Neutral Citation Number: [2013] EWCA Civ 156

Case No: A3/2012/2001

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
Mr Justice Eder
[2012] EWHC 1988 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2013

Before :

LORD JUSTICE PILL

LORD JUSTICE TOMLINSON
and
LORD JUSTICE McCOMBE

- -

Between :

MRI Trading AG	**Respondent**
- and -	
Erdenet Mining Corporation LLC	**Appellant**

- -
- -

Alain Choo Choy QC and Matthew Cook (instructed by **Watson, Farley & Williams LLP**) for the **Respondent**
Stephen Moriarty QC and Clare Ambrose (instructed by **Clyde & Co LLP**) for the **Appellant**

Hearing date : 12 February 2013

- -

Approved Judgment

Lord Justice Tomlinson :

Introduction

1. Two judges of the Commercial Court, very experienced in commercial disputes, have concluded that an arbitration award made by arbitrators pursuant to the rules and regulations of the London Metal Exchange, "the LME", is, in the words of Christopher Clarke J who gave permission to appeal against it, obviously wrong and, in the words of Eder J, who determined the appeal, somewhat surprising if not bizarre. For good measure, Eder J also concluded that no reasonable tribunal correctly applying the relevant legal principles could have reached such a conclusion. In the light of these trenchant views and of s.69(8) of The Arbitration Act 1996, it might be thought surprising that an appeal to this court has been permitted. Eder J rejected an argument that he should remit the award to the tribunal for reconsideration. He was of "the very strong view" that remission would be inappropriate. He varied the award in accordance with what he had concluded to be the correct legal principles, and otherwise set it aside. However, he was persuaded that there was at least a possibility that a different tribunal might take the view that the appropriate course was not to set aside the award but to remit the matter to the arbitrators. Eder J also took into account that the amount at stake is of the order of US$10M and that he had reached a conclusion different from that of the market tribunal chosen by the parties. So he granted permission to appeal generally so that the argument before this court should not be circumscribed. Hence this appeal.

The facts

2. We are only entitled to consider the facts found by the arbitrators in their award of 3 February 2012, although we have without objection by either party looked at the contractual documents to which reference is made in the award. They are four in number.

3. I shall call the Appellant "EMC" and the Respondent "MRI". EMC is a Mongolian mining company. MRI is a Swiss trading company. MRI and EMC were party to an amended and supplemented contract numbered E-2005/12-Cu dated 28 June 2005 for the sale of copper concentrates. We do not even know which was seller and which was buyer, although I can infer that EMC was seller and MRI buyer. Disputes arose between MRI and EMC concerning the performance of that contract. We know nothing about the nature of the disputes (although Mr Moriarty QC told us, impermissibly as it seems to me, that they related to enforceability of the contract) save that they were referred to arbitration at the LME. That arbitration was terminated by the parties agreeing a Settlement Agreement dated 30 January 2009.

4. The Settlement Agreement included the following terms:-

> "WHEREAS
>
> (1) MRI Trading and EMC are party to an amended and supplemented contract for the sale of Copper Concentrates numbered E-2005/12-Cu and dated 28 June 2005 ("the Original Contract");

(2) Disputes arose between MRI Trading and EMC, which were referred to arbitration at the London Metal Exchange ("the LME Arbitration");

(3) MRI Trading and EMC would like to resolve their disputes and terminate the LME Arbitration.

NOW IT IS AGREED AS FOLLOWS

1. **Deliveries of Erdenet Copper Concentrates and Molybdenum Concentrates**

EMC shall sell MRI Trading 40,000 WMT of EMC Copper Concentrates in each of 2009 and 2010, and 200 WMT of EMC Molybdenum Concentrates *in 2009*, all pursuant to new, separate contracts between EMC and MRI Trading in the forms agreed at Schedules 1, 2 and 3 to this Settlement Agreement.

2. **Termination of the Original Contract**

Following signature by authorised signatories of the new, separate contracts between EMC and MRI Trading in the forms agreed at Schedules 1, 2 and 3 to this Settlement Agreement, the Original Contract and all rights, obligations, claims and counterclaims of EMC and MRI Trading under or in connection with the Original Contract are terminated, and MRI Trading and EMC each irrevocably waive all their accrued rights and obligations arising in connection with the Original Contract.

