Sayyed Mohammed Musawi v R.E. International (UK) Ltd, Sayyed Mohammed Ali Shahrestani, Sayyed Reza Shahrestani, Sayyed Saleh Shahrestani

JUDGMENT : The Hon. Mr Justice David Richards: Chancery. 14th December 2007

Introduction

1. This case concerns a 4.1 acre undeveloped site in South Way, Wembley, London adjoining the Wembley Stadium (the Wembley land). The acquisition, development and ownership of the land was the subject of a series of agreements and alleged agreements between 1987 and 2002 involving the claimant and some or all of the defendants. From 1988 to 2004, the registered proprietor of the freehold title to the land was the first defendant R.E. International (UK) Limited (REI). The dispute in this case concerns the interest of the claimant in the Wembley land. The land was the subject of a compulsory purchase order made on 20 February 2004 by the London Development Agency and confirmed on 13 October 2004 by the Secretary of State. The London Development Agency took possession of the site on 14 September 2004. Any interest of the claimant is therefore now in the sum payable in compensation. The London Development Agency has put forward a valuation of £900,000 and paid £800,000 on account. The valuation is disputed and will have to be determined by the Lands Tribunal, if it cannot be agreed. It is said that the value was several millions of pounds. The parties are cooperating in relation to this issue.

2. There have been a number of unusual complicating factors. First, it was the position of all parties, in their statements of case and at the start of the trial, that all the relevant agreements were governed by Shia Sharia law. In the light of the Contracts (Applicable Law) Act 1990 and the decisions at first instance and on appeal in ***Halpern v Halpern*** [2007] EWCA Civ 291, as well as the decision of the Court of Appeal in ***Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd*** [2004] 1 WLR 1784, both counsel agreed that Shia Sharia law could not be the applicable law, at least for any of the agreements made after the 1990 Act came into force on 1 April 1991. They agreed that so far as those agreements were concerned, the applicable law must be the law of a country and that on the facts of this case it had to be English Law. Mr Harbottle for the claimant nonetheless submitted that at common law an agreement could be governed by a system of law which was not the law of a country and that the agreements at issue in this case made before 1 April 1991 were governed by Shia Sharia law. Mr Sen for the defendants submitted that this was not the correct position at common law and that all the relevant agreements were governed by English law.

3. Secondly, ad valorem stamp duty had not been paid on one of the relevant agreements. It was an agreement in writing made on 27 December 1990 providing for a transfer of the claimant's beneficial interest in the land to the second defendant Sayyed Mohammed Ali Shahrestani (Dr Shahrestani) in consideration of various payments, one of which was to be satisfied by the transfer of an interest in a nursing home in Hove (or, as the defendants submitted, shares in the company with registered title to the nursing home). It was subject to stamp duty under section 59(1) of the Stamp Act 1891 as a contract for the sale of an equitable estate or interest in property. This was not a point which either side had taken, nor were they or their solicitors and counsel obliged to take it; indeed, it used to be a breach of the Code of Conduct of the Bar for counsel to take a stamp duty point. It is, however, the duty of the court to take the point. When it occurred to me, some way into the trial, that the agreement should have been stamped, I raised it with counsel and gave them an opportunity of considering whether stamp duty should have been made and, if not, the consequences. Mr Harbottle submitted that stamp duty should have been paid and Mr Sen, while not formally accepting it, offered no submissions to the contrary.

4. Provision is made as to the effect of the non-payment of stamp duty by section 14 of the Stamp Act 1891 (as amended):

   "(1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator or referee of any omission or insufficiency of the stamp thereon, and the instrument may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and any interest or penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds. …

   (4) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was executed."

5. The unstamped agreement is not therefore admissible in evidence, nor may secondary evidence be given of its contents: ***Re Brown & Root McDermott Fabricators Ltd's application*** [1996] STC 483. The usual course adopted by the court in relation to an unstamped document is to accept an undertaking from the solicitors for the party wishing to put it in evidence to submit it for adjudication and to pay the duty and any interest and penalty found to be due. In this case, the solicitors for neither side were prepared to give this undertaking. It follows that the agreement is not admissible in evidence and cannot form the basis of any claim. I had, of course, read the agreement and it had been the subject of submissions in opening and questions in cross-examination. I will refer to it only to the extent necessary to make intelligible the course of events. As it happens, my decision in this case would not in any event depend on this agreement.

6. Thirdly, it does not appear that any of the agreements were made with the benefit of legal advice.

7. Fourthly, there has been considerable apparent confusion on the part of members of the Shahrestani family as to how interests on their side in the Wembley land were held and as to the identity of parties to an arbitration argument which is central to the case. This has led to a number of amendments and re-amendments to their defence, which have been significantly inconsistent.

Parties

8. The claimant is Sayyed Mohammed Musawi (Mr Musawi). He was born in 1955 and was an Iraqi citizen until 1991. He trained as a theologian at Najaf in Iraq and in 1980 became the leader of the Shia community in India. In that capacity supporters made funds available to him to be invested by him so as to produce income for charitable purposes in the Shia community. He was forced to leave India in 1991, although as I understand it he retains his standing in the Shia community there. He has lived in London since 1991 and became a British citizen in July 2000.

9. Religious and community activities are the focus of Mr Musawi's life. Although it would appear that there are substantial sums available to him for investment on the basis mentioned above, he is not commercially sophisticated. I found him to be a direct and forceful witness, with a clear and straightforward idea of what he was seeking to achieve in the relevant transactions. In general, I found his evidence to be reliable.

10. The Shahrestani family is Iranian in origin. Dr Shahrestani is 75 years old and is an architect and engineer. He was for many years a permanent resident in the UK but since 2003 he has been spending most of his time in Iraq, where he and other members of the family have business interests. Mr Musawi has great respect for Dr Shahrestani and it was because of that respect that he invested in the Wembley land. Dr Shahrestani was not due to give evidence in the case, because he is living in Iraq for most of the time and because of his health which is not good. However, overcoming considerable health difficulties, he did attend to give evidence. He is an impressive person and a truthful witness, although his recollection was in some respects patchy.

11. Dr Shahrestani's son, Ehsan, gave evidence and was the first witness for the defendants, although not himself a party. Dr Shahrestani has a brother, Seyed Mehdi Shahrestani (Mehdi), who is also an engineer and lives in Iran. He did not give evidence. His two sons, Sayyed Reza Shahrestani (Reza) and Sayyed Saleh Shahrestani (Saleh), are the third and fourth defendants. Both provided substantial witness statements but only Reza gave oral evidence. Saleh was in court for at least some of the trial and was available to give evidence. His failure to give oral evidence was adversely commented on by Mr Harbottle. I have disregarded his statement. The quality of the evidence of Ehsan and Reza was mixed.

The parties' claims

12. Mr Musawi's principal claim is for a declaration that he holds a 60.4% interest in the Wembley land and any proceeds of sale. This claim is based on an award dated 3 June 2004 given by Ayatollah Mohsen Araki pursuant to an arbitration agreement dated 27 September 2003. The defendants deny this claim on a number of grounds, principally because the award was outside the scope of the arbitration agreement and because the parties to the arbitration agreement did not include the legal or beneficial owners of any interest in the land against whom any such award could be made.

13. If Mr Musawi fails on his principal claim, he has a number of alternative claims. First, he claimed the same entitlement to a 60.4% interest in the land on the basis of an agreement alleged to have been made in correspondence 1998-1999. In his closing speech, Mr Harbottle informed me that this claim was not pursued.

14. Secondly, Mr Musawi claimed that the unstamped 1990 agreement had been rescinded for misrepresentation in 1999. There was no purported transfer of any interest in the land except as contained in the agreement. He therefore claimed the interest in the Wembley land which he had owned prior to the 1990 agreement. On this basis he claimed to be the sole beneficial owner of the land. As the 1990 agreement is not admissible in evidence and cannot be relied on by the defendants for any interest in the land, this claim falls away. The same is true of Mr Musawi's third alternative claim that Dr Shahrestani was in repudiatory breach of the 1990 agreement and that Mr Musawi accepted the repudiation and brought the agreement to an end in 1999.

15. A fourth alternative claim was added by way of re-amendment. On the basis that the 1990 agreement was unstamped and inadmissible, Mr Musawi claims the entire beneficial interest in the land which, on his case, he owned prior to that agreement.

