Neutral Citation Number: [2010] EWHC 1028 (Comm)

Case No: 2010 : FOLIO 34

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2010

Before :

MR JUSTICE HAMBLEN

- -

Between :

ASTRAZENECA UK LIMITED	**Claimant**
- and -	
(1) ALBEMARLE INTERNATIONAL COROPORATION	**Defendant**
(2) ALBEMARLE CORPORATION	

- -
- -

Mr John Odgers (instructed by **Reed Smith LLP**) for the **Claimant**
Mr Andrew Henshaw (instructed by **Barlow Lyde & Gilbert LLP**) for the **Defendant**

Hearing dates: 29th & 30th April, 2010

- -

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.

.....

MR JUSTICE HAMBLEN

Mr Justice Hamblen :

Introduction

1. The Claimants ("AZ") make three main claims in these proceedings: a claim against the First Defendants ("AIC") for damages for breach of a 2005 Agreement; a claim in economic duress against the Second Defendants ("AC") for restitution of the sums paid to them under a 2008 Agreement or damages, and a claim for damages against both AIC and AC for conspiring to injure AZ by unlawful means.

2. The Defendants (collectively "Albemarle") apply for an order that the court has no jurisdiction to try these proceedings, alternatively that it should stay these proceedings pending the resolution of issues pending before the courts in the United States.

Background

3. AZ are an English company involved in the manufacture of prescription drugs. AC are incorporated in Virginia and manufacture chemicals. AIC are also incorporated in Virginia and are AC's international trading subsidiary.

4. In 2005 AIC and AZ entered into a supply agreement ("the 2005 Agreement") for Di-isopropyl-phenol ("DIP"), which AZ used at their plant in Macclesfield to distil into propofol, the active ingredient of an anaesthetic sold by AZ, "Diprivan". AZ were obliged to purchase at least 80% of their DIP from AIC (clause C5), their only supplier. The contract price for the DIP was US$88.09 per kg at the outset, but later increased to US$98 per kg under the terms of the agreement.

5. The material terms of the 2005 Agreement included the following:

   (a) Albemarle were to sell to AZ specified amounts of DIP based on forecasts provided by AZ (clause C).

   (b) Shipments and invoicing were to be on a "DDU Macclesfield, UK basis" (clause D4).

   (c) Delivery was to be "on the date or during the period specified in the purchase order" (clause 2 of the Conditions of Contract).

   (d) AZ would give Albemarle at least eight weeks' lead-time to organise shipments in a timely fashion (clause D6).

   (e) In the event that AZ reformulated or otherwise changed their Diprivan brand to substitute propofol for DIP, they would so notify Albemarle and give Albemarle the first opportunity and right of first refusal to supply propofol to AZ under mutually acceptable terms and conditions (clause H).

   (f) If either party committed a breach of the contract and failed within 30 days of notice by the other party to rectify the breach, the non-breaching party could,

without prejudice to any of its other rights, terminate the contract by notice in writing (clause K).

(g) In case either party terminated the agreement "BUYER commits to purchase all remaining PRODUCT that is in stock as described in clause C or F (either at SELLER's Orangeburg plant and/or at BUYER's Macclesfield plant under the consignment program)" (clause D8).

(h) "The contract shall be subject to English Law and the jurisdiction of the English High Court" (clause 14 of the Conditions of Contract).

6. Two amendments to the 2005 Agreement were entered into. The parties have proceeded upon the basis, and AZ accept, that the second amendment had the effect of making AC an additional party to the contract.

7. In June 2007 AZ sought proposals from Albemarle and third parties for the supply to them of propofol, in place of DIP. AIC enjoyed a right of first refusal to supply propofol to AZ under mutually acceptable terms and conditions in the event that AZ substituted propofol for DIP under Clause H of the 2005 Agreement. A series of meetings ensued. Initially, AIC offered to supply propofol to AZ at US$435 per kg or US$385 per kg (according to quantity) but were informed that those prices were not competitive and they would have to drop their offer below US$250 per kg. Ultimately, at a meeting on 11 October 2007 AIC revised their offer to US$440 per kg or $315 per kg (according to quantity and region), but this was still not considered competitive. After the meeting, AZ wrote to Albemarle advising that they would not be awarded the propofol agreement, one of the stated reasons being that their quote was "approaching double the market rate".

8. Albemarle claimed that, in doing so, AZ were in breach of their obligations to allow Albemarle a right of first refusal under clause H of the 2005 Agreement and on 26 October 2007 wrote to AZ stating that they were in breach and asking AZ to rectify the breach within 30 days and reserving Albemarle's rights in the event that AZ failed to do so.

9. On 29 November 2007, AZ proposed to meet to discuss AZ's requirements further. As Albemarle wanted sight of the rival offer to supply propofol to AZ, which was confidential, a difficulty arose. AZ contend that Albemarle suspended a delivery of DIP, which was due to be made in January 2008, and only agreed to reinstate it when it was agreed that AZ would supply a redacted copy of the third-party offer once a confidentiality agreement was in place with Albemarle.

10. A confidentiality agreement was entered into between AZ and AIC, and the third-party offer provided to Albemarle, which sought AZ's confirmation of certain terms. In response, AZ say that they made it clear that the offer did not involve AZ contracting with the supplier to take their entire requirements for propofol from the supplier, and that it allowed AZ to choose between a three- or five-year term. On 25 January 2008, Albemarle claimed to exercise their right of first refusal by accepting AZ's offer to become their supplier of propofol. Whilst the prices for propofol (€166 to €176 per kg) now matched those required, the acceptance was on the basis that Albemarle be sole supplier, with a five year agreement and AZ informed Albemarle that in their view this was not an acceptance of an offer but an offer in itself.

11. Meanwhile, AZ contend that Albemarle had ceased to supply AZ with DIP in accordance with AZ's purchase orders under the 2005 Agreement. AZ's purchase order dated 9 November 2007 was for 6,175 kg of DIP, to be delivered by 22 January 2008. This was amended by agreement to 8,106 kg. AIC delivered only 1,936 kg, which arrived on 28 January 2008 but no further shipments were made. A further purchase order was issued dated 4 January 2008 for 6,175 kg of DIP to be delivered on 4 April 2008. AZ protested at Albemarle's failure to deliver DIP and drew attention to its dwindling stocks.

12. On 25 February 2008 AC and AIC issued proceedings ("the 2008 Action") in Orangeburg, South Carolina. Their claim against AZ was for damages for alleged breach of Clause H, disgorgement of all benefits enjoyed by AZ as a result of their actions, and an award of punitive damages for "breach of contract accompanied by a fraudulent act". The punitive damages claim was put on the basis that AZ had never intended to allow Albemarle to exercise their right of first refusal, whilst pretending that they held the opposite intention.

13. On 3 March 2008 Albemarle purported to terminate the 2005 Agreement for breach with immediate effect. At the same time, they stated that they did not wish to disrupt AZ's operations and that they were accordingly willing to supply DIP to AZ. Albemarle stated that they would only supply DIP at their list price (US$1,200 per kg), on a pre-paid basis and subject to their standard conditions of sale.

14. On 2 May 2008 AZ wrote to Albemarle stating that their termination was wrongful but that AZ regarded the 2005 Agreement as terminated. AZ demanded immediate delivery of DIP in accordance with their purchase orders and also requested delivery of the stocks of DIP under Clause D8.

15. On 23 June 2008 AC and AZ entered a further agreement for the sale of DIP ("the 2008 Agreement"). The 2008 Agreement provided for Albemarle to supply 9,253 kg of DIP to AstraZeneca at their list price of US$1,200 per kg.

16. The terms of the 2008 Agreement were AC's standard terms of contract. The following was added to clause 6:

> "Notwithstanding any other provision of this Agreement or term or condition of sale as set forth in Attachment A hereto, Buyer and Seller expressly agree that any and all claims held, alleged, or possessed by Seller (or any subsidiary of Seller) against Buyer shall not be waived or otherwise impacted in any way by the execution of this Agreement. All such claims held, alleged, or possessed by Seller (or any subsidiary of Seller) against Buyer are hereby expressly reserved to Seller (or any subsidiary of seller) without prejudice."

