JUDGMENT : The Hon Mr Justice Colman: Commercial Court. 23rd January 2007

Introduction

1. By a judgment dated 28 July 2006 this court ordered that proceedings brought by A against B should be stayed and that an order previously made giving permission to issue and serve proceedings outside the jurisdiction on C, D and Company E should be set aside. For the background to this dispute and for the nature of the claims advanced by A against the four defendants concerned reference should be made to my judgment [2006] EWHC 2006 (Comm).

2. All the defendants now apply for costs against A on an indemnity basis, for a payment on account, for an order for the payment of interest on the costs at 8 per cent from 9 May 2006 and an order debarring A from participating in the detailed assessment of the various defendants' costs if he fails to make an interim payment on account of costs by a specified date.

3. The basis of these applications for indemnity costs as distinct from costs on the standard basis is as follows.

4. As to B, it is submitted by Mr Graham Dunning QC that where proceedings are brought in the English courts in breach of an arbitration agreement costs should be awarded on an indemnity basis. This is because the damages which flow from the breach of that agreement are normally all the costs reasonably incurred by the party entitled to a stay of the proceedings. The damages recoverable for such a breach would not be calculated by reference to those principles of costs assessment under CPR 44.4(2) involving recovery only of such costs as were proportionate to the matters in issue and subject to a rule that any doubt which the court might have as to whether costs were reasonably incurred or reasonable and proportionate in amount should be resolved in favour of the paying party. Accordingly, the costs of the application to stay and thereby to obtain a remedy for the breach of the arbitration agreement should not be similarly limited but should instead be assessed simply on the basis of what costs were reasonably incurred.

5. Mr Dunning relied in support of this submission on a decision of the Court of Appeal in ***Union Discount Ltd v. Zoller*** [2001] EWCA Civ 1755 and on a decision of Cooke J. ***in Kyrgyz Mobil Tel Ltd v. Fellowes International Holdings Ltd*** [2005] EWHC 1314 (Comm).

6. It was decided by the Court of Appeal that where a party had incurred costs in successfully applying in New York to strike out proceedings against it brought in breach of an English jurisdiction clause but, due to a local costs rule, it could not obtain an order for costs in New York, it could recover **as damages** in English proceedings against the unsuccessful respondent to the New York application all costs reasonably expended in bringing the New York application. The English rule in ***Berry v. British Transport Commission*** [1962] 1 QB 306 precluding claims for damages in civil proceedings to recover unrecovered costs in prior English civil proceedings did not apply to a claim for malicious prosecution where the costs had been incurred in defending previous criminal proceedings and was not extended to the recovery as damages for breach of a jurisdiction agreement of all the costs reasonably incurred in striking out foreign court proceedings.

7. Quite clearly this decision is dealing only with the recoverability of damages by reference to reasonably expended costs: it does not indicate whether indemnity costs orders are justifiable in cases where in the same proceedings costs have been incurred in successfully applying to stay such proceedings brought in breach of an arbitration clause or foreign jurisdiction clause.

8. In ***Kyrgyz Mobil Tel Ltd v. Fellowes International***, supra, Cooke J. was concerned with the costs of complex litigation located in the English, British Virgin Islands and Kyrgyzstan courts. Under the relevant agreement there was an LCIA arbitration clause. Fellowes International Holdings were not a party to that agreement but they were in a position to control the conduct of Kyrgyz Mobil Tel, who were a party, in the conduct of any arbitration. Fellowes caused Kyrgyz to ignore the arbitration agreement and start proceedings in the Kyrgyzstan court. In awarding costs against Fellowes in proceedings for an anti-suit injunction Cooke J. said at paragraphs 42 and 43:

   "Taking all these matters into account as I do, and looking in particular at the terms of CPR 44 in relation to costs, I have come to the following conclusions. First, in my judgment, the correct approach where there has been a breach of a jurisdiction clause by a party in initiating proceedings in a non-chosen jurisdiction is that the costs should be awarded on an indemnity basis. The reason for that is plain. If a party has breached that agreement, then the damages which flow from the breach of that agreement are all the costs incurred by the party who successfully relies upon the choice of jurisdiction clause. In my experience, the Commercial Court in particular but courts generally in this country adopt such an approach.

   This is not of course a straight breach of jurisdiction clause case because the position here is that the defendants, Fellowes, are not party to the relevant contract and the arbitration clause, as has been made plain on a number of occasions now. Nonetheless, the position is that what they did has been categorised or characterised as vexatious and oppressive on the basis that they could not possibly be in a better position than a party to that contract in circumstances where they relied on the contract in seeking relief in Kyrgyzstan. The starting point therefore must be that the claimants are entitled to indemnity costs in relation to this action, subject to any particular reasons which would detract from that."

