BEA Hotels v Bellway LCC [2007] APP.L.R. 06/12

JUDGMENT : THE HONOURABLE MR JUSTICE COOKE. QBD. Commercial Court. 12th June 2007

Introduction

1. The claimant (BEA) challenges the substantive jurisdiction of Mr Peter Leaver QC as arbitrator under section 67 of the Arbitration Act 1996. Whilst it is accepted that there was a valid arbitration agreement and a valid appointment of the arbitrator, BEA alleges that the relevant arbitration agreement was repudiated by the defendant (Bellway) when the latter brought proceedings in Israel on 11 April 2006 and that this repudiation was accepted by a letter from BEA dated 26 April 2006.

2. The factual basis of the events said to constitute repudiation and acceptance are essentially undisputed and the issues turn on the significance of the Israeli proceedings to which I have just referred. This was the second set of proceedings in Tel Aviv (to which I shall refer as Tel Aviv 2), the first being brought by BEA and others some 4 years before (to which I shall refer as Tel Aviv 1). It is accepted by both parties that English law is the governing law of the arbitration agreement but expert evidence from Israeli lawyers in the form of written reports was put before the court to assist it in interpreting the statements of case in the Israeli court proceedings and the terminology referred to therein. It was agreed between the parties that neither expert would be called to give oral evidence but that each party would be free to make whatever submissions it considered appropriate in relation to the reports.

3. The background to the dispute arises out of a privatisation process of state shareholdings in Romania. A company, to which I shall refer as Bucaresti, which owned the largest residential and hotel complex in Bucharest, was state owned until, by a series of transactions, the right to purchase 66.18% of the shares in Bucaresti vested in a company to which I shall refer as Domino.

4. Mr Razin is a major figure in Bellway and had, through Domino, acquired the right to purchase the shares in Bucaresti, originally as part of a joint venture with a Mr Shreyer who pulled out of the arrangement some 7-10 days prior to the deadline set by the Romanian authorities for payment of the relevant purchase price. At that point Mr Razin was introduced to Mr Zisser and various meetings took place leading to a Joint Venture Term Sheet dated 7 December 2000 (the Term Sheet), which was executed by BEA, Bellway, Desca Investments Ltd (Desca) and Kitedown Investments & Holdings Ltd. Mr Razin also signed as guarantor of 3 specific obligations of Bellway. The purchase was duly completed but disputes arose between the parties to the Term Sheet and others in relation to alleged representations inducing its execution, alleged collateral or antecedent agreements with individuals and alleged non performance.

5. In proceedings commenced by BEA and BEA Eastern Europe BV (BEA Eastern) on 10 July 2002 in Tel Aviv 1, those claimants sued Mr Razin and Monilen Enterprises Limited, but not Bellway. In the statement of claim and the amended statement of claim allegations were made that Mr Razin was personally liable for the obligations undertaken by Bellway in the Term Sheet. The allegation was made that Mr Razin, prior to the signing of the Term Sheet repeatedly stated to BEA that he and he alone was making a commitment and assuming responsibility towards it and that the use of various companies which were parties to the Term Sheet derived solely from tax considerations. Allegations were also made of false representations inducing BEA to enter into the Term Sheet. The defence to those claims denied any liability on the part of Mr Razin save in relation to the obligations of Bellway under the three particular clauses of the Term Sheet where he was specifically a guarantor. These proceedings in Tel Aviv 1 have progressed to the extent that cross-examination of witnesses has partly taken place and it is thought that judgment might be handed down before the end of 2007.

6. The central scheme provided by the Term Sheet was for BEA to hold 80% and Bellway to hold 20% of a holding company, Desca, which was to be and did become the 100% owner of Domino. Under the Term Sheet, Desca was to have five directors appointed by the parties pro rata to their shareholdings. It is alleged that the BEA appointed directors held a directors' meeting of Desca, without notice or reference to the Bellway appointed director and resolved to transfer and then transferred all the shares in Domino to BEA Eastern, which was a subsidiary of BEA. In Tel Aviv 1, this was said to have been done by way of mitigation of the loss and damage sustained from the misrepresentations and breaches of agreement allegedly effected by Mr Razin and Monilen. It is also alleged that the Bellway appointed director and Bellway itself were thereafter excluded from any involvement in the management of the Bucaresti Hotel Apartments, the China Restaurant and other Bucaresti assets, which were matters provided for under the Term Sheet.