17. The Agreement incorporated AC's General Conditions of Sale which included the following clause which had also apparently been amended:

> "This Agreement constitutes the entire contract of sale and purchase of the product(s) named herein. All prior agreements between the parties relating to this product, if any are currently in force or effect, shall have no further force or effect, except to the extent relied upon by Seller (or any subsidiary of Seller) as forming the relief sought by Seller (or any subsidiary of Seller) against Buyer in

> current or future litigation between Buyer and Seller (or any subsidiary of Seller). The terms of this Agreement shall not, in the absence of prior express written consent of the parties, be amended, supplemented or superseded by any terms or provisions of any purchase order, invoice or other document of any kind."

18. In relation to governing law and jurisdiction, the General Conditions of Sale provided (clause (k)):

> "This Agreement shall be interpreted in accordance with the laws of South Carolina, without giving effect to provisions as to the conflicts of laws. Any disputes relating in any way to this agreement will be resolved in the state or federal court located in (or if none is located in, then the nearest to) Orangeburg, South Carolina, which court will have exclusive jurisdiction and venue over such dispute."

19. AZ's case is that they were forced to enter into the 2008 Agreement under duress as a result of Albemarle wrongfully starving them of DIP supplies. AZ contend that the DIP they purchased under the 2008 Agreement was DIP which they had been entitled to receive at a fraction of the price (a) under the outstanding balance of 12,346 kg due under their two purchase orders; and/or (b) under Clause D8 of the 2005 Agreement.

The litigation

20. Three actions have been brought in relation to the above events:-

(1) "The 2008 Action", in which Albemarle seek damages and punitive damages against AZ for breach of Clause H of the 2005 Agreement, as described above. Albemarle obtained an anti-suit injunction in these proceedings, which was in force between 31 March and 9 September 2009. However, on the same date that the injunction was discharged, the proceedings were dismissed, for infringement of the English jurisdiction clause in the 2005 Agreement. Albemarle's motion to have that decision reconsidered on the ground that the law and jurisdiction provisions in the 2005 Agreement have been superseded and are ineffective was rejected on 16 December 2009. Albemarle has appealed from that decision to the United States Court of Appeals for the Fourth Circuit.

(2) The present proceedings, which were issued by AZ in March 2009, and in which AZ makes the three claims (breach of the 2005 Agreement, duress and conspiracy) described above. Once the anti-suit injunction had been discharged, AZ obtained an order dated 12 October 2009 to serve these proceedings out of the jurisdiction, and served them on AC and AIC in South Carolina the same day. Albemarle issued their present application on 1 December 2009.

(3) A claim by AC against AZ ("the 2009 Action"), issued in September 2009, for declarations that AC had performed the 2008 Agreement, owe nothing to AZ under or in relation to the 2008 Agreement, and that claims between AC and AZ related to the 2008 Agreement must be brought in South Carolina's state or federal courts. On 22 January 2010 AC amended its complaint to add a claim that AZ had breached the

2008 Agreement by commencing the English proceedings, and another anti-suit injunction. AZ have applied to dismiss the amended complaint, which application is pending.

Albemarle's application

21. The essential basis of Albemarle's application may be summarised as follows:

(1) AZ's claims for economic duress and conspiracy are governed by the law of South Carolina, and are subject to a jurisdiction clause in favour of the courts of that state. Those claims should be litigated in the existing proceedings in South Carolina. Further, AZ have not established jurisdiction even aside from the jurisdiction clause.

(2) The provisions of the 2008 Agreement preclude AZ from suing the Defendants in England in reliance on the jurisdiction clause in the 2005 Agreement.

(3) AZ's claims for breach of the 2005 Agreement were discharged by the terms of the 2008 Agreement.

(4) Issues (2) and (3) depend, in any event, on questions of construction of the 2008 Agreement, which are governed by the law of South Carolina and subject to the exclusive jurisdiction of the courts of South Carolina.

(5) The question of whether the provisions of the 2008 Agreement preclude AZ from suing in England in reliance on the jurisdiction clause in the 2005 Agreement is already in issue in the existing proceedings in South Carolina. The English court ought accordingly to await the outcome of the pending appeal to the US Court of Appeals for the Fourth Circuit which will resolve the point, in practice conclusively.

Service out – the law

Jurisdiction

22. The claimant needs to show that the claim satisfies CPR rule 6.36. This means showing that each of the claims falls within one or more of the grounds set out in paragraph 3.1 of Practice Direction B supplementing CPR Part 6 – the jurisdictional "gateways".

23. The gateways relevant to the present case are:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> …
>
> *Claims in relation to contracts*
> (6) A claim is made in respect of a contract where the contract –
>
> …
>
> (c) is governed by English law; or

(d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.

(7) A claim is made in respect of a breach of contract committed within the jurisdiction.

…

Claims in tort
(9) A claim is made in tort where

(a) damage was sustained within the jurisdiction; or

(b) the damage sustained resulted from an act committed within the jurisdiction.

…

Claims about trusts etc.
…

(16) A claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction."

24. In order to show that a claim comes within a jurisdictional gateway, the standard of proof is to establish a "good arguable case". That connotes more than a serious issue to be tried or a real prospect of success, but not as much as balance of probabilities: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, and, more recently, the Court of Appeal in *Carvill America Incorporated PK Carvill & Co v Camperdown UK Ltd* [2005] 2 Lloyd's Report 457, in which Clarke LJ stated at para. 45:

> "The judge correctly held in paragraph 39 of his judgment that the test is that of a "good arguable case": *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islam Iran* [1994] 1 AC 438 , especially *per* Lord Goff of Chieveley at 453D-G. As the judge observed, that test is somewhat higher than the test under CPR Part 24, but less stringent than a balance of probabilities: see *MRG v Engelhard Metals Japan* [2004] 1 Lloyd's Rep 731 per Toulson J at 732 paragraph 9. It was thus for Carvill to demonstrate a strong argument which was short of a balance of probabilities.."

25. It was common ground between the parties that in considering whether a good arguable case has been made out in this context it is usually appropriate to apply what is known as the *Canada Trust* gloss, derived from the judgment of Waller LJ in *Canada Trust and Others v. Stolzenberg and Others (No. 2)* [1998] 1 WLR 547 (CA); [2002] 1 AC 1, namely whether the claimant has shown that it has much the better, or at any rate the better, of the argument.

26. The relevant authorities on this issue were reviewed by Christopher Clarke J in *Cherney v Deripaska* [2008] EWHC 1530 (Comm). His conclusion following that review was as follows (para 41):

> "…I have come to the conclusion that…the Court should usually, before giving permission, be satisfied that the claimant's contentions…provide a much better, or at any rate a better, argument in favour of there being the ground for jurisdiction alleged

than of there not being one. In granting permission to serve out of the jurisdiction the court is exercising an exorbitant jurisdiction over those who are not within its ordinary reach. In those circumstances the court is, as it seems to me, justified in applying the good arguable test in that manner in order to avoid the risk of compelling individuals or companies to submit to a jurisdiction to which they ought not in truth to be made subject. Further if, as Canada Trust indicates, the concept which the phrase reflects is "*of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction* ", it ought ordinarily to require that, when the Court looks at the material, it finds the points in favour of the ground for jurisdiction alleged to be more than just evenly balanced by those which point the other way."

27. In *Sharab v Al Saud* [2009] 2 Lloyd's Rep 160 the Court of Appeal referred with apparent approval to the judge's adoption in that case of the approach set out in *Canada Trust* and *Cherney* (para. 21). In considering whether a good arguable case had been shown they considered and concluded that the claimant had "the better of the argument" (para. 40).

28. Both *Sharab v Al Saud* and *Cherney* therefore provide some support for a test of who has the "better of the argument" rather than (if different) who has "much the better of the argument". Although there have been a number of cases in which the latter test has been applied, in none of them has it been made clear whether and, if so, what material difference the additional word "much" makes to the test. It would probably be clearer and simpler to apply a test of who has the better of the argument, not least because it avoids the uncertainty of exactly what the word "much" adds to it. It would also mean that in most cases the question of who bears the burden of proof would not be an issue. However, absent an authoritative determination to that effect I shall assume that I have to apply the test of who has much the better of the argument, which I understand to mean that it must be shown by the relevant party not merely that on balance they have the better of the argument, but that they clearly do so.

