JUDGMENT : Mr Justice Colman: QBD. 7 November 2003

Introduction

1. In 1999, following an admirable report by the Law Commission, Parliament dealt a long overdue body blow to the doctrine of privity of contract. It enacted the **Contracts (Rights of Third Parties) Act 1999**. That broadly had the purpose of enabling a third party to a contract under which one party had promised to confer a benefit on that third party to enforce that promise direct against the promisor. That facility is of particular importance to chartering brokers, like the Respondents to this application, and to others who create contracts under which one party promises to pay them commission.

2. This case is, I understand, the first time that the 1999 Act has been before the courts. It raises questions highly relevant to the shipping industry as to how a third party may enforce a promise of a benefit for him where there is an arbitration clause in the underlying contract.

3. This is an application under section 67 of the Arbitration Act 1996 for the court to declare that arbitrators have no jurisdiction to determine claims for commission said to be due to the Respondent chartering brokers ("Cleaves"), payment of such commission having been sought from the Applicant owners/guarantors.

4. There were nine relevant time charters negotiated by Cleaves on behalf of the Applicant, Nisshin. Each charterparty contained an arbitration clause. The Applicant challenges the entitlement of Cleaves to commission on the principal ground that Cleaves were in repudiatory breach of the agency relationship because their principal and controlling interest became a shareholder and member of the senior management team of a competitor of the Applicant. It is said that this breach was accepted by Nisshin as terminating the agency relationship.

5. Each charterparty provided for the payment of commission to Cleaves. Each arbitration clause contained wording referring to disputes between the "***parties***" to the charterparty or between Owners and Charterers. However, the wording was in each case in terms wide enough to cover a claim by the charterers against the owners for failure by the owners to perform their promise to pay commission to Cleaves.

6. The issue of entitlement to commission was referred by Cleaves to arbitration notwithstanding it was not a party to any of the nine arbitration agreements.

7. The issue as to the arbitrators' jurisdiction was raised and argued on paper before a tribunal consisting of Mr Timothy Young QC and Mr Timothy Rayment. Both are extremely experienced in the field of maritime law and arbitration. In an interim final arbitration award dated 24 January 2003 they concluded that the effect of sections 1 and 8 of the 1999 Act was that they did have jurisdiction.

8. There are four other charterparties involved which are not covered by the 1999 Act. The Respondents, Cleaves, have commenced proceedings in this court claiming commission in relation to all 13 charterparties. The Applicant wishes all the claims to proceed in one set of proceedings before the court.

9. The relevant sections of the 1999 Act are as follows: *Section 1:*

"(1) Subject to the provisions of this Act, a person who is not party to a contract (a "third party") may in his own right enforce a term of the contract if ?

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract."

Section 8 "Where ?

(a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and

(b) the arbitration agreement is an agreement in writing for the purposes of Part 1 of the Arbitration Act 1996 the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party."

Do Cleaves fall within Section 1 of the 1999 Act?

10. It is accepted on behalf of Cleaves that in none of the charters did the commission clauses expressly provide that Cleaves could enforce such clauses directly against the owners. However the real issues are (i) whether those clauses purported to confer a benefit on Cleaves within sub-section (1)(b) of section 1 and (ii) whether sub-section 1(b) is disapplied by sub-section (2) because *"on a proper construction of the contact it appears that the parties did not intend the term to be enforceable by the third party".*

11. It is argued by Mr Michael Ashcroft, on behalf of Nisshin, that under four of the charterparties, those numbered (ii), (iii), (iv) and (v) in the arbitration award, the commission clauses did not purport to confer a benefit on Cleaves alone. Although there was an issue before the arbitrators as to whether certain words had been deleted from numbers (iv) and (v) before or after the contract was entered into, it is common ground that, for the purposes of this application only, I should disregard deletions of part of these clauses which were made at some stage. The relevant wording for all four charterparties is thus as follows: *"A commission of 2 per cent for equal division is payable by the vessel and owners to Messrs Ifchor SA Lausanne and Messrs Cleaves and Company Ltd, London on hire earned and paid under this Charter, and also upon any continuation or extension of this charter".*

12. It is argued that the phraseology is such that the benefit conferred by the clause is to be subsequently divided between the two firms as distinct from a provision which specifies that a particular percentage should be paid to a particular broker.

