IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2018: NO. 94

BETWEEN

RANDALL KREBS

Plaintiff

and

MERITUS TRUST COMPANY LIMITED

Defendant

Ruling on Strike Out Application

Ruling Date: 23 October 2018
Hearing: 11 September 2018
Jai Pachai for the Defendant
Kevin Taylor and Benjamin McCosker for the Plaintiff

Introduction

1. The Defendants applied by Summons to strike out the Plaintiff's Statement of Claim in its entirety (the "**Strike Out Application**"), advanced in reliance upon the omnibus provisions of Order 18, rule 19(1)(a), (b) and (d) of the RSC, namely that the Writ allegedly:

   (a) discloses no reasonable cause of action;
   (b) is scandalous, frivolous or vexatious; or
   (c) is otherwise an abuse of process of the court.

2. In the event the Court ruled that the Writ ought not be struck out, the Defendant sought as an alternative a stay in the proceedings and for the case to be submitted to arbitration (the "Arbitral Stay").

Factual background

3. The Plaintiff was a senior employee of and shareholder in the Defendant. In January 2017, the Plaintiff's employment was terminated by the Defendant. A Shareholders'

Agreement dated 2nd October 2015 between the Plaintiff and Defendant (and others) (the "Shareholders' Agreement") provides that the Plaintiff owned 65,000 or twenty-six percent (26%) of the Defendant's issued shares.

4. Whilst the Shareholders' Agreement made numerous provisions for the purchase of a shareholders' interest, with a different mechanism for each scenario, oddly it did not make any provision for the scenario now faced, namely a shareholder is dismissed without cause. In the premises an ad hoc agreement was arrived at for the purchase of the Plaintiff's shares (the "Purchase Agreement"), which incorporated certain aspects (only) of the Shareholders' Agreement. There is a dispute as to what was and was not incorporated into the new agreement.

5. Section 9 (1) of the Shareholders' Agreement provided that the shares shall be repurchased in certain circumstances where a shareholder resigns or is terminated for certain causes (none of which applied). The purchase price of the shares would then be determined by the terms of Section 9(2) of the Shareholders Agreement, which provided in part:

> "9(2) The purchase price shall be the fair market value of the Purchased Shares (with allowance for goodwill, if any) determined in accordance with Canadian generally accepted valuation principles as at the date the option is exercised, discounted by the "Discount Factor. Such determination shall be made by a third party chartered business valuator appointed by the Company. The 'Discount Factor' shall be calculated as follows:
> …
>
> All of the parties agree that the appointment of such valuator shall be final and binding upon all of the parties hereto. All of the parties hereto also agree that the determination of such fair market value made by a valuator howsoever appointed shall be conclusive and final and binding upon the Company and the Vendor".

6. On 5th January 2017 the Defendant sent a letter of termination to the Plaintiff which included an offer to purchase the Plaintiff's shares, on terms including the following:

> "With respect to your 26% shareholding in the Company, as you know, it has always been the intention of the ownership and management group that the Company would buy out the shareholding of any exiting manager. Consistent with this principle, the Company wishes to extend to you the opportunity to sell your shares to Meritus at their current fair market value…
> The Meritus Shareholders Agreement contains (at section 9) a mechanism for the valuation of shares of the Company in the case of a separation. I would propose that an independent third party expert should be appointed to value Meritus and it shares in line with those terms. No discount (which is provided

for in the Shareholders' Agreement in certain events) would be applied to the valuation, and the value of your shares would be paid to you by the Company over a period three (3) years…

This offer in principle to purchase your shares at fair market value, without discount, will also remain open for acceptance through Friday, January 13th, 2017 at 4:00pm".

7. It is noted that the majority of section 9 did not apply to the current matter. Further, the Purchase Agreement included terms not found in section 9. In any event, the offer was accepted and this led to the Purchase Agreement being consummated. Whilst this Ruling comments on the implications of the question as to what parts of section 9 were to be included in the new agreement, that question remains to be determined by the trial judge.

8. There followed an extended period of time addressing the issue of the valuation, with the Plaintiff pressing the Defendant on numerous occasions for this to be advanced. The Defendant at one point stated that there was no agreement to proceed with the valuation or sale, which was on the evidence an unusual position to take given the written agreement between the parties.

