JUDGMENT : The Hon. Mr Justice Morison: Commercial Court. 20th October 2006.

1. This judgment contains the reasons for the decisions which I reached on the various applications before me. I gave my decision orally last week. The essence of the dispute between the various parties related to the issue whether the disputes should be arbitrated rather than litigated. That question itself raised a number of issues about rescission and avoidance of contracts. Some of the applications are what might be called, more or less routine, such as adding parties and permission to serve out. I have dealt with the arguments on the issues as the arguments were presented to me, in more or less detail as appropriate.

2. This case started off with one defendant: Mr Privalov. The essence of the case against him is that he acted in breach of his duties as the head of the second claimants, FML who are owned by the first claimants, Fiona, who are in turn owned by Sovcomflot, who are a Russian entity owned by the Russian State and own and, through Fiona, operate one of the largest commercial shipping fleets in the world. Fiona operates through one ship companies and Claimants 3 – 12, and 14 – 27 are some of them. Claimant 13 is a company incorporated to receive commissions arising out of Fiona's ship building transactions; claimant 28 is Sovcomflot and Claimant 29 is a Swiss company whose business was to act as chartering agent for Sovcomflot. The present applications do not concern claimants 30 to 78. Another contested application arises out of Fiona's application to amend to make claims on behalf of these companies against persons named as defendants 23 – 29.

3. The essence of the claims made in the part of the action with which this judgment is concerned centres on the activities of three named individual defendants, Mr Privalov, Mr Skarga, the second defendant, and Mr Nikitin the third defendant and one individual, Mr Borisenko, who is explicitly referred to but is not joined as a defendant. This latter individual is still acting on behalf of Sovcomflot, in a senior capacity.

4. What is alleged by the claimants is that the third defendant, Mr Nikitin, who conducts his shipping business through one ship Liberian and Cypriot companies which are controlled through the fourth Defendant, itself a BVI company, called Standard Maritime, paid bribes to Mr Privalov, Mr Skarga [who was at one time the Director General of Sovcomflot and director of Fiona and FML] and Mr Borisenko in order to procure advantageous commercial terms for his own fleet at the expense of Sovcomflot's business.

5. The applications before the Court

   (1) the application by the Claimants and the 22nd to 29th Proposed Claimants:
   (a) for permission to amend paragraphs 56 to 65 of the Re-Amended Claim Form in the form set out in exhibit "SWS6-1" to the sixth affidavit of Mr Stuart Wayne Shepherd and for permission to amend the Amended Particulars of Claim by adding paragraphs 297.1 to 297.49 in the form set out in exhibit "SWS6-2" to the sixth affidavit of Mr Shepherd ("the time charter claims");
   (b) for permission to add the 22nd to 29th Proposed Claimants as parties to the proceedings;
   (c) for permission to add the 20th to 22nd Proposed Defendants as parties to the proceedings;
   (d) for permission (if required) by the 22nd to 29th Proposed Claimants to serve proceedings out of the jurisdiction; and
   (e) for permission (if required) by the Claimants to serve proceedings out of the jurisdiction on the 20th to 22nd Proposed Defendants.

   (2) the application by the Claimants and the 22nd to 29th Proposed Claimants to restrain the 21st and 22nd Proposed Defendants from continuing the arbitration proceedings that have been commenced before Mr Mark Hamsher in respect of charterparties relating to the vessels "FILI", "AZOV SEA", "TROPIC BRILLIANCE", "IZMAYLOVO", "ROMEA CHAMPION", "LIGOVSKY PROSPECT", "NEVSKIY PROSPECT" and "ANICHKOV BRIDGE" ("the arbitration");

   (3) the application by the 3rd to 17th and 19th Defendants and the 20th to 22nd Proposed Defendants for the proceedings against the 20th to 22nd Proposed Defendants (insofar as they concern the dispute as to the entitlement of Owners to rescind the aforementioned charterparties and/or the arbitration agreements contained therein, and the validity of any such rescission) to be stayed pursuant to section 9 of the Arbitration Act 1996; and

   (4) the application by the 2nd to 17th and 19th Defendants and the 20th to 22nd Proposed Defendants for the proceedings in respect of the time charter claims to be stayed pending determination by award in the arbitration.

6. The additional claims which fall for consideration are what are happily called the 'time charter claims'. For the purpose of adding these claims there need to be additional claimants [Nos. 22 – 29] and additional defendants.[Nos. 20 – 22]. Hence the application for permission to amend includes an application to join additional claimants and defendants.

7. It is the claimants' case that the chartering of the vessels to companies controlled by Mr Nikitin forms part of a dishonest conspiracy to injure the claimants' business by unlawful means and that these claims are simply a part of the general claim to that effect: it is but one part of a pattern of corrupt activity in which Mr Skarga and Mr Nikitin have been engaged. It is alleged that this corrupt activity spanned a period from 2001 to 2005 and involved diversion of commissions from Fiona to Nikitin companies to the tune of about US$32 million; a deception whereby Fiona was tricked into paying an additional US$3.4 million in relation to a debt owed to RCB, a Russian Bank; un-commercial sale and leaseback arrangements with Nikitin companies and others involving 8 vessels and a claim for compensation for US$14.03 million in respect of the entry into the sale and leaseback transactions

and for US$71,672,596 in respect of the termination of the sale and leaseback transactions; the exercise by Nikitin companies and tohers of a series of shipbuilding options and the acquisition of shares in Fiona companies holding the benefit of shipbuilding contracts, all of which were said to have been obtained at no or no proper consideration, leading to a claim of US$172 million; and the surrender of rights owned by Fiona companies to Nikitin companies at a substantial undervalue [US$64 – 77 million]. In pursuit of the conspiracy it is alleged that documents were forged, in the sense that they were backdated and purported to be made when they were not in relation both to a release of security acquired by Fiona for no consideration and to a service contract with Mr Privalov.

8. Mr Nikitin and Mr Privalov are resident within this jurisdiction. The claimants have arrived at a settlement with Mr Privalov and, apparently also with Mr Borisenko, both of whom are helping the claimants to unravel what they consider to be a massive fraud on the Sovcomflot business.

9. The primary objection to the joinder of the time charter claims is that all the charters were on a Shell Time Form with an arbitration clause and the claims, if permitted should be stayed under section 9 of the 1996 Act or the court should stay them pending arbitration under its case management powers. The relevant clause is this:

"41(a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.

(b) Any dispute arising under this charter shall be decided by the High Court in London to whose jurisdiction the parties hereby agree.

(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred … to arbitration in London, one arbitrator to be nominated by Owners and the other by Charterers, and in case the arbitrators shall not agree to the decision of an umpire, whose decision shall be final and binding upon both parties. Arbitration shall take place in London in accordance with the London Maritime Association of Arbitrators, in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force.