13. I cannot accept this argument. These provisions leave no doubt as to the identity of the broker to whom payment is to be made and as to the amount to be paid. It is in substance exactly the same as if the clause had provided that there was to be a commission of 2 per cent of which 1 per cent was to be paid to Ifchor and 1 per cent to Cleaves. There is nothing in this clause to suggest that the total 2 per cent commission is to be paid to Ifchor and that Ifchor will then pay half of that to Cleaves. The words *"**for division**"* do not, in my judgment, bear that connotation in the absence of any indication as to the broker to whom payment is first to be made. Nor do the words support the submission that the obligation to pay commission can only be enforced jointly by both the firms of brokers. There is no conceivable commercial purpose in a construction which creates a joint and indivisible right of enforcement. Absent of much clearer wording than this, I do not consider that the clause should be thus construed.

14. Accordingly, I hold that the effect of the clause was to confer a benefit to the extent of 1 per cent commission on Cleaves alone.

15. It is then further argued by Mr Ashcroft, on behalf of Nisshin, that on the proper construction of the charterparties the parties to them did not intend the commission clause to be enforceable by Cleaves and accordingly section 1(1)(b) of the 1999 Act is disapplied by section 1(2).

16. In support of this argument Nisshin relies on three distinct points.

17. First, it is argued that the arbitration clauses in all of the charterparties do not make express provision for enforcement by a broker of a claim for commission. All except those numbered (viii) and (ix) include substantially the standard New York Produce Exchange arbitration clause: *"Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at London, one to be appointed by each of the parties hereto, and the third by the two so chosen."*

18. Those charterparties numbered (viii) and (ix) which substantially incorporated the Shelltime 4 standard claims provided as follows:

"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 English Courts to whose jurisdiction the parties hereby agree. See also LMAA Arbitration Clause. See additional Clause 48. (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 the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force."

19. The relevant part of the LMAA arbitration clause provided:

"48. LMAA Arbitration Clause. All disputes or differences arising out of this contract which cannot be amicably resolved shall be referred to arbitration in London. Unless the parties agree upon a sole arbitrator, one arbitrator to be appointed by each party .. This contract is governed and construed by English law both in regards to substance and procedure, and there shall apply to all proceedings under this Clause the terms of the London [Maritime] Arbitrators Association current at the time when the arbitration proceedings were commenced ?"

20. The references to "***Owners and Charterers***" and to two arbitrators to be appointed by "the parties hereto" in the NYPE form are thus expressly inconsistent with the brokers being obliged to utilise that arbitration agreement in order to enforce their rights to commission: the only parties being obliged or entitled to arbitrate are the Owners and Charterers similarly the reference in the Shelltime 4 clause to *"**either party**"* is a reasonably clear indication that its application is confined to disputes between Owners and Charterers.

21. It is accepted by Miss Philippa Hopkins, on behalf of Cleaves, that the brokers were not parties to the arbitration agreements as a matter of construction of those clauses. Her case is that the effect of section 8 of the 1999 Act is to impose the arbitration clauses on the Owners and the brokers as the means of enforcement of the commission benefit conferred by the commission clause. I shall have to consider this submission more fully when I come to discuss the effect of section 8. However, for the purposes of the submission in relation to absence of intention to confer a benefit, the wording of the arbitration clauses is, in my judgment, of little or no materiality. Firstly, although the parties to the charterparties clearly expressed their mutual intention that **their** disputes should be arbitrated, that mutual intention is entirely consistent with a mutual intention that the brokers should be obliged to recover their commission by court action rather than by arbitration. Secondly, if, on the proper construction of the 1999 Act, the third party is obliged to enforce the commission benefit by arbitration, even where the agreement does not on its proper construction provide for any participants in an arbitration other than the parties to the main contract, identification of the intention to be imputed to the parties as to enforceability of the third party commission benefit clearly has to take this into account. That is to say, if, as a matter of law, it makes no difference to the broker's ability to enforce his right to commission benefit that no express provision is made for this in the arbitration agreement, the strength of any inference derived from the absence of such express provision could be little more than negligible.

22. Secondly, it is argued by Mr Ashcroft on behalf of Nisshin that there is no positive indication in the charterparties that the parties did intend the brokers to have enforceable rights. There is no suggestion in those contracts that the Owners and Charterers were mutually in agreement that the brokers should be entitled to claim against the Owners as if they were parties to the contract.