The Arbitration Agreement

7. Paragraph 11 of the Term Sheet included the following:

> *"11.1 Any dispute between the BEA and Bellway pertaining to and/or connected with the agreements for the management of the Hotel and the Apartment Hotel, shall be referred to arbitration before Mr Ami Federman.*
>
> *11.2 Any dispute between the BEA and Bellway pertaining to any other matter arising out of and/or connected with this Term Sheet shall be referred to arbitration before Mr Eli Landau.*
>
> *11.3 In the event that either or both of the above arbitrators are unwilling or unable to act for any reason, then and in such event an alternative arbitrator shall be appointed by mutual consent between BEA and Bellway, failing which such alternative arbitrator shall be appointed by the President for the time being of the London Court of International Arbitration upon the application of either party.*
>
> *11.4 This Paragraph 11 constitutes a separate agreement to arbitrate which shall survive the termination of this Term Sheet for any reason."*

Bellway's attempts to arbitrate

8. In February 2003 Bellway sent a Statement of Claim to the nominated arbitrator Mr Landau. The focus of that claim against BEA was the alleged illegitimate and invalid transfer of the shares in Domino to BEA's associated company, BEA Eastern. Mr Landau was not willing to accept the appointment and Bellway then applied to the Tel Aviv courts, asking for the appointment of an Israeli arbitrator. After initial success (the court appointed Prof Hadari as arbitrator on 19 February 2004 and reappointed, following further argument in 2005), Bellway failed on appeal and the Tel Aviv District Court, on 17 January 2006, ordered the parties to apply to the LCIA to appoint an arbitrator, holding that there was no reason for the agreed procedure set out in clause 11 not to be adopted.

9. Bellway then sent a request for arbitration to the LCIA on 5 February and despite objections from BEA, the LCIA Court appointed Mr Leaver as sole arbitrator on 20 March 2006, after prolonged exchanges between the parties and the LCIA in which Bellway sought the appointment of an arbitrator (with an expressed preference for an Israeli) whilst BEA attempted to stall the appointment of an arbitrator or to stay the arbitration pending the conclusion of Tel Aviv 1. As the parties agreed LCIA Rules, the LCIA determined that the seat of the Arbitration was London but without prejudice to any decision of the arbitrator as to the location at which evidence might be heard. Questions of lis alibi pendens were left to him to decide, although, in the event he had to determine the challenge to his jurisdiction first (the matter which is now before this Court). Evidence in the arbitration is due to be heard in Tel Aviv later in the year.

The Second Israeli Proceedings (Tel Aviv 2)

10. On 11 April 2006 Mr Razin, Bellway and Monilen commenced proceedings in Tel Aviv against Mr Zisser, a major figure in BEA, Elscint Limited, a company controlled by Mr Zisser and the parent company of BEA, Mrs Levin (President of Elscint and a Director of Desca), Mr Levin (Vice-President of the group which controls BEA and a Director of Desca), Mr Ronsmans (Chief Executive Officer of BEA, BEA Eastern and a Director of Desca), Mr Pap (a Director of Desca), BEA and BEA Eastern (which now ultimately owned the Bucaresti shares through Domino). These proceedings include a number of different claims which were the subject of some analysis before me in the context of the alleged repudiation of the arbitration agreement. Bellway sought to have Tel Aviv 2 consolidated with Tel Aviv 1 but the court refused to allow this. Tel Aviv 2 has not proceeded very far beyond the statement of case (Particulars of Claim) served on 11 April 2006.

Repudiation of the Arbitration

11. The only issue which I have to decide (and which the arbitrator has already decided) is whether or not the commencement and service of the Tel Aviv 2 proceedings amounts to a repudiation of the arbitration agreement rendering the arbitrator devoid of jurisdiction. It is accepted that if this constituted a repudiation, the letter from BEA's solicitors was apt to accept it. The proceedings before this court, as is common ground, take place by way of a re-hearing. New evidence has been put before the court which was not available before the arbitrator in the shape of expert evidence from Israeli lawyers, which was limited in its purpose. The court approaches the matter de novo, although reference was made to the arbitrator's reasoning in the course of argument.

12. The law with regard to repudiation of an arbitration agreement was not seriously in dispute. It is clear that what BEA needs to show is a repudiation of the agreement to refer the BEA/Bellway dispute to Mr Peter Leaver QC, rather than simply the clause 11 agreement to arbitrate. The claim is made that, by pursuing claims against BEA in the Israeli proceedings, Bellway evinced an intention not to be bound by the agreement to refer those claims to the LCIA arbitration.

13. In order to show a repudiation of that agreement to refer, it was not disputed that BEA would have to show that Bellway evinced an intention no longer to be bound by that agreement and that Bellway's conduct would have to be such that a reasonable person, in BEA's shoes, would understand Bellway to be saying that it was not prepared to continue with the reference. It was common ground that it was not repudiatory merely to bring proceedings in breach of an arbitration agreement, even if the claims pursued in those proceedings were plainly ones which were subject to the arbitration agreement. It was undisputed that a breach of an arbitration agreement by bringing other proceedings was only repudiatory if it was done in circumstances that showed that the party in question no longer intended to be bound to arbitrate. It was also agreed that such an intention could not lightly be inferred and could only be inferred from conduct which was clear and unequivocal. If there was some other reason for the breaching of proceedings it would be hard to infer that the party bringing them intended to renounce its obligation to arbitrate.