9. I am bound to say that I have not previously encountered the practice as to costs orders where there has been breach of a jurisdiction agreement said by Cooke J. to be that which is generally adopted by the Commercial Court and by courts generally. Nevertheless, the rationale which he describes certainly provides some sensible

foundation for such a practice. Thus, if a costs order in favour of a successful applicant for a stay or for an anti-suit injunction directed to giving effect to an arbitration agreement or an English jurisdiction clause must, save in exceptional cases be confined to costs on the standard basis, there would necessarily be a part of the successful applicant's costs of the application which it had properly incurred but could not recover by such an order because of the restrictive process of assessment. This unindemnified portion of costs would then be loss which could only be recovered as damages for breach of the jurisdiction or arbitration agreement, if such a damages claim were permissible. Where the cause of action for relief enforcing the agreement by stay or injunction in the English court and the cause of action for damages for breach of that agreement are, as they normally will be, the same, the effect of those authorities such as ***Berry v. British Transport Commission***, supra, referred to in ***Union Discount v. Zoller,*** supra, will be to prevent separate proceedings for damages by reference to unrecovered costs, notwithstanding the breach of the arbitration or jurisdiction agreement.

10. This would give rise to a fundamentally unjust situation. There can be no question but that the procedural consequence of conduct by a party to an arbitration or jurisdiction agreement which amounts to a breach of it and causes the opposite party reasonably to incur legal costs ought to be that the innocent party recovers by a costs order and/or by an award of damages the whole, and not merely part, of its reasonable legal costs. Against that background, it is necessary to ask whether there is any sustainable policy consideration which would require that unless there were some special circumstances, excluding the fact that it was an arbitration or jurisdiction agreement that had been broken, the successful party should have to forgo part of its costs or alternatively to bring a separate claim for damages to cover any shortfall on assessment of costs. The relevant considerations point very strongly indeed against either result. To forgo part of the loss would be unjust. To be placed in a position where the balance of the recoverable damages could not be quantified until after the costs had been formally assessed would involve delay in obtaining compensation properly due and a formalistic and cumbersome procedure which would in itself involve more costs and judicial time. Where the defendant who had been improperly impleaded in the English courts was outside the jurisdiction, no claim for damages could be brought in the English courts without submitting to the jurisdiction.

11. In my judgment, provided that it can be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach has caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis.

12. In this connection, I refer to the remarks of Lord Woolf MR in ***Petrotrade Inc v. Texaco Ltd*** [2002] 1 WLR 947 at p 949 that "the power to order indemnity costs is a means of achieving a fairer result for a claimant" when compared with an order for costs on a standard basis. In ***Excelsior Commercial & Industrial Holdings Ltd v. Salisbury Hammer Aspden & Johnson*** [2002] EWCA Civ 879, Waller LJ. with whom Lord Woolf specifically agreed, observed that: *"The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"*

13. In ***Reid Minty v. Taylor*** [2002] 2 All ER 150 May LJ. observed at para 27 and 28.

"Under the CPR, it is not, in my view, correct that costs are only awarded on an indemnity basis if there has been some sort of moral lack of probity or conduct deserving moral condemnation on the part of the paying party. The court has a wide discretion under r 44.3 which is not constrained, in my judgment, by authorities decided under the rules which preceded the introduction of the CPR. The discretion has to be exercised judicially, in all the circumstances, having regard to the matters referred to in r 44.3(4) and 44.3(5). The discretion as to the amount of costs referred to in r 44.3(1)(b) includes a discretion to decide whether some or all of the costs awarded should be on a standard or indemnity basis. Rule 44.4 describes the way in which an assessment on each basis is to operate, but does not prescribe the circumstances in which orders on one or the other of the bases is to be made.

As the very word 'standard' implies, this will be the normal basis of assessment where the circumstances do not justify an award on an indemnity basis. If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted. But I do not think that this will necessarily be so in every case. What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation."

14. In ***ABCI v. Banque Franco-Tunisienne*** [2003] 2 Lloyd's Rep 146 Mance LJ. stated at paragraphs 70 to 72:
"There is nothing in the rules which says expressly that the Court should not make an order for indemnity costs unless it finds the paying party's conduct unreasonable, let alone wholly unreasonable. Decisions by this Court in particular cases should be read with this very much in mind. The thinking behind the CPR was that they would speak for themselves and that Courts would not have to refer to an ever increasing body of authority in order to apply them. For this reason we do not propose to embark upon an exhaustive analysis of the cases."

He then referred to the passage cited above from ***Reid Minty*** and continued:
*"These passages were considered in **Kiam** in the context of a defendant's refusal to accept an offer in settlement of a libel appeal. Lord Justice Simon Brown said at par 12:*

> *I for my part understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An*

indemnity costs order made under part 44 (unlike one made under Part 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory.

