El Nasharty v J. Sainsbury Plc [2007] APP.L.R. 11/13

JUDGMENT : The Hon. Mr Justice Tomlinson: Commercial Court. 13th November 2007

1. This is an application by the Defendant, J. Sainsbury Plc, to which I shall refer simply as Sainsbury, for an order pursuant to section 9 of the Arbitration Act 1996 that the proceedings be stayed. Section 9 provides, so far as material:

   "9.(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

   …

   (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

2. The proceedings were begun by the Claimant on 22 May 2007. The Claimant is an Egyptian national. In his Claim Form he claims a declaration that an agreement dated 8 April 2001 for sale by Sainsbury to him and others of shares in Egyptian Distribution Group SAE was entered into as a result of duress and has been avoided. In his Points of Claim he additionally claims damages of at least US$104,000,000. The agreement contained an arbitration clause, pursuant to which Sainsbury make this application.

3. I shall refer to Egyptian Distribution Group SAE as "Edge". As its name suggests it is an Egyptian company. It is or at any rate was at all material times the principal company in a group of companies carrying on the business in Egypt of food distribution and retailing through a network of convenience stores, supermarkets and hypermarkets.

4. The Claimant asserts that the action should not be stayed in favour or arbitration because so to do would deprive him of his right of access to a court implicitly guaranteed by Article 6 of the European Convention on Human Rights – see ***Golder v United Kingdom*** [1975] 1 EHRR 524 at paragraphs 28-36. Although the agreement of 8 April 2001 which he impugns and in relation to the execution of which he claims damages contains a clause providing that any proceedings in relation to the agreement, save for an immaterial exception, shall be subject to arbitration in Paris under the rules of the International Chamber of Commerce, hereafter "ICC", he claims that that agreement too was only entered into as a result of the influence upon him of duress and so does not represent a valid waiver of his entitlement under Article 6. If I understood him right Mr Mark Warwick on his behalf says that in such circumstances the arbitration agreement is "inoperative", a reference to the saving words in section 9(4) of the Arbitration Act which if satisfied divest the court of its mandatory obligation to impose a stay. I am not sure that this is a necessary step in the argument. The Claimant supports his principal argument with a further point concerned with the cost of access to justice in an ICC arbitration as contrasted with the cost of access to justice in the Commercial Court. The Claimant says that he is unable to afford the advances to cover the costs of the arbitration which the International Court of Arbitration attached to the ICC is likely to require as a condition of permitting his claim to be maintained before an arbitral tribunal appointed under the auspices of the International Chamber of Commerce. Mr Warwick was I think right to present this as no more than a supporting point, although on a proper analysis in my view it adds nothing to the debate whether the Claimant has validly waived his right of access to a court. It adds nothing because inherent in any finding of waiver will be a finding that the Claimant freely and voluntarily entered into an arbitration agreement which imported a transparent published costs regime, cf *Stretford v Football Association Limited* [2007] Bus LR 1052. Furthermore inability of one party to meet his financial obligations under the ICC or comparable Rules or procedures does not render the arbitration agreement inoperative or incapable of being performed – see *Janos Paczy v Haendler and Natermann* [1981] 1 Lloyds Rep 302, concerned with the materially identical section 1 of the Arbitration Act 1975. Brightman LJ in that case indicated that in his view it cannot have been intended by Parliament that the court should on an application such as this attempt to assess the financial resources of a party.

5. I need only set out in barest outline the background to this application. In 1999 Sainsbury, the Claimant and others entered into four agreements the effect of which was to transfer from the vendors to Sainsbury a majority shareholding, 80%, in Edge. Evidently the Claimant was the driving force behind Edge. Each of these agreements contained an arbitration clause in these terms:

   "*The parties agree that any proceedings in relation to this Agreement shall be subject to arbitration:*

   (a) in Paris;

   (b) under the rules of the International Chamber of Commerce;

   (c) in the English language; and

   (d) before three arbitrators."

6. The business of Edge did not flourish under the stewardship of Sainsbury. There may be controversy between the parties as to why that was so, but I am not concerned with that.