(i) A party shall lose its right to make an election only if:

(a) it receives from the other party a written notice of dispute which

(1) states expressly that a dispute has arisen out of this charter;

(2) specifies the nature of the dispute; and

(3) refers expressly to this clause 41(c)

(b) it fails to give notice of election to have this dispute referred to arbitration not later than 30 days from the date of receipt of such notice of dispute. ……

(d) It shall be a condition precedent to the right of any party to a stay of any legal proceedings in which maritime property has been, or may be, arrested in connection with a dispute under this charter, that that party furnishes to the other party security to which that other party would have been entitled in such legal proceedings in the absence of a stay. .."

10. The following dates are relevant:

On 12 April 2006 the Claimants purported to rescind the eight time charters. Of the 8, 5 were identified and described in the proceedings as the "Ongoing Charters" and 3 are described as having ceased. The names of the vessels under Ongoing Charters are identified in paragraph 297.44 of the Points of Claim [page 210] and the three vessels in respect of which charters had ceased are identified in paragraph 297.47 [page 211].

On 25 April an arbitration was instituted by the Nikitin charterers in relation to the 8 'time charter' vessels' and they appointed Mr Hamsher as their arbitrator. In the arbitration there are, effectively, two claims of what be called a routine nature relating to The TROPIC BRILLIANCE. That vessel grounded and the charterers blame the owners and claim as damages any sums that might be recoverable from them by way of any General Average Claim. The second is a claim by the Charterers for 'a balance of account' in respect of that vessel. Otherwise, the arbitrator is being asked to determine the effectiveness of the Owners' rescission of the charters purportedly on the grounds set out in the Points of Claim, namely the allegations of bribery and the various dealings allegedly done in bad faith.

On 27 April the claimants purported to rescind the jurisdiction and arbitration clauses in the charterparties. What was said in the letter of that date from Messrs Ince & Co on the Claimants' behalf was this: *"As you are aware, the owners of the relevant vessels subject to those charterparties have rescinded the charterparties. This includes the arbitration clauses in the charterparties. If there can be any doubt about that, then, without prejudice to that contention, owners of the relevant vessels hereby rescind the agreements to arbitrate any disputes under the charterparties as well."*

11. On this aspect of the case the arguments, in a nutshell, are these. The Owners say that the arbitration clause is not apt to determine a dispute as to whether the charterparty was lawfully rescinded for fraud and bribery. Second, they say that as a result of the rescission of the charterparties the arbitration clause has 'gone'. The charterers say that the clause is wide enough, and in any event the arbitration clause survives the attempted rescission of the contracts, as it represents a separate and distinct bargain between the parties which survives termination of the contract in which it appears ['the matrix contract']. In any event rescission is not an option in

relation to those 5 charterparties which have been fully performed because restitutio in integrum is no longer possible; and in relation to the existing charterparties it is clear from the terms of the pleading that the owners want to allow the charterparties to run on and are, effectively, sitting on the fence. In any event, the Owners have known of the alleged bribery as long ago as October 2005 and they delayed for 6 months before serving their rescission notices.

12. The first question which arises, at this stage, is whether the arbitration clause, on its proper construction, gives the arbitrators jurisdiction over the disputes outlined above? The second question relates to the claim in rescission. Do the claimants have a good arguable case that the matrix contracts have been rescinded and, if so, would the rescission bring the arbitration clause to an end or did it have a separate existence which survives rescission?

The arbitration clause

13. This is an interlocutory application and not the trial of the action and, therefore, my task is to decide whether the Claimants have shown a good arguable case for adding these claimants.

14. I start with the construction of the clause. Mr Flaux QC for the Claimants submits that the words in clause 41(c) *"any such dispute"* is a reference back to the words in (b) "*any dispute arising under this charter"*. He submits that those words are narrower in scope than "*in connection with"* or *"with regard to"* and he adopts what was said by Rix J in ***Chimimport Plc v G d'Alesio SAS*** [1994] 2 Lloyd's Law Reports 366 at 371-2. Thus, claims for misrepresentation and breach of a collateral contract were held not to be claims arising from disputes under a contract: ***Fillite Runcorn Ltd v Aqua-Lift*** (1989) Construction Law Reports page 66 at page 79 where Nourse LJ said this: "*The preposition "under" presupposes that the noun which it governs already has some existence. It operates in time as well as in space. I think that it means 'as a result of' and with reference to'. The disputes as to express or implied terms in the composite Peterborough contract arise both as a result of and with reference to that contract and are therefore within clause 14 of the heads of agreement. The disputes as to negligent misstatement, misrepresentation under the misrepresentation Act 1967 and collateral warranty or contract, while they may in a loose sense be said to arise with reference to the contract, cannot be said to arise as a result of it. They all relate to matters which either preceded the contract or were at best contemporaneous with it. Those disputes are therefore outside clause 14 and I agree with Slade LJ that the material words are not wide enough to include disputes which do not concern obligations created by or incorporated in the contract.*"

15. Here, there are four claims: first, the tort of conspiracy; second a claim for damages arising from the payment of bribes, third a claim for dishonest assistance in a breach of fiduciary duty by the charterers in procuring the charterparties by bribes and fourth a claim that by reason of the bribes the charterparties have been validly rescinded and for consequential restitution. It was submitted that the first three claims were not claims in respect of disputes 'under' the charterparty; rather they were disputes in relation to matters which occurred before the charterparty was made or at the time they were made. In no sense do these disputes arise as a result of and with reference to the charter. It is possible to argue that the fourth claim is a claim 'under' the charter since it is an averment that the Owners are no longer bound by the contract. However, the claim for restitution cannot be a claim under the contract since it is predicated on the basis that there is no contract because of bribery. There are no claims which presuppose the existence of the contract, or which are concerned with the terms of the contract.

