Film Finance Inc v The Royal Bank of Scotland [2007] APP.L.R. 02/14

JUDGMENT : Mr. Justice Andrew Smith: Commercial Court 14th February 2007

1. The Claimants, to whom I shall refer as FFI, and who are represented by Raymond Cox QC, seek a determination under section 32 of the Arbitration Act 1996 that a dispute between them and the Defendants, to whom I shall refer as RBS, is governed by an Arbitration Agreement and subject to arbitration by Mr Nik Powell thereunder. RBS, who are represented by Mr Antony White QC, seek a determination to the opposite effect.

2. Section 32 of the Arbitration Act 1996 provides as follows:
"(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question of the substantive jurisdiction of the tribunal. …
(2) An application under this section shall not be considered unless…
(b) it is made with the permission of the tribunal and the court is satisfied that
(i) that the determination of the question is likely to produce substantial savings in costs,
(ii) that the application was made without delay, and
(iii) that there is good reason why the matter should be decided by the court."

3. By an award dated 21 September 2006 Mr. Powell determined that he was duly appointed under an arbitration agreement to determine the dispute, and has given permission for FFI's application. I am satisfied that the application has been made without delay and that it is likely to produce a substantial saving in costs if I determine the question whether Mr. Powell has the jurisdiction to arbitrate the dispute and that there is good reason that I should decide the question. It has not been argued that these conditions are not satisfied.

4. The issue between the parties is the meaning and effect of provisions in a "Completion Guaranty" dated "as at" 5 April 2004. The Completion Guaranty is in the form of a letter agreement. There are three parties to it: the letter was sent by FFI to RBS and The Take Six Film Ltd. Partnership ("TAX Partnership"), and was countersigned by the two addressees. TAX Partnership has no involvement in this dispute.

5. The Completion Guaranty related to the financing by RBS and TAX Partnership of a film called Tempesta. The nature of completion guarantees is explained by an uncontroversial paragraph of a witness statement made by Mr. James Shirras of FFI as follows: *"In the film industry, completion guarantees are generally issued to investors as a form of partial security for production loans. The security taken by the lenders typically includes: (a) security interests in film materials and rights to exploit films; and (b) assignments of payments due to borrowers, including licence fees payable under pre-sale distribution agreements. In other words, the security will often largely depend on a film being completed, and lenders therefore typically require a guarantee that the producer will produce the film as described and deliver it to sales agents and/or distributors so that the film will be sold and licence fees will be generated. It is the primary responsibility of the producer of a film to complete and deliver the film. A completion guarantor, such as Film Finances, guarantees the performance of the producer to effect delivery."*

6. The financing of the film was arranged by the Commissioning Producer of Film, Kasander (Tempesta Finance) Ltd. On 5 April 2004 RBS entered into a bank facility letter with them and made advances of over 4.8 million euros under it. The provision of a completion guarantee was a condition precedent for the funds being advanced.

7. Clause 1 of the Completion Guaranty provided as follows:
"1. Guaranty: Subject to the provision of this agreement we:
(a) Guaranty the Completion and Delivery of the Film (as that term is defined in Schedule I attached hereto):
(b) Agree to procure or provide the Completion Funds, if any are needed, to Complete and Deliver the Film, as aforesaid, if the Producer shall fail to do so; and if Producer fails to Complete and Deliver the Film, we shall Complete and Deliver the Film as aforesaid; and
(c) If we fail to Complete and Deliver the Film as aforesaid, we shall make the payments specified in paragraph 7(a) hereof."

8. Clause 7 provided so far as material as follows:
"In the event that we fail to Complete and Deliver the Film, our liability hereunder shall be limited to (i) the payment to each of [TAX partnership and RBS] of, and we shall pay to each of [TAX partnership and RBS] upon demand an amount equal to the Obligations (as defined in Schedule II) less so much thereof as may have been refunded to and retained by each of [TAX partnership and RBS] by insurance or otherwise indefeasibly paid to each of [TAX partnership and RBS] in connection with the Film and (ii) the payment of any additional costs or expenses of the Film which we are required to pay pursuant to this Completion Guaranty".

