Case No: 2006 2353 A3 QBCMF

Neutral Citation Number: [2007] EWCA Civ 20
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
Hon Mr Justice Morison
[2006] EWHC 2583 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 24th January 2007

Before :

LORD JUSTICE TUCKEY
LADY JUSTICE ARDEN
and
LORD JUSTICE LONGMORE

- -

Between :

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

NICHOLAS HAMBLEN Esq QC and VERNON FLYNN Esq
(instructed by **Lawrence Graham Llp**) for the **Appellants/Defendants**
CHRISTOPHER BUTCHER Esq QC and PHILIP JONES Esq QC
(instructed by **Ince & Co**) for the **Respondent/Claimants**

- -

Judgment

Lord Justice Longmore:

1. This is the judgment of the court.

2. Introduction

This appeal raises, apparently for the first time, the question whether, if there is a plausible argument that contracts have been induced by bribery and have been rescinded on discovery of the bribery, that constitutes a dispute which can (and should be) determined by arbitration in the context of a common form of arbitration clause.

3. The relevant contracts are eight charterparties made by eight one-ship companies in the Russian Sovcomflot group of companies as owners, with three separate chartering companies between February 2001 and September 2003 on the Shelltime 4 Form. It is, however, important to appreciate that these eight charter disputes form a small part only of an overall dispute between Sovcomflot and its numerous subsidiaries or sub-subsidiaries on the one hand and a Mr Nikitin who is alleged to have successfully bribed one or more directors or employees of Sovcomflot and their associated companies. It is said that the charterparties with which this appeal is concerned and numerous other contracts were procured by this bribery and contained terms highly favourable to the charterers. But it is also said, inter alia, that (1) vast sums were paid by way of commission to companies nominated by Mr Nikitin, on ship purchases and both new and existing ship building business, (2) Sovcomflot interests were deceived into making an enormous payment to acquire a debt owed to a Russian bank, (3) uncommercial sale and leaseback transactions were made for the benefit of Mr Nikitin's companies, (4) shipbuilding options and shares in Sovcomflot companies were traded at a gross undervalue and (5) a fictitious service contract was entered into designed to injure owners' financial and commercial interests.

4. An intricate and complex action has therefore been instituted in England by a large number of claimants seeking damages for the tort of conspiracy and making claims by way of damages or restitution as a result of the payment of bribes and a claim for compensation or an account of profits in respect of what is said to be a breach of fiduciary duty by those who have entered into the charterparties. There is also a claim that the eight charterparties which are the subject-matter of these proceedings have been validly rescinded and that restitution of benefits should be made.

5. Each of the charterparties contains what is called a "Law and Litigation" clause which provides for any dispute under the charter to be decided in England and confers on either party the right to elect to have any such dispute referred to arbitration in accordance with rules of the London Maritime Arbitrators' Association. That clause is in the following terms:-

> "41. (a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.
>
> (b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree.

(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred . . . . to arbitration in London, one arbitrator to be nominated by Owners and the other by Charterers, and in case the arbitrators shall not agree to the decision of an umpire, whose decision shall be final and binding upon both parties. Arbitration shall take place in London in accordance with the London Maritime association of arbitrators in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force.

(i) A party shall lose its right to make such an election only if:

(a) it receives from the other party a written notice of dispute which –

(1) states expressly that a dispute has arisen out of this charter;

(2) specifies the nature of the dispute; and

(3) refers expressly to this clause 41(c)

And

(b) it fails to give notice of election to have the dispute referred to arbitration not later than 30 days from the date of receipt of such notice of dispute . . . . . ."

6. The charterers named in each of the 8 charterparties have sought to enforce their rights in arbitration and have appointed Mr Mark Hamsher as sole arbitrator. On 12th June 2006, owners made an arbitration application pursuant to section 72 of the Arbitration Act 1996 ("the 1996 Act") seeking to restrain the arbitration proceedings on the basis that they (the owners) have rescinded both the charterparties and the arbitration agreements contained in them for bribery and that there can be no arbitration. The charterers responded on 12th July 2006 by seeking a stay from the court under section 9 of the Act of the owners' rescission claims, as well as of any further time charter claims by the owners as explained in paragraphs 5(3) and (4) of the judgment.

