In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 402

BETWEEN:-

IAN COCKWELL

Plaintiff

-and-

GORDON FLATT

Defendant

RULING (redacted)

(In Chambers)

Date of hearing: 10th September 2014
Date of ruling: 23rd September 2014

Mr Jeffrey Elkinson and Mr Ben Adamson, Conyers Dill & Pearman, for the Plaintiff

Mr Timothy Frith, MJM Limited, for the Defendant

Introduction

1. The Plaintiff alleges that the Defendant holds certain assets for him on trust. By an originating summons dated 30th October 2013 he seeks a declaration to that effect and consequential relief. The assets are alleged to be worth many millions of dollars.

2. The Defendant having filed a memorandum of appearance, the parties entered into a consent order for directions as to the future conduct of the action. This was filed with the Court on 12th December 2013 and duly signed by me.

3. The directions included a timetable for the filing of affidavit evidence and a provision that the parties be at liberty to cross-examine any deponent of an affidavit upon giving notice. The matter was to be set down by the Registrar after counsel had liaised and agreed dates.

4. Pursuant to that timetable, the Plaintiff filed a lengthy affidavit dated 7th January 2014 in support of his claim. This explains that the assets to which he lays claim lie within a pool of marketable securities known as the "Coastal Group". It alleges that the Defendant holds certain of these securities on trust for the Plaintiff; Jack Cockwell, his brother; and Bruce Flatt, the Defendant's brother.

5. By a letter dated 30th January 2014 the Defendant's attorneys requested an extension of time in which to file an affidavit in reply. By a letter dated 3rd February 2014 the Plaintiff's attorneys granted them an extension until 20th February 2014.

6. The Defendant did not file an affidavit in reply. Instead, by a notice of motion dated 4th March 2014 he seeks an order that the action be stayed pending the determination of certain arbitral proceedings in Canada ("the Canadian Arbitration") which were commenced by notices of arbitration dated 30th August 2013, 3rd October 2013, and 11th November 2013.

7. The Plaintiff is a party to the Canadian Arbitration. The Defendant is not a party to the Canadian Arbitration in his personal capacity, but is a director

and shareholder of a company, Intercana Investments Limited ("Intercana"), which is a party to the Canadian Arbitration. The parties to the Canadian Arbitration may be referred to as the Jack Cockwell parties on the one side and the Ian Cockwell parties on the other.

8. The Defendant's attorney, Alan Dunch, filed an affidavit dated 25th March 2014 in support of the stay application. In this, he asserts that a document headed Settlement and Agreement to Renounce and Release dated 25th May 2010 ("the Settlement Agreement") provides a complete defence to the Plaintiff's claim. The Plaintiff was a party to the Settlement Agreement but the Defendant was not. However the Defendant claims that he is a member of the class of persons to whom the releases to which the Plaintiff agreed in the Settlement Agreement are expressed to apply.

9. The relief sought in his notice of arbitration includes a declaration that the releases provided by the Settlement Agreement encompass all claims of any kind whatsoever that the Plaintiff had or may have against Intercana, its shareholders, directors, officers and members of their families, with respect to matters known by the Plaintiff as of 25th May 2010, including the claims made by the Plaintiff in the matter before the Court ("the Coastal Claim").

10. The Defendant claims that he has the benefit of the Settlement Agreement both as a director and shareholder of Intercana and as a member of the family of Bruce Flatt, who was at all material times also a director and shareholder of Intercana. Bruce Flatt's claim for a declaration is supported by the other Jack Cockwell parties.

11. The Ian Cockwell parties contend in the Canadian Arbitration that the Settlement Agreement, including whether it covers the claim brought by the Plaintiff in the instant proceedings, falls outside the scope of the Arbitration.

12. In a ruling dated 3rd July 2014, the Arbitral Tribunal decided to put the determination of this issue over until the hearing of the arbitration on the merits. The Tribunal stated that only after hearing the evidence would it be in a position to interpret the relevant arbitration provisions and whether or not it had any basis to comment upon the propriety of the Coastal Claim.

