Weissfisch v Julius, [2006] EWCA Civ 218 (08 March 2006)
Neutral Citation Number: [2006] EWCA Civ 218
Case No: A3/2006/0197 PTA & A
IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
THE HONOURABLE MR JUSTICE DAVID STEEL
Claim No. 2005 Folio 683
B e f o r e :
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MASTER OF THE ROLLS and LORD JUSTICE MOSES
Between:
AMIR WEISSFISCH Claimant
- and -
ANTHONY JULIUS, First Defendant
RAMI WEISFISCH, Second Defendant
and PHILIP DAVIS Third Defendant
Lord Phillips CJ :
This is the judgment of the court.
This appeal came before this court as an application for permission to appeal from an order of David Steel J dated 12 January 2006, dismissing the claimant (Amir's) application for an interim injunction against the first defendant, Anthony Julius, with the appeal to follow should permission be granted. This is an unusual case raising important issues of principle and, accordingly, we think it appropriate to give permission to appeal. We shall proceed to deal with the appeal, which was fully argued.
The relief that Amir seeks in the action in which these proceedings arise includes a declaration that an arbitration agreement providing for both Swiss law and a Swiss seat of the arbitration is void and an injunction restraining the first defendant, Mr Julius, the arbitrator under that agreement, from acting as such. The first three defendants have all sought orders that have the common theme that this court should not entertain the claim to this relief, but should leave Amir to advance it in Switzerland. The issue is to be resolved in proceedings before Colman J, which have now been fixed for hearing in April with a time estimate of 4 days. Mr Julius has made it plain that he intends, before the matter comes before Colman J, to hold his own hearing on the issue of his jurisdiction. The present proceedings raise the question of whether he should be permitted to do so.

The background

The principal protagonists in these proceedings are two wealthy brothers, 'Amir' and the second defendant 'Rami'. The first defendant, Mr Julius, is a solicitor of the Supreme Court. The third defendant, Mr Davis, is a lawyer practising in the Bahamas, who is the trustee of a discretionary trust entitled the 'APW Trust'. That trust was established in July 1984 and the beneficiaries were Amir and his children, or such others as might be appointed by the nominated protectors under the terms of the trust. Rami was a nominated protector. Amir and Rami's wealth was derived from metal trading. This was conducted through the MRG group of companies, some of which were owned by the APW Trust.
Mr Julius acted for the MRG group. On occasion he acted personally for Rami. It is common ground that Mr Julius also acted for Amir personally but there is an issue as to the extent to and the matter in which he so acted. Disputes arose between the brothers. Attempts by Mr

Julius to mediate did not resolve them. In the summer of 2004 Mr Davis, on Amir's instructions, transferred certain assets from the APW Trust to trusts called Renaissance 1 and Renaissance 2, which were controlled by Amir. Mr Davis subsequently made a criminal complaint in the Bahamas against Amir, alleging that he had falsely stated that this transfer of assets had had the approval of Rami as Protector. Rami was anxious that the assets should be returned to the APW Trust. Amir was anxious that the criminal inquiry should be discontinued. In these circumstances an agreement ('the Agreement') was signed on 29 July 2004 by Amir, Rami, Mr Julius and Mr Davis. The first part of the Agreement, headed 'Arbitration', was an arbitration agreement with some very unusual features. We shall refer to this part of the Agreement as 'the Arbitration Clauses'. The remainder of the agreement made complex provisions for settlement of at least some aspects of the dispute between Amir and Rami. The judge correctly observed that, in the negotiations leading up to the Agreement, the brothers had 'a wealth of legal assistance'.

The Agreement required (i) the provision by Amir to a stakeholder – in the event Mr Julius undertook this role – of documents which would enable the assets transferred to the Renaissance Trusts to be returned to the APW Trust, (ii) Mr Davis to procure the withdrawal of the criminal proceedings, whereupon the documents would be released to Mr Davis and (iii) the resolution of outstanding disputes in an arbitration, before Mr Julius as Arbitrator.