23. It is to be noted that section 1(2) of the 1999 Act does not provide that subsection 1(b) is disapplied unless on a proper construction of the contract it appears that the parties intended that the benefit term should be enforceable by the third party. Rather it provides that sub-section 1(b) is disapplied if, on a proper construction, it appears that the parties did not intend third party enforcement. In other words, if the contract is neutral on this question, sub-section (2) does not disapply sub-section 1(b). Whether the contract does express a mutual intention that the third party should not be entitled to enforce the benefit conferred on him or is merely neutral is a matter of construction having regard to all relevant circumstances. The purpose and background of the Law Commission?s recommendations in relation to sub-section (2) are explained in a paper by Professor Andrew Burrows who, as a member of the Law Commission, made a major contribution to the drafting of the bill as enacted. He wrote at [2000] LMCLQ 540 at 544: *"The second test therefore uses a rebuttable presumption of intention. In doing so, it copies the New Zealand Contracts (Privity) Act 1982, s4, which has used the same approach. It is this*

rebuttable presumption that provides the essential balance between sufficient certainty for contracting parties and the flexibility required for the reform to deal fairly with a huge range of different situations. The presumption is based on the idea that, if you ask yourself, "When is it that parties are likely to have intended to confer rights on a third party to enforce a term, albeit that they have not expressly conferred that right", the answer will be: "Where the term purports to confer a benefit on an expressly identified third party". That then sets up the presumption. But the presumption can be rebutted if, as a matter of ordinary contractual interpretation, there is something else indicating that the parties did not intend such a right to be given."

24. In the present case, apart from Mr Ashcroft?s third point, the charterparties are indeed neutral in the sense that they do not express any intention contrary to the entitlement of the brokers to enforce the commission term.

25. Thirdly, Mr Ashcroft submits that the parties' mutual intention on the proper construction of the contracts was to create a trust of a promise in favour of the brokers a trust enforceable against the Owners at the suit of the Charterers as trustees. That being the proper construction of the contracts by reference to the state of the law at the time when the 1999 Act came into force, the very same contract wording did not, subsequently to that, evidence a different mutual intention. Accordingly, the mutual intention evidenced by the contracts was that the enforcement of the promise to pay commission would be at the suit of the Charterers who must be joined by the brokers as co-claimants.

26. The starting point for consideration of this point is ***Les Affreteurs Reunis SA v. Leopold Walford (London) Ltd [***1919] AC 801. The House of Lords in that case confirmed the decision in **Robertson v. Wait** (1853) 8 Ex 299. In relation to that authority Lord Birkenhead LC said this at pages 806-807: *"My Lords, so far as I am aware, that case has not before engaged the attention of this House, and I think it right to say plainly that I agree with that decision and I agree with the reasoning, shortly as it is expressed, upon which the decision was founded. In this connection I would refer to the well-known case of* ***In re Empress Engineering Company****. In the judgment of Sir George Jessel MR the principle is examined which, in my view, underlies and is the explanation of the decision in* ***Robertson v. Wait.*** *The Master of the Rolls uses this language:* ***So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As Lord Justice James suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the cestui que trust can take the benefit of the contract.***

It appears to me plain that for convenience, and under long established practice, the broker in such cases, in effect, nominates the charterer to contract on his behalf, influenced probably by the circumstance that there is always a contract between charterer and owner in which this stipulation, which is to enure to the benefit of the broker, may very conveniently be inserted. In these cases the broker, on ultimate analysis, appoints the charterer to contract on his behalf. I agree therefore with the conclusion arrived at by all the learned judges in ***Robertson v. Wait****, that in such cases charterers can sue as trustees on behalf of the broker."*

27. Viscount Finlay and Lords Atkinson and Wrenbury adopted identical reasoning.

28. Accordingly, the position in 1853 and 1919 was that when a charterparty was entered into and incorporated a term that the owners could pay commission to the brokers the only means of enforcement of that promise was an action by the charterers and the brokers as co-plaintiff because, the charterer having contracted for commission on behalf of the broker, once the contract had been signed, the charterer became trustee of the broker's right to recover that commission, the broker being unable to enforce the promise direct and without the charterer's intervention because he was not a party to the contract and therefore had no cause of action available to him against the owner. With regard to this trustee relationship it could then be said that when the charterparty was entered into neither Owners nor Charterers contemplated that the brokers could sue the owners direct.