We should add however that indemnity costs are only compensatory. They enable the receiving party to recover more of the costs which he has incurred than standard costs but never more and usually less than his actual costs. One reason for awarding indemnity costs is that if the receiving party's costs have been increased because the opponent has behaved unreasonably it is fair that he should recover an enhanced amount of his costs."

15. The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from *"the norm"* as to require judicial discouragement by more stringent means than an order for costs on the standard basis. However, although an order for indemnity costs will usually be appropriate in such cases, there may be exceptional cases where such an order should not be made. Although the requirement that the successful party should establish that the claimed costs were caused to be reasonably incurred (subject to the reversed evidential burden of proof in CPR 44.4(2)(b)) by the breach of the jurisdiction clause or arbitration clause will normally cater for those cases where the true cause of the expenditure on costs is the conduct of the successful party, there may be other cases in which an order for indemnity costs would not be appropriate. Without wishing to confine this flexibility in any way, it is not difficult to envisage that departure from the normal approach might be justified in a case where conduct on the part of the successful party has led the party in breach to believe that the chosen forum can be ignored. Further there may be cases in which the general conduct of the successful party, although not breaking the chain of causation, would nevertheless justify its being deprived of an order for indemnity basis costs. In such cases the need to reflect judicial disapproval of such conduct might justify an order for costs on the standard basis.

16. As I have held (in paragraph 112 of my Judgment in this case), the parties to the arbitration agreement were under an obligation to refer to the Swiss courts any issue between them going to the supervisory jurisdiction in relation to the arbitration, including the arbitrator's decisions within the kompetenz-kompetenz area. To have invoked the jurisdiction of the English courts for this purpose was as much a breach of the agreement as the attempt to invoke the jurisdiction of the English courts for the purpose of determining the parties' disputes as to the substantive issues in the arbitration, inducing those which under Swiss Law fell within B's kompetenz-kompetenz jurisdiction. The agreement as to the exclusive jurisdiction of the Swiss courts to resolve issues falling within their supervisory jurisdiction, even if the arbitration agreement subsequently were held by those courts to be voidable or invalid, would still be an effective means of vesting exclusive jurisdiction in them, for the kompetenz-kompetenz principle would apply as fully to that jurisdiction as to the jurisdiction of the arbitrator. Were it otherwise, the whole structure of the supervisory jurisdiction of the seat of an international arbitration would be completely undermined. Accordingly, just as breach of an arbitration or jurisdiction agreement can properly be reflected in an award of damages, so breach of the jurisdiction agreement vesting supervisory jurisdiction in the courts of the seat of the arbitration can be remediable in damages and upon an application in which one party ignores that agreement and is unsuccessful in so doing by an order for costs against that party on an indemnity basis.

17. I should add that although the availability of a remedy for breach of a Swiss arbitration agreement is a matter governed by Swiss Law, I have assumed that on this matter there is no material difference between Swiss and English law, there being no evidence to suggest the contrary.

18. Although B was sued within the jurisdiction for relief directed to and based upon the alleged invalidity or voidability of the arbitration agreement as well as for relief against him personally, C, D and Company E all had to be served outside the jurisdiction on the basis that there were adequate connecting factors under CPR 6.20. However, the relief claimed against C and D necessarily involved challenging the validity of the arbitration agreement in the English courts. I have already held that, just as it was a breach of contract for A to invoke the jurisdiction of the English courts for that purpose as against B, so also was it a breach of contract to invoke that jurisdiction for the same purpose as against C and D. Does it make any difference in principle to the approach to costs that the proceedings between A and those two defendants were in form applications to set aside service outside the jurisdiction rather than for a stay of proceedings effectively commenced by service within the jurisdiction?

19. To this question the answer must clearly be no. The substance of the claim by A to be entitled to invoke English jurisdiction involved a denial of the validity of the agreement for Geneva arbitration and a breach of that agreement and of the agreement that Geneva should be the seat of the arbitration, thereby conferring exclusive supervisory jurisdiction on the Swiss court. These breaches of contract were therefore in principle such as to engage the same approach to costs as those vis a vis B.

20. Returning to the position of B, it is submitted by Mr Staff on behalf of A that B should be awarded his costs only on two issues, namely (1) asserting that he would, if necessary, decide on his own jurisdiction and (2) applying for a case management stay with regard to the personal claims against him. That is because the two threshold issues identified at paragraph 86 of the Judgment were fully argued by counsel on behalf of C and D viz:
"The two threshold questions are therefore:
a) Should there be a stay of these proceedings against B?

