Neutral Citation Number: [2018] EWHC 1908 (Comm)

Case No: CL-2018-000328

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN PRIVATE

Royal Courts of Justice
7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26/07/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Franek Jan Sodzawiczny	**Claimant/ Applicant**
- and -	
(1) Andrew Joseph Ruhan **(2) Gerald Martin Smith** **(3) Dawna Marie Stickler** **(4) Simon Nicholas Hope Cooper** **(5) Simon John McNally**	**Defendants/ Respondents**

- -
- -

David Caplan (instructed by **Charles Russell Speechlys LLP**) for the **Claimant**
Philip Edey QC and Bajul Shah (instructed by **Jones Day**) for **the Fourth and Fifth Defendants**

Hearing dates: 9, 10 and 11 July 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Popplewell :

Introduction

1. On 22 May 2018, on a without notice application by Mr Sodzawiczny, I granted a worldwide freezing order against the Second to Fifth Defendants, Dr Smith, Ms Stickler, Mr Cooper and Mr McNally respectively. On the resumed return date there are the following applications before the Court:

   (1) an application by Mr Sodzawiczny to continue the freezing order ("the continuation application");

   (2) an application by Mr Cooper and Mr McNally to stay the proceedings under section 9 of the Arbitration Act 1996 ("the Act") and/or the Court's inherent jurisdiction ("the stay application");

   (3) an application by Mr Cooper and Mr McNally to discharge the freezing order as against them ("the discharge application");

   (4) a contingent application by Mr Sodzawiczny to continue the freezing order, alternatively for a fresh order in equivalent terms, under section 44 of the Act ("the contingent continuation application").

2. Dr Smith and Ms Stickler did not appear before me and were not represented. However they each sent letters to the Court in which, amongst other things, they supported the stay application and submitted that the appropriate place for the claim against them as well as Mr Cooper and Mr McNally was in arbitration.

The parties and background

3. Mr Sodzawiczny's claim in these proceedings arises against the background of events stretching back to 2003 which have given rise to extensive and complex litigation in this court. The main litigation was initially between those associated with Dr Smith on the one hand, and on the other Mr Ruhan and those associated with him. In the Ruhan camp, apart from Mr Ruhan himself who is a businessman with wide ranging business interests, there are (or were) Mr Cooper and Mr McNally, solicitors practising in the Isle of Man and at the time close personal friends of Mr Ruhan, who through various vehicles were responsible for managing assets on behalf of Mr Ruhan in a complex group of companies ("the Arena Group") held within an Isle of Man trust structure known as the Arena Settlement. The Arena Group assets within the Arena Settlement were transferred by Messrs Cooper and McNally to those in Dr Smith's camp in 2013 and 2014 during the course of the main litigation in what has been called "the Isle of Man Agreement", together with other assets which were outside the Arena Settlement.

4. In the other camp are Dr Smith himself, who was convicted of fraud, sentenced to eight years imprisonment and subjected to a confiscation order in favour of the Serious Fraud Office; although not a party to the main proceedings he was the driving force behind them; his former wife, Dr Cochrane, a GP practising in Jersey; Orb a.r.l, a Jersey company used as a vehicle to hold Dr Smith's family's financial interests; Pro Vinci Ltd (now in liquidation), a company described as providing "family services" to Dr Cochrane, which was heavily involved in managing assets within the Arena Settlement

and outside it following the Isle of Man Agreement; Ms Dawna Stickler, who was the managing director and sole shareholder of Pro Vinci and the principal individual engaged in carrying out those functions; and SMA Investment Holdings Limited ("SMA"), a Marshall Islands company owned by Dr Cochrane which became the holding company of the Arena and non-Arena Settlement assets as a result of the Isle of Man Agreement.

5. The events prior to the settlement of the main litigation are set out in a little detail in one of my judgments in those proceedings at [2016] EWHC 850 (Comm) at paragraphs [7] to [19]. It is sufficient for the purposes of this application merely to record that the transfer of assets by Messrs Cooper and McNally to Dr Smith's camp pursuant to the Isle of Man Agreement appeared to be a betrayal of trust towards Mr Ruhan with whom Dr Smith was locked in very hard fought litigation, in what was a form of self-help for Dr Smith to redress what he asserted were the wrongs done to him by Mr Ruhan. It has been described as "*extraordinary*" by Cooke J and as an "*appropriation by Dr Smith*" by Mostyn J. It involved Messrs Cooper and McNally purporting to deal with the assets – worth hundreds of millions of pounds – as if they were their own, and, it appears, being promised a reward for doing so.

6. Following the settlement of the main litigation there have emerged numerous further claims, both in relation to the settlement and in relation to assets of those in the Dr Smith camp including the Arena and non-Arena assets. Amongst the claimants are the SFO; the Viscount of Jersey who has succeeded to the title of Dr Cochrane who is in "en désastre" (a form of bankruptcy in Jersey); liquidators of various BVI companies which sat at the head of structures within the Arena Settlement below SMA, including Glen Moar Properties Ltd ("Glen Moar"); beneficiaries of the settlement of the main action; various litigation funders; Stewarts Law, Orb's former solicitors in the main litigation; and a number of others. I have been managing those various actions together, which were described before me as "the Popplewell proceedings", and have ordered a trial of a number of issues in relation to proprietary claims to certain of the assets, which is not due to be heard until 2020. One of the many issues in those proceedings is the validity of the Isle of Man Agreement and its effect on prior proprietary claims.

7. Mr Sodzawiczny is an engineer by trade, with a particular expertise in developing, building and running digital data centres. In 2005, Mr Sodzawiczny began working with Mr Ruhan to develop a group of digital data centres which were held within the Arena Group in companies bearing the brand Sentrum ("the Sentrum Group").

The claim

8. Mr Sodzawiczny's case in these proceedings is as follows. He and Mr Ruhan entered into an oral agreement pursuant to which Mr Sodzawiczny would assist the Arena Group in creating data centres in return for a 15% profit. Mr Sodzawiczny was not aware of the details of the Arena Group but understood that it was a complex corporate structure through which Mr Ruhan managed his affairs and assets with the assistance of Messrs Cooper and McNally. Mr Sodzawiczny was instrumental in the success of the Sentrum Group. From 2005-2012, he dedicated his whole professional life to it. In 2012 parts of it were sold to Digital Stout Holding, LLC ("Digital Realty") for over £700m, some of which was payable in an "Earn-Out Period". Following the sale, Mr Sodzawiczny continued to be involved with the Sentrum Group through a consultancy arrangement which ran until July 2015. Shortly after the Digital Realty sale, on 22

September 2012, Mr Sodzawiczny had a meeting with Mr Ruhan at which the oral agreement was affirmed and in certain respects modified in Mr Sodzawiczny's favour. In particular, it was agreed that:

(1) Mr Sodzawiczny was entitled to 15% of the net profits from the Digital Realty sale; and

(2) Mr Sodzawiczny would be entitled to 20% of each of (a) the profits generated in the Earn-Out Period, (b) the monies left over in an escrow account set up as part of the Digital Realty sale ("the Escrow Account"), and (c) the net sale proceeds of properties and data centres which had not been sold to Digital Realty.