16. In reply, Mr Flaux QC drew my attention to ***The Angelic Grace*** [1995] 1 Lloyd's Law Reports page 87, where the Court of Appeal considered the words of an arbitration clause which provided that "*all disputes from time to time arising out of this contract shall … be referred to the arbitrament of two arbitrators carrying on business in London.*"

17. There, on the charterers' orders the Angelic Grace was required to tie up alongside another vessel which they owned. During the unloading operation the weather turned nasty and during the subsequent manoeuvring by the Angelic Grace there was a collision between the two vessels. Both parties blamed each other for what happened and the owners brought a salvage claim. It was held by Rix J that the claims and cross-claims were governed by the arbitration clause. The essence of his judgment was that the "*collision claims in the present case raised disputes which are within the arbitration clause. To some extent the claims in contract and in tort are true alternatives (for example the charterers' counterclaim). To some extent they may not be true alternatives, but they clearly overlap (as in the owners' claims for breach of the warranty of safety and for fault in collision) In any event all claims and cross-claims arise out of the same incident, the identical set of facts which have to be investigated by the arbitrators …. The parties clearly contemplated that a collision or other accident of navigation could give rise to a charterparty dispute …*"

18. In upholding the Judge's decision, the Court of Appeal, Leggatt LJ, said this: "*The question in a nutshell is whether the relevant claims and cross-claims arise out of the contract. It is common ground that the question must be answered in the light of* ***The Playa Larga*** *[1983] 2 Lloyd's Law Reports 171, in which the Court upheld the dictum of Mr Justice Mustill that a tortious claim does arise out of a contract containing an arbitration clause if there is a sufficiently close connection between the tortious claim and a claim under the contract. In order that there should be a sufficiently close connection, as the Judge said, the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other.*"

19. And the Court also emphasised the fact that parties most probably wished to have one stop adjudication, so that if a part of the claim or cross claim arose out of the contract it was inherently likely that the parties intended that they should all be heard in one forum if the facts were closely knitted together.

20. On the question of construction of the arbitration clause, Mr Pollock QC made the following points, which I summarise:

    (1) Clause 41(b) is a jurisdiction clause. The parties must have intended that the clause would cover all disputes relating to the charterparty since it was inherently improbable that the parties intended to permit disputes which might be said not to arise *'under'* the charterparty to be outwith the clause leaving uncertainty as to which courts where had jurisdiction. This was re-inforced by clause 41(c)(i)(2) which required a party exercising its option to go to arbitration to serve a written notice of dispute stating that *"a dispute has arisen out of this charter"*. In other words, the words of the clause use the words *"under"* and *"out of"* interchangeably. Reference was made to Mustill & Boyd on Commercial Arbitration where it was said that words arising *"out of"* a charter were apt to cover every dispute except a dispute as to whether there had ever been a contract at all.

    (2) The modern approach is to adopt a *"generous"* interpretation of dispute resolution clauses and to apply a presumption in favour of one stop adjudication: see Bingham LJ's dictum in ***Ashville Investments Ltd v Elmer Contractors Ltd*** [1989] QB 488 at page 517F "*I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings*".

21. In my judgment, I must approach the question of construction by reference to the words used by the parties which represent their mutual intentions. I assume for present purposes that the arbitration clause survives the rescission of the contracts by the Owners. I see the force of Mr Pollock QC's submission relating to the notice of dispute and I agree with him that the clause should be read as though the words *"under"* were equivalent to "*arising out of"*. So the question is whether those words are apt to include disputes between the parties as to whether the charterparty is void by reason of the alleged bribes which are said to have induced the making of the contract. What is being alleged is that the will of the Owners was not expressed by their acceptance of the charterparties; there was no true meeting of minds because the apparent or ostensible will of the Owners had been suborned. It is the Owners' case that they never made these contracts in the sense that they never became bound by their terms because they had not truly consented to them. In a sense this is no different from a case of *non est factum* or mutual or unilateral mistake.

22. This distinguishes the case from the decision of the Court of Appeal in ***Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*** [2003] 1 Lloyd's Law Reports page 455. There, the question before the court was whether an argument about illegality was one which fell within the arbitrator's jurisdiction. It was held that the 'illegality' did not impeach the arbitration clause itself; whereas the bribery arguments, if sustainable, do impeach the whole contract.

23. As it was put by Ralph Gibson LJ at page 461:

    "*Mr Longmore pointed out that a party to a contract the making of which he says was induced by fraud, would be surprised to be told that he is bound to have the issue tried by an arbitrator appointed under a clause in that contract. He also pointed out that when such a party alleges that the contract is void for illegality, he might well be astonished to be told that the issue of that illegality is to be determined by an arbitrator appointed under it.*

    There is, I think, force in these comments, but I add that in my view they are no more than forceful comments. Mr Justice Steyn said that the question of fraud or initial illegality was capable of being referred to arbitration. He did not qualify the clearly stated principle that if the validity of the arbitration clause itself is attacked the issue cannot be decided by the arbitrator. His reference to direct impeachment was, as I understand his judgment, to distinguish an attack upon the clause otherwise than by the logical proposition that the clause falls within the containing contract. When it is said that the contract was induced by fraud it may well be clear that, if it was, the making of the independent arbitration clause was also induced by fraud."

24. Hoffmann LJ in the same case said [at page 468]

    "*Mr Longmore therefore accepts, as he must, that for some purposes the arbitration clause is treated as severable and may survive the termination or even the avoidance with retrospective effect of all the other obligations under the contract .. He submits however that the severability doctrine cannot apply to any rule which prevents the contract from coming into existence or makes it void ab initio. In particular, it does not apply to a statute or other rule of law which makes the contract void for illegality.*

    It seems to me impossible to accept so sweeping a proposition. There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence."

25. In my judgment, the question whether the Owners ever made this contract cannot be said to be a dispute which arises out of the contract; and certainly does not arise "under" the contract. The arbitrator does not have jurisdiction to decide this issue; the court alone does. There is no overlap between what the claims of a routine nature involve and the issue of bribery.

26. But even were I wrong about this, it seems to me that the Court and not the arbitrator should decide the jurisdiction issue. Although the modern trend is to treat the arbitrators as having power to decide for themselves their own jurisdiction [*Kompetenz Kompetenz*] English Law gives the Courts the ultimate right to determine such issues. In this case, the Owners have not participated in the arbitration and, under section 72(1)(a) of the Arbitration Act 1996, May, by proceedings in Court for a declaration or injunction or other appropriate relief, question whether there is a valid arbitration agreement. They could also await the outcome and challenge the Award under section 67 on ground of lack of substantive jurisdiction. Regrettably, as I have already affirmed in another case, the view has been taken by a number of Judges in this Division that under section 67 there is a full re-hearing with evidence, rather than some more limited 'review' suitable for an appellate process. This means that if after the arbitrator has carried out a detailed, albeit one-sided, review of the material put before him and made detailed findings of fact, the Owners could ask for the facts to be re-heard by the Court. This would be a considerable waste of resources. At least if the court were to exercise its powers under section 72(1)(a) there would be one trial only. In any event, an Award which did not bind Mr Nikitin would be of limited value and it is doubtful whether the Award would, or could, be relied upon at the trial of this action.

