Neutral Citation Number: [2019] EWHC 1277 (Comm)

Case No: CL-2018-000574

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 16 May 2019

Before :

SIR MICHAEL BURTON
(sitting as a Judge of the High Court)

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Between :

P **(a company incorporated in Country A)**	**Claimant**
- and -	
(1) D **(a company incorporated in Country B)** **(2) E** **(a company incorporated in Country A)** **(3) F** **(a company incorporated in Country C)**	**Defendants**

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Richard Morgan QC and **Nicholas Craig QC** (instructed by **DLA Piper UK LLP)** for the **Claimant**
Nicholas Berry (instructed by **Anthony Gold LLP**) for the **Defendants**

Hearing dates: 1, 2, 16 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Sir Michael Burton :

1. This application by the Claimant ("P") under s. 68 of the Arbitration Act 1996 ("the Act") arises in respect of a Partial Final Award dated 6 July 2018 by Mr M, Mr N and Professor O, as supplemented by a further award dated 4 August 2018, following the application by P under s57 of the Act ("the Ruling"), in favour of the First Defendant ("D"). The Second and Third Defendants did not take part.

2. D's claim in the Arbitration was for (inter alia) repayment of loans made by them to P. The Arbitrators found that, notwithstanding a "no oral modification" clause, there was an estoppel by which D was precluded from demanding the payment of any loans due to it before 1 January 2018, but that there was neither an agreement nor an estoppel, as P contended, extending such repayment date to 1 January 2020.

3. P, represented by Richard Morgan QC, who also appeared before the Arbitrators, and Nicholas Craig QC, rely upon s68(2)(a) of the Act to contend that the Arbitrators acted in breach of their duty under s33 of the Act to "*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent*", because in relation to an alleged meeting on the yacht of D's principal, Mr D, between Mr D and Mr E of P, when P allege either the agreement or the estoppel arises (the "August 2015 meeting"), there was no cross-examination of Mr E by counsel for D then, as before me, Mr Nicholas Berry, and yet the Arbitrators found that there was no such agreement or estoppel.

4. This is what I shall call Ground 1, and it appeared to be their only ground. However, it became clear early in oral argument that P was also relying on a second ground, which did not appear in terms in their Claim Form, although referred to in the witness statement of P's solicitor, Mr F, and, after hearing argument, I permitted amendment of the Claim Form to set it out in terms as Ground 2. I was satisfied that no prejudice was caused to D, since the point had been fully raised and Mr Berry did not suggest he was not able to deal with it by reference to the evidence already before me.

5. Ground 2 arises by virtue of the fact that, by reference to an ambiguous passage in the Award, clarified by the Arbitrators in their Ruling, it became clear that the Arbitrators concluded that there was a shared assumption at the August 2015 meeting, but that it was conditional or contingent and hence of no effect. As to this conclusion of the Arbitrators, P contends that (i) there was similarly no cross-examination and further (ii) such a case was not adequately or at all addressed by D and never argued or dealt with during the hearing before the Arbitrators, and thus was not open to the Arbitrators as a conclusion.

6. As I have said above, P succeeded in respect of its estoppel case so far as January 2018, notwithstanding that, on the face of it, the loans were repayable earlier. P relied for their case as to a further extension to January 2020 upon the August 2015 meeting, and asserted that this was confirmed at a further meeting on Mr D's yacht on 10 June 2016 ("the June 2016 meeting"). This was pleaded in paragraphs 201-204 of P's Statement of Case dated 4 August 2017, described in terms in paragraph 396 of D's Statement of Defence and Counterclaim as "*completely and utterly unsubstantiated. The truth is that the alleged Extension Agreement never occurred*". In the D opening skeleton for the hearing dated 3 February 2018 it was stated:

> *"D's position as regards the alleged extension agreement is that there was never any such agreement as a matter of fact nor even any discussion about such an extension".*

7. The position was dealt with in the witness statements of the two protagonists, Messrs D and E, who alone were present at the August 2015 meeting. Mr E said as follows:

