***Bridgehouse (Bradford No. 2) Ltd v BAE Systems Plc* [2020] EWCA Civ 759**

The essential facts of the case were straightforward. Bridgehouse (Bradford No. 2) Ltd ("BB2") entered into a contract with BAE Systems Plc ("BAE") for the purpose of two commercial sites (let to Airbus) for £93 million. The purchase was due to complete no earlier than January 2021. BB2 was incorporated specifically for the purpose of entering into the contract and has no other assets.

The contract contained an arbitration clause, which applied to any dispute between the parties "arising out of the provisions of this agreement". Such a dispute was to be referred to an "Independent Person" who was to act as an arbitrator in accordance with the provisions of the Arbitration Act 1996 ("the 1996 Act") unless otherwise agreed.

In addition to the arbitration clause, the contract also contained a governing law and jurisdiction clause, which provided that "the courts of England shall have exclusive jurisdiction to hear and decide any suit action or proceedings and/or settle any disputes which may arise out of or in any way related to this agreement or its formation (including any non-contractual disputes or claims)".

The terms of the contract entitled BAE to terminate the contract upon service of a written notice upon the occurrence of certain "Events of Default", which included BB2 "being struck off the Register of Companies or being dissolved or ceasing for any reason to retain its corporate existence".

BB2 was struck off the register and dissolved on 31 May 2016 due to an administrative oversight. It had failed to file its annual return on time and the usual notice sent out by the registrar of companies pursuant to section 1000(3) of the Companies Act 2006 ('the 2006 Act") was sent to its registered office, which was the address of a firm of solicitors which had acted for BB2 in the past but no longer existed. BAE became aware of the striking off and served a notice of termination on 2 June 2016.

BB2 was restored to the register on 28 July 2016 pursuant to the administrative restoration procedure in section 1024 of the 2006 Act. It disputed the validity of the termination on a number of grounds. These included the effect of section 1028(1), which provides that "the general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register". BB2 contended that all the consequences of the striking off, including the termination of the contract, had to be reassessed retrospectively in the light of this deeming provision. As the Event of Default relied upon by BAE was deemed never to have happened, the termination was rendered ineffective.

The dispute concerning the validity of the termination of the contract was referred to arbitration by a sole arbitrator. In his award he determined that the contract had been validly terminated. He rejected BB2's argument that the termination of the contract was rendered ineffective by the deeming provision contained in section 1028(1). He held that this provision did not serve to undo an action taken by a party to the contract in the period between striking off and restoration.

The section 69 appeal

BB2 then issued an appeal against the arbitrator's decision pursuant to section 69 of the 1996 Act on the grounds that his conclusion on the effect of section 1028(1) was wrong in law. The appeal was heard by Cockerill J in the Commercial Court. She dismissed the appeal holding that a distinction had to be drawn between the direct or automatic consequences of the striking off, and indirect consequences which are not automatic, but flow from the actions taken by a third party (such as the service of notice). Only the former are reversed by the deeming provision contained in section 1028(1), but not the latter[1].

It may be observed in passing that the reasoning of Cockerill J does not sit well with the decision of HHJ David Cooke (sitting as a High Court Judge) in *Re Fivestar Properties Ltd* [2015] EWHC 2782 (Ch). In that case, it was held that the deeming provision contained in section 1028(1) automatically reversed the termination of a freehold estate, which had escheated to the Crown following the service of a notice of disclaimer by the Treasury Solicitor. *Re Fivestar Properties* is therefore a clear case of the deeming provision reversing an indirect or non-automatic consequence of the striking off. BB2 relied on *Re Fivestar Properties* in its submissions before Cockerill J, but it is not considered in her judgment.

[1] The decision of Cockerill J is reported at [2020] Bus LR 306

The distinction drawn by Cockerill J also produces the arbitrary result that the termination of the contract was not reversed by the deeming provision purely because the contract required service of a notice by BAE. If the contract had provided for automatic termination upon BB2 being struck off the register (as some contracts do), the termination would have been reversed upon BB2's restoration. It is difficult to see why Parliament would have intended that the effect of the deeming provision would be dependent on the vagaries of the drafting of contracts[2].