13. The arbitral hearing is scheduled for early 2015. But I understand from a letter from the Plaintiff's Canadian attorneys that upon its conclusion the parties will submit written submissions. These will be followed by oral argument, which is unlikely to be heard before April 2015. The final award is not expected to be made before or during the summer of 2015.

The Defendant's application

14. The Defendant seeks a stay of the proceedings:

    (1) Pursuant to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law). Section 23 of the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act") provides that the Model Law has the force of law in Bermuda.

    (2) On case management grounds, pursuant to the Court's inherent jurisdiction.

15. I shall address each ground in turn.

Stay under article 8

16. Article 8 of the Model Law is set out below. So, too, is Article 7 as both articles need to be read together.

> **Article 7. Definition and form of arbitration agreement**
>
> (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an

> exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.
>
> **Article 8. Arbitration agreement and substantive claim before court**
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

17. The Plaintiff takes a preliminary point that the Defendant has lost the right to request that the Court refer the parties to arbitration as, or so it is alleged, the Defendant has already submitted his first statement on the substance of the dispute. This, the Plaintiff submits, was the consent order for directions or alternatively the request in correspondence for an extension of time in which to file an affidavit in reply.

18. The Plaintiff relies on the decision of the Court of Appeal of England and Wales in Patel v Patel [2000] QB 551. This was concerned with section 9 of the Arbitration Act 1996 ("the 1996 Act"). So far as relevant this provides:

> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may … apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> . . . . .

> (3) An application may not be made by a person … after he has taken any step in those proceedings to answer the substantive claim.

19. The defendant applied to set aside a default judgment and sought leave to defend the action and counterclaim. The judge held that in so doing he had taken a step in the proceedings to answer the substantive claim and that he had therefore lost the right to seek a stay of the proceedings pursuant to section 9 of the 1996 Act. The defendant appealed and his appeal was upheld.

20. Lord Woolf MR, who gave the leading judgment, stated that when asking whether the defendant had taken any step to answer the substantive claim, the court should take into account the wording of article 8(1) of the Model Law because it was clear that those responsible for drafting the 1996 Act had the provisions of the Model Law in mind when doing so. Nonetheless, Lord Woolf stated that the best test for the meaning of the 1996 Act was the words which actually appeared in the Act.

21. Lord Woolf held that the application to set aside the default judgment could not assist the plaintiff, because without such an application there was nothing to stay. The request for leave to defend the action and counterclaim was more problematic. Lord Woolf recognised the force in the plaintiff's submission that it was a clear indication that the defendant was going to defend the action and counterclaim. But the defendant did not need leave to defend the action and counterclaim, because he could do so as of right if the default judgment was set aside. To hold that the defendant had taken a step in the proceedings by asking for something otiose would, the learned judge held, be inconsistent with the spirit of the 1996 Act. The implication was, I infer, that had the request for leave to defend the action and counterclaim not been otiose, then they would have constituted a step in the proceedings.

22. Otton LJ agreed. However he cited with approval the commentary to Merkin, Arbitration Law at paragraph 6.19, upon which the Plaintiff places some reliance:

> The right to apply for a stay will be lost if the defendant in the judicial proceedings has expressly or impliedly represented that he does not

> intend to refer the issues in dispute to arbitration. The matter is determined by the usual rules applicable to estoppel, i.e. has the defendant unequivocally represented that there will be no reference to arbitration, and has the plaintiff conducted his affairs on the basis that the matter will be determined by the court, in reliance on that representation.

23. Otton LJ found that the defendant by his action did not impliedly represent that he did not intend to refer the issues in dispute to arbitration. This was because at the same time as the defendant had filed an affidavit setting out the merits of his case in support of his application to get the default judgment discharged he had filed another affidavit in which he asked the court for a stay.

24. In the instant case, the Plaintiff submits that by agreeing a timetable for the filing of affidavits the Defendant unequivocally represented that there would be no reference to arbitration, and that in reliance on that representation the Plaintiff has conducted his affairs on the basis that the matter will be determined by the court by preparing and filing his above-mentioned affidavit.