9. Mr Ruhan said at this meeting that Mr Sodzawiczny's share of the Digital Realty sale profits were £21.75m, and that of that sum, £1.75m would be dealt with by way of a transfer of a property to Mr Sodzawiczny and £20m would be paid into a "*structure*". Mr Ruhan said that Mr Sodzawiczny should see Mr McNally to set up the "*structure*". Mr Sodzawiczny did so on 25 September 2012, in the Isle of Man (where Mr McNally was based). At that meeting, Mr McNally explained that (a) Mr Sodzawiczny's money would be held in a structure involving Isle of Man and Liechtenstein entities with the name "*Ruefikopf*" in them ("the Ruefikopf Structure"), (b) Mr Sodzawiczny would be able to access his money or get some kind of finance based on his entitlement to it during the Earn-Out Period and thereafter collapse it, but (c) Mr Sodzawiczny could not have any paperwork in relation to the structure.

10. Mr Sodzawiczny, who had worked with Mr McNally closely for many years by this point, trusted what he said in relation to the structure and was content to go along with it. And, although Mr Sodzawiczny did not actually know that the Ruefikopf Structure had been set up, he believed that it had, and, on one occasion, received what he believed was financing from it in a manner which was consistent with what Mr McNally had told him.

11. Mr Sodzawiczny first became aware of the effect of the Isle of Man Agreement (but not its terms) on 9 April 2014. It caused him considerable confusion and shock. There then followed a series of meetings and communications with Dr Smith and Ms Stickler, now ostensibly in control of the Arena Group and any "structure" for Mr Sodzawiczny within it, at which Mr Sodzawiczny tried to find out what had happened to, and ultimately secure, the money which he had believed had been set aside for him. In summary, Mr Sodzawiczny's evidence is that:

(1) Dr Smith presented himself as the man now in charge, with the assistance of Ms Stickler and Pro Vinci;

(2) Dr Smith and Ms Stickler throughout acknowledged Mr Sodzawiczny's entitlement to 15% of the Digital Realty sale proceeds;

(3) Mr Sodzawiczny was told different things at different times about what had happened: initially that there was no separate structure for him, then that there was, then again that there wasn't, the last being the narrative which Dr Smith and Ms Stickler ultimately stuck to;

(4) Mr Sodzawiczny was under severe financial pressure in relation to cash calls for his new business, Zenium, one of which he had already missed – and Dr Smith and Ms Stickler were aware of that;

(5) Dr Smith and Ms Stickler represented that, although there was no separate pot for Mr Sodzawiczny, and the corporate structure with which they were dealing was very complex, they would make genuine and good faith efforts to try to honour his entitlements; and

(6) in that context, discussions took place about a mechanism which might allow Mr Sodzawiczny to be paid, and Dr Smith and Ms Stickler represented that a "phased payment plan" would be necessary because of "cash flow issues".

12. It is common ground that whatever the content of discussions, they led to three written agreements:

(1) a "Confidential Settlement Deed" dated 22 August 2014 pursuant to which Pro Vinci agreed to "*procure*" the payment of £12m to Mr Sodzawiczny in three tranches, in exchange for a release of claims against various parties and to assets within the Arena Group ("the Deed");

(2) a side letter from Pro Vinci of the same date which provided that it would procure the transfer of the company which owned a property to Mr Sodzawiczny, and would procure the satisfaction of the first tranche payment under the Deed in particular ways, including by providing an early advance so that Mr Sodzawiczny could meet his cash calls;

(3) a side letter from Glen Moar, the Arena Group company sitting below SMA at the head of the structure containing the Sentrum companies (not yet then in liquidation), which provided that it would pay £9m to Mr Sodzawiczny in two tranches.

13. The Deed, to which Dr Cochrane, SMA, Pro Vinci, Glen Moar, and Messrs Cooper, McNally and Sodzawiczny were parties (but not Dr Smith or Ms Stickler) contained an arbitration clause providing for LCIA arbitration in London and widely worded release and settlement provisions. The scope of each is substantially in dispute on these applications.

14. Part payment was made of the first tranche payment under the Deed, totalling just under £5m, but nothing else. This led to an arbitration between Pro Vinci and Mr Sodzawiczny which resulted in an award in Mr Sodzawiczny's favour of £6.6m plus interest and costs. The award was registered as a judgment of the High Court on 15 June 2016, but Pro Vinci had by that time entered administration. It has since gone into liquidation. Glen Moar is also in liquidation. Mr Sodzawiczny regards the prospects of any further recovery under the Deed or side letters as remote.

15. Mr Sodzawiczny's evidence is that subsequent investigations have revealed the following. The Ruefikopf Structure, and parallel Madloch structure ("the Structures"), were in fact set up, but every entity within them (with one exception) has been dissolved. The exception, Ruefikopf Investments Limited, is now owned by a company which is owned by Messrs Cooper and McNally. Pursuant to a *Norwich Pharmacal*

order obtained in the Isle of Man on 1 December 2017, the former CFO of the Legion Group (one of Messrs Cooper and McNally's corporate vehicles), Mr Clive Wilcox, who was involved in some respects in administering the Structures, has sworn that very substantial sums – some £20m-£26m – were paid into the Structures on the instructions of Mr McNally; that the named beneficiaries of the Liechtenstein Foundations which sat at the top of the Structures included Messrs Cooper and McNally, but the Structures had in fact been set up for Mr Sodzawiczny's benefit and Messrs Cooper and McNally knew that; and that all distributions from the Structures were made to Messrs Cooper and McNally.

16. The causes of action advanced by Mr Sodzawiczny have been characterised as First Tier Claims and Second Tier Claims. Messrs Cooper and McNally submit that the First Tier Claims have been settled by the Deed. Mr Sodzawiczny's Second Tier Claims are advanced on that alternative hypothesis, that is to say if but only if the First Tier Claims are held to have been settled by the Deed.

17. The First Tier Claims are:

    (1) against Mr Ruhan for breach of the oral agreement and for deceit; it is unnecessary to consider these claims in any detail for present purposes because no freezing order was sought against Mr Ruhan and he is not a party to any of the applications currently before the Court;

    (2) against Messrs Cooper and McNally that they held their respective entitlements as named beneficiaries of the Structures and any distributions which they received on trust for Mr Sodzawiczny, and owed Mr Sodzawiczny duties as trustees and fiduciary duties, which they have breached by failing to account to Mr Sodzawiczny for the monies held in the Structures; and

    (3) against Dr Smith and Ms Stickler that they dishonestly assisted in Messrs Cooper and McNally's breaches of trust/fiduciary duty.

18. As to the value of the First Tier Claims, Mr Sodzawiczny relies on the information from Mr Wilcox that £20-26m was paid into the Structures. He argues that in addition, significant sums were earned during the Earn-Out Period and that his 20% share of those sums may have been paid into the Structures, but in any event they should have been (or to him); and that significant sums should also have been paid into the Structures or to him in relation to the Escrow Account. Accordingly giving credit for sums received by or for the benefit of Mr Sodzawiczny in respect of the first tranche of the payments he was due under the Deed (just under £5m), it is submitted that the value of his First Tier Claims comfortably exceeds £20m.