27. An alternative way in which the substantive jurisdiction of the arbitrator may come before the Court is on an application under section 9 f the 1996 Act. Mr Pollock QC submits that this is a proper case for a stay under section 9 of the Act, which provides:

> *"(1) A party to an arbitration agreement against whom legal proceedings are brought … in respect of any matter which under the agreement is to be referred to arbitration may … apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
>
> *(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

28. The onus of showing that the case ought not to be referred to arbitration rests on the Owners. The proper approach to an application under this section is to be found in the judgment of Waller LJ in ***Ahmed Al-Naimi v Islamic Press Agency Inc*** [2000] 1 Lloyd's Law Reports page 522. It is necessary to set out a substantial quotation from the judgment:

> ***"Approach to application for stay under section 9***
>
> *The judge in this case was dealing with the matter under the Rules of the Supreme Court. It is by those rules which this court must judge whether the judge erred in the exercise of his discretion. If this court was to be of the view that he did err, then this court should act under the new CPR although I am doubtful whether in the context of an application under section 9 the approach will be very different.*
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> *Under the old rules, and in the context of a dispute as to whether there was a contract, and in particular a contract that contained an arbitration clause, His Honour Judge Humphrey Lloyd QC considered how the court should approach a section 9 application in **Birse Construction Ltd v St David Ltd** [1999] BLR 194. His decision was reversed on appeal (see Transcript Friday 5 November 1999), but I do not understand his suggestions as to approach, save conceivably on one aspect, to have been criticised. The reversal resulted (a) from the fact that the parties had failed to make clear to him, that they were not agreed that he should decide the question whether there was an arbitration agreement on the affidavit evidence alone, and (b) because the majority thought that without that agreement, it would be an illegitimate exercise of discretion in that case, to decide to determine, and then to determine the question whether there was a contract upon affidavit evidence, which showed a genuine dispute of relevant fact; (see Pill LJ at page 4 and Aldous LJ at page 7). His approach must of course be read with that last point in mind.*
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> *I find that what he had to say about the approach to a section 9 application very helpful, and both Counsel before us suggested that it provided useful guidance. It is particularly helpful to note his attitude to the situation in which what is in dispute is not whether a clause exists at all but as to precisely what is covered by that clause. I will set out the relevant passage in full:-*
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> *"It is common ground that the following courses are open to me:*
>
> *1. To determine, on the affidavit evidence that has been filed, that an arbitration agreement was made between the parties, in which case the proceedings will be stayed in accordance with section 9 of the 1996 Act since article 5 and clause 41 of the JCT Conditions contain an arbitration agreement;*
>
> *2. To stay the proceedings but on the basis that the arbitrator will decide the question of whether or not there is an arbitration agreement since section 30 of the Arbitration Act 1996 provides -*
>
> *(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to -*
>
> *(a) whether there is a valid arbitration agreement,*
>
> *. . .*
>
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*
>
> *(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.*
>
> *Sub section (2) is a reference to provisions such as section 67 which states -*
>
> *(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court -*

(a) challenging any award or the arbitral tribunal as to its substantive jurisdiction; . . .

3. Not to decide the question immediately but to order an issue to be tried. RSC Order 73, rule 6(2) provides -

Where a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject matter of the proceedings falls within the terms of such agreement, the court may determine that question or give directions for its determination, in which case it may order the proceedings to be stayed pending the determination of that question.

4. To decide that there is no arbitration agreement and to dismiss the application to stay.

Mr Darling for the plaintiff contended that there should be no stay of the proceedings unless the court was satisfied that there was clearly an arbitration agreement. I do not consider that the position is that clear cut. The circumstances of the application must be taken into account. I accept that if it is clear on the evidence that a contract did or did not exist then the court should so decide for it cannot be right either to direct an issue pursuant to Order 73, rule 6(2) or to leave the "dispute" to be determined by an arbitral tribunal. The dominant factors must be the interests of the parties and the avoidance of unnecessary delay or expense. Where the rights and obligations of the parties are clear the court should enforce them. Unless the parties otherwise agree section 30 of the Arbitration Act 1996 now permits an arbitral tribunal to decide questions of jurisdiction where it might not previously have been competent to do so. It is not mandatory and, contrary to a suggestion made by Mr Palmer, the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. Indeed RSC Order 73, rule 6 in making express provision for a decision as to whether there is an arbitration agreement suggests that normally a court would first have to be satisfied that there is an arbitration agreement before acting under section 9 (and that a dispute about such a matter falls outside section 9). There will however be cases where it would be right to defer the decision, particularly, for example, if the determination of whether or not a contract was made also embraces the determination of the scope of the contract and its ingredients. In some cases it would be better for the court to act under Ord 73 r6; in other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. One of the matters that a court is bound to take into account is the likelihood of the challenge to an award on jurisdiction under section 67 or, under section 69, on some important point of law connected to the existence of the agreement for which leave to appeal might be given (if it is plainly discernible at that early stage), eg its proper law, since it cannot be in the interests of the parties to have to return to the court to get a definitive answer to a question which could and should be decided by the court before the arbitrator embarks upon the meat of the reference. Such a course would mean that the arbitral proceedings would not be conducted without unnecessary delay or expense. On the other hand the court must bear in mind that it must not act so as to deprive the party of the benefit of the contract that it has made whereby disputes are to be referred to arbitration. The recent case of ***Azov Shipping Co v Baltic Shipping Co*** *[1999] 1 Lloyd's Rep 68 (which was not cited to me) supports the approach that the court ought to decide questions relating to the existence or the terms of the arbitration agreement for there may otherwise be a real danger that there will be two hearings: the first before the arbitrator under section 30 of the Arbitration Act 1996 and the second before the court on a challenge under section 67."*

I would entirely support the above approach in relation to an application under Order 73 rule 6(2) subject only to the point ultimately made by the Court of Appeal. If the court decides that it is the court which should determine whether the matters the subject of the action are the subject of an arbitration clause, unless the parties were agreed that the matter should be resolved on affidavit, then, if there is a triable issue, directions should be given for trying that issue."

29. In this case, taking into account the arguments about rescission I would have decided, had the point fallen for determination, that this is plainly a case where the existence or otherwise of the arbitration agreement is best decided once, and by the court. There will be substantial factual material to be examined and detailed submissions on the law. On balance and at this stage it seems to me that the arguments on behalf of the Claimants are likely to be right and that they have, as I would now estimate, a better than evens chance of establishing their case on rescission and that the arbitration clause does not bite. This is a far cry from a case where the court considers it more likely than not, let alone 'virtually certain' that the agreement will be held to exist. Therefore, even had I decided that the arbitration clause was apt to cover the jurisdiction question I would have concluded that a one trial adjudication was preferable to a trial by arbitrator followed by what would be a re-trial by the court.

Rescission and the independence of the arbitration clause.