7. Morison J has declined to stay the claims for rescission and has granted interlocutory injunctions to restrain the arbitration proceedings pending the trial of the action. That trial has as yet no fixed date and it is not easy to predict when it may be concluded.

8. The submissions of the parties can be most conveniently grouped under the following headings:-

(1) Construction of the arbitration clause or (in other words) does a claim that the charters have been rescinded for bribery come within the arbitration clause?

(2) Separability of the arbitration clause

(3) Procedural matters viz the relationship (if any) between sections 9 and 72 of the 1996 Act.

9. Construction

For the charterers Mr Hamblen QC addressed us first on the question of the separability of the arbitration clause from the rest of the agreement. Mr Butcher QC for the shipowners said that logically one must first decide what disputes are governed by the arbitration clause before considering the extent to which the arbitration agreement (whatever it meant) was separable from the main charter agreement. To that extent we agree with Mr Butcher. Counsel agreed that, since the clause referred both to the expression "any dispute arising under this charter" and (in sub-clause c(i)(a)(1) for the purpose of describing the requirements of a notice of dispute which may lead to the consequence that a party has lost his right to arbitrate) to the expression "a dispute has arisen out of this charter", the parties drew no distinction between disputes arising "under" and "out of" the charterparty. That was the limit of their agreement. Mr Hamblen submitted that "out of" was a wider phrase than "under" and that the parties therefore intended a wide meaning to be given to the clause. Mr Butcher submitted that "under" had a narrow meaning, was the primary word in the clause and that "out of", since it appeared only second and in a sub-sub-clause, must take its meaning from the meaning of "under". In any event he said that "out of" itself had a narrow meaning. We were referred to numerous authorities which Mr Butcher said supported his submission that the arbitration clause did not apply to a dispute about rescission for bribery.

10. The appellate authorities to which we were referred on this point were Heyman v Darwins Ltd [1942] AC 356, Mackender v Feldia [1967] 2QB 590, The Evje [1975] AC 797, The Playa Larga [1983] 2 Lloyds Rep 171, Antonis P Lemos [1985] AC 711, Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488, Fillite (Runcorn) v Aqua-Lift (1989) 26 Const LR 66, Harbour Assurance Co (UK) Ltd v Kansa General International Insurance [1993] QB 701 and The Angelic Grace [1995] 1 Lloyds Rep 87. In Heyman v Darwins both Lord Wright (page 385) and Lord Porter (page 399) said that "arising out of" had a wider meaning than "arising under". In The Evje both Viscount Dilhorne (page 814H) and Lord Salmon (page 817A) said they could not discern any difference in the meaning in the two phrases. As to this difference of view Lord Brandon of Oakwood in the Antonis P Lemos at page 728B said:-

> ". . . I do not doubt that, in some contexts, such as an arbitration clause in a commercial contract, it would be right to treat the first of these two expressions as the equivalent of the second."

He continued that it would not be right to do so in the context of domestic statutes intended to give effect to an international convention "which require . . . . a broad and liberal construction". Mr Butcher laid considerable emphasis on this passage but did not explain why on the facts of this particular case, words in a well-known form of agreement likely to be made between two parties of different nations should be construed less broadly and less liberally than a statute giving effect to international obligations.

11. In the Playa Larga the Court of Appeal decided, in relation to the words "arising out of" that, where a claim in tort was closely knitted together with a contractual claim on the facts, an agreement to arbitrate the contractual claim could properly be construed as covering the tortious claim, see page 182. This decision was followed in The Angelic Grace.

12. The clause that fell for consideration in Mackender v Feldia was a jurisdiction clause rather than an arbitration clause but there can hardly be any difference between the two clauses as a matter of construction. The clause provided that an insurance policy should be governed by Belgian law and

> "any disputes arising thereunder shall be exclusively subject to Belgian jurisdiction."