7. On 7 February 2001 Sainsbury entered into an agreement with the Claimant and others to acquire the outstanding shareholding in Edge. This agreement was not completed or performed. Again there may be controversy as to why that was so, but for present purposes again it does not matter. It is sufficient to notice that at this stage the Claimant was contemplating the sale to Sainsbury of his outstanding shareholding in Edge. By the 8 April 2001 agreement to which I have already referred, the terms of which were according to the Claimant effectively agreed on 28 February, i.e. three weeks after the earlier abortive transaction, Sainsbury sold all of its shares in Edge, said to be 80.1% of the issued share capital, back to the Claimant and others on whose behalf he

purported to conclude the agreement. I leave out of account disputes which have arisen subsequently as to the Claimant's authority to act on behalf of those others. The 8 April 2001 agreement also varied the terms of the 1999 agreements. It gave full management and control of Edge back to the Claimant. On completion of the agreement and subject to certain formalities Sainsbury had no further role in the management or affairs of Edge.

8. It is this contract into which the Claimant says he entered as a result of being subject to duress. I set out his own account in his Witness Statement made for the purpose of this application:

"9. It is now apparent to me that not long after 7 February 2001 JS [Sainsbury] decided that it did not wish to buy the rest of my shares, and other parties' shares, in Edge SAE. Rather, it wished to dispose of all of its interest in Edge SAE as quickly as it could. What I do know is that on about 27 February 2001 I was summoned to attend a meeting at the offices of Dr Atef Ebid, the Prime Minister of Egypt. At that meeting Dr Ebid told me that he had recently had several meetings with senior personnel from JS. These included Messrs Coull and Mills-Hicks. He explained that during these meetings he had been told that JS was minded to liquidate Edge SAE and to dismiss all of its 5,000 employees. Dr Ebid explained that Presidential instructions had been issued requesting that I purchase the shares, then owned in Edge SAE, by JS. Dr Ebid stated that he wished me to comply with this request. My conversation with Dr Ebid was conducted in Arabic. It is therefore not possible to precisely reproduce the words that he used. However he explained that if I did not buy the JS shares in Edge SAE, I could not regret what would then happen to me. The plain meaning of the statement was that I would not be in a position to regret what would happen to me if I did not comply.

10. The result of my meeting with Dr Ebid was that I believed that if I did not buy the shares in Edge SAE, then owned by JS, I would be imprisoned, or suffer very severe other penalties, or both. I had no choice but to comply with the request made to me. Within about a day I attended a meeting with personnel from JS. I was asked at that meeting if I was going to buy the JS shares in Edge SAE. I said that I was. It was obvious to me from what was said at that meeting that the JS personnel were well aware of my meeting with Dr Ebid and of the purport of what I had been told at that meeting.

11. At my meeting with the JS personnel, on about 28 February 2001, there and then I agreed terms for the purchase of the JS shares in Edge SAE. In due course, on 8 April 2001, the 2001 Share Sale Agreement was entered into.

12. I would emphasise that Dr Ebid's summonses for me to meet with him, and the statements that he made, were part of an overall plan formulated by JS, with which Dr Ebid was co-operating. I refer to this plan in paragraph 21 of my Points of Claim. I also refer to Mr Coull's letter to Dr Ebid of 22 August 2001. A copy of this letter is at pp 101 to 102 in AAN1.

13. Following the 2001 share sale agreement I took back control of the business of Edge SAE. The business had been very poorly handled whilst under the control of JS. I believed however that with very hard work from me and with the input of my own money I could save the business – all, however, to no avail.

14. On 17 June 2002 I left Egypt. I did so because if I stayed I would have been subject to further duress and imprisoned. This was because my hands were completely tied: I could not rationalise Edge SAE, or I would have been subject to the like duress from Dr Ebid who would not countenance mass redundancies. Without rationalising and restructuring, the company continued to make horrendous losses despite large injections of funds by me. I had been required to provide post-dated cheques as security for payments due from Edge SAE to certain suppliers and from me to JS under the buy-back agreement. Without the requisite rationalisation (which, as I have mentioned, was not feasible) the cheques would bounce. In Egypt, the drawer of a dishonoured cheque is liable to imprisonment for a minimum of three and a maximum of six years. I have not returned to Egypt. I am now resident in England.

15. On 26 December 2002 a court in Giza declared me bankrupt in my capacity as chairman of Edge SAE. On 27 February 2003 the same court declared me bankrupt in my personal capacity. Samir Anouar Hassan Farag was appointed my trustee in bankruptcy ('the Trustee'). Edge SAE was formally wound up on 26 December 2003".

9. I should make it clear that the evidence of the Claimant is untested and that Sainsbury strenuously deny that there are any grounds upon which the Claimant can impugn the agreement.

10. The "Governing Law and Proceedings" clause in the 8 April 2001 agreement provides as follows:

"22.1 This Agreement shall be governed by and construed in all respects in accordance with English law.