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

21. It is submitted that in advancing argument on these issues B took sides by supporting the position of C and D in breach of the basic principles of party autonomy expressed in Section 1 of the Arbitration Act 1996. Further he unnecessarily incurred expenditure of costs for which he himself was or will be reimbursed in consequence of orders made by him as arbitrator on 3 October 2005 by which he directed that each of A, C and D should pay £500,000 on account of expenses which he would have to incur in the English court proceedings. C and D complied but A did not. D used A Trust funds for this purpose.

22. In my judgment, the criticisms of B's conduct of these proceedings are misconceived.

23. In the unusual circumstances of this case, not only did the application by A involve personal allegations which impeached the professional competence and integrity of B as a solicitor and arbitrator but it also involved an attack on the validity and conduct of a foreign seat arbitration in which B was the sole arbitrator. In the ordinary way, where an English arbitration is involved and issues arise as to whether the agreement to arbitrate is valid and binding on the parties an arbitrator can quite properly leave it to the parties to argue the issues for he finds himself having been appointed into a disputed jurisdiction as to which the English court is available to determine the issues without his intervention. This case is a very long way from that situation. Here, not only was it alleged that the arbitrator had personally participated in the very facts said to give grounds for the voidability of the arbitration agreement but he was under a duty to all parties under Swiss Law to proceed with the arbitration subject only to the supervisory jurisdiction of the Swiss courts. But that jurisdiction had not been invoked by A, notwithstanding his undertaking to do so (see Judgment paragraphs 44-52). Further, the personal damages claims against B were very closely associated with the claims in relation to the arbitration. B was therefore confronted by what was in effect an attack on him personally which went not only to his liability in damages but also to his ability to proceed with the arbitration. In these circumstances, although it was theoretically open to him wholly to ignore A's attack on the validity of the agreement to arbitrate, leaving it to C or D to make submissions designed to preserve the integrity of the arbitration and his position as arbitrator, I have no doubt that, in view of the issues raised by A, B took a perfectly tenable and appropriate course in choosing to present argument independently of C and D. In this connection it is right to observe that B at no stage attempted to join issue with A on any matter which, apart from the issue of his own jurisdiction as arbitrator, he would have to determine as arbitrator. To this extent he adopted a position of careful neutrality. His evidence and submissions dealt with the background to the conclusion of the arbitration agreement because it was relevant to his own position as sole arbitrator and therefore to his jurisdiction. In as much as he sought a case management stay of the personal claims he was entitled to explain and support the close connection between the issues raised by those claims and those raised by the dispute as to the validity or voidability of the agreement.

24. In these circumstances, I reject the submission that B either acted in concert with, or with partiality towards, C and D or that he had no legitimate interest in submitting independent arguments as to his jurisdiction. I find that the entire participation by B in the application was justifiable and ought to be reflected in an order for costs.

25. Should the basis be on an indemnity basis or the standard basis?

26. I conclude that, having regard to the considerations set out earlier in this judgment, it should be on the former basis. I find no reason to depart from that approach. Justice requires that the costs order should compensate B as fully as possible for the costs incurred. The fact that he has received funding from the parties is irrelevant. What matters is that the applications have caused him to incur a liability to his solicitors. The fact that he may have to reimburse the A Trust or C if he recovers does not displace his entitlement to compensation on as full a basis as possible, namely by way of an order for costs on an indemnity basis.

27. It is submitted on behalf of B that, having regard to A's conduct in failing to pay his own solicitors, Lane & Partners and WGM, and to the judgment of Peter Smith J. in the Chancery Division proceedings, to the effect that in those proceedings A's conduct in withholding payment amounted to an abuse of process, there should be an order for a substantial payment on account of costs. Whatever the ultimate source of the funding of B's costs liability I consider that overall the justice of the case does in principle require an order for interim payment. In reaching that conclusion I am not influenced by A's failure to settle his solicitors' bills. For this there can be all manner of explanations. Impecuniosity is not necessarily one of them. However, this expenditure has been largely incurred over a period of several months expiring nine months ago and, notwithstanding the availability of an order for interest to run on the amount assessed to be outstanding, justice requires that there be payment of at least a significant part of the total without further delay.

28. There will be an order for an interim payment forthwith of £600,000 out of a total amount of costs claimed of £845,896.84. The latter figure does not include a further £179,290.23 claimed in respect of the hearing before David Steel J. and £130,011.20 in respect of the hearing in the Court of Appeal. I shall hear submissions as to the precise date for payment if agreement cannot be reached. The costs will carry interest from 9 May 2006 at the judgment rate of 8 per cent.

29. As to C, who also applies for an order for costs on an indemnity basis, together with an interim payment and judgment debt interest, it is submitted by Mr Staff on behalf of A first that the order should be on a standard basis and not an indemnity basis for five reasons.

