Neutral Citation Number: [2021] EWHC 926 (Comm)

Case No: CL-2018-000498

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2021

Before :

SIR NIGEL TEARE
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

Alexander Tugushev	**Claimant**
- and -	
(1) Vitaly Orlov	**Defendants**
(2) Magnus Roth	
(3) Andrey Petrik	

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Christopher Pymont QC, Benjamin John and Fiona Dewar (instructed by **Macfarlanes LLP**) for the **First Defendant/Respondent**
Daniel Toledano QC, Emily Wood, Joshua Crow and Lorraine Aboagye (instructed by **Covington & Burling LLP**) for the **Second Defendant/Applicant**

Hearing dates: 22 and 23 March 2021
Draft sent to parties: 12 April 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 on 16 April 2021.

Sir Nigel Teare :

1. This is an application by the Second Defendant, Mr. Roth, for permission to bring three Part 20 claims against the First Defendant, Mr. Orlov. The application is opposed by Mr. Orlov on the grounds that two of the claims are the subject of an arbitration agreement and the third is the subject of an estoppel arising from proceedings in Hong Kong.

Mr. Tugushev's claim in this jurisdiction

2. Mr. Roth's application is made in proceedings which were commenced by the Claimant, Mr. Tugushev, in July 2018. They concern the ownership of a fishing business. In short, Mr. Tugushev claims that in 1997 he, Mr. Orlov and Mr. Roth agreed a 3-Way Joint Venture Agreement (the "3-Way JVA") pursuant to which each would hold a one-third interest in the business but that Mr. Orlov and Mr. Roth have since conspired to keep Mr. Tugushev's interest from him.

3. The relief sought by Mr. Tugushev was initially an account in respect of dividends and a declaration as to his one-third interest. In May 2020 the relief sought was amended to include restitution in damages and an order that shares in certain companies (to be identified) be transferred to him.

4. The Defences of Mr. Orlov and Mr. Roth to this claim are long and complex. I have not been taken though them in any detail. I shall seek to summarise the bare outline of the Defences.

5. Mr. Orlov's case in response to Mr. Tugushev's claim is that there was no 3-Way JVA and that Mr. Tugushev is not entitled to the relief he seeks. He says that there was a 2-Way Partnership Agreement ("the Partnership Agreement"), also in 1997, between himself and Mr. Roth pursuant to which the fishing business was to be owned 50/50 between them. The business was run on that basis until 2007 when Mr. Orlov and Mr. Roth entered into the 2007 Understanding pursuant to which Mr. Orlov's interest in the business was increased to two thirds and Mr. Roth's interest was reduced to one third. However, one part of the business, TTC, was owned and operated 50/50. Following the lead of counsel I shall describe the former business as the Russian Business and the latter as the Hong Kong Business.

6. Mr. Orlov says that in 2008 he and Mr. Roth entered into the 2008 Agreement pursuant to which Mr. Orlov was to hold Mr. Roth's one-third share on trust for him. The 2008 Agreement contained a London arbitration clause.

7. Mr. Roth's case in response to Mr. Tugushev's claim is that there was a 2-Way Partnership Agreement in 1997 between himself and Mr. Orlov but that it was quickly superseded by the 3-Way JVA. He therefore accepts that Mr. Tugushev is entitled to one third of the Russian Business but says that Mr. Tugushev must pay Mr. Roth and Mr. Orlov an amount reflecting his lack of contribution to the business when he was imprisoned and to reflect harm he has caused the business. So Mr. Roth accepts that in 2007 he had a one-third interest in the Russian Business but on his case that emanated from the 3-Way JVA whereas on Mr. Orlov's case it emanated from the 2007 Understanding and the 2008 Agreement.

8. Between 2011 and 2013 one third of the shares in the Russian business was transferred to Mr. Roth including 23% of the shareholdings in certain companies held by third parties ("the Transferred Alex Bundle Shares").

9. In 2016 Mr. Orlov, Mr. Roth and a number of companies entered into the Framework Agreement pursuant to which Mr. Roth agreed to sell his one-third interest in the Russian Business to Mr. Orlov and the companies for the sum of US$200 million. The Framework Agreement also included a London arbitration clause.

10. In addition to his claim based upon the 3-Way JVA Mr. Tugushev has alleged a trust claim in respect of one third of certain parts of the Russian Business which trust was said to have arisen in 2008. It is said that the transfers made in 2011-2013 to Mr. Roth were made in breach of that trust. Mr. Orlov and Mr. Roth deny there was any such trust.

11. Mr. Orlov and Mr. Roth have served contribution notices on each other.

The proceedings in Hong Kong

12. Since 2017 Mr. Orlov and Mr. Roth have been litigating in Hong Kong with regard to TTC, the company which was the holding company for the Hong Kong Business. Mr. Orlov issued an unfair prejudice petition as a registered shareholder in TTC and Mr. Roth counterclaimed with his own unfair prejudice petition as a registered shareholder in TTC. At the time they were the only registered shareholders in TTC. Judgment was given in 2019. Unfair prejudicial conduct was found on both sides. Mr. Roth was ordered to buy out Mr. Orlov's shareholding in TTC. The value of TTC has now been assessed.

The Part 20 claims in this jurisdiction

13. Draft Particulars of Mr. Roth's Part 20 claims against Mr. Orlov have been provided. They consist of three claims; the Partnership Claim, the TTC claim and the Alex Bundle Claim.

The Partnership Claim

14. This is based upon the premise that this court holds that the 3-Way JVA was never entered into or is void and not binding. On that basis Mr. Roth claims that the 1997 Partnership Agreement remains binding, that there was never a 2007 Understanding and that it was never agreed that Mr. Orlov would be entitled to a greater share of the Russian Business than Mr. Roth. Mr. Roth therefore claims from Mr. Orlov one sixth of the Russian Business currently owned by Mr. Orlov.

The TTC Claim

15. This is based upon the premise that this court holds that the 3-Way JVA was entered into and remains binding so that Mr. Tugushev is entitled to one third of TTC. Mr. Roth expects that his purchase of Mr. Orlov's interest in TTC (pursuant to the order of the Hong Kong Court) will have been completed before judgment is given in England. Mr. Orlov will therefore have received from Mr. Roth payment in respect of a greater number of shares (50%) than that to which he was entitled (33.3%). Mr Roth refers to

the difference as the "Excess Shares". Mr. Roth therefore seeks a payment from Mr. Orlov equal to the purchase price paid for the Excess Shares.

The Alex Bundle Claim

16. This is based upon the premise that Mr. Tugushev succeeds in his trust claim. On that basis it is said that the Alex Bundle shares which were transferred to Mr. Roth were beneficially owned by Mr. Tugushev and that Mr. Roth is liable to Mr. Tugushev in respect of them. Thus, so it is claimed by Mr. Roth, Mr. Roth will not have received the 23% shareholding in the Russian Business to which he was entitled under the 1997 3-Way JVA and Mr. Orlov will hold a 23% shareholding in the Russian Business to which he was not entitled under that Agreement. Mr. Roth therefore claims to be entitled to that 23% shareholding or its value.