The Arbitration Clauses included the following unusual provisions: "A. Arbitration 1.1 The parties agree to and hereby appoint Anthony Julius, who accepts such appointment, to act as arbitrator ("the Arbitrator"), with the broadest possible powers to make final and binding determinations or awards on all issues and disputes between the parties in full and final settlement of them. 1.2 These issues and disputes, which in substantial part were the subject of the Arbitrator's extensive efforts over a period of several months to help the relevant parties settle matters amicably (and through which he was able to understand the intention of the parties with regard to this arbitration and its scope), are as follows: a) Those issues and disputes already known to the Arbitrator in consequence of his many discussions with the parties; b) Such further issues or disputes as may arise during the arbitration (which the Arbitrator will allow within his discretion); … 1.4 The Arbitrator will have the discretion to act ex aequo et bono whenever he may find it suitable or equitable, paying due regard in all circumstances to the parties' equal treatment and their right to be heard in fair adversarial proceedings. 1.5 The parties agree that the Arbitrator may represent or continue to represent them, outside of this arbitration, for reward, and represent or continue to represent such other persons or entities, as the parties may, in their sole discretion, desire. 1.6 The parties expressly waive any rights they may have to challenge the appointment of the Arbitrator on any ground, including on the grounds that he (a) endeavoured to help the relevant parties settle matters amicably, and/or (b) was engaged in the mediation of their disputes, and/or (c) has been legal advisor (and Mishcon de Reya have been legal advisors) over the course of many years to Amir Weissfisch, Rami Weisfisch and companies owned (or formerly owned) by Amir Weissfisch, Rami Weissfisch and the APW Trust, and/or (d) accepts instructions in accordance with 1.5 above. 1.7 The parties acknowledge that they each had legal representation both prior to and during the negotiation and finalisation of this Agreement. 1.8 In the making of determinations or awards the Arbitrator may draw on information he acquired during the course of his relationship with the parties or any one or more of them. He shall not make reasoned determinations or awards, unless so requested by all parties. 1.9 The parties expressly agree to waive their rights to (a) challenge any determination(s) or award(s) by the Arbitrator through set aside proceedings or any other proceedings; (b) oppose enforcement of the Arbitrator's determination(s) or award(s) in any jurisdiction.

The Agreement also provided: "1.3 This Agreement is governed by Swiss law, the arbitration

will be ad hoc, and the seat of the arbitration shall be Geneva, Switzerland."

Some steps were taken to comply with the settlement part of the Agreement, but these did not run smoothly. The criminal complaint was withdrawn, although Amir does not accept that this was with sufficient finality. Amir objected to the release of certain documents. Mr Julius ordered their release, whereupon, on 1 June 2005, Amir obtained an interlocutory injunction from the Commercial Court restraining their release. In so doing he implicitly accepted the validity of the Arbitration Clauses by undertaking to commence proceedings in Switzerland to set aside the arbitrator's order. He did not comply with that undertaking, with the result that the injunction was discharged and the proceedings discontinued on 13 July.

Meanwhile, on 17 June, Amir's lawyers had given notice that he intended to apply to the Swiss court to remove Mr Julius as arbitrator on grounds which included bias based, at least in part, on Mr Julius' prior involvement with Rami, with the MRG companies and his detailed notice of the parties' prior positions. Mr Julius was asked to undertake not to proceed with the arbitration. He refused.

On 20 August 2004 Rami, as Protector, had sent to the trustee of the APW Trust a sealed envelope, not to be opened except on his instructions, containing a notice dated 6 July 2004 that Amir and his children were removed as beneficiaries of the trust, to be replaced by a charity. Instructions to open this envelope were given in January 2005. This version of events is entirely disputed by Amir. Amir did not learn of this until 1 July 2005. On 19 August he issued the present proceedings. In this action, Amir alleges that the Agreement was void, or has been avoided by him, on the ground that it was procured by misrepresentations that he and his children remained beneficiaries under the APW Trust and that no steps had been taken to remove them as such, made by both Mr Julius and Rami and, in the case of the latter, made fraudulently. The following is Amir's pleaded summary of Rami's alleged fraud: "6.1 In the period from May 2004 until 26 July 2005 the Claimant was the victim of a fraudulent scheme carried on by the Second Defendant in which he was assisted directly or indirectly by the First and [Third] Defendants. Without discovery the Claimant cannot state whether the First Defendant was knowingly involved in the scheme. The aim of the Second Defendant's fraudulent scheme was to obtain total control of the MRG Group of companies and to exclude the Claimant from all rights and interests in it and APW Trust without paying any or any sufficient consideration.

Significant elements of the said fraud were perpetrated in England.