> *"126. In order to reach an agreement, Mr D and I met on his yacht in the summer of 2015. At that meeting, which I recall was in early August 2015, we discussed the need for an extension of the repayment dates. I do not recall the precise words that Mr D and I used (although we did discuss the extension), simply because we had so many meetings over the years and in any event, we had always agreed that the term of the investment was five years, so to extend to a date which was five years from the completion of the Oil Major transaction was not a major issue.*
>
> *127. As I recall it, the two year extension from 1 January 2018 to 1 January 2020 was something that Mr D suggested, rather than something I asked for, although I do not recall Mr D's words. I believe Mr D made this suggestion because he knew that we would need five years to realise the full value of the investment, and to maximise his return. That was consistent with what had originally been agreed. It was very much in D and Mr D's interest to give the investment the opportunity to mature. The extension was also necessary to reflect our original intention agreed prior to the Oil Major transaction that the investment would need five years to achieve results.*
>
> *128. Mr D also recognised that the delays that we had experienced in completing the transaction were not caused by Z and that 'we [being the existing management of Z] had done our best'. Mr D knew the Government of Country C at the time of the deal had been hostile to Z and it changed in May 2015. Mr D understood that the investment was premised on being five years from when Z took control of the assets and that there was no unreasonable delay in the granting of ministerial consent. Mr D agreed the political change in Country C would now allow the investment to be worked out without political interference, and in accordance with a five year plan, which took account of the former Government's delayed consent. No paperwork was signed at the time because the extension was part and parcel of the restructuring that we were still undertaking.*
>
> *129. I proceeded on the basis that we would implement what we had agreed in due course in what had become our usual way ie with Mr G and Mr H subsequently documenting what had been agreed between us. My clear recollection is that we both understood that we had agreed that the repayment date for the*

> *loans would be extended by two years to 1 January 2020, albeit that this date never found its way into the written agreements. I would have been unconcerned that this aspect of the transaction was not documented. Mr D had proposed an agreement which gave the investment full opportunity to mature, and I had agreed to this. As we were both clear about this, and given the nature of our relationship, documenting it was not a priority.*
>
> *130. If Mr D had not offered the extended maturity date, then I would have been forced to commence marketing our joint interest in Q and identifying someone to replace Mr D, in order to repay him by 1 January 2018. If I had taken this action, then I would have had to consider an equity raising, selling assets, finding new third party investors or bank debt. I did not take any of these steps as Mr D had agreed to the two year extension on D's behalf. As the extension was granted, I did not need to take any such steps.*
>
> *131. Although I understand that this date was never recorded in the terms of any written agreement, Mr D and I would have been clear that an agreement had been reached that the loans would not be due until 1 January 2020, as that corresponded with the original basis of our agreement in 2012.*
>
> *132. From late August 2015 onwards, I understand that Mr H that the documentation was being discussed I was not concerned with that and was not kept updated in relation to it. An agreement was in place so there was no need to concern myself with formalities."*

8. He recounted the events of 10 June 2016, which began (as became common ground) with a confrontation between him and Mr I, a new adviser to Mr D, in relation to the management of the joint venture. He then continued:

> *"152. At the end of that meeting, there was a private meeting. The meeting took place in Mr D's private study, which was located to the side of his private quarters. Mr D, Mr J, Mr K and I were the only people who attended this meeting.*
>
> *153. Mr D opened the discussion by apologising for Mr I's behaviour. I recall that Mr J tried to stop Mr D speaking. While reviewing a 'to do' list that had been drafted by Mr J, Mr D then raised the issue of the maturity date of the loans. Mr D said something along the lines of 'Don't worry, I will give you the extension of the time to repay the loans because I know the delays were caused by the old government'. Mr D characterised the delays to the investment caused by the former Government of Country C and the falling oil price as akin to a force majeure situation. Mr D considered that progress had been made and that he expected the oil industry would pick up in two*

years. Mr J and Mr K were clearly unsupportive about Mr D's statements regarding the extension of the repayment dates. However, Mr D's words, on D's behalf, reconfirmed to me the extension of the maturity dates to 1 January 2010. I was pleased by this affirmation of Mr D's commitment to our relationship and felt that we had recovered some of the ground lost in the meeting because of Mr I's outburst.

154. The extended maturity date was never formally documented although Mr D and I, consistent with the way in which we had done much of our business, regarded it as having been agreed, with this meeting being a reconfirmation of that agreement. I do not think that either of us, given the nature of the investment and the way in which we did business, regarded it as a particularly big tale. Repayment in cash of the loans had never been the focus -- this was an equity finance deal. What Mr D was recognising at this meeting, as he had done in August 2014, was that the delays caused by the Government of Country C should be taken into account such that the five years which we had agreed would be the duration of the investment should begin to run from at or around the time the investment took effect (ie following the completion of the Oil Major transaction)."

