CA on appeal from Chancery (Mr Justice Lightman) before Waller LJ; Longmore LJ; Sir Peter Gibson. 6th November 2007

Lord Justice Longmore :

1. This appeal is an interlude in hard fought litigation being case managed by Lightman J in the Chancery Division. It stems from a car dealing relationship between Mr Albon in England and Naza Motor Trading Sdn Bhd ("Naza") in Malaysia. Practically everything in the relationship is controversial but in broad outline it can be said that Mr Albon provided agency services in England in respect of cars imported by Naza from Malaysia and, at any rate according to Mr Albon, at a later date also in relation to cars exported from England to Malaysia.

2. Disputes arose between the parties and on 26th August 2005 Master Bragge granted Mr Albon permission to serve out of the jurisdiction a Claim Form in which Mr Albon claimed against both Naza and Mr Nasim, its controlling director and shareholder, that he had made overpayments to Naza in the course of performing the importation agreement. The grounds, on which that permission was granted, were that the claim was made in respect of a contract which was made in England and/or was governed by English law. On 28th October there was an attempt to serve the Claim Form on Naza at their office in Malaysia but that purported service was ineffective because the document which was served was marked 'Not for service out of the Jurisdiction' and was un-translated. Naza's solicitors (Finers) on 21st November pointed out that service was defective and on 14th December 2005 they withdrew acknowledgements of service which they had needlessly served. Two days later Naza served on Mr Albon a notice of dispute and conciliation prior to arbitration pursuant to an arbitration clause in a written document called a Joint Venture Agreement ("the JVA") dated 29th July 2003. On 11th January 2006 Mr Albon's solicitors said that Mr Albon had not signed that agreement; Mr Albon has ever since said that his purported signature on the document was a forgery. On 29th March 2007 (in his third judgment in this matter) Lightman J held that, since Naza has applied for a stay of the English proceedings, it is for the English court to decide whether the JVA is a genuine document and whether accordingly there is a genuine agreement to arbitrate between the parties. Naza has not yet decided whether to seek permission to appeal this judgment but has agreed (subject to any possible appeal) that it will not invite the arbitration tribunal which has now been appointed to determine that question. It has thus been agreed for present purposes that the question of authenticity will be determined finally by the English courts.

3. In the fourth judgment of 31st July 2007 Lightman J decided that, pending the decision as to the genuineness of the JVA, the arbitration should not proceed and he has granted an injunction restraining Naza from pursuing the arbitration pending resolution of that question. It is this fourth judgment that is now under appeal, permission having been granted by Rix LJ limited to the question whether the court had jurisdiction to grant the injunction. He refused permission to appeal the discretionary aspects of the judge's decision and there is now a renewed application to this court on the discretionary issues. He also adjourned to this court an application for permission to appeal the order for costs made in favour of the claimant.

4. In his third judgment, Lightman J described the issue as to the genuineness of the JVA in the following way:-

   "Mr Nasim and a Mr Naidu (an employee of Naza Motors) have made witness statements to the effect that Mr Albon signed the JVA or acknowledged his signature on the JVA in their presence at the offices of Naza Motors in Kuala Lumpur on the 29th July 2003. Mr Albon has made a witness statement to the effect that he never agreed to or signed the JVA and he suggests that his signature was "lifted" from a document which he signed at about that time at the request of Mr Nasim to be provided to the Malaysian tax authorities. Mr Albon points out a number of features of Naza Motors' case which (he argues) call into question the evidence of Mr Nasim and Mr Naidu. These include that: (1) the JVA was allegedly made on the 29th July 2003 but according to its terms was deemed to have commenced six years earlier in March 1997. One of Naza Motors' witnesses, Ms Amin, in part of her evidence states that the explanation for this given to her by Mr Nasim is that this earlier date was the date when the importation of cars into the UK commenced. Mr Nasim in his later evidence and Mr Albon however agree that trading only started in November 1997; (2) Naza Motors have produced no other document referring to the JVA; (3) Naza Motors first asserted the existence of the JVA in a letter from their solicitors FSI dated the 22nd December 2005; (4) though (according to Naza Motors) the JVA was drafted by Mr Naidu who (according to Mr Nasim) "had many years experience in drafting legal documents on behalf of the Naza group of companies" and though Mr Albon, Naza Motors, Mr Nasim and NA Carriage are named as parties, the document is signed only by Mr Albon and Mr Nasim personally, and there is no reference to Naza Motors at all on the signature page; (5) the layout and print of the last (signature) page is not the same as for the previous pages and the last (signature) page is paginated differently; (6) the "draft" which Naza Motors says was produced for discussion prior to finalising the JVA has never been produced; and (7) Naza Motors have refused to permit Mr Albon's expert Mr Brown to take the original JVA away for (non-destructive) testing and to carry out an ESDA test. I cannot resolve the issue of the genuineness of the JVA on the material before me. There must be cross-examination of Mr Albon, Mr Nasim and Mr Naidu and (in all probability) expert evidence. All I can say on the material before me is that the outcome of the trial of the issue is wide open."