16. There is a counterclaim as to the beneficial interests in the land. As finally pleaded, after the close of evidence, it is a counterclaim by REI, Reza and Saleh for a declaration that Mr Musawi holds a 47.7% interest, and Reza and Saleh on behalf of their father Mehdi hold a 52.3% interest, in the land or proceeds of sale, subject to the assessment of management charges claimed by Reza and Saleh. This is based on an agreement which the defendants allege was made on 7/8 August 2002.

The proper law of the contracts at common law

17. Mr Harbottle submitted that at common law the proper law of a contract need not be the law of a country, but could be any system of law provided it was sufficiently certain. It was common ground that the parties to the various contracts in this case had intended them to be governed by Shia Sharia law and there was no dispute between them as to which school or system of Sharia law was intended. He submitted that Shia Sharia law was sufficiently certain and that therefore, while accepting that agreements made after 1 April 1991 had to be governed by the law of a country, those made before that date could be governed by the parties' choice of Shia Sharia law.

18. Mr Harbottle accepted that his submission was not directly supported by any authority, but equally there was no decision which established the contrary. He accepted that a dictum of Lord Diplock in ***Amin Rasheed Shipping Corp v Kuwait Insurance Co*** [1984] AC 50 was against his submission, but he pointed out that it was made in a case which concerned only the laws of countries and which raised no issue of non-national systems. He relied on dicta in ***Deutsche Schachtbau-Und Tiebohrgesellschaft MBH v Ras Al-Khaimah National Oil Co*** [1990] 1 AC 295 (**DST v Rakni) and *Home and Overseas Insurance Co Ltd v Mentor Insurance Co Ltd*** [1989] 3 All ER 74.

19. In my judgment, at common law the proper law of a contract had to be either English law or the law of another country, and the courts would not apply any other system to a contract. Although I am not aware of any decision to this effect, it was clearly stated as the applicable principle in successive editions of Dicey & Morris: The Conflicts of Laws. For example, in the 11th edition (1987), the last before the Contracts (Applicable Law) Act 1990, it was stated that the parties to a contract could choose the law of a country as its governing law, failing which the court would decide the proper law by applying its conflicts of laws rules which necessarily involve a choice between the laws of countries: see p.1162. By way of exception, it was noted that where a government was a party to a contract, "*it may, it seems (at any rate for purposes of arbitration) choose as the proper law the **"general principles of law"** or even **"public international law"*** (p 1188). In Chapter 16, dealing with arbitration, the editors stated:

"Nor can an English arbitrator apply any conflict of laws rules other than English rules; nor can he apply any substantive law other than that of a fixed and recognisable system. Some of the most important cases in England on the conflict of laws have been decided by the courts by way of review of arbitration awards, or in answer to questions of law posed by arbitrators. The reason is that arbitrators in an English arbitration must apply the law, and that in English law a contract is governed either by English law or by some specific foreign law."

In the latest edition (14th ed, 2006), the equivalent paragraph (16-047) notes the changes made by the Arbitration Act 1996 and states:

*"In England, prior to the 1996 Act, it was axiomatic that an English arbitrator was bound to apply English law, including the English conflict of laws rules to decide the substance of any dispute, and many of the most important cases in the conflict of laws arose by way of appeal on matters of law from arbitral awards. The other consequence of this approach was that, just as in the English courts [emphasis added], an English arbitrator could only apply a national legal system, designated as applicable by the relevant choice of law rule. The tribunal could not apply non-national rules, still less decide the dispute **'ex aequo et bono'** or as an **'amiable compositeur',** on the basis of general principles of justice and fairness."*

20. Lord Diplock's dictum in ***Amin Rashid Corp v Kuwait Insurance Co*** at pp61 – 62 is at the end of the following passage:

*"English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed. So the first step in the determination of the jurisdiction point is to examine the policy in order to see whether the parties have, by its express terms or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained. As Lord Atkin put it in **Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft** [1937] A.C. 500,529:*

"The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances."

Lord Atkin goes on to refer to particular facts or conditions that led to a prima facie inference as to the intention of the parties to apply a particular system of law. He gives as examples the lex loci contractus or lex loci solutionis, and concludes:

"But all these rules but serve to give prima facie indications of intention: they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such."

*"There is no conflict between this and Lord Simonds's pithy definition of the **"proper law"** of the contract to be found in **Bonython v. Commonwealth of Australia** [1951] A.C. 201, 219 which is so often quoted, i.e., **"the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection."** It may be worth while pointing out that the "or" in this quotation is disjunctive, as is apparent from the fact that Lord Simonds goes on immediately to speak of **"the consideration of the latter question."** If it is apparent from the terms of the contract itself that the parties intended it to be interpreted by reference to a particular system of law, their intention will prevail and the latter question as to the system of law with which, in the view of the court, the transaction to which the contract relates would, but for such intention of the parties have had the closest and most real connection, does not arise.*

*One final comment upon what under English conflict rules is meant by the **"proper law"** of a contract may be appropriate. It is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them."*

Lords Roskill, Brandon and Brightman agreed with Lord Diplock's speech. Mr Harbottle accepted that it left no room for anything other than the law of a country, and I regard it as an authoritative statement of the position at

common law. In ***Halpern v Halpern*** at para 24, Waller LJ described it as the conventional view of the common law principles.

21. The dicta of Sir John Donaldson MR in *DST v Raknoc* at p315 and of Lloyd LJ in ***Home and Overseas Insurance Co Ltd v Mentor Insurance Co Ltd*** at pp84-85 were concerned with the principles by which arbitrators could decide the substantive issues. The first case concerned the enforcement of a foreign award, but the second concerned an English arbitration. In the years immediately before the Arbitration Act 1996, there was some uncertainty as to whether the conventional and established rule, that in an English arbitration the arbitrators had to apply the law of a country, remained good law.

22. Section 46(1)(b) of the Arbitration Act 1996 enables parties to choose principles other than the law of a country as the basis on which the dispute is to be decided by the arbitrators. Section 46 provides as follows:

"1) The arbitral tribunal shall decide the dispute—

(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

The "law" which may be chosen under section 46(1)(a) or which may be applied under section 46(3) must be the law of a country: see Dicey, Morris & Collins (14th ed) at paras 16-050 to 16-055. By contrast, section 46(1)(b):

"*allows the parties the freedom to apply a set of rules or principles which do not in themselves constitute a legal system. Such a choice may thus include a non-national set of legal principles (such as the 1994 UNIDROIT Principles of International Commercial Contracts) or, more broadly, general principles of commercial law or the lex mercatoria."*

The distinction made in section 46 between "law", being the law of a country, and "other considerations" is consistent with what I consider to be the common law position. I do not think that the dicta in ***DST v Raknoc*** and the ***Home and Overseas*** case, dealing with arbitrations, have any application to the common law rules which the court would apply when deciding on the proper law to be applied by it to a contractual dispute.

23. As regards contracts made since the Contracts (Applicable Law) Act 1990 came into force, the position is that the only law which the courts may apply is the law of a country. So far as I am aware, no-one suggested that its enactment would change English law in this respect.

24. I therefore conclude that all the agreements in issue in this case, including the 1987 agreement, are governed by English law.

The facts

25. By 1987 Mr Musawi and Dr Shahrestani were well known to each other. Dr Shahrestani visited India and was well-known and respected in the Shia community. Mr Musawi knew that Dr Shahrestani's business interests included construction and he was looking for an investment to produce income and returns for charitable uses. As he knew, Mr Musawi completely trusted him. In or about July 1987 Dr Shahrestani told Mr Musawi that the Wembley land was for sale, with planning permission for 200,000 square feet of offices. An initial feasibility study showed that the whole project, including acquisition and development, would cost £19.5 million and on completion could be sold for £24 million. He had made an offer of £2.5 million and suggested that Mr Musawi might put up £1 – 1.3 million, with the balance of the purchase price being borrowed.