30. Was rescission effective to bring the time charters to an end and, if so, did the arbitration clause survive the rescission?

31. I start with rescission and the argument advanced by the prospective defendants to the Time Charter claims that there has been no effective rescission of those contracts by the Owners.

32. Mr Pollock's arguments were, assuming rescission was effective:

(1) Jurisdiction and arbitration clauses are independent and separable contracts.

(2) Merely demonstrating an event/reason/factor which renders the matrix contract unenforceable is not relevant to the continuing existence of the arbitration/jurisdiction clause.

(3)To demonstrate that the separable contract has itself been voided it is necessary to show something which specifically impacts on that contract or choice of forum clause. It has to be demonstrated and alleged not just that the conduct relied upon was aimed at the matrix contract. In this case, whilst the Owners may say that they would not have entered into these particular contracts had there been no bribery, the fact is that they were in the business of chartering out their tankers and would, probably, have entered into contracts on the Shell Time Form in any event. In other words the alleged bribes played no part in the agreement as to jurisdiction and arbitration.

(4) Section 7 of the 1996 Act makes the position clear and he relied also on a passage from the third edition of Merkin on the Act and a decision of Colman J. in *Vee Networks v Econet Wireless International Ltd* [2005] 1 Lloyd's Law Reports 192 at paragraphs 19 – 22:

19. "Prior to the coming into force of the 1996 Act the English courts had worked out a doctrine of separability, as expressed in ***Harbour Assurance Co (UK) Ltd v. Kansa General Insurance Co Ltd*** *[1993] QB 701, the substance of which was that, if the scope of an arbitration clause were sufficiently wide to cover the dispute, an arbitrator would, because of the separability of the agreement to arbitrate, have jurisdiction conclusively to determine whether the matrix contract was void ab initio, for example on the grounds of fraud or illegality, or was voidable, for example for misrepresentation or repudiatory breach. This jurisdiction was held to exist provided always that there was a binding agreement to arbitrate. The essence of the separability doctrine was that of insulation of the agreement to arbitrate from the matrix contract to the effect that the agreement to arbitrate would not be rendered void or invalid or avoided solely because the matrix contract was void or invalid or had been avoided. Unless the agreement to arbitrate was independently void or invalid, that agreement would remain in effect and the arbitrator could determine conclusively whether the matrix contract was enforceable. Thus, for example, as in that case, if the matrix contract were illegal and void, that matter of illegality could be conclusively determined by the arbitrator unless the agreement to arbitrate was also independently rendered illegal and void by the legislation in question. However, where one of the parties to the arbitration had not agreed to become a party to the matrix contract it could invariably be said that the party in question was not bound by the arbitration agreement. That, however, is quite different from a case of statutory illegality, which renders the matrix contract void.*

20. Section 7 of the 1996 Act reflects this concept of separability. Its effect in substance is to confirm that arbitrators have jurisdiction conclusively to determine issues on the voidness or voidability of the matrix contract to the effect that they do not lose jurisdiction by reason only that the matrix contract may be void or voidable. However, Section 7 leaves intact the requirement that the arbitration agreement should be valid and binding. If it is not valid and binding for reasons other than the bare fact that the matrix contract is not valid and binding, then Section 7 does not enable arbitrators to exercise conclusive jurisdiction in respect of any issue relating to the matrix contract. Thus in ***Harbour Assurance v. Kansa,*** *supra, the question relevant to the arbitrator's jurisdiction was whether the regulatory legislation which was said to render the matrix contracts of reinsurance illegal and void also independently rendered the agreement to arbitrate illegal and void.*

21. If, in accordance with section 7, an arbitrator determines that the matrix contract is, for example, void ab initio by reason of illegality and it is not in issue whether the arbitration agreement is also illegal and void, the tribunal can continue to exercise such jurisdiction under the arbitration agreement as its scope permits. For example, if there were an alternative claim in tort or for restitution which was within the scope of the clause, the tribunal would continue to have jurisdiction conclusively to determine that claim. The argument, advanced from time to time on behalf of EWN as this matter developed, that, once the tribunal had decided that the matrix contract was void ab initio, the tribunal's jurisdiction to determine other issues was automatically spent save as to orders for costs, is, in my judgment, misconceived. It reflects a misunderstanding of the principle of separability underlying section 7. Neither the inclusion in the last sentence of that section of the words "it shall for that purpose" nor the contents of Article 16 of the UNCITRAL Model Law Support EWN's argument.

22. If it is not only in issue whether the matrix contract is void or otherwise non-existent but also whether the arbitration agreement itself is independently void or non-existent, that issue can be determined by the arbitrator, but not conclusively. This is where section 30 comes into play. The arbitral tribunal is by that provision given "competence" to rule on its own "substantive jurisdiction". The former word identifies this section effectuating the concept of Kompetenz Kompetenz and the phrase "substantive jurisdiction" is thus statutorily defined by section 82(1) as confined to the issues identified in Section 30(1), (a), (b) and (c). The issue identified in (a), "whether there is a valid arbitration agreement", has to be understood as referring to an issue as to the validity of the arbitration agreement while giving full effect to the principle of separability under Section 7 which I have already considered. Accordingly, for the purpose of determining an issue as to substantive jurisdiction under Section 30(1) it is not sufficient to proceed from a conclusion that the matrix contract is or is not void or invalid to the conclusion that therefore the arbitration agreement is or is not valid. The relevant issue can only be whether the latter agreement is, independently of the validity or invalidity of the matrix contract, valid or invalid. "

33. For the Claimants, Mr Flaux QC reiterated his position that on the case advanced by the Claimants they were never truly bound by the Charterparties or by any clause therein.

34. As I have already said, it seems to me that this case is akin to a case of non est factum and mistake which goes to the root of the existence of the contract. It is this feature which distinguished it from other cases. It is not simply the fact that the matrix contract has been rescinded: it is the basis on which that has been done. I fail to see how one can distinguish between the unenforceability of the matrix contract without necessarily impugning the validity of the arbitration clauses. The claimants are saying that they never truly agreed to enter into the contracts, or, if severable, the arbitration agreements. If rescission is an available remedy then the whole contract, arbitration clause and all, tumbles to the ground. The fact, if it be one, that the Owners would have entered into other charters on Shell-Time Forms seems to me irrelevant. The question is whether they entered into these particular agreements to arbitrate; not whether they would have voluntarily entered into other similar clauses had they not been bribed.

Rescission

(1) Is it too late to rescind in relation to some or all of the time charters;
(2) Has the right to rescind been lost as a result of delay or acquiescence?