9. The Defendant then proposed Mazaars Bermuda and provided the Plaintiff with a copy of the Mazaars proposal for the valuation. The Plaintiff objected to this, complaining that Mazaars were proposing to use ASPE standards for the valuation. The Defendant pointed out that this was a "demonstration of their inexperience" as "Valuations of this sort in Canada are conducted under the Standards of the Canadian Institute of Chartered Business Valuators (CICBV), not ASPE.

10. The Plaintiff pointed out that Mazaars Bermuda had no valuators on staff with the appropriate Canadian Valuation qualifications, which would enable them to prepare a valuation which met Canadian valuation principles. They proposed using Duff & Phelps but this was objected to by the Defendant on the ground that they did not have a Bermuda office.

11. The Defendant offered to use another local accounting firm, who would charge more than Mazaars, if the Plaintiff shared the cost. So the Defendant proceeded up to this point, on the basis that the parties should agree on the appointment of a valuator and possibly share the costs. The Plaintiff then suggested that each party appoint their own Valuator and that the two Valuators then attempt to agree a figure. This also was rejected by the Defendant.

12. In the end the Defendant appointed Mazaars to be the Valuator. The Plaintiff then had Duff & Phelps prepare a detailed critique of the valuation prepared by Mazaars, setting out numerous examples of the failure to meet the relevant Canadian valuation

principles (CICBV). The Defendant takes exception to each of the criticisms of their valuation report.

13. At this point the court notes that there is a legitimate disagreement as to whether or not CICBV principles have been met.

The Strike out application

The legal principles

14. The principles to be considered by the Court in determining the present application are set out in Order 18, rule 19 of the RSC, as stated above.

15. In *Broadsino Finance Company Limited v Brilliance China Automotive Holdings Limited and Others*,[1] the Court of Appeal for Bermuda explained the approach which is to be taken, both as regards evidence and the consideration of the actual merits of the action or defence, as the case may be. As Stuart-Smith JA said at pages 4 and 5:

> "There is no dispute as to the applicable principles of law. Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In *Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick* [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: "It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, Mr. Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. There may be a little more scope for an early summary judicial dismissal where the evidence relied on by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg *Lawrence v Lord Norreys* (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219-220". In *National Westminster Bank plc v Daniel* [1994] 1 All ER 156 was a case under Order 14 where the Plaintiff was seeking summary judgment, but it is common ground that the same approach is applicable. Glidewell LJ, with whom Butler-Sloss LJ agreed, put the matter succinctly following his analysis

[1] [2005] Bda LR 12.

> of the authorities. At page 160, he said: "Is there a fair and reasonable probability of the defendants having a real or bona fide defence? Or, as Lloyd LJ posed the test: "Is what the defendant says credible"? If it is not, then there is no fair and reasonable probability of him setting up the defence".

16. The parties appear to be in agreement as to the principles applicable.

17. On an application under O.18 r. 19(a) to strike out pleadings on the basis that they disclose no cause of action, one is required to assume that the contents of the pleading are factually correct. On such an application no evidence is permitted.

Rules (a) and (b)

18. Whilst included in their written submissions, the rule (a) point was also not pursued at the hearing. If we were proceeding only under rule (a) then I would have found that no specificity was provided by the Defendant as to what parts of the statement of claim failed to disclose a cause of action (see the 1999 White Book at para 18/19/4)). Further that the Statement of Claim did in fact disclose a cause of action and ought not be struck out under rule (a).

19. As to the Defendant's allegation that the Writ is *scandalous, frivolous or vexatious, Justice* Meerabux in *Performing Rights Society v Bermuda Cablevision Ltd* considered the meaning of the term 'frivolous or vexatious':

> "…It is pertinent to mention that the words 'frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley LJ in *Attorney-General of Ducky of Lancaster v L & NW Railway* [1892] 3 Ch 274 at 277".[2]

20. In *Young v Holloway*, Jeune P considered the applicable test, and concluded that the relevant pleading must be:

> "so clearly frivolous that to put it forward would be an abuse of the process of the Court".[3]

21. Whilst included in their written submissions, the rule (b) point was also not pursued at the hearing. If we were proceeding only under rule (b) then I would have found that the Writ was not scandalous, frivolous or vexations and that it ought not be struck out under rule (b).