9. By clause 8 of the agreement it was provided:
"So long as you do not interfere with our ability to Complete and Deliver the Film pursuant to the Completion Guarantee, you may at all times, without prejudice to this Completion Guarantee without discharging or in any way increasing our liability hereunder, make further advances …".

10. I am not, of course, concerned with the merits of the dispute between FFI and RBS, but I must explain its nature. It is described by Mr Cox in his skeleton argument and I adopt his description as an accurate and fair summary of it.

11. It is common ground that only part of the loan which RBS provided to enable the film to be made was to be paid by distributors and investors on the completion and delivery of the film, leaving a shortfall of 1.3 million euros which RBS would only recover if the film generated sufficient income. On the other hand, under the Completion Guaranty RBS could recover from FFI the whole of the loan if the film was not completed and delivered.

12. The following sufficiently summarises FFI's contentions to explain the nature of the dispute. Shooting took place in the middle of 2004. The film was in effect complete by the end of October 2004 and could have been delivered on time. However from November 2004 RBS or their agents required the film to be changed because they feared a loss. Changes included re-shooting significant parts of the film and re-editing the whole of it to make its appeal more commercial. As a result the budget was exceeded and the production schedule overran. The commercial version of the film was ready only in September 2005, after the original delivery date of 31 March 2005 and indeed after an extended delivery date of 31 July 2005. However, the sales agent's forecasts for that version of the film were even more pessimistic than before the changes and in September 2005 RBS claimed that the film required by the Completion Guaranty had not been completed and delivered by 31 July 2005. The importance of this dispute is that if the film was completed and delivered RBS could only recover the "shortfall" funding from sales; if the film was not completed and delivered RBS could seek to claim from FFI under the Completion Guaranty. In fact the sales agent accepted delivery of the film and distributors who were to pay on its completion and delivery have paid. However the film has not been a commercial success and RBS now claim for funding which they have not recovered.

13. FFI advance two arguments that RBS have no claim under the Completion Guaranty. First, they say that RBS were in breach of a term of the Completion Guaranty that prohibited them from interfering with completion and delivery of the film and that since their interference caused the film not to be completed and delivered as RBS say it should have been, any failure to complete and deliver the film was caused by RBS's own breach of contract. This, FFI argue, answers the claim because the obligation of FFI under clause 1 of the Completion Guaranty is introduced by the words "subject to the provisions of this agreement". They also say that, even if they are not protected by these words, nevertheless RBS are not entitled to claim under the Completion Guaranty because of the principle of construction which prevents the party from relying in a contractual claim upon his own wrong, as explained by the House of Lords in ***Alghussein Establishment v Eton College,*** [1988] 1 WLR 587. Secondly, FFI say that RBS's conduct prevents them from complaining about the completion and delivery of the film because it amounts to forbearance on their part or gives rise to a promissory estoppel.

14. The Completion Guarantee includes at clause 14 a provision in these terms:

"In the event of a dispute relating to delivery hereunder, the provisions for arbitration specified in Schedule III attached hereto shall apply. Any dispute other than a dispute relating to delivery shall be submitted to the jurisdiction to the courts of law of England…"

It is of some significance that the word "delivery" when used in clause 14 is not printed with a capital letter "d".

(This clause is headed "Remedies", but since the Completion Guaranty provides "The captions used herein are for convenience only and have no other significance", this is to be ignored for the purpose of interpreting the contract.)

15. Schedule III to which clause 14 refers is headed "Notice Cure and Arbitration Arrangements". It has four paragraphs.

16. Paragraph 1 starts with the words:

"With respect to any dispute relating to the delivery of the Films (sic) the following provision will apply".