26. On 15 July 1987 Mr Musawi and Dr Shahrestani signed an agreement in Arabic in a form put forward by Dr Shahrestani (the 1987 agreement). It is stated to be Islamically binding. Although not mentioning the Wembley land, it was in fact made with a view to its acquisition and development. (I mention here that both Mr Musawi and Ehsan gave evidence that the agreement preceded any discussion of the Wembley site. Ehsan thought that any discussion was certainly a year after the agreement. A contemporaneous letter from Dr Shahrestani to Mr Musawi shows this to be wrong. It simply illustrates the difficulty of accurate recollection after 20 years.)

27. Articles 1 and 2 of the 1987 agreement provided (in translation):

"1. The arrangement for and provision of money for the work of the agreement will be from pledges by the first party, [Mr Musawi] and the work and the activities making use of the money in the field of construction works in England are among the obligations of the second party [Dr Shahrestani].

2. Projects, which will be carried out by purchase, implementation or establishment, must remain within the limit of the amounts paid in for the work of the agreement, and when more is needed prior agreement must be obtained from the first party."

Article 5 spelt out in a little more detail the obligations of Dr Shahrestani and provided that he should be responsible for the fees of professional advisers and the costs of supervising the development. Articles 6 to 8 provided:

"6. All expenses related to the project other than those mentioned above will be included within the expenses and cost of the project.

7. The cost calculation of each project will be made upon its completion and the fulfilment of its sale.

8. The final (net) profits will be divided between the two parties equally after the deduction of all expenses, duties and taxes."

28. In broad terms, Mr Musawi was to provide funds and Dr Shahrestani was to provide his project management expertise, on the basis of an equal division of the profits. The parties called the agreement a mudaraba, which is a form of joint venture agreement recognised in Sharia law but it was strictly a misnomer because a mudaraba involves raising money for trade, not property investment or development.

29. The Wembley land was purchased in 1988 for £2.5 million, of which a little over £1.5 million was initially funded by a mortgage loan from Benchmark Bank plc to REI. The costs incurred on the purchase were £83,420. The records for costs incurred over the next two years, including interest and maintenance and other expenditure on the land are very inadequate but, according to figures produced by Ehsan, the total expenditure on the land, including the purchase price, until the end of 1990 was £3,537,000. According to Ehsan's figures, Mr Musawi provided £2,002,000 of this amount and the balance was provided by the Shahrestani family. The mortgage loan was reduced by instalments over this period out of the funds provided by the parties. It does appear that a significant proportion of the necessary expenditure was met by the Shahrestani family rather than by Mr Musawi, as required by the 1987 agreement. Although it was agreed in discussions that funds would be borrowed, Mr Musawi accepted that he was responsible to procure their repayment.

30. It is clear from the evidence of all the witnesses and was common ground among them that under the 1987 agreement and the associated discussions between the parties Mr Musawi was to be the beneficial owner of the Wembley land, although legal title was to be held by REI, a company owned by the Shahrestanis. For the first time, a case was advanced for the defendants in Mr Sen's closing speech that at all times the entire beneficial interest in the land was owned by REI and that Mr Musawi's interest was in the share capital of REI. Not only was this not part of the defendants' pleaded case, until re-amendments were made after the end of the parties' main closing speeches (without prejudice to the claimant's right to contend that it was without foundation), but it was directly contrary to the defendants' pleaded case. It was not put to Mr Musawi and Dr Shahrestani's evidence was clear that REI was owned by his brother Mehdi and himself. He never suggested that Mr Musawi had any interest in REI. There is no substantial basis for the contention that he was to be a beneficial owner of shares in REI, rather than the Wembley land itself. Mr Sen relied on the facts that Mr Musawi agreed that the land should be conveyed to REI and that REI was the borrower under the loan agreements with Benchmark Bank. But, it was Dr Shahrestani's explanation to Mr Musawi at the time that it was necessary to vest legal title in a company in order to borrow the necessary funds. Mr Sen also relies on the annual accounts of REI which at all times showed the land as an asset, beneficially owned by REI. This is a telling point in favour of the conclusion that the Shahrestanis personally were not beneficial owners of any interest in the land. However, it carries no weight as against Mr Musawi, who was in no sense a party to the accounts. There is no evidence, or even any reason to suppose, that he saw the accounts.

31. The plan to develop the site was at first delayed by the need to negotiate the termination of tenancies of parts of the site, which was in due course achieved, and then halted by the recession in the commercial property market in the early 1990's. The land remained undeveloped at the time of the compulsory purchase order.

32. The lack of any income from the investment in the land was a major concern for Mr Musawi and it was against that background that the parties negotiated the 1990 agreement. As I have already indicated, the agreement contemplated a sale by Mr Musawi of his interest in the land to Dr Shahrestani.

33. By 1998, Mr Musawi was expressing great dissatisfaction with the arrangements following the 1990 agreement. On 27 May 1998 Dr Shahrestani wrote to Mr Musawi with a proposal to resolve these issues, the main feature of which was:

"We revert to the partnership agreement between us and cancel the Hove sale and the conditions surrounding it. The actual picture is that you have paid to the Wembley project the sum of £2,002,522 while we have paid £1,313,000. That means the proportion of our participation in Wembley is 39.6% and your participation is 60.4% (despite the fact that, under Item 1 of the agreement, we were not responsible for paying anything). This ratio is still in force now and, when we sell (it is sold) and receive the money, the net amount received will be distributed between us in the same ratio."

By "our" participation, Dr Shahrestani meant the Shahrestani family. According to Ehsan, Dr Shahrestani wrote the letter on behalf of Mehdi, Reza and Saleh. At the end of the letter, he wrote that the new agreement "could be signed for us by me and by my brother, Sayyed Mehdi, and his son, Sayyed Reza".

34. Mr Musawi did not accept this proposal but in subsequent correspondence affirmed the 1990 agreement. In the first part of 1999 he sought and obtained written confirmation of his rights under the 1990 agreement. However, in a letter dated 26 September 1999 to Dr Shahrestani he stated that he had been considering whether to continue with the 1990 agreement or to bring it to an end, involving a return to Dr Shahrestani of the share in the nursing home in Hove and the receipt by Mr Musawi of a 55% interest in the Wembley land. He stated that he had decided to pursue the second of these alternatives and requested registration of his interest in the land as quickly as possible.

35. In his oral evidence Mr Musawi made clear that he regarded Dr Shahrestani as having been in serious breach of the 1990 agreement since 1994 and that in 1999 his reason for terminating that agreement was non-performance by the other party, not misrepresentation. It is clear that Mr Musawi did not purport to rescind the agreement for misrepresentation.

36. There is not a great deal of evidence concerning the period from September 1999 to mid-2002. It is clear that Mr Musawi wished to be recognised as having an interest in the Wembley land and in principle the Shahrestanis were agreeable to this, but the documents and the evidence of the witnesses do not disclose an enforceable agreement as a matter of English law. In February 2001 and again in June 2001, Mr Musawi wrote to Dr Shahrestani stating his wish to proceed as Dr Shahrestani had proposed in his letter of 27 May 1998, which would give Mr Musawi a 60.4% share in the land. These requests were not acted upon.

Nature of Shahrestani family interest in the Wembley land

37. It is convenient at this point to consider how members of the Shahrestani family held any direct or indirect interest in the Wembley Land, at any rate by the late 1990's.

38. As I earlier indicated, there has been considerable inconsistency in the defendants' case as to who owned a beneficial interest in the land and whether it was owned by members of the Shahrestani family directly, or indirectly through their ownership of shares in REI. The ultimate position, adopted by Mr Sen in his closing submissions, was that the land was beneficially as well as legally owned by REI and that members of the Shahrestani family beneficially owned shares in REI. It was only in that sense that they could describe themselves as owning the land. Mr Harbottle made the same submission as regards any interest of the Shahrestani family.

39. It is therefore now common ground that members of the Shahrestanis had no direct beneficial interest in the land, and that on their side it was REI, if anyone, which was the beneficial owner in whole or in part of the land. In my judgment, this fully accords with the evidence given by Ehsan, Reza and Dr Shahrestani. It remains relevant to summarise the way in which the defendants' case developed, for the light it sheds on other issues.

40. The original pleaded defence dated 11 August 2005 was that following the 1990 agreement Dr Shahrestani held the entire beneficial interest in the Wembley land and that following the alleged agreement made on 7/8 August 2002 (the alleged 2002 agreement) Mr Musawi and Dr Shahrestani held the beneficial interest in the land in the proportions 47.7/52.3 subject to final adjustment for management charges. It was averred that Reza and Saleh had no interest in the land. The counterclaim was for a declaration that Mr Musawi and Dr Shahrestani were the beneficial owners in those proportions.