3. **The LME Arbitration and settlement of disputes**

3.1 MRI Trading shall abandon and terminate the LME Arbitration within 2 business days from (1) execution of this Settlement Agreement AND (2) following signature by authorised signatories of the new, separate contracts between EMC and MRI Trading in the forms agreed at Schedules 1, 2 and 3 to this Settlement Agreement.

3.2 MRI Trading and EMC each shall bear their own legal or other costs in relation to the LME Arbitration. MRI Trading and EMC shall equally bear the costs of the Arbitration, as determined by the Tribunal. To the extent that more than 50% may be borne in the first instance by MRI Trading, then EMC will indemnify MRI Trading for all such Arbitrators' costs up to 50% of the total [of] those costs. Payment will be organised by way of offset against any payment otherwise due by MRI Trading under the contract set out at Schedule 1 to this Settlement Agreement.

> 3.3 MRI Trading and EMC each accept and agree that in (1) entering into this Settlement Agreement AND (2) signature by authorised signatories of the new, separate contracts between EMC and MRI Trading in the forms agreed at Schedules 1, 2 and 3 to this Settlement Agreement, that this shall be in full and final settlement of all claims and counterclaims under the Original Contract (including those that have arisen as at the date hereof)."

5. The Settlement Agreement was expressly governed by English law and contained a LME arbitration clause. It also contained a mutual warranty to the effect that the respective signatories to the Settlement Agreement and those to the new, separate contracts between EMC and MRI in the forms agreed in Schedules 1, 2 and 3 were fully authorised to sign the Settlement Agreement on their behalf.

6. It is the contract pursuant to which EMC sold 40,000 WMT of copper concentrates for delivery in 2010 which has given rise to the present dispute. The two contracts calling for performance in 2009 were, in the language of the award, executed, by which is meant, as is common ground, that they were fully performed.

7. All three contracts dated 30 January 2009 made pursuant to the Settlement Agreement are detailed written contracts in very similar form. It is suggested however by EMC that the third, 2010 contract, is unenforceable because it left three matters for agreement "during the negotiation of terms for 2010". Although there is nothing about this in the award, we were told by Mr Moriarty for EMC that the reference to "the negotiation of terms for 2010" is a reference to an annual round of negotiations which takes place during a stipulated period each year following an annual meeting of metal traders in London. I should stress that I should reach the same conclusion on this appeal whether I took that piece of information into account or not.

8. The judge summarised the content of the 2010 contract in this way:-

> "The 2010 Contract consisted of 9 typewritten pages signed by both parties. In particular, it provided in material part as follows:
>
> "WHEREAS [MRI] agrees to buy and [EMC] agrees to sell a copper flotation concentrate production of Erdenet Mining Corporation ("Concentrate") on the terms and conditions hereinafter contained:
>
> 2. Duration – This Contract shall enter into force from the date of the last signature and shall remain in force until completion of the Parties' obligations herein.
>
> 3. Quantity - The quantity of Concentrate to be delivered shall be 40,000 WMT plus or minus 10% at [EMC's] option.
>
> 6. Dispatch

6.1 Shipping schedule shall be agreed during the negotiations of terms for 2010.

9. Deductions

9.1 Treatment Charge shall be agreed between [MRI] and [EMC] during the negotiation of terms for 2010.

9.2 Refining charge shall be agreed between [MRI] and [EMC] during the negotiation of terms for 2010.

25. Prior Agreements - This Contract shall constitute the entire agreement between the Parties hereto and supersedes all prior agreements and understandings, whether oral or written, in relation to the subject matter hereof. Except the terms of the Settlement Agreement between Parties dated 30 January 2009."

In addition, the 2010 Contract contained detailed provisions with regard to the quality and description of the material to be supplied [clause 4], how the concentrate would be delivered [clause 5], when railway bill instructions would be provided [clause 6.3], how the purchase price would be calculated [see below], Quotational Period [clause 10], Payment [clause 11], Title and Risk [clause 12], Insurance [clause 13], Weighing, Sampling and Determination of Moisture [clauses 14 and 15]. It also expressly provided that it was governed by English law [clause 23] and subject to arbitration under the LME arbitration rules [clause 22]. [That provision reads:-

> "22. ARBITRATION
>
> All disputes arising in connection with this Contract which cannot be settled by a mutual accord between Buyer and Seller shall be settled by arbitration to be conducted in accordance with the rules and regulations of the London Metal Exchange.
>
> The award of such arbitration shall be finally binding upon the Parties and may be entered in any court having jurisdiction.
>
> The place of arbitration shall be London, Great Britain.
>
> The language to be used in the arbitral proceedings shall be English language."]