Rule (d)

22. The Defendant's only remaining argument on strike out was that the case is an abuse of process because the Court has no jurisdiction to hear it. In relation to Rule (d), "the court will prevent the improper use of its machinery, and will in a proper case,

[2] [1997] Bda LR 33 at page 31.
[3] [1895] P. 87 at 90.

summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation".[4]

23. Further, the court will only strike out cases where it is "plain and obvious" and will not do so if what is required is "a minute and protracted examination of the documents and facts of the case".[5]

24. Abuse of process is a broad-reaching concept. As stated by Lord Diplock in *Hunter v Chief Constable*:

> "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people..."[6]

25. The UK 1999 White Book provides at para 18/19/18 – 25 some examples (only) of cases where the court will strike out on the abuse of process basis. The present case does not fall within any of the examples, however this in and of itself is not dispositive.

26. The Defendant maintains that the entire Writ should be struck out because (see para 21 of their written submissions):

> "In conclusion, all of the criteria laid out in Section 9 of the Agreement have been met and are final and binding on all parties. In particular, the Plaintiff's shares were valued at fair market value determined in accordance with the Canadian generally accepted valuation principles at the date the option is exercised. There was no bad faith, fraud or collusion, or material departure from instructions. The valuator chosen by the Defendant and the determination made by Mazaars are final and binding and conclusive on all parties. Therefore there is no basis for the Plaintiff's action and the claim must be dismissed with costs awarded to the Defendant."

27. It is important to note that the Defendant therefore invites the court to make the following findings, as necessary steps in order to strike out the Writ:

(a) That all the criteria in Section 9 of the Shareholders' Agreement (and therefore the Purchase Agreement) have been met.

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[4] UK 1999 White Book para 18/19/18, referencing *Castro v Murray* (1875) 10 Ex. 213.
[5] UK 1999 White Book para 18/19/6
[6] [1982] AC 529 at 536C.

(b) That Mazaars' valuation actually complied with the relevant Canadian valuation principles.

28. Whilst there is a dispute as to what was in or not in the Purchase Agreement, the parties agree on the basis for the valuation. This is set out in the Statement of Claim and effectively is agreed by the Defendant:

> "The basis of valuation be "fair market value" determined in accordance with "Canadian generally accepted valuation principles", meaning in conformance with the Canadian Institute of Chartered Business Valuators Practice Standards (the 'CICBV Standards")"

29. When asked, the Defendant's counsel accepted that if the valuator did not comply with the contractual agreement, that this would prevent the Statement of Claim being struck out. For example, the Defendant accepted that if instead of applying Canadian valuation principles, the valuator had applied USA valuation principles, that this would be a deviation from the agreement.

30. In the premises, I am invited to decide whether or not there has been a departure from the contractually agreed basis of valuation. The Defendant's evidence is that there has been no departure. The Plaintiff's evidence is that there has been such a departure.

<u>Did the valuation comply with Canadian valuation principles?</u>

31. The Plaintiff's case on departure is set out on the Krebs affidavit and more specifically in the Duff & Phelps report of 27 February 2018, which is exhibited to the Defendant's own affidavit evidence. That report provides in part:

> "3.1 The Mazaars Report was not prepared to an adequate level of assurance. It is an Estimate Valuation Report, which provides a mid-level of assurance, between a Calculation Valuation Report (lowest assurance) and a Comprehensive Valuation Report (highest level of assurance). A Comprehensive Valuation Report ought to have been prepared given that the valuation is being used for a final and binding transaction between Meritus and Mr. Krebs.
>
> 3.2 There are indications in the Mazaars Report that it does not conform with the CICBV Practice Standards. The conclusions contained therein are not properly supported, and Mazaars' application of the CCF Approach is inconsistent with having a sufficient understanding of the underlying business of Meritus. Specifically:
>
> …"

32. What we derive from the Duff & Phelps report (and this is by no means accepted as correct by the court at this stage) is that:

(a) There are three classes of report, high, medium and low.

(b) Because of the purpose of this valuation, Canadian principles require that a Comprehensive Valuation ought to have been used, given that the results were to be final and binding on the parties. In such circumstances an Estimate Valuation report was simply not good enough and ought not to have been used.