It is about the "Guarantor", that is to say FFI, giving notice to "Distributors" that Completion and Delivery of the Film has taken place as far as that Distributor is concerned. The term "Distributors" is defined in schedules I and II to the Completion Guaranty and means "Sales Agent". Each Distributor then has 30 days to respond by giving either an "Acceptance Notice" or an "Objection Notice". An Objection Notice requires the Distributor to specify complaints about the film, which might in turn lead to him having to develop his complaints in a "Response". Paragraph 1 provides that "Completion and Delivery of the Film" as defined in the Completion Guaranty was "hereafter" referred to as "Delivery", that word having a capital "D".

17. If they receive an Objection Notice (or an Objection Notice together with a Response), FFI as Guarantor have two alternative courses. One option is to effect delivery that complies with the points about which the Distributor is complaining and to serve what is called a "Cure Notice". The alternative course is to serve an "Arbitration Notice", that is to say a written notice "that Delivery had been effected notwithstanding the Objection Notice and that the Guarantor has elected to submit the issue whether Delivery has been effected for expedited binding arbitration in accordance with paragraph 4 hereof …"

18. Paragraph 3 of schedule III deals with the position if FFI take the first course and serve a Cure Notice. It provides that in those circumstances the Distributor shall respond either by giving an Acceptance Notice or by giving notice that Delivery had not been effected and that he elects "to submit the issue of whether Delivery has been effected (and such issue only) for expedited binding arbitration in accordance with paragraph 4 below ("Arbitration Notice")".

19. Paragraph 2 of schedule III provides that the Distributor, "Co-Producers" and FFI agree that "in the event that any dispute arises between any of the parties hereto as to whether or not Delivery has been effected such dispute will be submitted to expedited binding arbitration as hereinafter provided". ("Co-Producers" were Kasander (Tempesta) Limited and other companies who had entered into a Co-Production Agreement to make the film as an official co-production under the terms of the European Convention on Cinematographic Co-Production 1992, and had agreed to provide the financing required to meet the film's budget.)

20. Paragraph 4 of Schedule III is introduced by the words "In the event Distributor or Guarantor elects to submit the issue whether Delivery has been effected to arbitration pursuant to this agreement, the following shall apply". There then follow five sub-paragraphs. The first provides for the selection of three arbitrators. It contemplates that one will be appointed by FFI and one by the Distributor with whom FFI are in dispute, and that the appointees will choose a third arbitrator, with a default provision for appointment of the third arbitrator by the President of the Chartered Institute of Arbitrators. The persons appointed by the parties to the dispute as arbitrators are to be persons "with knowledge and experience in the United Kingdom motion picture industry and the technical delivery issues relating to motion pictures".

21. Sub-paragraph (ii) of Paragraph 4 provides for the location of the arbitration in London and for its timing: it is to commence 20 days after the selection of the arbitrators and "such arbitration shall continue on each consecutive business day therefrom until fully concluded, unless continued by the Arbitrators for good cause shown". Whatever the precise meaning of this provision it is clear that a speedy hearing is contemplated.

22. Sub-paragraph (iii) deals with the provision of documents and disclosure. It provides that the arbitrators are to have "the Delivery Material", a defined term that I shall explain further in due course.

23. I should set out sub-paragraph (iv) in full. It reads:

"The Arbitrators must determine whether Delivery has been effected or has not been effected and shall promptly notify the parties in writing of the finding made, and the arbitrators' decision shall be final, binding and not open to any appeal process."

24. Sub-paragraph (v) deals with costs of the parties to the arbitration and the arbitrators and any "court reporter's fees".

25. Returning from schedule III to the clauses of the Completion Guaranty itself, I should also refer to clause 15, which provides as follows:

"It is agreed that we shall be absolutely and unconditionally released from all our obligations under this Guaranty on the date which is 60 days after the Film has been Completed and Delivered pursuant to our obligations hereunder (or if any party to whom delivery of the Film is to be made pursuant to [the relevant provision in schedule 1] has initiated arbitration proceedings pursuant to Schedule III hereof, on the date which is 60 days after the final and binding arbitration award is made by the arbitrators), unless you have given us notice in writing that you do not consider that we have discharged our obligations in full, specifying the reasons for this."