41. The defendants' case was altered in further information of the defence served in December 2005 (re-served in August 2006 in a revised form but leaving this part unaffected). It was averred that prior to August 2002 Dr Shahrestani's shares in REI had been transferred to Mehdi and later transferred by Mehdi to Reza and Saleh. It was further averred that on 7/8 August 2002 it was agreed between Mr Musawi and Reza, acting for himself, Saleh and REI, that "the shares in the Wembley land would be shared" between Mr Musawi and Reza and Saleh in the proportions 47.7/52.3 subject to adjustment for management charges.

42. An amended defence and counterclaim was served in March 2007. The defence as originally pleaded was amended to incorporate and be consistent with the further information. It was still pleaded that Dr Shahrestani was the beneficial owner of the Wembley land as a result of the 1990 agreement but there was no pleading of a transfer by him of that interest, as opposed to the shares in REI, to Mehdi or to Reza and Saleh. The counterclaim was amended to seek a declaration that Mr Musawi and Reza and Saleh, not Dr Shahrestani, were the beneficial owners of the Wembley land.

43. A different account was given in the defendants' evidence. Ehsan stated in his witness statement that in about 1995 there had been a re-arrangement of assets within the Shahrestani family and that Dr Shahrestani had transferred "*whatever interest we had in the Wembley land*" to Mehdi's side of the family. Ehsan was not precise as to whether the Shahrestani interest in the land was held by Mehdi, Reza or Saleh or a combination of them. However, he was clear that at the meeting in August 2002 and during the later arbitration Reza had authority to represent Mehdi, Saleh and Reza himself.

44. Reza's witness statements were also imprecise as to who in the Shahrestani family owned any interest in the Wembley land. Reza gave oral evidence that the original counterclaim for a declaration of ownership in favour of Dr Shahrestani was a mistake and that the real owner was Mehdi. When asked why the amended counterclaim sought a declaration of beneficial interest in the land in favour of Saleh and himself, he said that it was because they held their shares in REI as nominee for their father Mehdi. He explained that in their community it was normal for one person to hold property for another and that there was often no precise division of ownership between family members. He also explained that for a number of reasons neither he nor Saleh had looked closely at the way the case was pleaded.

45. Although Reza saw little difference between REI owning the land and Mehdi owning the land, the overall sense of his evidence was that REI owned the land and Mehdi, through Reza and Saleh, owned the shares in REI. That is consistent with documents such as REI's accounts and dealings with the compulsory purchase order, and is now the position adopted by the defendants. In the course of the main closing submissions and thereafter Mr Sen produced a number of proposed re-amendments to the defence and counterclaim to take account of the evidence. In the final version, it was alleged that following the alleged August 2002 agreement, the shares in REI

were held as to 47.3% by Mr Musawi and as to 52.3% by Reza and Saleh on behalf of Mehdi, subject to adjustment for management charges. The counterclaim was re-amended accordingly.

46. I will later consider the nature of Mr Musawi's interest following the events of 2002 to 2004, but my conclusion is that any interest of his was in the land itself, not in REI. As regards the Shahrestanis, the position, which is common ground, is that they had no direct personal interest in the land but held their personal interests in the shares of REI. The effect, therefore, is that the beneficial interest in the land was at all material times in Mr Musawi and/or in REI.

7/8 August 2002

47. On 1 July 2002 Reza wrote on REI–headed paper to Mr Musawi. He headed the letter "Our joint venture" and stated that initially REI and Mr Musawi had gone into a joint business venture for the purchase and development of the Wembley site. He referred to the subsequent arrangements involving the nursing home and to the Shahrestani family arrangement in 1995 involving the transfer of the Wembley site "to us (Seyed Mehdi Shahrestani)". He offered payment of sums due under the 1990 agreement.

48. On 3 July 2002 Mr Musawi wrote to Dr Shahrestani, complaining that Reza was denying him any interest in the Wembley site. Dr Shahrestani replied on 4 July 2002. He affirmed that "you own your share in the land at Wembley the area of which extends to 4.1 acres which is registered in the name of (RE UK)". He went on to refer to Mr Musawi's dispute with "my brother Mr Mehdi (represented by his son Reza) who is the other partner in this land" as to the treatment of £300,000 paid to Mr Musawi as rent for the nursing home. Dr Shahrestani expressed his view that it should be deducted from Mr Musawi's share in the Wembley site and added to the share of the other partner. Mr Musawi replied on 5 July 2002 agreeing with this approach and asking Dr Shahrestani to take the necessary action as quickly as possible. At Dr Shahrestani's request, Ehsan prepared a calculation of respective shares, based on cash contributions for the Wembley site and adjusted to take account of the nursing home payments. This showed a split of 47.7% for Mr Musawi and 52.3% for REI.

49. On 3 August 2002 Mehdi wrote as follows to Reza:

"Further to the various conversations with you and Mr Saleh in Tehran about the share of the Wembley site and the residential home in Hove, myself and your uncle, Dr Mohammed Ali Shahrestani have come to the conclusion and believe that the shares should be divided up and settled between us (the Shahrestanis) and Mr Sayyed Mohammed Mousavi:

1 – Mr Sayyed Mohammed Mousavi will have no legal right in the residential home.

2 – In exchange, Mr Sayyed Mohanned Mousavi will own 47.7% of the Wembley land and we (the Shahrestanis) will own 53.3% of the above land. [It is common ground that 53.3% should read 52.3%].

We would like you to write a letter to Mr Sayyed Mohammed Mousavi and officially confirm to him the ownership of the shares."

Reza was not satisfied with this arrangement. He believed that the time incurred by the Shahrestanis in dealing with the Wembley land since 1990 should be compensated, probably by an increased interest in the land. Mehdi told Reza to arrange a meeting with Mr Musawi to discuss matters and to seek to reach agreement with him.

50. A meeting took place at Mr Musawi's house in London on the evening of 7 August which lasted into the early hours of 8 August. Those present were Mr Musawi, Reza and Ehsan. Ehsan's evidence was that he was representing Dr Shahrestani and Reza was representing Mehdi and Saleh as well as himself. Mr Musawi may have been sent a copy of Mehdi's letter to Reza, but in any event Ehsan produced a copy at the start of the meeting and read it out. There was a long and heated argument, mainly concerning the issue of management charges. Mr Musawi gave evidence which I accept that by the end of the meeting he was very tired. At that stage, Ehsan wrote a note on the back of Mehdi's letter. In evidence, Ehsan explained that he wanted something at the end of the meeting because they were getting nowhere. He said that it was done very quickly and he read it out as he was writing it. He wrote it in Farsi which is not Mr Musawi's first language but which in written form is similar to, but not quite the same as, Arabic. Mr Musawi has a reasonable understanding of written Farsi. Mr Musawi, Ehsan and Reza each signed the note.

51. The note read as follows:

"At a meeting held on 7/8/02 at the house of Mr Mousavi in the presence of Sayyed Ehsan Shahrestani and Sayyed Reza Shahrestani, it was decided that the letter from Mr Mohandes Mehdi Shahrestani, which is written overleaf, should form the basis of the parties' agreement. The issue of management, however, still has to be resolved and the parties have agreed that the amount payable for managing the project from its inception to now should be determined through a specialist or specialists so the agreement can be finalised. Of course, if the parties agree, there will be no need to go back to the specialists."

52. The defendants submit that this note created a binding agreement between the parties, that Mr Musawi's share in the Wembley site would be 47.3%, subject to downward adjustment to take account of the management changes which were to be determined by a specialist or specialists, if not agreed between the parties.

53. For a number of reasons I have concluded that no binding agreement was made at the meeting. First, the note is itself expressed in somewhat tentative terms: Mehdi's letter "should form the basis of the parties' agreement" and the amount payable for management charges should be determined by specialists "so the agreement can be finalised"

54. Secondly, the note does not spell out how account is to be taken of the management charges, once determined. Ehsan's evidence was that this was deliberate. In his first witness statement (para 68) he said:

"Because we were uncertain as to the quantification of the Management charges we left the matter on the basis that when it is quantified it will either be converted into shares or agreed as a payment due to the Sharestani family. That is it either be treated as an additional investment by the Sharestani family or treated as a "loan" or outstanding payment due to the Shahrestani family before the net proceeds are divided in the ratios above referred to."