The underwriters avoided the contract for non-disclosure of material facts and submitted that the jurisdiction clause could no longer apply because there

> "is no contract and there was no contract when the Belgian proceedings were started. So the relations between the parties are no longer governed by the contract at all" per Mr R A MacCrindle QC at page 593.

Lord Denning MR described the argument as being

> ". . . . owing to the non-disclosure there was no true contract – no real consent by the underwriters – and that, on this basis, the contract itself falls down, including even the jurisdiction clause."

This court rejected the argument on the grounds that there was a contract until avoidance and that the case was not like a case of "non est factum" when the foreign jurisdiction clause might not apply at all (see page 598C per Lord Denning MR and page 603 per Diplock LJ). It is clear that a claim for innocent misrepresentation would have also been regarded as falling within the words "any dispute arising thereunder" (pages 603-604 per Diplock LJ).

13. In Ashville Investments v Elmer Contractors, where this court held that a claim for rectification fell within a clause referring to arbitration

> "any dispute or difference . . . as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith . . . ."

Balcombe LJ said (page 503C) that a dispute about a mistake leading to rectification was not a matter "arising" under the contract but also said (503G) that all words should as far as possible be given a meaning. In that case the clause used two different phrases which were intended to have different meanings; their use in the instant clause, however, shows, as is common ground, that the phrases "arising under" and "arising out of" are intended to have the same meaning. Bingham LJ said (508H) disputes "arising under the contract" would not include claims in tort but left undecided the question whether claims for restitution or rectification would be covered because such claims would be covered by the subsequent wording.

14. Fillite (Runcorn) v Aqua-Lift decided that claims for negligent misrepresentation (whether in tort or in contract under the Misrepresentation Act 1967) or for breach of a collateral contract did not fall within an arbitration clause referring any dispute "arising under these heads of agreement". Slade LJ held (page 76) that the phrase "disputes arising under a contract" was not wide enough to include disputes which do not concern obligations created by or incorporated in that contract. He approved the dicta of Evans J in Overseas Union v AA Mutual [1988] 2 Lloyds Rep 62, 67 drawing a distinction between clauses relating to disputes about rights created by the contract itself and clauses showing an intention to refer some wider class of dispute. Nourse LJ agreed saying that the word "under" meant "as a result of and with reference to". Hollings J agreed with both judgments. Mackender v Feldia was not cited; nor was The Playa Larga. It is difficult to think that if they had been cited the judgments would have been expressed in the terms they were. The contract was moreover a specially negotiated contract for services and was not a common form of commercial agreement.

15. Harbour v Kansa, to which we will have to return, was a case about the words "disputes or differences arising out of this agreement". It was there held that even a dispute about initial illegality, pursuant to which the contract would be void, was covered by those words. Ralph Gibson LJ said (page 714F):-

> "The question whether all the promises contained in the agreement were rendered invalid and void at the time when the parties signed the document by the illegality of the agreement is, in my judgment, a dispute arising out of the agreement."

At page 726C Hoffmann LJ said that the words of the arbitration clause applied without difficulty to a dispute over whether the agreement which was admittedly concluded gave rise to any enforceable obligations.

16. We were also referred to numerous first-instance decisions including:

(1) Ethiopian Oil Fields v Rio del Mar [1990] 1 Lloyds Rep 86 in which it was held that a dispute about rectification came within the words "any dispute arising out of or under this contract" Hirst J held that "out of" must add something to "under", even though the words "out of " were in fact the words which appeared first in the clause. He also said that the words "arising out of" were virtually synonymous with the words "arising in connection with". Mr Butcher

submitted that that was not right on the authorities but it seems to us that both Antonis P Lemos and Harbour v Kansa support Hirst J in relation to that;

(2) The Ermoupolis [1990] 1 Lloyds Rep 16 where it was held, following The Playa Larga, that a claim for the tort of conversion fell within the phrase

> "any dispute arising in any way whatsoever out of this bill of lading";