In relation to purchase price, pursuant to clauses 7, 8 and 9 of the 2010 Contract, the price that MRI would pay for the concentrates was to be calculated by reference to the copper and silver content of the concentrates:

> (a) For copper, pursuant to clause 8, there would be a 1.1 unit deduction from the agreed copper content and MRI would pay for the balance at the daily LME US$ Copper Grade A Settlement quotation taken from the London Metal Bulletin, averaged over the quotational period. In addition, pursuant to clause 9, a treatment charge and a refining charge would be deducted.
>
> (b) For silver, if the silver content was over 30 grams per DMT, MRI would pay for 90% of the silver content at the daily LME US$ London Spot quotation for Silver taken from the London Metal Bulletin, averaged over the quotational period. In addition, pursuant to clause 9, a specified silver refining charge would be deducted. A further specified deduction would also be made if the arsenic level in the concentrates exceeded a certain level."

9. It is the form of clauses 6.1, 9.1 and 9.2 which is said to render the contract unenforceable. It is said to be an agreement to agree, alternatively, I suppose, to be too uncertain to be enforced.

10. The award recites that "Following the conclusion of the contract, no concentrates were shipped, as no agreement was reached on either the TC/RC or the shipping schedule. Failure to reach this agreement is the essence of the dispute". The award does not disclose whether the parties in fact attempted to reach agreement on these matters. The tribunal does say, at paragraph 20 of the award, that it "found evidence that EMC had oversold and that the relationship between the parties had gone cold". However the arbitrators also observed, rightly, that they had concluded that these matters were not pertinent to their sole focus, the construction of the contract in dispute. If however the contract is rightly to be characterised as an agreement to agree, it is just worth pausing to remind oneself that it imposed no obligation to attempt to agree – *Walford v Miles* [1992] 2 AC 128. If the contention of EMC, upheld by the arbitrators, is correct, the document executed as Schedule 3 to the Settlement Agreement was totally devoid of contractual content.

11. Following a procedural hearing the tribunal concluded that it should deal with the issue of liability first, and therefore, as set out in paragraph 5 of the award, the hearing which led to that award was designed to address three issues:-

    a) Was there an enforceable obligation on EMC to deliver the copper concentrates?

    b) What is the reasonable price at which the copper concentrates should have been sold?

    c) When should the copper concentrates have been delivered?

    In the event, the tribunal concluded that the delivery obligation was "non-existent" and that MRI's claim failed. Although all three issues were fully argued at the hearing, having answered the first question in the negative, the tribunal did not consider it necessary to answer the second and third questions and did not do so.

12. We were told that at the procedural hearing EMC applied for leave to call expert evidence. This was opposed by MRI, but the arbitrators acceded to the application in these terms:-

> "The Tribunal gave leave for each side to call one expert witness to give evidence on market practice in normal framework copper concentrate contracts and what is the obligation to deliver in such contracts." [Award paragraph 5]

13. Insofar as the expert evidence was intended to inform the arbitrators about market practice in normal framework copper concentrate contracts, I doubt that it could tell them anything that they did not know already, and so it seems to have proved, although if market practice was in dispute I can understand why the arbitrators thought it appropriate to admit the evidence. Insofar as the expert evidence was intended to inform the arbitrators "what is the obligation to deliver in such contracts?" that was the very issue of construction of the contract which the arbitrators had to decide and about which it is unlikely that any expert evidence could assist them in the absence of a suggestion that there was some binding custom of the trade. However, there is no indication in the award that any expert evidence was in fact directed to the question "what is the obligation to deliver in such contracts".

14. At paragraph 13 of the award the tribunal set out its conclusion that it should construe the 2010 contract without regard or reference to the Settlement Agreement. In so doing they overlooked that in clause 25 of the 2010 contract there is an express saving of the Settlement Agreement from the effect of the entire agreement provision. The arbitrators also regarded as relevant two provisions in the 2009 contracts for copper and molybdenum which in my view had no bearing on the point. In my view the 2010 contract falls to be construed in the light of the fact that it is part of the Settlement Agreement, as indeed clause 25 recognises.