The arbitration agreements and the Partnership and Alex Bundle Part 20 claims

17. The 2008 Agreement refers to arbitration in London "any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity hereof."

18. The 2016 Framework Agreement refers to arbitration in London under the LCIA Rules "any dispute arising out or in connection with this Agreement, including any question regarding its existence, validity or termination."

19. It is common ground that Mr. Roth's application to bring the Partnership and Alex Bundle Claims should be determined as if Mr. Orlov were seeking a stay of those claims pursuant to section 9 of the Arbitration Act 1996. (It is not suggested that the TTC Claim is to be referred to arbitration.)

20. Section 9(1) of the Arbitration Act 1996 provides:

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings had been brought to stay the proceedings so far as they concern that matter."

21. Section 9(4) provides that the court

> "shall grant a stay unless satisfied that the arbitration is null and void, inoperative, or incapable of being performed."

22. The manner in which section 9 is applied by the court has been the subject of recent decisions by the Commercial Court and the Court of Appeal. Both decisions have drawn upon a decision by the Chief Justice of Singapore dealing with the equivalent section in the law of Singapore; see *Sodzawiczny v Ruhan and others* [2018] EWHC 1908 (Comm), *The Republic of Mozambique v Credit Suisse and others* [2021] EWCA Civ 329 and *Tomolugen Holdings v Silica Investors* [2015] SGCA 57.

23. The guidance from those decisions most material to the present case is as follows. Where there is an arbitration agreement the parties have agreed not only that the matters

within the agreement should be arbitrated but also that they should not be decided by a court. The grant of a stay is mandatory; the court has no discretion. A "matter" referred to arbitration includes any issue capable of constituting a dispute under the arbitration agreement. There may be some disputes between the parties which are within the arbitration agreement and others which are not. In such a case the stay will apply only to the former. This may lead to fragmentation of forum but, as Popplewell J observed in *Sodzawiczny* at paragraph 44 "the desideratum of unification of process must give way to the sanctity of contract, as the mandatory terms of section 9(4) intend."

24. Section 9 envisages a two-stage process. First, the court must identify the matters in respect of which proceedings have been brought. Second, the court must decide which of those matters the parties have agreed to refer to arbitration.

25. At the first stage of the process the court may have regard to issues which it is reasonably foreseeable may arise. This should be a "common-sense enquiry in relation to any reasonably foreseeable substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings." The search is not for the main issue but for any and all issues which may be the subject matter of the arbitration agreement.

26. At the second stage of the process the court will have regard to the presumption in favour of one-stop adjudication as explained by Lord Hoffman in *Fiona Trust & Holdings v Privalov & others* [2008] 1 Lloyd's Reports 254. Thus the construction of an arbitration clause should start from the assumption that the parties as rational businessmen intended any dispute arising out of their relationship to be determined in the same forum and that such presumption can only be displaced by clear words.

27. The present case involves more than one contract; the 1997 agreements (whether the 3-Way JVA or the 2-Way Partnership Agreement), the 2008 Agreement and the 2016 Framework Agreement. It is therefore important to note that the *Fiona Trust* principle has been extended to cases where a claim is brought not under the contract which contains the arbitration clause ("Contract A") but under another contract between the parties ("Contract B"). This has been described by Bryan J in *Terre Neuve SARL and others v Yewdale Limited and others* [2020] EWHC 772 (Comm) at paragraph 30 as the "extended *Fiona Trust* principle". Bryan J analysed the scope of this principle at paragraph 31. He noted that the wording of the arbitration clause in Contract A must be fairly capable of applying to disputes under Contract B. He also noted that the principle normally applies where the parties to Contract A and Contract B are the same and where Contract A and Contract B are interdependent or have been concluded at the same time as part of a single package or deal with the same subject-matter.

28. In deciding whether an arbitration clause applies to claims arising under a different contract the court is engaged in an exercise of construction. Thus the underlying principle is that the arbitration clause should be given the meaning which a reasonable person, with the background reasonably available to both parties, would give it. The considerations described in *Fiona Trust* assist the court in applying that underlying principle and are consistent with it, as noted by Popplewell J in *Sodzawiczny* at paragraph 52.

29. In *Tomulgen* Chief Justice Menon, after a wide ranging review of the common law authorities and other materials (see paragraphs 25-70), concluded that the court was not required to determine the scope of the arbitration clause but only to undertake a prima facie review of its scope. One of his reasons for so concluding was that such an approach ensured that the court did not encroach upon the arbitral tribunal's power to determine its own jurisdiction. I was not referred to any passages in *Sodzawiczny* or *The Republic of Mozambique* which adopted this view. Indeed, the language used by Popplewell J and the Court of Appeal in those cases is consistent with the courts having determined the scope of the arbitration clause; see paragraph 61 of Popplewell J's judgment and paragraphs 90 and 124 of Carr LJ's judgment. I heard no detailed submissions on this matter. Counsel for Mr. Orlov submitted in writing (see paragraph 50 of Mr. Orlov's Skeleton Argument) that the court should decide the matter on the balance of probabilities. Counsel for Mr. Roth told me, orally, that that was accepted. In *Albon v Naza Motor Trading* [2007] EWHC 665 (Ch) Lightman J held that the court had to determine the scope of the arbitration clause; see paragraphs 19 and 20. In *Joint Stock Company Aeroflot-Russian Airlines v Berzosky and others* [2013] EWCA Civ 784 Aikens LJ also appeared to be of that view; see paragraph 73. Although Counsel for Mr. Orlov in his reply said that he need only establish a *prima facie* case (basing himself, I presume, on the view of Chief Justice Menon) it seems to me that I should determine the scope of the arbitration agreement. That is what the Commercial Court and the Court of Appeal appear to have done in *Sodzawiczny* and in *The Republic of Mozambique* and is supported by *Albon* and by *Joint Stock Company Aeroflot-Russian Airlines v Berzosky*. Whilst Chief Justice Menon (at paragraph 69 of his judgment in *Tomulgen)* expressed his disagreement with the approach of Aikens LJ in *Joint Stock Company Aeroflot-Russian Airlines v Berzosky* that approach is not open to me.

<u>The matters in respect of which the Partnership and Alex Bundle Claims have been brought</u>

30. The Partnership Claim has been pleaded in the draft Part 20 Claim. The Claim is based upon the 1997 Partnership Agreement (in the sense that it assumes that Mr. Tugushev fails in his claim based upon the 1997 3-Way JVA) and Mr. Roth seeks the transfer of one sixth of the business or its value to Mr. Roth. It specifically raises the issue whether Mr. Roth had entered the alleged 2007 Understanding. Counsel for Mr. Roth identified the disputed issues as being:

    i) Did Mr. Orlov and Mr. Roth enter the 2007 Understanding?

    ii) If no, as of 2007 did Mr. Orlov and Mr. Roth continue to be entitled to call for the assets of the Russian Business in equal shares?

    iii) If yes, does clause 11.1.1 of the 2016 Framework Agreement provide a defence to Mr. Roth's claim for an additional sixth of the shares?

