

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2009

Before :

THE HON.MR.JUSTICE RAMSEY

Between :

British Telecommunications PLC

Claimant

- and -

SAE Group INC

Defendant

Mr Simon Henderson (instructed by **Group General Counsel of British Telecommunications PLC**) for the **Claimant**

Mr Paul Buckingham (instructed by **Nabarro LLP**) for the **Defendant**

Hearing dates: 5th February 2009

Judgment

Mr Justice Ramsey :

Introduction

1. In these Part 8 proceedings the Claimant (“BT”) seeks certain declarations concerning the existence and effect of dispute resolution procedures under a contract between BT and the Defendant (“SAE”).
2. The proceedings raise the question of the proper approach of the Court where, as here, one party asserts that there is an arbitration clause and the other party contends that there are no agreed dispute resolution procedures and, in any event, the draft clause relied on is not an arbitration agreement and would not cover the dispute.
3. BT brings these proceedings as Part 8 proceedings and, in the alternative, as an arbitration claim under s.72 or s.32 of the Arbitration Act 1996 (“the Act”), in so far as that is necessary. SAE submits that the Court should not make the declarations sought by BT.
4. There are essentially two questions. First whether the Court should consider the merits of the claim for declarations where one party contends that there is an

arbitration agreement with a properly appointed arbitrator. Secondly, if the Court should do so, whether there is a valid arbitration agreement.

Background

5. By an agreement in writing dated 14 July 2000 (“the Contract”) SAE agreed to provide certain equipment, software and services to BT relating to BT’s activities in broadcast and satellite communications and in particular relating to BT’s outside broadcast television operations. The original contract price was £97,500. The parties agreed five amendments to the Contract by which SAE agreed, on the terms set out in the Contract, as amended, to provide additional services and software to BT. The effect of these amendments was to increase the contract price to approximately £1,235,000.
6. Under Clause 25.4 of the General Conditions at Schedule 1 to the Contract BT was entitled to terminate the Contract at any time on written notice. They did so on 24 October 2002. On such termination SAE became entitled to be paid certain sums. Disputes have arisen between the parties as to those sums.
7. On 25 June 2006 Dr Robert Gaitskell QC notified the parties that he had been appointed by the President of the Institution of Electrical Engineers as arbitrator in respect of the dispute between the parties. There was evidently a unilateral application by SAE for such an appointment.
8. BT acknowledged receipt of the notification and stated that they had not previously been aware of Dr Gaitskell’s appointment. By a letter dated 6 July 2006 BT wrote to solicitors who had previously been instructed by SAE in respect of the dispute and said that they had last heard from those solicitors and SAE in August 2004 and:

“It has therefore come as something of a surprise to BT to receive notice from a Mr Robert Gaitskell of Keating Chambers, dated 23 June 2006, that he has been appointed arbitrator in this dispute by the President of the Institution of Electrical Engineers (IEE).

In very basic terms, I understand that your client claims entitlement to additional costs allegedly incurred in delivering an IT solution to BT. I do not understand your client’s claim to relate to the provision of software source code to an escrow agent.

If my understanding is correct, Mr Gaitskell has no jurisdiction to determine the dispute between BT and SAE (Contract Number 654293). It would appear that you/your client have mistakenly referred the dispute to the President of IEE pursuant to Appendix 4, Clause 17 of the Contract (the model escrow agreement), which governs disputes connected with the escrow agreement only. I understand in any event that the model escrow agreement was not used by the parties.

It follows that you/your client must immediately withdraw the Request for Arbitration and proceed in accordance with the general pre-action protocols.

In other words, and not least due to the fact that almost 2 years have lapsed since we last heard from you,(i) provide BT with an up to date statement of case (ii) allow BT a reasonable opportunity to respond (iii) explore, if feasible, alternative dispute resolution prior to taking any formal action.

I urge you/your client to act as above and provide BT with an updated statement of case within 21 days of the date of this letter. Failure to do so may result in BT making the necessary application to the courts, without further notice, and seeking its costs of doing so from your client.”

9. SAE responded on about 11 July 2006 to say this:

“We have initiated arbitration according to the procedure incorporated as an integral part of the contract bundle prepared by BT and executed by both parties for the work performed by SAE out of a desire to resolve the matter (all our prior BT contact attempts apparently having been ignored), and certainly not as part of any attempt to obtain an unfair advantage over yourselves.

