JUDGMENT : The Honourable Mr Justice Henderson : Chancery. 11th May 2007

Introduction and Background

1. In this action, which was started by a claim form issued on 28 December 2006, the claimant Mabey and Johnson Limited ("Mabey") seeks damages for fraud and conspiracy against four defendants. Mabey is a company incorporated in England and Wales, which among other things manufactures and exports pre-fabricated steel bridges. The first defendant ("Mr Danos") and the second defendant ("Mr Joyce") are former employees of Mabey. The third defendant, Deryck A Gibson Limited ("DAG"), is a company incorporated and resident in Jamaica. The fourth defendant ("Mr Gibson"), after whom DAG is named, is also resident in Jamaica.

2. On 23 August 2002 Mabey signed a contract for the supply of modular pre-fabricated bridges and associated technical services in Jamaica, known as the Priority Rural Bridge Programme ("the Jamaica Project"). The Project had a contract value of £15.3 million for the supply of equipment and an initial amount of £5 million for the supply of services which was later increased to £7.5 million. DAG acted as Mabey's agent in connection with the Jamaica Project. From 28 November 2003 the agency relationship was governed (at least in part) by an undated written Representative Agreement ("the Representative Agreement") which Mr Gibson signed on behalf of DAG.

3. Under the Representative Agreement it was agreed, among other things, that DAG, acting *"in accordance with good faith and fair dealing",* would use its best endeavours to promote the sale of Mabey's products in Jamaica, and would further Mabey's interests "*with the diligence of a responsible business man*". According to Mr Gibson, the agreement extended to the provision of extensive services by DAG in connection with the Jamaica Project, as well as the sale of Mabey's products. DAG was to be remunerated by commission, that is to say a percentage of the contract value of the Jamaica Project. The level of commission had been the subject of detailed consideration by Mabey, and in particular by its Export Committee; it was agreed at a level of 8.5%. Neither the contract price nor the level of commission were referred to in the Representative Agreement itself, which simply provided that the negotiated amount would be confirmed in writing by both parties.

4. The Representative Agreement was governed by English law. Clause 18.2 was an arbitration clause, in the following terms: *"All disputes arising out of or in connection with this agency contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."*

5. The alleged fraud, full particulars of which are pleaded in the Particulars of Claim dated 11 January 2007, consisted of a conspiracy to inflate the level of commission and divide up the surplus between DAG and/or Mr Gibson, Mr Danos and Mr Joyce. Particular reliance is placed on a document obtained by Mabey from Mr Joyce's laptop computer ("*the Payments Schedule*") which appears to show in detail how an "increase" of £735,000 over *"commission*" of £565,000 was agreed to be split up in specified percentages between "DAG" (which could refer either to DAG or Mr Gibson), Mr Danos and Mr Joyce, and how the first nine payments received from Mabey up to March 2006 had been divided up pursuant to that agreement. The total shown on the Payments Schedule as due to Mr Danos and Mr Joyce down to March 2006 was £273,479.88. This figure ties in with an *"invoice"* ("the OMS Invoice"), also obtained from Mr Joyce's computer, which purports to be issued by a company called OMS Limited with an address in Miami and to charge DAG for "services rendered to date" on the Jamaica Project in the same amount. The OMS Invoice appears to have been created by Mr Joyce on his computer on 28 March 2006. It says that the fees are due "*in accordance with our agreement letter dated 24 July 2004"*. A letter apparently dated 24 July 2002 (not 2004) has been recovered from Mr Joyce's computer which purports to be addressed to OMS Limited in Miami and to have been sent by Mr Gibson as chairman and chief executive officer of DAG. It confirms a "*verbal understanding"* that *"you will provide services to assist us technically, and also in negotiating finance"*. The letter says that the Project is estimated to be £23 million, and "*it is understood that your fee will be £417,500",* to be paid out of the flow of commissions due to DAG. £417,500 is the total amount shown as due to Mr Danos and Mr Joyce in the Payments Schedule as their share of the *"increase"* of £735,000 (consisting of £317,500 due to Mr Danos and £100,000 to Mr Joyce).