31. Counsel for Mr. Orlov did not list the disputes in that way. Rather, he identified as "the real issue" or "the core of this dispute" (see paragraphs 45 and 60 of Mr. Orlov's skeleton argument) the impact of the 2008 Agreement and the Framework Agreement upon the Partnership Claim. This approach is contrary to the guidance in the recent cases to which I have referred.

32. Counsel for Mr. Roth accepted that the Partnership Claim will foreseeably give rise to a defence based upon clause 11.1.1 of the 2016 Framework Agreement. Clause 11.1.1

contains a warranty by Mr. Roth that the shares being sold "represent the entire interest and rights of the Seller in the Companies, and that Seller has no Encumbrance or right of any kind that would entitle him to acquire or be granted any further shares…….in the Companies." Counsel for Mr. Orlov explained the defence by reference to the doctrine of contractual estoppel.

33. The Alex Bundle Claim has also been pleaded in the draft Part 20 Claim. The Claim is based upon the 1997 3-Way JVA (in the sense that it assumes that Mr. Tugushev succeeds in his claim under that Agreement) and Mr. Roth seeks transfer of 23% of the shares in certain companies or their value. It is again accepted that it will foreseeably give rise to a defence based upon clause 11.1.1 of the 2016 Framework Agreement. Thus the disputes are, according to counsel for Mr. Roth:

    i) Is Mr. Roth entitled to call for 23% of the shares in the Russian Business?

    ii) If yes, does clause 11.1.1 of the 2016 Framework Agreement provide a defence to that claim?

34. Again, counsel for Mr. Orlov described "the central dispute" or "core of the dispute" (see paragraphs 64 and 66 of Mr. Orlov's skeleton argument) as the impact of the 2008 Agreement and the 2016 Framework Agreement upon the Alex Bundle Claim.

35. It is unnecessary to consider the TTC Claim because a stay is not sought in respect of that claim.

The scope of the arbitration clauses

36. Although there are arbitration clauses in both the 2008 Agreement and the 2016 Framework Agreement, particular reliance was placed upon the latter by counsel for Mr. Orlov in his oral submissions.

37. Clause 28.2 of the 2016 Framework Agreement refers to arbitration "any dispute arising out of in connection with this Agreement, including any question regarding its existence, validity, or termination."

38. Counsel for Mr. Orlov submitted that the Partnership and Alex Bundle Claims were within the arbitration agreement. He developed, orally, an argument upon the following lines. The 2016 Framework Agreement was an agreement by which the relationship between Mr. Orlov and Mr. Roth was ended. In this regard reliance was placed upon the circumstance that Mr. Roth was selling for US$200 million shares which he warranted in clause 11.1.1 were his "entire interest ……in the Companies" and upon his further warranty that he had no "right of any kind that would entitle him to acquire or be granted any further shares….in the Companies." Counsel also drew attention to clause 19.1 which provided that "this agreement supersedes any and all previous agreements or understandings (whether oral or written) relating to the subject-matter of the Transaction Documents, which shall cease to have any further force or effect". Counsel compared this agreement with a settlement agreement. In *Sodzawiczny* Popplewell J had noted in paragraph 51 that where a settlement agreement contained an arbitration clause the presumption in favour of one stop adjudication had particular potency. Where a person seeks to bring a claim based upon a right which had arguably been settled then, unless the arbitration agreement is construed as extending to a dispute

as to the validity of that right, there will be two tribunals determining related disputes; the arbitral tribunal will address the validity or efficacy of the settlement whilst the court will address the validity of the pre-existing right. That is a situation which rational businessmen are unlikely to intend. Thus it was submitted that just as an arbitration clause in a settlement agreement can properly be construed as extending to the determination of claims alleged to have been settled, so the arbitration clause in the 2016 Framework Agreement can properly be construed as extending to the determination of claims brought under the 1997 3-Way JVA or the 1997 2-Way Partnership Agreement which have now been superseded by the 2016 Framework Agreement.

39. Counsel for Mr. Roth accepted that any defence to Mr. Roth's Partnership or Alex Bundle Claims based upon clause 11.1.1 of the 2016 Framework Agreement was a matter referred to arbitration but submitted that Mr. Roth's claim based upon the 1997 Agreements was not a matter referred to arbitration. The defence would have to be resolved in arbitration and then, depending upon the outcome of that arbitration, the court would determine the claims brought under the 1997 Agreements. In this regard, counsel relied upon the circumstance that the arbitration clause referred to arbitration disputes arising out of or in connection with "this Agreement". The Partnership and Alex Bundle Claims did not arise out of or in connection with the 2016 Framework Agreement but arose out of or in connection with agreements made almost 20 years earlier. Further, he noted that the parties to the 1997 and 2016 Agreements were not the same. There were three companies party to the 2016 Agreement who were not party to the 1997 Agreements. Whereas Mr. Tugushev was party to the 1997 3-Way JVA, he was not party to the 2016 Agreement. Counsel submitted that the 2016 Framework Agreement was neither a settlement agreement nor an agreement which brought the relationship of Mr. Orlov and Mr. Roth to an end. Rather, it was simply an agreement for the sale and purchase of certain shares owned by Mr. Roth. The arbitration agreement which referred to arbitration claims arising under or in connection with "this agreement" was intended by the parties to refer to arbitration claims arising out of or connected with the sale and purchase of shares, rather than to claims arising out of or connected with the overarching or umbrella 1997 Agreements. In this regard reliance was placed upon the approach of Foxton J in *Albion Energy Limited v Energy Investments Global* [2020] EWHC 301 (Comm) where it was accepted that an arbitration clause can be regarded as applying only to the specific agreement in which it is found rather than to a more general agreement between the parties; see paragraph 24 per Foxton J. With regard to clause 19.1 of the 2016 Agreement it was observed that the 2016 Agreement was to supersede all previous agreements "relating to the subject-matter of the Transaction Documents", that is, the sale and purchase of certain shares. That was not an apt description of the 1997 Agreements and so it was not superseded.

40. In resolving this dispute as to the scope of the arbitration clause it is necessary to bear in mind the underlying principle of contractual construction, namely, that the court is seeking to find that meaning which a reasonable man, with all the background knowledge reasonably available to both parties, would give to the arbitration clause. The background knowledge available to Mr. Orlov and Mr. Roth when they entered the 2016 Framework Agreement (along with 3 companies) was that their involvement with the Russian fishing business went back to 1997 and had found expression in one of two 1997 Agreements and in the 2008 Agreement.