(3) Harbour v Kansa at first instance [1993] 1 Lloyds Rep 81 where Steyn J said (page 95) that older (pre Heyman v Darwins Ltd) authorities about the width of arbitration clauses had to be approached with some care and that the words "arising from the contract" have almost invariably been treated as "words of very wide import". He also said (page 91) that the inexorable logic of Mackender v Feldia required him to hold that a question of voidability for fraud is just as much capable of being referred to arbitration as an issue of avoidance for innocent misrepresentation;

(4) Chimimport v D'Alesio [1994] 1 Lloyds Rep 366 where Rix J said that "arising under" is narrower than "arising out of" and doubted whether a tortious claim could easily give rise to a dispute "under the contract";

(5) The Delos [2001] 1 Lloyds Rep 703 where Langley J held claims for breach of duty and bailment could be brought within the phrase "any disputes under" the relevant contract.

17. Not all these authorities are readily reconcilable but they are well-known in this field and some or all are invariably cited by counsel in cases such as this. Hearings and judgments get longer as new authorities have to be considered. For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.

18. As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover

"every dispute except a dispute as to whether there was ever a contract at all", see Mustill and Boyd, Commercial Arbitration, 2nd ed page 120 (the debate, to which we were treated, about whether the authorities there cited support the proposition is, since Harbour v Kansa, both technical and sterile). Although in the past the words "arising under the contract" have sometimes been given a narrower meaning, that should no longer continue to be so. Since both phrases are used in the present case there is, in any event, no need here to differentiate between them but the proposition that the phrases "under" and "out of" should be widely construed is to my mind strongly supported by Mackender v Feldia. Mr Butcher submitted that times have moved on since that decision and that more recent decisions (particularly Ashville v Elmer and Fillite v Aqua-Lift) have emphasised the difference between the phrases "under" "out of" and "in connection with". We do not read Ashville in that way; Fillite can be so read but neither Mackender nor the Playa Larga were cited and that must detract from its weight as an authority. Even Mr Butcher did not submit that Fillite was an authority which bound us in relation to the particular clause before us.

19. One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction. Mr Butcher was able to say that on the facts of the present case two adjudications were inevitable if the dispute as to rescission came within the clause because the question of bribery would still have to be resolved in the context of the High Court action for damages for conspiracy, bribery and breach of fiduciary duty against the very same (among many other) defendants who are now seeking to invoke the arbitration clause. That is, however, merely how things have happened in this particular case and cannot affect the true construction of the clause.

20. In the present case there is the further consideration that in the opening words of the clause the parties agree a choice of English jurisdiction. The logic of Mr Butcher's argument is that his claim for rescission for bribery cannot be brought in England because it is not a claim "under the contract" since it is a claim to have the contract set aside. It cannot really be supposed that the business men negotiating these charterparties (however much they intended honest negotiations) intended that any claim suggesting the contract was invalid would have to be brought wherever the defending companies were incorporated (here the British Virgin Islands) while claims for breach of contract were brought in England. The fact that jurisdiction may have been established in England for other reasons against the three charterers who are applying for a stay cannot affect the oddity of the result of Mr Butcher's submissions on this aspect of the matter.

21. We would, therefore, conclude that a dispute whether the contract can be set aside or rescinded for alleged bribery does fall within the arbitration clause on its true construction. The case is different from a dispute "as to whether there were ever a contract at all", in the Mustill and Boyd sense.

22. Separability

Ever since Heyman v Darwins Ltd the English common law has been evolving towards a recognition that an arbitration clause is a separate contract which survives the destruction (or other termination) of the main contract. Heyman v Darwins Ltd itself was a case of termination by accepted repudiation. A major evolutionary step was taken in Harbour v Kansa in which it was decided that the arbitration clause applied to a dispute whether the agreement in which it was embedded was void for initial illegality. Section 7 of the 1996 Act now provides:-

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

23. This statutory principle codifies the principle that an allegation of invalidity of a contract does not prevent the invalidity question being determined by an arbitration tribunal pursuant to the (separate) arbitration agreement. It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contact. Thus in Harbour v Kansa at first instance [1992] 1 Lloyds Rep 81, Steyn J, in a passage (at page 92) approved by the Court of Appeal said

> "Once it became accepted that the arbitration clause is a separate agreement, ancillary to the contract, the logical impediment to referring an issue of the invalidity of the contract to arbitration disappears. Provided that the arbitration clause itself is not directly impeached (e.g. by a non est factum plea), the arbitration agreement is as a matter of principled legal theory capable of surviving the invalidity of the contract."