22.2 The parties agree to submit to the jurisdiction of the English Courts and the Egyptian Courts (at the Vendor's discretion) as regards any claim by the Vendor against the purchaser in respect of the Further Purchaser Payment.

22.3 The parties agree that any proceedings in relation to this Agreement, save for any proceedings in relation to a claim referred to in the preceding sub-clause, shall be subject to arbitration:

(a) in Paris;

(b) under the rules of the International Chamber of Commerce;

(c) in the English language; and

(d) before three arbitrators.

22.4 The Purchaser hereby appoints Norton Rose of Kempson House, Camomile Street, London, EC3A 7AN, England, marked for the personal attention of the senior partner, as its authorised agent for the purpose of accepting service of process in connection with any claim referred to in Clause 22.2 above."

11. In her second Witness Statement dated 5 October 2007 Gillian Harris, a partner in Messrs Denton Wilde Sapte acting on behalf of Sainsbury, explained the circumstances in which this clause came to be included in the agreement. I set out her account:

"8. During negotiations with Mr El Nasharty for the sale of the shares in Edge, JS was represented by Simon Mitchell, a partner at DWS. I have reviewed Mr Mitchell's contemporaneous files, from which I am able to describe how the April 2001 Sale Back Agreement was negotiated.

9. Mr El Nasharty was represented by Norton Rose, the City solicitors. Norton Rose's involvement included advising Mr El Nasharty and his associates on the proposed disposal of his shares in Edge to JS at a time when it had appeared that JS would enter into an agreement to sell 100 percent of the shareholding of Edge to a third party. Those negotiations took place during the course of January and February 2001, and culminated in an agreement dated 7 February 2001, but the third party purchaser pulled out and the deal with Mr El Nasharty was not completed. Shortly afterwards, the parties entered into negotiations for the sale of JS's shares in Edge to Mr El Nasharty and (purportedly) his associates. (As I mentioned in paragraph 20 of my first statement, it was JS's understanding that the Hesham Parties were also party to the April 2001 Sale Back Agreement, but they subsequently disputed the authenticity of a power of attorney by which Mr El Nasharty claimed to have had authority to enter into the April 2001 Sale Back Agreement on their behalf). Norton Rose continued to advise Mr El Nasharty in the negotiation and execution of what was to become the April 2001 Sale Back Agreement.

10. Commercial terms for Mr El Nasharty to purchase JS's shares in Edge were agreed at a meeting on 28 February 2001. Simon Mitchell was instructed to produce a first draft of a sale and purchase agreement, which was transmitted by e-mail to Tim Marsden and Helen Renshaw of Norton Rose on 7 March 2001. Clause 17 of that draft provides that 'the parties agree to submit to the exclusive jurisdiction of the English Courts as regards any claim or matters arising in relation to this Agreement'.

11. Helen Renshaw replied by fax dated 15 March 2001 attaching a copy of the draft sale and purchase agreement which she had marked up with her amendments and comments in manuscript. Clause 17 has Ms Renshaw's manuscript comment next to it as follows:

*'*substitute arbitration clause from February 2001 agreement'*

12. Mr El Nasharty has produced a copy of the 7 February Agreement at page 79 of his Exhibit AAN1, and it does indeed contain (also at Clause 17) an arbitration clause that provides as follows:

'17.1 This Agreement shall be governed by and construed in all respects in accordance with English law.

17.2 The parties agree that any proceedings in relation to this Agreement shall be subject to arbitration:

(a) in Paris;

(b) under the rules of the International Chamber of Commerce;

(c) in the English language; and

(d) before three arbitrators.'

13. On 17 March 2001, Mr Mitchell prepared a second draft incorporating the above arbitration clause at sub-clauses 22.1 and 22.3, but adding a further sub-clause at 22.2, in which the parties 'agree to submit to the jurisdiction of the English Courts and the Egyptian Courts (at the Vendor's discretion) as regards any claim by the Vendor against the Purchaser in respect of the Further Purchase Payment'. Sub-clause 22.4 was also amended to provide for the purchasers to have a service agent. A copy of the second draft was sent to Norton Rose by courier on 17 March 2001.

14. Having reviewed drafts incorporating further changes between 17 March and the date of execution, I confirm that no further amendments were made to the dispute resolution provisions. The April 2001 Sale Back Agreement was executed by the parties with clause 22 in the same form as that described above."

12. Again I should make it clear that the evidence of Ms Harris is equally untested. However the Claimant has subsequently put in a further Witness Statement in answer to the second Witness Statement of Ms Harris. Whilst joining issue vigorously with much of what she has to say, he does not comment on her account of how the arbitration clause came to be included in the agreement. That is perhaps unsurprising since that account is made out on and evidenced by the documents.