29. What is the position arising from the contract itself following the coming into force of the 1999 Act? As a matter of analysis of the underlying relationship between the parties, it must be precisely the same. Thus, the charterer is no less the trustee of the Owners' promise to pay the commission, having regard to the fact that the charterer contracts for payment of the commission on behalf of a non-contracting

party. Indeed, the only thing that has changed is the coming into force of the 1999 Act and the introduction of the statutory facility of a direct right of action for a non-contracting party on whom a contract purports to confer a benefit.

30. Accordingly, the argument advanced by the Owners can only succeed if it is to be inferred from the existence of the underlying trustee relationship that it was the mutual intention of Owners and Charterers that the broker beneficiary should not be entitled to avail himself of the facility of direct action by the 1999 Act.

31. This proposition is, in my judgment, entirely unsustainable. The fact that prior to the 1999 Act it would be the mutual intention that the only available facility for enforcement would be deployed by the broker does not lead to the conclusion that, once an additional statutory facility for enforcement had been introduced, the broker would not be entitled to use it, but would instead be confined to the use of the pre-existing procedure. Indeed, quite apart from the complete lack of any logical basis for such an inference, the very cumbersome and inconvenient nature of the procedure based on the trustee relationship (described by Lord Wright as a "***cumbrous fiction***") would point naturally to the preferred use by the broker of the right to sue directly provided by the 1999 Act. Not only would that original procedure be inconvenient, but it might involve risk that the broker would be prevented from recovering his commission, for example, in a case where the charterer had been dissolved in its place of incorporation or where, in the absence of co-operation by the charterer, proceedings had to be served on it outside the jurisdiction and service could not be effected. There are therefore very strong grounds pointing against any mutual intention to confine the brokers to the old procedure and to deny them the right to rely on the Act.

32. I therefore reject the third ground relied upon by Nisshin. In so doing I reach the same conclusion as the arbitrators.

33. It follows that Cleaves are entitled to enforce the commission clauses in their own right by reason of section 1 of the 1999 Act.

Is the Enforcement of those Rights subject to the Arbitration Agreements in the Charterparties?

34. It is conceded by Ms Hopkins that, given that the arbitration agreements are between and only between owners and charterers, they do not confer rights or impose obligations on the brokers unless the effect of section 8 of the 1999 Act is to deem the brokers to be bound by and entitled to the benefit of the arbitration clauses for the specific purpose of enforcement against the owners of their entitlement to commission.

35. It is submitted on behalf of the owners that the question whether under section 8 a third party's right is subject to an arbitration agreement is to be determined by the proper construction of the contract as to whether third parties intended an arbitration agreement contained in it to apply to any dispute relating to the third party's rights. In particular, section 8 is to be construed by reference to the conditional benefit principle adopted in the Law Commission's Report No. 242, paras 10.24 to 10.32 and which is reflected in section 1(4) of the 1999 Act. In this connection, there can be no presumption that the Arbitration agreement applies. Having regard to the need to construe section 8 in accordance with Human Rights principles in particular Article 6(1) it would be wrong in principle so to construe it as to shut out the parties from the courts unless there were clear words to that effect. The imposition of the arbitration agreements would involve shutting out the use by the third party of his local court and his exposure to liability for the fees of the arbitrator were he to lose. Further, section 8 should be interpreted consistently with the principles of party autonomy in as much as a party should not be required to arbitrate unless it had clearly been agreed by the parties to the underlying contract and the arbitration agreement that the broker must arbitrate in order to enforce his rights to commission. Applying this approach, it is submitted that in view of the proper construction of the arbitration clauses the brokers' rights to commission were not "subject to the arbitration agreements".