19. The Second Tier Claims are advanced against Dr Smith, Ms Stickler, Mr Cooper and Mr McNally. The claims against Dr Smith and Ms Stickler are primarily framed in deceit. Mr Sodzawiczny alleges that he was induced to enter into the Deed and side letters by fraudulent misrepresentations by Dr Smith and Ms Stickler. The representations are pleaded as being:

    (1) (expressly and impliedly) that there was no separate "pot" or structure for Mr Sodzawiczny;

(2) (expressly) that the Ruefikopf structure did not exist;

(3) (impliedly) that a parallel structure, the Madloch structure, set up at the same time and in the same way as the Ruefikopf Structure, did not exist;

(4) (impliedly) that (a) getting Mr Sodzawiczny's money to him would not be straightforward, but (b) they would make genuine and good faith efforts to try to do so;

(5) (impliedly) that (a) whatever mechanism was chosen in order to achieve payment to Mr Sodzawiczny, it would be a mechanism genuinely intended to achieve that end, (b) they and Pro Vinci (of which they were the controlling minds) intended that Pro Vinci would in fact "procure" the payments specified in the Deed, (c) they were unaware of any reason why Pro Vinci would be unable to fulfil its payment obligations specified in the Deed, and (d) they and Glen Moar (of which they were the controlling minds) intended that Glen Moar would in fact make the payments specified in the Glen Moar side letter.

20. On the hypothesis that the Deed settled some or all of the First Tier Claims, Mr Sodzawiczny avers he has suffered damage by entering into it, the recoverable measure of loss being the value of the rights and assets lost as a result of entering into the Deed less the value of the rights conferred on him by the Deed; and that the latter can be measured by reference to the value actually received under the Deed to date (i.e. just under £5m), as the chance of any further recoveries from either Pro Vinci or Glen Moar, both of which are in liquidation, are remote.

21. Mr Sodzawiczny's Second Tier claims against Messrs Cooper and McNally are put on three bases. First, Messrs Cooper and McNally are said to be liable for the deceit of Dr Smith and Ms Stickler on agency principles - Dr Smith and Mr Stickler were the ones negotiating with, and making representations to, Mr Sodzawiczny throughout; Dr Smith and Ms Stickler, either in their personal capacities or in their capacities as representatives of Pro Vinci, were negotiating with Mr Sodzawiczny for all of the other parties to the Deed, including Messrs Cooper and McNally; Messrs Cooper and McNally must have been aware of that fact, and allowed them to fulfil that role; accordingly, Dr Smith and Ms Stickler had actual or ostensible authority to make representations relating to the Deed to Mr Sodzawiczny on behalf of (amongst others) Messrs Cooper and McNally. Secondly, Messrs Cooper and McNally are said to be liable as conspirators with Dr Smith and Ms Stickler. The same factual basis is relied on as giving rise to the inference of an agreement to injure Mr Sodzawiczny by the unlawful means of the deceits practised on him by Dr Smith and Ms Stickler. Thirdly, it is said that in seeking a release for themselves without giving full and frank disclosure of either the true facts or their own wrongdoing, Messrs Cooper and McNally preferred their own interests over those of Mr Sodzawiczny and failed to act loyally and in good faith (see ***Item Software v Fassihi*** [2004] BCC 994 per Arden LJ at paragraphs [41]-[44]); and are therefore liable to compensate Mr Sodzawiczny in equity for any loss he has suffered as a result of entering into the Deed.

22. In addition to these claims, Mr Sodzawiczny asserts a proprietary claim to the monies and/or assets held within the Structures and/or their traceable proceeds. Mr Sodzawiczny did not, however, apply for a proprietary freezing order.

Procedural history

23. Dr Smith, Ms Stickler, Mr Cooper and Mr McNally were served with the freezing order and have given disclosure in purported compliance with it. On 5 June 2018, Messrs Cooper and McNally issued the stay and discharge Applications. On 6 June 2018, in response, Mr Sodzawiczny issued the contingent continuation application relying on section 44 of the Act. Messrs Cooper and McNally also issued an application on 21 June 2018 to discharge the freezing order on additional grounds namely that there was no good arguable case; and/or there was no sufficient evidence of a risk of dissipation; and/or that there had been material non-disclosure at the ex parte hearing.

24. On 8 June 2018, the initial return date, there was insufficient time to address all the issues; accordingly Phillips J adjourned the applications and return date, and gave directions.

25. Meanwhile on 6 June 2018, Messrs Cooper and McNally initiated an LCIA arbitration against Mr Sodzawiczny under the arbitration clause in the Deed. In their Request for Arbitration, Messrs Cooper and McNally claim that both these proceedings and indeed the proceedings which formed part of Mr Sodzawiczny's investigations into the alleged wrongdoing against him, constitute breaches of the Deed. On 12 June 2018, Messrs Cooper and McNally applied to the LCIA Court for the expedited formation of a tribunal pursuant to Article 9A of the LCIA Rules, which allows for such a procedure in cases of "*exceptional urgency*". On 13 June 2018, Mr Sodzawiczny responded to that request for expedition alleging that Messrs Cooper and McNally's application appeared to be tactical, and explaining that Mr Sodzawiczny could not make any application to a tribunal for relief given his position that the Court (and not a tribunal) had jurisdiction; and that even if a tribunal were to be put in place on an expedited basis, that would not obviate the need for the freezing order to be continued by the Court, because (a) the risk of dissipation in this case was very high and (b) in order for relief to be effective it had to bite immediately, be binding on third parties who were notified of it, and be backed up with a potential sanction for contempt. On 13 June 2018, the LCIA Court granted Messrs Cooper and McNally's application. On 20 June 2018, Mr Stuart Isaacs QC was appointed as sole arbitrator. An initial procedural conference in the arbitration took place on 13 July 2018.

26. On 20 June 2018, Mr Sodzawiczny issued a disclosure application seeking further asset disclosure, which was subsequently ordered to be heard at the resumed return date only if time permitted. In the event there was no time for it to be argued.

The Deed

27. The relevant parties to the Deed were Dr Cochrane, SMA, Pro Vinci, Glen Moar, Mr Cooper, Mr McNally and Mr Sodzawiczny. Paragraph 2 recorded the background and included the following statements:

> "(b) Following the success of Camberley Sentrum, [Mr Ruhan] and [Mr Sodzawiczny] entered into an oral agreement ("the Oral Agreement") pursuant to which [Mr Sodzawiczny] would assist the Arena Group in creating a group of further data-warehouses business operations located in Croydon, Woking and Hayes (collectively the "Sentrum Group") in return for which [Mr

> Sodzawiczny] would receive an equity stake in the Sentrum Group and share in its profits. The Oral Agreement was accepted by both [Mr Sodzawiczny] and [Mr Ruhan] as being binding upon each of them.
>
> (g) [Mr Ruhan] failed to honour the terms of the Oral Agreement, denying that [Mr Sodzawiczny] has any entitlement to a share in the profits derived from the sale of the Sentrum Group or its sale.
>
> (i) In a number of meetings between Pro Vinci and [Mr Sodzawiczny], [Mr Sodzawiczny] has threatened to issue legal proceedings against [Dr Cochrane], SMA, Glen Moar, [Mr Cooper] and [Mr McNally], alleging that (i) pursuant to the Oral Agreement, [Mr Sodzawiczny] has at all times been entitled to a profit share and/or equity interest in the Sentrum Group and future profits arising from the Sentrum Group; (ii) consequently Glen Moar, SMA and [Dr Cochrane] hold certain assets on trust for [Mr Sodzawiczny] and/or fiduciary duties to [Mr Sodzawiczny]; and (iii) [Dr Cochrane], SMA and/or Glen Moar are liable to [Mr Sodzawiczny] for compensation and/or damages as a result of the [Isle of Man Agreement] (collectively the "Dispute").
>
> (j) The Parties have agreed to terms for the full and final settlement of the Dispute and wish to record those terms of settlement, on a binding basis, in this Agreement."