41. There is no dispute that there is a reasonably foreseeable defence to the Partnership Claim and the Alex Bundle Claim derived from clause 11.1.1 which must be referred to arbitration. The question is whether the parties intended that the validity of the claims said to derive from the 1997 Agreements was also a matter referred to arbitration, in addition to the particular defence provided by clause 11.1.1.

42. In reaching a conclusion on this question I have taken care not to say anything about the cogency or otherwise of the defence based upon clause 11.1.1 because that is a matter which, on any view, must be determined in arbitration.

43. The presumption in favour of one-stop adjudication would suggest that the parties, with the background knowledge to which I have referred, intended that the validity of the claims said to derive from the 1997 Agreements should be referred to arbitration in addition to the validity of the defence to such claims provided by clause 11.1.1.

44. Against that must be borne in mind the fact that the parties to the 2016 Framework Agreement are not the same as the parties to the 1997 Agreements and the fact that a distance of almost 20 years separated the 1997 Agreements from the 2016 Framework Agreement. However, the 2016 Agreement and the 1997 Agreements are connected with each other because they both concern the same subject matter, namely, the Russian Business.

45. Clause 19.1 of the 2016 Agreement provides that the 2016 Agreement "superseded any and all previous agreements or understandings (whether oral or written) relating to the subject-matter of the Transaction Documents." That clause, having regard to its inclusion in a contract which provides for the sale of Mr. Roth's share in the Russian Business, tends to support the suggestion that the 2016 Agreement was "a parting of the ways" (a phrase used by counsel for Mr. Orlov). Counsel for Mr. Roth submitted that the reference to the "subject-matter of the Transaction Documents" militates against this conclusion because "Transaction Documents" was a defined term which did not include the 1997 Agreement or Agreements. But the subject matter of the Transaction Documents was the shares in certain companies which formed part of the fishing business. The fishing business was of course the subject-matter of the 1997 Agreements, though the particular companies whose shares were being sold in 2016 may not have been in existence at that time. I therefore think there is force in the suggestion that the 2016 Agreement was "a parting of the ways".

46. That the 2016 Agreement was in the nature of a "parting of the ways" suggests that the presumption in favour of one-stop adjudication has "particular potency" (the phase used by Popplewell J) just as it has in the context of a settlement agreement. Rational businessmen would surely expect that if, after the 2016 Agreement, Mr. Roth were to make a claim for more shares, not only would a defence to that claim based upon clause 11.1.1 be referred to arbitration but also the validity of the claim would be referred to arbitration.

47. Of course, the language of the arbitration clause must be apt to apply, or fairly capable of applying, to such a claim. The arbitration clause applies to any dispute "in connection with" the Framework Agreement. Sufficiency of connection is "a nuanced concept in respect of which there is scope for reasonable disagreement"; per Carr LJ in *The Republic of Singapore* at paragraph 84. In the present case the phrase is used in the

2016 Framework Agreement which is closely connected with the 1997 Agreements since they both concern the same subject matter, namely, the Russian Business. In that context a claim which arises out of the 1997 Agreements is, in my judgment, fairly to be regarded as a dispute in connection with the 2016 Framework Agreement.

48. For these reasons I have concluded that the matters in respect of which the Partnership Claim is brought by Mr. Roth (for one sixth of the shares in the Russian Business or damages in the amount of their value), and the matters in respect of which the Alex Bundle Claim is brought by Mr. Roth (for 23% of the shares in the Russian Business or damages in the amount of their value) are matters which under the arbitration agreement in the 2016 Framework Agreement are to be referred to arbitration.

49. It follows that the Partnership and Alex Bundle Claims must be stayed pursuant to section 9 of the Arbitration Act 1996.

50. There are three further, related, matters with which I must deal.

51. Counsel for Mr. Roth emphasised that the matters in dispute on the Partnership Claim included the existence or otherwise of the 2007 Understanding and the entitlement of Mr. Roth and Mr. Orlov to equal shares in the business at that time. Counsel submitted that Mr. Roth's denial of the 2007 Understanding was an important part of his case to which he had not pleaded by way of defence because it is not part of Mr. Tugushev's claim. The existence of the 2007 Understanding was not, it was said, a matter referred to arbitration. Therefore, it should not be stayed.

52. If, as seems likely, Mr. Orlov raises the 2007 Understanding as part of his defence to the claim of Mr. Tugushev, I do not see why Mr. Roth cannot, in the course of the hearing of Mr. Tugushev's claim, deny the existence of the 2007 Understanding and make such submissions as he wishes to about its alleged existence. Mr. Roth does not have to have pleaded his case on such matters by way of a Part 20 Claim in order to be able to do so. Counsel for Mr. Roth submitted that Mr. Roth has sought to answer Mr. Orlov's defence to Mr. Tugushev's claim "by the declarations he seeks in the Partnership Claim". It may be said that it is helpful for him to have done so in circumstances where the CPR does not require a defendant to reply to what a co-defendant has said in response to the claim of the claimant. But I am unable to accept that he was required to do so. Mr. Roth could have made his position clear by letter or perhaps by way of an amendment to his contribution notice.

53. Mr. Orlov may also raise the 2007 Understanding as part of his case in response to the Partnership Claim. If he does so then Mr. Roth is likely to respond by advancing his case that there was no 2007 Understanding in support of his Partnership Claim against Mr. Orlov. Indeed, I have noted from the Fourth Witness Statement of Mr. Pollack (served in support of Mr. Roth's application for permission to bring the Partnership Claim) at paragraph 16 that it is the allegation that there was the 2007 Understanding which has "given rise" to the Partnership Claim. Any such case of Mr. Roth (that there was no 2007 Understanding), being part of the Partnership Claim, is a matter which is referred to arbitration by the 2016 Framework Agreement and therefore must be stayed. It is or would be a dispute "in connection with" the 2016 Framework Agreement because both the 2016 Framework Agreement and the 2007 Understanding concern the same subject matter, namely, the Russian Business.

54. Of course, it is undesirable that the same factual issue might be determined by the court and by the arbitral tribunal. There is a risk of inconsistent decisions. That is, at the very least, most unfortunate and has the potential to cause great difficulty but the court has no discretion in this matter. As noted by Popplewell J in *Sodzawiczny* at paragraph 44 the court can only use its case management powers to ameliorate the adverse consequences of a mandatory stay.

55. Counsel for Mr. Roth also submitted that Mr. Roth's claim for a declaration that Mr. Orlov and Mr. Roth did not enter the alleged 2007 Understanding and his claim for a declaration that, since there was no 2007 Understanding, Mr. Orlov and Mr. Roth continued to be entitled to call for the Joint Venture Assets in equal shares at that time should not be stayed. This was essentially the same point as that with which I have just dealt.