The judge had already said (page 91) in relation to fraud and duress that Lord Macmillan's statement in Heyman v Darwins Ltd that a claim to set aside the contract on the ground of fraud or duress was not arbitrable was no longer the law. Likewise in responding to a submission that the separability doctrine cannot apply to any rule which prevents the contract from coming into existence or makes it void ab initio Hoffmann LJ said at page 723F-724C of Harbour v Kansa

> "It seems to me impossible to accept so sweeping a proposition. There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence . . . . . .

> In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but . . . it may not . . . . . saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be. As Ralph Gibson LJ has pointed out the same is true of allegations of fraud."

The reference to Ralph Gibson LJ's remarks on fraud is to page 712D where that learned Lord Justice said of Steyn J's reference to direct impeachment that it was

> "to distinguish an attack upon the clause otherwise than by the logical proposition that the clause falls within the containing contract. When it is said that the contract was induced by fraud it may well be clear that, if it was, the making of the arbitration clause was also induced by the fraud."

In similar vein Leggatt LJ (717E) referred to the judgment of Fortas J in Prima Paint Corporation v. Flood & Conklin (1967) 388 U.S. 395 to the effect that the court could adjudicate if the arbitration clause was itself induced by fraud but not if the contract was in general induced by fraud.

24. A good example of direct impeachment is the decision of Rix J in Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd [1999] 1 Lloyds Rep 784 where an oral contract for the sale of Russian Notes was followed by a Trade confirmation with an English jurisdiction clause. Not only was it alleged that this document was fraudulently presented by Credit Suisse as a mere perfunctory confirmation (which it was not) but it was said that the oral contract was not with Credit Suisse Europe but with Credit Suisse US and that there was a specific agreement that the deal was to be centred in New York where Credit Suisse US had its centre of business. In those circumstances the English jurisdiction clause could not be relied on, whether or not the allegations of fraud were, in the event, made out.

25. So the question here is whether the assertion of invalidity goes to the validity of the arbitration clause as opposed to the validity of the charterparties as a whole of which the arbitration agreements are a part. Mr Butcher relied on Mr Shepherd's eighth witness statement in which he stated that the owners would not have made any contract at all with the charterers if they had been aware that their employees had been bribed by Mr Nikitin and then submitted that it was enough for the owners to say that whatever it was that impeached the main agreement also impeached the arbitration clause. But that is precisely the opposite of what the authorities on separability have laid down viz. that it is not enough to say that the contract as a whole is impeachable. There must be something more than that to impeach the arbitration clause. That extra element is missing in the present case. Counsel's comments in Harbour v Kansa at 712B (that a party to a contract the making of which he says was induced by fraud would be surprised to be told that he is bound to have the issue tried by an arbitrator appointed under a clause in that contract) were as Ralph Gibson LJ said "no more than forceful comments". They did not carry the day. Bribery cannot be any different from fraud (indeed fraud is alleged in the present case although it is clear that the substantial allegation is one of bribery) and Mr Butcher's

reliance on the "forcefulness" of that comment by counsel is, in our judgment, misplaced.

26. Mr Butcher further submitted that owners' case could equally well have been pleaded as a case of no contract by reason of lack of authority on the part of the owners' employees to accept bribes. On that analysis the owners would be entitled to treat the contract as void from inception rather than entitled, as Millett J put it in Logicrose Ltd v Southend United Football Club [1988] 1 WLR 1256, 1260,

> "to elect to rescind the transaction ab initio."

For this purpose Mr Butcher relied on Article 23 of Bowstead and Reynolds on Agency 18th edition (2006):-

> "Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal."