6. I should add that, according to Mabey, the monitoring and *"imaging"* of Mr Joyce's computer, which revealed the documents referred to above, was authorised under Mabey's policies governing the use of computers by employees.

7. In the light of this (and other) strong *prima facie* evidence of fraud, it is not surprising that, before starting the action, Mabey applied to the High Court for search and freezing orders, and orders authorising service of process out of the jurisdiction on both DAG and Mr Gibson. These applications were heard by His Honour Judge Mackie QC, sitting as a Judge of the High Court, on 23 November 2006. He granted freezing orders against both Mr Danos and Mr Joyce, and a search order against Mr Danos. He also made orders for service of proceedings out of the jurisdiction on both DAG and Mr Gibson.

8. The freezing and search orders were implemented on 28 and 29 December 2006. During the course of execution of the search order, and subsequently in correspondence, Mr Danos has sought to invoke the privilege against self-incrimination as a basis for refusing to disclose any documents to Mabey. The present position is that the documents seized as a result of the search order are held by the Supervising Solicitor, pending disclosure in the action and resolution of the self-incrimination issue. The freezing order against Mr Danos was discharged after he provided security in the form of a mortgage over his property in England. The freezing order against Mr Joyce has been continued by consent until trial or further order. The Particulars of Claim were served on Mr Danos and

Mr Joyce on 12 January 2007. Following applications for extensions of time, Defences were due to be served by both of them on 24 April 2007.

9. The claim form was served out of the jurisdiction on DAG and Mr Gibson on 12 January 2007, and the Particulars of Claim on 18 January 2007. Following two agreed extensions of time for making a challenge to the jurisdiction of the Court, on 15 March 2007 both DAG and Mr Gibson applied for orders staying or dismissing the action against them on various grounds. Those are the applications that came before me for hearing on 20 April 2007, when I heard submissions from Mr Matthew Hardwick of counsel on behalf of DAG and Mr Gibson, and from Mr Adam Johnson of Herbert Smith for Mabey. I am grateful to both of them for their clear, concise and helpful submissions.

The Applications and the Issues

10. In their application notice DAG and Mr Gibson seek:

(a) an order staying the action against DAG; and

(b) an order staying the action against Mr Gibson; or alternatively

(c) a declaration that the Court has no jurisdiction to try the claim against Mr Gibson, and an order setting aside the grant of permission to serve him out of the jurisdiction and the subsequent service of the claim form upon him.

11. The application notice makes it clear that the stay sought by DAG is based on the arbitration clause in the Representative Agreement and section 9 of the Arbitration Act 1996, which DAG wishes to invoke. The Court is asked to grant the stay sought by Mr Gibson under its inherent jurisdiction to stay proceedings, on the basis that it would be unjust to allow a claim against him to proceed while the action is stayed against DAG because of a valid arbitration clause. The alternative relief under sub-paragraph (c) above is sought on the basis that the proper forum for the dispute is Jamaica rather than England and Wales.

12. Section 9(1) of the Arbitration Act 1996 provides that a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration *"may … apply to the court in which proceedings have been brought to stay the proceedings so far as concern that matter"*. Section 9(4) then provides that: *"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."*

13. It follows from the above provisions that, since DAG has chosen to invoke section 9, and since there is no suggestion that the arbitration clause is void, inoperative or incapable of performance, the Court is bound to grant a stay pursuant to section 9(4) in respect of any matter within the scope of the arbitration clause. The wording of the arbitration clause ("*all disputes arising out of or in connection with this agency contract*") is very wide, and should be liberally construed. As Longmore LJ has recently said, giving the judgment of the Court of Appeal in ***Fiona Trust and Holdings Corporation v Privalov and others*** [2007] EWCA Civ 20 at paragraph 18: *"As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all"*, see ***Mustill and Boyd, Commercial Arbitration,*** second edition, page 120 … "

14. By a letter dated 20 March 2007, Mabey's solicitors (Herbert Smith) raised various arguments about the desirability of staying the action against DAG, but said that if DAG proceeded with its challenge in reliance on the arbitration clause "we would agree to stay the proceedings against DAG". Accordingly, it is accepted that the action should be stayed against DAG. However, the parties have been unable to agree on the appropriate order for costs, so that remains a live issue. I propose to deal with it at the end of this judgment, after I have dealt with the applications made by Mr Gibson in his personal capacity as fourth defendant.