56. The two declarations are to be found in paragraphs 1 and 2 of Mr. Roth's prayer for relief. Whilst, as explained above, their subject-matter may have a relevance in connection with Mr. Tugushev's claim they are, in the context of the Partnership Claim, steps on the way to the principal relief sought in paragraphs 3-8 of the prayer, namely, a transfer of shares or damages, interest and costs. That being so paragraphs 1 and 2 must be stayed just as paragraphs 3-8 must be stayed. They are all caught by the arbitration clause.

57. Counsel for Mr. Roth finally submitted that Mr. Orlov has invoked the court's jurisdiction by pleading, by way of defence to Mr. Tugushev's claim, (i) the 2007 Understanding, (ii) the consequence being that the 1997 Partnership Agreement no longer applied and (iii) that the alleged 2007 Understanding was reflected in the 2008 Agreement. It was said that having done that it was now too late to seek a stay of the Part 20 Partnership Claim.

58. It was accepted that in order for there to be a waiver of the right to seek a stay there must be an unequivocal act which invokes the jurisdiction of the court to deal with the substance of the claim which would otherwise have been arbitrated; see *Jurisdiction and Arbitration Agreements and their Enforcement* 3rd.ed. by David Joseph QC at paragraph 11.44.

59. In circumstances where what Mr. Orlov did was to plead his defence to Mr. Tugushev's claim in December 2019, some months before the Partnership Claim had been articulated, I am unable to accept that there was, as against Mr. Roth, an unequivocal invocation of the court's jurisdiction to deal with one or more of the matters referred to arbitration. Mr. Orlov was merely defending the claim brought against him by Mr. Tugushev. I am therefore unable to accept the submission that Mr. Orlov has waived the right to insist on arbitration in respect of the dispute as to the 2007 Understanding as between himself and Mr. Roth.

60. Counsel for Mr. Roth accepted that the facts of this case were "unusual" in that Mr. Orlov's allegations were made in his defence to Mr. Tugushev's claim, rather than directly against Mr. Roth. But he submitted that Mr. Orlov was aware that what he was saying as against Mr. Tugushev was a matter of controversy between Mr. Orlov and Mr. Roth and that the controversy as to the 2007 Understanding would have to be determined by the court in order to decide Mr. Tugushev's claim with the result that the

decision would be binding on Mr. Roth. Counsel said that Mr. Orlov "nevertheless elected to put these matters in issue without any reservation or suggestion that as between Mr. Orlov and Mr. Roth the questions of whether there was a 2007 Understanding or whether the Orlov/Roth Partnership Agreement continued to govern could only be decided in arbitration". This conduct was said to be "an unequivocal invocation of the Court's jurisdiction in respect of these matters". The difficulty with this carefully constructed argument is that when Mr. Orlov pleaded the alleged 2007 Understanding in response to Mr. Tugushev's claim the Partnership Claim as now advanced by Mr. Roth had not been articulated. In those circumstances I am unable to accept that Mr. Orlov's conduct was "an unequivocal act which invoked the jurisdiction of the court to deal with the substance of the claim which would otherwise have been arbitrated". Mr. Orlov cannot be expected to have reserved the right to say that as between Mr. Orlov and Mr. Roth the question of whether there was a 2007 Understanding could only be decided in arbitration in circumstances where Mr. Roth had not brought any claim against Mr. Orlov which was arguably within the arbitration clause.

Estoppel

61. TTC was incorporated in December 2006 when, I was told, Mr. Tugushev was in prison. According to Mr. Orlov and Mr. Roth TTC was at all material times owned by Mr. Orlov and Mr. Roth in equal shares. As joint shareholders they were responsible for the operation and management of TTC. Mr. Tugushev had never had any material involvement with the operation and management of TTC.

62. Mr. Roth's Part 20 TTC Claim is based upon the premise that this court holds that the 3-Way JVA was entered into and remains binding so that Mr. Tugushev is entitled to one third of TTC. Mr. Roth expects that his purchase of Mr. Orlov's interest in TTC (pursuant to the order of the Hong Kong Court) will have been completed before judgment is given in England. Mr. Orlov will therefore have received from Mr. Roth payment in respect of a greater number of shares (50%) than that to which he was entitled (33.3%), the "Excess Shares". Mr. Roth therefore seeks a payment from Mr. Orlov equal to the purchase price of the Excess Shares.

63. Mr. Orlov submits that permission should not be granted to advance this claim because Mr. Roth is estopped from doing so by the decision of the Hong Kong Court in the "unfair prejudice" litigation between Mr. Orlov and Mr. Roth. It is common ground that Mr. Roth's application should be determined as if Mr. Orlov were applying for reverse summary judgment in, and/or strike out of, the TTC Claim.

64. Both Mr. Orlov and Mr. Roth consider that the court has all the evidential materials necessary for this point to be determined on this hearing, including expert evidence of Hong Kong law. Neither party suggests that there will be any further evidence at trial, save perhaps, cross-examination of the experts on Hong Kong law. Since (a) the only dispute between the experts is not as to Hong Kong law but as to the application of Hong Kong law to the facts of this case, (b) the Hong Kong law of issue estoppel is derived from the English law of issue estoppel and (c) the Hong Kong Court is a common law court whose judgment is in English I accept that this court is able to decide the question of issue estoppel on this application without the need to hear cross-examination of the experts on Hong Kong law.

The elements of issue estoppel

65. It is common ground between the parties that an issue estoppel may arise from earlier proceedings in a foreign court if:

    i) the foreign court is a court of competent jurisdiction;

    ii) the decision of the foreign court has clearly or necessarily decided the issue finally and on the merits and with preclusive effect as a matter of the local law;

    iii) the decision is about the same issue which is sought to be raised in England; and

    iv) the decision is made in proceedings between the same parties or their privies.

66. There is no dispute as to requirements i) and iv) or that the decision of the Hong Kong Court was final and on the merits.

67. There is, however, a fifth requirement as counsel for Mr. Roth was keen to stress, namely, that the purpose of estoppel is to work justice. In *Carl Zeiss Stiftung v Rayner & Keeler* [1967] AC 853 Lord Upjohn said at p. 947 E that estoppels "must be so applied as to work justice and not injustice and ….the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind." In *Arnold v National Westminster Bank* [1991] 2 AC 93 at p.109 B. Lord Keith said that in special circumstances inflexible application of estoppel may work injustice. In the latter case it was held that a party to an earlier decision was not bound by it in circumstances where it had later been declared to be wrong in law. In *The Good Challenger* [2004] 1 Lloyd's Reports 67 Clarke LJ at paragraph 54 said that "the application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice." The matter was further discussed at paragraphs 75-79 where Clarke LJ said, at paragraph 79, that "the correct approach is to apply the principles set out above unless there are special circumstances such that it would be unjust to do so. Whether there are such special circumstances or not will of course depend upon the facts of the particular case."