9. Mr D addressed the August 2015 meeting as follows:

"20. I have in the meantime been made aware that English law does in certain instances contemplate the validity of oral agreements, but it goes without saying that for an agreement to be valid one ought to be at least reached, which I can unequivocally deny ever happened.

21. I can, therefore, confirm that there was no agreement to postpone the repayment of hundreds of millions of US dollars of the Loan Facilities made by D to P and to Q (Country A). There is no signed contract to that effect, and given what I explain below about my concerns with Z's management and its debt, I simply would not have allowed such a significant concession with respect to postponement of the debt.

22. P's argument is not only hardly plausible in normal circumstances, but in this instance absolutely false. The truth of the matter, as I see it, is that the pending litigation is part of a well-conceived scheme which is either intended to or has the effect of further delaying the contractual obligation to repay what is owed to D, further perpetrating the inappropriate and deliberate conduct of Mr E and his associates in selling-off many of Z's assets which has left Z in a precarious financial position. I believe that P and Mr E are simply playing for time.

> *23. To substantiate his position, I know that Mr E has submitted in this arbitration a witness statement where he references a number of meeting in which these postponements and other changes to the Loan Facilities were allegedly agreed. There is not a single document proving this and Mr E's recollection of the actual contents of these meetings are often manipulated, distorting the truth on the subject matter of our discussions. As a matter of fact, the discussions never focused on postponing the repayment date, but quite the opposite: I vehemently requested that he finally pay back loans that were well past their maturity dates.*
>
> *...*
>
> *67. I categorically deny that Mr E requested a postponement of the expired loans. He just casually mentioned that he would find a solution to honour the repayment."*

10. He said as follows with regard to the June 2016 meeting in paragraph 74(d):

> *"I did not agree or even mention that the repayment date in respect of the various Loan Facilities be extended to 1 January 2020. Again, this was not discussed at all, either during the 'main' meeting or the separate meeting which took place in my private study afterwards, which myself, Mr J and Mr K attended with Mr E."*

11. In his responding witness statement Mr E said as follows:

> *"36. Mr D knows full well that the repayment dates of the Loans was extended to 1 January 2018 and then again to 1 January 2020 in the manner I described in my First Witness Statement. It is correct that these dates do not appear in any signed documentation but that is not surprising, given the relatively informal way in which we worked. In fact, given our relationship, the repayment date for the Loans was almost irrelevant -- certainly, neither of us needed it to be documented. What mattered was that we trusted one another and we trusted that repayment had been postponed. Our focus was on commercial matters, in particular, the restructuring and effective management of Z.*
>
> *...*
>
> *41. At the August 2015 Meeting, contrary to what Mr D says, I did request that the Loan repayment date be postponed to 1 January 2020. The discussion was about US$200 million (ie Mr D's personal loan), and that led to a discussion about repayment dates. It was at that stage that Mr D offered that the Loan repayment date be postponed to 1 January 2020 and I agreed."*

12. There was some hearsay evidence supportive of Mr E from other P witnesses, Messrs L and H, but there was no support in the documentation, which never reflected the alleged extension to January 2020 as (in circumstances which Mr E explained in paragraphs 128 and 154 of his first witness statement and paragraph 26 of his second) such extension was never recorded in writing.

13. As to the June 2016 meeting, Mr K was not a witness. Mr J gave evidence in a witness statement not in the papers before me, but when cross-examined he said that he had no recollection of there being any discussion about repayment of the loans at the June 2016 meeting.

14. The stage was thus set for a contest of credibility between the two prime participants to be cross- examined in relation to what had been said, if anything, about an extension at the August 2015 meeting, said by P to have been confirmed at the June 2016 meeting.

15. The cross-examination began with that of Mr E by Mr Berry at the outset of Day 2 of the hearing. There were other issues to deal with in the Arbitration, and in any event Mr Berry explained to me that what he wanted to do was "*lay the groundwork*", by referring to matters which he submitted would be inconsistent with there having been an extension agreed, but he cross-examined for the whole of Day 2 and half of Day 3, and did not at any time put a question in relation to the meeting of August 2015, even though the Chairman, Mr M, pointed out towards the end of the morning on Day 3 that Mr Berry had not yet covered what he reminded Mr Berry that Mr Morgan had described as "the core issue", as to the alleged extension agreement. Notwithstanding that, no case was put by Mr Berry to Mr E by way of challenge or even questioning as to the events of August 2015 or the case pleaded in such strong terms in the Statement of Defence as set out above, as to whether there was such an agreement or representation or common assumption.