14. Thus, if the conduct of that party in all the surrounding circumstances did not reveal a clear intention not to be bound by the agreement to refer the claims in question to arbitration, it could not be said that the arbitration agreement or reference had been repudiated. If it was clear that the party intended to pursue the arbitration, again there could be no repudiation. Whilst Mr McGrath for BEA contended that, if Bellway was seeking to run the same claims against BEA in both the arbitration and in Tel Aviv 2, this would amount to repudiation, because running the claims in Tel Aviv was inconsistent with arbitrating them, it is clear that this could not amount to a renunciation or repudiation of the agreement to refer, since the intention expressed was to continue with the arbitration, albeit alongside other litigation.

15. Whilst a number of authorities were referred to in the skeleton arguments, in the end I was referred only to the decisions of Lloyd J (as he then was) in the Mercanaut [1980] 2 Lloyds Reports 183 and the Golden Anne [1984] 2 Lloyds Reports 489 where the arbitration agreements were breached but the court concluded that the breach

was not repudiatory because there was some explanation for bringing the court proceedings which in turn meant that the court could not infer an intention to repudiate.

16. It is in this context that attention must be paid to the Particulars of Claim served by Bellway in Tel Aviv 2.

The Particulars of Claim in Tel Aviv 2

17. The second set of Israeli proceedings was instituted by Mr Razin, Bellway and Monilen against the eight defendants to whom I have already referred and Domino.

The nature of the claim was described as "1. Contractual – torts. 2. Issuing of declaratory relief'. In the preamble the three plaintiffs set out their intention to apply for consolidation of the claim with Tel Aviv 1, which was described as "a futile attempt by BEA and BEA Eastern to cover up a blatant act of larceny committed by the first eight defendants against Bellway's property". Paragraphs 3, 4 and 5 are of importance in the context of the argument. In those paragraphs defendant 7 is BEA, defendant 8 is BEA Eastern and plaintiff 2 is Bellway. In translation those paragraphs read as follows:

"3. *This is the place to note that defendant 7 [BEA], who knew that plaintiff 2 [Bellway] would be filing a claim against it under the aegis of an arbitration as required by an agreement between the parties, preceded it and hurried to the Court with the concurrent claim, which is baseless and unfounded, against other parties who are involved in this saga, where it has omitted defendant 2 [BEA] from its claim due to the arbitration clause included in the agreement between the parties.*

*4. This is also the place to note that at the time of filing this claim (after 3 years during which the defendants did everything they could to obstruct Bellway in clarifying the affair thoroughly), legal proceedings are being conducted between plaintiff 2 and defendant 7 under the aegis of the London Court of International Arbitration (*hereinafter: "LCIA"). Accordingly, for the sake of caution, the plaintiffs shall expressly state that all the arguments, whether of a general or specific nature, addressed by the plaintiffs against the defendants, cannot include the arguments of plaintiff 2 [Bellway] against defendant 7 [BEA], arguments which are to be investigated under the aegis of the LCIA.*

5. It is not for nothing that this claim is deliberately being filed 3 years after the proceedings were instituted in the concurrent claim. Plaintiff 2 [Bellway], who fought for more than three years to have an arbitrator appointed in the dispute between it and defendant 7 [BEA], with the latter doing everything it could prevent the appointment of such an arbitrator, only 'managed' in the last few days to have an arbitrator appointed in this affair - an English arbitrator, based in London and appointed by the LCIA. Now, when it has transpired that the dispute is being conducted between some of the involved parties in London, the way has been prepared for filing this claim in Israel against the remaining parties who took part in this affair. In addition, the plaintiffs recently received for the first time the testimonies and opinions of the witnesses and experts on behalf of defendants 7 and 8 in the concurrent claim - very important material which attests, loud and clear, to the severity of the acts of all the defendants, to the personal and direct involvement of each and every one of them in this affair, parties who are not party to the aforementioned arbitration clause, and underlines the truth of the plaintiffs' outcry due to the larceny of their shares - literally daylight robbery - an argument that will be fully elaborated in this statement of claim."

18. Whilst there were small differences in various translations put forward by the parties the substance of the paragraphs remained the same. The message of paragraphs 3, 4 and 5 is clearly to the effect that BEA has sought to avoid arbitration, that Bellway has for 3 years fought to have arbitration, and that Tel Aviv 2 expressly excludes Bellway's claims against BEA which are to be pursued in the arbitration. Furthermore, as the arbitration is limited to *"some of the involved parties in London*" the claim in Israel is to take effect against the remaining parties who were involved in the events at issue but are not parties to the arbitration. (It is suggested by Bellway that the word "*arguments*", which appears twice in the last sentence of paragraph 4, would be better translated "claims").

19. Whether or not Bellway had unequivocally pursued the question of arbitration over 3 years or had pursued arbitration in a different format to that envisaged by clause 11 of the Term Sheet, by seeking to obtain an appointment of an Israeli arbitrator by the Tel Aviv, court is nothing to the point. By the time that the Particulars of Claim were served in April 2006, Bellway had just spent 2 months following the decision of the Tel Aviv Court that LCIA procedures should be followed, in following those procedures, commencing arbitration by making a Request to the LCIA and obtaining the appointment of an arbitrator in the face of continuing opposition and delay from BEA. At this stage Bellway was giving every indication that it wanted to proceed with the arbitration against BEA.