28. Clause 5 of the Deed provided that Pro Vinci was to procure a payment to Mr Sodzawiczny in the total sum of £12m in three tranches, the first within 30 days of execution and the last within 240 days. The settlement provisions were contained in Clause 6 and Clause 7 in the following terms:

> "6. RELEASE
>
> 6.1 The Agreement will constitute full and final settlement of, and the Parties will thereby have released and forever discharged, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the Parties or to the law, and whether in law or equity, that they, their Affiliates or any of them ever had, may have or hereafter, can, shall or may have against any other Party or any of their Affiliates or [the present or former trustee of the Arena Settlement] arising out of or connected with the Dispute and/or the underlying facts relating to the Dispute.
>
> 6.2 For the avoidance of doubt, [Mr Sodzawiczny] hereby waives any interest in or rights or claims over the Arena Assets (whether direct or indirect, legal or beneficial and howsoever arising) or in connection with the transfer of these assets pursuant to the [Isle of Man Agreement], and waives as against the Parties or any of them or any third party any claims he has in

> respect of the Oral Agreement, the Sentrum Group or anything else connected thereto.
>
> 6.3. The above waived claims in Clauses 6.1 and 6.2 are referred to below collectively as the "Released Claims".
>
> 7. AGREEMENT NOT TO SUE
>
> Each Party agrees, on behalf of itself and on behalf of its Affiliates not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other Party or their Affiliates [or the present or former trustee of the Arena Settlement] any action, suit or other proceeding of any kind concerning the Released Claims, in this jurisdiction or any other."

29. Clause 13 contained an entire agreement clause in the following terms:

> "13.1 This agreement constitutes the entire agreement between the Parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
>
> 13.2 Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Each party agrees that it shall have no claim for innocent or negligent representation or negligent misstatement based on any statement in this agreement."

30. Clause 15.1 contained a confidentiality clause requiring the terms of the agreement and the substance of all negotiations in connection with it to be kept confidential to the parties and not to be disclosed other than in limited identified circumstances. Clause 15.2 contained a widely drawn non-disparagement clause.

31. Governing law and jurisdiction were dealt with in Clauses 16 and 17 in the following terms:

> "16. GOVERNING LAW
>
> This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
>
> 17. JURISDICTION
>
> 17.1 The Parties agree that any dispute arising out of or in connection with the performance or non-performance of this Agreement shall be referred to and finally resolved by arbitration

> under the LCIA Rules, which Rules are deemed incorporated by reference into this clause, on the following terms:
>
> 17.1.1 The number of arbitrators shall be one
>
> 17.1.2 The seat, or legal place, of arbitration shall be London
>
> 17.1.3 The language to be used in arbitral proceedings shall be English
>
> 17.1.14 The governing law of the contract shall be the substantive law of England"

The rival submissions in outline

32. On behalf of Messsrs Cooper and McNally, Mr Edey QC submitted that the claims by Mr Sodzawiczny in these proceedings all fell within the arbitration clause in the Deed, alternatively the majority of them did so; insofar as they fell within the clause a stay was mandatory under section 9(4) of the Act; insofar as there were any which fell outside the clause the court should stay them pending the outcome of the arbitration under its inherent jurisdiction to impose a case management stay; so far as concerns the freezing order, there was no good arguable case against Messrs Cooper and McNally because the First Tier Claims had been settled by the Deed and there was no good arguable case on the Second Tier Claims against them; that there was no solid evidence of a risk of dissipation; that there had been a failure to make full and frank disclosure at the without notice application; and that if the stay application was successful, there was no jurisdiction to grant a freezing order under section 44 of the Act, even if otherwise appropriate in the context of court proceedings, because the Claimant could not satisfy the jurisdictional hurdles of urgency under section 44(3) of the Act or that the arbitrator was unable to act effectively under section 44(5) of the Act.

33. Mr Caplan argued that none of the claims fell within the arbitration clause in the Deed; that if any of them did, there should be no case management stay in relation to the remainder; that the freezing order was properly maintainable on the basis of a good arguable case on both the First and Second Tier Claims; that there was solid evidence of a risk of dissipation which was enhanced by the subsequent asset disclosure made by Mr McNally and Mr Cooper; that there was no failure to make full and frank disclosure, alternatively none which would justify discharge of the freezing order; and that the jurisdictional requirements of section 44 were fulfilled such that the court could continue the injunction under its section 44 jurisdiction if all the arguable claims were to be subjected to a mandatory stay in favour of arbitration under section 9 (and did not need to be if there survived any good arguable claims which were not arbitrable, even if subjected to a case management stay, because the court would retain and should exercise its jurisdiction to grant a freezing order in support of those claims).

The stay application

34. It is convenient to consider the stay application first. Section 9 of the Act provides in relevant part as follows:

> "9. (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 had 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 is null and void, inoperative, or incapable of being performed."

The legal principles

35. Section 9 of the Act is modelled on Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention"). Section 9(4) is taken directly from Article II. Section 9(1) is concerned with a "matter which under the agreement is to be referred to arbitration" to which I will refer in the following discussion as "an arbitral matter". It is apparent from the section that legal proceedings may be "in respect of" an arbitral matter although the proceedings concern both that and other matters. In those circumstances the proceedings are to be stayed "so far as" they concern the arbitral matter. It is therefore inherent in the section that identification of arbitral matters within the proceedings may result in the identification of more than one such matter; and that the section may operate to stay one aspect of proceedings whilst leaving others to be pursued in court. In doing so it clearly gives primacy to the arbitration agreement even in domestic disputes by making a stay of court proceedings relating to the same dispute mandatory, a significant change from the Arbitration Act 1975 under which it was a matter of discretion.

36. There are two stages to the inquiry which the court is required to make under section 9(1). The court must first determine what the matter or matters are in respect of which the court proceedings have been brought. Secondly the court must then determine in respect of each such matter whether it falls within the scope of the arbitration agreement upon its true construction.

37. So much was common ground. However the parties' submissions differed on the approach to determining what the "matters" were for the purposes of the first question. Mr Caplan submitted that "matter" in section 9(1) is to be equated with a claim or cause of action; and that the fact that a defence is raised which falls within the scope of an arbitration agreement does not mean that section 9 is engaged if the claim itself does not fall within the scope of the agreement. On behalf of Mr McNally and Mr Cooper, Mr Edey argued that what was meant by a "matter" was an issue; and that the search was for issues which were the subject matter of the arbitration agreement. If correct, this raises a question of the degree of granularity which is to be adopted in characterising the issues in the case.