15. With regard to the applications made by Mr Gibson, it seems to me that logically I should deal first with his alternative application to set aside the grant of permission to serve him out of the jurisdiction, because if that application succeeds he will no longer be a party to the action and the question of a stay will not arise. It is only if Mr Gibson remains a party to the action that the further question arises whether the Court should stay the action against him. I should add that although the stay contemplated in the application notice appears to be a permanent one, Mr Hardwick realistically accepted in his oral submissions that this would not be appropriate, and made it clear that the stay Mr Gibson is asking for is a stay until the arbitration has been completed.

Service out of the jurisdiction: is England or Jamaica the appropriate forum?

16. Mr Hardwick accepts on behalf of Mr Gibson that all of the preconditions for an order permitting service on him out of the jurisdiction are satisfied, apart from the question whether England is the appropriate forum for resolution of the dispute between him and Mabey. Thus it is accepted that there is a good arguable case that the claims made by Mabey against Mr Gibson fall within one or more of the sub-paragraphs of CPR 6.20, and that there is a serious issue to be tried in respect of each cause of action for which permission to serve out of the jurisdiction is sought: see generally ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islam Iran*** [1994] 1AC 438, ***Spiliada Maritime Corp v Consulex Ltd, the Spiliada*** [1987] AC 460 and the notes to the ***White Book*** at paragraph 6.21.15. However, Mr Gibson relies on CPR 6.21(2A), which provides that: *"The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."*

For his part, Mr Johnson accepts that the burden is on Mabey to satisfy the court that England is clearly the appropriate forum for the trial of the action.

17. Mabey's claims against Mr Gibson are set out in paragraphs 95 to 100 of the Particulars of Claim. They are in brief:
    (a) that he dishonestly assisted in the other three defendants' breaches of fiduciary duty by
        (i) making or permitting to be made false representations to Mabey (that the whole of any commission agreed would be payable to DAG, and that the proposed level of 8.5% was the amount required to compensate DAG for its services as agent), and
        (ii) procuring DAG to agree to pay sums to Mr Danos and Mr Joyce pursuant to the agreement to divide up the £735,000 (defined as "the Jamaica Kickback Agreement"), thereby making himself liable to account to Mabey as a constructive trustee for all sums received by, and distributed between, the parties to the Jamaica Kickback Agreement;
    (b) that having participated in the formation and performance of the Jamaica Kickback Agreement he wrongfully procured or induced breaches of contract by Mr Danos and Mr Joyce; and
    (c) that he was a party to a conspiracy with the other defendants to defraud Mabey into agreeing inflated commission terms.

18. It is further alleged in paragraph 7 of the Particulars of Claim that DAG is owned or controlled by Mr Gibson, so Mabey's claims against DAG in paragraphs 86 to 94 are also likely to involve Mr Gibson in his capacities as a director and/or shareholder of DAG. It would not, however, be a valid defence to the claim against him in his personal capacity to say that any frauds committed by him were committed on behalf of the company: see ***Standard Chartered Bank v Pakistan Shipping Corporation*** [2002] UKHL 43, [2003] 1AC 959, especially at paragraphs 20 to 23 per Lord Hoffmann.

19. In the evidence filed in support of his application (which consists of only one short witness statement, with a single exhibit) Mr Gibson says that the natural forum for determination of his dispute with Mabey is Jamaica, and not England, for the following main reasons:
    (a) the dispute arises out of the Jamaica Project, which was carried out in Jamaica;
    (b) the Representative Agreement (under which the commission was payable) was signed by him in Jamaica on behalf of DAG, a Jamaican company;
    (c) the services which DAG provided pursuant to the Representative Agreement were all provided in Jamaica;
    (d) the only meetings concerning the level of commission in which he was involved took place in Jamaica, including in particular an interview with Mr David Few representing Mabey's Export Committee in November 2003; and
    (e) all the evidence which he obtained on behalf of DAG in relation to the level of commission was acquired from individuals and entities in Jamaica.