6.2 The scheme was (1) secretly to purport to remove the Claimant and his children from membership of the class of discretionary objects of APW Trust then (2) use unlawful, illegitimate and fraudulent means to cause the Claimant to enter in the Agreement with the effect that (3) control and direction of the MRG Group companies and APW Trust would pass from the Claimant to the Second Defendant and the ownership thereof would pass to the Third Defendant as trustee of APW Trust by (4) fraudulently leading the Claimant to believe that no attempts had been made to remove him from the said class (and that his interests in the APW Trust and underlying MRG Group were therefore secure) while (5) ensuring that his (the Second Defendant's) interests were secure against enforcement of any award by keeping them or moving them into jurisdictions where any award made under the Agreement would be unenforceable (e.g. Liechtenstein).

6.3 The Claimant therefore contends that the Agreement is an instrument of, or is designed to facilitate, the Second Defendant's fraud and is therefore void and unenforceable as being contrary to public policy." The second arrow in Amir's quiver is aimed at Mr Julius. It is alleged that as a solicitor he owed Amir fiduciary duties, some of which could not be waived, and was further under a duty to observe the rules of professional conduct as a solicitor. These duties he broke by promoting and accepting appointment as an arbitrator in a matter between

two existing clients (Amir and Rami) with conflicting interests, where he had advised and acted for both parties in the matter and closely connected matters previously. This conduct is alleged to entitle Amir to an injunction restraining Mr Julius from continuing to act as Arbitrator.

Various other substantive claims are brought against the first three respondents, including a claim for $88 million against Rami. It is common ground that the substantive claims made by Amir raise triable issues, albeit that the respondents contend that they are weak claims. These proceedings were served on Mr Julius within the jurisdiction and on Rami and Mr Davis, with permission, out of the jurisdiction. They each responded by seeking orders "declaring that the Court has no jurisdiction to try the claims made in this action, or should not exercise any jurisdiction which it may have". Mr Julius' application was a little more detailed. It was in the following terms:

"The First Defendant ("the Arbitrator") seeks an order that the action against him be stayed on the grounds that: (1) the proceedings concern an arbitration the seat of which, as provided for in clause 1.3 of the Arbitration Agreement, is Geneva, Switzerland and which is expressly governed by Swiss law; (2) the matters raised in the Particulars of Claim are all, or essentially, either (a) matters of substance that fall within the scope of the Arbitration Agreement and should accordingly be decided by the Arbitrator or (b) matters alleged to go to the jurisdiction of the Arbitrator which should be decided by the Arbitrator, at least in the first instance (subject to any review by the Swiss Courts); (3) accordingly, as they concern matters agreed to be subject to arbitration, the proceedings should be stayed under section 2(2)(a) and 9 of the Arbitration Act 1996 and/or under the inherent jurisdiction of the Court; (4) insofar as, notwithstanding (1) to (3) above, any matters raised in the Particulars of Claim should be decided by any Court (as opposed to being decided by the Arbitrator), they should be decided either (a) by the Swiss Courts, being the Court(s) at the seat of the arbitration, or (b) the Courts of the Bahamas, where certain proceedings are already pending between the parties and, accordingly, these proceedings should be stayed on the basis of forum non conveniens and/or lis alibi pendens; (5) insofar as the Particulars of Claim make any non-demurrable claim(s) for damages against the Defendants, such claim(s) for damages is/are brought in breach of clause 2.1(a) of the Arbitration Agreement and/or such claims(s) is/are intimately connected with the matters to be determined in the arbitration and/or (if necessary) in the Swiss Courts and/or in the Courts of the Bahamas (as per (1) to (3) above) and/or at present such claims(s) is/are premature and cannot or should not be tried pending such determination(s) of the Court and/or on the basis of forum non conveniens and/or lis alibi pendens; (6) further, in all circumstances, the action against the Arbitrator should be stayed under the inherent jurisdiction of the Court because it is an abuse of process, vexatious and oppressive and/or an illegitimate attempt to invoke the jurisdiction of the English Court to disrupt a foreign arbitration." Thus there were set in train interlocutory proceedings ('the stay proceedings') which were to determine, among other matters, whether the English Court should entertain Amir's claim or decline to do so on the ground that it should properly be pursued in Switzerland because it concerned the validity of an arbitration agreement the putative law and seat of which were Swiss.

On 28 October Mr Julius wrote to the other parties stating that he intended to hold a hearing in Geneva to determine his jurisdiction and invited submissions from the parties as to the case that had been advanced by Amir. On 14 November Amir's lawyers wrote to Mr Julius asking him to undertake not to act as arbitrator until final determination of the application for a stay 'and thereafter until further order'. Mr Julius consulted the other parties to the Agreement, neither of whom agreed to his giving this undertaking. Accordingly he declined to do so. Amir reacted by applying for an injunction restraining Mr Julius from 'taking or continuing to

take any steps whatsoever as an arbitrator' under the Agreement until the determination of the stay application 'and thereafter until further order'.