38. I was referred to a number of authorities which do not all speak with one voice, including ***T & N Ltd v Royal & Sun Alliance Plc*** [2002] CLC 1342 (Lloyd J); ***Lombard North Central PLC v GATX Corporation*** [2012] 1 Lloyd's Rep 662 (Andrew

Smith J); ***Tomolugen Holdings Ltd v Silica Investors Ltd*** [2015] SGCA 57 (a decision of the Singapore Court of Appeal which also considered authorities in Australia and other jurisdictions); ***Autoridad del Canal de Panama v Sacyr SA*** [2017] 2 Lloyd's Rep 351 (Blair J); and ***China Export & Credit Insurance Corporation v Emerald Energy Resources Ltd*** [2018] EWHC 1503 (Sir Richard Field). With the benefit of the views expressed in those cases I would myself approach the problem in the following way.

39. In addressing what the Singapore Court of Appeal in ***Tomolugen*** described as the "methodological" question of how narrowly or broadly one should characterise a "matter", which determines the answer to the first question, I start with an examination of the general approach to what falls within the scope of arbitration agreements. This might appear to be starting with the subject matter of the second question, but I regard it as the right starting point for two reasons. First, the two questions are intertwined. It is necessary to approach the first question in a way which enables the second question to be meaningfully addressed. Where the matter in respect of which proceedings are brought involves issues A and B, only one of which falls within the scope of an arbitration agreement, it is not possible to approach the categorisation of the matter as A plus B, because then to ask whether A plus B falls within the scope of the arbitration clause is a question which is incapable of being answered yes or no. Secondly, the imperative of upholding party autonomy so as to enforce arbitration agreements, which underpins both the 1996 Act (see section 1(b)) and the New York Convention (see Article II.1 and II.3), means that where the parties have agreed to refer something to arbitration, their bargain must be upheld, and that that "something" must be removed from the ambit of court proceedings. It is therefore appropriate to ask for the purposes of interpreting section 9: what is the nature of that "something"?

40. The answer is a dispute or difference, which for these purposes can be treated as synonymous. Article II of the New York Convention treats an arbitration agreement as one in which "the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them". Arbitration clauses are usually framed by reference to disputes or differences: see Mustill & Boyd on *Commercial Arbitration* 2nd edn at page 122. Although other wording is sometimes used (including "claims"), the paradigm arbitration agreement contemplated by the Act is one which bites on disputes.

41. For these purposes, a dispute can be constituted in the most general terms. If a party claims a sum of money, it is enough to constitute a dispute if the other party simply fails to pay. The existence of a dispute does not depend upon the disputing party advancing any reasons for disputing the claim. If it does advance reasons, a dispute exists irrespective of whether the grounds are bona fide or reach any merits threshold: see ***Halki Shipping Corporation v Sopex Oils Ltd*** [1998] 1 Lloyd's Rep 465. It is commonplace in maritime arbitrations, for example, for the dispute to be identifiable only at a very high level of generality at the time of appointment of arbitrators. Short time limits in certain cases make it essential that a dispute can be referred at an early and potentially undeveloped stage.

42. On the other hand, the dispute between the parties may be well defined before any proceedings are commenced, with clear identification of issues and sub issues by reference to different causes of action and different defences. Commercial disputes often involve more than one cause of action and a number of alternative or cumulative defences in relation to each. It is trite to observe that the problem being considered arises in the context of what will often be a dispute involving multiple issues. Even a

single cause of action may involve some issues which are arbitral and others which are not, depending on the scope of any potentially applicable arbitration agreement. This would be so, for example, in the case of a claim in the tort of conspiracy to injure by unlawful means, where the unlawful means are breaches of a contract between the parties, where the arbitration clause on its true construction applies to contractual but not tortious disputes. Moreover the grounds for disputing a claim may involve a completely different set of facts and legal principles from those involved in the claim itself. Defences of compromise, discharge, estoppel, and limitation provide obvious examples. So too does a transactional set-off arising out of a different contract or tortious liability.

43. The approach to what constitutes a "matter" in section 9 "in respect of which" the proceedings are brought should be capable of application in all these different circumstances and many in between, all of which are contemplated by the section. As a matter of principle the approach should therefore be as follows:

(1) The court should treat as a "matter" in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.

(2) Where the issues have been identified at the time the court is making the inquiry, there is no difficulty in conducting that exercise. Where the issues are not fully identified or developed at that stage, the court should seek to identify the issues which it is reasonably foreseeable may arise. In this respect I agree with Andrew Smith J at paragraph [14] of the ***Lombard North Central*** case.

(3) The court should stay the proceedings to the extent of any issue which falls within the scope of an arbitration agreement. The search is not for the main issue or issues, or what are the most substantial issues, but for any and all issues which may be the subject matter of an arbitration agreement. If the court proceedings will involve resolution of any issue which falls within the scope of the arbitration agreement between the parties, the court must stay the proceedings to that extent. This is necessary to give effect to the principle of party autonomy which underpins the Act. If a dispute is arbitral, effect should be given to the parties' bargain to arbitrate it. That applies to any dispute with which the court proceedings are, or will foreseeably be, concerned. Again I would respectfully agree with Andrew Smith J in the ***Lombard North Central*** case at paragraph [15] to this effect.

(4) Further, in considering the claim, the Court should look at the nature and substance of the claim and the issues to which it gives rise, rather than simply to the form in which it is formulated in a pleading. As Andrew Smith J put it in the ***Lombard North Central*** case at paragraph [14], the latter "would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred mater, knowing that any application to stay them must be made before a defence is pleaded." The same is true of identified or foreseeable defences. Section 9 is concerned with substance not form.

44. The objection that this approach leads to fragmentation of proceedings is not a sufficient reason for departing from these principles. The desideratum of unification of process

must give way to the sanctity of contract, as the mandatory terms of section 9(4) intend. Fragmentation is implicit in the pro tanto wording of section 9, and is in any event often a consequence of the consensual nature of arbitration agreements (for example in string contracts). The risk of fragmentation is reduced by the expansive approach which is taken to the construction of arbitration clauses, but it may be the inevitable result of upholding the parties' bargain. If so, the adverse consequences can be ameliorated, if not altogether avoided, by the case management power of the court to stay proceedings insofar as they fall outside the scope of an arbitration agreement.

45. Nothing I have said is intended to apply where the arbitration agreement is in a contract with third parties. The courts sometimes have to determine in a dispute between A and B what rights and obligations exist under a contract between C and D, or between C and A or B, and will do so irrespective of any arbitration agreement in that contract. Different considerations apply in such cases because of the lack of identity of parties.