29. In addition to showing that the claim comes within a jurisdictional gateway the claimant must show that there is a serious issue to be tried on the merits of the claim made.

30. In relation to the merits of the claim, the test is whether the claimant has a reasonable prospect of success or has shown a serious issue to be tried and is the same as the test for resisting summary judgment. It is satisfied if the claimant puts forward a case which has sufficient substance to defeat a notional summary judgment or strike-out application: see *De Molestina and Others v Ponton and Others* [2002] 1 Lloyd's Rep 271, and *Swiss Reinsurance Company Limited v United India Insurance Company* [2002] EWHC 741 (Comm) at para. 27, per Gross J:

> "To my mind, the wording in CPR 6.21(1)(b) [now 6.37(1)(b)] is synonymous with "real prospect of success" — wording to be found in CPR Parts 3 and 24. "Real" is to be contrasted with fanciful or imaginary. Once this stage is reached, the test is the same or substantially the same as the test in *Seaconsar* : an issue which is imaginary or fanciful is not a serious issue to be tried. …Any higher test would doom parties in such applications to unwarranted mini trials on the merits."

Discretion

31. CPR 6.37(3) states that:

> "The court will not give permission [to serve out] unless satisfied that England and Wales is the proper place in which to bring the claim."

32. This requires the court to consider the question of forum conveniens and to be satisfied that the English court is clearly the appropriate forum for the trial having regard to where the case may most suitably be tried for the interests of all the parties and the ends of justice.

33. The criteria which govern the application of forum conveniens in this context are set out in the speech of Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, at pages 478 to 482. These principles are summarised in the notes to the White Book at 6.37.15 (approved at para. 20 per Waller LJ in of *Cherney v Deripaska* [2009] EWCA Civ 849). These include the following:

> "(i) The burden is upon the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.
>
> (ii) The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.
>
> (iii) One must consider first what is the "natural forum": namely that with which the action has the most real and substantial connection….
>
> ….
>
> (v) If the court concludes at that stage that there is another forum which is apparently as suitable or more suitable than England, it will normally refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless be granted…
>
> (vi) Where a party seeks to establish the existence of a matter that will assist him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it."

34. The above principles were not in issue between the parties, but there were two matters upon which they were in dispute, both relating to a case in which the defendant disputes the grant of permission to serve out on the grounds of a jurisdiction clause in favour of the courts of another country. The first concerned the burden of proof in such a case. The second concerned the law governing the applicability of the doctrine of separability to the issue of the validity of such a jurisdiction clause.

35. In relation to the burden of proof, AZ submit that it is for the defendant to establish the jurisdiction agreement upon which he relies – he who avers must prove. By contrast, Albemarle submit that once the issue has been raised evidentially by the defendant then it

is for the claimant to show that it remains an appropriate case for permission to serve out, in accordance with the general burden on him to satisfy the court that England is the proper place to bring the claim. Both parties were agreed that the appropriate standard of proof is much the better, or at any rate the better, of the argument.

36. This issue was considered by the Court of Appeal in *Konkola Copper Mines v Coromin Ltd* [2006] 1 Lloyd's Rep 410. In his judgment in that case Rix LJ reviewed the various first instance authorities which address the issue, noting that they involved a divergence of opinion. He cited from Lawrence Collins J's decision in *Bank of Tokyo-Mitsubishi Ltd v Baskan Gida Sanaye ve Pazarlarma AS* [2004] 2 Lloyd's Rep 395 at para 194:

> "[Canada Trust] does not deal with the burden or standard, when the defendant claims that the English court (which would otherwise have jurisdiction) has no jurisdiction by virtue of a foreign jurisdiction clause. In *Knauf U.K. G.m.b.H. v. British Gypsum Ltd.*, [2002] 1 W.L.R. 907 (CA) Mr Justice David Steel had held that the burden on good arguable case in relation to an alleged German jurisdiction clause lay on the defendants. The Court of Appeal did not find it necessary to decide on the claimants' argument that the good arguable case test was too low a threshold where a litigant sought to use what is now art. 23 to derogate from a jurisdiction otherwise established under the Brussels Convention, but the point was not necessary to decide: see page 925. See also *Carnoustie Universal S.A. v. ITWF*, [2003] I.L.Pr.82 , at 102. This question was not developed in argument before me, but subsequently I put it to the parties that unless there were a submission to the contrary (which there was not) I would proceed on the basis that the standard is good arguable case in the sense of which side has the better of the argument, and that the burden (on which I consider that Mr. Justice David Steel's approach is right) would only matter if the argument were evenly balanced."

37. Rix LJ then stated at paras 94 and 95:

> "94 I would seek to sum up these authorities, which are all at first instance, in this way: that where an established Regulation (or Convention) jurisdiction in England is challenged under article 23 (or article 17), (1) there are conflicting views as to where the burden of proof lies (there is a decision in Carnoustie that the burden remains on the claimant, a decision in Knauf (at first instance) that it is on the defendant, and a view in Bank of Tokyo-Mitsubishi also to the latter effect); (2) that the standard of proof has not been settled, but that there is a general tendency to apply the good arguable case test in a form which is more or less consistent with the Canada Trust gloss, but that question was expressly reserved in this court in Knauf ; and (3) that no case cited to us has dealt specifically with either aspect of the present case which is of particular interest here, namely (a) a situation where the foreign jurisdiction clause is not within article 23 (17) , and (b) the jurisdiction clause issue goes to the heart of the ultimate merits at trial.
>
> 95 As for the difference of opinion at first instance on burden of proof, I would hazard the opinion, without seeking to decide the issue, that the views of David Steel J and Lawrence Collins J are to be preferred. It seems to me to be counter-intuitive to think that, where a statutory jurisdiction has been established but an exceptional jurisdiction elsewhere is put forward based on a contract which must be clearly shown

to have the assent of both parties, it remains the burden of the claimant to prove a negative rather than that of the applicant who challenges the established jurisdiction to prove that he is entitled to rely on the clause in question. After all, article 23 comes in a section of the Regulation (section 7) called "Prorogation of Jurisdiction".

38. Richards LJ agreed with Rix LJ's judgment, as did Sir Anthony Clarke MR who added the following in relation to this specific issue at para 101:

> "As to the interesting jurisdictional questions considered but not decided by Rix LJ in the latter part of his judgment, his reasoning seems to me to be persuasive but, like him, I would prefer not to reach a final conclusion upon them until they arise for decision."

39. I respectfully agree with the intuitive approach supported by Rix LJ. Although it is ultimately always for the claimant to show that it is a proper case for service out, where this is disputed by the defendant on a specific ground such as the existence of a jurisdiction agreement which it is alleged obliges the claimant to bring the claim before the courts of another country, it is for him to establish the agreement, its scope, applicability and validity rather than for the claimant to prove a negative. Nor do I consider that a different approach is appropriate depending upon whether the case concerns common law jurisdiction or statutory jurisdiction (as in *Konkola* and the cases there referred to).

40. In relation to the law applicable to issues of separability, Albemarle submit that this is a procedural matter governed by the law of the forum and therefore English law. AZ submit that it is a substantive issue governed by the law which governs or would govern the jurisdiction agreement.

41. Some support for the application of English law is to be found in the Court of Appeal case of *Mackender v Feldia AG* [1967] 2 QB 590, although the matter does not appear to have been in issue. The separability doctrine is relevant to how the validity of a jurisdiction clause is to be determined. Unless the alleged ground of invalidity offends against some mandatory law of the law of forum in principle one would expect questions of validity to be governed by the law by which the agreement would be governed if it were valid. As a general rule I therefore consider that this is the law by reference to which the English court would determine whether the doctrine of separability applies.

Jurisdiction

(1) <u>The breach of contract claim</u>

42. The 2005 Agreement provides:

> "This contract shall be subject to English law and the jurisdiction of the English High Court."

43. As a matter of English law, which is the applicable law, that clause would be construed as being an exclusive jurisdiction clause, as was conceded by Albermarle in the 2008 Action in the light of Article 23.1 of the Judgments Regulation (No 44/2001) which provides:

> "If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise …" (emphasis added).

