction, the claim against Company E would perpetuate a wholly unjustifiable degree of procedural dislocation which cannot be sustained in the interests of justice. The resolution in the arbitration of the issue whether A or D is entitled to control Company E, as part of the A Group, and whether A is entitled to any share in the proceeds of the Company M Action will inevitably lead to the result that Company E will pay all that is rightfully due to A. It is quite unnecessary for Company E to be impleaded in the English courts in order to fortify the arbitrator's award.

Injunction of 30 September 2005 as extended

151. In reaching the conclusions arrived at to the effect that service upon C, D and Company E should be set aside, I must make it clear that I have taken full account of the fact that the consequence of those orders will be that each defendant will be automatically released from the injunction of 30 September 2005 as extended by the order of Morison J. on 21 October 2005. In this connection, I am not persuaded that there is any serious doubt that C and D will comply with any interim or final awards that B may issue. That being so, I have no doubt that the discharge of that injunction upon the making of this order will cause no injustice to A.

Conclusions

i) The arbitration claims against B will be stayed.

ii) The personal claims against B will be temporarily stayed with liberty to apply after B has made a final award or has otherwise become functus officio.

iii) The orders giving leave to serve C, D and Company E outside the jurisdiction will be set aside as will the injunction of 30 September as extended by the Order of Morison J. on 21 October 2005.

Annex 1

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