The Hong Kong proceedings

68. I must first describe the Hong Kong proceedings in a little more detail.

69. Mr. Orlov and Mr. Roth fell out and lost trust in each other. On 8 June 2017 Mr. Orlov issued an unfair prejudice petition in Hong Kong against Mr. Roth. On 22 December 2017 Mr. Roth issued an unfair prejudice cross-petition against Mr. Orlov. Each sought an order that Mr. Roth buy-out Mr. Orlov. It was common ground in those petitions that Mr. Orlov and Mr. Roth were the each direct or indirect owner of 50% of the shares in TTC, that TTC had been set up and was to be operated in accordance with their Mutual Understanding pursuant to which each was to contribute to the share capital, share expenses and share profits on an equal 50/50 basis and that all decisions would be taken by mutual agreement. Each alleged that the other had breached the Mutual Understanding.

70. It is to be noted that Mr. Tugushev brought his claim against Mr. Orlov and Mr. Roth in England in July 2018.

71. On 29 January 2019 Mr. Roth applied for a stay of the Hong Kong proceedings pending the outcome of the proceedings before this court in which Mr. Tugushev claimed one-third of TTC. The application was dismissed on 21 March 2019 by a deputy judge (not the trial judge) for three reasons:

    i) Mr. Tugushev's claim to the shares in TTC had been known since July 2018 and Mr. Roth had participated in setting the petitions down for trial in August 2018.

    ii) There was no dispute between Mr. Orlov and Mr. Roth as to the size of their respective shareholdings.

    iii) Mr. Tugushev had not sought to participate in the Hong Kong proceedings.

72. Over 11 days in July and August 2019 the petitions were tried before Coleman J. Judgment was given on 28 August 2019. Unfair prejudice was found on both sides and the Court ordered a buyout by Mr. Roth of Mr. Orlov's shareholding. The following observations in the judgment have been relied upon as being of particular relevance to the present dispute.

    i) At paragraph 27 the Judge referred to the proceedings in England.

    > "27. As an aside, it might be mentioned that there is a dispute between Tugushev and Orlov and Roth about the one third share originally held on trust for Tugushev, which has led to proceedings brought by Tugushev against Orlov and Roth in England…….Orlov now holds the shares, but Tugushev alleges they were misappropriated as a result of joint activity by Orlov and Roth. But that dispute and those proceedings have not really figured in these proceedings, and this case has proceeded on the basis that the only relevant shareholders are Orlov and Roth. Therefore, other than possibly in the context of the precise terms of relief which might be granted in these proceedings, I do not think the Tugushev dispute and proceedings require further consideration for present purposes."

    ii) Counsel for Mr. Roth invited the Hong Kong Court to have regard to the possibility that Mr. Tugushev might obtain an order from this Court that he is entitled to ownership of one third of the shares in TTC and that any buyout order might unfairly prejudice Mr. Roth. The Judge noted at paragraph 393 that counsel had offered no specific suggestions for a mechanism to deal with this situation. At paragraphs 394-5 he said:

    > "394. In any event, I am not persuaded that any such mechanism is necessary or appropriate. Orlov and Roth have chosen to fight these proceedings on the basis that they, and they alone, are the equal shareholders of TTC. That they so assert is a necessary corollary of the whole basis of their cross-claims upon the alleged MU. It seems to me to be a bit late in the day to suggest at the end of the trial that the fundamental basis asserted by both parties as underpinning these proceedings might not actually be correct, and that my order ought somehow to take that into account.
    >
    > 395. In any event, from my reading of Tugushev's claim, if it is made good he can be suitably compensated by a financial award, and any financial award

> against Orlov and Roth as co-conspirators or co-tortfeasors is likely to give rise to duties and obligations between them as a result. I do not think my order for buyout in these proceedings need be unnecessarily complicated by anticipation of matters which appear, at this point, to be entirely speculative and somewhat remote."

73. In December 2019 Mr. Orlov and Mr. Roth served their Defences to Mr. Tugushev's claim in England.

74. On 31 December 2019 there was fixed before the Hong Kong Court a hearing to finalise the terms of the Court's order. Shortly before that on 24 December 2019 Mr. Tugushev applied to be heard. That application was heard on 31 December 2019. In support of his application Mr. Tugushev relied upon Mr. Roth's defence in the English action in which he accepted that Mr. Tugushev was entitled to one third of the business which included TTC. It was said that "the English Court will have to make some determination for which the buyout order potentially has some effect, because it potentially involves shares which in fact belong to Tugushev". Counsel for Mr. Orlov said that it was not open to Mr. Roth to adopt in the Hong Kong proceedings a stance which was diametrically inconsistent with his previous position in these proceedings. The Judge thought there was force in that point but did not rely on it for the purposes of resolving Mr. Tugushev's application; see paragraph 21. He gave his decision on that application at paragraph 22:

> "22. At bottom, I am not persuaded that it is necessary for Tugushev to be allowed to intervene in these proceedings to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, nor is it my opinion that it would be just and convenient to determine as between Tugushev and Orlov and Roth in these proceedings, those matters which he says are common issues in the other proceedings."

75. The Judge then gave three reasons. The valuation process was likely to be different in the two jurisdictions. There was a difference of some months in the valuation date. Mr. Tugushev would not be bound by the valuation in Hong Kong.

76. On 23 January 2020 the Judge made an order for an interim payment. Mr. Tugushev's claim was again mentioned. At paragraph 46 the Judge said:

> "46. Mr. McLeish [counsel for Mr. Roth] also submitted that a further complication is Tugushev's claim to a one third interest in the TTC Group. As indicated, I have dismissed Tugushev's application to intervene in these proceedings, I do not think it is necessary or appropriate to speculate as to what might happen on his claim in the English proceedings. But, if the express concern is that Roth could find himself in a position of having overpaid Orlov even by way of an interim payment based on an "irreducible minimum" possible valuation of the shares registered in Orlov's name, when one third of those shares might be found to be beneficially owned by Tugushev, that seems to me to be a litigation risk which Roth voluntarily assumed when he conducted the litigation in Hong Kong on the basis that he and Orlov, and only he and Orlov, were equal beneficial shareholders of TTC. Therefore, and though I have in mind that any such claim

might be met by an award of damages, I take no account of Tugushev's claim for the purposes of considering Orlov's interim payment application."

The alleged issue estoppels

77. An issue estoppel is said to arise in relation to 5 issues:

i) The fact that Mr. Orlov is entitled to be paid by Mr. Roth 50% of the value of TTC on transferring to Mr. Roth his 120,000 shares.

ii) The fact that Mr. Roth and Mr. Orlov (and they alone) were equal shareholders in TTC.

iii) The fact that TTC was set up and operated pursuant to the Mutual Understanding (that is, an understanding as to how TTC was to be managed) as opposed to any other agreement.

iv) The fact that the Hong Kong Order gave appropriate effect to, and was consistent with, the Mutual Understanding.

v) The fact that Mr. Tugushev did not have any interest in TTC shares.