Steel J did not treat these last five words as indicating that Amir was seeking more than an injunction that would be capable of remaining effective after determination of the stay application if the judge hearing that application so directed. If the stay application was granted, there would plainly be no question of the injunction continuing. If it was not, it would be for the judge hearing the application to decide whether it was appropriate for the injunction to continue.

Thus the issue was simply whether Steel J should grant an injunction for what was likely to be the relatively short period that would elapse before the stay application was heard. Since the date of the hearing before Steel J the stay application has been listed to be heard before Colman J in April.

It is not easy to see what Rami has to gain from Mr Julius holding a hearing into his own jurisdiction in advance of the hearing before Colman J. If he rejects the challenge to his jurisdiction this will not dictate the result of the latter hearing. By the same token, it is not easy to see what Amir has to lose from that hearing. If he takes part in it in order to challenge Mr Julius' jurisdiction he will not thereby affirm the validity of the Arbitration Clauses. Nor if Mr Julius finds against him will this prevent his challenging Mr Julius' decision before the Swiss courts or prejudice his position at the hearing before Colman J.

In these circumstances, the sensible course might have seemed to be for the parties to agree that Mr Julius should wait the result of the hearing before Colman J before proceeding further. The respondents did not choose to do so but took a stand on principle in opposition to Amir's attempt to restrain Mr Julius from the course that he proposes to take. Steel J dealt with the application as turning on principle. We consider that he was correct to do so.

Steel J's judgment

After summarising the background to the application before him, Steel J remarked:

"17. The starting point for any consideration of the merit of the claimant's application must be Switzerland and Swiss law. The seat of the arbitration is in Geneva. Both the curial and governing law of the contract is Swiss law. The arbitration has been underway for about a year. The arbitrator has made a number of orders and awards. On the face of it, the obvious forum for any challenge to the contract and to the appointment or performance of the arbitrator at this stage is Switzerland."

He went on to note that under Swiss law the arbitrator had Kompetenz-Kompetenz and, indeed, was obliged to decide his own jurisdiction. An appeal against his decision would lie pursuant to article 191 of the Swiss Federal Act and article 180 of that Act made other provisions for challenging the arbitrator.

He commented that Swiss law furnished a full scheme for the supervision of arbitral tribunals in the state courts, consistent with the 1985 UNCITRAL Model Law on Commercial Arbitration. Any restraint on the decision of an arbitral tribunal as to its own jurisdiction would be inconsistent with a mandatory Kompetenz-Kompetenz rule and would preclude access to the Swiss courts.

Steel J then observed that it was a well established principle of English law that the courts of the seat of arbitration should have supervisory jurisdiction. For this reason, by virtue of section 2(2) of the 1996 Act, sections 30, 32, 67 and 72 did not apply in respect of an arbitration with a foreign seat. In contrast, section 9 and 44 did apply, giving the English court express jurisdiction to intervene in support of a foreign arbitration. In these circumstances, if, despite the limitations in the 1996 Act, section 37 of the Supreme Court

Act gave him jurisdiction to grant the injunction sought, it was a jurisdiction that should be exercised with great caution. The judge could find nothing that justified the injunction sought. He held that Amir could appear before Mr Julius in Switzerland to challenge his jurisdiction without affirming the arbitration agreement. The fact that there was a claim against Mr Julius personally, that the allegations made by Amir related to matters of which Mr Julius was a witness, and that it was alleged that, by acting as arbitrator, Mr Julius was acting in breach of the Solicitors' Professional Rules, were all matters to be considered by Mr Julius in the first instance in the light of the specific waiver in the Agreement.

Both the structure of the 1996 Act and the spirit of the New York Convention militated against the grant of the injunction sought.

Finally Steel J ruled that the balance of convenience weighed against the grant of the injunction in that Amir could challenge Mr Julius' jurisdiction at the hearing before him and renew that challenge before the Swiss courts.