20. Some 3 weeks after the arbitrator which Bellway sought had been appointed, Bellway served the Particulars of Claim in Tel Aviv 2 which contained these paragraphs. In my judgment, what Bellway was unequivocally saying in paragraphs 3-5 of this statement of case was that it was not using the Tel Aviv proceedings to pursue any claims by Bellway against BEA, since those claims were to be resolved within the context of the arbitration, but was now in a position, having commenced arbitration against BEA, to pursue the other defendants in Tel Aviv in respect of the same history of events. I cannot see that these paragraphs can bear any other construction and the effect of them in the Preamble to the Particulars is that the rest of the pleading must be read subject to it.

21. In these circumstances, unless that statement of Bellway's intention to pursue its claims against BEA in the LCIA arbitration was untrue, it is not possible to say that Bellway, in serving this pleading, was unequivocally stating that it did not intend to abide by the agreement that these claims should be determined in the arbitration. There is no basis for any such assertion and it was not made. The furthest that BEA was prepared to go was to say that

Bellway was trying to have its claims heard against BEA in both fora, (Tel Aviv and the arbitration). BEA said it was not a matter of subjective intention, but a question of what the conduct of Bellway in pursuing claims in Tel Aviv showed and if the later claims included claims against BEA, then objectively there must be a repudiation, because the running of such claims in Tel Aviv was inconsistent with having them determined in arbitration.

22. BEA's case is that BEA has been joined as a defendant in Tel Aviv 2 and that the balance of the statement of case sets out some claims against BEA alone which the Tel Aviv court would be bound to determine and which would constitute res judicata or issue estoppel as between BEA and Bellway. It is said that paragraphs 3-5 are not to be given undue weight and that they must be read in the context of the statement of case as a whole which pursues contractual claims which can only be claims made by Bellway against BEA. It is said that, where such claims are clearly made, paragraphs 4 and 5 of the Particulars of Claim are, to all intents and purposes ineffective. On a true construction, they can only have application where there is a measure of doubt whether a claim is being pursued against BEA or others, but can have no impact where it is clear that a claim is being pursued against BEA, which must be the position where there is no other potential defendant to the claim in question. Because BEA is joined as a defendant, the Israeli Court is invested with the duty of determining those claims regardless of paragraphs 3-5 of the pleading.

23. I am unable to accept BEA's submissions. Even if the Particulars of Claim in Tel Aviv 2 contained a series of claims which on analysis could only be vested in Bellway and run against BEA, so that there is apparent inconsistency between paragraphs 3-5 and the later pleaded claims of Bellway against BEA, the effect of paragraphs 3-5, in coming at the beginning of the pleading and explaining the intention of the pleader, is expressly and specifically to disavow any claim of Bellway against BEA which falls within the arbitration agreement. Whatever inconsistencies thereafter might appear, the controlling paragraphs in the Preamble to the pleading govern the position for all purposes, with a clearly expressed intention to pursue such claims in arbitration and not in Tel Aviv 2. No reasonable person in BEA's position could have thought that Bellway was, in this pleading, exhibiting an intention not to pursue its claims against BEA in arbitration. The expressed intention was to complement the arbitration by having those claims determined in Tel Aviv which could not be decided in the arbitration, essentially because the relevant plaintiff or defendant was not a party to the arbitration agreement.

24. BEA's case on repudiation cannot therefore, in my judgment, succeed. Far from there being an unequivocal evincing of an intention not to be bound by the agreement to refer, there is, in these paragraphs in the preamble, an unequivocal expression of an intention to be bound by that agreement and if anything appears elsewhere in the pleading which could throw that into doubt, the position at best for BEA's arguments would be ambiguous, which would not be enough for it to show an unequivocal intention not to be bound which is necessary to show a renunciation/repudiation.

25. The challenge to the arbitrator's jurisdiction must therefore fail and BEA's application under s 67 of the Arbitration Act must be dismissed.

26. Whilst conduct after the alleged acceptance of the repudiation is irrelevant, it is noteworthy that BEA never sought any clarification of Bellway's position with regard to the forum for determination of its claims against BEA nor ever applied to the Israeli Court for a stay of such claims, insofar as they were to be found in Tel Aviv 2. Instead it applied on 27 April 2006 to the Arbitrator for a ruling that the arbitration agreement had been repudiated. It is in my judgment plain that, for tactical reasons, BEA wishes to avoid arbitration or at the very least delay any arbitration until the conclusion of Tel Aviv 1, which does not concern claims against Bellway or Bellway claims against BEA. The whole of BEA's conduct, including its pursuit of its failed lis alibi pendens application to the Arbitrator following his ruling against it on the jurisdiction application, bears this out. It is clear to me, from all the evidence, that BEA could not have subjectively thought that Bellway intended not to pursue its claims against BEA in the LCIA arbitration, whilst the objective position is plain, as I have already held.