78. Counsel for Mr. Roth submitted that this was an over-elaborate structure to debate and in reality there were only two issues to debate:

i) Is the TTC Claim an impermissible attempt to rewrite or undermine the Buy-Out Order; and

ii) Did the Hong Kong Court determine, clearly and as a necessary and fundamental part of its reasoning that Mr. Roth and Mr. Orlov (and they alone) were the only persons with any interest or rights to TTC's shares and, if so, does Mr. Roth's TTC Claim put this matter in issue?

79. I consider that the important question is whether the Hong Kong Court found clearly or necessarily that Mr. Roth and Mr. Orlov (and they alone) were the only persons with any interest in TTC. If there was such a decision then there is no dispute that it would be preclusive in Hong Kong law. It was common ground that in Hong Kong there was a doctrine of issue estoppel which applied to a decision which was final and on the merits. The parties to such a decision were not able to challenge that decision in later litigation. There did not appear to be any material distinction between English and Hong Kong law on this subject.

The decision in Hong Kong

80. What the Hong Kong Court decided has been addressed by the experts on Hong Kong law and on that they have expressed different opinions.

81. Rachel Lam SC expressed the opinion that the parties' "agreed position" was that they were equal shareholders in TTC and that that was necessary and fundamental to the decision of the Hong Kong Court; see paragraph 63 of her report. She said that the Court proceeded on the fundamental basis that no one other than Mr. Orlov or Mr. Roth

had any interest in or rights to TTC's shares, that is, that Mr. Tugushev had no such entitlement; see paragraph 70 of her report.

82. Mr. Abraham Chan SC expressed a different opinion. He drew attention to paragraph 27 of the judgment (which I have quoted above) and concluded that the question of Mr. Tugushev's potential interest in TTC was simply not material to - and still less was it foundational or dispositive of - the dispute before him other than (possibly) for the specific terms of relief to be granted. This was because the unfair prejudice proceedings were conducted on the basis that the only relevant shareholders were Mr. Orlov and Mr. Roth; see paragraph 72 of his report. Mr. Chan explained that whilst the decisions of the court as to mismanagement gave rise to an issue estoppel the judge's observations at paragraphs 393-5 of the judgment showed that he was not refusing to take account of Mr. Tugushev's possible interest in TTC on the grounds of issue estoppel but on case management grounds and that his possible interest should best be left to the English court; see paragraphs 74-82 of his report. There were further elements in Mr. Chan's sustained argument. The Hong Kong Court was concerned with an issue between the only two *registered* shareholders in TTC. That was quite a different issue from whether or not Mr. Tugushev had rights *beyond the register*; see paragraphs 96-102. Mr. Tugushev's possible interest was "no more than background matter in the Hong Kong Proceedings and was deliberately left untouched by Coleman J. There was certainly no "distinct determination of the court" on the issue of Mr. Tugushev's interest "in sufficiently clear and precise terms" "; see paragraph 105(3) of his report. It followed that Mr. Roth would be precluded from asserting that there were more than two registered shareholders but not from asserting that there were other unregistered shareholders (and *a fortiori* other people with contractual claims to TTC shares); see paragraph 112(b) and (c) of his report.

83. Rachel Lam SC responded to this opinion at length; see paragraphs 20-46 of her supplementary report. But her fundamental objection is that, in her opinion "the fundamental basis on which the Hong Kong court proceeded was that only Mr. Orlov and Mr. Roth, and no one else, had any interest in or rights to TTC's shares". This opinion had been explained and supported at paragraphs 70-74 of her first report.

84. I have considered carefully the expert evidence of the two Hong Kong leading counsel but ultimately I have to form my view assisted by their views. It is to be noted that when the Judge referred in his judgment to the possible interest of Mr. Tugushev in the TTC shares he did not say that Mr. Tugushev's possible interest was irrelevant on the ground that he was concerned only with registered shareholders. Rather, the Judge appears to have recognised that Mr. Tugushev's suggested interest might be relevant to the precise terms of the relief granted; see paragraph 27 of the judgment. That suggests that he had in mind that the interest of a third party to the proceedings could potentially be relevant to the relief granted even though Mr. Tugushev was not a registered shareholder. When, at the end of the hearing, he was invited to have regard to Mr. Tugushev's possible interest as a third party he decided not to do so. Again, he did not say that Mr. Tugushev's possible interest was irrelevant because he was not a registered shareholder. Instead he said that it was not necessary or appropriate to take that possible interest into account because the fundamental basis upon which the parties had conducted the proceedings was that "they, and they alone, are the equal shareholders of TTC". The Judge considered that Mr. Tugushev's "claim, if it is made good" could be compensated by a financial award in England. That claim was "at this point …… entirely speculative

and entirely remote". As I read the judgment the Judge appreciated that Mr. Tugushev's claim was not that he was a registered shareholder (it must have been obvious that he was not) but that he had a claim to ownership of one third of the shares in TTC. Thus, when the Judge referred to the fundamental basis upon which the parties had conducted the proceedings as being that they and they alone were equal shareholders in TTC he was saying that the parties had conducted the proceedings on the basis that the only persons with an interest in the shares were Mr. Orlov and Mr. Roth who held them equally. Had the Judge considered that Mr. Tugushev's claim, whatever it was, was irrelevant to the proceedings because he was not a registered shareholder I think it likely that he would have said so.

85. When the Judge dealt with the question of an interim payment in a later ruling he referred to Mr. Roth's concern that he "could find himself in a position of having overpaid Orlov even by way of an interim payment based on an "irreducible minimum" possible valuation of the shares *registered* in Orlov's name, when one third of those shares might be found to be *beneficially owned* by Tugushev…" (my emphasis added). That language confirms that the Judge appreciated that Mr. Tugushev's claim was to a beneficial interest in the shares and that he was not a registered shareholder. The Judge said that Mr. Roth took a "litigation risk" when he "conducted the litigation in Hong Kong on the basis that he and Orlov, and only he and Orlov, were *equal beneficial shareholders* of TTC" (again, my emphasis added).

86. These passages in my view support the opinion of Rachel Lam SC that "the fundamental basis on which the Hong Kong Court proceeded was that only Mr. Orlov and Mr. Roth, and no one else, had any interest in or rights to TTC's shares". Counsel for Mr. Roth said that these passages were irrelevant because Mr. Tugushev does not claim a beneficial interest but "a contractual claim to call for one-third of the shares". But in my view the Judge in Hong Kong clearly regarded Mr. Tugushev's claim as a claim to beneficial ownership.