I start with the parties' arguments:

35. For the Claimants Mr Flaux QC submitted that:

(1) A transaction which has been entered into as a result of bribery may be rescinded: Millett LJ in ***Logicrose Ltd v Southend United FC*** [1988] Times Newspaper 5 March:

"*It is well established that a principal who discovers that his agent in a transaction has obtained or arranged to obtain a bribe or secret commission from the other party to the transaction is entitled, in addition to other remedies which may be open to him to rescind the transaction ab initio or, if it is too late to rescind, to bring it to an end for the future.*"

(2) Rescission is the act of the party rescinding, not the act of the court. When rescinded a contract is treated both in law and equity as "*non-existing*": see Bowen LJ in ***Newbbigging v Adam*** [1886] 34 Ch.D.582 at 592.. Mr Flaux QC cited paragraph 13-13 of the 13th edition of Snell's Equity:

"*If a claim for rescission succeeds, then it is clear that the transaction in question is brought to an end with retrospective effect. The action which "triggers" is not the order of the court but, rather, the act of the person who claims to be entitled to rescind: the role of the court is merely to adjudicate upon that entitlement and to make consequential orders so as to achieve restitution in integrum. Both of the functions of the court involve what may be referred to as "discretion" – but only in the weakest sense of that word. Even though rescission is a matter of substantive right, it is sensible to consider it as an equitable remedy, for only a court of equity could do what was necessary to make restitution, e.g. take accounts and make allowances for deterioration in the property dealt with by the contract.*"

(3) He relied upon a decision of the High Court of Australia in ***Alati v Kruger*** (1955) 94 CLR 216 at 223-224; per Dixon CJ, cited with approval by the English Court of Appeal in ***O'Sullivan v Management Agency and Music Limited*** [1985] QB 428 at 457:

"*If the case had to be decided according to the principles of the common law, it might have been argued that at the date when the respondent issued his writ he was not entitled to rescind the purchase, because he was not then in a position to return to the appellant in specie that which he had received under the contract, in the same plight as that in which he had received it: **Clarke v. Dickson**, E.B. & E. 148. But it is necessary here to apply the doctrine of equity, and equity has always regarded as valid the disaffirmance of a contract induced by fraud even though precise restitutio in integrum is not possible, if the situation is such that, by the exercise of its powers, including the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, it can do what is practically just between the parties, and by so doing restore them substantially to the status quo: **Erlanger v. New Sombrero Phosphate Co.**, 3 App.Cas. 1218, at pp.1278, 1279, **Brown v. Smith** (1924) 34 C.L.R. 160, 165,169; **Spence v.Crawford** [1939] 3 All E.R. 271, 279, 280. It is not that equity asserts a power by its decree to avoid a contract which the defrauded party himself has no right to disaffirm, and to revest property the title to which the party cannot affect. Rescission for misrepresentation is always the act of the party himself: **Reese River Silver Mining Co. Ltd. (Directors of the) v. Smith** (1869) L.R. 4 H.L. 64, 73. The function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction ab initio, and, if it is valid, to give effect to it and make appropriate consequential orders: see **Abram Steamship Co. Ltd. v. Westville Shipping Co. Ltd.** [1923] A.C. 773. The difference between the legal and the equitable rules on the subject simply was that equity, having means which the common law lacked to ascertain and provide for the adjustments necessary to be made between the parties in cases where a simple handing back of property or repayment of money would not put them in as good a position as before they entered into their transaction, was able to see the possibility of restitution in integrum, and therefore to concede the right of a defrauded party to rescind, in a much wider variety of cases than those which the common law could recognise as admitting of rescission. Of course, a rescission which the common law courts would not accept as valid cannot of its own force revest the legal title to property which had passed, but if a court of equity would treat it as effectual the equitable title to such property revests upon the rescission.*"

(4) He submitted that the principle was accurately summarised by Virgo, The Principles of the Law of Restitution, 2nd edition, 2006:

".. rescission will hardly ever be defeated in equity by the bar of restitution or counter-restitution not being possible, since restitution can be made in respect of virtually all benefits received if the benefit can be valued, even if it is not possible to return the specific benefit to the defendant."

(5) There is an example where the court was prepared to hold that rescission was available to a defrauded principal even where the contract had been fully performed: ***Armstrong v Jackson*** [1917] 2 KB 822 at 826.

Where there has been fraud or bribery as alleged here, Mr Flaux QC submitted that

"*practical justice can be achieved by taking an account of the profits made by the charterer (whether with or without an .. allowance for work and effort) and ordering an equivalent amount to be paid to the shipowner. Alternatively, the shipowner can be required to make restitution of the freight or hire received from the charterer in return for a payment by the charterer of a sum equal to the value of the use which the charterer has had of the vessel: in practice, these sums can be set-off against each other and a net sum ordered to be paid by either the charterer or the shipowner.*"

(6) Whilst affirmation of the contract will be a bar to rescission, a person who becomes suspicious of matters entitling him to rescind a transaction does not affirm a transaction merely because he continues to perform the contract whilst steps are taken to verify the position. In ***Senana yake v Cheng*** [1966] AC 63 at 79, the Privy Council held that the representee, to whom a fraudulent misrepresentation had been made was "*entitled to make all inquiries and to endeavour to learn all the facts.*"

(7) The question that must be asked is whether the representee has elected to affirm the contract, elected to rescind the contract or made no election. Mr Flaux QC relied upon the decision of Mellor J. in ***Clough v London & North Western Railway Co*** [1871] LR 7 Exch. 26 at 34:

"*In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or has he elected to avoid it? Or has he made no election?*

We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.

And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined. But we cannot see any principle, and are not aware of any authority for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission is such a change of position as would preclude the defrauded party from exercising his election to rescind."

(8) On the facts the Owners were entitled if not required to carry out detailed investigations of the time charters and take advice from an expert as to their true value before seeking to make these claims and "*it cannot seriously be suggested that the charterers have acted to their detriment in the interim in respect of the ongoing charters believing that the shipowners would not exercise any right to rescission they had.*"

36. Mr Pollock's arguments [and I merely summarise them] on the question whether there has been a valid rescission can be summarised thus:

(1) Restitutio in integrum is not possible. The charterers cannot give back what they have received; they will have entered into sub charters and bills of lading will have been issued. None of this is capable of being 'unscrambled' [my expression]. In any event, rescission is not a remedy which Sovcomflot need; if their case is proved there are a whole panoply of remedies available to them so that they can be recompensed or given restitution: for example they can be given an account of the profits which the defendants. Under the existing charters, hire is still being paid and the Claimants are not asking for their vessels back. The only purpose of a claim in rescission is to get rid of the arbitration clause.