26. The parties to the Completion Guaranty and others including Kasander (Tempesta) Ltd. also entered into a "Interparty Agreement" dated 5 April 2004 which provided by clause 7 as follows:

"Notwithstanding any other provisions of the Sales Agency Agreement and any other agreement in relation to the Film (collectively the "Agreements") and without prejudice to any rights any parties hereto might have against the Co-Producers and/or the Commissioning Producer, the parties hereto agree that they will abide with the provisions of the Completion Guarantee regarding Completion and Delivery (as defined therein) of the Film, and that such provisions should override any requirement relating to delivery contained in the Agreements".

27. The matter was considered by Mr. Nik Powell and by his award dated 21 September 2006 he concluded as follows:

"1. If one party denies a claim made by another, there is a "dispute" sufficient to satisfy an arbitration clause. There is clearly a dispute between the parties.

2. That dispute clearly relates to the delivery of the Film "Tempesta".

3. The agreements entered into by RBS and Film Finances regarding this film clearly state that Arbitration should apply in the event of dispute relating to delivery of the film, "Tempesta".

4. A dispute concerning a delivery does in my determination extend to disputes concerning the circumstances of and matters affecting the delivery of the film and not be limited solely to the matter of the physical delivery and the simple date of delivery.

5. It is clear that RBS is a proper party to this arbitration…".

28. I observe that Mr. Powell might have been under a misapprehension as to the nature of the dispute. At one point in his award he writes,

"RBS contends that the "Delivery Date", as extended, was 30 July 2005. Film Finances dispute that contention".

In fact, as far as appears from the information before me, neither party disputes that the original delivery date was duly extended to 31 July 2005.

29. Mr. Cox seeks to uphold that decision. His argument is very simple and it essentially is that RBS's claim is for payment under the Completion Guaranty on the grounds that FFI have failed to "Complete and Deliver the Film", whereas FFI contend that they have not so failed and therefore they are under no obligation to make payment. He contends that the claim by RBS and the rejection of it by FFI constitute a "dispute relating to delivery" under the Completion Guaranty, and clause 14 provides such a dispute shall be arbitrated.

30. Mr. White disputes this, arguing that the opening sentence of clause 14 should be given a narrower application, and should be so interpreted that this dispute does not fall within it. However on two points he shares common

ground with Mr. Cox. First, it is agreed that there is a single dispute between the parties which either does or does not fall within the arbitration agreement. Although FFI put forward different legal arguments that they are not liable under the Completion Guaranty, the parties are agreed that, at least in the circumstances of this case, the arbitration agreement is not be given an interpretation that would result in some of the issues between the parties falling to be determined by an arbitral reference and others by litigation. That, it is agreed, cannot have been the parties' intention.

31. Secondly, Mr White agrees with Mr Cox that in the phrase "dispute relating to delivery hereunder" when it is found in the first sentence of clause 14, the word "hereunder" refers to delivery under the Completion Guaranty and not to a dispute under it.

32. Mr White contends that clause 14 must be interpreted together with Schedule III and given an interpretation consistent with it. This, he argues, requires the words "relating to" a dispute to be given a narrow meaning which affords such consistency. In this context Mr White makes the following observations about Schedule III:

i) It is directed to a dispute between FFI and a Distributor, and not to a dispute between FFI and RBS. This is undoubtedly the case. In particular, perhaps, it provides for a reference to be triggered by the service of an Arbitration Notice by the Guarantor (FFI) or a Distributor.