(c) The Duff & Phelps report then goes on to set out a detailed list of further areas where the Mazaars report fails to comply with the applicable Canadian valuation principles.

33. The Defendant (and Mazaars) deny that the Mazaars report fails to comply with the applicable Canadian valuation principles, as alleged or at all.

34. Another key issue is whether the Purchase Agreement included an agreement on the mechanism for the appointment of a valuator, as well as the mechanism for valuing the shares. The Defendant avers that both were agreed whilst the Plaintiff maintains that only the latter was agreed.

(a) It is not clear that Mazaars could unilaterally appoint a valuator. The evidence suggests that there was no agreement on a unilateral appointment. Support for this is found in the Wakefield Quin email of 8 April 2017 offering to permit the Plaintiff's involvement in the selection of the valuator if he shared the cost and subsequent exchanges. In fact Wakefield Quin went further subsequently to suggest that his client had no obligation to perform a valuation at all.

(b) I do not decide this point, as that also should be a question for the trial judge, but for the purposes of the strike out application only, I will assume that Mazaars were properly appointed.

(c) However, even assuming that Mazaars were properly appointed, and so the valuation was to be binding on the parties, Mazaars were still required to perform the valuation in accordance with Canadian valuation principles. The parties both concede that the failure to follow the Canadian principles would render the valuation report as not binding.

<u>When is a party bound by a valuation - the law:</u>

35. The Defendant relies on *Campbell v. Edwards* (1976)1 WLR 403 for the proposition that a party who agrees to be bound by a valuation is bound by it even if it is wrong, absent fraud. But *Campbell* is distinguishable as in that case the parties both agreed on the identity of the valuator. Furthermore, in *Campbell* there was no agreement as to the method of valuation to be employed nor a dispute as to whether the agreed method was followed, as in the case at bar.

36. The Defendant also relies on *Jones and Ors v. Sherwood Computer Services Plc* (1992) 1 WLR 277 for the proposition that a party is bound by an agreement to be bound by an agreed valuation. But for the purposes of the strike out application, this case supports the position of the Plaintiff's case, as Lord Denning makes it clear that it is an exception to enforceability that the valuator departed from the valuation instructions. It is logical to assume that the same principle must apply if the valuation was not done in accordance with the agreed basis of valuation. In the present case, this means done or not done in conformance with Canadian valuation principles. Given the real and substantive factual dispute on this point, this issue should be decided by the judge at trial, hearing all the relevant evidence on point, and not on a strike out application.

37. In their written submissions the Defendant also relied upon the decision in *Norwich Union Life Insurance Society v. P&O Property Holdings Ltd and Ors* (1993) 1 EGLR 164. This case is inapplicable to a strike out on the facts set out above.

38. In the present action, the Defendant does not say that the court has no jurisdiction to decide the point because only an arbitrator can decide it. To the contrary they say that only the Valuator has jurisdiction to decide the issue (as such, an arbitrator would equally have no jurisdiction to decide this). In the premises, the Defendant was asking the court to decide, on the merits, whether the decision of the Valuator was binding. In order to decide this, the court would have to first decide whether all the conditions precedent for the Valuator's decision to be binding had occurred, including complying with the relevant binding Canadian valuation principles.

39. Whether Duff & Phelps are correct in their statements and criticisms of the Mazaars' valuation is a question of fact which turns on a detailed consideration of the evidence and the law.

40. In light of the above, there is clearly a real dispute as to whether or not Canadian valuation principles were complied with. Given this, the valuation is not binding at this point. This type of factual determination should not be made on a strike out application. This is an issue to be determined by the trial judge having heard all the relevant evidence, including possibly expert testimony. This falls within the exception set out by the Court in *Jones v. Sherwood*. The application to strike out is denied.

<u>The Arbitral Stay</u>

41. There two key questions that arise here:
    (a) Is there an arbitration clause which applies to this contract?

(b) If so, has the Defendant taken a step in the action and thus waived his right to arbitrate?