20. In his oral submissions, Mr Hardwick took me through the key documents exhibited to Mabey's evidence which relate to the fixing of the level of commission and the deliberations of the Export Committee. He pointed out that Mr Few was required to make a report on the level of commission in 2003, and that Mr Gibson provided him with a good deal of relevant information, including quotations from local contractors. He also pointed out that none of the allegedly incriminating emails relating to the conspiracy and the division of the £735,000 were sent by Mr Gibson himself, and those sent from his email address were signed by Trudy Vaz, his assistant, who was also resident in Jamaica. He suggested that, if there was a conspiracy at all, it might have been one which involved Ms Vaz, but not Mr Gibson himself.

21. I can say at once that I attach no weight to this last suggestion. Mr Gibson's evidence is completely silent about the merits of the claim against him and DAG, or what his defence to it will be (in whatever forum it is prosecuted). In those circumstances an attempt to shift responsibility on to his assistant, even on a hypothetical basis, seems to me singularly unattractive. I will therefore approach the question of forum on the footing that there is strong *prima facie* evidence of fraud against Mr Gibson personally, as well as against the other three defendants.

22. For Mabey, Mr Johnson submits that England is clearly the forum with which the action has the most natural connection. In support of this submission he makes the following main points:
    (a) Mabey is an English company, with its head office in England. The alleged fraud did not relate to the implementation of Project Jamaica on the ground, or to any defects in the bridges supplied by Mabey or their installation, but rather to a deception perpetrated on Mabey and its Export Committee in England, which led Mabey to pay (in England) more than it should have done by way of commission.
    (b) The Representative Agreement is governed by English law.
    (c) So far as is known at this early stage, all the documents and all of the witnesses (including Mr Few) are in England. Of the parties, Mr Gibson is resident in Jamaica, but Mr Joyce is thought to be both domiciled and resident in England, and Mr Danos at least has property in England, although he spends most of his time in Panama.
    (d) There is no credible suggestion that the claim against Mr Danos and Mr Joyce should be stayed for any reason, and it is desirable in principle that Mabey's claims against the three human alleged conspirators should be tried together in the same forum. A degree of fragmentation is unavoidable, given DAG's decision to invoke the arbitration clause, but it is overwhelmingly in the interests of justice that the other three defendants should be tried together; and for that purpose it is far more reasonable that Mr Gibson should have to defend in England than that Mr Danos and Mr Joyce should have to defend in Jamaica. Indeed, Mabey has no intention of suing Mr Danos and Mr Joyce in Jamaica, so in practice if Mr Gibson cannot be

joined in the present action he will be separately sued in Jamaica, thereby giving rise to three sets of proceedings (including the arbitration) in respect of a single alleged fraud.

(e) It cannot be said that the arbitration is likely to take place in Jamaica, so it is not even the case that the claims against DAG and Mr Gibson would be resolved in the same jurisdiction if Mr Gibson cannot be sued in England. Article 14(1) of the ICC Rules of Arbitration provides that the place of arbitration shall be fixed by the (arbitral) court, unless agreed upon by the parties. In the present case the parties are unlikely to agree on a venue, and certainly will not agree on Jamaica. In those circumstances the court will usually try to find a neutral venue, and will not situate the arbitration in either of the parties' country of origin: see ***Derains and Schwartz, A guide to the ICC Rules of Arbitration,*** second edition, p.214. Mr Johnson suggested that likely venues might be Paris, Zurich or Geneva.

23. In my judgment Mabey's submissions are much the stronger, and the balance comes down firmly in favour of England as the appropriate forum for determination of Mabey's claims against Mr Gibson. Almost the only factor of any significance connecting the case with Jamaica is Mr Gibson's residence there (and, if it adds anything, the residence of DAG in Jamaica). In the absence of any evidence about his intended defence, I can attach little, if any, weight to the submission that the costs of local services in Jamaica will be an important feature of the trial; and as Mr Johnson pointed out, the information supplied by Mr Gibson to Mr Few in 2003 is anyway likely to be of only limited relevance, because the level of commission had already been fixed in principle at 8.5% in August 2002, and Mr Few's mission was merely to gather information so that the Export Committee could revisit the question and satisfy itself that the services element in the commission could be justified. The original and crucial deception of the Export Committee, if deception there was, must have taken place in or before August 2002, although it may have been repeated in 2003.