44. Albemarle, however, contend that AZ are precluded from pursuing claims under the 2005 Agreement (a) pursuant to the jurisdiction clause in that agreement, or (b) at all in that:

(1) the effect of clauses (j) and (k) of the 2008 Agreement is to confer exclusive jurisdiction on the South Carolina courts in respect of any claims brought by AZ in relation to the supply of the DIP, including any claims under the 2005 Agreement; and

(2) the effect of clauses 6 and (j) of the 2008 Agreement is to release AZ's claims under the 2005 Agreement.

45. The jurisdiction issue has already been addressed in the 2008 Action. Albemarle lost their anti-suit injunction because the United States District Court for the District of South Carolina held that the scope of the clause is a matter of English law not US federal law; that the clause is an exclusive jurisdiction clause in English law; that such clauses are enforceable unless unreasonable; and that this clause is not unreasonable and should be enforced, as set out in the Order dated 9 September 2009 of District Judge Margaret B. Seymour. In that judgment she held as follows:

> "In Yavuz v. 66 MM Ltd., 465 F.3d 418, 430-31 (10th Cir. 2006), the Court of Appeals for the Tenth Circuit explained:
>
> > "If the parties to an international contract agree on a forum-selection clause that has a particular meaning under the law of a specific jurisdiction, and the parties agree that the contract is to be interpreted under the law of that jurisdiction, then respect for the parties' autonomy and the demands of predictability in international transactions require courts to give effect to the meaning of the forum-selection clause under the chosen law, at least absent special circumstances…. In other words, just as the Supreme Court has made clear that under federal law the courts should ordinarily honor an international commercial agreement's forum-selection provision, we now hold that under federal law the courts should ordinarily honor an international agreement's forum-selection provision as construed under the law specified in the agreement's choice-of-law provision…."
>
> ….The court finds the reasoning of the Second and Tenth Circuits to be persuasive. Therefore, the court will turn to an analysis of the forum selection clause at issue with reference to English law."

46. The argument that the jurisdiction clause in the 2005 Agreement has been superseded and rendered ineffective by the 2008 Agreement was rejected by the same judge in her Order of 16 December 2009. District Judge Seymour held that she discerned no support for the

assertion that the 2008 Agreement superseded the 2005 Agreement "in any respect" and stated:

> "Contrary to the arguments espoused by Plaintiffs, the only reasonable construction of the provisions at issue in the 2008 Sales Agreement was to preserve the allegations of the within complaint that were raised by Plaintiffs with respect to the 2005 Contract. The court discerns no support for Plaintiff's assertion that the 2008 Sales Agreement superseded the 2005 Contract in any respect. The 2005 Contract was for a definitive period of three years and involved the purchase of at least seventy-five percent of forecast requirements…. The 2008 Sales Agreement represented a one-time purchase within a short time frame of a specific amount of DIP…. The 2005 Contract provided for payment for DIP to be made at the close of the month following the month during which the goods were delivered…. The 2008 Sales Agreement provided for a one time payment due upon signing the agreement.
>
> The 2005 Contract was terminated by Plaintiffs. The 2008 Sales Agreement did not resurrect the business relationship between the parties, but provided an opportunity for Defendant to purchase a finite supply of DIP from Albemarle without affecting the rights asserted by Plaintiffs in the within litigation. The court concludes that the 2008 Sales Agreement is unambiguous and capable of only one reasonable interpretation, i.e., that the 2008 Sales Agreement did not supersede or render ineffective the choice of law and forum selection clauses in the 2005 Contract. Plaintiff's assertion is without merit."

47. Albemarle recognise that in the light of District Judge Seymour's decisions they have to accept that AZ have much the better of the argument on this issue. They nevertheless submit that their appeal is being pursued in good faith and has a real prospect of success. In this connection they rely on the evidence of Professor Lacy of the University of South Carolina School of Law to that effect. Since the appeal prospects are of relevance to the case management stay sought by Albemarle it is necessary to address those prospects.

48. In relation to the issue of applicable law, Professor Lacy states that he agrees with the argument that federal law should be applied. However, the cases suggest that in this connection there is a distinction between issues as to the scope of the jurisdiction clause and issues as to its enforceability. In any event, for the reasons set out in Judge Seymour's decision, I consider that AZ has much the better argument and prospects of success on appeal on this issue. If federal law applies it was common ground between the experts that the clause would be construed in a permissive way.

49. In relation to the supersession issue Professor Lacy contends that an analysis of paragraph (j) demonstrates:

(1) The first and third portions of paragraph (j):-

> "This Agreement constitutes the entire contract of sale and purchase of the product(s) named herein. ... The terms of this Agreement shall not, in the absence of prior express written consent of the parties, be amended, supplemented or superseded by any terms or provisions of any purchase order, invoice or other document of any kind."

are a standard merger clause, but the remainder:-

> "All prior agreements between the parties relating to this product, if any are currently in force or effect, shall have no further force or effect, except to the extent relied upon by Seller (or any subsidiary of Seller) as forming the relief sought by Seller (or any subsidiary of Seller) against Buyer in current or future litigation between Buyer and Seller (or any subsidiary of Seller). "

forms no part of a standard merger clause, and is a "rescission agreement" designed to abrogate pre-existing duties and liabilities except to the extent specified. The only exception specified is claims by Albemarle and therefore AZ is precluded from asserting any claims related to the 2005 Agreement.

(2) The reference to "All prior agreements between the parties relating to this product" is inconsistent with any suggestion that the clause applies only to DIP sold "under" the 2008 Agreement itself. It expressly contemplates the existence of at least one prior agreement, such as the 2005 Agreement, relating to the supply to DIP. There was no other prior agreement between the parties: the 2005 Agreement was the only prior agreement between the parties at the time of the negotiation of the 2008 Agreement.

(3) The provision expressly preserves Albemarle's claims "in current ... litigation" against AstraZeneca, and thus must cover pre-existing claims as well as future claims.

(4) In any event paragraph (j) provides that the terms of the 2005 Agreement are to have no further force and effect. Those terms include the jurisdiction clause and therefore it can no longer be relied upon.

50. AZ submit that the US Court's conclusion was correct, and rely on District Judge Seymour's decision and the evidence of Professor Crystal of the University of South Carolina School of Law to that effect.

51. AZ submit that paragraph (j) is simply an entire-agreement clause and that it is consistent with the orthodox purpose of such clauses: excluding arguments of contractual variations and collateral agreements relating to the same purchase. Moreover, it is positively inconsistent with an intention to discharge accrued claims under the 2005 Agreement. It is common ground that the 2005 Agreement had terminated well before the 2008 Agreement was entered into, whereas the clause is limited to "prior agreements between the parties, if any, relating to this product, if any are currently in force or effect". That wording is plainly inappropriate to catch a previous, but now ended, supply agreement.

52. AZ also point out that Albemarle also face the difficulty that the only parties to the 2008 Agreement were AC and AZ. In this connection Albemarle rely on Professor Lacy's opinion to the effect that AIC are able to take the benefit of the 2008 Agreement. In his reports, he argues that there are different routes by which this can be achieved:

(1) That AIC is, on the language of the 2008 Agreement, intended to enjoy enforceable rights under the agreement and qualifies as a "third party beneficiary";

(2) That AIC "might" be permitted to enforce the 2008 Agreement as a "transaction participant" or under the "closely related test", under which AIC would be bound because it is closely related to AC.

53. Professor Crystal points to difficulties with each of those arguments. In summary:

(1) Generally, the doctrine of privity of contract applies; and, in order to confer a right on a third party, the contracting parties must have "intended to create a direct, rather than an incidental or consequential, benefit to such third person". A contract must have clear language showing an intention to benefit a third person to be recognised as a beneficiary under the contract; this fits ill with the fact that AIC receive no performance at all under the 2008 Agreement.

(2) The "transaction participant" doctrine and the "closely related test" doctrine have never been applied in South Carolina and it is uncertain whether South Carolina state law recognises such a right at all.

54. AZ also point out that AIC is not merely seeking to take the benefit of a jurisdiction agreement to which they are not party but also thereby to assert rights under that agreement by way of ousting their own earlier express jurisdiction agreement. AIC are unable to point to any decision that supports their position in this respect.