13. The original vendors of the Edge shares other than the Claimant and his wife (described by Ms Harris as the "Hesham Parties") were stated by the Claimant in the April 2001 Agreement to have authorised him to enter into that agreement on their behalf. They subsequently challenged this assertion of authority in proceedings brought in this court against Sainsbury. Sainsbury successfully applied for a stay of those proceedings under section 9 of the Arbitration Act 1996 which was granted by Mr Julian Flaux QC, as he then was, sitting as a Deputy Judge of this court.

14. There followed an ICC arbitration commenced by Sainsbury in September 2003 against the Hesham Parties, the Claimant and his wife. The parties agreed that, for the purposes of those proceedings, the seat of the arbitration would be moved from Paris to London. Sainsbury sought damages for breaches of warranties contained within the four agreements made in 1999 when it first acquired shares in Edge. This was of course therefore an arbitration brought pursuant to the arbitration clauses in the four 1999 contracts. However, in response the Claimant and his wife asserted counter-claims against Sainsbury arising out of the April 2001 agreement. These claims were to the effect that the April 2001 agreement had been induced by misrepresentation by Sainsbury as to the value of Edge and/or that it had been entered into in circumstances of "fundamental mistake" as to the solvency of Edge. The Claimant sought rescission of the April 2001 agreement and/or damages for misrepresentation by Sainsbury

and/or a declaration that the agreement was void and an order for restitution of the benefits received by each party.

15. The Claimant did not make any allegation of duress at this stage, nor did he challenge the jurisdiction of the ICC arbitration tribunal on any basis connected with the validity of the arbitration agreement.

16. Shortly before the Claimant put forward these counterclaims Sainsbury ascertained that the Claimant had been adjudicated bankrupt in Egypt in 2003. In fact it now appears that the Claimant was on 26 December 2002 declared by an Egyptian court bankrupt in his capacity as Chairman of Edge. On 27 February 2003 the same court declared him bankrupt in his personal capacity. This led to a hearing on 4 February 2005 before the arbitration tribunal concerned with the Claimant's capacity to be a party to the proceedings. Following the arbitration tribunal's ruling on 1 April 2005 that he had no capacity to bring or defend claims, the Claimant ceased to be a party to the arbitration, but his Trustee in Bankruptcy became such a party in his place.

17. In September 2004, i.e. shortly before the hearing which I have just described, the Claimant asserted for the first time, by way of an amended Statement of Case in the arbitration, that he had entered into the April 2001 agreement under economic duress exerted by or at the instigation of Sainsbury. In December 2005 the Claimant's Trustee in Bankruptcy indicated his intention to participate in the arbitration and to adopt the Claimant's various counterclaims, including those based upon the allegation of duress.

18. The ICC, in accordance with its Rules, set advances on costs in relation both to Sainsbury's claims and, subsequently, the Trustee in Bankruptcy's counterclaims. The advance on costs fixed for the counterclaim, subject to later readjustment, was US$740,000. The Egyptian lawyer acting for the Trustee in Bankruptcy informed all parties that the Trustee in Bankruptcy was not empowered to pay such advance on costs without authorisation of the Bankruptcy Court. He advised "therefore payment shall be made once such Court authorisation is obtained."

19. According to a Statement of Case filed in the arbitration by the Egyptian lawyer acting for the Trustee in Bankruptcy, the Trustee applied to the Egyptian court for sanction in respect of the advance on costs, but the sanction process could not be completed within the timetable set down by the arbitration tribunal.

20. At all events on 22 February 2006 the ICC Secretariat directed the tribunal to treat the counterclaims as withdrawn, without prejudice to their introduction in later proceedings. However the Trustee in Bankruptcy, as was obviously his entitlement, maintained the Claimant's mistake and duress arguments as defences to Sainsbury's claims.

21. According to Sainsbury, as the date for the hearing of their claims in December 2006 approached a number of events occurred which caused them to conclude that there would be neither attendance by, nor representation on behalf of, either the Trustee in Bankruptcy or the Claimant's wife. Accordingly, without the prospect of obtaining a binding ruling, after a full hearing involving evidence, on the various issues including the duress defence, Sainsbury made it clear to all parties that it was not proceeding with its claims in the arbitration. I do not need to decide what is in the upshot the present status of Sainsbury's undetermined claims against the Claimant. As I understand it the arbitration is in any event still on foot because the tribunal is still seised of arguments as to costs. I am told that Messrs Simmons and Simmons continue to represent the Claimant in those proceedings notwithstanding his alleged inability to pay them because they are hopeful of securing in his favour an award of costs against Sainsbury out of which they will be able to recoup themselves.