42. The Plaintiff argued that a contractual agreement to arbitrate is a prerequisite for an arbitral stay, relying on *Conagra (International) SA v. Seamotion Navigation Ltd* (unreported, Supreme Court of British Columbia, 13 Jan 95) and *Shell Hong Kong Ltd v. ESA Consulting Engineers Ltd* (Unreported, Court of Hong Kong SAR Court of First Instance, 20 Nov 95, both cited with approval by Hellman J in *Crockwell v. Flatt* (2014) Bda LR 89 at 37 and 38. The Defendant took no issue with the principle set out above.

43. During argument Mr Pachai for the Defendant confirmed that it was accepted that the current dispute relates to the Purchase Agreement and not the Shareholders' Agreement. So the question is does the Purchase Agreement contain an arbitration clause?

44. Mr Pachai added however that they maintain that section 9 of the Shareholders' Agreement is incorporated in its entirety into the Purchase Agreement. Therefore, he submitted, section 9 "drags along" with it, the arbitration clause contained at section 13.6 of the first contract.

45. It was put to Mr Pachai in argument that the court was aware of authorities which held that an arbitration clause could be incorporated by reference. However, the Court was not aware of any authority for the proposition that an arbitration clause could be incorporated by implication, which is what the Defendant was asking the court to find. Mr Pachai was invited to but was unable to point to an authority in support of this proposition.

46. On a further review the Court notes that Russell on Arbitration (24th Ed) states at para 2-016 (relying on *Gulf Import & Export co v. Bunge SA* (2007) EWHC 2667) that it is theoretically possible to have an arbitration clause by implication. However, that this would be very rare and that "*there must be conduct evidencing the agreement to arbitrate or conduct inconsistent with it, but if the parties would or might have acted in the same way without there being an agreement to arbitrate, none will be implied.*" In the present case there was no evidence called to demonstrate that the parties would not have entered into the Purchase Agreement absent an arbitration clause.

47. After resting his case and on the return from the lunch break, when the Plaintiff was to commence his case, the Defendant's Counsel asked to raise further point. He then pointed to the original Offer letter from Meritus dated 5 January 2017 which provides as follows:

"Please also note that, in the meantime, your shareholding will be held strictly subject to the Shareholders' Agreement (including the terms relating to restriction on share sales and the said restrictive covenants)."

48. The Defendant now argued that this provision, which became part of the New Contract, incorporated "all" of the Shareholders' Agreement into the New Contract, including the arbitration clause in the earlier contract.

49. The Plaintiff responded to this point by saying that:

(a) That use of the words "in the meantime" suggests that this position would remain the position in the event that the Plaintiff failed to enter into the New Contract proposed by the Defendant. However, once the parties entered into the New Contract that this provision (the "in the meantime provision") fell away.

(b) In any event, that this was not a sufficient incorporation of the arbitration clause by reference. Such incorporation of the arbitration clause would have to be express, which is not the case here.

50. For present purposes I am only concerned with whether the arbitration clause was incorporated into the Purchase Agreement. I accept the Plaintiff's argument in this regard, that it was not.

51. The requirement for the incorporation of an arbitration clause by reference is not sufficiently made out. In relation to the Defendant's submissions on incorporation by implication, this argument is also rejected. For this reason alone, I would deny the application the application for a stay.

Did the Defendant take a step in the proceedings?

52. If I am wrong on the existence of an arbitration clause issue, and there was a valid clause, the court would have to decide the next question, whether the Defendant is debarred from now relying on the arbitration clause because he has taken a step in the action. I have considered this question below.

53. Both parties relied upon *Eagle Star Ins Co Ltd v. Yuval Ins Co Ltd* (1976) E. No 2766, where a very strong Court of Appeal led by Lord Denning MR opined that an application to strike out a statement of claim, on the facts of that case, was not taking a step in the action, such as to preclude a party from applying to stay proceedings in favour of an arbitration clause.

54. The Defendant suggests that the Court in *Eagle Star* held here that any application to strike out is immune from counting as a step in the action. Alternatively that in the

current case, the Defendant's strike out application was not made on the merits and therefore did not count as taking a step in the action.

55. The Plaintiff's counsel countered this by reference to Shaw LJ's caveat relating to that case, where he ruled at page 16 that the:

> "statement of claim in the present case was vague in the extreme and completely inaccurate. It failed to specify what contract or contracts were sued upon…
>
> Therefore without committing myself to the proposition that a summons to strike out for want of particulars can never be a step in the action, I am satisfied that on the fact that it ought not to be so regarded in this case…"

56. I believe that the present case is distinguishable from *Eagle Star* because:

(a) It is not suggested here that the Statement of Claim fails to disclose a cause of action (this part of the summons was not pursued). In any event I have found that a cause of action is clearly disclosed.