36. Section 8 of the Act has an unusual legislative history. Although the text of the bill originally recommended by the Law Commission included section 1(4) and so reflected the principle of conditional benefit, there was no provision dealing expressly with arbitration. The Report excluded its

application to arbitration agreements. When the bill was first introduced before the House of Lords it contained no specific provision as to arbitration. The background to the addition of section 8 is described by Professor Burrows in his most helpful article on the Act at Law Maritime and Commercial Law Quarterly [2000] P540. Eventually, section 8 was introduced by way of Government amendment at the Report stage in the House of Commons. The Lord Chancellor?s Department issued Explanatory Notes which were made available to members of Parliament and peers before the debates. In respect of Section 8 those Notes contained the following advice:

> *"33. Section 8 ensures that, where appropriate, the provisions of the Arbitration Act 1996 apply in relation to third party rights under this Act. Without this section, the main provisions of the Arbitration Act 1996 would not apply because a third party is not a party to the arbitration agreement between the promisor and the promisee.*
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> *34. Subsection (1) deals with what is likely to be the most common situation. The third party?s substantive right (for example, to payment by the promisor) is conferred subject to disputes being referred to arbitration (see section 1(4)). This section is based on a "conditional benefit" approach. It ensures that a third party who wishes to take action to enforce his substantive right is not only able to enforce effectively his right to arbitrate, but is also "bound" to enforce his right by arbitration (so that, for example, a stay of proceedings can be ordered against him under section 9 of the Arbitration Act 1996). This approach is analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden (see, for example, DVA v. Voest Alpine, The Jaybola [1997] 2 Lloyd's Rep 279). "Disputes relating to the enforcement of the substantive term by the third party" is intended to have a wide ambit and to include disputes between the third party (who wishes to enforce the term) and the promisor as to the validity, interpretation, existence or performance of the term; the third party's entitlement to enforce the term; the jurisdiction of the arbitral tribunal; or the recognition and enforcement of an arbitration award. But to avoid imposing a "pure" burden on the third party, it does not cover, for example, a separate dispute in relation to a tort claim by the promisor against the third party for damages.*
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> *35. Subsection (2) is likely to be of rarer application. It deals with situations where the third party is given a right to arbitrate under section 1 but the "conditional benefit" approach underpinning subsection (1) is inapplicable. For example, where the contracting parties give the third party a unilateral right to arbitrate or a right to arbitrate a dispute other than one concerning a right conferred on the third party under section (1). To avoid imposing a pure burden on the third party (in a situation where, for example, the contracting parties give the third party a right to arbitrate a tort claim made by the promisor against the third party) the subsection requires the third party to have chosen to exercise the right. The timing point at the end of the subsection is designed to ensure that a third party who chooses to exercise his right to go to arbitration by, for example, applying for a stay of proceedings under section 9 of the Arbitration Act 1996, can do so. Under section 9 of the Arbitration Act 1996, the right to apply for a stay of proceedings can only be exercised by someone who is already a party to the arbitration agreement."*

37. Although these Notes clearly do not have the force of law, they occupy a position in relation to the Act similar to that of the statement by a minister introducing a bill. The courts are entitled to construe the wording of the Act on the assumption that, if the precise meaning of the words used is in doubt, when Parliament enacted those words it did so with some regard to the ministerial explanation.

38. The reference in the Explanatory Notes to the decision of the Court of Appeal in **The Jay Bola** [1997] 2 Lloyd's Rep 279 and to the approach of section 8(1) being *"analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden" is of some importance. It is quite clearly directed to the meaning to be given to the words "a right under section 1... is* ***subject to*** *an arbitration agreement"* (emphasis added).

39. The introduction into these Notes of the assignment analogy directs attention to the concept that under the contract the promisee could not enforce the substantive term unless he had resort to arbitration if the scope of the agreement to arbitrate were wide enough to cover the dispute about such enforcement. Once the latter condition is satisfied an assignee from the promisee stands in the shoes of the promisee as regards enforcement of that term. Although the Court of Appeal was concerned in **The Jay Bola**, supra, with the right of insurers of cargo to recover damages by reason of

their status as a party subrogated to the cargo owners' rights of action, the approach adopted was based on the established principles applicable to the position of an assignee under section 136 of the Law of Property Act 1925. Hobhouse LJ. with whose judgment Sir Richard Scott VC and Morritt LJ. agreed, cited the following passage from his judgment in **The Jordan Nicholev** [1990] 2 Lloyd?s Rep 11 at page 15: *"Where the assignment is the assignment of the cause of action, it will, in the absence of some agreement to the contrary include as stated in s. 136 all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action. The assignee is bound by the arbitration clause in the sense that it cannot assert the assigned right without also accepting the obligation to arbitrate. Accordingly, it is clear both from the statute and from a consideration of the position of the assignee that the assignee has the benefit of the arbitration clause as well as of other provisions of the contract."*