22. It was in these circumstances that the present proceedings were begun by the Claimant's newly appointed solicitors Messrs Jeffrey Green Russell without prior notice or pre-action correspondence. According to Paragraph 1 of his Points of Claim the Claimant brings the claim with the permission of Division 19, Insolvency, General Jurisdiction, Giza, which is stated to be the appropriate Bankruptcy Court.

23. Although it is asserted in paragraph 30 of the Points of Claim that the Share Sale Agreement was voidable and that the Claimant and his Trustee have avoided it, it is not stated when he or they actually did so. Although it may not for present purposes matter, it is not clear to me that they or either of them have or has in fact at any time purported to avoid the agreement.

24. Unsurprisingly it is common ground that the arbitration agreement, if there is one, is on its true construction apt to embrace the claims brought in this action, notwithstanding the assertion that the 2001 agreement was voidable and has been avoided on the basis of duress. I note that the Points of Claim in this action speak of duress rather than simply economic duress, the expression used in the pleadings in the arbitration. I can understand why the allegation is put on the broader basis. Subject to a point to which I must return, it does not affect the analysis that in principle the claims sought to be advanced in this action are all matters which the parties have agreed should be resolved in arbitration. So much is plain from the decision of the Court of Appeal in ***Fiona Trust and Holding Corporation v Privalov*** [2007] Bus LR 686, affirmed by the House of Lords on 17 October 2007 sub nom. ***Premium Nafta Products Limited v Fili Shipping Company Limited*** [2007] UKHL 40. The principle of separability of the arbitration agreement now has statutory force in English law – see section 7 of the Arbitration Act 1996 which provides:

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

25. The ***Stretford c***ase to which I have already referred makes clear that by agreeing to arbitration parties may waive the requirement implicit in Article 6 that they have access to a court. However as Sir Anthony Clarke MR pointed out at paragraph 52 of the judgment of the Court of Appeal, if there is duress or undue influence or mistake which invalidates the arbitration agreement there will be no waiver of relevant rights under Article 6. The relevant duress must however impeach the validity of the arbitration agreement itself, not just the wider agreement of which it forms part. An attack on the validity of the wider contract may of necessity impeach the arbitration clause too, but it may not, as pointed out by the Court of Appeal in *Harbour Assurance Co (UK) Limited v Kansa General International Insurance Co Limited* [1993] QB 701.

26. As Longmore LJ pointed out in ***Fiona Trust*** at page 697 Steyn J at first instance in the ***Harbour case*** [1992] 1 Lloyds Rep 81 at page 91 had already said, in relation to fraud and duress:

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

Fraud is an imprecise term which takes its colour from the context. Duress however in English law leads usually to voidability rather than initial invalidity, and no doubt the same is true of most cases usually characterised as fraud. The significance of what Hoffmann LJ added in the Court of Appeal on appeal from Steyn J in the ***Harbour*** case at pages 723/4 of the report lay in his point that even in cases of initial invalidity of the wider agreement it does not follow that the issue which invalidates the main contract invalidates the separate arbitration agreement. The question must always be asked whether the issue extends to the validity of the arbitration agreement itself.

27. Mr Warwick submitted that an allegation that the main agreement was entered into under the influence of duress must necessarily impeach the arbitration agreement because it is an allegation that the Claimant's will was coerced, vitiating his apparent consent to the main agreement and everything in it. The case should he submitted be regarded as analogous to one of mistake or non est factum affecting the main agreement where arguably an arbitration agreement could not be relied upon. He suggested that the Court of Appeal in ***Fiona Trust*** had gone further than was justified by anything said in the earlier case *Harbour* in requiring in even such a case something more than simply a challenge to the validity of the contract containing the arbitration clause. Even if this was wrong, *Fiona Trust* was he pointed out concerned with bribery, not duress, as to which different considerations apply and in any event, suggested Mr Warwick, the duress in this case plainly affected the arbitration clause. In this regard he relied upon the following passage in the Claimant's second Witness Statement, at paragraph 18:

"I would not have entered into any part of the April 2001 Agreement (and that includes the arbitration clause) had I not been obligated to do so by the duress the subject matter of my claim."