This is a new Article in the latest edition of the work and no doubt Professor Reynolds is correct to observe there that a transaction such as a contract procured by bribery is, as regards the principal, void as being unauthorised. But that is no argument for saying that a separable arbitration clause cannot be invoked for the purpose of resolving the issue whether bribery occurred. In this connection an allegation of bribery is (and should be) no different from the allegation of initial illegality in Harbour v Kansa.

27. The way that Dicey Morris & Collins Conflict of Laws (14th edition) deals with the matter in relation to jurisdiction clauses is to refer to the cases in which it has been held that arbitration clauses are severable from the contracts in which they are contained and to say (para 12-099):-

> "The Supreme Court of the United States has also held that a challenge to the existence of the jurisdiction agreement based on fraud or duress must be based on facts specific to the clause and cannot be sustained on the basis of a challenge on like grounds to the validity of the contract containing it. It is submitted that there are excellent reasons of policy to support such an approach, for the parties when they nominated a court with jurisdiction to settle their disputes may well have expected this court to have and exercise jurisdiction if the dispute were to concern the very validity of the contract."

Mr Butcher said that this statement of the law went beyond any existing authority but it seems to us to be amply supported by both Mackender v Feldia and Harbour v Kansa. Moreover the European Court of Justice has in Benincasa v Dentalkit (1997) Case C-269/75, [1997] ECR 1-3767, come to the same conclusion in relation to a distribution agreement which contained an exclusive jurisdiction clause.

28. The judge dealt with this matter quite shortly by saying (para. 21) that owners' case that they had not truly consented to the relevant charterparties by reason of bribery was no different from a case of non est factum or mistake; he distinguished Harbour v Kansa on the basis that the illegality there did not impeach the arbitration clause

"whereas the bribery arguments, if sustainable, do impeach the whole contract". He concluded (para. 25) that the question whether owners ever made the contracts was not a dispute arising out of or under the contract. He then said that the arbitrator did not have jurisdiction to decide that issue, only the court did.

29. For the reasons we have given we cannot agree. If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure. Illegality is a stronger case than bribery which is not the same as non est factum or the sort of mistake which goes to the question whether there was any agreement ever reached. It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular. There is no such reason here.

30. The judge went on to say that, even if the arbitrator did have jurisdiction to decide the bribery issue, he would exercise his powers under section 72(1)(a) of the 1996 Act to grant an injunction to restrain the arbitration so that there could be a one-stop hearing of the issue and would not exercise his power to grant a stay of the claims to be entitled to rescind the charterparties or of the other time charter claims brought by owners.

31. This requires the court to decide what we consider to be essentially procedural matters pursuant to the 1996 Act but the judge's conclusions under this latter head are potentially far-reaching. If in a case where an arbitrator does have jurisdiction to decide a particular dispute, he is to be restrained from so doing and no stay of court proceedings is to be granted, there is likely to be a potential breach of the United Kingdom's international obligations in relation to commercial arbitrations under the New York Convention of 1957 as enshrined in the 1996 Act.

32. Sections 9 and 72 of the Act

It will be convenient first to set out these sections:-

> "9 Stay of legal proceedings
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> . . . .
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed . . . .

> 72 Saving for rights of person who takes no part in proceedings
>
> (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 . . . ."

33. The reference to section 67 in section 72 reminds the reader that once an award has been made an application to the court can be made challenging the award on jurisdictional grounds. It is also important to be aware that sections 30 – 32 of the 1996 Act relate to the jurisdiction of the arbitral tribunal. Section 30 provides that the arbitral tribunal may rule on its own substantive jurisdiction including (in the same words as used in section 72) the question whether there is a valid arbitration agreement. Section 31 provides that any objection as to jurisdiction must be taken before any step is taken to contest the merits of the matter and section 32 provides for the court to be able to determine a preliminary point of jurisdiction if all the parties agree in writing or the tribunal itself permits the court (for good reason) to do so.

34. This combination of sections shows, together with the prescriptive section 9(4), that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. In these circumstances, although it is contemplated also by section 72 that a party who takes no part in arbitration proceedings should be entitled in court to "question whether there is a valid arbitration agreement", the court should, in the light of section 1(1) of the Act, be very cautious about agreeing that its process should be so utilised. If there is a valid arbitration agreement, proceedings cannot be launched under section 72(1)(a) at all.