46. Mr Caplan's argument that section 9 is not concerned with a defence, but only with the claim, is for these reasons unsound in principle. It would mean that where there was an arbitration agreement which was wide enough to cover the dispute comprised by the defence, the parties' agreement that it should be decided in arbitration would be frustrated. Nor is it supported by the authorities relied on, namely ***Aectra Refining and Manufacturing Inc. v Exmar NV*** [1994] 1 WLR 1634 per Hoffman LJ at pages 1648G-1650C; ***Prekons Insaat Sanayi AS v Rowlands Castle Contracting Group Ltd*** [2007] 1 Lloyd's Rep 98; and ***Guidance Investments Ltd v Guidance Hotel Investment Company BSC (Closed)*** [2013] EWHC 3413 (Comm). Those cases stand as authority for the proposition that if A brings a claim against B, and B advances a counterclaim which amounts to a defence by way of transactional set-off, A cannot have B's counterclaim stayed in favour of arbitration under section 9. There is an obvious justice in that result, because A should not be allowed to obtain judgment on his claim whilst insisting that a defence be stayed for arbitration, so that the court is confined to the facts A has chosen to prove and prevented from examining related facts which may amount to a defence (see Hoffman LJ at page 1650 B-C in ***Aectra***). Tomlinson J and Hamblen J, as they then were, gave as a tentative explanation for section 9 being inapplicable that A was not to be treated as a person against whom proceedings were being brought by a counterclaim, the deploying of a transactional set-off by way of defence not being the bringing of proceedings even if pleaded out in a statement of case entitled counterclaim (see ***Prekons*** at paragraph [11] and ***Guidance*** at paragraph [40]). An alternative explanation is simply that by bringing its claim in court, A has waived its right to insist on arbitration of any arbitral issue which constitutes a defence to the claim. Mr Caplan's argument is also inconsistent with section 1(6) of the Contracts (Rights of Third Parties) Act 1999 and ***Fortress Value Recovery Fund LLC & others v Blue Skye Special Opportunities Fund LP & others*** [2013] 1 WLR 3466 in which the Court of Appeal disapproved Blair J's analysis that reliance on a contractual exclusion was outside the scope of section 9 because the enquiry depended upon the nature of the claim, not any defence: see per Tomlinson LJ at [28], disapproving paragraph [103] of the judgment below quoted by Tomlinson LJ at [26].

47. I recognise that these conclusions are out of line with what was said by Lloyd J at paragraph [18] of the ***T & N*** case, and the reliance which Sir Richard Field indirectly placed upon it in the ***China Export*** case at paragraph [60]. However in ***T & N*** the facts

of the case and the way the argument arose were unusual, and neither judgment involves any analysis or reasoning of the kind I have endeavoured to undertake.

The first question

48. Mr Edey characterised the issues in respect of which the proceedings are brought against Messrs Cooper and McNally in the following way. The First Tier Claims raised two issues: (i) the causes of action in breach of trust/fiduciary duty; and (ii) the issue whether such claims were settled by the Deed. The Second Tier Claims raised four issues, namely (iii) whether the First Tier Claims were settled by the Deed (i.e. the same as issue (ii)), because the Second Tier Claims were premised on the proposition that First Tier Claims were so settled; (iv) whether the Deed was procured by the alleged wrongdoing by Messrs Cooper & McNally; (v) whether the Second Tier Claims have been settled by the terms of the Deed or are precluded by clause 13; and (vi) the validity of the First Tier Claims (i.e. the same as issue (i)), because the claim is for the value of the First Tier Claims which were on this hypothesis lost by reason of the settlement provisions of the Deed.

49. Mr Caplan was content to address the issues on the basis of this analysis, subject to his argument, which I have rejected, that section 9 requires a focus only on claims, not defences or issues.

The second question

50. The leading modern authority on the construction of dispute resolution clauses is the decision of the House of Lords in ***Fiona Trust & Holdings v Privalov & others*** [2008] 1 Lloyd's Rep 254, in which it was held that arbitration clauses in a series of time charters governed claims for rescission of the charters on the ground of bribery. In the leading speech Lord Hoffmann emphasised that the construction of an arbitration clause should start from the assumption that the parties as rational businessmen intended any dispute arising out of their relationship to be determined in the same forum; and that the presumption is a strong one, and requires clear words to the contrary if it is to be displaced: see paragraphs [6], [7] and [13]. This is what, as Hoffmann LJ in ***Harbour Assurance Co (U.K.) Ltd v Kansa General International Assurance Co*** [1993] QB 701 at page 726B, he had characterised as the "*presumption in favour of one-stop adjudication*". Lord Hope endorsed the same approach at paragraph [26], where he also observed that a dispute resolution clause is not one on which parties tend to focus during contractual negotiations, and so the court should be wary of placing too much weight on particular forms of words, so as to exclude certain disputes from its scope.

51. The presumption in favour of one-stop adjudication has particular potency where there is an agreement which is entered into for the purpose of settling disputes. Where parties to a dispute enter into a settlement agreement, the disputes which it can be envisaged may subsequently arise will often give rise to issues which relate both to the settlement agreement itself and to the previous circumstances which gave rise to the dispute. It is not uncommon for one party to wish to impeach the settlement agreement or challenge its scope and to advance a claim based on his alleged pre-existing rights. In such circumstances rational businessmen would intend that all aspects of such a dispute should be resolved in a single forum. This is especially so because in considering any dispute about the scope or efficacy of a settlement agreement, the tribunal is likely to have to consider the background, of which an important element will often be the

circumstances in which the pre-existing dispute arose and the alleged rights of the parties which preceded the settlement agreement. There will therefore often arise a risk of inconsistent findings if the tribunal addressing the validity or efficacy of the settlement is not seised of jurisdiction to address the pre-existing disputes and the latter fall to be determined by a different tribunal. This is no less true when a settlement agreement is in terms alleged to be wide enough to cover unknown or unidentified disputes: it will be envisaged that the settlement agreement will be invoked in the context of claims allegedly within its scope, which will often require adjudication on the validity of the claims as well as the effect of the settlement agreement.

52. The court must of course pay attention to the language of the arbitration clause, as it must in its approach to any exercise of construction; but these are important considerations which inform that approach and are consistent with the general principles on construction reiterated in the recent cases of high authority culminating in ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173.

53. Applying these considerations, the wording of the arbitration clause in the Deed is in my view apt to cover all the issues in the current proceedings. Mr Caplan draws attention to the difference in wording between the governing law clause (clause 16) and the narrower language in the arbitration clause (clause 17). This distinction may bear less weight than he sought to put on it in the light of Lord Hope's observations, and the possibility that each clause may simply have been adopted from different standard form agreements in circumstances where the parties had been involved in numerous previous contracts with other parties. Even taking the distinction as one of significance, it remains the case that the arbitration clause is in fairly wide terms - "arising out of or in connection with" performance or non-performance of the Deed.

54. As to the First Tier Claims, performance of the Deed involves compliance with the promises in clause 7 not to sue or prosecute any action suit or proceeding of any kind "concerning" the claims which are released and settled by clause 6. That is wide enough to cover the causes of action advanced in the First Tier Claims as issue (i), because they involve a dispute arising out of and in connection with whether Mr Sodzawiczny has failed to perform that promise. The same is true of issue (ii) which is concerned with the scope and effect of the settlement provisions in the Deed.

55. Mr Caplan submitted that the scope of the arbitration clause was confined to the performance or non-performance of the payment obligations in clause 5. I can see no justification for such a narrow reading. "Performance" of the Deed encompasses performance of all its terms, and the release and non-suit provisions are amongst those terms. Indeed they are central provisions which are the quid pro quo for the payment obligation in clause 5. It would be anomalous for the arbitration clause to extend to the one and not the other, and so to confine it is inconsistent with its plain language.