5. In these circumstances Mr Robert Anderson QC for Mr Albon submits not only that it is a fair inference that the JVA (together with its arbitration clause) is not genuine but a forgery but also that it is a forgery which has been brought into existence in order to defeat the English proceedings which Mr Albon has rightly been given permission to bring. He submits that this is oppressive and vexatious conduct on the part of Naza which justifies the grant of an interim injunction preventing the arbitration from continuing while the question of forgery is decided.

6. Mr Stephen Nathan QC submits that this is impossibly controversial because it assumes that Mr Albon's forgery contention is correct but that is precisely what is still to be determined. Meanwhile he has a right to arbitrate or at any rate a right not to be restrained from arbitrating since no oppressive or vexatious conduct can be demonstrated to exist. Moreover, the whole scheme of the Arbitration Act 1996 is that arbitrators are autonomous and interference by the court is firmly discouraged, see in particular section 1(1).

7. These submissions derive from the well-known principle that a party will not be restrained from instituting or continuing foreign proceedings unless the applicant can show that to do so would be oppressive and vexatious or (as it is sometimes said) unconscionable, see Dicey, Morris and Collins Conflict of Laws 15th Edition, paras 12-069ff. A recent enunciation of the principle is contained in the judgment of Rix LJ in the *Metro* litigation, ***Glencore International v Exeter Shipping*** [2002] 2 All E.R.Comm. 1 at paras 42-43 where he said that:-

   i) the defendant must be amenable to English territorial and personal jurisdiction;

   ii) jurisdiction to grant an injunction in cases in which it is "just and convenient to do so" is then provided by section 37 of the Supreme Court Act 1981.

   iii) it will not be just and convenient unless:-

      a) the threatened conduct is "unconscionable" which primarily means it must be conduct which is oppressive or vexatious or which interferes with the due process of the court;

      b) the jurisdiction is necessary to protect the applicant's legitimate interest in proceedings in England which must be the natural forum for the litigation.

   Rix LJ then said that while these are conditions for the grant of an anti-suit injunction (and in that sense may be said to go to jurisdiction), these considerations are again relevant when the court comes to exercise its discretion. I would, however, myself prefer to say that the conditions set out in (iii) above do not, strictly speaking, go to jurisdiction. They are requirements of the exercise of a jurisdiction that the court already has. This is, however, purely a matter of nomenclature and I have, no doubt, that, while Rix LJ confined his permission to appeal in the present case to the question of jurisdiction and refused permission to appeal against the judge's discretion, he intended there to be full argument as to the principles on which the judge exercised his jurisdiction.

8. I have so far referred only to the third and fourth judgments of Lightman J. His first judgment [2007] 1WLR 2489 disposed of the application to set aside the proceedings for want of jurisdiction in Mr Albon's favour and held that England was the most appropriate forum. His second judgment related to sufficiency of service. The matter is now complicated by the fact that Naza has decided to pursue a Barrell application asking the judge to set aside his first judgment on the grounds of newly discovered documents. That application will be determined shortly; it is currently listed for a five day hearing. It is self-evident that the case as a whole has escalated beyond any reasonable proportion. Be that as it may, the judge (in paragraph 7 of the judgment under appeal) said that there were two issues for his decision:-