55. If the manner in which the management charges were to be dealt with was left open, as this paragraph and paragraph 103 of Ehsan's witness statement suggest, there was no binding agreement. It is not consistent with paragraph 73 in which Ehsan stated that the parties "agreed that they would own shares in the Wembley land in certain proportions subject to adjustment in respect of management charges".

56. By contrast, in his oral evidence, Ehsan said that it was agreed during the meeting that the management charges would be satisfied by an increase in the Shahrestani interest in the Wembley site, not by the payment of a fee. When taken to his witness statement, and after consulting the original Farsi version, Ehsan said:

"It does not say one way or the other. I don't recall. It could be one way or the other. Probably both. I don't remember which."

He went on to say that orally Mr Musawi agreed that the management charges should be reflected in the Shahrestani interest in the land, but Ehsan did not write it down because Mr Musawi's agreement was "*not strong"*. He said that Mr Musawi was not prepared to have the written agreement reflect that the management charges should be compensated in the Shahrestani interest because he did not know how large it would be. This was, he said, a very hot issue because Reza's figures would result in an interest of only 25% for Mr Musawi. When asked whether he considered that the parties had a binding agreement as to the effect of the management charges on the size of their interests, he replied "*certainly not"*. He confirmed that there was left open the question as to how the management charges were to be satisfied.

57. Reza's evidence suggested that a different approach was adopted. Both in his written and oral evidence, he said that he made it clear to Dr Shahrestani that the management charges should be treated as an investment by Saleh and himself, just as Mr Musawi and the Shahrestanis had invested in the acquisition of the site. On sale, the acquisition costs would be reimbursed and the profits split equally between Mr Musawi and the Shahrestanis on the one hand and Saleh and himself on the other hand. His view of the effect of the note signed on 8 August 2002 was:

"The management charges when determined would either have been credited to us as investment or converted into a percentage of shares and we had no objection either way."

58. In his oral evidence, Reza made clear that he was envisaging a three-way split, between REI/Shahrestanis, Mr Musawi and himself, and that he made this clear to Mr Musawi. He also described his discussion with Mr Musawi as to what should be stated in the note. He wanted it to state that the management charges should be paid in shares, but Mr Musawi would not agree, saying it could be either shares or a payment. There was also some suggestion in Reza's evidence that it was agreed that Mr Musawi should be entitled to decide whether the management charges, once their amount had been determined, should be paid in cash or as an adjustment to shares in the Wembley site but this was a new case, not pleaded nor stated in the defendant's witness statements nor put to Mr Musawi. Reza also gave evidence, unsupported by any other evidence, that it was agreed at the meeting on 7/8 August that the management expenses actually incurred would be paid out of rental income.

59. Reza's final word in evidence was that what was agreed on 7/8 August was not a final agreement, but an agreement which was based on a 47.7% share which would be finalised once the management charges were determined.

60. There is in my judgment too much confusion in the evidence as to the discussions during the meeting to conclude that terms were finally agreed. The confusion in the evidence simply reflects the confusion of the event.

61. In explaining why he signed the note, Mr Musawi said that he misunderstood the word "tawafuk" in it. He thought it meant that Mr Mehdi's letter had been gone through, not that it had been agreed. It appears that it is the same word in Arabic and Farsi and I was not convinced by his evidence on this point. However, I am satisfied that he signed the note when very tired and that he did not understand, rightly as I hold, that any binding agreement had been made.

62. The parties' conduct after the meeting is starkly inconsistent with any belief that a binding agreement had been made. For his part, Mr Musawi wrote on 8 August 2002 to Dr Shahrestani in terms which cannot be reconciled with a belief that an agreement was made:

"But I beseech you to urge Seyed Reza to hurry and register our share, and to hand over the amount due to us from the land rental, because he was here yesterday threatening and proclaiming that he will not register anything of the land in our name and won't give us anything from the rentals amounts, except if we accept to give him a large sum Management for the land in addition to his share is more than 52% according to the letter addressed to him from his Seyed father, he even requested addition to his share, another share and it is 50% from land profits. And this is absolutely unacceptable because management of the land on behalf of his father or the company does not mean he can share in the profits and addition to his share. And his endeavours to find tenant to rent land and his management can be appreciated and rewarded with 8% of rental proceeds and this is what is said by experts in commercial management."

63. On the same day Mr Musawi wrote to Reza at REI requesting the immediate registration of his share in the Wembley land and as regards management charges he wrote:

"Regarding the (management fees) for you, about which you spoke last night, and we agreed to refer the matter to experts, we have consulted experts in property management in London, who said that property management fees for big properties vary between 5% to 8% depending on the state of the property and the frequent need for maintainance. We wish to resolve this matter amicably, so, we are ready to agree on 8% out of the net rent amount to be given to you as management fees as far as rent amounts are coming."

64. On 9 August 2002, Reza drafted a letter in response to Mr Musawi's letter in which he stated:

"Until our discussions on 7/8/02 following my father's request to go ahead with partnership in Wembley, neither I nor my father believed that we are in agreement with you: the difference of opinion on management fee is an obvious point. You have switched between the deal involving Nursing Home and Wembley several times that we are not even now sure that if we settle the management fee, and you get a better picture from legal problems of the site, you will be still interested in Wembley. Until a full agreement is made, or at least the one we made following my father's letter yesterday, I do not see any reason to believe that you were a partner in Wembley."

He sent a letter including this paragraph to Mr Musawi on 15 August 2002.

65. In a letter dated 8 October 2002, REI's accountant, on instructions from Saleh and Reza, wrote that :

"According to Mr Saleh Shahrestani, director of RE International (UK) Limited, the value of the Wembley land is to be apportioned as 40% to yourself and 60% to the Shahrestani family."

He asked for urgent confirmation which Mr Musawi refused in a reply on 9 October, saying that the percentage was wrong and requesting the accountant:

"to send us a detailed list of the amounts spent on this land, then a meeting can be arranged between our accountants and yourself to finalize the percentages of both parties, ASAP."

66. Correspondence continued between Mr Musawi and Reza and Saleh and in a letter dated 17 March 2003 Saleh stated:

"Your comments about your entitlement of ownership of the site comes into effect only when agreement has been reached by both parties and the percentages quantified by taking into consideration the management costs which will adjust the share accordingly."

67. In September 2003, Mr Musawi, Reza and Saleh signed an arbitration agreement. I will come in detail to this shortly. For present purposes, it is notable that in their initial oral and written statements to the arbitrator they did not mention the agreement said to have been made on 7/8 August 2002. On the contrary, in a letter dated 29 September 2003 the agreement made in 1990 was described as "*the last solid agreement*" and in a draft of the letter, there was a reference not included in the final form to "*outlined agreement of August 2002"*. In oral evidence, Reza explained that he treated the 1990 agreement as binding because the August 2002 agreement had not been finalised.

68. Reza also gave evidence that he did not mention the August 2002 agreement because the arbitrator had said at the initial meeting on 27 September 2002 that it was not binding and Reza did not wish to appear as if he was questioning the arbitrator's view. I do not accept this explanation. Not only did he include the reference to the "*outlined agreement*" in the draft letter prepared the day after the meeting but in subsequent communications he did refer to the alleged agreement and placed some reliance on it.

69. Ultimately, the question whether as a matter of English law a contract was made on 7/8 August depends on what was written and said on that occasion. However, the subsequent conduct of the parties is telling evidence of the existence or extent of any agreement reached on that occasion. Overall the evidence shows strongly that there was neither finality nor sufficient certainty in the terms discussed to constitute a contract, nor a belief by the parties that a contract had been made.

70. I should mention that in his closing submissions Mr Sen submitted that the evidence established a binding agreement for shares in the ratio of 52.3/ 47.7 in the site, which was not conditional on the treatment of management charges. While I accept that in fact Mr Musawi had at that time no objection to a split on that basis, it is not in my judgment tenable to conclude that a contract was made to that effect. As the signed note makes clear, the question of shares in the site was at that stage inextricably linked to the question of management charges.