28. Mr Warwick advanced his thoughtful argument only five days before the House of Lords gave judgment on appeal from the ***Fiona Trust*** decision, all parties being in ignorance that the appeal had been heard, no doubt in consequence of the changed name under which the appeal was heard. His main argument cannot survive their Lordships' speeches. Lord Hoffmann said this:

"17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

19. In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of argument which section 7 was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the

main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement."

Lord Hope said this:

"33. The appellants' case is that, as there was no real consent to the charter parties because they were induced by bribery, there was no real consent to the arbitration clauses. They submit that a line does not have to be drawn between matter which might impeach the arbitration clause and those which affect the main contract. What is needed is an analysis of whether the matters that affect the main contract are also matters which affect the validity of the arbitration clause. As the respondents point out, this is a causation argument. The appellants say that no substantive distinction can be drawn between various situations where the complaint is made that there was no real consent to the transaction. It would be contrary to the policy of the law, which is to deter bribery, that acts of the person who is alleged to have been bribed should deprive the innocent party of access to a court for determination of the issue whether the contract was induced by bribery.

34. But, as Longmore LJ said in paragraph 21 of the Court of Appeal's judgment, this case is different from a dispute as to whether there was ever a contract at all. As everyone knows, an arbitral award possesses no binding force except that which is derived from the joint mandate of the contracting parties. Everything depends on their contract, and if there was no contract to go to arbitration at all an arbitrator's award can have no validity. So, where the arbitration agreement is set out in the same document as the main contract, the issue whether there was an agreement at all may indeed affect all parts of it. Issues as to whether the entire agreement was procured by impersonation or by forgery, for example, are unlikely to be severable from the arbitration clause.

35. That is not this case, however. The appellants' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect."

29. Specifically as to the position on this spectrum at which allegations of duress will usually fall, I would draw attention, as did Longmore LJ in the ***Fiona Trust*** case at page 699, to what is said by the learned editors of Dicey & Morris, *Conflict of Laws*, 14th Edition [2006] at paragraph 12-099:

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

The decision of the Supreme Court of the United States to which reference is there made is ***Scherk v Alberto-Culver*** Co. 417 U.S. 506 (1974). That was a case where a contract between a German seller and a US buyer for the purchase of various business and associated intellectual property was said to have been induced by fraudulent misrepresentation concerning the trademark rights transferred. The sales contract, which was negotiated in the United States, England and Germany, signed in Austria and closed in Switzerland, contained an ICC arbitration clause providing for arbitration in Paris. At page 519, footnote 14 the majority opinion of the court noted:

*"In **The Bremen** we noted that forum-selection clauses 'should be given full effect' when 'a freely negotiated private international agreement [is] unaffected by fraud…' … This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion."*

30. Accordingly what is needed in the present case if the Claimant is successfully to impugn the enforceability of the arbitration clause is reliance on some facts *"specific to the arbitration agreement"* – see per Lord Hope. In my judgment the allegations put forward by the Claimant in this case are simply, again in the words of Lord Hope, "parasitical to a challenge to the validity of the main contract" and thus "*will not do*". Like the argument of Mr Butcher QC in ***Fiona Trust***, Mr Warwick's argument is, in the words of Lord Hoffmann, "exactly the kind of argument which section 7 was intended to prevent".

31. I can however on the facts of this case go much further. Indeed the facts of this case in my view exemplify the "*excellent reasons of policy*" which support the approach taken, as appears from the speech of Lord Hope, not simply here and in the United States but also internationally. I have already set out the circumstances in which the arbitration clause came to be included in the agreement. Sainsbury had proposed that disputes should be resolved in the English courts which should have exclusive jurisdiction. The Claimant, advised by a leading firm of solicitors in the city of London, Messrs Norton Rose, countered with a requirement that disputes should be resolved

by ICC arbitration in Paris. Sainsbury acceded to this request, subject only to the carve-out in respect of any claim by the vendor against the purchaser in respect of the Further Purchase Payment. In such circumstances the suggestion that the Claimant's agreement to the arbitration provision was procured as a result of duress or coercion is simply hopeless. The facts demonstrate that whilst, arguably, it may only have been under duress that he was agreeing to purchase shares from Sainsbury, that duress did not prevent him exercising his own free will in relation to dispute resolution machinery and, indeed, prevailing in his choice.