55. Quite apart from the difficulty that only AC was party to the 2008 Agreement, I am satisfied, for the reasons given by District Judge Seymour in her Orders and by Professor Crystal in his reports, that on the material before the court AZ has much the better argument and prospects on appeal on the issue of whether there exists between AZ and Albemarle a subsisting agreement conferring jurisdiction on the English courts. In particular:

(1) The "product" referred to in the entire agreement clause is the product which was the subject of the purchase and sale effected by the 2008 Agreement. That is not the contractual product which was the subject matter of the 2005 Agreement. If so, the 2005 Agreement is not a relevant "prior agreement".

(2) Even if the 2005 Agreement is such a "prior agreement", the fact that it is agreed to have no further force and effect has little relevance to an already terminated agreement, still less to accrued claims thereunder.

(3) The clause does not expressly deprive AZ of their already accrued causes of action for damages under the 2005 Agreement, still less does it expressly address or remove their rights to rely on the jurisdiction agreement.

(4) On any view the clause does not clearly deprive AZ of those rights and Professor Crystal's undisputed evidence is that in the event of any ambiguity the clause would be construed against AC, the drafting party.

56. In relation to whether the claims made raise a serious issue to be tried the only point raised by Albemarle was the alleged supersession of the 2005 Agreement. For the reasons outlined above AZ have at the least established that there is a serious issue to be tried on that issue.

57. It follows that AZ have established that the English court has jurisdiction over its contract claims pursuant to Article 23 of the Judgments Regulation.

(2) <u>The claims in relation to duress and conspiracy</u>

58. As regards the claims in duress and conspiracy, AZ submit that the evidence shows that these come within their respective jurisdictional gateways and that there are serious issues to be tried on the merits of both.

Duress

59. Albemarle argue that the duress claim is "in substance" a claim for a declaration that no contract exists and therefore it could only be brought if it fell within the contractual gateway (Practice Direction 6B, paragraph 3.1(8)). However, there is no reason why a given claim cannot be brought within any number of alternative gateways. The fact that the restitution sought by AZ is in the context of a voidable contract, does not mean that AZ are not seeking restitution within paragraph 3.1(16).

60. As regards whether the claim "arises out of acts committed within the jurisdiction" within 3.1(16), the substance of the alleged acts of duress is pleaded at paragraphs 54.3 to 54.6 of the Particulars of Claim. In summary, AZ's case is that, knowing that a failure to deliver DIP would be disastrous for AZ, in bad faith and for an illegitimate purpose, AIC (with AC's knowledge and encouragement) refused to deliver the outstanding orders and stockholding of DIP under the 2005 Agreement.

61. It is AZ's pleaded case, therefore, that those deliberate non-deliveries of DIP constituted the duress against AZ and led to them paying an exorbitant price for replacement DIP.

62. Under Clause D4 of the 2005 Agreement, the place at which the DIP should have been delivered was "BUYER's Macclesfield UK works." AZ accordingly submit that that is the place from which deliveries were withheld.

63. Looking at the matter (as required) in a common sense way, and asking whether damage has resulted from substantial and efficacious acts committed within the jurisdiction, AZ therefore submit that the duress claim does so.

64. Albemarle's case is that the non-deliveries are an omission rather than an act and that the relevant act for the purpose of the duress claim was the entering into the 2008 Agreement and that there is no evidence that this occurred within the jurisdiction. I consider that that is too narrow and formalistic approach. The alleged suborning of AZ's will occurred in this country where AZ is based and, on AZ's case, was directly brought about by the failure to make required deliveries of DIP in this country.

65. AZ's argument finds support in *Briggs and Rees on Civil Jurisdiction and Judgments* (5th ed) para. 4.73:

> "….as long as the defendant has something to do with acts which were committed within the jurisdiction, the requirements of the paragraph should be seen to be satisfied. As to whether an omission to perform an act within the jurisdiction – such as the failure to pay contractual consideration – would suffice to bring the claim within the paragraph, principle suggests that it should, if the act complained of as not done was one which was required to be done within the jurisdiction".

66. I am accordingly satisfied that AZ can bring their claim within 3.1(16) As regards Albemarle's argument that as a matter of South Carolina law the duress claim does not

give rise to a serious issue on the merits, AZ point out that it is surprising that Albemarle seeks to take this point, as Mr Howell stated as follows in his second witness statement (paragraphs 6 and 7):

> "Albemarle, it is suggested [in Mr Hewetson's witness statement], sought to disrupt AstraZeneca's supply of DIP in an attempt to secure negotiating leverage.
>
> The merits of the parties' respective claims is of course a matter to be resolved at the substantive hearing of those claims, whether that be in South Carolina or England, once the issue of jurisdiction has been determined. Nonetheless, it is important to make clear now that Albemarle takes serious issue with AstraZeneca's characterisation of the factual background."

67. Albemarle's case on economic duress under South Carolina law (as to the principles of which there was no material dispute between the experts) and its potential application to the facts of this case are addressed in AZ's evidence both by Mr Hewetson (at paragraph 33) and Professor Crystal in his first report (section 5). I accept that that evidence establishes that there is a serious issue to be tried on the merits.

68. There were two aspects of the duress claim in particular which Albemarle contend mean that the requirements of South Carolina law relating to economic duress will not be satisfied, namely the fact that AZ was represented by legal counsel and that Albemarle contends that they had a good faith belief that AZ had breached the 2005 Agreement.

69. The significance of representation by legal counsel will depend on the evidence. It does not in itself mean that there is no duress. Indeed, that AZ felt compelled to enter into such a one-sided agreement notwithstanding the availability of counsel might be said to emphasise the degree of duress involved.

70. Whether Albemarle were acting in good faith is very much in issue. AZ rely in particular on the entire alleged course of conduct by Albemarle and the fact they insisted on a price for DIP that was about 12 times that of 2005 Agreement and about six times the price that they were prepared to sell the finished product (propofol) as opposed to its ingredient (DIP). Further, central to the duress claim is whether Albemarle believed that it could lawfully refuse to make the further DIP deliveries under the 2005 Agreement and that is not necessarily the same question as whether they believed they had a right to terminate that Agreement.

71. I am therefore satisfied that AZ have established a serious issue to be tried and jurisdiction over the duress claim and that the court has jurisdiction over the claim.

Conspiracy

72. In relation to the jurisdictional gateway Albemarle stress that the substantial act involved in the conspiracy case was the alleged agreement or combination and that the damage would have been suffered where the 2008 Agreement was made, all of which occurred outside the jurisdiction.

73. As to where the damage was sustained, AZ contend that:

(1) Significant damage was sustained within this jurisdiction, in two forms as pleaded at paragraph 60 of the Particulars of Claim:

> "AZ suffered loss and damage as already set out, namely non-delivery of the outstanding orders and the stockholding of DIP and/or the additional cost of purchasing 9,253 kg of DIP from [AC] at US$1,200 per kg rather than at US$98 per kg."

(2) For the reasons already given, the non-delivery of outstanding DIP was suffered by AZ at Macclesfield. AZ were thereby deprived of a business asset.

(3) As regards the additional cost of purchasing DIP from AC, this is economic damage the substance of which was suffered by AZ in England. The sums were paid from bank accounts in this country and the economic consequences of the additional costs involved were suffered here.

74. AZ further submit that, looked at from Albemarle's perspective the non-delivery of DIP to Macclesfield was a substantial and efficacious "act committed within the jurisdiction" and so AZ also come within the second limb of the tort gateway.

75. For the reasons given by AZ I accept that they have shown to the requisite standard that their claim comes within the relevant gateway.

76. As to serious issue to be tried, AC were the manufacturers of DIP, and AIC was their subsidiary and international trading company, through which they supplied DIP to AZ under the 2005 Agreement. AZ contend that it is reasonable to suppose that in withholding deliveries of DIP from AZ in order to force them to pay AC an exorbitant price, AIC and AC must have acted in concert: AIC applied the pressure by withholding the deliveries from AZ, whilst AC reaped the profits in terms of the exorbitant price then extracted from AZ.

77. Albemarle contend that the Particulars of Claim do not provide the basis for a conspiracy allegation, because the pleading (at PoC paragraph 59.2) that AC and AIC agreed that AIC should unlawfully and in breach of the 2005 Agreement refuse to deliver any further DIP to AZ has not been further particularised.