25. That may be so. But the test in article 8(1) of the Model Law, namely a statement on the substance of the dispute, is not the same as the test in section 9(3) of the 1996 Act, namely a step in the proceedings to answer the substantive claim. Merely by agreeing to a timetable and seeking an extension to it the Defendant cannot reasonably be taken to have made "*a statement on the substance of the dispute*".

26. The plain meaning of those words is reason enough for me to arrive at this conclusion. But it is supported by the first instance decision of Waung J in the Supreme Court of Hong Kong in Louis Dreyfus Trading Ltd v Bonarich International (Group) Ltd [1997] HKCFI 312, with whose analysis at paragraph 21 I respectfully concur:

> In my judgment what Article 8(1) has provided for as a bar to a Mandatory Stay is some formal document (probably first in a series)

> specially submitted by a party to the Court which contains what that party says on the substance of the dispute.

27. As the consent order for directions was not a statement on the substance on the dispute, neither was the request for an extension of time to comply with those directions. Moreover, as Waung J states, the reference in article 8(1) of the Model Law to "*submitting*" a statement means submitting to the Court. The request for an extension was only made in correspondence.

28. I therefore rule against the Plaintiff on the preliminary point. The Defendant had not submitted his first statement on the substance of the dispute prior to requesting that the Court refer the parties to arbitration. Although the affidavit of Mr Dunch may well be such a statement, it was filed after and in support of the application for a stay. Accordingly, the Defendant has not lost any right that he may have under article 8 of the Model Law to request that the Court refer the parties to arbitration.

29. The Plaintiff is on firmer ground when he submits that the Defendant has no right under article 8 of the Model Law to request that the Court refer the parties to arbitration as the Plaintiff is not a party to an arbitration agreement dealing with the subject matter of the dispute before the Court.

30. The Defendant says this is unnecessary. I disagree. The reference to "*party*" and "*parties*" in article 8(1) is a reference to a party and parties to the arbitration agreement. Thus "*parties*" has the same meaning in article 8(1) as it has in article 7(1). Of course in article 8(1) the party and parties must also be parties to the action: if they were not, the requesting party would have no standing to make a request to the court and the court would have no jurisdiction to refer the parties which were not before it to arbitration.

31. The contrary interpretation – that under article 8 of the Model Law the Court may be required upon the request of a party to the litigation who is not a party to a relevant arbitration agreement to refer the parties to the litigation to arbitration even though there is no arbitration agreement between them –

would, as the Plaintiff submits, be "*arbitration heresy*". As the UNCITRAL 2012 Digest of Case Law on the Model Law states at paragraph 6:

> courts have emphasized the importance, while applying the Model Law, of taking into consideration that party autonomy is one of its philosophical cornerstones.

32. Thus, where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the courts, they should be held to their contract. See the dissenting judgment of Cumming JA in Burlington Northern Railroad Co v Canadian National Railway Co 1995 1802 (BC CA) at paragraph 58. His judgment was approved by the Supreme Court of Canada at [1997] 1 RCS 5 when reversing the Court of Appeal's decision.

33. Conversely, where the parties have not contracted to arbitrate it would be inconsistent with party autonomy for the Court to compel them to do so. The Court has no jurisdiction to require the parties to enter into an arbitration contract. Were the Court to attempt to coerce them to do so by refusing to hear their dispute it would be acting unlawfully and in breach of their constitutional right under section 6(8) of the Constitution of Bermuda to a fair hearing within a reasonable time.

34. No doubt that is why the UNCITRAL 2012 Digest, to which I was referred, states at paragraph 12:

> Referral to arbitration may be denied on the ground that the respondent to the referral never undertook, or never validly undertook, to resort to arbitration as alleged by the party seeking a referral order.

35. The Plaintiff referred me to summaries of several cases supporting this proposition as set out in the legal textbook Model Law Decisions, Cases Applying the UNCITRAL Model Law on International Commercial Arbitration (1985 – 2001).[1]

[1] Alvarez, Kaplan and Rivkin, Kluwer Law International.