30. D and probably C have deliberately withheld before and during the hearing of the applications material information from A and from this court. That material information may be summarised as follows. On 1 May 2006 – some nine days before judgment was delivered in these proceedings – D served an affidavit in proceedings in the Bahamas, in which he applied for a ***Beddoe*** order with regard to the A Trust, in which he stated that on 22 or 23 June 2004, about one month before the commencement of the inter parties negotiation of the arbitration agreement, he realised that he had the Company K Share certificates in his office. Accordingly he then must have realised that there had been no theft of them by A and also that to the extent that the criminal complaint alleged such theft it was groundless. That was no more than one week after D had entered the criminal complaint against A (see Judgment paragraph 21). On 25 June 2004 G, who was C's associate and adviser in the Bahamas, became aware of D's possession of the share certificates. It is submitted that it is to be inferred that he would have passed on this information to C and that accordingly C must have known that A could not have stolen the certificates. On 28 June 2004 D withdrew the allegation of theft made in the criminal complaint but left in place the allegation of fraudulent misrepresentation. However, A was left to believe that the allegation of theft remained.

31. It is alleged that, by withholding this information from A, he was deceived as to the nature of the continuing allegations and left in fear so as to induce him to enter into the arbitration agreement, one of the terms of which was that the criminal complaint would be withdrawn. He was therefore left to believe that what was to be withdrawn included inter alia an allegation of theft. It is further submitted that the substance of the Judgment on the application was influenced by the failure to disclose this fact until after the hearing and only in the Bahamas. It is said that this wrongly influenced this court in arriving at its conclusion in as much as it was misled into believing that the criminal complaint contained an allegation of theft of the share certificates and that to have procured its withdrawal was therefore to confer a benefit on A which he had derived from performance of the agreement.

32. The circumstances in which the arbitration agreement was negotiated and the extent, if any, to which misrepresentations may have been made by C and/or D to A and their effect on A's decision to enter into that agreement were matters which were exclusively within the sphere of determination of whichever court or tribunal had to decide whether the arbitration agreement was voidable or invalid. That was not the function of this court but of the arbitrator and possibly, subsequently, of the Swiss court.

33. The decision of this court setting aside service on C and D was based on and only on discretionary consideration that if either became parties to the proceedings, their application for a stay under Section 9 of the 1996 Act was bound to succeed. The judgment proceeded on the assumption that A had a sufficiently strong case on the merits of his allegations in support of the avoidance of the arbitration agreement. Whether the criminal complaint contained an allegation of theft or merely one of fraud therefore had no bearing on the Court's conclusion. There were two determinative points: (1) that it was for the arbitrator and, if necessary, the Swiss courts to determine whether B had jurisdiction or ought to exercise it with the effect that an ultimate application by C and D under section 9 would inevitably lead to a stay and (2) that, in any event, if B were entitled to a stay of the arbitration claims, it was inappropriate for there to be a continuation of proceedings in the English courts against C and D which raised precisely the same issues as B would have to resolve in the arbitration. Accordingly the alleged failure to disclose the withdrawal of the theft allegation had no bearing on any key issue before the court.

34. Is it, nevertheless, conduct deserving of such strong disapproval by the court as to displace an order for indemnity costs as might otherwise be made?

35. In my judgment it is not. This court has heard no evidence of the circumstances in which D or C failed to disclose the full facts to A. Nor is it right to conclude that this was for the purpose of influencing the result of these applications. Indeed the fact that it was disclosed in the Bahamian proceedings **before** the date of the judgment in this court suggests that such was not the purpose. Indeed, counsel for A, when given the opportunity to do so upon the present application, did not rely on D's evidence for any purpose. It is right to add that as early as March 2006 it had been stated in a witness statement served on behalf of D for the purpose of this application that when D first made the criminal complaint he believed that A must have made attempts to obtain Company K's assets by misusing that company's bearer shares but that "subsequently it emerged that he had done so by other means". Without some very specific evidence as to the circumstances in which D did not disclose this information, it would not be right to draw any adverse inference. The point was raised so late before the costs hearing that there could be no question of further evidence being adduced by D or C to explain why this delayed disclosure had occurred. In all the circumstances this conduct is not shown to weigh against an order for indemnity costs.

36. It is further argued on behalf of A that there was no dispute to be referred to arbitration. Therefore there was no dispute to be arbitrated. Therefore there was no need for C to defend it or presumably to challenge the jurisdiction over A's claims in the English courts.

37. This startling submission is derived from observations made in the course of a judgment given by Mr Justice Lyons on 29 May 2006 in the Bahamas Supreme Court. He sensibly decided that the Bahamas court, being seized of jurisdiction over the A Trust, should, with the agreement of all parties (not including B) make an accounting order which would provide for the appointment of a forensic accountant to enquire into and report upon what sum if any should be paid by one brother to the other in order that each would receive the amount of his entitlement to a 50 per cent share of the profits from trading under the partnership of honour during the period 1992-2000 but taking into account all subsequent dealings and transfers in relation to the A Trust and otherwise. At pages 11-12 of that judgment Lyons J. stated:

"There is no dispute between C and A as to the use of the A Trust. It matters not who the settlor is, who the beneficiaries are or who the protector is. They are red herrings. What needs to happen is the profits need to be identified and the use to which they have been put needs to be ascertained."