24. In short, I take the view that this is a case which at heart involves the alleged deception of an English company in England, in the context of a contract governed by English law, and where all (or at least a great majority) of the witnesses and documents are likely to be in England. The case will in any event proceed against Mr Danos and Mr Joyce in this country, and it is in the interests of justice that Mr Gibson should be tried with them. I accept that this will cause him some personal inconvenience. He is 77 years old, and suffers from diabetes. He says that he has no family, business or assets in the UK, and that he would find it "onerous in the extreme" to be a defendant to litigation here. However, these personal factors in my judgment count for little in what must be an essentially objective appraisal of the forum with which the action has the most real and substantial connection.

25. For these reasons I refuse Mr Gibson's application to set aside the order made by His Honour Judge Mackie giving permission for the claim form to be served on him out of the jurisdiction. The action must be stayed against DAG, but it will proceed in England against the other three defendants, subject to the question whether the action should be stayed against Mr Gibson pending the outcome of the arbitration to which I now turn.

Should the action be stayed against Mr Gibson pending the outcome of the arbitration?

26. The application for a stay pending the outcome of the arbitration is made under the inherent jurisdiction of the court to stay or strike out proceedings, whenever it is necessary to do so to prevent injustice. Alternatively, the court is asked to make the order in exercise of its case management powers. See generally ***Dicey, Morris and Collins on the Conflict of Laws,*** fourteenth edition, Rule 31(1) and paragraph 12-006. For present purposes, nothing turns on the precise nature or basis of the jurisdiction that Mr Gibson seeks to invoke. The existence of the jurisdiction is not disputed by Mabey. The question is whether this is a proper case for its exercise.

27. In support of his submissions on this part of the case Mr Hardwick referred me to a recent book by David Joseph QC, ***Jurisdiction and Arbitration Agreements and their Enforcement,*** first edition (2005), at paragraphs 11.43 and following, where the learned author discusses the problems that arise where court and arbitral claims proceed in parallel. In paragraph 11.44 Mr Joseph points out that the court has a wide discretion, in exercise of its case management powers, to manage the order in which different actions will be heard, to order the trial of preliminary issues, to list one action before another, or to order a stay of certain proceedings pending the outcome of a lead action. He then continues: *"In the context of arbitration and court proceedings the matter is more complex. First, the court is not able to make orders for the case management of the arbitration. Secondly, the court is not able to order the joinder of proceedings or to order that proceedings be heard at the same time. Nonetheless, in the interests of justice, the courts have indicated a willingness (where appropriate in the interests of justice) to stay its proceedings or give case management orders in order to permit the most orderly resolution of the matters in arbitration and before the courts."*

28. In paragraph 11.46 the author deals specifically with the position where court proceedings are brought against several parties, only one of whom is entitled to obtain a stay in favour of arbitration. That is of course the position in the present case. He says, and I would respectfully agree, that: *"As regards the claims in court not covered by the arbitration agreement there is clearly a power to order a stay. The discretion is not, however, likely to be exercised lightly."*

He then gives some examples, and refers to some of the matters that the court could be expected to take into account (such as how long the arbitration is likely to take, and any undue hardship likely to be caused by the delay), before going on to discuss the decision of the Court of Appeal in ***Reichhold Norway ASA v Goldman Sachs International*** [2000] 1WLR 174, where the court faced a variant of the same problem.