15. The arbitrators directed themselves by reference to authorities dealing with the implication of terms into a contract. The tribunal then set out certain conclusions on which Mr Moriarty places heavy reliance so I shall set them out in full:-

> "The Tribunal has considered whether or not Clauses 6.1 and 9.1 and 9.2 (shipping schedule and TC/RC) are a matter of detail, or a significant part of the pricing of the goods. While clearly aware that the largest part of the price was purely dependent upon the underlying LME copper price, the Tribunal is also aware, as was confirmed by the experts, that the negotiation of the TC/RC plays a significant role in the conclusion of concentrates contracts. Although the monetary value is considerably smaller than that of the underlying, it is still an amount of around $200,000-$300,000. The Tribunal concludes that the TC/RC is an integral part of the contract negotiation, and is not to be dismissed as a matter of detail. Likewise, the shipping schedule is not a matter of detail, as it needs to conform to the ultimate requirements of the final end-user. It is worth noting the following (Lewison, The Interpretation of Contracts) *"The effect of uncertainty may be that no contract comes into existence; or it may be that one*

> *provision in an otherwise binding contract is unenforceable. Which of these two possibilities is likelier depends on the importance of the term which is uncertain. The more important the term, the more likely it is that the contract as a whole is unenforceable.*"

16. The arbitrators then set out certain passages from authorities summarising the proper approach to the question whether an agreement is too uncertain to be legally binding. Since again Mr Moriarty placed heavy reliance on these passages I will set them out in full, as did the judge, although the arbitrators only set out what plainly they saw as the most salient parts. The judge's full citation is as follows:-

> "23. The parties were agreed that the law setting out whether an agreement is not legally binding because it is too uncertain was accurately summarised by the Court of Appeal in *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 76 (per Rix LJ) and in *BJ Aviation Ltd v Pool Aviation Ltd* [2002] 2 P & CR 25 (per Chadwick LJ). As to the former, i.e. *Mamidoil*, the relevant principles were stated by Rix LJ in paragraph 69 of his judgment as set out below – with added paragraph numbering inserted for ease of reference.
>
> *"69. In my judgment the following principles relevant to the present case can be deduced from these authorities, but this is intended to be in no way an exhaustive list:*
>
> *i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that,*
>
> *ii) Where no contract exists, the use of an expression such as "to be agreed" in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that "you cannot agree to agree".*
>
> *iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.*
>
> *iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.*

v) Where a contract has once come into existence, even the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence.

vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest.

vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.

viii) For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable.

ix) Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in section 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in section 15(1) of the Supply of Goods and Services Act 1982).

x) The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute."

As to the latter, i.e. *BJ Aviation,* the relevant principles were stated by Chadwick LJ as follows:

"19. It is unnecessary, and would be superfluous, to review those authorities again in this judgment. It is I think sufficient to identify five propositions which, as it seems to me, are not capable of dispute.

20. First, each case must be decided on its own facts and on the construction of the words used in the particular agreement. Decisions on other words, in other agreements, construed against the background of other facts, are not determinative and may not be of any real assistance.

21. Second, if on the true construction of the words which they have used in the circumstances in which they have used them,

> *the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future—on the basis that either will remain free to agree or disagree about that matter—there is no bargain which the courts can enforce.*
>
> *22. Third, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them—see Walford v. Miles [1992] A.C. 128 , at page 138G.*
>
> *23. Fourth, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a "fair" price, or a "market" price, or a "reasonable" price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. In a contract for sale of goods such a term may be implied by section 8 of the Sale of Goods Act 1979 . But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness.*
>
> *24. Fifth, if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court will provide its own machinery for determining what needs to be determined—where appropriate by ordering an inquiry (see Sudbrook Trading Estate Ltd v. Eggleton [1983] A.C. 444).*"

17. The arbitrators then set out their conclusions as follows:-

> "17. Clauses 6.1 and 9.1 and 9.2 constitute an agreement to agree. In *Foley v Classique Coaches* the court found that it could imply a term into the contract; however, in this case there

> had already been some lengthy period when the contract had been performed. In the case before the Tribunal, as noted above, the contract in question is to be construed in the light of its own wording, and it is clear that there had been no part performance. Relevantly, in *May and Butcher Ltd v the King* (1934), Viscount Dunedin observed *"The simple answer in this case is that the Sale of Goods Act provides for silence on the point and here there is no silence, because there is a provision that the two parties are to agree."*
>
> 18. In the light of the above, the Tribunal finds that the answer to the question "*Was there an enforceable obligation on Erdenet to deliver the copper concentrates?"* is no. The contract had left material terms as 'agreements to agree', and the Tribunal has no option but to conclude that the delivery obligation was therefore non-existent.
>
> 19. As the Tribunal finds there is no enforceable obligation to deliver, the second and third questions addressed, *"What is the reasonable price at which the concentrates should have been delivered"* and *"When should the concentrates have been delivered"* therefore fall away."