As a sign of our good faith, we will take no further action in the IET (IEE) proceeding and will lodge with your office a full and detailed statement of the case and provide you with a reasonable opportunity to respond. We will meet with you in your offices after you have had an opportunity to review our claim materials if necessary to advance an informal resolution.”

10. In a further letter of 13 July 2006 SAE further stated:

“We will not take any further action to advance the IEE arbitration, but must reserve all of our rights to do so in the event BT fails to participate meaningfully in settlement discussions once you have received a full and detailed statement of SAE’s claim and a reasonable time has passed for you to evaluate and respond to the information.”

11. There matters remained, so far as the potential arbitration was concerned. The parties communicated with each other about the dispute until about July 2008.
12. Then, on 14 October 2008, SAE wrote to Dr Gaitskell’s clerk to say that they had been advised that the “Disputes” section of the Contract with BT required that all disputes between the parties should be referred to binding third party arbitration. They set out what had happened since 2006 and concluded by requesting Dr Gaitskell to restart arbitration proceedings forthwith.
13. Dr Gaitskell in an e-mail of 16 October 2008 said that his recollection was that BT took the position that he had no jurisdiction. He suggested that before SAE incurred costs they should discuss this procedural point with BT.
14. In response on 16 October 2008, SAE sent Dr Gaitskell a copy of Clause 17 of Appendix 4 to Schedule 2 to the Contract (“Clause 17”). Dr Gaitskell responded on 20 October 2008 to say this:

“I am in receipt of the documents attached to Mr Dea’s letter (below). I note that Clause 17 contains an arbitration clause. I understand the parties are currently discussing matters of procedure. I await an indication as to whether or not the parties have agreed upon procedure or whether I should now proceed on the basis of my earlier appointment by the President of the IEE/IET.”

15. BT wrote to Dr Gaitskell on 20 October 2008 and said:

“.. I would however repeat BT’s Position that an IEE Expert has no jurisdiction to determine the dispute between the parties. SAE has, unhelpfully, provided you with an excerpt to Appendix 4 of the Contract, which Appendix is a model IPR Information Deposit Agreement which was never used by the parties. Had such Agreement been used and signed by the parties, and had a dispute arisen thereunder, then it would have been open to either party to nominate you and in the absence of a joint appointment ask the President to make a suitable nomination. In fact, the dispute relates to SAE’s Claim for breach of the Contract-BT’s alleged failure to pay SAE’s reasonable project costs following termination. The Contract does not provide a mechanism for your appointment...”

16. On 21 October 2008 BT wrote to SAE setting out, more fully, BT’s position that there was no arbitration clause. SAE responded on the same day disputing that position. Both letters were copied to Dr Gaitskell who wrote to the parties in 22 October 2008 to say this:

“I am in receipt of various communications between the parties, from which I note there is a dispute as to whether or not there is an effective arbitration clause. Obviously, it is not for me to advise the parties, nevertheless, I am sure you are aware that the (English) 1996 Arbitration Act provides in section 32 for an application to be made to the court for a determination of a preliminary point of jurisdiction. Further section 31(5) caters for an arbitral tribunal staying proceedings whilst an application is made to the Court under section 32. No doubt the parties will wish to consider their respective positions. I shall do nothing further until I hear from the parties.”

17. There was further correspondence between the parties and Dr Gaitskell and it is common ground that Dr Gaitskell gave permission for BT to proceed with an application under s. 32 of the Act.

The contentions of the parties

18. Mr Simon Henderson who appeared on behalf of BT submits that:

- (1) The Court should make the declaration under Part 8 because on a review of the evidence there is no arbitration agreement and the provisions of the Act are not engaged.
- (2) Alternatively, if the matter comes within the Act, then BT is entitled to the declaration under s.72, alternatively s 32, of the Act.

19. Mr Paul Buckingham who appeared on behalf of SAE submits that:

- (1) The Court cannot make a declaration under Part 8 because there is an arbitration and under s.1(c) of the Act the Court should not interfere except as provided for by Part I of the Act.
- (2) Section 72 of the Act does not apply because BT has taken part in the proceedings. Alternatively, BT has lost the right to object under s.73 of the Act.
- (3) In relation to s.32 of the Act, whilst the arbitrator has given permission, the requirements of s.32(2)(b) are not satisfied and the Court cannot make a declaration.