The section 1028(3) claim

BB2 also issued, in the alternative to its section 69 appeal, a claim for an order restoring the contract under section 1028(3) of the 2006 Act. This provides that "the court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register". As explained by the Court of Appeal in *Tymans v Craven* [1952] 2 QB 100, the purpose of the power now contained in section 1028(3) is to complement the deeming provision and to enable the court (consistently with justice) to achieve to the fullest extent the "as-you-were position".

BAE applied to have the section 1028(3) claim stayed pursuant to section 9 of the Arbitration Act 1996 on the grounds that it was covered by the arbitration clause contained in the contract. Section 9(1) allows a party to an arbitration agreement to apply for a stay of any proceedings brought against it in respect of a matter which is the subject of the agreement. Section 9(4) provides that the Court must accede to such an application unless it is satisfied that the arbitration agreement "is null and void, inoperative, or incapable of being performed".

BB2 opposed the application on the grounds (a) that the arbitration clause in the contract did not, on its true construction, cover the dispute, (b) alternatively, that a claim for relief under section 1028(3) was not arbitrable in any event, so that the arbitration agreement was inoperative insofar as it purported to apply to such a claim, and/or (c) that BAE was estopped from relying on the arbitration clause.

[2] Despite the apparent conflict of authority that now exists at first instance Cockerill J refused BB2 permission to appeal to the Court of Appeal. BB2 did renew its application to the Court of Appeal, but it held that it had no jurisdiction to entertain the application because a refusal of permission to appeal by the High Court Judge in proceedings under section 69 of the 1996 Act is final.

The application came before Mr Stuart Isaacs QC (sitting as a deputy High Court Judge) who granted the stay. BB2 was granted permission to appeal by the Court of Appeal on the construction and arbitrability issues (but not the estoppel issue).

The decision of the Court of Appeal

Construction

On the construction point, BB2 argued as follows:

1. On a natural reading of the words of the arbitration clause, the claim for relief under section 1028(3) was a not a 'dispute arising out of the provisions of this agreement'. There was no longer any such dispute between BB2 and BAE, the arbitrator having found that the contract had been validly terminated and BB2's appeal against that decision having been dismissed. The section 1028(3) proceeded on the basis that the agreement was at an end. The only question for the court was whether, on the facts as found by the arbitrator, it was just that it should be reinstated. That was a dispute arising out of the statute, not the agreement.

2. The presumption laid down by the House of Lords in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2007] 4 All ER 951 that the parties, as rational business people, were likely to have intended that any dispute arising out of their relationship was to be decided by the same tribunal was of little relevance in the present case because the inclusion of a more widely-drafted exclusive jurisdiction clause in favour of the English courts, alongside the arbitration clause, demonstrated that the parties did not intend that every dispute arising out their relationship would be referred to an arbitrator. The section 1028(3) claim was a non-contractual dispute and therefore expressly covered by the exclusive jurisdiction clause.

3. *Fiona Trust* was decided prior to a number of recent cases on contractual interpretation, such as the decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, which emphasise that the parties' intention is to be gleaned first and foremost by the words they used in the contract, and that commercial common sense cannot be used to override the natural meaning of those words.

4. The fact that relief under section 1028(3) has the potential to affect third parties meant that the parties cannot have intended that a claim for such relief would be covered by the arbitration agreement.

The Court of Appeal rejected this argument. Newey LJ (with whom Males and Phillips LJJ agreed) said (at paras. 38 to 41) that construing the arbitration clause in accordance with the *Fiona Trust* presumption did not deprive the exclusive jurisdiction clause of a role. Apart from anything else, that clause ensured that the English Courts had jurisdiction over issues arising from an arbitration or expert determination under the arbitration clause (the clause envisaged that an independent person appointed pursuant to it could act either as an arbitrator or an expert).

Further, the fact that relief under section 1028(3) might affect third parties did not lend any real support to BB2's case as, very often, an application for such relief would be of no significance to anyone other than the immediate parties. If a particular case did potentially engage third party interests, that might limit the type of relief that the arbitrator could grant, but this did not indicate that the arbitration clause was not intended to cover disputes as to the application of section 1028(3).