29. Since both sides relied on ***Reichhold*** as supporting their cases, I need to examine the decision with some care. The basic facts were as follows. A Norwegian company, Jotun AS, engaged Goldman Sachs to act for it in relation to the proposed sale of a subsidiary. Reichhold expressed interest in purchasing the subsidiary, and sought detailed financial information about its business. A confidentiality agreement between Jotun and Reichhold contained a term whereby Reichhold accepted that neither Jotun nor any of its agents, representatives or advisors had made any representations as to the accuracy or completeness of the evaluation material, and that none of them should have any liability to Reichhold resulting from the use of the evaluation material. In due course the negotiations led to exchange of a draft sale agreement, containing warranties of a usual nature. Shortly afterwards, Goldman Sachs sent Reichhold a memorandum saying *"Management does not currently foresee any reason to adjust the budget for 1997",* although on the previous day the subsidiary had apparently reported a significant decrease in its profitability for 1997. A month later an agreement was entered into for sale of the shares, which contained warranties much as in the draft agreement and provided that the claimants' remedies for any breach were limited to damages and were to be resolved by arbitration in Norway. The contract itself was governed by Norwegian law. The claimants gave notice to Jotun of a possible claim under the agreement, but then began an action in England claiming damages for negligent misrepresentation against Goldman Sachs. Following the issue by Goldman Sachs of a summons to stay the action, the claimants began arbitration proceedings in Norway. The judge (Moore-Bick J) stayed the claimants' action pending determination of the arbitration in Norway, and the Court of Appeal dismissed the claimants' appeal.

30. The judgment of the Court of Appeal was delivered by Lord Bingham of Cornhill CJ, with whom Otton and Robert Walker LJJ agreed. Having reviewed the facts and the relevant legal principles, Lord Bingham upheld the stay as a proper exercise by the judge of his discretion to control the course of proceedings. In so holding, he rejected the submission for ***Reichhold*** that the judge's order violated a fundamental principle that a claimant making a bona fide claim, untainted with abuse, oppression or any vexatious quality, may sue in the English court any defendant over which the court has jurisdiction. He agreed with Counsel for Goldman Sachs that this was not an absolute principle, and could yield in a suitable case to the modern and developing principles of case management. He also agreed that in a suitable case the order would not involve any infringement of Article 6 of the European Convention on Human Rights. However, he clearly considered that the grant of such a stay *"would be a rarity"* (see 186B), and at 186C he said this: *"I for my part recognise fully the risks to which Mr Carr draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances."*

31. Mr Hardwick submits that the court should follow the same course in this case as it did in ***Reichhold.*** He says that Mabey's allegations against DAG will now have to be dealt with in the arbitration, and Mr Gibson as a director of DAG will clearly be involved in the arbitration; yet if the claim against him is not stayed, he will remain a defendant to the parallel proceedings in England. That would be unfair, says Mr Hardwick, because DAG was a party to the Representative Agreement, and if Mabey's claim against DAG, its contractual counterparty, is stayed, Mabey's claim against Mr Gibson should not proceed. Furthermore, the only reason why Mr Gibson cannot himself rely on the arbitration clause is that he signed the Representative Agreement on behalf of DAG and not in his personal capacity.

32. Mr Hardwick also takes two further points. First, he says that until late 2006 Mabey had evinced no intention of bringing a claim against either DAG or Mr Gibson personally, and the focus of Mabey's investigations had been on Mr Danos and Mr Joyce alone. Thus in March 2006 Mabey had applied without notice for a search order against Mr Danos, and at that stage the proposed defendants were only Mr Danos and Mr Joyce. It was only in November 2006 that the position changed and Mabey sought to bring DAG and Mr Gibson into the proposed proceedings. Accordingly, says Mr Hardwick, Mabey cannot plausibly claim that Mr Gibson is a necessary and proper party to the proceedings, because until recently they did not intend to sue him at all.

33. Secondly, Mr Gibson seeks to deal with the point that grant of a stay would lead to fragmentation of the proceedings by offering to submit to the claims against himself being determined in the arbitration. This offer was made in a letter dated 19 April 2007 (the eve of the hearing before me) from Mr Gibson's solicitors to Herbert Smith. The offer was declined by Herbert Smith, who replied on the same day and said: *"Whilst this would reduce the fragmentation of the proceedings to which your client's decision not to waive the effect of the arbitration clause has already given rise, we remain of the view that the preferable course, inter alia from a case management perspective, is for the proceedings against your client to continue in England. The effect of this would be that the defences of all the human actors in the alleged conspiracy would be considered together in the same proceedings, and that the documents disclosed and witness evidence called by each party would be available to the others and to the Court. Furthermore, we note that contribution claims may be made by Messrs Danos or Joyce against either DAG or Mr Gibson in the English proceedings, and we therefore fail to understand the benefit to your client in staying the proceedings against him in favour of arbitration."*