Provisions of the Arbitration Act 1996

20. These are the following relevant provisions of the Act:

- (1) Section 1(1)(c) sets out general principles as follows:

“(1) The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(c) in matters governed by this Part the court should not intervene except as provided by this Part.”

- (2) Section 32 deals with the determination of a preliminary point of jurisdiction:

“(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the court.”

21. Section 72 deals with certain rights of a person who takes no part in proceedings and states:

“(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.”

Jurisdictional issues in Arbitration

22. The provisions of the Act apply when there is an arbitration agreement, as defined in s. 6 of the Act. If one party asserts that there is an arbitration agreement within the Act but the other party contends that there is not and commences court proceedings then the question arises as to the approach of the court when faced with a dispute as to the existence of an arbitration agreement.
23. In this case BT commenced Part 8 Proceedings for declarations to the effect that there was no arbitration agreement. It puts the proceedings in the alternative and in so far as necessary, under the Act. There was no application by SAE for a stay of the proceedings under s.9 of the Act. There was an issue, though, as to whether the proceedings could only be brought under s.72 or s.32 of the Act, if at all. That necessarily raised the question of the applicability of the Act which, in turn, raises the very question as to the existence of an arbitration agreement which BT says the Court should decide but which SAE says should be decided by an arbitrator. How should the Court approach this matter?
24. A similar question arose in the context of ss.9 and 72 of the Act in Fiona Trust & Holding Corporation v. Yuri Privolov. Longmore LJ gave the judgment of the Court of Appeal at [2007] 2 Lloyd’s Rep 267 and the decision was affirmed by the House of Lords on appeal at [2008] 2 Lloyd’s Rep 254. In that case there was no dispute as to the existence of an arbitration clause in the relevant charterparties but there was a claim that the relevant charterparties had been rescinded because they were induced by bribery; that the arbitration provisions had been rescinded as part of the charterparties and that, in any event, the arbitration clause did not cover such a claim. The charterers started arbitration proceedings and the owners started court proceedings making a claim under s.72 of the Act. This was countered by the defendant seeking a stay of proceedings under s.9 of the Act. The interrelationship of ss.9 and 72 of the Act therefore fell to be considered as did the procedural position under the provisions.
25. At paragraph 34 after referring to the provisions concerning jurisdiction issues in ss.30 to 32 of the Act, Longmore LJ said this:

“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.”

26. In that case, as I have said, the existence of an arbitration agreement was not disputed and the Court held that the arbitration agreement covered the dispute and was not impeached by the alleged invalidity of the charterparties. It had therefore found that there was a valid arbitration agreement covering the dispute and so, in that way, s.72(1)(a) of the Act did not arise. However, in deciding to grant a stay under s.9 of the Act, the court investigated whether there was a valid arbitration agreement covering the dispute and this effectively determined the jurisdictional issues.

27. At paragraph 35 to 36 Longmore LJ continued and said this about s.72 of the Act:

“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.”

28. At paragraph 37 Longmore LJ cited from the decision of His Honour Judge Humphrey LLoyd QC in Birse Construction v. St. David [1999] BLR 194 where he had said that on an application under s.9 of the Act there were the following possible approaches to deciding whether an arbitration agreement existed :

“(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."

29. Longmore LJ added that:

"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."

30. It is evident from the Fiona Trust case that, where the existence of a valid arbitration clause covering the dispute was in issue, that question has to be decided on an application to stay, so as to determine whether the Act applied. On that application the Court of Appeal decided that the clause was separable and therefore would not be impeached by the allegations of bribery and that the arbitration agreement was broad enough to include arbitration of those disputes. In doing so the Court of Appeal applied Judge LLOYD's option (1) and found that there is a valid arbitration agreement covering the dispute so that the Act did apply. If the Court of Appeal had found that there was not a valid arbitration agreement covering the dispute then option (4) would have applied. In that case the Act and therefore s.9 would not apply. In such circumstances, the Court would not stay proceedings and could, in principle, make a declaration that there was no valid arbitration agreement covering the dispute. In this way when the Court proceeds to decide the issue of the existence of an arbitration agreement for the purpose of considering an application under s.9 of the Act, it is necessarily deciding the jurisdictional issue of whether there is a valid arbitration agreement covering the dispute.