35. That will be the situation where the arbitration agreement is wide enough to comprise the relevant dispute and the arbitration clause, being a severable agreement, is not directly impeached by whatever ground is used to attack the invalidity of the contract

in which the arbitration clause is contained. That is this case. Section 72 has, accordingly, no application.

36. For our part, we would go further than this and say that, if the party who denies the existence of a valid arbitration agreement has himself (as the owners have here) instituted court proceedings and the party who relies on the arbitration clause has applied for a stay, the application for a stay is the primary matter which needs to be decided. It would only be if a stay were never applied for or were refused, but for some reason the party relying on the arbitration clause insisted on continuing with the arbitration that any question of an injunction should arise. Of course section 72 might well be applicable if the party denying the existence of an arbitration agreement had not started English proceedings and did not wish to do so. Such a party would then be entitled to apply under section 72 for a declaration that there was no valid arbitration agreement; even then an injunction would usually be necessary only if there was some indication that the other party was intending not to comply with any declaration which the court might make. This is all a long way from the present case in which court proceedings have been instituted and an application has been made to stay (some part of) those proceedings. Section 9 governs the position and for that section to apply there must be an arbitration agreement. If the existence of an arbitration agreement is in issue, that question will have to be decided under section 9 and there is no reason, at the moment at any rate, for any invocation of section 72 at all.

37. As HHJ Humphrey Lloyd pointed out in Birse Construction v St David (1999) BLR 194 there are four possible approaches to deciding whether an arbitration agreement exists to which section 9 applies:-

> (1) to determine on the evidence before the court that such an agreement does exist in which case (if the disputes fall within the terms of that agreement) a stay must be granted, in the light of the mandatory "shall" in section 9(4). It is this mandatory provision which is the statutory enactment of the relevant Article of the New York Convention, to which the United Kingdom is a party;
>
> (2) to stay the proceedings on the basis that it will be left to the arbitrators to determine their own jurisdiction pursuant to section 30 of the 1996 Act, taking into account the subsequent provisions in the 1996 Act for challenge to any decision eventually made by the arbitrators;
>
> (3) not to decide the issue but to make directions pursuant to what is now CPR Part 62.8 for an issue to be tried as to whether an arbitration agreement does indeed exist;
>
> (4) to decide that no arbitration agreement exists and to dismiss the application to stay.

No question of the interrelation between section 72 and these approaches arose in that case but His Honour did proceed to give helpful guidance as to the circumstances in

which it might be appropriate to adopt options (2) and (3) rather than (1) and (4). In this case it is, in our judgment, clear that option (1) is appropriate and that a stay should be granted.

38. The judge relied on Ahmed Al-Naimi v Islamic Press Agency [2000] 1 Lloyds Rep 522 to decide as a matter of his discretion that it was more convenient for the court to decide the question whether the charterparties and the arbitration clause were invalidated by the alleged bribery of the owners' agents because it was best that the matter should be decided only once. If the matter were truly a matter of his discretion that exercise of it might well be difficult to criticise, but the discretion of the court only arises if there is truly a "question whether there is a valid arbitration agreement". As we have sought to explain, once the separability of the arbitration agreement is accepted, there cannot be any question but that there is a valid arbitration agreement. Al Naimi (in which Judge Lloyd's four options are all set out and approved) was different because in that case there was a real question as to whether any arbitration agreement had come into existence or (perhaps more accurately) whether the agreement that did exist under a preceding contract covered disputes that arose pursuant to a subsequent ad hoc contract. If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid eg for illegality, misrepresentation or bribery and the arbitration agreement is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd since we do not consider that the judge had the discretion which he thought he had.