18. The tribunal's approach to "part performance" was in my view flawed, as it was bound to be once the arbitrators had decided to leave the Settlement Agreement out of consideration. In his principle (vii) in *Mamidoil* Rix LJ stressed the importance of one or other party having already had the advantage of some performance reflecting the parties' agreement on a long-term relationship. The present situation is analogous. The overall transaction here comprised the settlement of the original dispute. MRI's claim against EMC was compromised in terms that three new contracts were entered into. EMC had derived the full benefit of the abandonment of MRI's claim. Moreover, rather as in *Foley v Classique Coaches* [1934] 2 KB 1, the 2010 contract is part of a wider arrangement between the parties, which wider arrangement the parties had for some time, here for over one year, been acting upon. In *Foley* the sellers sold to the buyers a piece of land for use by the buyers in their coach business, and also contracted with them as part and parcel of the same transaction but by separate contract to supply petrol required for that business "at a price to be agreed by the parties in writing and from time to time". There was an arbitration clause. The land was conveyed and for three years petrol was supplied at agreed prices lower than those paid by the public. In the third year the buyers thought that they could obtain cheaper petrol elsewhere and repudiated the petrol sale agreement, claiming that it was unenforceable as an agreement to agree. A strong Court of Appeal, Scrutton, Greer and Maugham LJJ, was in no doubt that the petrol sale agreement was enforceable. A term was to be implied into the agreement that the petrol should be sold at a reasonable price and if any dispute arose as to that it was to be determined by arbitration for which the parties had made provision. It weighed heavily with the court that the buyers had received the full benefit of the sale of the land and that both parties had conducted themselves for some time on the footing that there was between them a binding contract concerning the sale of petrol. The situation here is not of course exactly the same as the 2010 contract was not performed in any part. But the

2010 contract was, in turn, an integral part of an overall deal pursuant to which both parties had derived benefits, a deal which they had worked through together for over a year without any suggestion that the final part thereof fell into a different and unenforceable category of obligation.

19. In my judgment the language used by the parties in both the Settlement Agreement and the 2010 contract shows beyond any doubt that they did not intend that, in the language of Chadwick LJ in the *B J Aviation* case, they should remain free to agree or to disagree about the TC/RC and the shipping schedule as their own perceived interests should dictate with the result that, should they not reach an agreement, there would be no obligation in respect of 2010 at all. I have no doubt that, just as in *Foley v Classique Coaches* and *Wessex v Fine Fare* [1967] 1 Lloyd's Rep 53, another decision of this court, a term is to be implied that the TC/RC and shipping schedule shall be reasonable, and in the event of any dispute as to the appropriate charges and schedule the dispute is to be determined by arbitration.

20. The judge helpfully summarised the language which leads to that conclusion at paragraph 30 of his judgment:-

> "Third, the language of both the Settlement Agreement and the 2010 Contract plainly shows that the parties certainly intended the 2010 Contract to be legally binding. That this is so is clear from, in particular, Clause 1 of the Settlement Agreement ("*EMC shall sell MRI … 40,000 WMT of EMC Copper Concentrates in each of 2009 and 2010 … all pursuant to new, separate contracts between EMC and MRI … in the forms agreed at Schedules 1, 2 and 3 to this Settlement Agreement*" (emphasis added)); and the express wording of the 2010 Contract including the recital ("*WHEREAS [MRI] agrees to buy and [EMC] agrees to sell copper flotation concentrate of Erdenet Mining Corporation on the terms and conditions hereinafter contained*" (emphasis added)), Clause 2 ("*This Contract shall enter into full force from the date of the last signature and shall remain in force until completion of the Parties' obligations herein*" (emphasis added)), Clause 3 ("*The quantity of Concentrate to be delivered shall be 40.000 WMT plus or minus 10% at Seller's option*" (emphasis added)), Clause 4 ("*The Concentrate to be delivered*") and Clause 5 ("*The Concentrate shall be delivered…*"). Each of these obligations was unqualified and wholly inconsistent with EMC having no obligation to deliver anything at all unless and until it actually agreed the TC/RC and detailed shipping schedule with MRI (in circumstances in which it had no legal obligation even to try to agree such matters with MRI). Moreover, in my judgment, these provisions go further than just indicate that the parties objectively intended that they were entering an agreement which was legally binding: they are important terms of the contract which inform the proper construction of the other terms of the 2010 Contract in particular Clause 6.1, 9.1 and 9.2."