36. Simmonds Capital Ltd v Eurocom International Ltd (1998), 144 FTR 230 was a first instance decision of the Federal Court of Canada. One of the defendants applied for a stay of proceedings pursuant to article 8 of the Model Law on the strength of an arbitration clause between that defendant and one of the plaintiffs in a licensing agreement between them. The Court dismissed the application insofar as it related to (i) causes of action that did not arise under the licensing agreement and (ii) defendants to the action who were not also parties to the licensing agreement. The headnote accurately summarises the *ratio* as being that where the disputed claims fall outside the scope of the arbitration agreement, the court has no jurisdiction under article 8 of the Model Law to issue a stay, notwithstanding some commonality of evidence.

37. Conagra (International) SA v Seamotion Navigation Ltd was an unreported 1995 decision of the British Columbia Supreme Court. The Court refused an application for a stay of proceedings pursuant to article 8 of the Model Law because the documents containing an arbitration clause did not form part of a contract between the parties. Thus it held that a contractual agreement between the parties to arbitrate was a prerequisite for an article 8 stay.

38. Shell Hong Kong Limited v ESA Consulting Engineers Limited was an unreported 1998 decision of the Hong Kong Court of First Instance. One of the defendants applied for a stay of proceedings under section 6 of the Arbitration Ordinance, which was in the same terms as article 8 of the Model Law. The defendant acknowledged that its dispute with the plaintiff was not subject to an arbitration agreement: if there was an arbitration agreement it was with another limited company. As the defendant had failed to show that the plaintiff's action was brought in a matter which was the subject of an arbitration agreement, which was a prerequisite for a stay under article 8 of the Model Agreement, the application for a stay was dismissed.

39. I am therefore satisfied that as there is no agreement between the Plaintiff and the Defendant to arbitrate the subject matter of the action, I have no jurisdiction to order a stay pursuant to article 8 of the Model Law.

40. The Plaintiff has indicated that in the event of such a ruling Jack Cockwell will apply to be joined as party to these proceedings so that he can request a stay of the action pursuant to article 8. I shall deal with that application if and when it arises. However, as I have heard argument upon the point, it may be helpful if I make a couple of observations.

41. First, it is a precondition of a reference to arbitration under article 8 of the Model Law that the action is brought "*in a matter which is the subject of an arbitration agreement*". This implies that before referring the matter to arbitration the Court must be satisfied that the precondition has been met.

42. That is the position which the courts have adopted with respect to the analogous provision of the section 9(1) of the 1996 Act. Thus in Al-Naimi v Islamic Press Agency Inc [2000] CLC 647, EWCA, Waller LJ stated at 651:

> I would in fact accept that on a proper construction of section 9 it can be said with force that a court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the court can grant a stay under that section.

43. To determine whether the action is brought in a matter which is the subject of an arbitration agreement would be likely to require a lengthy evidential hearing. In so observing I bear in mind that the Arbitral Tribunal concluded that it could not determine the point as a preliminary issue but only in the context of the substantive arbitration hearing.

44. Second, there is strongly persuasive authority that under article 8 of the Model Law the right to request a reference to arbitration is limited to a party against whom an action has been brought. The authority in question is Etri Fans Ltd v NMB (UK) Ltd [1987] 1 WLR 1110 EWCA. It concerned the construction of section 1(1) of the Arbitration Act 1975 ("the 1975 Act"). This read as follows:

> If any party to an arbitration agreement.. or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the

> proceedings may.. apply to the court to stay the proceedings; and the court.. shall make an order staying the proceedings.

45. Woolf LJ, giving the judgment of the Court, held at 767 d – e:

> In my view the purpose and intent of section 1(1) of the Act of 1975 is that the parties to an arbitration agreement and those claiming through or under them who are *sued* in relation to a matter which it has been agreed to refer to arbitration, should be entitled to seek a stay. It is not the intention of the subsection that those who have not been sued should be able to take advantage of the provisions of section 1(1), by applying to become parties to the proceedings against the wishes of a plaintiff purely for the purpose of obtaining a stay of an action which has been commenced, not against them, but against another party who either did not have or did not wish to avail himself of the right to seek a stay.