32. It was Sainsbury's solicitors Messrs Denton Wilde Sapte who drew to my attention, and to the attention of the Claimant's solicitors Messrs Jeffrey Green Russell, the decision of the House of Lords which was published the week following argument before me. Messrs Denton Wilde Sapte offered to make further submissions if necessary on any points arising out of their Lordships' speeches. I did not invite further submissions from either side because Mr Warwick had already made such points as could be made in a valiant attempt to distinguish the present case from the facts before the Court of Appeal (and the House of Lords) in the *Fiona Trust* case and to persuade me not to regard what was said in the Court of Appeal as relevant and determinative. I would have rejected those submissions in any event but their Lordships' speeches meant that there was nothing further which Mr Warwick could possibly have advanced.

33. I would add that in my view the Claimant has in any event by his conduct waived his right to contend that the arbitration agreement is or was voidable at his election on the ground of duress. Sainsbury has no need to rely on this ground but in my view it is made out. Although the ICC arbitration was begun under the 1999 agreements the Claimant introduced counterclaims over which the arbitrators only had jurisdiction on the footing that the 2001 agreement gave them such competence. Mr Warwick suggested that because the arbitrators subsequently determined that the Claimant, as a bankrupt, had no capacity to pursue a claim before them, so therefore nothing done by him could constitute a waiver. I disagree. The fact that the Claimant's invocation of the jurisdiction of the arbitrators under the 2001 agreement was ineffective seems to me nothing to the point. It was nonetheless an unequivocal assertion of the existence of an enforceable arbitration agreement relating to the 2001 agreement. I also reject Mr Warwick's argument that there could be no waiver because there was no final decision by the tribunal on the merits of the Claimant's counterclaims. Again, this seems to me beside the point. There may be more merit in Mr Warwick's point that nothing done thereafter by his Trustee in Bankruptcy could amount to a waiver of rights personal to the Claimant under Article 6. I say nothing about that point since in my view it does not arise. The waiver is made out on the basis of the Claimant's own prior conduct.

34. My conclusion that the Claimant freely and voluntarily entered into the arbitration agreement is in my judgment conclusive of this application, as Miss Rose QC who addressed me on the human rights aspects submitted it should be. A party who agrees to arbitrate is unlikely to have access to any form of public funding to assist him in defraying the cost of arbitration. All arbitrators are at liberty to require as a condition of their acting some security for the payment of their reasonable fees and expenses. It is a matter of contract. The ICC regime as to the costs of the arbitration is contained in its published Rules particularly in Articles 30 and 31 and Appendix III. There are relevant scales both for arbitrators' fees and administrative expenses. There is provision for readjustment at any time during the arbitration. In my view it is irrelevant to the question whether the Claimant has waived his Article 6 rights that, if it be proved, he cannot afford to pursue an arbitration. Mr Warwick's reliance upon the decision of Holman J in *A. v A.* [2001] 1 WLR 605 carried him no further forward. That case referred to some standard Strasbourg learning on "equality of arms" in the context of matrimonial litigation where a wife had hitherto been always economically dependent upon her husband. As Miss Rose submitted, it tells one nothing about the circumstances in which rights derived from Article 6 may be waived. Lord Hoffmann in *Premium Nafta* gave short shrift to an argument based on Article 6 although I doubt if arguments concerning equality of arms were advanced in that case. However if it is relevant and necessary to examine the question I would go further and hold that the costs rules of the ICC pursue the legitimate aim of ensuring that arbitrators are properly remunerated and that the administrative expenses of the ICC are paid. The Rules are proportionate to this aim. Mr Warwick pointed out that the advance required on account of the counterclaim on the last occasion was "a big figure" and that the ICC Rules do not indicate that the financial resources of the parties are likely to be taken into account in determining the advances required. Beyond making these points however I did not understand Mr Warwick seriously to controvert the proposition that the ICC Rules pursue a legitimate aim in a proportionate manner. The regime enshrined in the ICC costs rules is in my judgment not incompatible with Article 6.

35. I have already mentioned that in relation to the ongoing ICC arbitration the parties agreed to vary the provision that the seat of the arbitration be Paris and the proceedings have instead been conducted in London. In the event that the Claimant pursues his claim against Sainsbury I do not know whether a fresh arbitration would have to be commenced and the point was not explored. However I should record that Sainsbury through their counsel indicated their willingness to agree that any further arbitration proceedings instigated by the Claimant arising out of the 2001 agreement should likewise have their seat in London. Either way therefore the arbitration of the Claimant's claims either will be or could at the Claimant's election be subject to the procedural and other safeguards contained in section 33 of the Arbitration Act 1996, although I should stress that it is not shown or sought to be shown that arbitration in Paris would lack any features which compliance with Article 6 would require. The discussion of the Strasbourg jurisprudence in the *Stretford* case would seem to indicate that any such argument would be doomed to failure.