ii) The Arbitrators are to determine whether Delivery has been effected or has not been effected. The Schedule does not require the Arbitrators to make any other determination and Mr White argues that that is the limit of their jurisdiction. That is a question to which I shall return, but in support of this contention, Mr White is able to point out that the Arbitration Notice to be served by FFI is a notice that they have elected to submit to arbitration the issue of "whether Delivery has been effected"; that the notice to be served by the Distributor is similarly that the Distributor has elected to submit to arbitration the issue "whether Delivery has been effected"; and paragraph 4 applies in the event that the Distributor or FFI elect to submit to arbitration the issue "whether Delivery has been effected".

iii) The arbitrators appointed by the parties are to be persons of technical expertise, and Mr White submits that this contemplates that the disputes that the parties to the Completion Guaranty intended should be arbitrated are technical disputes. This submission is supported by the stipulation that the arbitrators are to be provided with the "Delivery Material", that is to say a collection of technical materials described as the "negative and picture elements" of the film, "sound elements" of the film, the "videotape master", publicity materials, music and other documents and other materials.

iv) A speedy timetable is laid down for the arbitration.

33. Accordingly, it is argued that the parties are to be understood to be agreeing in clause 14 that they should refer to arbitration only disputes such as those to which schedule III is directed. On this basis, RBS's primary contention is the first two sentences of clause 14 are to be interpreted as if they read, "In the event of a dispute relating to delivery hereunder [arising between any party to whom delivery is to be made and FFI], the provisions for arbitration specified in Schedule III attached hereto shall apply. Any dispute other than [such] a dispute relating to delivery shall be submitted to the jurisdiction of the courts of law of England." It is said that this does not deprive the provisions of any application because clause 15 of the Completion Guaranty contemplates that there might be such a reference to arbitration and that that reference will affect the obligations arising under the Completion Guaranty.

34. I am unable to accept that this interpretation does give the first sentence of clause 14 any true application or any real meaning. The sentence is directed to a dispute about delivery under the Completion Guaranty and is directed to a dispute between the parties to the Completion Guaranty. The effect of the interpretation that RBS advance is that the agreement to arbitrate would not apply to any dispute between FFI and RBS. It does not result in an interpretation that reconciles the tension between clause 14 and Schedule III, but one that would allow Schedule III to emasculate clause 14.

35. Undoubtedly there is a tension between clause 14 and Schedule III. Schedule III is directed to the position between FFI and Distributors. I accept Mr Cox's submission that clause 14 does not refer to all the provisions in the Schedule, but only to the "provisions for arbitration" and that those are the provisions in the sub-paragraphs of paragraph 4 of the Schedule, but this only mitigates the point and does not mean that the "provisions for arbitration" in Schedule III are all aptly expressed to apply to a dispute between FFI and RBS. Those sub-paragraphs still contemplate a dispute between FFI and Distributor, and still seem best directed to a dispute of a technical nature.

36. It seems to me that the Completion Guaranty is to be interpreted so that clause 14 does apply to some disputes that might arise between the parties to it. This requires the provisions for arbitration in Schedule III to be modified so that they are to be read as referring to FFI and RBS, but it does not seem to me that it is difficult so to modify the provisions of paragraph 4 of the Schedule or to require any excessive re-writing of them. It is a well established principle of interpretation that in these circumstances provisions may be read subject to necessary modifications, and disregarding what is inapplicable or "insensible" (to use the word of Lord Esher MR in ***Hamilton & Co v Mackie & Sons,*** (1889) 5 TLR 677). This, in my judgment, will lead to an interpretation that was intended by the parties, and not allow Schedule III to drive a conclusion that the parties to the Completion Guaranty did not provide for any dispute between themselves to be referred to arbitration, a conclusion which, it seems to me, would defy their intentions. I therefore reject RBS's first argument.

37. However, RBS have a second argument: that the proper interpretation of clause 14 is that the first two sentences are to be understood as if they read, "In the event of a dispute [as to whether Delivery has been effected], the provisions for arbitration specified in Schedule III attached hereto shall apply. Any dispute other than [such] a dispute relating to delivery shall be submitted to the jurisdiction of the courts of law of England."