As a matter of construction, the claim under section 1028(3) could be characterised as a 'dispute arising out of the provisions of the agreement'. BB2 only needed such relief because BAE had invoked the termination provisions in the agreement and the question whether there should be relief was intimately connected with the effect of the deeming provision in section 1028(1), which was within the arbitrator's remit. The fact that it had now been established that the agreement had been terminated was not determinative. Arbitrations are commonly concerned with contracts that have already been brought to an end (e.g. by repudiation of frustration). Nor did the fact that the dispute related to whether relief should be granted pursuant to a statute mean that it could not also 'arise out of the provisions' of the agreement. Absent clear words excluding disputes arising out of applications under section 1028(3) from the ambit of the arbitration clause, the *Fiona Trust* presumption applied.

In a short judgment of his own, Males LJ said this on the construction issue (at para. 70):

> "To accede to BB2's submission that the arbitration clause is in relatively narrow terms which do not extend to the current dispute would take us back to the days before the House of Lords in the *Fiona Trust* case swept away the verbal distinctions between clauses which provided for disputes "arising in connection with", "arising out of" and

"arising under" an agreement to be arbitrated. While some of us made a good living from arguing about these arcane distinctions, they reflected no credit on English law and it would be a retrograde step to go back".

Non-arbitrability

The concept of non-arbitrability allows a court to refuse to give effect to an otherwise valid arbitration agreement on the grounds that the wording of a particular statutory provision shows that Parliament intended to preclude the use of arbitration, or there is an inherent conflict between arbitration and the public policy considerations that underpin a particular statutory provision: see the decision of the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21, [2011] 3 SLR 414 (V K Rajah JA delivering the judgment of the court).

The concept has previously been considered by the Court of Appeal in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] Ch 333. That case concerned an unfair prejudice petition under section 994 of the 2006 Act. The Court of Appeal held that, whilst some aspects of the statutory regime governing companies were immune from interference by the members of the company whether by contract or otherwise (such as a winding up order which lies within the exclusive jurisdiction of the court), an unfair prejudice petition was essentially concerned with internal disputes about alleged breaches of the terms or understandings on which the parties were intended to co-exist as members of the company, which could be arbitrated. The fact that an arbitrator, unlike the court, was unable to grant certain forms of relief (such as a winding up order) or make orders affecting non-parties was not determinative of whether the subject matter of the dispute was itself arbitrable.

BB2 argued that claims for relief under section 1028(3) were non-arbitrable for the following reasons:

1. The section exists not simply for the benefit of the company, but was intended to protect the public interest. The striking off and dissolution of apparently defunct companies is an administrative act, which can be reversed. Unlike a dissolution following a liquidation, it does not follow an orderly winding up of the company's affairs. It may occur (and frequently does occur) when the company is not in fact defunct, but simply appears to be because it has failed to comply with its statutory filing obligations as a result of an administrative oversight (as happened in the present case). The company may still have assets and liabilities and may still have been trading at the

time of dissolution. It is not uncommon for the striking off to have occurred without the knowledge of the company's directors and it may have continued to trade following the dissolution.

2. This is reflected in the wording of the section, which refers to the 'court' granting such relief as it thinks fit for the purpose of putting the company and 'all other persons' in the 'as-you-were position'.

3. No one could suggest that an application to restore a company to the register under section 1029 could be determined by arbitration and the grant of relief under section 1032(3), which is in identical terms to section 1028(3), is ancillary to that and must equally be decided by the court. There is no reason to suppose that Parliament intended that applications under sections 1028(3) and 1032(3) should be treated differently.

In its submissions BAE relied heavily on the decision of the Court of Appeal in *Fulham*, arguing that the present case involved a private dispute about the termination of a contract, which did not affect any third parties. Although it was possible for a claim for relief under section 1028(3) to affect third parties, this would be rare and was not determinative of the question of arbitrability. It simply limited the relief available in arbitration which, as the Court of Appeal held in *Fulham*, did not mean that the claim was non-arbitrable.