38. It is argued that, in view of the analysis of the positions of the parties set out above and elsewhere on pages 10-13, there was nothing to be referred to arbitration.

39. The short answer to this submission is that the existence or otherwise of an arbitrable dispute has to be tested by reference to what was in issue at the time of the hearing in April 2006 in the English court and not by reference to the analysis of the Bahamian judge following several days of further submissions as to what was in issue a month later on the Beddoe application. It was never suggested by A at the hearing of these applications that there was no arbitrable underlying dispute and this court was at no time called upon to investigate such a contention. Before this court the essential issues were as to its jurisdiction and not to the substance of the underlying claims. Moreover, the reference by Lyons J. to there being "no dispute" was confined to the operation of the A Trust. All that was being said was that the way in which the brothers had caused the Trust to be used was not what mattered in the sense that it was not the real matter in dispute: that was the question what amount of profits of the partnership of honour was due for payment by one brother to the other. That was the real matter in issue to the extent that their 50 per cent shares remained unquantified. The suggestion that this in itself was not an arbitrable dispute falling within B's jurisdiction presents itself to me as simply wrong. His jurisdiction was quite widely enough expressed to cover this issue. Consequently, this point is misconceived and is irrelevant to what I now have to decide about the costs.

40. A further submits that C has encouraged B to take an unnecessarily large and expensive part in these proceedings by funding him expressly for that purpose to the extent that he has paid B's costs orders and by allowing without objection D to use assets of the A Trust (to which C claims to be entitled) to fund B's costs by payment of those costs orders. He is said to have done this in the knowledge that B's submissions would essentially replicate his own. C has therefore financed the challenge by B to A's London proceedings by funding directly or indirectly B's costs. He has also funded D's own costs. That is to be inferred from D's evidence in the Beddoe proceedings in which he said on affidavit that his costs had been paid out of a fund of at least £1.5 million held for that specific purpose by Q of Liechtenstein. Q had been C's lawyer in the arbitration. According to a letter dated 2 March 2006 from D's solicitors to Q, such costs were to be paid as a non-recourse loan repayable if and to the extent that the Bahamian court permitted D to utilise A Trust assets and/or if and to the extent that D recovered costs on the application. In essence, it is said that C was the puppet-master marshalling the other parties to launch the heaviest possible assault on A.

41. I have already held that B was entirely justified in taking the course he did with regard to his independent conduct of these proceedings. I discuss below the position of D and conclude that he also was entitled to adopt an independent course. The fact that C funded either of them and thereby provided them with the means of doing what they were perfectly entitled to do is not, in my judgment, a matter as to which this court should show its disapproval by depriving C of costs on an indemnity basis. He was simply facilitating an entirely proper course by those parties. Their submissions at the hearing in this Court were carefully designed to avoid significant overlap with each other or with those advanced on behalf of C.

42. I do not accept the submission on behalf of A that B and D have colluded with C to maximise the costs incurred against A.

43. The point which is open to A, though scarcely developed at the hearing, and which is perhaps the most difficult on the question of indemnity costs is that although C (and indeed D) prepared evidence and made submissions to challenge the orders giving leave to serve them outside the jurisdiction on the grounds of (i) non-disclosure of material facts by A on the without notice application for leave, (ii) whether A had raised serious issues to be tried and (iii) whether A had made out a good arguable case that any of the claims against C fell within the CPR 6.20 connecting factors, this court did not decide those issues but dealt with the matter entirely by reference to its discretion not to exercise jurisdiction on the undecided hypothesis that A was right on all the other points. In such circumstances would it be appropriate to order costs on an indemnity basis?

44. On behalf of C Mr Nicholas Lavender has submitted that, apart from A's unjustifiable attempt to litigate the underlying substantive issues as well as the arbitration voidability issues in the English court, there are eight matters which, taken together, would justify an order for indemnity costs as a mark of this court's disapproval of A's conduct.

45. Firstly, this action was only brought after A had failed to comply with the undertaking given by him (see paragraph 22 above) to commence proceedings in Switzerland impeaching B's jurisdiction pursuant to an order of Gloster J. on 1 June 2005. The sequence of events is set out in paragraphs 44 to 52 of the Judgment.