31. Whilst at paragraph 40 of his judgment Longmore LJ said that where there are both applications under s.9 and under s.72, the application under s.9 should be considered first, he observed that the answer to either application would determine the answer to the other.

32. In this case there is no application under s.9 of the Act. There is, though, an issue of whether the Court should consider the application for a declaration under the Court's general powers or whether the matter must be dealt with, if at all, under ss.72 or 32 of the Act. That question depends on whether there is an arbitration agreement within the terms of the Act. I consider that, in deciding whether to proceed under its general powers or under the Act, the Court has, as in the case of an application for a stay, to determine whether there was an arbitration agreement between the parties, as defined in the Act, covering the dispute. If there were no arbitration agreement then the court would be free from the limitations in ss.72 or 32 of the Act. If the Act applied then the court would have to consider whether the requirements of those sections of the Act were satisfied so as to permit it to make a declaration or grant other relief under those

sections. It would though have made the underlying finding of jurisdiction in coming to that initial conclusion.

33. Whilst, in principle, the Court could grant a stay under its inherent jurisdiction as in Judge LLOYD's option (3) I do not consider that the court would do so in a case where no application was being made under s.9 of the Act. As was said in the Fiona Trust case at paragraph 37, option (1) applied in that case where a stay was applied for. It is difficult to see why the Court should adopt a different approach where a party does not seek a stay. At the very least, the Court would not, in my view, proceed on option (3) without investigating whether, prima facie, there was an arbitration agreement.
34. In my judgment, given that I have an issue of whether the Act applies, I intend to proceed to consider if there is an arbitration agreement covering the dispute and thereby adopt a procedure which will lead to the equivalent of Judge Lloyd's option (1) or option (4).

Is there an arbitration agreement covering the dispute?

35. BT submits that the provisions of Clause 17 were contained in a draft agreement within the Contract and were not agreed. They also submit that the provisions of Clause 17 are not an arbitration agreement but an expert determination clause and that, in any event, Clause 17 would only apply to disputes under the terms of the IPR Information Deposit Agreement in Appendix 4, not disputes as to payment following determination of the Contract under Clause 25.4.
36. SAE submits that Clause 17 expressly provides for a specific dispute resolution procedure under which disputes that cannot be effectively resolved between the parties shall be referred to an "independent third party"

Was there an agreement of Clause 17?

37. Although directions were given in the Part 8 proceedings for SAE to serve evidence, it has not done so. It has, however, served a response to the Particulars of Claim with a signed statement of truth from Richard Dea, the President of SAE. It does not seek otherwise to challenge BT's evidence which I have in the form of two witness statements from Stephen O'Dowd, a Solicitor employed by BT, who sets out the basis of his knowledge at paragraph 3 of his first witness statement. Mr O'Dowd has also signed the statement of truth at the end of the Particulars of Claim.
38. At paragraphs 9 to 15 of the Particulars of Claim BT set out the matters on which they rely and these are confirmed by the first witness statement of Mr O'Dowd at paragraphs 12 to 17. The relevant factual matter concerns the formation of the alleged agreement to arbitrate. Clause 9 of Schedule 2 to the Contract provides that, if BT requests, then SAE shall enter into an agreement in the form set out in Appendix 4 to Schedule 2 to the Contract and it is Clause 17 of that Appendix which SAE contends is the agreement to arbitrate. BT's evidence is that BT did not request SAE to enter into the agreement in Appendix 4 or any form of such agreement and the parties did not enter into such an agreement.
39. As I have said, SAE has no evidence to contradict what Mr O'Dowd says and the Response to the Particulars of Claim does not set out any case that an agreement was

formed in the terms of Appendix 4 and this position was accepted by Mr Buckingham at the hearing.

40. In these circumstances, I find that there was no binding agreement between BT and SAE in the terms of Appendix 4. That appendix was only a draft IPR Information Deposit Agreement which was not entered into by the parties. Clause 17 is therefore not an agreed provision and does not bind the parties. I note that this is consistent with the view of SAE's former solicitors who said in a letter dated 22 April 2004 that they were instructed to issue court proceedings and that the Contract "*contains no other form of dispute resolution*".