In his judgment Newey LJ reviewed a number of the leading cases on the concept of arbitrability, including *Larsen Oil*, *Fulham* and the more recent decision of the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, [2016] 1 SLR 373. He concluded that the 2006 Act itself did not, either expressly or by implication, prohibit reference to arbitration of a claim for relief under section 1028(3). The fact that the section refers to the 'court' granting relief is not sufficient.

As for the public policy considerations, he emphasised the concept of party autonomy, as enshrined in section 1(b) of the 1996 Act, which provides that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". Although many aspects of the statutory regime governing companies undoubtedly lie within the exclusive jurisdiction of the court (such as applications for winding up orders or orders restoring a company to the register following a striking off) because they concern the status of the company and potentially have implications far beyond the company and any particular counterparty, this could not be said of applications for relief under either

section 1028(3) or 1032(3). Those provisions could doubtless be said to have been motivated by public policy considerations, but that was not to say that the grant of relief under them engaged the public interest in such a way as to require determination by the court rather than an arbitrator.

Nor could it be said that the issues raised on an application under section 1028(3) or 1032(3) were obviously unsuited to determination by an arbitrator. The question of what was just for placing the company and all other persons in the 'as-you-were' position was comparable to questions that might arise in the context of an unfair prejudice petition, or a dispute over whether a partnership should be dissolved under section 35 of the Partnership Act 1890, or contribution claim under the Civil Liability (Contribution) Act 1978, all of which an arbitrator might be called upon to determine.

Newey LJ considered that the potential for relief under section 1028(3) to impinge on third parties who would not be bound by the outcome of an arbitration did not mean that applications for such relief were not susceptible to arbitration, although it might limit the scope of the relief obtainable in arbitral proceedings. On the facts, there was no reason to think that any third party would be affected by the relief sought by BB2 because no contract for the re-sale of the sites included in the agreement had yet been concluded.

Newey LJ agreed with BB2 that it would be odd if an application for relief under section 1028(3) were arbitrable, but one under section 1032(3) were not. Section 1032(3) only applies where an order for restoration has been made by the court, so referring a claim for relief under that section to arbitration could produce procedural complexity. However, as the Singapore Court of Appeal held in *Tomolugen*, this would not of itself generally be capable of giving rise to non-arbitrability.

Accordingly, Newey LJ concluded that the second ground of appeal failed as well. In his concurring judgment Males LJ added the following observation (at para. 73):

> "In considering whether a dispute is arbitrable, the fact that the parties have agreed that it should be arbitrated is an important starting point. What that means is that they have agreed, not only that it should be arbitrated, but also that it should *not* be decided by a court. The law permits commercial parties to choose arbitration and should respect their choice unless there are compelling reasons not to do so. As I said in *Nori Holding Ltd v PJSC 'Bank Otkritie Financial Corpn' [2018] EWHC 1343 (Comm), [2019]*

Bus LR 146 at [66], "Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain".”

Comment

This decision is a resounding endorsement of the prevailing orthodoxy that most disputes are capable of being arbitrated. Only very clear statutory language, or very strong countervailing public policy considerations, are capable of displacing the concept of party autonomy.

The case also demonstrates that there is no appetite whatsoever to row back from the ‘one-stop-shop’ presumption formulated in *Fiona Trust*, even in cases where it seems clear from the agreement itself that the parties did not necessarily envisage that all their disputes would be resolved by a single tribunal. In order to uphold the presumption, and maximise the scope of the arbitration clause, the Court of Appeal ‘read down’ the exclusive jurisdiction clause in the agreement as applying essentially only to the supervisory jurisdiction of the English court, thereby doing considerable violence to the wording of that clause. That is difficult to reconcile with recent decisions on contractual interpretation more generally, such as *Arnold v Britton*, which stress the primacy of the words used by the parties. It would appear that the *Fiona Trust* presumption is now virtually irrebuttable, except perhaps in cases where the arbitration clause states, in terms, that a particular type of dispute lies outwith its scope.