   "The first is whether (as Mr Albon contends) the court has jurisdiction to grant such an injunction. The second is whether, assuming that there is such jurisdiction, (again as Mr Albon contends) the court can and should grant an injunction barring Naza Motors from taking any further steps in the Arbitration Proceedings pending judgment on the Barrell application and (if that application fails) judgment on the issue of the authenticity of the JVA; or whether (as Naza Motors contends) the relief should be limited to barring Naza Motors from inviting the Arbitrators to rule on the authenticity of the JVA but should leave it to the Arbitrators to decide whether to proceed with the arbitration in the interim without prejudice and subject to any determination by this court on the issue of authenticity and accordingly of their jurisdiction. "

9. The judge held that there was jurisdiction in the formal sense of the term since (a) the matter was properly before the court which had to determine the application to set aside the permission granted to serve Mr Albon's claim form and (b) Naza had itself invoked the jurisdiction of the court by making an application to stay. That there is jurisdiction in this formal sense is not now challenged. There was some debate at the hearing as well as in a further written submission dated 25th October 2007 (after the hearing) as to whether the judge ought to have granted permission to amend the Claim Form to include a claim for an anti-suit injunction in that document but that need not concern us, if the judge was otherwise right in granting an interim injunction pending resolution of the forgery issue. We have therefore given no consideration to this aspect of the judge's judgment.

10. As to the second issue identified by the judge, Mr Nathan submits there was a misunderstanding because Naza have always accepted that, while the decision of Lightman J (that the genuineness of JVA is to be determined by the English Court) remains, it will not be asking the arbitration tribunal to determine that question. There is, therefore, according to Mr Nathan, no need for an injunction restraining the arbitrators from ruling on the agreement's authenticity. I am not convinced that the judge did misunderstand the position since before the arbitrators it would not be Naza but Mr Albon who would be challenging the authenticity of the JVA but, be that as it may, Mr Nathan's clarification of Naza's position does show how narrow the true issue before the judge was and is. Using the judge's words it is whether it is right to

    "leave it to the Arbitrators to decide whether to proceed with the arbitration in the interim without prejudice and subject to any determination by the court on the issue of authenticity, and accordingly of their jurisdiction."

11. On this issue it is said by Naza that it will be a useful exercise to exchange pleadings and conduct disclosure since these processes will have to be conducted in whatever forum the disputes will be ultimately determined. It is pointed out that ultimately the case will come down to an accounting exercise and that the preliminaries to that account can usefully be got on with as fast as possible. It is further said that it is at least not oppressive, vexatious or unconscionable for the arbitration to continue; it is also entirely consistent with the principles of autonomy of the arbitration tribunal contained in the 1996 Act.

12. The judge said that he had wavered on this question but that he had in the end decided to grant the injunction mainly because (a) there would be limited scope for the arbitrators to proceed with the arbitration until the authenticity of the JVA had been decided, (b) it would be oppressive for Mr Albon who had limited funds to be required to fight a battle on two fronts and (c) it would not be long before the question of authenticity would be decided. It can be seen from this that he had the criteria of oppressiveness and vexatiousness well in mind when he came to his conclusion. He did not at this stage of his first judgment re-articulate the assessment of the forgery issue which was contained in his third judgment but his judgments must to my mind be read together.

13. If one does that, one reaches this position :-

    i) there is a sufficiently good arguable case for Mr Albon to be justified in issuing and continuing proceedings in England;

    ii) there is likewise a good arguable case not only that Mr Albon's signature on the JVA has been forged but that the forgery was brought into existence after Mr Albon issued his proceedings in order to stop the English proceedings in their tracks;

    iii) the present position is that the English Court is to be the final judge on the question of the authenticity of the JVA so that that question will not at this stage be determined by the arbitrators.

14. In these circumstances it does seem to me that the immediate and co-extensive continuance of arbitration proceedings is indeed unconscionable (in the sense of being oppressive) for very much the reasons which the judge himself gave. It is a needless expense; it will be difficult to avoid over-proliferation of pleadings and disclosure if the parties do not know whether it will be ultimately determined that the JVA is genuine or not; it need not take long to determine the forgery issue and Naza can co-operate in a speedy resolution of that question if they wish to do to.