38. This submission is designed, no doubt, to reflect the provision of Schedule III that the arbitrators should determine whether or not "Delivery has been effected or has not been effected". Indeed, in support of the submission, it is said that this interpretation attaches appropriate significance to the identification in Schedule III of the narrow issue which under Schedule III may be submitted to and determined in arbitral proceedings and acknowledges the limited jurisdiction of the arbitral tribunal. However, it must be remembered that in paragraph 4 of Schedule III, "Delivery" is a defined term and means "Completion and Delivery of the Film as defined in the Completion Guaranty". Certainly, I see no reason to confine the application of clause 14 as RBS suggest unless "Delivery" in their formulation is given that extended meaning. However, when used in clause 14, delivery is not so defined.

39. It is therefore necessary to go to the definition that is given to the expression "Completion and Delivery of the Film" in the Completion Guaranty, which is in Schedule I. It stipulates a number of requirements including

    i) "the production of the Film in accordance with the Budget and the Production Schedule" and other specified conditions; and

    ii) The delivery of the Delivery Materials by the Delivery Date.

40. It seems to me that the dispute between the parties in this case is indeed to be characterised as essentially one as to whether Delivery, in the sense of the Delivery and Completion of the Film as defined, has been effected. RBS contend that they are entitled to payment under the Completion Guaranty because the Film was not Completed and Delivered, as those expressions are defined. FFI respond that it was Completed and Delivered because this film was delivered to the Distributors after it was completed in September 2005, and that it is not open to RBS to complain that there was not "Delivery", because in so far as the delivery that took place did not comply with what was required by the Completion Guaranty, that was caused by RBS's beach of contract and they cannot complain of it, or alternatively they cannot complain of it because of their forbearance or because FFI can rely upon a promissory estoppel.

41. Of course, FFI advance a further argument that if there was a failure to Complete and Deliver the Film, nevertheless RBS cannot claim under the Completion Guaranty because of the opening words of clause 1, "Subject to the provisions of this agreement". I acknowledge that if that formulation of FFI's argument were to dictate the characterisation of the dispute between the parties as a whole, it would follow that the dispute is not one as to whether or not Delivery has been effected and upon RBS's second submission as to the ambit of the arbitration agreement, the dispute would not fall within it. However, it is, as I have said, common ground that the clause is not to be given an interpretation that would result in some of the arguments being referred to arbitration and other remain to be litigated. The question is whether the dispute looked at as a whole is to be characterised by the difference between the parties as to whether or not Completion and Delivery of the Film has been effected, and in my judgment it is so to be characterised.

42. Even if I am wrong about this, and the dispute between the parties is to be characterised by reference to whether RBS's interference with FFI's ability to Complete and Deliver the Film prevents them from claiming under clause 1 of the Completion Guaranty, FFI submit that nevertheless the dispute relates to delivery under the Completion Guaranty and is to be arbitrated. This submission gives rise to two questions: (i) whether RBS are correct in their contention that, upon the true interpretation of clause 14, it is only disputes as to whether Delivery has been effected that are to be referred to arbitration, and (ii) if not, whether this dispute is one "relating to delivery".

43. I reject RBS's argument that the ambit of the arbitration agreement is that it covers only disputes as to whether Delivery has been effected. I cannot accept that the implication of paragraph 4(iv) of Schedule III is that the jurisdiction of the tribunal is confined to determining that Delivery has been effected or that it has not been. It states that the tribunal is to determine that question, not that the tribunal may determine only that question. The point can be made by considering the case of a dispute between FFI and a Distributor, the sort of case to which Schedule III appears to have been directed when it was originally drafted. If a Distributor served an Objection Notice identifying two purported defects and FFI served an Arbitration Notice in response, and if the tribunal concluded that one of the Distributor's complaints was justified and the other not, the tribunal would surely be expected to determine not only that Delivery had not been effected but also determine in what respect the film was defective. In my judgment they could properly determine that matter not only as part of their reasoning but as part of their award, so that the parties would know, and have it authoritatively determined, what defects had to be corrected.