34. For Mabey, Mr Johnson began by submitting that ***Reichhold*** was a very unusual case. The obvious and straightforward remedy for the claimants to pursue was their claim for damages for breach of the warranties in the sale agreement. That claim was covered by the arbitration clause, and would have to be determined in Norway. The claim against Goldman Sachs for alleged negligent misstatement was very much a secondary one, and also contrary to the spirit, if not the letter, of the term in the confidentiality agreement absolving Jotun's agents and advisors from liability. However, the claimants chose to proceed in the first instance against Goldman Sachs in England, although the claim against them was more complex both factually and legally than a simple

claim against the vendor. These matters clearly influenced the judge, and his assessment of them was endorsed by the Court of Appeal: see in particular 178B-E, 180C-H and 181D-G. Furthermore, the factors relied on by the claimants against the grant of a stay amounted to very little: see 183D-F.

35. By contrast, in the present case (submitted Mr Johnson) there are powerful considerations which tell against a stay:
    (1) First, Mabey has every legitimate reason to call those involved in the alleged conspiracy to account for their actions at the earliest opportunity. The Particulars of Claim were served in January 2007, but on 20 April no Defences had been served by either Mr Danos or Mr Joyce, although they were due to serve their Defences by 24 April.
    (2) Secondly, the grant of a stay would deprive Mabey of the advantage of a trial in which all the human actors in the alleged conspiracy could be tried together. Mr Johnson buttressed this point by referring to the decision of the House of Lords in ***Donohue v Armco*** [2001] UKHL 64, [2002] 1 Lloyds LR 425, where the House declined to give effect to an exclusive English jurisdiction clause where to do so would prevent the trial in New York of all of the parties to an alleged conspiracy: see in particular the speech of Lord Bingham at paragraphs 33 and 34.
    (3) Thirdly, Mr Gibson is a party to the alleged conspiracy, and there is conceded to be an arguable *prima facie* case against him. There is therefore nothing in the point that Mabey did not originally intend to sue him, or indeed DAG. The question has to be examined in the light of circumstances as they are now, not as they were a year ago.
    (4) Finally, Mr Gibson's offer to submit to the arbitration would be very much a second-best solution from Mabey's point of view. The arbitration proceedings would be private and confidential, and it is not clear that the documents disclosed in the arbitration would be available and admissible in the English proceedings against Mr Danos and Mr Joyce, even if their trial too were postponed until after the arbitration had taken place.

36. In summary, Mr Johnson submitted that the present case is very far from being one of the rare instances where the grant of a stay could be justified.

37. I accept Mr Johnson's submissions, and have come to the clear conclusion that it would be wrong to grant the stay requested. In reaching this conclusion I am influenced in particular by the desirability of a single trial taking place, in public, at which the strong *prima facie* case of fraud and conspiracy against the three human defendants can be fully investigated and determined. DAG's invocation of the arbitration clause, presumably at the instance of Mr Gibson, has prevented the claim against DAG from being determined in the same forum as the claim against Mr Gibson. DAG is fully entitled to take that step, but I can see no good reason why Mr Gibson too should be permitted to take advantage of the arbitration clause, or to hold up the English action while the arbitration proceeds. I am unimpressed by Mr Hardwick's submission that this would be in any way unfair to Mr Gibson. The claims against Mr Gibson are distinct, both legally and conceptually, from the claims against DAG; and Mr Gibson's protestations that the claims against DAG and himself should be heard together would carry more weight if he had not himself brought about the position which makes this impossible. I also note that his apparent willingness to submit to the arbitration, as a means of obtaining a stay, shows that he is in principle willing and able to answer for his conduct in a forum outside Jamaica, because as I have already explained it is highly unlikely that Jamaica will be the seat of the arbitration.