78. However, as AZ point out, the type of agreement needed to found a conspiracy, a "combination", does not require anything in the nature of an express agreement. It suffices if two or more persons combine with a common intention or, in other words, they deliberately combine, even tacitly, to achieve a common end. The origins of conspiracies are concealed and it is usually impossible to establish when or where the initial agreement was made. *See Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 [para. 111-112 per Nourse LJ]. As stated by Deputy Judge Michael Briggs QC in *Derksen v Pillar* (17 December 2002) at para. 33(2):

> "Because it will rarely if ever be possible to prove an express agreement between the defendants, the extent or scope of their combination will usually be a matter of

inference, to be arrived at by a careful and painstaking review of the acts and omission of each of them, considered as a whole."

79. I therefore accept AZ's submission that their inability to particularise the manner in which agreement between AC and AIC in the present case came into being is neither unusual, nor a bar to the argument that the Court can infer the existence of such an agreement, and that they have established a serious issue to be tried in respect of the conspiracy claim.

80. I am accordingly satisfied that the court has jurisdiction over the conspiracy claim.

Discretion

(1) Breach of contract

81. Albemarle do not seek to argue that England is not the forum conveniens for AZ's contractual claims under the 2005 Agreement and I am satisfied that AZ have shown that England is clearly the appropriate forum for the trial of those claims. However, Albemarle seek a stay on case management grounds. This will be considered further below.

(2) Duress/conspiracy

82. Albemarle contend that it has been agreed that AZ's claim in duress can only be litigated in the courts of South Carolina by reason of the exclusive jurisdiction clause in the 2008 Agreement and that therefore it cannot be shown that this is a proper case for service out in respect of those claims, alternatively that they should be stayed.

Construction of the clause

83. Albemarle submit that AZ's allegations of duress fall within the jurisdiction clause in the 2008 Agreement. In particular:

(1) The clause is very broad: it covers "Any disputes relating in anyway to this agreement …".

(2) An allegation of duress by its very nature relates to the contract sought to be impugned.

(3) South Carolina law, like English law, draws a distinction between widely worded and narrowly worded jurisdiction clauses, and a widely worded clause such as this would be construed broadly and generously.

84. Notwithstanding Professor Crystal's opinion that the clause "could" or "could well" be construed as inapplicable to the duress claim, AZ realistically accept that it was wide enough to cover the duress claim. However, they did not accept that it applied to the conspiracy claim. Unlike the duress claim that was not a claim which impugned or affected the 2008 Agreement. Further, it is a claim which by its nature involves and does here involve a non-party to the contract.

85. On the facts of the present case, I am satisfied that Albemarle have much the better of the argument on this issue. The conspiracy claim made is very closely bound up with the duress claim and depends on many of the same essential facts and matters. Moreover, the clause is drawn very widely covering any disputes relating to the Agreement "in anyway".

86. In any event, even if the conspiracy claim was not covered by the clause, its very close connection to the duress claim means that it should sensibly be tried before the same court. As AZ accept, the fact that on their case AIC cannot rely on the jurisdiction clause cannot affect the matter since the claim against AIC should clearly be tried in the same court as the claim against AC. Similar considerations apply to the trial of the duress and conspiracy claims.

87. I am therefore satisfied that Albemarle have shown that there is a South Carolina exclusive jurisdiction clause which applies to the claims in duress and conspiracy. The next question which arises is as to the validity of that agreement.

Separability

88. If, as Albemarle contend, this is a matter governed by English law then it is now well established (and was not disputed) that the doctrine of separability would apply – see *Premium Nafta Products v Fili Shipping* [2007] UKHL 40; *Deutsche Bank v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091. However, for reasons already stated I am not satisfied that this is an English law question.

89. The law which would govern the agreement if it were valid is South Carolina law. As to that law, AZ contend that although the doctrine of separability is established as a matter of federal law, it is not established as a matter of South Carolina law and that there is a decision of the Supreme Court of South Carolina to the contrary effect, namely *Johnson & Building Environmental Services In v Key Equipment Finance* 627 S.E.2d 740 (S.C. 2006). In that case the court considered the applicability of a New York jurisdiction clause in a lease of telephone marketing equipment to claims that arose prior to the signing of the lease agreement or were the product of misrepresentations made before the lease agreement. The Supreme Court of South Carolina held that the jurisdiction clause did not cover those claims. AZ say that the principal reasons for so holding were the following:

(1) "Generally, when wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, the remedies and limitations specified by the contract do not apply."

(2) The above proposition is consistent with South Carolina's "general disfavoring of forum selection clauses".

(3) A forum selection clause ought not logically to operate so as to prevent suit in South Carolina based on acts preceding the execution of the agreement.

(4) "… the forum selection clause in the present case is narrowly tailored to encompass all events related to the lease whereas [*Forrest v Verizon Communications*] involved a clause that related to all claims arising between the parties."

90. AZ argue that this decision involves at least implicit rejection of the separability doctrine in relation to disputes based on acts prior to the agreement itself, consistently with South Carolina's policy of disfavouring forum selection clauses.

91. However, as Professor Lacy points out, the doctrine of separability was not specifically in issue in the *Johnson* case. Further, the essential holding or ratio of the case turned on the "narrowly tailored" clause in issue. That clause conferred jurisdiction on the New York Court "with respect to any provision of the lease". That was regarded as being "narrowly tailored to certain activities between the parties". In contrast the jurisdiction clause in the 2008 Agreement is not limited in scope in this way, but is expressed in general and wide terms which are clearly capable of covering pre-agreement acts.

92. Professor Lacy also points out that South Carolina's alleged policy of not favouring forum selection clauses only applies to intra-state forum selection clauses which provide for an action to be maintained in a venue which the South Carolina courts would otherwise regard as being inappropriate. It does not apply to clauses conferring jurisdiction on the South Carolina courts.

93. Further, Professor Crystal accepts that the South Carolina courts apply the separability doctrine to arbitration clauses. As Professor Lacy points out, arbitration clauses are a subset of forum selection clauses and the same reasoning should apply. This has been recognised by virtually all state courts which have considered this issue.

94. For the reasons given by Professor Lacy I am satisfied that Albemarle have much the better of the argument on this issue.

95. If so, the next issue is whether, notwithstanding the application of the separability doctrine, the duress claim impeaches the jurisdiction agreement.

96. On this issue it was common ground that guidance is to found in the English law authorities.

97. In the leading case of *Premium Nafta Products v Fili Shipping* [2007] UKHL 40, Lord Hoffmann explained the principle as follows:

> "17. The principle of separability enacted in section 7 [of the Arbitration Act 1996] means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his

signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

19. In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of argument which section 7 was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement."

98. In *El Nasharty v J Sainsbury plc* [2007] EWHC 2618 (Comm.), [2008] 1 Lloyd's Rep. 360, Tomlinson J applied the above principle in a case relating specifically to duress, again in the context of an arbitration clause. He stated as follows:

> "25. … as Sir Anthony Clarke MR pointed out at paragraph 52 of the judgment of the Court of Appeal, if there is duress or undue influence or mistake which invalidates the arbitration agreement there will be no waiver of relevant rights under Article 6. The relevant duress must however impeach the validity of the arbitration agreement itself, not just the wider agreement of which it forms part.

An attack on the validity of the wider contract may of necessity impeach the arbitration clause too, but it may not, as pointed out by the Court of Appeal in *Harbour Assurance Co (UK) Limited v Kansa General International Insurance Co Limited* [1993] QB 701.

26. As Longmore LJ pointed out in *Fiona Trust* at page 697 Steyn J at first instance in the *Harbour* case [1992] 1 Lloyd's Rep 81 at page 91 had already said, in relation to fraud and duress:

> "Once it became accepted that the arbitration clause is a separate agreement, ancillary to the contract, the logical impediment to referring an issue of the invalidity of the contract to arbitration disappears. Provided that the arbitration clause itself is not directly impeached (e.g. by a non est factum plea), the arbitration agreement is as a matter of principled legal theory capable of surviving the invalidity of contract."