27. Bellway further argued that the later claims set out in the Particulars of Claim were, on proper analysis, claims by or against parties to the action other than Bellway or BEA, as the case might be, or at worst claims which were not against BEA alone, so that there was no inconsistency between paragraphs 3-5 and the later parts of the statement of case, because no claims were being pursued by Bellway against BEA as such. In such a case, not only would paragraphs 3-5 be effective to exclude claims by Bellway against BEA from the claims before the Israeli Court, but there could in any event be no breach of the arbitration agreement in serving the Particulars of Claim at all, let alone a repudiatory breach.

Breach of the Arbitration Agreement.

28. Section B of the statement of case identifies the parties to the proceedings. Mr Zisser is identified as an Israeli businessman who controls BEA through Elscint Limited and as *"the one pulling all the strings in the affair being discussed here"*. Elscint is described as an American public company controlled by Mr Zisser. Ms Levin is described as the President of Elscint and Mr Zisser's Business Manager, serving as his representative and loyal assistant in everything relating to the transaction which is the subject of the claim. Additionally she is described as serving at all times relevant to this action as Director of Desca, on behalf of BEA. Mr Levin is described as the Chief Financial Officer of the group of companies controlling BEA and handling the financial aspects of the transaction on behalf of Mr Zisser and the companies he controls. In addition he also served as a Director of Desca on behalf of BEA. Mr Ronsmans is described as the Chief Executive Officer of BEA and BEA Eastern and as serving as a Director of Desca on behalf of BEA whilst Mr Pap is also described as a Director of Desca serving on behalf of BEA. BEA is then described as a company which served the Zisser group in the engagement that is the object of the action

whilst BEA Eastern is described as being fully controlled by BEA and serving the Zisser group by the receipt of the shares stolen from Desca. Domino is described as being fully controlled by Desca up until the theft of the shares. The thrust of the pleading, amplified elsewhere in it, is that Mr Zisser controlled all the companies and individuals who were involved in the events in question and the individuals mentioned acted to procure the effecting by the companies of his and their purposes. In so doing he and they acted tortiously and in breach of statutory duty whilst putting BEA in breach of contract.

29. Reliance is placed by BEA on paragraph 18 of the pleading which states that where arguments are raised in the pleading against *"the defendants*", that means all the defendants except where the arguments are expressly directed against Domino. BEA points out that throughout most of the pleading the Plaintiffs are referred to generically as "the Plaintiffs" and the Defendants as *"the Defendants",* without drawing any distinction between them, save on particular occasions when the pleader deliberately chooses to refer to one or more individual defendants by their respective numbers on the Particulars of Claim or by their respective names. Thus it is said that where no distinction is drawn, the pleader has defined who it is that is referred to as *"the Defendants",* namely all the defendants numbered 1 to 8, including the 7th Defendant, BEA. Wherever this appellation is used, there is therefore a claim against BEA.

30. In Section C which is headed *"Introduction"* the claim is said to concern a *"flagrant act of larceny perpetrated by the defendants against the property of Bellway which had entered with BEA into an agreement that constituted the object of the claim"*. All the first 8 defendants are therefore alleged to be involved. Paragraph 20 of the pleading states that these defendants effected the theft of Bellway's indirect holding in Domino at the instance of Mr Zisser and that this was done by passing an invalid resolution at the Desca Board of Directors without the consent of Bellway or Mr Razin its owner and its appointed Director of Desca. This was said to be contrary to the agreement *"between the parties"*. By the terms of the resolution Desca's shares in Domino were transferred to BEA Eastern.

31. Paragraph 22 alleges that the theft was perpetrated as an act of conspiracy and alleges that BEA and BEA Eastern have admitted that in Tel Aviv 1, in evidence filed on their behalf. It is clear from this section of the pleading that all the defendants except Domino are alleged to have been involved in a conspiracy to deprive Bellway of its shares in Domino and that Mr Zisser was the instigator and lead figure in that conspiracy, acting through or in conjunction with BEA and Elscint (his creature companies) and the individual directors of Desca appointed by BEA who passed the resolution to transfer the shares to BEA Eastern. This is amplified elsewhere in the pleading where the conspiracy referred to in paragraph 22 is said to have been initiated by Mr Zisser (paragraph 20) and thus also by BEA (paragraph 73) and resulted in all of the first 8 defendants acting in concert to steal Desca's shares in Domino (paragraph 92) thus circumventing the provisions of clause 7 of the Term Sheet and Bellway's right of first refusal to acquire the Desca shares before any transfer was made. Thus all the defendants, save Domino are said to have "*walked all over the provisions of the Term Sheet"*.