I entirely agree.

21. I also agree with the judge that the use of the mandatory "shall" in clauses 6.1, 9.1 and 9.2 is a strong indicator that the parties did not intend that a failure to agree should destroy their bargain. Given that they were contracting in January 2009 for delivery in 2010, it was no doubt sensible to leave open for future agreement in the conditions obtaining in 2010 the appropriate level of charges and the appropriate shipping schedule. In circumstances however where the parties had agreed every other aspect of the contract, including quality, specification and price, and where they had stipulated for the arbitration of disputes by a market tribunal, it is almost perverse to attribute to them an intention not to conclude a binding agreement, a fortiori where the agreement was an integral part of a wider overall transaction compromising an earlier dispute.

22. The judge spelled out at some length why this conclusion accords with the principles enunciated in *Mamidoil* and *B J Aviation*:-

> "32. Fifth, as to the principles in *Mamidoil* and at the risk of repetition:
>
> a. This was clearly a situation in which a binding agreement had been intended to be entered into, given the terms of the Settlement Agreement and the other terms of the 2010 Agreement. From an objective standpoint, it can hardly be supposed that the *quid pro quo* for the settlement of MRI's claim under the Original Contract, in so far as it consisted of the 2010 Contract, was, in effect, illusory because EMC was under no enforceable obligation to make any delivery to MRI; there is every reason why, objectively speaking, the entirety of the settlement package, including the 2010 Contract and all of the delivery and payment obligations described therein, should have been intended to be legally binding.
>
> b. Therefore, principles (ii) and (iii) (as summarised at para. 69 of *Mamidoil*) do not apply and instead principle (iv) applies i.e. since this was a commercial dealing between parties who were familiar with the trade and who had acted in the manner (as objectively demonstrated by clause 2 of the 2010 Contract) that they had a binding contract, the contract should be construed, where possible, to enable the contract to be carried out.
>
> c. While the parties had used the term *"to be agreed"*, in accordance with principle (vi), since the 2010 Contract (which was signed in early 2009) involved performance in the future with the result that it made sense to leave the TC/RC and shipping schedule to be determined subsequently, the tribunal should have approached the construction of the 2010 Contract so as to preserve rather than destroy the parties' bargain. At the risk of repetition,

> this was particularly the case (in accordance with principle (vii)) where EMC had already received the benefit of some advantage from entry into the Settlement Agreement and 2010 Contract (which constituted the relevant agreements in relation to the 2010 deliveries).
>
> d. As stated in principle (ix), such a construction or implication is reflected but not exhausted by the Sale of Goods Act 1979 and so the observation of Viscount Dunedin from *May and Butcher* in relation to the Sale of Goods Act (as quoted in paragraph 17 of the Award) does not exclude a term being implied. On the contrary, the normal basis for the implication of terms where a term is "to be agreed" is outside the Sale of Goods Act for just this reason.
>
> e. Pursuant to principle (x), the presence of an arbitration clause should have supported the conclusion that the agreement was sufficiently certain or capable of being rendered so, since it provided a commercial and contractual mechanism, which could be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, could resolve a dispute about a reasonable TC/RC or shipping schedule.
>
> 33. Similarly, in relation to *BJ Aviation*, the distinction drawn between the second and fourth principles is whether the court is satisfied that the parties intended their bargain to be enforceable. If the court is satisfied that the parties intended their bargain to be enforceable, then under the fourth principle it will *"strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement".* "

Again, I entirely agree.

23. Mr Moriarty rightly reminded us of the deference due to arbitral awards, of which the classic exposition is still that of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repair Limited* [1985] 275 EG 1134:-

> "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the object of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it."