(2) In any event, any right to rescind has been lost by delay and affirmation. On 12 April 2006 the Claimants sought to rescind the time charters; on 25 April 2006 the Nikitin defendants commenced arbitration, having appointed as their arbitrator Mr Hamshire. Two days later, the claimants purported to rescind the arbitration clauses in those time charters, the defendants having taken the point that a rescission of the charterparty was not sufficient to rescind the arbitration clause which was a separate and distinct contract. In effect, on the facts, the arbitration clause was purportedly rescinded after the arbitration had commenced. On 8 July 2005 Mr Mednikov of Sovcomflot wrote to the managers of the six time charter vessels and said:

"We believe it is high time to meet and discuss the current situation with the view of possible termination of the concerned charters by mutual agreements."

There were documents which showed that assignments were being made by Owners of the hire due under some of the six time charters between July 2995 and April 2006.

Decision on Rescission

(1) The relevance of the submissions at this stage is to determine whether the Claimants have shown a fully arguable case that the Time charters and their arbitration clauses have been validly rescinded. If they have been, then that has a bearing on the arbitration question, although I have already concluded that the bribery

issue does not fall within the arbitration clause: it is a purely tortious claim with no contractual overlap. In my view the case is fully arguable despite the legal problems that are caused when the contract in question has been fully performed and where third party rights may be involved. In my judgment, the law is flexible enough to permit rescission even in such cases. Restitutio in integrum may not be possible in the literal sense but that, I think, is not a bar to the remedy. In this case, there can be returns of hire which may be just restitution in relation to contracts induced by bribery. This is not the time or occasion for a detailed reasoned judgment on this issue, which remains for argument and debate at the trial.

(2) I am also of the view that the remedy of rescission has probably not been lost by delay or other acts. As for delay, I agree with Mr Flaux QC that the Claimants were entitled to await the outcome of their inquiries of an expert whose task was to review the commercial terms of the charterparties in question and the options granted in relation to them. In my judgment the court will not, in such circumstances, deprive a party otherwise entitled to the remedy of rescission. The loss of the right to elect will, as a matter of law, I think, only arise where the relevant facts are or ought to be known to the party who has such a right. In this case, the claimants were entitled to await the outcome of their expert's investigation before exercising their right to elect. As it was put in the eighth witness statement of Stuart Shepherd, the partner responsible for the case on behalf of the Claimants:

"*Without waiving privilege, I can also indicate that, as regard the timing of the rescission of the charters, it was not considered that an election could properly be made until my firm and Counsel considered that we were in a position to put our name to a pleading containing an allegation that the charters had been procured by fraud and our clients were completely satisfied that this was the case. Although my clients considered from as long ago as October 2005 that the charters were very probably tainted by fraud involving Mr Nikitin, and my firm considered that it was likely that that was the case, the distinguishing feature in relation to the time charters was that Mr Privalov had no involvement in that aspect of Sovcomflot's business.*"

I conclude, therefore, that the Claimants have a good case for saying that they had a right to elect the rescind the charters and have exercised that right timeously.

A Case Management Stay

37. Both Mr Pollock QC on behalf of the Nikitin defendants and Mr Dunning QC on behalf of Mr Skarga [the third to seventh and nineteenth and second named prospective defendants respectively] submitted that I should stay these proceedings against them and allow the matter to proceed by way of arbitration. I do not consider that such arguments as they adduced on this issue as of any weight. Either the case should be referred to arbitration or it should not. I have endeavoured to say why there is no arbitration clause which governs the principal issue between the parties, namely whether the contracts were procured by bribery. I accept, of course, that arbitrators are well qualified to decide such issues and the mere fact that there are serious issues of fraud to be decided says nothing about which forum is better suited for the trial of them. Here, the case will need extensive interlocutory hearings about disclosure, since the contemporary documents as may be available will largely determine the outcome. There will, no doubt, be applications for disclosure against persons not parties to the action and this is something which the courts can order but arbitrators may not.

I refuse a stay as I do not consider that any good reason for one has been shown.

Should Mr Skarga be joined as a defendant?

38. In an able submission on his behalf, Mr Dunning QC submitted that Mr Skarga, who emphatically denies what is alleged against him is a respectable citizen of the Russian Federation. He resides in Moscow and currently serves as a senator in the Russian Parliament and also represents Russia at the Parliamentary Assembly of the Council of Europe. This claim relates to events between May 2000 and October 2004. He was appointed as the President and Director General of Sovcomflot by the then Prime Minister, Vladimir Putin. His relationship with Sovcomflot, which is wholly owned by the Russian State was governed by a contract of employment dated 30 June 2003. It is his case that the action against him in this jurisdiction is designed to get round the limitation on liability contained in his contract of employment and in the substantive provisions of Russian law. Because Sovcomflot is owned by the State not all the decisions of the Board of directors are taken on purely commercial grounds: socio political considerations may be taken into account as well. The Board of Directors largely comprise Russian Government Ministers, and the Russian Ministry of Transport is expected to keep a close watch on Sovcomflot's operations. Mr Skarga was succeeded as President and Director General by Mr Frank who was Minister of Transport during Mr Skarga's tenure of the post. It is somewhat curious that Mr Frank has only recently chosen to make allegations relating to Sovcomflot's business at this stage rather than earlier. Russia would be the natural forum for this dispute yet no similar proceedings in that jurisdiction complaining about the way the Sovcomflot's business was done has been brought there. Until these proceedings no complaint about Mr Skarga's performance of his duties had previously been made and he was paid substantial compensation when his position came to an end.

39. His position is to be contrasted with that of Mr Borisenko, his de facto deputy. Whilst there is evidence that Mr Borisenko was involved in bribery, he remains in post. He is alleged to be a main conspirator. Mr Dunning QC submitted that: "*It is readily apparent that these proceedings are simply an attempt by the Claimants to have the political tussle between the old and the new management of Sovcomflot and their associated political backers played out in the Commercial Court in London.*"

40. The Claimants have failed to produce any evidence to support their case against Mr Skarga to show that he received any bribes or was associated with any of the companies who are said to have benefited from the allegedly corrupt transactions. Their case is based largely on the evidence of Mr Privalov which has been 'bought' through a settlement of the claims against him and with the evidence of Mr Borisenko. This paucity of evidence is despite the fact that the Claimants have been trawling through the documents and have come up with no direct evidence to show that Mr Skarga was involved in bribery.

41. There is a heightened standard of proof when serious allegations are made, as here. The concept of a heightened standard was articulated by Lord Bingham in ***B v Chief Constable of Avon & Somerset Constabulary*** [2001] 1 WLR 340 and has received judicial support since then and is to be applied in this jurisdiction when allegations of fraud and conspiracy are alleged: see per Thomas J. in ***Sphere Drake Insurance Ltd v Euro International Underwriting Limited and Others*** [2003] 1 Lloyd's Law Reports 525 at 544, paragraphs 106 and 107.