Grounds of the Appeal

At the heart of Amir's appeal is the contention, made by Miss Dohmann QC on his behalf, that Amir has brought an action in England making claims against Mr Julius personally, which are not the subject of the Arbitration Clauses, cannot be made the subject of a stay and are only justiciable in England. Miss Dohmann contends that, because these are claims of breach of fiduciary duty and breach of his professional duty as a solicitor in procuring the Agreement and agreeing to act as arbitrator under it, they cannot be met by a plea of waiver. She submits that the court is bound to exercise its jurisdiction over Mr Julius pursuant to the Brussels and Lugano Conventions, as incorporated into English law by the Civil Jurisdiction and Judgments Act 1991. In particular, she submits that the claim against Mr Julius does not fall within the 'arbitration' exception in Article 1 of the Lugano Convention. She further submits that the English court must itself consider allegations of misconduct against an officer of the court. Coupled to these submissions is the contention that it would be wholly inappropriate for Mr Julius to rule on his jurisdiction when this is being challenged on the ground of his own breaches of duty in relation to matters of which he is the primary witness. He is proposing to be both judge and witness in his own cause.

Many of the submissions made on behalf of Amir raise issues that will be relevant to the stay application. Steel J was careful not to anticipate the result of the hearing before Colman J and, in this, we consider that he was correct. He was dealing with an interim application dealing with the position pending the hearing before Colman J. While it was legitimate to consider the apparent strength or weakness of Amir's position, it would not have been appropriate to attempt to resolve contentious issues that would be fully explored before Colman J. Steel J did not consider that Amir had a strong case on the jurisdiction issue, but this was not critical to his decision. Miss Dohmann complains that "it would be utterly wrong for the court to take sides and make an assumption that Amir will fail in his submissions", but her submissions invite the court to assume that Amir will succeed. We do not approach this case on the basis that Amir is almost certain to succeed before Colman J, or that he is almost certain to fail. This case has extraordinary features. The parties to the Agreement, who include Mr Julius, have agreed that Mr Julius is to perform a role which comes close to being an amalgam of arbitrator and mediator despite, indeed because of, previous professional connections that Mr Julius had with the subject matter of the dispute and the parties that, on normal principles, would preclude Mr Julius from acting as an arbitrator. Under the Agreement, however, Amir and Rami have expressly waived reliance on these principles as a

ground of objection to Mr Julius' jurisdiction.

Miss Dohmann has asserted that this waiver is ineffective in law. The validity of that assertion is not axiomatic and will fall for consideration by Colman J. We repeat that the issue before Steel J and before us is whether Mr Julius should be restrained from acting as arbitrator pending the hearing before Colman J. This limited issue is yet another stage in a bitter but dispiriting dispute which cries out for a speedy and discreet solution, not least for the sake of the youngest members of the family.

Conclusion

We are not impressed by Miss Dohmann's complaint that Mr Julius is proposing to be both judge and witness in his own cause. The principle of Kompetenz-Kompetenz sometimes requires this. It is not uncommon for arbitrators to be called upon to consider submissions that they are not competent to act by reason of bias. In such circumstances the decision of the arbitrator will not be final, at least where the seat of the arbitration is in a country such as Switzerland where the courts exercise an appropriate supervisory jurisdiction over arbitration. There is nothing untoward in Mr Julius considering the question of his own jurisdiction now that this has been put in issue. This will only be a first step in determining that question, whether the subsequent steps take place in Switzerland or, if Colman J so rules, in England.

We have formed the conclusion that there are cogent reasons why we should not at this stage restrain Mr Julius by injunction from holding a hearing to consider his own jurisdiction. These essentially mirror the conclusions of Steel J.

They are: (i) Amir and Rami, each of whom was receiving independent legal advice, expressly agreed that their disputes should be resolved by Mr Julius under arbitration which would be governed by Swiss law and have its seat in Switzerland. (ii) The natural consequence of this Agreement was that any issues as to the validity of the unusual provisions of the Arbitration Clauses would fall to be resolved in Switzerland according to Swiss law. (iii) This consequence accords with principles of the law of international arbitration agreed under the New York Convention and recognised by this country by the 1996 Act. (iv) For the English court to restrain an arbitrator under an agreement providing for arbitration with its seat in a foreign jurisdiction to which the parties unquestionably agreed would infringe those principles. (v) Exceptional circumstances may, nonetheless, justify the English court in taking such action. Whether such circumstances exist will be a matter to be resolved by Colman J and nothing in these reasons is intended to influence his decision in that regard. (vi) No special circumstances have been shown which justify taking such action on an interim basis, pending the hearing before Colman J.

For these reasons this appeal is dismissed.

There is an issue as to whether this appeal concerns an 'arbitration claim' within CPR 62.10, which we have not resolved. Whether it does or not, we have decided that his judgment should be delivered in open court.