32. At Section D(5) it is pleaded that *"BEA and Zisser decided to embark on a series of actions, judicial and other, whose object was solely to unfairly gain control of Bellway's share in this transaction, while depriving it of its rights and assets under the agreement"*. Paragraph 74-76 then set out the allegation that BEA or a party on its behalf convened an ostensible board meeting of Desca and that the 2nd, 3rd, 4th and 5th defendants, Mr Levin, Mrs Levin, Mr Ronsman and Mr Pap attended that meeting as BEA Directors (without any notification to Mr Razin as Bellway's Director) and passed the resolution to transfer the shares in Domino to BEA Eastern. It is then pleaded that this was done in breach of Clause 6 of the Term Sheet, that the transfer was carried out improperly, without authority, contrary to law and that this constituted mistreatment and deprivation of Bellway's minority shareholding and "*flagrant larceny of Bellway's assets and elimination of its rights to profits derived from Bucaresti's assets"*. It is alleged that the resolution was passed contrary to company law in Cyprus, the country in which Desca was registered with the result that the resolution was null and void.

33. Paragraphs 85 and 86 of the pleading additionally allege BEA's prevention of Bucaresti and Bellway entering into a management agreement for the apartment hotel, contrary to clause 9.4 of the Term Sheet and deprivation of revenues which would have been earned by Bellway resulting from joint management of the China Restaurant and other Bucaresti assets contrary to clause 9.5.

34. At Section E of the pleading Bellway set out *"the causes of the claim against the defendants"*. In that section Mr Zisser alone was said to be the primary active player in the events and that all the actions performed by any of the other defendants were done on his direct instructions. The individual defendants were again described as being under the control of Mr Zisser and being involved as Directors of Desca in the unlawful transfer of the Domino shares.

35. Paragraph 134 sets out *"the legal arguments"* in relation to the Defendants' "*breaches of statutory provisions*". In paragraph 134.3 and 134.7 particular defendants are identified but elsewhere they are simply referred to generically as *"the defendants"* which, in accordance with the earlier definitions paragraph, means the 1st-8th defendants.

    i) There is a claim for breach of the Unjust Enrichment Act by the larceny of Bellway's shares in Domino. This claim requires the defendants to procure the return of the shares by BEA Eastern (to Bellway or Desca) whilst seeking a declaration that Bellway is the lawful owner of 20% of those shares. That claim impleads other defendants than BEA who were involved in the alleged theft of the shares who between them could control BEA and acted at Mr Zisser's instance in passing the challenged Desca resolution.

ii) A claim is made that "the defendants' conduct resulted in the deprivation of Bellway's rights as a shareholder" in Desca, invoking the court's authority under section 191 of the Companies Act. This, I find, is a claim made against the Directors of Desca for "unfair prejudice" a form of minority shareholder relief against the Directors responsible, as explained by Professor Goshen in his report.

iii) A claim is made against the first 5 defendants for breach of the provisions of section 425 of the Criminal Justice Act on the basis of fraud and breach of trust in a corporation. This is a claim against Directors and Elscint which owns BEA, in this case for breach of fiduciary duty. It may be that the 2nd defendant has been wrongly included and the 6th defendant wrongly excluded, but plainly BEA is itself not impleaded by this part of the claim.

iv) The Plaintiffs claim that the defendants breached the provisions of section 52 of the Torts Order (New Version) pertaining to embezzlement by the improper share transfer. This claim once again impleads the Directors of Desca and others involved in the acts in question.

v) In paragraph 134.5 of the pleading the claim is made that the defendants contravened the provisions of section 39 of the Contracts Act (General Part) when breaching the provisions of the agreement (meaning the Term Sheet) in improperly convening the board meeting and acting to steal the shares, in failing to comply with clause 6.3 of the Term Sheet with regard to hotel renovation and failing to repay the Monilen debt in accordance with a loan agreement of 26 June 2001. BEA's submission was that this was a clear contractual claim which could only be made against BEA and nobody else.

vi) In paragraph 134.6, the plaintiffs claim that clauses 9.4 and 9.5 of the Term Sheet entitled Bellway to sign a management agreement with Bucaresti for the apartment hotel and to a share in the management profits of the China restaurant and other Bucaresti assets. Specific performance was claimed in accordance with the provisions of section 2 of the Contracts Act (Remedies for Breach of Contract). Once again BEA maintains that this was a clear claim for breach of contact which could only arise against BEA.

vii) It is also alleged that Elscint breached the provisions of section 35 of the Torts Order (New Version) when it reported to the authorities that it had purchased Bucaresti for an amount which did not match the true purchase value. This claim is expressly not made against BEA.

viii) There is then a catchall sub-paragraph in which it is stated that the plaintiffs would argue that the defendants breached the provisions of section 63 of the Torts Order (New Version) which relates to violation of statutory duty, when they failed to fulfil the duties imposed on them pursuant to the various statutes referred to in the previous 7 sub-paragraphs.

36. BEA's argument focused on the particular paragraphs in the pleading which alleged breaches of clause 6.3, 9.4 and 9.5 of the Term Sheet, as set out in subparagraphs (v) and (vi) of the previous paragraph of this judgment. Reliance was also placed upon paragraphs 136-139 of the pleading, whilst submitting that it was contractual relief which was being sought in each case.

37. What BEA overlook however in their submissions, is that the thrust of the pleading is to the effect that Mr Zisser is responsible for the acts of BEA, as it is said to be his creature company whilst all the other individuals and entities are equally under his control as part of his Group. Any claim of a breach of the Term Sheet therefore is not simply a claim against BEA for breach of contract but a claim against Mr Zisser and the other defendants (other than BEA and Domino) for their actions as tortious or statutory breach of duty in respect of the self same breach.