Fraud is an imprecise term which takes its colour from the context. Duress however in English law leads usually to voidability rather than initial invalidity, and no doubt the same is true of most cases usually characterised as fraud. The significance of what Hoffmann LJ added in the Court of Appeal on appeal from Steyn J in the *Harbour* case at pages 723/4 of the report lay in his point that even in cases of initial invalidity of the wider agreement it does not follow that the issue which invalidates the main contract invalidates the separate arbitration agreement. The question must always be asked whether the issue extends to the validity of the arbitration agreement itself.

27. Mr Warwick submitted that an allegation that the main agreement was entered into under the influence of duress must necessarily impeach the arbitration agreement because it is an allegation that the Claimant's will was coerced, vitiating his apparent consent to the main agreement and everything in it. The case should he submitted be regarded as analogous to one of mistake or non est factum affecting the main agreement where arguably an arbitration agreement could not be relied upon. … Even if this was wrong, *Fiona Trust* was he pointed out concerned with bribery, not duress, as to which different considerations apply and in any event, suggested Mr Warwick, the duress in this case plainly affected the arbitration clause. In this regard he relied upon the following passage in the Claimant's second Witness Statement, at paragraph 18:

> "I would not have entered into any part of the April 2001 Agreement (and that includes the arbitration clause) had I not been obligated to do so by the duress the subject matter of my claim."

Mr Warwick advanced his thoughtful argument only five days before the House of Lords gave judgment on appeal from the *Fiona Trust* decision, …. His main argument cannot survive their Lordships' speeches. …Lord Hoffmann said this:

29. Specifically as to the position on this spectrum at which allegations of duress will usually fall, I would draw attention, as did Longmore LJ in the *Fiona Trust* case at page 699, to what is said by the learned editors of Dicey & Morris, *Conflict of Laws*, 14th Edition [2006] at paragraph 12-099:

> "The Supreme Court of the United States has also held that a challenge to the existence of the jurisdiction agreement based on fraud or duress must be based on facts specific to the clause, and cannot be sustained on the basis of a

> challenge on like grounds to the validity of the contract containing it. It is submitted that there are excellent reasons of policy to support such an approach, for the parties, when they nominated a court with jurisdiction to settle their disputes, may well have expected this court to have and exercise jurisdiction if the dispute were to concern the very validity of the contract."

The decision of the Supreme Court of the United States to which reference is there made is *Scherk v Alberto-Culver Co.* 417 U.S. 506 (1974). That was a case where a contract between a German seller and a US buyer for the purchase of various business and associated intellectual property was said to have been induced by fraudulent misrepresentation concerning the trademark rights transferred. The sales contract, which was negotiated in the United States, England and Germany, signed in Austria and closed in Switzerland, contained an ICC arbitration clause providing for arbitration in Paris. At page 519, footnote 14 the majority opinion of the court noted:

> "In *The Bremen* we noted that forum-selection clauses 'should be given full effect' when 'a freely negotiated private international agreement [is] unaffected by fraud…' … This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion."

30. Accordingly what is needed in the present case if the Claimant is successfully to impugn the enforceability of the arbitration clause is reliance on some facts "specific to the arbitration agreement" – see per Lord Hope. In my judgment the allegations put forward by the Claimant in this case are simply, again in the words of Lord Hope, "parasitical to a challenge to the validity of the main contract" and thus "will not do". Like the argument of Mr Butcher QC in *Fiona Trust*, Mr Warwick's argument is, in the words of Lord Hoffmann, "exactly the kind of argument which section 7 was intended to prevent".

99. AZ contend that the South Carolina jurisdiction clause in the 2008 Agreement is specifically impeached on the grounds of economic duress: see Particulars of Claim, paragraphs 57 & 57.2. In particular:

(1) AZ were entitled to receive the DIP, which they contend they were forced by economic duress to purchase from AC, under an agreement with AIC and AC (the 2005 Agreement) which was subject to English law and jurisdiction.

(2) Those English law and jurisdiction provisions had been both very long-standing (going back before the 2005 Agreement to 1994) and uncontentious.

(3) AC's exploitation of the fact that AIC had illegitimately withheld DIP from AZ included insisting not only on the oppressive commercial terms of the 2008 Agreement but also on the incorporation of their own Terms and Conditions. Thus (adding underlining for emphasis):

(a) On 14 April 2008 Brian Carter of Albemarle provided AZ with their proposed Sales Agreement (including the General Conditions of Sale), warning "Any proposed changes to this agreement may delay shipments".

(b) On 17 April 2008 John Steitz of Albemarle wrote: "As I mentioned last week, it is our desire to Supply DIP. However, it would be based on terms and conditions as prescribed by Brian Carter."

(c) On 18 April 2008 Marc Jones of AZ protested: "AZ cannot sign up to the terms and conditions set out by Brian for DIP supply as they are completely unreasonable and our governance processes will not allow me to do it."

(d) On 21 April 2008, Mr Steitz responded that unless mediation resulted in DIP and Propofol commercial agreements being entered into "any sales of DIP from Albemarle to AZ will be made according to the terms and conditions previously offered. I reiterate please contact Brian Carter as he will be coordinating this for Albemarle. On the subject of governance, I do not believe that I can help provide any solution."

(e) On 16 May 2008, Mr Carter repeated Albemarle's position:

> "As Albemarle has advised you several times in the past, we have no desire to disrupt your operations. Moreover, as we have also consistently advised you in the past, we will continue to sell DIP to AstraZeneca at list price, pre-paid with order and subject to our Conditions of Sale."

(f) On 22 May 2008, Mr Jones responded disputing the assertion that Albemarle did not intend to disrupt AZ's operations and stating that "the price offered and the conditions attached to such purchase are deliberately calculated to put us in a position where we cannot accept your offer". He suggested a lower price, payment via an escrow account, and an agreement by AZ not to claim the difference in price.

(g) None of those proposed amendments was accepted by Albemarle.

(4) Thus, relying on AZ's inability to resist, AC drove through not just the commercial bargain but also their own desired ancillary terms, including the law and jurisdiction provisions, which were plainly disadvantageous to AZ, as compared to those which previous applied to the supply of DIP by AIC.

100. In these circumstances, AZ contend that the duress case is specifically directed against the imposition of the South Carolina jurisdiction provision. The duress case is one which involves both the impeachment of the 2008 Agreement as a whole and of its South Carolina law and jurisdiction clause and it should not be enforced.

101. Albemarle submit that paragraph 57 of the Particulars of Claim makes clear that the allegation of economic duress is directed at the 2008 Agreement as a whole, rather than the jurisdiction clause in particular:-

> "AstraZeneca contends that its consent to each term of the Second Agreement was procured by economic duress".

102. They point out that this is confirmed by Mr Gosling at paragraphs 40 and 42 of his first witness statement:

> "…as a direct consequence of the economic duress placed on the Claimant, it was forced to enter into the Second Agreement…".
>
> …..
>
> "In the circumstances, the exclusive jurisdiction clause was clearly part of the overall deal which was being demanded of the Claimant in return for sale of further DIP."

103. Further, Albemarle stress that:

(1) The evidence is that the jurisdiction clause in the 2008 Agreement is a typical clause which was incorporated by reference into the agreement. This removes the duress objection still further from the jurisdiction clause. AZ have to argue that by duress Albemarle impelled AZ to enter into an agreement, one term of which incorporated by reference terms and conditions, which in turn contained the jurisdiction clause.

(2) AZ did not at any stage object to the jurisdiction clause in the 2008 Agreement, whereas it did object to the price. Thus, AZ's letter of 22 May 2008 proposed various changes to the draft of the 2008 Agreement, including that:-

(a) payment should be made into an escrow account;

(b) the price should be amended to US$250 per kg; and

(c) AZ should be entitled expressly to reserve any claims which it might have against Albemarle, save that it would accept a more limited waiver of its claims for the difference between the 2005 Agreement price and US$250 (a point which AZ ultimately conceded);

but AZ did not seek to change the terms of the governing law and jurisdiction provision in the draft contract.