Arbitration

71. I have already referred to some of the correspondence following the meeting on 7/8 August 2002, beginning with Mr Musawi's letter dated 8 August, which shows that there was immediately a dispute about Mr Musawi's interest, if any, in the Wembley land. In the course of correspondence over the following months, Mr Musawi's position was that he was entitled to the 60.4% interest offered in 1998. In a note written in October 2002 by Dr Shahrestani to Mr Musawi, he said that the only alternative for Mr Musawi to the agreement in the document signed in the early hours of 8 August 2002 was "*to seek arbitration or seek the legal process."* Mr Musawi applied for a caution against dealings with the land which was registered by the Land Registry on 26 November 2002. In his letter dated 17 March 2003 to which I have already referred, Saleh ended by saying:

"If you feel that you have exhausted all avenues in relation to resolving this situation and there is no other way then we will have no problem of entering into any litigation that you feel will resolve the problem."

72. By April 2003 the new owner of Wembley Plc were preparing plans for the 40 acres it owned round the stadium and Reza and Saleh knew that there was a prospect of a compulsory purchase order for the Wembley land. They were anxious to conclude matters with Mr Musawi.

73. Saleh wrote to Mr Musawi on 15 September 2003 to say that a compulsory purchase order was imminent and continued:

"If you do not remove the caution placed on this land within 14 days of this latter we shall have no alternative but to instigate proceedings to remove this caution ourselves, which may lead to litigation."

74. On 27 September 2003 Mr Musawi, Reza and Saleh signed an agreement in Farsi providing as follows:

"The parties to the dispute over the Wembley land (located in South Way), as per the attached map, and also the nursing home at: Regent House Nursing Home, 107-109 The Drive, Hove BN3 6GE which is related to the issue of the disputed land, namely [Mr] Mousavi, Mr Sayyed Reza Shahrestani, director of RE International Ltd, as well as Mr Sayyed Saleh Shahrestani, a shareholder in the aforementioned company and director of the nursing home, have agreed to accept whatever judgment is issued by Sheikh Mohsen Araki as arbitrator and Islamic legal judge in settlement of the dispute according to Islamic legal standards and to accept it as a final judgment and submit to its findings."

75. This agreement was signed at a meeting with Ayatollah Araki, the arbitrator appointed by the agreement. Mr Musawi, and Reza and Saleh, made oral statements of their respective positions which are recorded in minutes. On 29 September 2003 Reza wrote to the arbitrator with a position statement and a request for judgment.

76. A second hearing, as it is described in the minutes, was held on 10 January 2004. The principal participants were Mr Musawi and Reza, to both of whom the arbitrator addressed questions. The translated minutes run to 11 pages. Further written submissions were made by Mr Musawi on 11 January and by Reza on 12 January 2004.

77. On 13 January 2004, the arbitrator issued a preliminary judgment, running in translation to seven pages. He invited further submissions within three days, failing which the judgment would become final and binding. Mr Musawi and Reza both made further written submissions on 15 January 2004.

78. On 7 June 2004, Ayatollah Araki wrote to Mr Musawi, Dr Shahrestani, Reza, Saleh and Mehdi as follows:

"Following the revocable judgement in relation to the disputed case relating to the Wembley land, in order to give the final judgement in the final meeting (which has been postponed 3 time despite pre-announcement and failure to attend), you are required to attend the meeting at the Islamic Centre. Therefore the last appointment for the final review of this case between yourselves will be Sunday the 20th of June. And in this date the judgement shall be given, even if no-one shows up."

A letter in almost identical terms was sent on 18 June to the same addresses except Mr Musawi.

79. No-one attended before Ayatollah Araki on 20 June 2004. He had prepared a final award which is dated 3 June 2004, although there is no reason to suppose that he would not have re-considered it in the light of any submissions from the parties if they had attended. It is not absolutely clear on the evidence exactly how and when the parties received the final award, but on 19 July 2004 Mr Musawi's solicitors wrote to the defendants' solicitors asking if they would honour the award. Later in the year the defendants through their solicitors orally stated they would not do so.

80. Mr Musawi pleads the effect of the award as follows:

"a. Mr Musawi is beneficially entitled to 60.4% of the Wembley land and Messrs Reza and Saleh Shahrestani are beneficially entitled to 39.6% thereof.

b. Mr Musawi has no interest in the Nursing Home.

c. Mr Reza Shahrestani is entitled to a fair remuneration in respect of any work he did in relation to the Wembley land after September 26, 1999.

d. Entitlements to any income from the Wembley land are as follows:

i. Income accruing from November 22, 1988 to December 28, 1990 belongs to Mr Musawi;

ii. Income accruing between December 28, 1990 and September 26, 1999 belongs to Messrs Reza and Saleh Shahrestani.

iii. Income accruing after September 26, 1999 is owned in accordance with the parties' respective shares in the Wembley land."

It was not submitted that this was an inaccurate summary, although it may be added that the award also determined that Mr Musawi was entitled to retain a total of £300,000 which he had received as rental for the nursing home in Hove.

81. It is common ground that an arbitration agreement, effective in English law, was made on 27 September 2003 appointing Ayatollah Araki as arbitrator. It was accepted that the applicable law for the arbitration agreement, as opposed to the law or principles to be applied by the arbitrator, was English law. Although the Rome Convention, incorporated into English law by the Contracts (Applicable Law) Act 1990, does not apply to arbitration agreements, the common law requires in my view the applicable law to be the law of a country, for the reasons which I have already given. In the case of this arbitration agreement, there is no country other than England whose law could arguably apply to it. Accordingly, issues concerning the arbitration agreement itself are governed by English law.

82. It is also common ground that the arbitrator was required by agreement to apply to the subject matter of the dispute and its resolution the principles of Shia Sharia law. This was an agreement which the parties were entitled to make under section 46(1)(b) of the Arbitration Act 1996: see **Halpern v Halpern** at para 36 per Waller LJ and *Dicey, Morris & Collins: Conflict of Law (14th ed.)* at 16-050 to 16-053.

83. The parties agree that Ayatollah Araki was qualified for appointment as an arbitrator who would apply Shia Sharia law. The defendants admit Mr Musawi's pleading that the Ayatollah has *"at all material times been a highly qualified Shia Islamic scholar and Islamic judge."* At the time of the arbitration he was President of the Islamic Centre in England which is a centre for the teaching of Shiite Islam. He returned to Iran in 2005 and is now teaching at the University of Qom. He is one of the 86 members of the expert parliament, all of whom are ayatollahs and whose function is to choose the religious leader of Iran. He gave evidence in these proceedings both as an expert and as a witness of fact on certain issues. In his evidence, he explained that an ayatollah is a person whose level of knowledge of the Shiite Islamic religion and Sharia law is such as to give him the authority to rule on theological and legal disputes.

84. The defendants submit that the arbitrator never made a final award. They rely on the facts that no-one attended on 20 June 2004 and that the date of the award is 3 June 2004. I reject this submission. The arbitrator signed and issued what he described as his "*final and irrevocable judgment"*. The parties' non-attendance on 20 June 2004 meant that there was no reason for the arbitrator to re-consider the award already prepared by him. There is no reason not to treat the award as his final award.

85. Reza had some complaints about the conduct of the arbitration but none was pleaded and the time to challenge or appeal the award under section 70(3) of the Arbitration Act 1996 has long since passed. They were not relied on by Mr Sen as grounds for disputing the validity of the award.

86. The two principal grounds on which the defendants resist enforcement of the award are (i) that the matters ruled on in the award are outside the scope of the arbitration agreement and (ii) the relevant parties to those issues were not parties to the arbitration.

87. On the scope of the arbitration agreement, the defendants' case is that the purpose of the arbitration was to determine the issue of management charges left unresolved by the alleged August 2002 agreement. As originally pleaded, and in Reza's first witness statement, it was said that the arbitrator had jurisdiction to determine only the management charges. On the face of it, it is highly improbable that the parties would have referred an issue as to the amount to be allowed for management charges to an Islamic scholar. In his second witness statement Reza revised his evidence and stated that the arbitrator:

"*had jurisdiction to determine if we were at the 1990 Agreement or at the 2002 Agreement, then the management charge to be determined if the latter is correct.*"

88. Mr Musawi's case is that the arbitration was to determine all the issues between the parties as to the Wembley land and the nursing home in Hove, particularly Mr Musawi's claim to an interest in the Wembley land.