Is Clause 17 an arbitration clause?

41. There is also a dispute as to whether Clause 17 would, in any event, have been an agreement to arbitrate. The terms of Clause 17 provide as follows:

"17.1 All disputes or differences which shall at any time hereafter arise between the parties hereto in respect of the construction or effect of this agreement or the rights, duties and liabilities of the parties hereunder or any matter or event connected with or arising out of this agreement (a 'Dispute') shall be referred to such independent third party (the 'Third Party') as the parties shall jointly nominate.

17.2 If the parties hereto shall fail to nominate a Third Party within [fourteen] days of the date of the occurrence of the Dispute then the Third Party shall be nominated at the request of any of the parties hereto by the President for the time being of the [Institute of Electrical Engineers].

17.3 The Third Party (whether appointed under Clause 17.1 or 17.2 above) shall act as an expert whose decision (including as to costs) shall except in the case of manifest error be final and binding upon the parties hereto."

42. I was referred to the decision of the Court of Appeal in David Wilson Homes Ltd v. Survey Services Ltd [2001] BLR 269 in which the court had to construe a clause in a contract which provided as follows:

"any dispute or difference arising hereunder between the Assured and the Insurers shall be referred to a Queen's Counsel of the English bar to be mutually agreed between the Insurers and the Assured or in the event of disagreement by the Chairman of the Bar Council."

43. The Court of Appeal held that this provision was an arbitration clause. In doing so Longmore LJ, with whom the other members of the Court agreed, said at paragraphs 13 to 15:

"13. Since it is just a matter of construction, not much assistance can be gained from authority, but the question whether an agreement is an agreement to arbitrate or merely to value as an expert has occasionally had to be decided, and Mr Bowdery has referred us to one such case, Re Carus-Wilson v. Green (1887) 18 QBD 7. There a contract for the sale of land provided that the timber was to be paid for at a valuation made by two valuers appointed by the parties, who were to appoint an umpire to decide if the valuers did not

agree. The valuers did not agree, so the umpire decided. The aggrieved party applied to set that valuation aside on the basis that it was an arbitration award and thus, according to the legislation then in force, could be set aside on certain grounds. The Court of Appeal refused to entertain the application. The passage to which Mr Bowdery referred us is at page 9, where Lord Esher MR said this:

“The question here is whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.”

14. For my own part, it seems to me that the clause in the present case falls fairly and squarely into Lord Esher's first category, where the intention is that the inquiry is to be in the nature of a judicial inquiry and that the Queen's Counsel is to hear the respective cases of the parties and decide on evidence before him. That is what Queen's Counsel are normally expected to do when matters are referred to them, and all the more so if the formality of the position is such that, if there is disagreement as to the identity of the Queen's Counsel, he is to be appointed by the Chairman of the Bar.

15. In the present case, the parties cannot, with respect to the judge, have intended a reference to a Queen's Counsel as an expert or for a non-binding opinion, because in that way no finality could be achieved. They must in my judgment have wanted a binding result, and the clause thus constitutes an arbitration agreement.”

44. Mr Henderson contends that the reference to “expert” in Clause 17.3 is determinative of the matter. Mr Buckingham contends that the clause should be construed as an arbitration clause.
45. In my judgment Clause 17 provides for determination by an expert and is not an arbitration agreement for the following reasons:
 - (1) The reference to the person acting “as an expert” in Clause 17.3 is a clear reference to the dispute being determined by person acting in that capacity which is inconsistent with arbitration.

- (2) Clause 17.3 says that the decision of the expert “*shall except in the case of manifest error*” be final and binding upon the parties. The manifest error provision is a provision applicable to an expert determination rather than to arbitration: see, for example, Galaxy Energy International v. Eurobunker [2001] 2 Lloyd’s Rep 725.
- (3) There is no express obligation on the third party to hold a judicial inquiry, hear each party’s case and evidence and there is no indication that this is intended.
46. Accordingly I find that Clause 17 would not, in any event, be an arbitration agreement.

Would Clause 17 cover the dispute?