104. I consider that Albemarle have much the better of the argument on this issue for the reasons given by them. In particular, although AZ can point to duress relating to the acceptance of their standard terms as opposed to their commercial terms, they cannot point to duress relating specifically to the jurisdiction clause as opposed to Albemarle's standard terms generally. Albemarle never specifically insisted on the jurisdiction clause, nor did AZ ever raise any specific objection to it. There are no facts alleged which are specific to the jurisdiction agreement itself.

105. I am therefore satisfied to the requisite standard that Albemarle can rely on the South Carolina court exclusive jurisdiction clause in respect of the claims in duress and conspiracy.

106. AZ nevertheless submit that this is one of those exceptional cases where the jurisdiction clause should not be enforced. Notwithstanding the South Carolina court exclusive jurisdiction clause the English court does have a discretion to allow the duress and conspiracy claims to be brought here. However, given the parties' agreement that they will not be such discretion will only be so exercised if strong reason or cause can be shown.

107. As Lord Bingham stated in *Donohue v Armco* [2002] 1 Lloyd's Rep 425 at para 24:

> "..the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it"

108. AZ rely on what Lord Bingham then stated at para 27:

> "The authorities show that the English court may well decline to grant an injunction or a stay, as the case may be, where the interests of the parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions."

109. This is not a case where the interests of third parties are involved. However, AZ contend that it is a case involving a risk of parallel proceedings and inconsistent decisions. For the purpose of the argument I shall assume in AZ's favour that the contractual claims shall proceed before the English court.

110. AZ rely on the following as individually and cumulatively constituting strong reasons for not staying the duress and conspiracy claims:

(1) The question of whether, as AZ contend, AIC breached the 2005 Agreement is a key issue in both those claims: the wrongful deprivation of AZ by AIC of DIP to which they were contractually entitled under the 2005 Agreement constitutes both a central element of the duress exercised against AZ, and of the unlawful means deployed pursuant to the conspiracy.

(2) That question falls for determination under the English jurisdiction clause and arises as part of AZ's claim for damages for breach of the 2005 Agreement. The American courts have expressly declined jurisdiction over that claim and AIC's claims against AZ for damages and punitive damages are under the same agreement. Thus, part (at least) of the issues arising in the duress and conspiracy claims has correctly been assigned to be dealt with here.

(3) The question of what attitude the American Courts will take to the enforcement of South Carolina jurisdiction clause remains unknown. Yet it is now almost two years since Albemarle first applied for an anti-suit injunction (on 16 May 2008). The 2009 Action, in which AC seeks to enforce that clause by obtaining another anti-suit injunction, is subject to an outstanding Motion to Dismiss and, even if it survives that challenge, it will not come on for trial until (at the earliest) December 2010. When and how those proceedings will ultimately be resolved is a matter of conjecture.

(4) As matters stand, therefore, the English courts alone have the opportunity to hear and determine all the related disputes, with the obvious advantages inherent in such a procedure.

111. I am not satisfied that AZ have made out sufficiently strong reasons for not giving effect to the South Carolina court jurisdiction clause. Although there is an overlap between the contract and the duress/conspiracy claims, they are nevertheless distinct claims. The contract claims raise relatively narrow issues which, subject to the supersession point, essentially depend on the construction of the 2005 Agreement. They ought to be capable of being determined relatively simply and speedily.

112. AZ point out that the contractual claims will involve evidence as to what was said or agreed at certain meetings and that these meetings will also have to be considered in relation to duress and conspiracy claims. However, the fact that there may be some duplication of evidence is not in itself a strong reason for disregarding a jurisdiction agreement. Further, there is a major difference between a factual investigation into what was said or agreed and one which involves considering issues of motive and bad faith. In any event, any duplication or inconvenience is a foreseeable consequence of agreeing two different jurisdiction clauses.

113. The determination of the contractual position under the 2005 Agreement will set the context for the consideration of the duress and conspiracy claims, wherever those claims are tried. However, those are distinct claims and there is no necessary inconsistency between the contract claims being decided in one way and the duress/conspiracy claims in another.

114. If the contractual claims are split from the duress/conspiracy claims this is not therefore a case which will involve parallel proceedings on the same claims/issues, or the risk of directly inconsistent decisions. Nor is it a case in which other parties' interests are involved.

115. Further, it is possible that the resolution of the contractual issues will mean that the duress and conspiracy claims never need to be determined. Unless AZ prove that Albemarle was acting in breach of contract in withholding DIP deliveries its duress/conspiracy case will not get off the ground. Even if all these claims were being decided before the same court there would therefore be a reasonable case for deciding the contract claims first.

116. If the South Carolina court was to rule that the duress/conspiracy claims should not be tried before it then different considerations would arise, but that has not happened, nor does it seem likely. That eventuality can be catered for by staying rather than setting aside these claims.

117. For all these reasons, I do not consider that AZ have made out the strong reason necessary for the court not to respect and enforce the parties' jurisdiction agreement.

118. Subject to one further matter, my conclusion is that both jurisdiction agreements should be respected, with the consequence that the contract claims proceed here and the duress and conspiracy claims (if pursued) should proceed before the South Carolina courts. That further matter is Albemarle's contention that there should be a stay on case-management grounds pending the conclusion of its appeal from the orders by which the 2008 Action was dismissed.

119. The court only grants stays on case-management grounds in rare and compelling circumstances – see *Reichhold Norway v Goldman Sachs* [2000] 1 WLR 173, at 186 per Lord Bingham; *Konkola* at paras 63 and 64.

120. Albemarle contend that rare and compelling circumstances exist in this case in that the question of whether this court has jurisidiction under the English court jurisdiction clause depends on an issue arising under a subsequent agreement governed by South Carolina law, which issue is before the South Carolina court, and which is logically anterior to the assumption of jurisdiction by this court. In such unusual circumstances the appropriate course is to stay the English proceedings and await the outcome of Albemarle's appeal in South Carolina.

121. In my judgment Albemarle have not established the requisite rare and compelling circumstances. In particular:

(1) The premise of Albemarle's argument is false as the English court's jurisdiction is not dependent on the English court jurisdiction clause. As Albemarle were constrained to accept, the court would in any event have jurisdiction under ground (6)(c) (contract governed by English law) and/or (7) (breach of contract committed within the jurisdiction). Regardless of the outcome of the appeal in South Carolina the English court therefore has jurisdiction.

(2) For reasons already stated, AZ have much the better prospects of success on the appeal.

(3) If the appeal is dismissed then the parties will be in the same position as they are at present, but progress of the claim will have been significantly delayed.

(4) There has already been delay caused to the progress of the English court proceedings by reason of the South Carolina proceedings and the anti-suit injunction granted for a period. The South Carolina proceedings have proceeded slowly and there is every prospect of significant further delay. No decision on Albemarle's appeal is likely much before the end of this year. There is then the possibility of a rehearing *en banc*, which would cause further delay. There is then the possibility of an application for permission to appeal/appeal to the Supreme Court which would delay matters still further.

(5) If the appeal succeeds on the basis that federal law applies and under federal law the clause is permissive rather than mandatory, then jurisdiction would be being assumed on a basis which English law would not accept, English law being the applicable law as far as the English court is concerned.

(6) If the appeal succeeds on the basis of supersession then that is likely to provide a substantive defence to the contract claim regardless of where the claim proceeds, in which case the forum is unlikely to matter.

(7) There is an injustice in staying AZ's claim so that Albemarle can have recourse to the South Carolina courts when part of its avowed objective is to subject AZ to a punitive damages regime said to be available there, even in circumstances where Albemarle is seeking to advance a claim for breach of a contract, which it agreed with AZ should be subject to English law and exclusive jurisdiction.

(8) As the 2005 Agreement is governed by English law, the South Carolina courts will defer to any decision which may be made by the English court on questions of which party breached the 2005 Agreement and whether the breach was a circumstance giving rise to economic duress and/or arising out of a conspiracy. So, as a matter of sensible case management, it makes positive sense to progress the English claims to a point where it can decide on those questions.

Conclusion

122. I accordingly conclude that the English court has jurisdiction over all three of AZ's claims. However, as a matter of discretion the duress and conspiracy claims should be stayed in the light of the South Carolina court exclusive jurisdiction clause in the 2008 Agreement. No stay should be ordered in respect of the contract claims under the 2005 Agreement which should be allowed to proceed in this country regardless of Albemarle's appeal in the 2008 action.