46. Secondly, by 19 August 2005, when A started these proceedings, there were already commenced in the Bahamas three proceedings raising issues connected with the arbitration agreement and the A Trust: see Judgment paragraphs 46, 54 and 57. They all raised issues directly or indirectly connected with the validity of orders made by B in the arbitration. A and D were parties to all three actions. C was a party to A's 7 June action and the Children's Action. The issues raised as to the assets of the A Trust which were raised in the 7 June action and the Children's Action were then repeated in the English proceedings notwithstanding that, as indicated in

paragraph 145 of the Judgment, the Bahamas was the obviously convenient forum for the determination of issues relating to the assets of a Bahamian Trust.

47. Thirdly, A had failed to disclose when he applied for leave to serve C outside the jurisdiction that the Building A action and the 7 June action, as well as the Children's action, all concerned issues which he sought to litigate in England. The statement in his evidence that he was "not asking the English court to grant relief in respect of matters currently before the court in the Bahamas" was therefore distinctly misleading.

48. Fourthly, it was to be inferred that having the known opportunity of challenging the validity of the arbitration in Switzerland and having commenced the 7 June proceedings in the Bahamas and having become involved in the Children's action and the Building A action, A started the English proceedings to bring pressure to bear on B to resign as arbitrator and on D to resign as trustee.

49. Fifthly, when A took part in the arbitration and started his first English action he was already aware of the facts underlying all matters alleged against the validity/enforceability of the arbitration agreement except for the allegations of fraud against C. Therefore, as held by the Court of Appeal, he implicitly accepted that none of those matters other than fraud could disturb the arbitration agreement. Yet he reintroduced these allegations in his claim in these proceedings, thereby unnecessarily and unjustifiably overloading them.

50. Sixthly, in his 7 June proceedings in the Bahamas A in his skeleton for 22 May 2006 invited the court to proceed on the basis that the arbitration agreement was valid and stated that he did not intend to raise in it any of the matters which were in dispute in these proceedings. He was thus seeking relief from the Bahamian courts on the assumption that the arbitration agreement was valid whereas in the English court he was seeking overlapping relief on the basis that it was voidable.

51. It is also submitted that A's solicitors, WGM, adopted an improperly aggressive tone in inter-solicitor correspondence.

52. Further, it is alleged that A has on numerous occasions made adjournment applications for the purpose of causing delay to these proceedings.

53. Having reviewed the totality of A's conduct and having taken fully into account such explanations as have been put forward by Mr Staff on his behalf, I observe that so much of these criticisms is based on conduct involving failure to comply with the arbitration agreement or adopting inconsistent positions with regard to that agreement, that it is unrealistic to attempt to evaluate the quality of his conduct with regard to these matters separately from and without taking account of his attack on the arbitrator and the arbitration. However, they do, in my judgment, at their lowest, display a palpable disregard for the need to pursue the determination of the issues with C and D in a sensible and cost efficient manner. There is, in my view, much force in the submission that A's two objectives in bringing these proceedings were to force B to resign as arbitrator and D to resign as trustee. The commencement of these English proceedings was thus, in my view, motivated at least in part by considerations which made it a misuse of this court in circumstances where the arbitration together with the Swiss courts and the Bahamian courts provided what was obviously the proper and cost-efficient way of achieving determination of the disputes. In totality therefore this conduct would justify an indemnity costs order.

54. In these circumstances, given that I have left undecided three issues upon which those advising both C and A doubtless spent considerable time and effort in preparation and presentation, is it appropriate that this court should make an indemnity costs order covering the whole range of costs, including those attributable to undecided issues? I have come to the conclusion that it is. The fundamental defect in A's conduct which led to all these points being taken was his improper invocation of the jurisdiction of this court in breach of the arbitration agreement. I am satisfied that all the other grounds of challenge to service out were properly made in the sense that they raised eminently arguable issues. If one asks whether the predominant cause of their preparation and presentation was the wrongful invocation of English jurisdiction, the answer is clearly that it was. It would have been otherwise if they were unreasonably raised in the sense of being clearly without substance. That can be said of none of them. Given that the rationale of an indemnity costs order being attracted by breach of a jurisdiction clause is both an expression of judicial disapproval of deliberate misuse of the English courts and an attempt to provide compensation at an appropriate level for a breach of contract, I conclude that in a case such as the present it is open to me to make an indemnity costs order covering all the costs unless this is an exceptional case in which for example the innocent party's own conduct displaces such an order. In my judgment, there is in the points raised on behalf of A nothing which would justify that course.

55. It follows that there will be an order for costs in favour of C on an indemnity basis.

56. There will be an order for an interim payment on account of C's cost of £490,000. Their payment will be made forthwith. I shall hear submissions as to the precise date.