16. There was a case pleaded in paragraph 398 of the Statement of Defence and Counterclaim that *"even if the alleged Extension Agreement was orally agreed it was not legally binding ... (a) as part of the discussions regarding the wider restructuring, it was an agreement in principle and subject to further negotiation and executed written contracts"*. This too, not referred to in Mr Berry's opening, and indeed inconsistent with it, as appears in paragraph 6 above, was not put or explored. Mr E did not, therefore, have any opportunity to defend his credibility, to answer questions as to inconsistencies or to deal with any suggestion about there only being an agreement in principle (if such case was being put). There was only one passing reference to the August 2015 meeting in the course of cross-examination, and that is because Mr E raised it in the course of his being cross-examined with regard to the June 2016 meeting on Day 3 at page 71:

> *Q: You are saying that in a side study on Mr D's yacht, you talked directly with Mr D and you agreed an extension to 2020 of these loans. That's what you say, don't you?*
>
> *A: The extension had already been agreed upon prior to that.*
>
> *Q: You said that was discussed --*

A: That was before this meeting.

Q: That's complete nonsense, Mr E, isn't it? A: No, you're wrong.

Q: Why would Mr D countenance an extension to a loan that you haven't even paid and you won't pay?

A: Because he was involved, he was an investor of the company, it was clear to him the time frame that would be required to realise the investment."

The hearsay witnesses were cross-examined by reference to a suggestion that it was not credible or sensible that there had been an extension, but neither of them were present at either of the two meetings.

17. The Arbitrators noted the following in paragraph 337 of the Award:

> *"Mr E was not cross-examined at all on his version of events at this meeting. Whilst we do not expect each and every matter in dispute to be put punctiliously to witnesses in commercial arbitration, the decision not to put Mr D's account of this potentially significant meeting to him in cross-examination was somewhat surprising. In any event, we have focused on Mr E's evidence of the meeting."*

18. Mr D's evidence was, as the Arbitrators summarised in paragraph 336:

> *"that he could not recall the meeting, and that D's lawyers had prepared his witness statement from documents in their possession."*

19. They described him as a witness in paragraphs 257-259:

> *"257. Mr D was not a satisfactory witness. He viewed his oral evidence as an opportunity to make speeches about what he regarded as relevant and without paying any real attention to what he was being asked. Substantially the whole of his evidence was not responsive to the questions put to him. This was despite repeated requests from the Tribunal to listen carefully to questions and confine his responses accordingly. He gave the impression of being a powerful personality who was used to getting his own way and who objected to the constraints which the role of a witness was placed upon him. His speeches were repetitive. It is sufficient to recall the main thrust of them. He said he was not a details man and that his role was limited to overall strategy. A signed loan agreement with a prescribed repayment date meant what it said. As far as he was concerned, the only way a signed agreement could be changed was with another signed written agreement. In relation to the key meetings at which legally binding oral*

> *agreements were said to have been made, Mr D was emphatic that there had been no binding agreement.*
>
> *258. Mr D sought to give the impression that he was inexpert in any of the technicalities of businesses in which he invested and that he did not involve himself in the detail of any businesses. He portrayed himself simply as someone with little formal education, who provided finance for businesses, and relied completely on advisers to negotiate and finalise the detail of any investment that he made and to run those businesses.*
>
> *259. Having seen and heard Mr D giving evidence, the Tribunal was not persuaded that he was as unsophisticated as he sought to suggest. The portrait of Mr D as a purely passive provider of finance is not an obvious one; nor did Mr D come across in this way when he gave evidence. It was clear that Mr D is a very experienced and sophisticated businessman with a forceful personality. He came across as a decision-maker with entrepreneurial flair and a good understanding of the businesses in which he invests, the underlying business case for any investment and the environment in which those businesses operate. This is unsurprising, given the widely diversified business empire that he has successfully built in Country C and other countries in the continent. It is inherently improbable that Mr D would have enjoyed such success in these unpredictable markets without personal involvement in, and understanding of,* those businesses and industries/sectors."

20. The nub of his evidence was as follows:

"*A: You cannot ask me the same question for 20 times. 15 August is three years ago almost. Now I can't remember what we discussed about what. When you have 730 invested and you don't receive the money from Intels, you don't receive the money from catering every time he is telling you different stories, what I have to discuss about what?*

Q: So I'm putting to you that the focus of the meeting on the boat in the summer of 2015 was the restructuring of Z and you say it wasn't?