36. I turn finally simply to record my findings as to the Claimant's alleged inability to fund an arbitration, conscious that this is a task which it was not envisaged by Parliament ought to be undertaken by the Court hearing an application of this sort. The Claimant's Points of Claim, supported by his statement of truth, assert at paragraph 31:

"In order to enable [the Claimant] to obtain the discharge of his bankruptcy, [his wife] is arranging to lend [the Claimant] sufficient monies to repay his creditors (the sum that is needed is up to US$40,000,000)."

37. Evidently therefore the Claimant's wife has substantial assets which are in excess of that required to repay the Claimant's creditors, whatever that sum may be. In his second Witness Statement made on 10 October the Claimant said this at paragraph 19:

"The Defendants in their skeleton argument allege an inconsistency between my inability to raise US$740,000 for the arbitral fee when my wife is in a position to lend me US$40,000,000 to repay my creditors. In fact, there is no inconsistency. When my family and I fled Egypt, the totality of our assets were frozen by the prosecution, that is to say, not merely my personal assets, but those of my wife and three teenage children. There is a procedure in Egypt whereby my wife is able to apply to the Prosecutor General to remove the freeze on some of her assets to enable her to pay my creditors. I would then be in the position of owing that money back to my wife. There is no equivalent procedure that would enable me to unfreeze her assets for the purpose of speculating on litigation or funding litigation."

38. I find this evidence wholly unsatisfactory. I am sure that the language is chosen with care. Notably, there is no assertion that the procedures would not permit the Claimant's wife, as opposed to the Claimant himself, to apply to remove the restriction on her assets so as to enable her to lend her husband money to fund the litigation. I am also puzzled by the circumstances of the Claimant's bankruptcy in this jurisdiction. He was adjudged bankrupt here on 18 July 2006 on the petition of his current solicitors Messrs Jeffrey Green Russell for non-payment of professional fees in the sum of £8,695. According to the Claimant friends provided funds sufficient to pay Jeffrey Green Russell's bill and the Official Receiver's costs and the bankruptcy order was annulled by further order of 18 September 2006. However a letter from the Insolvency Service dated 11 September 2006 addressed to Messrs Jeffrey Green Russell refers to *"[the] bankrupt's application for an order annulling the bankruptcy order on the grounds that the order ought not to have been made, to be heard on Tuesday 12 September 2006*". This is puzzling. Furthermore the Claimant says that insofar as Messrs Simmons and Simmons have been paid they have been paid by friends in Egypt who consider that he has been treated badly. They will apparently not put up funds sufficient to fund an advance on costs in the arbitration which the Claimant anticipates, based on past experience, may be of the order of US$740,000. Finally I should note that there is no evidence from the Claimant's Egyptian Trustee in Bankruptcy. The evidence as to the position in that bankruptcy, such as it is, is simply to the effect that in 2005/2006 the relevant sanction procedures empowering the Trustee to pay the advance on costs to which I have already referred could not be completed within the timetable then established by the ICC for payment.

39. I accept that the evidence shows that the Claimant has been declared bankrupt in Egypt. There is controversy, which I cannot hope to resolve on an application such as this, and in relation to which in any event I have very little evidence, as to why and in what circumstances his personal bankruptcy came about. The Claimant has also been declared bankrupt in this jurisdiction although apparently since discharged. The evidence also shows that the Claimant ran up rent arrears of about £29,000 in respect of a flat in Mayfair in consequence of which the landlord obtained an order for possession. The Claimant now apparently lives in a rented flat near Marble Arch. I refused Mr Warwick's application for permission to adduce further evidence from the Claimant clarifying what was said by him in paragraph 19 of his second Witness Statement, which I have set out above. The Claimant must have known that, if he wished to rely on his impecuniosity, he would have to make full and frank disclosure as to his means – cf ***Yorke (M.V.) Motors v Edwards*** [1982] 1 WLR 444. Even the evidence as to how these proceedings are themselves being funded, such as it is, is undocumented, enigmatic and thoroughly unsatisfactory. It is sufficient that I merely record that the evidence as a whole falls far short of satisfying me that the Claimant does not have access to resources which would enable him to pursue his claims against Sainsbury in his chosen forum, arbitration.

40. There must be a stay of these proceedings as required by Section 9 of the Arbitration Act 1996.

Mark Warwick (instructed by Messrs Jeffrey Green Russell) for the Claimant/Respondent
Ian Mill QC and Dinah Rose QC (instructed by Messrs Denton Wilde Sapte) for the Defendant/Applicant