15. It may be right, as Mr Nathan submits, that this question of oppressiveness or unconscionability is not, strictly speaking, a question of discretion but does constitute a condition of the exercise of the court's jurisdiction. But if a judge has applied the right principle (as the judge has here), this court should give considerable weight to the judge's assessment of the facts leading him to his conclusion of unconscionability and this court should be slow to interfere with that assessment. That is particularly so when the judge has a far more intimate knowledge of the case as a result of his immersion in it over a period of months than this court can ever hope to have on an appeal listed for a day's argument. The assessment of the overall picture should be for the judge at first instance and it should only be in a clear case that this court should interfere. As it happens I agree with the judge's conclusion but even if I did not I would be reluctant to interfere with it. The fact that at present there is no more than a good arguable case in relation to factors (1) and (2) in paragraph 13 above does not militate against the judge's conclusion.

16. That leaves for consideration the argument relating to the autonomy of the arbitration tribunal. It is said that the caution exercised by the court relating to anti-suit injunctions should be increased or even re-doubled in the case of an anti-arbitration injunction. It is further said that the judge is effectively case managing the arbitration and that it should be for the arbitrators, not the English Court, to decide whether the arbitration should proceed pending resolution of the genuineness of the JVA.

17. In the ordinary case there would be much to be said for this argument. But this is not an ordinary case because of the features set out in paragraph 13 above. It is properly arguable that the agreement to arbitrate has been forged in order to defeat proceedings properly brought in England and, in addition to this, it is at present agreed that the English Court will determine that question. The autonomy of the arbitrators has thus already been undermined because they are, in any event, precluded for the present from determining that question. In these circumstances it is not right to say that the judge is attempting to case-manage the arbitration. It would be more accurate to say that he is case-managing the application before him which will determine in England the question whether the JVA is authentic or not.

18. For these reasons I consider that the judge was right to grant the interim injunction which he did.

Discretion – renewal application for permission

19. This relates to various alleged non-disclosures by Mr Albon in the course of his without notice proceedings and subsequently. The judge was addressed 'at length and in detail' by Mr Nathan and, having protested about the length of time and effort taken on the point, said merely that there was no basis for any substantial or sufficiently substantial complaint (paragraph 23). The main ground for the proposed appeal was insufficiency of the judge's reasons. By the time Mr Nathan had completed his submissions on those aspects of his appeal for which he was given leave, there was no time for oral development of his renewed application and so it was agreed that this court should consider the renewal application by reference to the skeleton. For that purpose this court has been required to read a thirteen page skeleton which was not considered to be enough on its own, since we were also

asked to read sixteen further pages of the skeleton at first instance on this topic as well as a further six page supplement. This is a completely counter productive way to conduct a non-disclosure argument in a case of this kind. It if cannot be done on two pieces of A4 paper, it probably cannot be done at all. I am not at all surprised the judge protested in the way he did and that he expressed his conclusion as shortly as he did nor in the least surprised that Rix LJ refused permission to appeal. Having now read all the material, I have come to exactly the same conclusion as the judge and Rix LJ. The idea that the judge or this court should engage with every point made in 35 pages of written submissions on a topic peripheral to the issues in the case is disproportionate and completely misplaced.

Costs

20. The judge ordered that the claimant's costs of the application for the injunction should be the claimant's costs in any event because he had succeeded. Although the costs are a matter for his discretion, the application for permission to appeal has been adjourned to the Full Court.

21. The argument for Naza on this issue is that costs are not usually ordered on applications for interim injunctions since it is not until trial that it can be known whether the claimant has the right which he asserts he has, see *Picnic at Ascot v Kalus Derigs* [2001] FSR 2 and Bean, Injunctions (9th Ed) paragraph 5.41. This is not, however, an invariable rule. The narrow issue in the present case is what is to happen while the forgery issue is being determined; that does not depend on the claimant being right on the forgery issue. Granted that the forgery issue is to be determined in England, Naza was perfectly able to form a view as to the likelihood of their persuading the court that the arbitration should continue meanwhile. The judge was entitled to conclude that they miscalculated and should suffer the consequences. This is very much a matter for the judge's discretion and I would refuse permission to appeal on this question.

Conclusion

22. I would dismiss both the appeal and the applications.

Sir Peter Gibson:

23. I agree.

Lord Justice Waller:

24. I also agree.

Mr Stephen Nathan QC & Mr Neil Kitchener (instructed by Stephens Innocent Llp) for the Appellant
Mr Robert Anderson QC (instructed by Sheridans) for the Respondents