44. It seems to me that the parties would not have intended that if disputes arose between them, they should in normal circumstances have to resort to both arbitral proceedings and to litigation. Of course, they did choose a dual regime under which only some disputes that might arise between them are to be referred to arbitration, and under such a regime there is always a risk that the parties might have to resort to both tribunals. However, this difficulty is much aggravated if the arbitral tribunal is to be confined to determining whether or not Delivery had been effected, and cannot, for example, at the same time determine whether the fact that delivery had not been effected was a breach of contract and if so what compensation is payable. I cannot accept that the parties

intended to make an arbitration agreement that would result in this sort of fragmentation of the resolution of their disputes.

45. RBS also rely in support of their second restrictive interpretation of the arbitration agreement in clause 14 upon the indications in schedule III that the parties expected that the disputes to be referred to arbitration would be of a technical nature. I readily accept that this does appear to have been the expectation of the parties and that this is a consideration that can and should properly inform the interpretation of clause 14: see ***May v Hassell Ltd v Vsesojuznoje Objedineenije "Exportles",*** (1941) 69 Ll L R 102 esp. at p.108, in which Atkinson J sought what he called the "business basis" of the parties' decision to provide for some disputes to be decided by English arbitration and others to be referred to arbitration in Moscow. However, this argument cannot be taken too far. The question can never be tested by reference to the actual dispute that has arisen, and it is not in point to consider whether the dispute that has in fact arisen involves technical questions (although, to my mind, the question whether RBS's alleged "interference" delayed the Delivery might well raise just such questions). The question which it is proper to consider is whether a particular interpretation of clause 14 would bring within the ambit of the arbitration agreement disputes of a kind which are unlikely to give rise to technical questions, which the parties can therefore be taken not to have intended should be referred to a tribunal of technical arbitrators, and which would not fall within the ambit of the agreement upon another interpretation of the agreement which is narrower in that regard. I am not persuaded that the sort of dispute which would be excluded from the arbitration agreement upon the narrower interpretation of it suggested by RBS in its alternative submission would typically be questions which are unlikely to give rise to technical questions and which the parties would not have intended to refer to a tribunal that includes technical arbitrators.

46. I therefore agree with Mr Cox that (assuming contrary to the conclusion that I have reached the dispute between the parties is to be characterised by reference to the issue whether RBS's interference with FFI's ability to Complete and Deliver the Film prevents them from claiming under clause 1 of the Completion Guaranty) the question is whether the dispute is one "relating to delivery" under the Completion Guaranty in the natural and ordinary meaning of those words. Mr Cox argues the factual aspect of this issue is about whether or not RBS interfered in the Delivery of the Film, and the focus of that, as it seems probable to me, is likely to be upon the effects of what RBS did. Of course there is the possibility of differences about what RBS did do, and there will, no doubt, be arguments about the legal implications of what RBS did and its consequences, but I agree with Mr Cox's submission that this dispute would be described as a matter of ordinary language as one relating to delivery.

47. Since I wrote this judgment, the recent decision of the Court of Appeal ***in Fiona Trust & Holding Corporation v Privolov,*** [2007] EWCA Civ 20 has been drawn to my attention. The judgment in that case, and in particular the observations that "any jurisdiction or arbitration clause in an international commercial contract should be liberally construed" (at para 18) and that "One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration" (at para 19), seem to me to provide some additional support for the conclusion that I have reached.

48. I therefore conclude (despite the clarity of the well-presented arguments of Mr. White) that the dispute that has arisen between FFI and RBS is a dispute relating to delivery under the Completion Guaranty within the meaning of clause 14, and that therefore Mr Nik Powell has jurisdiction to determine it.

Raymond Cox QC (instructed by Sedgwick Detert Moran &Arnold LLP) for the Claimants
Antony White QC (instructed by Reed Smith Richards Butler LLP) for the Defendants