38. Whether or not such a claim is also vested in Mr Razin, Bellway has, according to Professor Goshen, a claim against Mr Zisser for causing, and against the other defendants for assisting in, the breach of the agreement between Bellway and BEA as breaches of statutory duty or tort. Whilst Professor Bein contended that a claim for breach of contract was different from a claim for inducing breach of contract or assisting in a breach of contract and should be distinctly pleaded, it is clear from the overall tenor of the pleading and from the relief sought that the plaintiffs, whether Bellway or Mr Razin, are seeking orders of the court to procure the fulfilment by the Defendants of BEA's contractual obligations because they are in a position to act for BEA and/or Desca and/or Domino or to claim damages for their breach of tortious or statutory duty. Thus an application is made to the court in the pleading: under paragraph 136 to declare that Bellway is the lawful owner (against the world) of 20% of Domino shares (through Desca); under paragraph 137 to rule that the Defendants breached and or acted to breach the Term Sheet and failed to repay the loan due to Bellway from Domino; under paragraph 138 to enforce the Loan Agreement against Domino; and under paragraph 139 of the pleading for the enforcement of the agreement between the parties, requiring the defendants to act so that Bucaresti signs a management agreement with Bellway or the apartment hotel and the China restaurant and other Bucaresti assets.

39. Where paragraph 134.5 specifically alleges the improper convening of the Desca Board Meeting and the improper transfer of shares by the Desca Directors, also complaining of the failure to comply with the provisions of the Term Sheet for hotel renovation, those matters lay in the hands of the BEA Directors who passed a resolution to close down the hotel for that purpose, as set out in paragraph 106 of the pleading. The ignoring of the related party transaction provisions in the Term Sheet was something carried out by the BEA appointed Desca Directors, once again without reference to the Bellway appointed Director at a meeting which had been improperly convened. It is clear again that the "they" referred to in paragraph 134.5 must include the individual defendants who were responsible for the Board Meetings and Board decisions in question and for Domino's failure to repay the debt to Monilen or Bellway - see paragraph 134.5, 137 and 138.

40. In paragraph 134.6 the complaint is made about the failure to sign the management agreement or to jointly share profits of management, matters which lay in the hands of Mr Zisser and the individual defendants who were directors of BEA and/or Desca and thus controlled BEA and Domino and the actual effectuation of these matters.

41. Thus paragraphs 134.5 and 134.6 are not claims solely made against BEA.

42. Whilst the body of the pleading could be read as including contract claims by Bellway against BEA, the effect of paragraphs 3-5 of the pleading is specifically to exclude such claims from Tel Aviv 2. Whilst there was a difference of view between the experts on Israeli law in relation to the impact of these paragraphs, no relevant canons of construction were put forward for me to take into account in considering the language used. I can see no inconsistency in a pleading which sets out claims where a number of defendants are said to be jointly or severally liable but where some of those claims are specifically not pursued against one particular defendant.

43. In this context, there is no difficulty in reading paragraphs 3-5 as doing what they say they do, namely excluding from the determination of the Israeli court any issues between Bellway and BEA which are to be determined in arbitration. There is no inconsistency between the balance of the pleading as formulated and those paragraphs. Those paragraphs govern the reading of the rest of the pleading so that, although BEA is named as a defendant, no claim is being pursued by Bellway against BEA in Tel Aviv 2 which should properly be arbitrated.

44. There was much dispute as to whether or not Mr Razin was in the pleading making a personal claim against BEA in contract, since BEA contended that in no part of the pleading is there any reference to contract obligations being owed to him personally, as opposed to Bellway. Bellway maintained that a claim was being made by Mr Razin and that this was part of the explanation for the presence of BEA as a defendant. Whilst in Tel Aviv 1, BEA alleged a claim against Mr Razin personally, the latter has always maintained that his only liability to BEA was as guarantor of 3 particular obligations set out in the Term Sheet. This is reiterated in the pleading and nowhere in paragraphs 53-72 of the pleading in Tel Aviv 2 is that position changed or is it suggested that there are any grounds for a personal claim by him against BEA.

45. Under Section D(4), headed "*the Agreement between the Parties*", it is alleged that the main points of agreement reached in negotiations on 7 and 8 December were summarised in the Term Sheet dated 7 December, although some changes were thereafter made to the structure of the transaction as set out therein. At paragraph 66.8, the plaintiffs case is set out that Mr Razin only assumed responsibility as guarantor of three of Bellway's obligations, whilst at paragraph 68 it was stressed that Mr Zisser was not only involved in each and every stage of the transaction but made all the decisions required and that every clause included in the Term Sheet was formulated and agreed by him and everything that was done in the transaction was done with his approval.