46. Although the wording of section 1(1) of the 1975 Act differs from article 8 of the Model Law, the reasoning of Woolf LJ is in my judgment equally applicable to them both. In which case the joinder of Jack Cockwell to the action would not be appropriate.

Stay on case management grounds

47. The Court has inherent jurisdiction to order a stay. But a stay in cases such as the present should only be granted in "*rare and compelling circumstances*". See the judgment of Lord Bingham CJ (as he then was) in Reichhold Norway ASA v Goldman Sachs [2000] 1 WLR 173 at 186 C.

48. The Defendant seeks a stay because, if the Arbitral Tribunal (i) finds that it has jurisdiction to arbitrate the subject matter of the dispute before this Court, and, having done so, (ii) interprets the Settlement Agreement in a manner favourable to him, he wishes to refer the Court to the arbitral award. I am not in a position to predict how the Arbitral Tribunal is likely to resolve either issue.

49. There is another element of uncertainty. Arbitration proceedings are by nature private and this gives rise to obligations of confidentiality. In Aegis v

European Re [2003] 1 WLR 1041 Lord Hobhouse, giving the judgment of the Board on an appeal from Bermuda, acknowledged at paragraph 6:

> the general principle of privacy in arbitration proceedings: Dolling-Baker v Merrett [1990] 1 WLR 1205, analogous to the duty of secrecy as between banker and customer.

50. The obligations of confidentiality may apply differently to the generality of the arbitration on the one hand and the arbitral award on the other. Thus Lord Hobhouse stated at paragraph 20:

> Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain. This may mean that the implied restrictions on the use of material obtained in arbitration proceedings may have a greater impact than those applying in litigation. But when it comes to the award, the same logic cannot be applied. An award may have to be referred to for accounting purposes or for the purpose of legal proceedings … or for the purposes of enforcing the rights which the award confers … .

51. Lord Hobhouse prefaced those remarks with the observation:

> The present case involves the construction of an express confidentiality agreement and whether the later use of the award to support an issue estoppel comes within the scope of enforcement. For this reason more general statements concerning the privacy of arbitration proceedings and the duty of one party to respect the confidentiality of the other are of less assistance and relevance.

52. That observation underlines the importance of attending to the wording of the particular confidentiality agreement in question. In the present case this wording consists of rule 33 of the National Arbitration Rules published by the ADR Institute of Canada. This relevant part of the rule reads:

> The parties, the witnesses and Arbitrators shall treat all meetings and communications, the proceedings, documents disclosed in the proceedings, discovery and awards of the Tribunal as confidential, except in connection with a judicial challenge to, or enforcement of, an award, and unless otherwise required by law.

53. In Ali Shipping Corp v Shipyard Trogir [1999] 1 WLR 314, EWCA, Potter LJ, giving the judgment of the Court, had characterised the duty of confidentiality arising from arbitration proceedings as an implied term at 326 D – F and then formulated exceptions to it at 326 H – 327 B. At paragraph 20 of Aegis v European Re Lord Hobhouse expressed reservations about the desirability or merit of adopting this approach. But I find it helpful to have the exceptions in mind as providing at least some guidance.

> As to those exceptions, it seems to me that, on the basis of present decisions, English law has recognised the following exceptions to the broad rule of confidentiality: (i) consent, that is, where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception, that is, the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-a-vis a third party in order to found a cause of action against that third party or to defend a claim, or counterclaim, brought by the third party: see Hassneh Insurance Co. of Israel v. Mew [1993] 2 Lloyd's Rep. 243.

54. When considering whether, in principle, the Court would or might permit the Defendant to rely on an arbitral award made by the Arbitral Tribunal, it is helpful to identify in what way the award would be relied upon.