47. Finally, it is said by BT that Clause 17 would not cover the dispute in this case. The dispute, as expressed by Mr Buckingham, is one: “*concerning SAE’s entitlement to payment pursuant to the terms of clause 25.4 of the General Conditions of Contract.*”
48. Clause 17.1 states that the disputes were those referable to the IPR agreement in Appendix 4. Clause 17.1 provided that it applied to dispute or differences: “*in respect of the construction or effect of this agreement or the rights, duties and liabilities of the parties hereunder or any matter or event connected with or arising out of this agreement*”. In my judgment, even given the wide interpretation of such clauses following the decision of the House of Lords and Court of Appeal in the Fiona Trust case, I do not consider that this provision is wide enough to cover a dispute as to payment under clause 25.4 of the Contract. It is concerned with disputes under, connected with or arising out of the IPR deposit agreement.

Summary

49. Therefore, for those reasons, I consider that there is no valid arbitration agreement and accordingly the provisions of the Act do not apply. In those circumstances it is, in principle, appropriate for me to make the declarations sought by BT.
50. If, contrary to the approach adopted, I had been minded to consider staying the matter under the inherent jurisdiction of the court on the basis of Judge LLOYD’s option (2), then I do not consider that there is a sufficient prima facie case for the existence of an arbitration agreement to justify that approach.

Sections 72 and 32 of the Act

51. Because the matter was also argued on the basis of s.72, alternatively s.32 of the Act, I consider that I should deal with certain arguments for the sake of completeness. Obviously, I assume, in doing so, that ss.72 and 32 of the Act would apply.
52. Under ss.72 and 32 of the Act the Court has to take a two stage approach. First, it has to decide whether the requirements under s.72 or s.32 of the Act are satisfied, so that the Court has power to act under those sections.
53. Secondly, the Court has to decide whether, in its discretion, it should make declarations. When s.1(1)(c) of the Act is read with ss.72 and 32 then clearly the

Court can intervene in arbitration proceedings when the requirements of those sections are satisfied. But as Longmore LJ said in the Fiona Trust case at paragraph 34, in the context of s.72 of the Act: “*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.*” This was similarly the view of Thomas J, as he then was, in Vale de Rio v. Bao Steel [2000] 2 Lloyd’s Rep 1 at paragraph 45, in relation to s.32 of the Act.

Section 72

54. In this case I consider that the Court would have power to make a declaration or, if necessary, grant an injunction under s.72 of the Act because, on the facts, when BT issued the Part 8 proceedings they had taken no part in the proceedings before Dr Gaitskell. As the authors of Mustill and Boyd on Commercial Arbitration (2001 Companion) said at page 362:

“The right to apply for a declaration or an injunction or other relief only attaches to a person who has taken no part in arbitral proceedings. At the outset this is of course true of any person alleged to be a party to the arbitral proceedings who has not appointed or concurred in the appointment of an arbitrator. It is thus open to any such person to take early action to bring the matter before the Court by proceedings for a declaration and an injunction.”

55. In this case there was no notice of arbitration or other communication between SAE and BT prior to SAE making a unilateral application to the President of the Institution of Electrical Engineers under Clause 17.2. In those circumstances, it must be doubted whether, in any case, any arbitration has been properly commenced or Dr Gaitskell properly appointed. When informed by Dr Gaitskell that he had been appointed, BT notified Dr Gaitskell of their objection and did not take part in the arbitration proceedings. Indeed SAE does not seem to have informed the arbitrator at any stage of the nature of the dispute and apart from the appointment of Dr Gaitskell nothing further has happened.
56. As referred to in Mustill and Boyd, as BT have not applied or concurred in the appointment of the arbitrator, they have not taken part in the arbitration proceedings as that is the full extent, so far, of the arbitration proceedings. Although Mr Buckingham pointed to the reference in Mustill and Boyd to it being open for a person in the position of BT “to take early action to bring the matter before the Court”, I do not consider that there is a time limit under s.72 of the Act. The temporal requirement is for the matter to be brought before the Court at an early stage of the arbitration proceedings in the sense that it must be before the challenging party has taken part in the arbitration proceedings. Delay may, of course, be matter going to discretion but that is a separate matter.
57. There are time limits in the Act but they do not, in my judgment, apply to s.72 of the Act because those time limits only apply to a party who takes part in the proceedings. Under s.31 of the Act it provides that “*An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of proceedings must be raised not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal’s jurisdiction.*” By that time, the party will have lost any rights under s.72 of the Act because it will have taken part in the proceedings.