46. Paragraphs 56 and 57 set out an agreement, prior to the Term Sheet, on the main points of the transaction between Mr Razin and Mr Zisser, but not an agreement between Mr Razin and BEA. There is, in my judgment, no basis pleaded for any personal contract claim by Mr Razin against BEA, although Mr Razin and Bellway make tort claims against Mr Zisser and others.

47. On the face of the pleading, Mr Razin has a claim in conspiracy against BEA and the other Defendants in respect of his own interests (and under Israeli law according to Prof Goshen) and his interests include his control of Bellway and Monilen and their employment by him as pleaded in paragraph 7 of the pleading. He may therefore be able to establish personal loss in respect of the conspiracy which deprived Bellway of the Domino shares and the money owing to Monilen by Domino, though none is expressly pleaded. Monilen too has a claim in conspiracy in respect of the loss which is expressly pleaded, namely the non payment by Domino of $600,000 plus interest, which BEA and some of the other defendants by their actions in *"stealing"* Desca and controlling Domino have procured. Whilst there is obvious overlap in the loss claimed, that is no reason why such a claim cannot be brought by Mr Razin and Molinen and that alone is sufficient to explain the presence of BEA as a defendant.

48. I find therefore that although the pleading asserts various claims by the Plaintiffs against many parties, none of those claims, as a matter of Israeli law or language, can properly be said to be solely a claim by Bellway against BEA which fell within the arbitration agreement.

49. Furthermore, even if such Razin or Monilen claims against BEA are not to be found in the pleading, BEA's inclusion as a defendant would still not be sufficient to override paragraphs 4 and 5 of the pleading. If, contrary to what I have held, there are no claims being made against BEA by any Plaintiff other than Bellway, Professor Bein maintained that the inclusion of BEA as a defendant meant that the Israeli Court would have to determine claims which were made against it. I am unable to accept Professor Bein's view of the effect of joining BEA as a defendant on the Israeli Court and the suggestion that the court would ignore paragraphs 4 and 5 and determine Bellway's claims against BEA regardless. Professor Goshen's view was that the Israeli court would read the pleading in the way that I have held it should be read, so that it would not concern itself with Bellway's claims against BEA, even if such were included in the body of the pleading. I accept his evidence on that, as according with common sense and with what the pleading says. If BEA should wish to seek clarification in the Israeli court or to strike out or stay any claim which is arbitrable, it would be open to it to apply to do so.

50. It is said by BEA that there are no claims against BEA by Plaintiffs other than Bellway and this must mean that BEA is a defendant to BEA claims in Tel Aviv 2. Even if BEA was right in its premise, this reads too much into the inclusion of BEA as a Defendant. Whether the concept of a nominal defendant against whom no claim is pursued is known or unknown in the Israeli legal system, the inclusion of a defendant where the plaintiff says in terms that it is

not pursuing that defendant, cannot negate the clear eschewal of such claims. It should be borne in mind that both Monilen and Mr Razin were sued by BEA in Tel Aviv 1, and in paragraph 1 of the pleading, Bellway sought consolidation of Tel Aviv 1 and Tel Aviv 2. BEA's interests are undoubtedly affected by the claims against other defendants and issues decided in Tel Aviv 2 would impact on its interests, which might well be seen as good reason for joinder.

51. Professor Bein goes so far as to say that decisions against the defendants other than BEA could or would constitute res judicata against BEA and that this in itself means that there is a breach of the arbitration agreement. That does not represent English law however. Bellway cannot arbitrate against entities which are not party to an arbitration agreement with it and has no option but to litigate against them whilst pursuing BEA in arbitration. If issues of res judicata or issue estoppel arise in respect of the first determination by either tribunal of overlapping issues, that will have to be the subject of determination by the relevant tribunal thereafter faced with the problem. This cannot give rise to any suggested breach of the arbitration agreement however, since it can only be the lawsuit of one party to such an arbitration agreement against another such party which breaches that agreement, regardless of the consequences of others taking proceedings.

52. Thus where Bellway says in terms that it is not pursuing BEA in Tel Aviv 2, there is no basis for gainsaying that, whatever the exact form of the claims which appear thereafter in the pleading. Moreover if Bellway should seek to change its stance and pursue such claims, it would be open to BEA to refer the matter to the Israeli court which on the evidence before me would not allow departure from the pleaded disavowal of claims by Bellway against BEA unless the relevant parties, by word or conduct agreed to that course. Such a later course of action on Bellway's part would not however affect the current position on repudiation or breach.

53. Since paragraphs 3-5 of Bellway's Particulars of Claim are effective to exclude the arbitrable claims from the determination of the Israeli court, I hold that there has been no breach of the agreement to arbitrate, let alone any repudiatory breach.

Conclusion

54. For all these reasons BEA's application must fail and, subject to any special considerations of which I have not been made aware, costs will follow the event. If there are special circumstances to take into account, no doubt the parties will let me know and the matter can be argued at the formal handing down of this judgment. If not, perhaps the parties could agree a form of order which follows from my decision.

Mr P McGrath (instructed by Berwin Leighton Paisner) for the Claimant
Mr J Lockey QC (instructed by Kennedys) for the Defendant