(b) The Defendant in the case at Bar put in evidence which crossed the line and addressed the merits of the case, eg Michelle Wolfe's affidavit evidence.

(c) In *Eagle Star* there was no reference to any evidence being filed. If evidence was filed, it was not important enough to be mentioned. The strike out was really based on failing to disclose a cause of action (even if other grounds were thrown in for good measure).

(d) Having addressed the merits in their evidence in considerable detail, the defendant has taken a step in the action, consistent with the caveat in Shaw LJ's ruling.

57. In *L Capital Jones Ltd v. Maniach Pte Ltd* [2017] SGCA 03, the Court of Appeal of Singapore (a very experience commercial court of appeal) concluded that an application to strike out, on the merits, was clearly a step in the action.

58. Further, the Singapore Court of Appeal in *L Capital* referred to their own decision in *Carona Holdings v. Go Go Delicacy Pte Ltd* (2008) 4 SLR(r) 460 at 55, where they summarized the approach in England and expressed their agreement with that approach. In *Carona*, the Singapore Court of Appeal explored the history of this question in England and the long list of cases on point, going to back to the decision in *Ives & Barker v. Williams* [1894] 2 Ch 478, addressing squarely *Eagle Star* (1978) and subsequent UK authorities including *Blue Flame Mechanical Services Ltd v. David Ford*

Engineering Ltd [1992] 8 Const LJ 266 and leading arbitration text books *Merkin* and also *Mustill & Boyd*).

59. The *Blue Flame* decision (1992) summarized the current UK position as follows, namely that a step in the action refers to:

> "(1) a step in the action which bars the defendant is something actually done or acquiesced in by him which is significant procedural act in the case; (2) done with the intention of electing to litigate rather than stand on the right to arbitrate."

60. In the case at Bar, the Defendant's application to strike out is not limited to pointing out technical problems (eg failing to disclose a cause of action, which is done without evidence). They attack the claim on the merits, using copious evidence. Further, the nature of certain of their attacks amount to a step in the action.

61. For example, the Defendant says at para 20 of their written submissions:

> "However, as stated above, once the contract was formed, where it was agreed that "*parties agree that the appointment of such valuator shall be final and binding upon all of the parties hereto"* and *'the determination of such fair market value made by a valuator howsoever appointed shall be conclusive and final and binding",* there is no scope for the Plaintiff to challenge any determination. In light of the above, it is clear that the **Plaintiff's claim is unmeritorious."**

62. This is expressly an attack on the "merits" of the case and therefore is a step in the action.

63. Further at para 22 of their submissions they say:

> "…, all of the criteria laid out in Section 9 of the Agreement have been met and are final and binding on all parties."

64. The Defendants invite the Court to consider and determine the question as to whether or not the criteria of Section 9 of the Agreement have been met, such that the validation would become binding. If they have been met, the Defendant wins. If they have not been met, the Plaintiff wins. This is position taken on the merits of the claim. This must be taking a step in the action.

65. So it seems that the correct legal position is that generally speaking, an application to strike out on technical grounds, including where a Statement of Claim clearly discloses no cause of action on its face, will not be a step in the action (see *Eagle Star*), but an application to strike out where the court is invited to consider evidence and make a decision on the merits, is to be considered taking a step in the action.

66. In the present case, for the reasons set out above, the Defendants did take a step in the action. In the premises they have waived their right to arbitrate. Their application for a stay, for this reason also, would be denied.

Conclusion

67. I have refused the Defendant's application to strike out the writ and statement of claim. In addition I have refused the Defendant's application for an arbitral stay.

68. In view of the above, in the normal circumstances costs would follow the event. I will make an order nisi to this effect, subject to giving the parties 14 days from receipt of this Ruling to apply to the court in relation to the issue of costs, failing which I would order that the Defendant pay the Plaintiff's costs, to be taxed if not agreed.

Rod S. Attride-Stirling
Acting Puisne Judge