57. The costs will carry interest from 9 May 2006 at the judgment rate.

58. As to D, it is submitted on behalf of A that no order should be made for his costs for the following reasons.

i) For many months he deliberately withheld the true facts about the whereabouts of the share certificates and the withdrawal of the theft allegation from A and this Court.

ii) D should have sought Beddoe directions in the Bahamas at a much earlier stage and in the absence of directions to the contrary, he ought simply to have entered an appearance in these proceedings for the

purpose of indicating that he did not submit to the jurisdiction and then taken no further part in them – the usual course for an overseas trustee.

iii) His submissions on the key issues duplicated those advanced by C.

iv) D could just as well have been represented by C's lawyers.

v) D's counsel's skeleton arguments were mainly dealing with issues such as whether there was a serious issue to be tried and forum non conveniens which this court did not decide.

59. In any event, if and to the extent that any costs should be awarded in favour of D, that should be on a standard basis.

60. I have already discussed the submission advanced by A with regard to withdrawal of the theft allegation (see paragraph 32-35 above). D's conduct on this matter cannot be so characterised as to displace the order for indemnity costs to which he would otherwise be entitled as a party to the arbitration agreement.

61. Further, the criticism of D's participation and representation at the hearing of this application is misplaced. The issues raised by A impacted on D in both his personal capacity and as a trustee. Allegations of fraud were made against him and, as a practising lawyer and public figure in the Bahamas, he was entitled to rely on separate and ample representation to rebut those allegations. Indeed he was entitled to proceed as if he were the only defendant, taking reasonable steps and utilising all appropriate representation regardless of what other defendants, such as B or C, might rely upon and even if some duplication were involved. In the event I am satisfied that, given a reasonable level of co-operation between counsel in the course of the hearing, repetition and duplication was successfully avoided. Further, the fact that D was acting in his capacity of trustee clearly justified full separate representation. It was essential to maintain an arms-length position vis-à-vis C and B and it would not have been appropriate to turn over his representation to C's counsel or solicitors.

62. The fact that D's submissions concentrated on the merits of the underlying claim against him is hardly surprising: he was obliged to defend a personal fraud claim. The fact that this court did not decide those or other issues was not the fault of D or his advisers. They were entitled to respond to these proceedings with any seriously arguable point available and to incur the costs attributable to preparation and presentation of such points. Like C, D was put to this expense by A's conduct in deliberately ignoring the arbitration agreement and invoking English jurisdiction. An order for indemnity costs is equally appropriate in his case. It is not clear what the total amount of D's costs is and I am therefore not able to quantify the interim payment which I hold to be appropriate. In principle interest on the costs should run from 9 May 2006 at 8 per cent.

63. As to Company E, that company was not a party to the arbitration agreement and therefore the general approach to costs discussed earlier in this judgment cannot apply. However, Mr Doyle, on behalf of Company E, submits that in the special circumstances of this case an order for costs on an indemnity basis would be appropriate.

64. It is submitted that, given that, as held by this Court at paragraph 144, the claim was an aspect of the underlying dispute between A and C, Company E should never have been joined in the English proceedings. The claim should have been pursued in the arbitration and indeed, in as much as it figures in the BDO Report, it was raised before that tribunal. Indeed before A joined Company E in these proceedings D had already given an undertaking to preserve the proceeds of the Company M action pending determination of the arbitration. As indicated at paragraph 151 of the Judgment, there can be no serious doubt that D would comply with any award of B on this or any other issue. A nonetheless applied for an injunction to restrain D dealing with 100 per cent of the proceeds of that action, notwithstanding that he only claimed 50 per cent. And, although at the hearing of these applications Company E was represented by solicitors and counsel A neither advanced submissions in opposition to the application to set aside service nor applied for the continuation of the injunction against D. It seems that A had lost interest in the presence of Company E as a party.

65. In my judgment, the joinder of Company E in these proceedings was quite unnecessary, even if A had been justified in ignoring the arbitration agreement and pursuing C and D in this Court. Given the existence of the arbitration agreement and the fact that C and D had been wrongfully impleaded in this court, the attempt to join Company E also was doubly misconceived. These circumstances are such as to take this case out of the norm and to deserve this court's disapproval.

66. There will accordingly be an order for costs in Company E's favour on an indemnity basis.

67. Again I am not able to quantify the amount of an interim payment. In principle interest should run on the costs as from 9 May 2006 at 8 per cent.

68. I have not made orders requiring payment into court of the balance of the claimed costs over and above the interim payment. I would not be disposed to do so unless there had already been a default in making payment of the interim amount on the due date. A further application can if necessary be made for that purpose.

Ms Clare Stanley and Mr Marcus Staff (instructed by Weil Gotshal & Manges) for the Claimant
Mr Graham Dunning QC and Mr James Collins (instructed by Allen & Overy) for the First Defendant
Mr Nicholas Lavender (instructed by Lewis Silkin) for the Second Defendant
Mr Shane Doyle QC (instructed by Masseys) for the Third and Fourth Defendants