39. Mr Butcher submitted more broadly that any party challenging the jurisdiction of the arbitrators was entitled to invoke section 72 of the Act which effectively precluded (or trumped) any application to stay proceedings under section 9 of the Act. We have already given reasons why that cannot be correct but he relied on the first instance decision of Law Debenture Trust v Elektrim Finance BV [2005] EWHC 1412(Ch), [2005] 2 Lloyds Rep 755 as authority for his proposition. In that case there was a bond which contained an arbitration clause but this was subject to a clause which gave the claimant "the exclusive right at its option to apply to the courts of England to settle any disputes which may arise out of or in connection with these presents". The defendants started an arbitration challenging the claimant's assertion that events of default had occurred; the claimant then started proceedings to recover the full amount due under the bond to which it added a section 72 claim asking for an injunction to restrain the arbitration. The defendants retaliated with an application for a stay under section 9, CPR 62.8(3) and section 49(3) Supreme Court Act 1981. The judge rejected the general submission that the 1996 Act required the court to allow the arbitrators to decide whether they had jurisdiction. The claimant could therefore invoke section 72 (if it applied) to ask the court to decide the jurisdiction issue (para. 16). He then went on to reject the defendants' arguments that the claimant could not bring itself within section 72 because, as he put it, once the claimant opted for litigation, there was no longer an arbitration agreement (para. 20). The judge then dealt with the question of stay in paras. 32 - 37. But he makes it clear that his decision was dependant upon his construction of the deed: if, as he found, the claimant was entitled to litigate then obviously he would not grant a stay and vice

versa. Thus he said that the section 9 point "does not really arise as a contentious point" (para. 32).

40. The judge had no need to consider the separability of the arbitration clause but only had to decide if the litigation option had been rightly exercised by the party seeking to litigate. He decided that it had been and that accordingly the section 72 application for a declaration and an injunction should be granted and the stay application should be dismissed. There is nothing in the judgment which suggests that section 72 "trumps" section 9. The judge correctly described the sections as mirror images of one another. The only minor qualification we would make to the approach of Mann J in that case is to repeat that, in a case where court proceedings have begun and there is an application that they be stayed, it is more consistent with this country's obligations under the New York Convention to consider that application first, rather than the section 72 application first. But the answer to either application will, as the judge pointed out, determine the answer to the other.

41. We would, therefore, reject the owners' arguments and hold that the arbitration clause is a separate (and unrescinded) agreement unimpeached by the claim to set aside the charterparties and wide enough to determine whether the charterparties can indeed be set aside. The claim to rescission should be stayed and the application under section 72 of the 1996 Act should be dismissed.

42. Defence to claims for rescission

Mr Hamblen submitted that, even if the owners had been in theory entitled to rescind the relevant charterparties and the agreements to arbitrate contained in them, on account of the alleged bribery by or on behalf of Mr Nikitin, they were not in fact so entitled because three of the charterparties had been wholly performed and the remaining five partly performed so that restitutio in integrum was impossible and rescission therefore unavailable. He also had arguments about delay or acquiescence.

43. In the light of our conclusion that the arbitration agreements are separate contracts which remain in existence to resolve the dispute whether the charterparties can be rescinded for the alleged bribery, it is not necessary to consider these arguments. But their existence prompts us to wonder what relief the claim for rescission could give to the owners beyond what is already available to them under the heads of their claims for damages for conspiracy, damages or restitution in respect of the bribes and for account of profits. As far as we can see a claim to have successfully rescinded the arbitration agreements would have as its only practical effect the result that the charterers would be prevented from arbitrating the claims that they have against the owners (eg claims for any balance of account alleged to be due from owners at the end of the charters and the claim which has resulted from the grounding of the "TROPIC BRILLIANCE"). That is indeed the result of the order made by the judge.

44. For our part, we see no reason why the charterers should be prevented from arbitrating these claims; if the arbitration tribunal decides that the charters were indeed procured by bribery they will be able to decide what consequence that conclusion has on any claims which the charterers might otherwise legitimately have.

45. Conclusion

We would therefore allow this appeal, set aside paragraphs 8 – 10 of the judge's order and substitute an order that the owners claims for rescission of the charterparties be stayed pursuant to section 9(4) of the Act and that the applications made pursuant to section 72 of the Act be dismissed.

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