Mr Moriarty also reminded us of the following passage in Mustill and Boyd on Commercial Arbitration, 2nd Edition at page 570:-

> "Thus an award will be construed liberally and in accordance with the dictates of common sense, and as far as possible in accordance with the real intention of the arbitrator. The Court will not go out of its way to find uncertainty or error in the award merely because the arbitrator has not expressed his conclusion in the correct legal language. Furthermore not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid. Thus if it is alleged that an award is subject to error on its face, but the award contains insufficient facts to enable the Court to tell whether the arbitrators' conclusion of law was justified or not, it will assume that any justifying facts which could exist did exist, even though the arbitrator has not found them. This process cannot, however, be carried too far. The Court is not concerned with fanciful hypotheses in order to support awards. It must have regard to probabilities and not to flights of fancy."

24. Mr Moriarty contended that the view which I have expressed above, in agreement with the judge, fails loyally to adhere to the arbitrators' finding, or observation, that the TC/RC is an integral part of the contract negotiation, and that neither that nor the shipping schedule are to be dismissed as a matter of detail. That, he suggested, demonstrates that the arbitrators considered that the parties had intended to leave essential matters to be negotiated and agreed later, on pain of the contract breaking down, or more accurately of there being no contract in the event that they failed to reach agreement. I do not accept this submission. The arbitrators have not in my judgment addressed themselves to the critical question "What was the parties' intention in the event that agreement on these points was not achieved?" This is in part explicable in the light of the arbitrators' approach to the Settlement Agreement, for it is the circumstance that the 2010 contract is an integral part of the Settlement Agreement that throws into such stark relief the importance of the unaddressed question. The arbitrators have also not asked themselves whether the parties have supplied a machinery whereby any uncertainty can be resolved.

25. Mr Moriarty also submitted that the judge was wrong to set aside the award and to substitute his own conclusion. The arbitrators' conclusion might, he submitted, be explicable on other grounds not explained in the award. In particular, Mr Moriarty submitted that the arbitrators may have had in mind the underlying strength of the parties' cases in relation to the original dispute. If MRI's case was weak, they might well have been prepared to accept as part of the settlement what might prove to be no more than an aspiration for 2010. In any event, submitted Mr Moriarty, if paragraph 15 of the award is not as it stands determinative, the arbitrators should be given an opportunity to express their conclusion in more felicitous language.

26. I reject these submissions. In the first place, given the judge's view that no reasonable tribunal correctly applying the relevant legal principles could have reached the conclusion that the contract was unenforceable, there was no scope for remission. Only one answer is possible.

27. However, I also reject the suggestion that the judge should in this case and for the reasons suggested have remitted had he reached a less trenchant conclusion, simply to the effect that on the basis of the material set out in the award the arbitrators' conclusion was wrong. The question here is one of construction of the contract, albeit against the background of its relevant context. No matters of context not apparent from the award were drawn to the attention of the judge which could have led to a different conclusion.

28. I am not sure that the submission as to the relative strength of the parties' cases was made to the judge in quite the form in which it was advanced before us. It seems merely to have been asserted before the judge that the tribunal had had the benefit of considerable factual and expert evidence relevant to the question to be decided, of which evidence the court was of course ignorant. I am afraid that I regard as wholly misconceived the suggestion that the arbitrators either might or should have taken into account the relative strength of the parties' positions before entering into the Settlement Agreement. The Settlement Agreement was intended and expressed to draw a line under the original dispute. It would be contrary to all principle and to what the parties expressly agreed to seek to go behind it. In any event, it would not assist in construing the 2010 agreement to conduct this enquiry. One party may have had a weak case but have been convinced, or wrongly advised, that it was strong. Moreover, Mr Moriarty's submission presupposed that it would be the weakness of MRI's case which induced it to accept a non-binding element in the Settlement Agreement. Yet as Mr Moriarty was also at pains to remind us, the relative enthusiasm of the parties to enforce the 2010 bargain, if such it was, would depend upon market movements which would be unpredictable viewed as at January 2009. It might equally have been EMC pressing for performance and MRI resisting it. The judge was, I think, entirely right to take "the very strong view" that remission was inappropriate. It was completely inappropriate.

29. For all these reasons, which are in substance those which commended themselves to the judge, I would dismiss this appeal.

Lord Justice McCombe :

30. I agree.

Lord Justice Pill :

31. I also agree.