58. Similarly s.73 of the Act provides that “*if a party to the arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection...*”. If a party takes part in the arbitration proceedings then that party will have lost its rights under s.73 of the Act.
59. Thus, on the assumption that s.72 of the Act applied, I would have had the power under s.72 (1)(a) to determine the question of whether there was a valid arbitration agreement.

Section 32

60. Under s.32 of the Act, it is common ground that this is a case where Dr Gaitskell has given permission and the requirements of s.32(2)(b)(i) to (iii) have to be satisfied. In this case I consider that these requirements are satisfied.
61. In relation to s.32(2)(b)(i), that the determination of the question is likely to produce substantial savings in costs, I consider that there are a number of possible outcomes in determining the question of jurisdiction. If I were to find that the arbitral tribunal did not have jurisdiction then there would be a substantial saving of costs in terms of the arbitration proceedings which would terminate at that stage. If I were to determine that the arbitral tribunal did have jurisdiction then compared to a process which requires the arbitral tribunal to make the decision there will be a saving of costs given that proceedings are currently before me. If the arbitrator were to decide the question and find that he did not have jurisdiction, further costs would have been wasted. If he were to find that he did have jurisdiction then it is likely that BT would seek to challenge that decision under s.67 of the Act and there would be a substantial savings in costs by dealing with it now. Overall balancing the permutations and the costs position I consider that there is likely to be a substantial savings in costs if I were to determine the issue.
62. In relation to s.32(2)(b)(ii), that the application was made without delay, the application was made on 20 November 2008 but the first objection was taken by BT on 6 July 2006. On these dates it would seem that there has been delay. However I consider that the circumstances show a different picture. On 23 June 2006 BT received the e-mail from Dr Gaitskell saying he had been appointed in a dispute on which BT had not heard anything since August 2004. There was the acknowledgement on 23 June 2006 and the considered response to SAE, copied to Dr Gaitskell, on 6 July 2006 in which objection was taken. This led to SAE saying on 11 July 2006 that they would take no further action in the proceedings and would lodge a statement of case, provide BT with an opportunity to respond and pursue informal resolution. They confirmed this on 13 July 2006. Nothing further happened in relation to the arbitral proceedings until 14 October 2008 when Mr Dea contacted Dr Gaitskell, who contacted the parties on 16 October 2008. Mr O'Dowd responded on 20 October 2008 and issued proceedings on 20 November 2008 after correspondence with Dr Gaitskell following his suggestion of proceedings under s.32 of the Act.
63. In that context I do not consider that the periods from 23 June to 11 July 2006 or from 16 October to 20 November 2008 can be said to amount to delay in making the application. In the light of the fact that SAE agreed not to proceed with the arbitral

proceedings pending settlement discussions, I do not consider that there was any obligation on BT to make an application in the period 11 July 2006 to 16 October 2008. To do so would have been likely to waste time and money and was not contemplated as being necessary by either party in that period. The remaining period cannot reasonably be said to amount to delay.

64. As to s.32(2)(b)(iii), that there is good reason why the matter should be decided by the court, I consider that to a large extent this issue must overlap with the question of discretion. This is an unusual case where the arbitral tribunal has itself made the suggestion of an application under s.32 of the Act. Otherwise, as set out in this provision and in paragraph 147 of the DAC Report, there is a presumption that the arbitral tribunal should make the decision. Whilst the Court could refuse to decide the question when the arbitral tribunal has suggested that it might do so, I consider that this, in itself, provides a good reason why the Court should decide the issue. This is also a case where the very existence of any arbitration agreement is in issue and where the application is made at an early stage. I consider, on balance, these are good reasons why the Court should make the decision.
65. In relation to s.32 of the Act Mr Buckingham submits that under s.73 BT has lost its right to object. He accepts that BT did register an objection in July 2006 but says that it is then incumbent on a party to proceed with an application to have that objection determined. He refers to possible difficulties which might arise in terms of limitation problems when there is a delay of some two and a half years in resolving the matter.
66. I consider that, in respect of s.73 of the Act, all that is required is for a party to make an objection as to the tribunal's substantive jurisdiction. In my judgment, there is no requirement on a party, after making the objection, to pursue an application to have the issue determined. Rather under s.31(4) of the Act it is for the tribunal to decide whether to rule on the matter or deal with the objection in its award on the merits.
67. I was referred to the decision in ASM Shipping v. TTMI Ltd [2006] 1 Lloyd's Rep 375, a case which concerned an objection to an arbitrator on the grounds of apparent bias. At paragraph 49 Morison J said:

"49. In my judgment, by taking up the award, at the very least, the owners had lost any right they may have had to object to X QC's continued involvement in that part of the arbitral process. It is unacceptable to write making further objections after the hearing was concluded. X QC had made his decision not to recuse himself, rightly or wrongly, at the beginning of the third day. Owners were faced with a straight choice: come to the court and complain and seek his removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A "heads we win and tails you lose" position is not permissible in law as section 73 makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them."

68. On the facts of that case Morison J held that the parties, instead of making a continuing objection in correspondence, should have applied to the Court under s.23 of the Act for the removal of the arbitrator.
69. That was not a decision on substantive jurisdiction and, in so far as it was argued by Mr Buckingham that the requirement to proceed to make an application to determine the issue comes from s.73 of the Act, I do not read that section as giving rise to that requirement. I note that in the Court of Appeal in ASM Shipping v. TTMI Ltd [2007] 1 Lloyd's Rep 136 at paragraph 18 there was an unresolved issue as to whether Morison J's decision was based on s.73 of the Act or common law waiver. Certainly in the context of a challenge to the substantive jurisdiction of the tribunal, in the light of s.31(4) of the Act I do not consider there is any such requirement.
70. Accordingly, on the assumption that s.32 of the Act applied, I consider that I would have had power under that section to determine whether there was a valid arbitration agreement.

Discretion

71. On the question of whether I should exercise my discretion to act under these sections, I consider that, whilst caution is required before acting under s.72 of the Act, this is a case where it would have been appropriate to do so. The only difference between this case and the Fiona Trust case is that there was an application to stay under s.9 of the Act in that case.
72. In the case of s.32 of the Act, the usual presumption would be not to act under this section. However, I consider that a major factor in this case is the suggestion by the tribunal that the procedure under s.32 might be used which differs from a mere case of permission. Equally, this is a case where the very existence of the arbitration agreement was in issue. It is also a case where nothing has happened in the proceedings and so the decision is being made at an early stage. In addition, the issue is not dependant on the particular facts of the dispute which the arbitral tribunal would be in a better position to determine in the context of consideration of the dispute.
73. As a result, I would have made the necessary declarations under ss.72 or 32 of the Act if those sections applied.

Summary

74. In all the circumstances I consider that BT is entitled to the declarations which it seeks under the inherent jurisdiction of the Court and not under any provision of the Arbitration Act 1996. If I were wrong about the approach to determining the question as a threshold issue and making a declaration under the inherent jurisdiction of the Court then I consider that I would have had jurisdiction to and would have exercised my discretion to make the necessary declarations under s.72 or s.32 of the Act, given the particular facts of this case.
75. Accordingly I declare as follows, subject to hearing any submissions on the precise form of words:
- (1) The Contract does not contain any agreement to arbitrate or any agreement that any dispute shall be subject to expert or third party determination;

- (2) The draft terms contained in Appendix 4 of Schedule 2 to the Contract are of no effect since no agreement in the form of the said terms was executed by the parties;
- (3) The draft Clause 17 of Appendix 4 to the Contract provides for an expert determination and not an arbitration agreement;
- (4) The draft Clause 17 of Appendix 4 to the Contract would not have covered disputes as to sums due to SAE on the termination of the Contract under Clause 25.4 of Schedule 1 to the Contract;
- (5) Dr Gaitskell has no jurisdiction to determine any disputes which have arisen between the parties. In particular, he has no jurisdiction to determine the dispute between the parties relating to SAE's claim to payment following termination of the Contract under Clause 25.4 of Schedule 1 to the Contract;
- (6) The purported appointment of Dr Gaitskell as arbitrator and/or as an expert to determine the dispute which has arisen between the parties, is null and void;
- (7) The proceedings purportedly commenced by SAE in or about June 2006 are null and void.

76. I shall hear submissions as to the form of Order and any ancillary matters.