42. He submitted that I should not give permission to serve the proceedings out of the jurisdiction upon Mr Skarga. He supported the application that these proceedings should be stayed pending arbitration. A valid arbitration had been commenced in relation to what might be called a straightforward shipping matter and the court should exercise its very wide discretion to stay its proceedings to await the outcome of a related arbitration. Those proceedings are already on foot and "*there is a significant overlap between the arbitration and the court proceedings (both of which are running concurrently in respect of the issues arising out of the proposed time charter claims)*."

43. In the arbitration Messrs Ince and Co are asserting that the charters are void because of the bribery and are asserting their right to rescind.

44. The proposed time charter claims are not seriously arguable and he relies on the report in response to that prepared on behalf of the Claimants.

45. There is a serious risk of prejudice to Mr Skarga if the proposed amendments are made and if the court refuses to stay the action pending arbitration. It would be oppressive for him to have to face two sets of proceedings at once. He is a stranger to this jurisdiction and good reasons must be shown for bringing him here with the inconvenience and annoyance that will follow.

Decision

46. In my judgment, there is sufficient evidence against Mr Skarga to justify the Claimants in advancing the claims against him. Without going into the detail, the case against him is circumstantial, at this time, rather than direct. In the first place he was directly involved in relation to each of the transactions which are the subject of the claims; there is evidence that he was aware that bribes were being paid by the Nikitin interests to Mr Privalov and Mr Borisenko; he had a close relationship with Mr Nikitin and it is inconceivable [so the claimants allege] that if Mr Nikitin was bribing the other two he was not also bribing Mr Skarga. There is evidence to suggest that Mr Skarga was involved [after his employment had ceased] in the creation of a false paper trail to establish that the claimants had entered into an agreement whereby they released for no consideration all of the security they held for the guarantees they had given in dubious circumstances. The agreement was supposed to have been made as of 23 March 2004 when in fact documents were created in 2005 and backdated. There is also evidence, say the claimants, that Mr Skarga had participated in the creation of a false contract of employment for Mr Privalov so that the latter could leave his employment with the Sovcomflot Group with substantial payments and a release from restrictive covenants to enable him to start work with the Nikitin group of companies.

47. It would be wrong to say any more at this stage. The answer to the question whether the claimants have advanced a credible case against Mr Skarga is 'yes'.

48. For reasons which I have already given I do not think that it would be sensible to stay these proceedings pending arbitration. But I do agree with the thrust of the submission that it would be wrong that there should be two sets of proceedings [one in the arbitration and one in the courts] dealing with the question of the arbitrators jurisdiction and issues of bribery and fraud. I am asked to make an anti arbitration injunction against the Nikitin defendants to stop them from trying to proceed with the arbitration in relation to the time chartered vessels. Having concluded that these issues are best dealt with in the court and bearing in mind the determination as I see it of the Nikitin defendants to pursue arbitration unless stopped by order I consider that such an order should be made, and I dismiss the application by the defendants to the opposite effect.

49. Accordingly the conclusions which I have reached on all the applications is as follows:
    (1) the application by the Claimants and the 22nd to 29th Proposed Claimants:
        (a) for permission to amend paragraphs 56 to 65 of the Re-Amended Claim Form in the form set out in exhibit "SWS6-1" to the sixth affidavit of Mr Stuart Wayne Shepherd and for permission to amend the Amended Particulars of Claim by adding paragraphs 297.1 to 297.49 in the form set out in exhibit "SWS6-2" to the sixth affidavit of Mr Shepherd ("the time charter claims"); granted;
        (b) for permission to add the 22nd to 29th Proposed Claimants as parties to the proceedings; granted
        (c) for permission to add the 20th to 22nd Proposed Defendants as parties to the proceedings; granted.
        (d) for permission (if required) by the 22nd to 29th Proposed Claimants to serve proceedings out of the jurisdiction; granted and

(e) for permission (if required) by the Claimants to serve proceedings out of the jurisdiction on the 20th to 22nd Proposed Defendants; granted

(2) the application by the Claimants and the 22nd to 29th Proposed Claimants to restrain the 21st and 22nd Proposed Defendants from continuing the arbitration proceedings that have been commenced before Mr Mark Hamsher in respect of charterparties relating to the vessels "FILI", "AZOV SEA", "TROPIC BRILLIANCE", "IZMAYLOVO", "ROMEA CHAMPION", "LIGOVSKY PROSPECT", "NEVSKIY PROSPECT" and "ANICHKOV BRIDGE" ("the arbitration"); granted

(3) the application by the 3rd to 17th and 19th Defendants and the 20th to 22nd Proposed Defendants for the proceedings against the 20th to 22nd Proposed Defendants (insofar as they concern the dispute as to the entitlement of Owners to rescind the aforementioned charterparties and/or the arbitration agreements contained therein, and the validity of any such rescission) to be stayed pursuant to section 9 of the Arbitration Act 1996; refused and

(4) the application by the 2nd to 17th and 19th Defendants and the 20th to 22nd Proposed Defendants for the proceedings in respect of the time charter claims to be stayed pending determination by award in the arbitration; refused.

50. Since the draft judgment was sent to the parties, Mr Pollock QC suggests that I have not dealt with his primary case that the claimants had shown no arguable claim under the time charters. That was not my impression of what his primary case was but I apologise if it were. The defendants produced an expert's report which was designed to cast doubt on the assertion that the time charters were entered into other than on a market rate basis. The reason why this point was not, I think, the main plank of Mr Pollock's submission is that it is obviously hopeless. There is credible evidence before me adduced on the claimants' behalf that options were granted which could not be explained on normal commercial principles. There is direct evidence that Mr Nikitin paid bribes to Sovcomflot officials with whom he did business. It is not possible for the court to say on an interlocutory judgment that this expert or that expert is right, nor whether the evidence of bribery will stand up at trial. As I said in paragraph 48 of my judgment it is not appropriate to say any more than this at this stage. There is a credible case to be advanced but I cannot say whether it will or will not succeed at the end of the day.

Mr Julian Flaux QC, Mr Philip Jones QC, Mr Justin Higgo and Ms Jennifer Haywood (instructed by Ince & Co) for the Claimants
Mr Graham Dunning QC and Mr Jern-Fei Ng (instructed by Howes Percival) for the Second Defendant
Mr Gordon Pollock QC, Mr Nicholas Hamblen QC and Mr Vernon Flynn (instructed by Lawrence Graham) for the Third to Seventeenth and Nineteenth Defendants