56. The fact that the existence and effect of the settlement provisions in the Deed are at the heart of all the First Tier Claims is apparent from the way in which they are pleaded in the Particulars of Claim. Paragraph 45 avers that the breaches of trust/fiduciary duties were deliberate and dishonest, giving particulars of the grounds relied on. That averment is superfluous and unnecessary for the establishment of the causes of action, but is advanced in order to defeat reliance on the settlement provisions in the Deed. Paragraph 47 contains the positive averment that none of the First Tier Claims are barred by the Deed because (1) it does not extend to cover fraud or dishonesty and (2)

the Deed is unenforceable due to sharp practice/unconscionability (which although unparticularised was confirmed by Mr Caplan as intended to refer to the conduct giving rise to the Second Tier Claims). It may be that these allegations could have been pleaded in a Reply rather than the Particulars of Claim, but the form of pleading does not determine the question, which is one of substance not form. It is clear that Mr Sodzawiczny's First Tier Claims are intimately bound up with the question whether the claims have been settled and it would be contrary to the expectations of rational businessmen and to the presumption of one stop adjudication for the arbitration clause to extend to one without the other.

57. There is a further reason why the validity of the causes of action in relation to the First Tier Claims (issue (i)) are within the scope of the arbitration agreement. The Particulars of Claim do not identify when the breaches of duty are alleged to have taken place; it may be before or after the date of the Deed, and it is reasonably foreseeable that the latter may be the case. If they were after the date of the Deed, the effect of the settlement provisions goes directly to the question whether there was any breach of duty at all, not merely as to a defence that such breach has been released or such claim settled. If Messrs McNally and Cooper were released by the Deed from any liabilities thereafter in relation to the claims by Mr Sodzawiczny to a pot of money under the alleged Oral Agreement with Mr Ruhan, then any trust arrangement would cease and any subsequent conduct in relation to any such pot would not amount to a breach of any fiduciary duties owed to Mr Sodzawiczny (or at the very lowest arguably so).

58. As to the Second Tier Claims, what I have said about issue (ii) applies equally to issue (iii), because it is the same issue whether the First Tier Claims have been settled, and the logic applies with equal force to issue (v). Issue (vi) is the same as issue (i) and covered by the clause for the same reason.

59. That leaves issue (iv) which concerns the enforceability of the Deed and concerns the alleged wrongdoing by which it is sought to be impeached. That issue is also within the scope of the arbitration clause for several reasons: first because the enforceability of the terms of clauses 6 and 7 are issues which arise "in connection with" their performance; secondly because Messrs Cooper and McNally rely upon clause 13 of the Deed as a defence to the claims which are dependent upon misrepresentations or non-disclosure, and the applicability and enforceability of clause 13 is an issue which arises "in connection with" the performance of that aspect of the Deed; and thirdly because it is an issue which is itself premised on the assertion which pervades the whole of the Second Tier Claims that the Deed is effective to settle the First Tier Claims. This is an essential ingredient which Mr Sodzawiczny has to prove in order to advance the Second Tier Claims at all, because the claims are brought in tort and damage is a necessary ingredient of the cause of action, the damage alleged in this case being the loss of the First Tier Claims by operation of the provisions of clauses 6 and 7 of the Deed.

60. This last point provides an additional reason why the validity of the causes of action in relation to the First Tier Claims (issue (i)) is within the scope of the arbitration clause: it is an essential ingredient of loss (and therefore the cause of action) in the Second Tier Claims and forms the alleged measure of loss for those Second Tier Claims; and the latter are within the scope of the arbitration clause because they are all premised on the Deed being effective to settle the First Tier Claims.

Conclusion on stay

61. Accordingly I conclude that all the proceedings against Mr McNally and Mr Cooper are in respect of matters within the scope of the arbitration agreement in the Deed, and they are entitled to a mandatory stay under section 9 of the Act.

The other applications

62. It follows from this conclusion that the continuation of the freezing order falls to be considered solely under the contingent continuation application and by reference to the court's jurisdiction under section 44 of the Act.

63. During the course of the hearing Mr Edey submitted that in that eventuality the court was invited not to consider the arguments in relation to the freezing order; his clients were content for it to remain in place until the arbitrator had had an opportunity to consider the arguments, on the understanding that Mr Sodzawiczny would proceed expeditiously to seek equivalent relief from the arbitrator. The arbitrator would then be able to allow the freezing order to continue or not, pursuant to section 44(6). He submitted that this was the correct course to follow because arguments on whether there was a good arguable case that the First Tier or Second Tier Claims escaped the operation of the settlement provisions in clauses 6 and 7 of the Deed was a matter which the parties had agreed to submit to arbitration and should be determined by the arbitrator. Mr Caplan accepted that this was a course open to the court, but submitted that since the court had heard argument on the issues of good arguable case and risk of dissipation, procedural efficiency and the desideratum of saving costs justified the court dealing with them.

64. Having heard full argument on these issues it is tempting to address them, but in my view it would be wrong in principle to do so. It would put case management considerations ahead of the parties' bargain in their arbitration agreement, which confers on the arbitrator the jurisdiction to consider the merits of substantive issues and jurisdiction to decide upon ancillary relief, subject only to the court's residual jurisdiction to intervene under section 44 in cases of urgency where the tribunal is unable to act effectively. If the freezing order remains in place until the arbitrator can consider the exercise of that jurisdiction, there is no proper role for the court to address issues which only arise in the context of the exercise of a section 44 jurisdiction which is no longer justifiable on the gateway criteria of urgency and efficacy required by sections 44(3) and 44(5) of the Act. Mr Caplan did not pursue a free-standing argument that the arbitrator would never have the power to act effectively because of the absence of contempt sanctions applicable to third parties notified of the order, it being possible, of course, to make any order of the arbitrator an order of the court under section 42 of the Act. His concern, ultimately, was that there should be no gap in the operation of a freezing order in the time necessary for the arbitrator to consider the exercise of his jurisdiction to grant ancillary relief. That concern is met by Mr Edey's concession that the freezing order should remain in place for that purpose. I will therefore take the course urged on me by Mr Edey.

The claims against Dr Smith and Ms Stickler

65. As I have said, Dr Smith and Ms Stickler were not present or represented at the hearing, and had not issued any section 9 application, but had nevertheless intimated in letters that the claim against them should go to arbitration if that was the fate of the claims against Messrs McNally and Cooper. At the hearing Mr Caplan proceeded on the basis

that they were not parties to the Deed and could not invoke the benefit of clause 17. In final speeches I drew attention to the fact that the terms of clause 18, which is concerned with rights under the Contracts (Rights of Third Parties) Act 1999 ("CRTPA") provided "With the exception of Affiliates, and with the exception of clause 6.2, the Parties agree that the terms of this Agreement are not enforceable under [CRTPA]"; and that the terms of clauses 6 and 7 were expressed to be in favour of Affiliates, as defined. I invited submissions on the position of Dr Smith and Ms Stickler under CRTPA and in particular its effect if any on their invocation of a right to arbitrate. Mr Caplan provided written submissions following the hearing addressing this question.

66. On Mr Sodzawicny's behalf it is not disputed that Dr Smith and Ms Stickler come within the definition of Affiliates of Pro Vinci. As such there can be no doubt from the language of clauses 6, 7 and 15 that those were provisions intended to confer benefits on them; and clause 7 involves express promises by Mr Sodzawiczny not to sue them in respect of matters within the scope of the settlement and release provisions. Section 1 of CRTPA provides that a third party may enforce a term of the contract when the contract expressly so provides (section 1(a)), or the term purports to confer a benefit on it (section 1(b)). Section 1(6) makes clear that "enforcing" a term includes availing oneself of any term purporting to exclude or limit liability. In my view clause 18 expressly purports to confer rights under the Act on Affiliates. Accordingly Dr Smith and Ms Stickler are entitled under both section 1(a) and 1(b) of CRTPA to invoke the benefit of, and rely upon, the settlement and release provisions in clauses 6 and 7 of the Deed, and in doing so are, in the terminology of CRTPA enforcing terms for their benefit. Can they insist on doing so in arbitration?