A: Which day, where and how? Where? Which day and how? Q: I'm going to suggest --

A: No, I need the place, the boat, the name and where. Tell me.

Q: I'm going to suggest to you, Mr D, that you were very keen for Mr E to --

A: I need to know the name of the boat, the port where the boat was and the day of the week and the month. All right? Don't reply you any more because you are telling me too many stupid things. I'm sorry. How I can summer 15, where, in which boat?

Q: Well, you accept that this meeting took place, Mr D, don't you?

A: Who was with me?

Q: Do you accept that the meeting which took place in the summer of 15?

A: Which meeting, where?

Q: The meeting at which you put to Mr -- A: Where in which boat and in which port?

Q: Okay. Mr D, let's look at your witness statement, bundle 3, tab 1, page 13. A: Sorry?

Q: Page 13. Could you read to yourself paragraphs 65 to 69? (Pause). "This is your witness statement with your signature on it.

A: Yes, it's early August 2015, I suggest and agree to ... I don't remember. This paper is prepared with the assistance of my lawyer. No? They have more document in their hand than me, and I sign at the hand.

...

THE CHAIRMAN: As of today, now, can you remember having a meeting on the yacht in August 2015?

A: No, no.

THE CHAIRMAN: You can't remember it at all?

A: I don't remember beginning of August that I sit with Mr E in the boat where and how, I don't remember."

21. On Day 1 there was an exchange between Mr Berry and Mr N:

*"MR N: Sorry, is it any part of your case, [*whether*] there is an alternative case [*to*] your primary case that any tentative or putative agreement that might have been made was conditional upon repayment of the $150 million loan?*

*MR BERRY: Yes, sir, yes. Because we say that whatever -- I mean we don't accept that what was as characterised by my learned friend actually happened ... but if it did, then there's still foul [*sic*], because it was conditional. And the evidence is that we say overwhelmingly that it was conditional."*

This did not feature again either in cross-examination or in closing speeches (and it, namely a case that any agreement was conditional upon the $150 million loan being paid in any event, would have been inconsistent with both Mr D's evidence and any pleaded case).

22. In the closing speeches the dispute between the parties was limited to whether there had or had not been an oral agreement or promise. Mr Berry contended that there was no oral agreement or promise in August 2015 or June 2016. Mr Morgan submitted that *"D's counsel did not put the summer 2015 meeting to Mr E, with the result that his clear witness evidence was unchallenged"*. Mr Berry replied by relying on Mr J's evidence in relation to June 2016 and the fact that he had made a list of decisions taken at that meeting whose accuracy was confirmed by P, making no mention of the allegedly agreed or promised extension.

23. Despite their criticism of Mr D's evidence and the fact that Mr E was not cross-examined at all as to the August 2015 meeting, and thus as to the existence of the agreement/representation/estoppel/common assumption relied upon by P, the Arbitrators said in paragraph 339 that "*properly analysed*" Mr E's evidence was that *"the parties had a shared view that an extension until 2020 would in due course lead to be being incorporated into a wider package which would cover other things as well"*; and they reached their conclusion by reference to the absence of the extended date from any of the documentation (paragraph 341 of the Award) - *"this is inconsistent with an agreement or representation that the repayment date had been, or even was to be, extended to 1 January 2020"* - and by what they called the *"stark conflict"* between the evidence of Mr E and Mr J as to the June 2016 meeting (paragraphs 348- 353 of the Award). The conclusion which they reached was as follows:

> *"355. In summary, therefore, P succeeds in its estoppel argument, but only up until 1 January 2018. P has failed to establish an agreed extension for repayment of the loans to 1 January 2020. For the same reasons, P has failed to establish an estoppel, such as would prevent D claiming repayment between 1 January 2018 and 1 January 2020."*

24. P asked for clarification/correction of the somewhat concise paragraph 355, and the consequent Ruling by the Arbitrators said as follows:

> *"8. The findings in paragraphs 338-349 of the Partial Award are based on the passages in Mr E's first witness statement referred to in paragraph 335. Mr E could not recall the precise words used by Mr D. The Tribunal attached particular importance to Mr E's statement that 'the extension was part and parcel of the restructuring that we were still undertaking'. Mr E would not have said this unless that was the impression he was given by Mr D.*
>
> *9. A representation that an extension would need to be incorporated as part of ongoing restructuring negotiations is not a promise that an extension was being granted come what may. At most it was a promise that an extension would in due course need to be incorporated into a wider package which would cover other things as well.*
>
> *10. Similarly a shared assumption that an extension would need to be incorporated as part of ongoing restructuring*