38. I agree with Mr Johnson that ***Reichhold*** was an unusual case. It can also be distinguished on the basis that Goldman Sachs was the only defendant to the English proceedings, so the court did not have to consider the position where only one of the defendants to English proceedings is seeking a stay pending an arbitration. It seems to me that in such a case even more compelling circumstances would have to be shown to justify depriving the claimant of his *prima facie* right to proceed against the defendants of his choice in the appropriate forum for resolution of the dispute. It is true that Mr Danos and Mr Joyce do not themselves seek a stay, but I consider that the effect of granting a stay of the claim against Mr Gibson would in practice probably be to delay resolution of the claim against them, because it would be wholly unsatisfactory to have a trial against Mr Danos and Mr Joyce followed at a later date by a separate trial against Mr Gibson.

39. In any event, whether or not ***Reichhold*** should be distinguished in the way I have suggested, I am clear in my mind that the circumstances of the present case come nowhere near the *"rare and compelling circumstances"* envisaged by the Court of Appeal in that case as justifying a stay.

DAG's costs

40. I come finally to the question of DAG's costs. Since DAG's right to a stay is conceded, and since the action therefore cannot proceed against DAG, it seems to me that DAG is *prima facie* entitled to its costs of the action, including its costs of the application for a stay. However, Mabey resists this conclusion on two separate grounds.

41. First, Mabey submits that it should not have to pay DAG's costs of the application for a stay because:
    (a) although it was always clear that if DAG were to apply for a stay, it would be entitled to one, it was not unreasonable for Mabey to initiate proceedings against all the defendants and to seek to bring about a situation in which all related claims could be resolved in the same jurisdiction;
    (b) if, before making its application on 15 March 2007, DAG had given some reasonable notice of its position, it is likely that Mabey would have conceded the point and DAG would not have had to incur the costs of making an application at all; and
    (c) instead, DAG waited until 14 March before stating its position in correspondence and seeking a response.

I should add that, following two agreed extensions of time, 15 March 2007 was the last day on which DAG and Mr Gibson could make an application to challenge the jurisdiction of the court. However, a further agreed extension could have been sought and Mabey says that this is another alternative that was open to DAG instead of making its application on 15 March.

42. Secondly, there is the question of any costs incurred by DAG in connection with the action apart from the application to stay. Mabey submits that any such costs are likely to be common costs with Mr Gibson, and it would be unfair for DAG to obtain payment of those costs if Mr Gibson is to remain in the action as a defendant. In any event, the costs referable to DAG alone are likely to be minimal, and for that reason no order should be made. Alternatively, the appropriate order would be that DAG should recover only the amount of any increase in costs arising by reason of its joinder as a defendant.

43. I am not persuaded by these submissions. It seems to me that the appropriate order to make is that Mabey should pay DAG's costs of the action on the standard basis, including DAG's costs of the application. I can fully understand why Mabey decided to join DAG as a defendant, despite the existence of the arbitration clause. However, in doing so Mabey took a calculated risk that DAG would indeed invoke the clause, and now that DAG has done so I think that the usual consequences must follow. So far as concerns the costs of the application, it is true that DAG only made its position clear at the last moment, but by seeking extensions of time for a challenge to the jurisdiction DAG and Mr Gibson had put Mabey on notice that they were likely to do this, and it was always open to Mabey to make it clear in correspondence that if DAG sought a stay it would not be opposed. However, Mabey did no such thing. In my judgment there was an element of brinksmanship on each side, but the application can have come as no surprise to Mabey, and in the absence of any prior concession from Mabey DAG cannot be blamed for having made it. With regard to DAG's costs of the action generally, Mabey may well be right in saying that such costs are likely to be minimal, but in my view this is a matter to be determined on assessment, if it cannot be agreed between the parties, and is not a matter in respect of which I should make a specific direction.

Conclusion

44. For these reasons I will make an order staying the action against DAG, but not against Mr Gibson. Mr Gibson's application to set aside the order for service on him out of the jurisdiction is refused.

Mr Matthew Hardwick (instructed by Simmons & Simmons) for the Third and Fourth Defendants
Mr Adam Johnson, Solicitor Advocate, of Herbert Smith LLP for the Claimant