89. In my judgment, Mr Musawi is correct and the defendants' contention is unsustainable. There are a number of reasons for this conclusion.

90. First, the terms of the arbitration agreement signed on 27 September 2003 made no reference to management charges. The dispute which is referred to in the agreement is "*the dispute over the Wembley land… and also the nursing home… which is related to the issue of the disputed land."* In context, this is, as it appears to me, a clear reference to the existing and substantial dispute as to whether Mr Musawi was entitled to an interest in the Wembley land and, if so, its size.

91. Secondly, the context of the arbitration agreement is not the alleged August 2002 agreement and a dispute about management charges. The context is the dispute about the existence and size of Mr Musawi's interest in the Wembley land which had been the subject of correspondence before and after 8 August 2002, and which had escalated with registration of a caution by Mr Musawi. I have already referred to the correspondence, from which can be seen the rival positions of the parties, including Mr Musawi's contention that he was entitled to a 60.4% interest.

92. Thirdly, it is clear from the submissions made by the parties to the arbitrator that they saw the scope of the arbitration as including primarily the dispute over Mr Musawi's alleged interest in the Wembley land. This is as true of Reza's submissions as it is of those of Mr Musawi. The minute of Reza's statement on 27 September 2003 deals with the entire history of the arrangements, includes only one passing reference to Reza wanting to take account of 13 years of management of the Wembley land, makes no mention of the alleged August 2002 agreement or the division of interest said then to have been agreed and concludes with Reza saying that "*in his view, Mr Musawi had no rights in the land other than the one million pounds already paid."*

93. Similarly, the submissions made in writing by Reza on 28 September 2003 are directed to the basic issue of Mr Musawi's interest in the Wembley land. They rely on the 1990 agreement and assert that he has no interest in the land, but only a contractual right to the payment of £1 million on its sale. There is no mention of management charges. Although there are brief references to the discussions in August 2002 (not said to be a binding agreement) and to management charges in the minute of the hearing on 10 January 2004, the submissions range over the whole area of the dispute.

94. On 13 January 2004 the arbitrator issued a non-binding, preliminary judgment upholding Mr Musawi's claim to an interest based on an agreement made in 1999. It was thus clear that the arbitrator did not understand the arbitration to be concerned with management charges or with a choice between the 1990 agreement and the alleged August 2002 agreement. In his response dated 15 January 2004, Reza did not suggest that the arbitrator had misunderstood the scope of the arbitration agreement but, on the contrary, went carefully over all the principal facts relating to the history of the parties' involvement in the land, and in particular taking issue with the view that an agreement had been made in 1999.

95. For all these reasons, I conclude that the entire dispute relating to ownership of the Wembley land and related matters, such as entitlements to income and management charges, was the subject of the arbitration agreement. In his closing speech, Mr Sen accepted that it was difficult for the defendants to sustain their position that the arbitration was restricted to the issue of management charges.

96. The defendants' second principal defence to Mr Musawi's claim to enforce the award relates to the parties. This is an issue which has been bedevilled by the confusion and inconsistencies on the defendants' part as to the ownership of the Shahrestani family interest in the Wembley land. As I have already found, REI was not only the legal owner of the Wembley land but also its beneficial owner subject to any interest of Mr Musawi. It is common ground that on the Shahrestani side only REI itself had any beneficial interest in the land. Given that the principal purpose of the arbitration was to determine Mr Musawi's interest (if any) it was essential that the parties should include REI and/or those able to control REI.

97. It is, in my judgment, clear that REI was a party to the arbitration. The arbitration agreement was signed by Reza and Saleh and, while the agreement names them as parties, Reza is described and identified as director of REI and Saleh as a shareholder in REI. Importantly, the letter to the arbitrator dated 29 September 2003 and signed by Reza, was not only written on REI paper and signed by Reza as its director, but also referred to the arbitration as "*RE International (UK) Ltd vs Mr S Musawi*" and thanked the arbitrator for listening to "*both parties*". Consistently with this, the enclosures were headed "*in the case: RE International (UK) Ltd vs Mr S M Mousawi*". One stated the "*Position of RE Intentional as of today*" and the other began *"RE International require the following actions to be taken"*. Likewise, when Reza wrote to the arbitrator on 15 January 2004 in response to the preliminary award, the enclosure was headed "*Facts regarding RE International (UK) Ltd (Shahrestani) v Mr Musawi*". Three times the question was put to Reza in cross-examination as to whether it was his position that REI was not a party to the arbitration, without an answer being given. When he was then asked whether he was putting REI forward as a party in his communications with the arbitrator, he agreed that he was.

98. The final award refers to the dispute "*between the Shahrestanis (Sayyed Reza Shahrestani and Sayyed Saleh Shahrestani) and Mr Sayyed Mohammed Musawi*". It determines that Mr Musawi has a 60.4% interest in the site and that "*the Shahrestanis*" have a 39.6% interest. It is not, in my judgment, significant that the award does not refer in terms to REI. The arbitration and the award was not concerned with how the Shahrestani interest in the land was owned or who on the Shahrestani side was or were the owner or owners, but with the split (if any) between the Shahrestani side and Mr Musawi. As Reza and Saleh had signed the arbitration agreement, it was not unreasonable for the arbitrator to refer to them as parties to the dispute, but in any case he knew of REI's involvement from the submissions made to him and it is to be noted that he addressed his letters of 7 and 18 June 2004 to REI as well as to the individuals.

99. For present purposes, it is enough to conclude that Reza and Saleh signed the arbitration agreement as agents for REI, that REI fully participated through Reza in the arbitration and that REI is bound by the award. However, the true position, in my view, is that Reza and Saleh were also signing the agreement on behalf of those members of the Shahrestani family who claimed a direct or indirect interest in the Wembley land, that is themselves and their father Mehdi. Again, the precise division of ownership on the Shahrestani side was of no concern to the arbitrator. The purpose of the arbitration was to resolve the issue of ownership between their side and Mr Musawi. If claims to ownership or other benefits were made by individuals on their side, that purpose would be served if they too were parties. It was Ehsan's evidence that Reza had authority to act in relation to the Wembley land and the arbitration on behalf of Mehdi and Saleh. It was Reza's evidence that he attended the meeting on 7/8 August 2002 to carry out his father's instructions and the pleaded case is that he attended the meeting on behalf of himself, Saleh, REI, Dr Shahrestani and Mehdi. It was ultimately the defendants' case that Reza and Saleh held their shares in REI on behalf of Mehdi. In his response to the preliminary award, Reza stated that he had spoken to Mehdi and given him a copy of the preliminary award and that Mehdi "insisted that he must have a meeting with yourself before the final judgment". No meeting took place but the arbitrator addressed his letters of 7 and 18 June 2004 to Mehdi, as well as others. Reza denied in cross-examination that he was acting on behalf of Mehdi in the arbitration. Mehdi did not give evidence. The overwhelming probability in my judgment is that Reza was acting with the authority and on behalf of Mehdi's side of the Shahrestani family in the arbitration. As by then Dr Sahrestani apparently had no direct or indirect interest in the Wembley land or in REI, it matters not whether Reza had authority to act also on his behalf.

100. The issue of the identity of the parties to the arbitration agreement is to be decided according to English law, as the applicable law for the agreement. Unusually, the arbitrator gave evidence. His understanding as to the parties is not determinative, particularly where as I have mentioned the dispute was essentially between Mr Musawi and the Shahrestani side. However, the arbitrator's evidence was that he understood that REI was a party, represented by Reza and Saleh. Like Mr Musawi, he regarded Dr Shahrestani as an important figure, and

as a party. I am not in the least surprised that they thought that he was still involved in the Wembley land, in view of the confusion and inconsistencies on the Shahrestani side as regards ownership. But the important point is not that Dr Shahrestani was or was not a party to the arbitration, but that REI, which I found was the beneficial owner of the Shahrestani interest, was a party. Mr Sen pointed to one reference in the award to *"the dispute between Mr Shahrestani and Mr Musawi over the Wembley site."* Mr Sen suggested that this must refer to Dr Shahrestani, although this is not clear from a reading of the award. In all other places, the findings in the award refer to *"the Shahrestanis"*.