> *negotiations is not a shared assumption that an extension was being granted come what may. At most it was an assumption that an extension would in due course need to be incorporated into a wider package which would cover other things as well.*
>
> *11. It is the nature of such a promise or assumption that it remains contingent until the wider package is fully agreed. The commercial reasons for this in the circumstances of this case are set out in paragraph 340 of the Partial Award. Although not necessary to the Tribunal's decision the Tribunal notes that in addition to the 'no oral modification' clause the loan agreements also included a 'no oral waiver' clause.*
>
> *12. In summary there was no clear and unequivocal promise, representation or common assumption that an extension to 1 January 2020 was being granted come what may. At most there was a promise, representation or common assumption that an extension would need to be incorporated into a wider package which would cover other things as well. Unless and until that wider package was agreed in all its elements that promise, etc, would have no legal consequences and could not reasonably be relied upon as being binding on the Respondent."*

25. The Arbitrators appear thus to have found:

    (i) that there was no agreement or promise at the August 2015 meeting (paragraphs 341 and 355 of the Award) and/or

    (ii) that there was a shared assumption (otherwise qualifying for an estoppel), but it was conditional upon being *"incorporated into a wider package which would cover other things as well"* (paragraph 339 of the Award, and the paragraphs of the Ruling set out above). This was not the same as the alternative contingent case suggested by Mr N to Mr Berry and accepted by him on Day 1, as set out in paragraph 21 above, which was a condition that any agreement was contingent upon immediate repayment of one of the loans.

26. The first conclusion had not been the subject of cross-examination of Mr E, as the Arbitrators themselves pointed out. The latter alternative (inconsistent with the first, and indeed in particular inconsistent with the last sentence of paragraph 341 of the Award, which I have quoted above) was also not the subject of cross-examination. There was the alternative plea in paragraph 398(a) of the Statement of Defence and Counterclaim to which I have referred in paragraph 15 above. This was not Mr D's evidence, was not put to Mr E and did not feature in closing submissions.

27. Mr Morgan recognises that s68 imposes a high hurdle, and both he and Mr Berry have reminded me of the regular re-emphasis by the Commercial Court in particular, by reference to the Departmental Advisory Committee on Arbitration Law's description of s68 as a *"long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected"*, for example in the **Lesotho Highlands Development Authority v Impregilo SpA** [2006] 1 AC 221 and recently by Flaux J in **Sonatrach v Statoil National Gas LLC**

[2014] 2 All ER (Comm) 857 and per Teare J in **UMS Holdings v Great Station Properties SA** [2017] 2 Lloyd's Law Rep 421. He, however, contends that this is such an "*extreme*" case. He relies upon authorities to establish two propositions:

(i) that where there is a challenge to a witness on a core issue as to credibility, it ought to be put in cross-examination to that witness, or the party not so challenging may be precluded from relying on his case not so put (relevant to Grounds 1 and 2);

(ii) that the Arbitrators may not base their decision against a party upon a case not argued against it (relevant to Ground 2).

28. As to the first proposition, it is founded upon the now well-known decision of the Court of Appeal in **Browne v Dunn** [1894] 6 R 57, whereby Lord Herschell LC at pages 70 to 71 commences by saying:

> *"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit."*

29. In modern times this has been emphasised by the Court of Appeal in **Markem Corp v Zipher Ltd [2005]** RPC 31, where Jacob LJ refers at paragraph 56 to the fact that:

> *"Procedural fairness not only to the parties but to the witnesses requires that if their evidence were to be disbelieved they must be given a fair opportunity to deal with the allegation."*

He refers at paragraph 58 to a passage in **Halsbury** whereby:

> *"Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence."*

30. Nevertheless the Court of Appeal does not go quite that far, because it approved of a passage of a judgment of Hunt J in an Australian case of **Allied Pastoral Holdings v Federal Commissioner of Taxation** [1983] 44 All ER 607 which, while quoting passages from **Cross on Evidence** and **Phipson on Evidence** to similar effect as **Halsbury**, does allow for exceptions. In **Okolo v Revenue and Customs Commissioners** [2013] STC 906 Arnold J applied the principle in the Upper

Tribunal, on the basis that *"the principles of natural justice ... apply in all courts and tribunals"*. The conclusion (at paragraph 34) was that:

> *"In the absence of any challenge to Mr Okolo's evidence to the Tribunal ... it was not open to the Tribunal to disbelieve that evidence."*

31. In **Edwards Life Sciences LLC v Boston Scientific Scimed Inc** [2018] FSR 29 CA Floyd LJ summarised the position as follows:

> *"62. Phipson on Evidence (19th Edn 2016) summarises the obligation to cross-examine a witness in the following way at paragraph 12-12:*
>
> *'In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general the CPR does not alter that position. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected. However, the rule is not an inflexible one. For example, if there is a time limit imposed by the judge on cross-examination it may not be practicable to cross- examine on every minor point, particularly where a lengthy witness statement has been served and treated as evidence-in-chief. Thus, in practice there is bound to be at least some relaxation of the rule. Failure to put a relevant matter to a witness may be most appropriately remedied by the court permitting the recall of that witness to have the matter put to him.'*
>
> *63. As made clear by cases from **Browne v Dunn** (1894) 6 R 67 HL to **Markem v Zipher [**2005] EWCA Civ 267; [2005] RPC 31, the rule is an important one. However, it is not an inflexible one. Procedural rules such as this are the servants of justice and not the other way round.*
>
> *...*
>
> *65 ... I would agree, as a general matter, that the rule requiring important positive evidence to be challenged is a rule which is not simply for the benefit of the witness (whose honesty or professional reliability is challenged) but is also designed to ensure the overall fairness of the proceedings for the parties. In **Markem** Jacob LJ, giving the judgment of the Court of Appeal, with which Mummery and Kennedy LJ J agreed, put it this way at 45:*

> *'.. procedural fairness not only to the parties but to the witnesses requires that if their evidence were to be disbelieved they must be given a fair opportunity to deal with the allegation.'"*

He then cited a passage from Foskett J in **Various Claimants v Giambrone and Law (a firm)** [2015] EWHC 1946 QB at [21], upon which Mr Berry has relied before me:

> *"I do not accept that merely because the suggestion that what he said in his witness statement was untrue (or simply misguided) was not put specifically to him (a proposition that inevitably he would deny) means that I am bound to accept his position. It is, of course, important to be fair to a witness, particularly if serious imputations as to the witness' honesty and integrity are being made, and there may be other areas of a witness' evidence that need to be challenged head-on, but the days of the 'I put it to you' cross-examination on other matters have long since gone."*

Floyd LJ concluded :

> *"69. On an appeal to this court the question must be whether the decision not to cross-examine has led to unfairness to the extent that the judge's decision on the relevant issue is thereby undermined."*

32. Before I address the question arising out of these authorities, namely whether there is a ground for departing from and/or applying flexibly the rule in **Browne v Dunn**, I turn to the authorities in relation to Mr Morgan's second proposition. Here he relies on two Court of Appeal authorities. The first is ***The Vimeira*** [1984] 2 Lloyd's Law Rep 66, in which an appeal was allowed on the basis that the case upon the basis of which the Arbitrators found in favour of the owners was unpleaded, never argued, not supported by any evidence and either abjured by or not put to the experts. This was a breach of natural justice, and the approach was confirmed in relation to s68 by Colman J in **The Pamphilos** [2002] 2 Lloyd's Law Rep 681 when, at page 686, he concluded that:

> *"The arbitrators' duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there had been no reasonable opportunity to address them during the hearings."*

33. In **Zermatt Holdings SA v Nu-Life Upholstery Repairs Ltd** [1985] 2 EGLR 14 CA at [15] a similar proposition was set out by Bingham LJ, as he then was, and in particular:

> *"It is not right that [an arbitrator's] decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of*

> *adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance."*

This too was confirmed and applied by Colman J in **Vee Networks Limited v Econet Wireless International Ltd** [2005] 1 Lloyd's Law Rep 192.