40. The promise under these charterparties to pay commission to the brokers was clearly a promise made to and enforceable by the charterers. Failure to perform that obligation would clearly fall within the scope of all the arbitration clauses. If the charterers had assigned their cause of action for failure to pay commission to the brokers by a statutory assignment the latter could only have enforced that promise if they resorted to arbitration against the owners. Had they done so, it would not have been open to the owners to challenge the arbitrators' jurisdiction on the grounds that the only parties to the arbitration agreement who were identified by it were the owners and the charterers. That would be because such identification would be completely irrelevant to the entitlement of the brokers to utilize the arbitration agreement. The transference by assignment of the substantive chose in action necessarily involved the transference of the procedural means of enforcement of it.

41. There is also authority which suggests that under the Third Parties (Rights against Insurers) Act 1930, which effects a statutory assignment of rights of action in a case where the assured has become bankrupt or been wound up, the party to whom the benefit of a right of action under the liability insurance contract has been transferred is obliged to pursue that right in accordance with an arbitration agreement in the contract of insurance even if that agreement is expressed to refer only to the parties to the contract of insurance and not in terms wide enough to cover a statutory assignee: see **The Padre Island** [1984] 2 Lloyd's Rep 408.

42. It is against this background that one must consider the words in subsection (1) *" the third party shall be treated for the purposes of that Act as a party to the arbitration agreement"*. In my judgment these words clearly reflect and are entirely consistent with the assignment analogy. The third party never was expressed to be a party to the arbitration agreement but, in view of the fact that he has in effect become a statutory assignee of the promisee's right of action against the promisor and because, by reason of the underlying policy of the 1999 Act expressed in section 1(4) he is confined to the means of enforcement provided by the contract to the promisee, namely arbitration, he is to be treated as standing in the shoes of that promisee for the purpose only of the enforcement of the substantive term. Thus although the wording of sub-section (1)(a) ***"is subject to a term"*** is capable of having a range of possible meanings, one of those meanings is that which I have described and, having regard to the further words of the sub-section, entirely reflects the assignment analogy referred to in the Explanatory Notes

43. Much weight was placed by Mr Ashcroft on the proposition that whether the third party must proceed, by arbitration depends on the mutual intention of the parties to the arbitration agreement as to the availability of that agreement to a third party for enforcement of his rights. I accept Miss Hopkins's submission that this proposition is true only to the limited extent that it is necessary that the scope of the arbitration agreement is wide enough to cover a dispute between the promisor and the promisee as to the performance of the substantive term. For the reasons which I have given, whether they did or did not express a mutual intention that the third party should be entitled to avail himself of the arbitration agreement for the purpose of enforcing his rights under the substantive term in relation to which the 1999 Act has transferred to him a right of action is not relevant.

44. Since, as I have held, the scope of the disputes covered by all nine arbitration agreements is wide enough to embrace a dispute between owners and charterers about payment of the brokers?

commission, I conclude that in the present case Cleaves were entitled and, indeed, obliged to refer those disputes to arbitration and that the arbitrators had jurisdiction to determine them.

45. The arbitrators reached the same conclusion in paragraphs 27 and 28 of their Interim Final Award. The conceptual basis for that conclusion is, I believe, closely similar to, if not identical with, that which underlies this judgment.

46. Before concluding this judgment it is right that I should comment on two matters considered by the arbitrators which have been raised in the course of argument before me.

47. Firstly, the arbitrators refer at paragraphs 21-28 to an article by Clare Ambrose entitled "*when can a Third Party Enforce an Arbitration Clause?*" [2001] JBL 415. In that interesting contribution to the widespread debate amongst commentators on the proper construction of section 8 Miss Ambrose starts from the proposition that whether a third party right under section 1 is "***subject to***" an arbitration agreement under section 8(1) depends on "whether it was the parties' intention to enable a third party to enforce the arbitration clause". She then goes on quite logically to suggest that section 8(1) should be construed so that it can only be invoked by (or against) third parties, if on its true construction disputes relating to a third party's enforcement of his rights under section 1 are agreed to be referred to arbitration. This, it is argued, is an important consideration because giving effect to the intentions of the parties to the contract was *"the sole justification for adopting legislation binding third parties to arbitrate"*. This was essentially the argument advanced by Mr Ashcroft on behalf of the owners.