55. The award would not give rise to an estoppel because estoppels are mutual. The Defendant could not enforce the arbitral award against the Plaintiff because, as the Defendant is not a party to the arbitration proceedings, the Plaintiff could not enforce the award against him. See the judgment of Bell J in ABC Insurance Company v XYZ Insurance Company [2006] Bda LR 8 at paras 32 – 34, approving the judgments of Buckley J in Carl Zeiss

Stiftung v Rayner & Keeler Ltd (No 3) [1970] Ch 506, Ch D, at 541 D; and Aldous LJ in Kirin-Amgen Inc v Boehringer Mannheim GMBH [1997] FSR 289, EWCA, at 306 – 307.

56. The Defendant has indicated that he would want to rely upon the chain of reasoning which led to the Arbitral Tribunal's award. But that reasoning can be as fully expressed in counsel's submissions. The Defendant's hope that the reasoning would be (even) more persuasive if it were attributable to the Arbitral Tribunal is not a good reason for the Court to interfere with the confidential status of the award. Phillips J (as he then was) adopted a similar approach in Glengate v Norwich Union [1995] 1 Lloyd's LR 278, QB (Com Ct), at 278.

57. The Defendant's best point is that in the interests of commercial certainty it is desirable that the Settlement Agreement should be given a uniform interpretation. In other words, it should mean the same thing as between the parties to the arbitration, who include the Plaintiff, as it should as between the Plaintiff and the Defendant. If a stay is not granted, there is a risk that this will not happen, as Court may interpret the contract differently to the Arbitral Tribunal.

58. If a stay is granted, however, the Defendant could apply to adduce the arbitral award as evidence of the legal rights and liabilities under the Settlement Agreement of the parties to the arbitration. The Court would then, to the extent that it thought it appropriate, be in a position to take account of those rights and liabilities as determined by the arbitral award when interpreting the Settlement Agreement. Assuming, of course, that the arbitral award not only contains a ruling upon the issue but a ruling to which the Defendant (or indeed the Plaintiff) wishes to refer the Court.

59. I can see no good reason why in those circumstances the Defendant should not be permitted to adduce the arbitral award in evidence, notwithstanding that he is a stranger to the arbitration proceedings.

60. When considering a stay I must have in mind the overriding objective under RSC Order 1A, rule 1 to deal with cases justly, and the Court's duty under

RSC Order 1A, rule 4 to further the overriding objective by actively managing cases.

61. The overriding objective is relied upon by both parties. The Defendant refers me to Order 1A, rule 1(2)(e), which provides that dealing with a case justly includes allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. However I derive little assistance from this rule. If I grant a stay the case will still have to be heard eventually, and as the arbitral award would not give rise to an estoppel it would be unlikely to make any material difference to the length of the trial.

62. The Plaintiff refers me to Order 1A, rule 1(2)(d), which provides that dealing with a case justly includes ensuring that it is dealt with expeditiously. The Plaintiff issued an originating summons on 30th October 2013, almost eleven months ago. The Defendant seeks a stay of the proceedings until the Arbitral Tribunal gives an award, which on the information before the Court is not likely to happen until the autumn of 2015. By no stretch of the imagination would a stay of the proceedings satisfy the requirement to deal with the case expeditiously.

63. To sum up, the Defendant seeks a stay for a legitimate purpose, namely to put the arbitral award before the Court. In order for the Defendant to do this, the Arbitral Tribunal would have to find that it has jurisdiction to arbitrate the subject matter of this action. In order for the Defendant to want to do this, the Arbitral Tribunal would have to interpret the Settlement Agreement favourably to him. I am not in a position to assess the likelihood of either outcome. If the Defendant were to put the arbitral award before the Court, it would not give rise to an estoppel nor obviate the need for a trial. But a stay would be likely to delay the progress of an action which is almost eleven months old by roughly another year.

64. In those circumstances a stay would be inimical to good case management and I decline to grant one.

Summary

65. The application is determined as follows:

(1) The Defendant has not lost any right that he may have under article 8 of the Model Law to request that the Court refer the parties to arbitration. However the Court has no jurisdiction to do so.

(2) I decline to order that the action be stayed on case management grounds.

66. I shall hear the parties as to costs and to directions for the future conduct of the action.

Dated this 23rd day of September 2014

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Hellman J