34. Both the propositions supported by Mr Morgan are on the face of them made out, and the fact that both apply in this case makes it the more difficult for me to consider the question of the exceptions to the **Browne v Dunn** principle. I certainly do not conclude in this case that because there was no cross-examination of Mr E in relation to the August 2015 meeting D thereby accepted or conceded the truth of what Mr E said. It was clear that there was no concession, not only from the pleadings, but from the challenge, minimal though it was, that there was to Mr E, referred to in paragraph 15 above. Similarly, to that extent, there was notice given to P prior to the cross-examination of Mr E, such as to that extent to put him on notice of D's case. But the suggestion that such notice was sufficient might have been appropriate in the days when witnesses gave evidence-in-chief, so that they could then give their evidence from scratch orally, knowing what was alleged against them, but that would not be enough where, as in the present system, they had put their evidence into a witness statement and expected to be challenged, but were not. Whereas there may be cases such as those adumbrated by Foskett J where not every point required to be challenged, nevertheless this was the core issue, it was one where, as I have referred to in paragraph 15 above, the Chairman had specifically expected it to be dealt with in cross-examination; and Foskett J himself in **Giambrone** accepted that it was *"important to be fair to a witness, particularly if serious imputations as to the witness' honesty and integrity are being made"*. As Floyd LJ emphasised in **Edwards**, by reference to **Markem**, fairness to a witness requires that, if his evidence is to be disbelieved, he must be given a fair opportunity to deal with the allegation. There is then in this case the further point that there was also not put, by virtue of the fact that there was no challenge at all to his evidence as to August 2015, any case as to conditionality or contingency, as to which he was given no opportunity to explain his case, or meet what it seems the Arbitrators subsequently concluded, without such cross-examination, was (paragraph 339 of the Award) the *"proper analysis of his evidence"*.

35. Success under s68 does not only require the establishment of serious irregularity by reference, in this case, to s68(2)(a), but also that the Court considers that such serious irregularity has *"caused or will cause substantial injustice to the applicant*". I have in mind in relation to the question of substantial justice in particular that:

(i) Mr E's evidence had potential flaws which were calling out for cross-examination both as to its *"proper analysis"* and otherwise.

(ii) his case was, on the face of it, inconsistent with the contemporaneous documentation, which particularly impressed the Arbitrators;

(iii) This case as to there being an agreement or promise or common assumption would or might fall to be disbelieved when set against his evidence as to the June 2016 meeting, where it would fall to be tested against that of Mr J, where the Arbitrators pointed out a "*stark conflict"*.

36. However, it must be said that:

(i) the evidence of Mr D was poor to the extent of non-existent.

(ii) Mr J's evidence, notwithstanding his record of decisions taken in June 2016, still left open the possibility that there had been and continued the common assumption from August 2015;

(iii) Mr E had his explanation as to the apparently inconsistent documentation, and it would seem that the Arbitrators themselves considered (paragraph 339 of the Award and the Ruling) that there was a common assumption, but that it was conditional or contingent;

(iv) if the point about condition/contingency had been raised before, or by, the Arbitrators at the hearing then cross-examination might have resolved it or, in any event, legal argument by Mr Morgan (whether by reference to the cases set out in paragraphs 26-27 of Mr F's witness statement or otherwise) might have been able to persuade the Arbitrators that *"a promise can be made or a shared assumption held, even though the formal details of a contractual variation still need formally to be established"*.

37. In any event, I must bear in mind the authorities to which I referred above. In **The Vimeira** at [76] Ackner LJ said:

> *"Where there is a breach of natural justice, as a general proposition it is not for the Courts to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Mr Justice Megarry in John v Rees, Martin v Davis, Rees v John [1970] Ch 345 at 402 where he said:*
>
> *"'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained, of fixed and unalterable determinations that, by discussion, suffered a change.'"*

38. Colman J in **Vee Networks** said as follows in paragraph 90 of his judgment:

> *"90. It is unnecessary and in the circumstances undesirable for me to express a view as to whether the arbitrator came to the right conclusion, even if by the wrong route, or whether, had he ignored the 2003 amendments, he should have reached the same or a different conclusion. The element of serious injustice in the context of s68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion*

> *unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process."*

39. There is a similar passage at paragraph 85(7) in Popplewell J's judgment in **Terna Bahrain Holding Company WLL v Al Shamsi** [2012] EWHC 3283 (Comm). I cannot possibly say that if Mr E had been properly cross-examined and given the opportunity to deal with what were in the event seen as weaknesses by the Arbitrators in his case and/or to deal with the alternative case which Mr Berry did not run, there might not have been a different outcome.

40. This was not an easy position for the Arbitrators where, despite clear indications given to Mr Berry, he did not cross-examine, and where it seems that the Arbitrators favoured a case inconsistent with that being forward by Mr Berry and not put to Mr E or Mr Morgan. But I am satisfied that there was a breach of s33 by reference to both the grounds relied upon by Mr Morgan, and allow the application under s68.