48. However, the problem with this approach is that it ignores the assignment analogy which I have already explained. The effect of section 1 being analogous to a statutory assignment to the third party by operation of law, the function of section 8 is to reflect the conditional benefit approach by attaching to the right of action thus transferred the means of enforcement of that right agreed between the parties. Their agreement is effected by limiting the third party to the means of enforcement available to the promisee. That is why their agreement is sufficiently reflected if the dispute would have fallen within the scope of the agreement to arbitrate, if the promisee were seeking to enforce the promise. And that is why it is necessary that section 8(1) should expressly provide that the third party should *"be **treated** for the purpose of that Act as a party to the arbitration agreement"* (emphasis added) which, but for that provision, he would not be. I have no doubt that in this sense section 8 does indeed fulfil the purpose of giving effect to the mutual intention of the parties to the contract as to how their obligations are to be enforced and the purpose of rendering conditional the benefit which by virtue of section 1 has been transferred to the third party.

49. Secondly, I am not persuaded that the reasoning of the Privy Council in **The Makhutai** [1996] AC 650 expressed by Lord Goff at page 666 assists in any way in the construction of section 8. That which makes the benefit of a Himalaya Clause available to a third party is the mutual intention of the parties to the underlying contract as expressed in the words of the clause. It is in that context that the approach to the incorporation of arbitration clauses and jurisdiction clauses from one contract into another such as a bill of lading, as discussed in **T W Thomas & Co Ltd v. Portsea Steamship Co Ltd** [1912] AC 1, may have to be considered. But Himalaya clauses transfer the benefit of substantive contract terms to a sub-contractor by operation of the agreement between the parties of the contract of carriage and the law of agency stemming from the relationship between the sub-contractor as principal and the contracting party as agent. This is a fundamentally different scene from that arising from the operation of section 1 of the 1999 Act. There is, above all, nothing analogous to a statutory assignment of a right of action effected subject to the principle of conditional benefit.

50. For these reasons I have no doubt that the arbitrators correctly declined to give to section 8 the construction advanced in Miss Ambrose's article and in the submissions advanced on behalf of the owners in this application.

51. As to the arguments advanced on behalf of the owners that to construe section 8 as did the arbitrators would invade Human Rights principles, I have the following brief comments.

52. The effect of sections 1 and 8 of the 1999 Act as analysed in this judgment is to provide to a third party a remedy which would otherwise have been denied to him. Where a contract included an agreement to arbitrate, a provision whereby a benefit was to be conferred on a third party could neither be directly enforced by the third party nor, if the third party were a broker claiming his commission, could it be enforced by means of the enforcement of a trust because the third party was not a party to the underlying contract or the arbitration agreement. This was a grave defect in the law which could give rise to considerable injustice. The enactment of the 1999 Act has removed that injustice by putting the third party in the position of the promisee to the extent of enforcement of the promise for his benefit and has thereby enabled him to bring proceedings direct against the promisor either by a direct claim in court or by commencing proceedings by arbitration where the arbitration agreement covered the claim. He no longer has to rely on the co-operation of the promisee to proceed as co-claimant where there can be a claim by means of court action and he is not deprived of all remedy because he was not a party to the arbitration agreement or the underlying contract. It is against this change in the law that one is bound to ask whether by requiring him to arbitrate a claim to enforce a promise which, had the promisee wished to pursue it, he would have had to refer to arbitration, the Act has infringed the third party's right under Article 6(1) of the European Convention on Human Rights.

53. The question has only to be postulated to demonstrate the absurdity of the underlying proposition. That proposition involves the third party?s right to access to the courts being infringed unless the law provides him with an enforcement facility which neither he nor the promisee party to the contract ever previously had. Thus stated the argument fails in limine. If it were correct every provision for statutory arbitration would be unlawful.

54. Finally, I should like to acknowledge the great assistance which I have derived from the several articles and commentaries on the 1999 Act written by Prof Burrows and Prof Merkin, as well as His Honour Anthony Diamond QC. The fact that I have not cited all the relevant passages from them does not indicate that they have not provided stimulating expositions of approaches to construction which have been most helpful.

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