101. Beyond finding that REI was the beneficial owner of the Shahrestani interest in the Wembley land, it is not necessary to make findings as regards any indirect interest of Shahrestani family members as shareholders in REI. I am satisfied that Dr Shahrestani was no longer interested but it is unnecessary to find whether Reza and Saleh held their shares for themselves, for Mehdi or more loosely as family assets. I am very sceptical of the late evidence and change in case that Mehdi, rather than Reza and Saleh, were in truth interested in REI or the land, and I specifically do not find that it has been established. I am concerned that this late development was directed at apparently vesting ownership in a person, Mehdi, with as remote a connection with the arbitration as possible, to support the defence (originally raised with reference to Dr Shahrestani) that the award was not binding on the correct parties as regards ownership.

102. In the context of the arbitration, Mr Sen again deployed his submission that any interest of Mr Musawi was in the shares of REI, not in the Wembley land itself. Thus, the argument ran, the correspondence in 1998 and 1999 which underpinned Mr Musawi's case for a 60.4% interest, and the alleged August 2002 agreement which the defendants said gave Mr Musawi a maximum 47.7% interest, concerned interests in the shares of REI, not the land. The advantage to be gained from this submission, if correct, was that on the defendants' case Mehdi was the beneficial, although not the legal, owner of the shares in REI and was therefore a necessary party to the arbitration. It was submitted that he was not a party to the arbitration and that the award, which itself must be directed at interests in the shares of REI, was not therefore enforceable.

103. This argument breaks down at every stage. First, there is nothing in the correspondence in 1998 or 1999, or in the documents relevant to the alleged August 2002 agreement, or in the arbitration agreement, or in the submissions to the arbitrator, or in his award, to support the argument. It is clear from those documents that they are concerned with Mr Musawi's interest (if any) in the land. The suggestion that any of them was concerned with an interest in REI was not pleaded nor supported by the defendants' witness statements nor put to Mr Musawi.

104. Mr Sen relied on a number of documents. First, he relied on a letter dated 6 September 2000 from REI's solicitors to a property newspaper. They write that the addressee had told them that Mr Musawi *"has an interest in the company which owns the property"*. This is hearsay of no weight: the maker of the alleged statement did not give evidence and it was not put to Mr Musawi. Secondly, Mr Sen relied on a draft letter written by Ehsan and addressed to REI's accountant. The draft letter states that Mr Musawi owns 49% of REI. This is an odd letter for the defendants to rely on, as it was their case that in October 2000 Mr Musawi had no interest in the land or in REI. Ehsan's evidence was that a copy was given to Mr Musawi, which seems to be correct because he disclosed it, and that it was prepared to help Mr Musawi obtain a loan. Ehsan said that he still had the original draft and that it was never sent to its addressee. It was, he said, untrue that Mr Musawi had a 49% interest in REI. The draft letter was not put to Mr Musawi. Thirdly, Mr Sen relied on a letter dated 8 August 2002 to Reza in which he requests Reza to register "*our share in 4.1 acre land in South Way, Wembley, which was purchased around 1987, and registered in the name of RE International"* in the name of a Panamian company. In the same letter he refers to Dr Shahrestani as the original shareholder of REI. By drawing the distinction between Dr Shahrestani as a shareholder in REI and his own share in the land, this letter does not support Mr Sen's submission but tells against it. Finally, Mr Sen relied on a letter dated 13 January 2003 from Saleh to REI's accountants, in which Saleh referred to a letter dated 23 December 2002 (not in evidence) and stated *"as you know we are disputing his shares within the company"*. Saleh did not give evidence and this letter was not put to Mr Musawi. It carries no weight.

105. I am satisfied that there is no basis for the submission that it was ever contemplated, still less agreed or the subject of the arbitration award, that Mr Musawi would have an interest in the share capital of REI. Further, as I have already said, I am not satisfied that Mehdi was the beneficial owner of the shares held by Reza and Saleh but on the balance of probabilities I am satisfied that in making the arbitration agreement Reza and Saleh were acting for their side of the Shahrestani family including Mehdi.

106. I therefore reject the defences to Mr Musawi's claim to enforce the arbitration award.

Mr Musawi's alternative claims

107. As I have already mentioned, Mr Musawi's alternative claim based on an agreement in 1999 is not pursued and his further alternative claims based in either rescission of the 1990 agreement for misrepresentation or its termination for breach fall away as a result of the failure to stamp the 1990 agreement.

108. A fourth alternative claim was added by re-amendment. Like his other alternative claims, this proceeds on the basis that there is not an enforceable arbitration award. As the 1990 agreement is inadmissible and as any claim by the defendants to beneficial ownership rests on that agreement, Mr Musawi claims that he remains the sole beneficial owner of the Wembley land by virtue of the 1987 agreement.

109. By way of defence, the defendants plead that at all times after 28 December 1990 the parties dealt among themselves on the basis of a common assumption that Mr Musawi had no interest in the Wembley land and he is thereby estopped from asserting any such interest. It is also pleaded that it would be inequitable for Mr Musawi to assert such interest, without repaying sums received from Dr Shahrestani under the 1990 agreement, reimbursing loan repayments and other sums in relation to the Wembley land and compensating the Shahrestanis for time spent on managing the land. Further, by virtue of the terms of the 1987 agreement, any profit must be divided equally between Mr Musawi and the Shahrestanis.

110. This raises a number of difficult legal issues which do not arise for decision on the view which I have taken of the arbitration award. These include the proper scope of estoppel by convention and its relationship with an agreement which is inadmissible through lack of stamping. I do not propose to decide these issues. So far as the facts are concerned, there is little room for controversy. From the end of 1990 until he terminated the 1990 agreement in 1999 for alleged breach, Mr Musawi and the Shahrestanis proceeded on the common basis that he had no interest in the Wembley land. This is clear from the documents and from the witnesses' evidence. From 1999 to the arbitration award in June 2004, Mr Musawi asserted that by reason of an agreement reached in 1999 he was entitled to a 60% interest in the land. From 1999 to August 2002, the defendants maintained that he had no entitlement to an interest in the land, although they were willing to reach agreement to grant him an interest, and from August 2002 they asserted that agreement had been reached giving him a maximum interest of 47%. The basis for the common position that Mr Musawi had no interest in the Wembley land, and in the defendants' position until August 2002, was the 1990 agreement.

111. Over the period from the end of 1990, as well as before, the Shahrestanis funded loan repayments and interest, and other costs and expenses associated with the land. Under the terms of the 1987 agreement they would have been entitled to seek reimbursement of the loan repayments and interest. Not doing so because of the common understanding that the 1987 agreement had come to an end represents a detriment to them.

112. Whether the defendants would be entitled to an equal share of any profits arising on the sale raises an issue on the 1987 agreement which is not easy. The agreement proceeds on the basis that Mr Musawi would provide or be responsible for the finance and Dr Shahrestani would undertake the development. The written agreement does not expressly provide, nor as I find was there an oral agreement, as to the consequences if there were no redevelopment. Would Dr Shahrestani still be entitled to half the profit resulting simply from a rise in the value of the land. The better view, I think, is that he would. The work and expertise to be provided by Dr Shahrestani, for which he was to be rewarded with half the profit, did not relate exclusively to an actual development of the land. Actual development was not, I think, a pre-condition to his entitlement to a half-share of the profits.

113. As trustee of the legal title to the land, REI would be entitled to a lien on the land and on the proceeds of its sale for all its proper expenditure and, arguably, for an allowance for the time spent on management of the land.

114. Although not pleaded as such, an alternative approach would be that the effect of the common assumption was that the 1988 agreement had ended. The defendants could not assert an interest on the basis of the inadmissible 1990 agreement. Neither side would therefore have a contractual basis for an interest. The question of beneficial interest would therefore fall to be determined on the basis of a resulting trust by reference to the parties' contributions to the acquisition costs of the land.

Conclusion

115. For the reasons given, I uphold Mr Musawi's primary claim to enforce the arbitration award and I dismiss the defendants' counterclaim. I will hear submissions on the appropriate form of order.

Gwilym Harbottle (instructed by Tilbrooks) for the Claimant
Aditya Kumar Sen (instructed by Sohal & Co) for the Defendants