67. The application of CRPTA to arbitration agreements is governed by section 8 of CRPTA. The Law Commission in its Report "*Privity of Contract: Contracts for the Benefit of Third Parties* (1996) (Law Com No 242) at paragraphs 14.14-14.18, recognised difficulties in the concept of separating arbitration agreements into benefits and burdens. As Professor Burrows, a member of the Law Commission Law responsible for the recommendations which led to CRPTA, put it in an article in [2000] LMCLQ 540, "arbitration caused the Law Commission a lot of difficulty". It recommended that arbitration agreements be outside the scope of the reform. However what became section 8 was introduced relatively late on in the legislative process by way of a Government amendment at the Report stage in the House of Commons. Section 8 provides:

> "8. Arbitration provisions.
>
> (1) Where—
>
> (a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and
>
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and

> the promisor relating to the enforcement of the substantive term by the third party.
>
> (2) Where—
>
> (a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ("the arbitration agreement"),
>
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and
>
> (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement, the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right."

68. The Explanatory Notes which accompany the CRTPA provide:

> Section 8: Arbitration provisions
>
> 33. Section 8 ensures that, where appropriate, the provisions of the Arbitration Act 1996 apply in relation to third party rights under this Act. Without this section, the main provisions of the Arbitration Act 1996 would not apply because a third party is not a party to the arbitration agreement between the promisor and the promisee.
>
> 34. Subsection (1) deals with what is likely to be the most common situation. The third party's substantive right (for example, to payment by the promisor) is conferred subject to disputes being referred to arbitration (see section 1(4)). This section is based on a "conditional benefit" approach. It ensures that a third party who wishes to take action to enforce his substantive right is not only able to enforce effectively his right to arbitrate, but is also "bound" to enforce his right by arbitration (so that, for example, a stay of proceedings can be ordered against him under section 9 of the Arbitration Act 1996). This approach is analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden (see, for example, *DVA v Voest Alpine, The Jaybola* [1997] 2 Lloyd's Rep 279). "Disputes …. relating to the enforcement of the substantive term by the third party" is intended to have a wide ambit and to include disputes between the third party (who wishes to enforce the term) and the promisor as to the validity, interpretation, existence or performance of the term; the third party's entitlement to enforce the term; the jurisdiction of the arbitral tribunal; or the recognition and

> enforcement of an arbitration award. But to avoid imposing a "pure" burden on the third party, it does not cover, for example, a separate dispute in relation to a tort claim by the promisor against the third party for damages.
>
> 35. Subsection (2) is likely to be of rarer application. It deals with situations where the third party is given a right to arbitrate under section 1 but the "conditional benefit" approach underpinning subsection (1) is inapplicable. For example, where the contracting parties give the third party a unilateral right to arbitrate or a right to arbitrate a dispute other than one concerning a right conferred on the third party under section (1). To avoid imposing a pure burden on the third party (in a situation where, for example, the contracting parties give the third party a right to arbitrate a tort claim made by the promisor against the third party) the subsection requires the third party to have chosen to exercise the right. The timing point at the end of the subsection is designed to ensure that a third party who chooses to exercise his right to go to arbitration by, for example, applying for a stay of proceedings under section 9 of the Arbitration Act 1996, can do so. Under section 9 of the Arbitration Act 1996, the right to apply for a stay of proceedings can only be exercised by someone who is already a party to the arbitration agreement."

69. At first sight it might be thought that if and to the extent that the arbitration agreement covers the matters in respect of which claims are brought against Dr Smith and Ms Stickler, this is a case which falls within section 8(1): the conditional benefit rationale applies as with any assignee of a right which he is seeking to enforce: they are seeking to enforce a term against Mr Sodzawiczny, albeit by way of defence and in accordance with the language of section 1(6), which is for their benefit and is subject to arbitration; if they do so they are both entitled and bound to do so in arbitration in accordance with the arbitration agreement. This approach would however be mistaken. A similar argument was rejected in the ***Fortress*** case, on the grounds that the effect of section 8(1) would be that the third party would be treated as party to the arbitration agreement and subject to its burdens irrespective of any invocation of the arbitration clause, such that the claimant party to the contract could arbitrate against the third party and require the arbitrator to determine that the exclusion clause which the third party was relying on afforded no defence in circumstances where the third party had not invoked and not agreed to be subject to the burden of the arbitration agreement. Section 8(1) is concerned with the situation where the third party seeks to enforce substantive rights under the contract, not where the contract gives him a defence; see per Tomlinson LJ at paragraphs [29] and [36] and Toulson LJ at paragraphs [42] to [43].

70. In these circumstance section 8(2) is available and not open to the same objection because it only applies if the third party invokes the right to arbitrate: see ***Fortress*** per Tomlinson LJ at paragraph [31] and paragraph Toulson LJ at [44]-[45]. As that case makes clear, however, section 8(2) can only apply if the arbitration clause upon its true construction gives the third party a right to arbitrate.

71. It may be that ***Fortress*** is distinguishable from the present case, because the rights which Dr Smith and Ms Stickler are seeking to enforce include a positive promise not

to sue etc in clause 7 of the Deed. But I am content to proceed on the basis that any right to arbitrate can only arise under section 8(2).

72. In ***Fortress*** the arbitration clause in question was held not to confer rights under section 8(2) as a matter of construction because it only applied to disputes which "the parties hereto" were unable to resolve: see paragraphs [31] and [47]. In this case, by contrast, the arbitration clause covers "any dispute arising out of or in connection with the performance or non-performance" of the Deed, and performance includes the express promises made to Affiliates and the exclusions of liability in their favour under clause 6 and 7 of the Deed. Again the presumption in favour of one stop adjudication and the approach to dispute resolution provisions in a settlement deed make it improbable that the parties should have intended disputes between parties to be resolved in one forum and the very same issues between parties and Affiliates who are intended to be entitled to take the benefit of the terms in another. The reasons I have identified for construing the arbitration clause as wide enough to cover all the issues in the First and Second Tier Claims against Mr McNally and Mr Cooper apply with equal force to the First and Second Tier Claims against Dr Smith and Ms Stickler. In other words, this is a case, unlike ***Fortress***, in which the parties have agreed to confer on the Affiliates the right to arbitrate the First and Second Tier Claims against them (cf ***Fortress*** at paragraph [47]), and section 8(2) enables them to take the benefit of that agreement, which is what they have sought to do by the terms of their letters. Accordingly they too are entitled to a stay under section 9 of the Act, and given that they are without representation, I would not regard the absence of a formal application notice as a bar to granting such relief; indeed I did not understand Mr Caplan's objections to extend to such a technical procedural point.

73. I will therefore stay the proceedings against them, but leave the freezing order in place against them pending application to the arbitrator for relief, on the same terms as apply to Messrs McNally and Cooper.