87. Reliance was placed by counsel for Mr. Roth on submissions made in Hong Kong by counsel for Mr. Orlov, when opposing Mr. Roth's stay application, to the effect that it was irrelevant that someone other than Messrs. Orlov and Roth was claiming a beneficial interest in the shares of TTC, not being a registered shareholder. Whilst that submission was made the Judge does not appear to have accepted it. He did not dismiss the claim of Mr. Tugushev as being irrelevant on the grounds that he was not a registered shareholder.

88. It is true that the Judge remarked, at paragraph 395 of his judgment, that if a financial award were made in England against Mr. Orlov and Mr. Roth as co-conspirators or co-tortfeasors that was "likely to give rise to duties and obligations between them as a result". It was suggested that this indicated that the Judge had in mind that the financial position between Mr. Orlov and Mr. Roth could be adjusted in England, which would suggest that he did not envisage that Mr. Roth would be estopped from claiming such an adjustment. That is possible, but not obvious. The Judge was not addressing the issue of any possible estoppel in England. He was addressing the question whether his order should have regard to Mr. Tugushev's possible interest. I do not consider it realistic to suggest that the Judge considered the question of issue estoppel in England. (It also appears from the transcript of the closing submissions on 19 August 2019 at p.151 that counsel for Mr. Orlov also did not have the question of an issue estoppel in mind.)

89. I therefore agree with Rachel Lam SC that "the fundamental basis on which the Hong Kong Court proceeded was that only Mr. Orlov and Mr. Roth, and no one else, had any interest in or rights to TTC's shares".

90. I now return to the question whether the Hong Kong Court "found clearly or necessarily that Mr. Roth and Mr. Orlov (and they alone) were the only persons with any interest in TTC."

91. There was no argument about this question before the Hong Kong Court. It was accepted by Mr. Roth that he and Mr. Orlov were each beneficial owners of 50% of TTC. That is why there is no discussion of the question of share ownership, legal or beneficial, in the judgment. It was not the subject of argument because it was the fundamental basis upon which all parties and the court proceeded. However, that Mr. Orlov beneficially owned 50% of TTC was a necessary part of the Court's conclusion that Mr. Roth should buy out the 50% of the shares owned by Mr. Orlov and registered in his name. Such a conclusion could only be reached on the basis that Mr. Orlov owned legally and beneficially 50% of TTC.

92. It has long been established that an assumption or concession which founds the basis for a decision can give rise to an estoppel. In *Hoystead v Commissioner of Taxation* [1926] AC 155 Lord Shaw said at p.165:

> "……it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact, secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact……..Thirdly, the same principle – namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed."

93. This approach to the law of issue estoppel was not challenged. I have noted that in *Carl Zeiss Stiftung v Rayner and Keeler Limited* [1967] AC 853 Lord Wilberforce applied the principle of issue estoppel where there had been "careful consideration and a clear decision on an issue" (see p. 967 E). That phrase might suggest that a mere assumption was insufficient. However, the question did not arise in *Carl Zeiss* because, as noted by Lord Reid (at p. 916 C) the issues in that case were "fully litigated in the West German court". In that same passage Lord Reid referred to comments which had been made about the approach in *Hoystead* and observed that "there may well be a difference between a case where an issue was in fact decided because the earlier judgment went by default or was founded on an assumption." However, in the present case Mr. Orlov's petition did not go by default.

94. It must follow that in the present case the Hong Kong Court necessarily found that Mr. Roth and Mr. Orlov (and they alone) were the only persons with any interest in TTC. That decision was final and on the merits.

<u>The issue sought to be raised in England</u>

95. The next question is whether that decision, which has preclusive effect in Hong Kong, is about the same issue which is sought to be raised in England in the Part 20 Claim.

96. Counsel for Mr. Orlov said that the same issue is raised in the Part 20 Claim because the TTC Claim is based upon the proposition that Mr. Tugushev had a one third interest in TTC.

97. Counsel for Mr. Roth said that that approach was fundamentally misconceived. Mr. Roth's claim does not depend upon an allegation made by Mr. Roth that Mr. Tugushev is actually entitled to or has any rights in TTC shares. The TTC Claim starts at the point at which the English Court has already determined Mr. Tugushev's entitlement to call for shares in TTC. Mr. Roth accordingly does not need to, and does not, make any allegation in the TTC Claim that Mr. Tugushev is actually entitled to shares in TTC. Mr. Roth's claim is merely a consequence of the potential outcome of the issue raised by Mr. Tugushev in his claim before this court.

98. I do not consider that the argument advanced on behalf of Mr. Roth is correct, notwithstanding its ingenuity. It is true that the claim is based upon an assumed finding by the court in Mr. Tugushev's claim that he has a right to one third of TTC. But once that finding is adopted by Mr. Roth in support of his TTC Claim against Mr. Orlov Mr. Roth is making a claim against Mr. Orlov that Mr. Tugushev is and always was entitled to one third of TTC. That claim is contrary to the foundation of the decision of the Hong Kong Court which was that Mr. Tugushev had no such right.

99. Thus the four conditions necessary for an estoppel arising from the decision of a foreign court are met. But there remains the question whether to hold that Mr. Roth is estopped from advancing the TTC Claim works an injustice on the special facts of this case.

Justice

100. Counsel for Mr. Roth submitted that the suggested issue estoppel, if applied, would work an injustice because, if Mr. Roth is ordered to transfer one third of the shares in TTC to Mr. Tugushev, he will have paid Mr. Orlov a sum in respect of a greater number of shares than those to which he was in fact entitled and so Mr. Orlov will get a windfall at Mr. Roth's expense.

101. Counsel for Mr. Orlov submitted that to hold that Mr. Roth was estopped from advancing the TTC Claim worked in favour of justice because it will avoid Mr. Orlov being harassed by the same claim twice.

102. The submission made on behalf of Mr. Orlov reflects the justice implicit in the doctrine of issue estoppel; see for example *The Good Challenger* at paragraph 58 per Clarke LJ. However, there can be cases where special circumstances make it unjust that a person cannot advance an issue already decided against him. *Arnold v Natwest Bank* is an example of such a case. In that case Sir Nicholas Browne-Wilkinson V-C said at first instance that injustice can lie in a successful party to the first action being held to have rights which he does not in fact possess; see the quotation from his judgment in *The Good Challenger* at paragraph 77. Whether that is unjust must depend upon the circumstances of each case.

103. In support of the argument advanced on behalf of Mr. Orlov it was said that there is nothing unjust in holding Mr. Roth to the decision of the Hong Kong Court because Mr. Roth could have contended before the Hong Kong Court that Mr. Tugushev was entitled to a one third interest by reason of the 3-Way JVA which, in Mr. Tugushev's claim in this court, he accepts existed. But he chose not to do so. Mr. Roth sought a stay on account of Mr. Tugushev's claim and submitted that the court's order following the trial should in some way reflect that claim but he never submitted that Mr. Orlov's interest in TTC was one third rather than one half. The first time he made that submission was in December 2019 in his Defence to the claim in England brought by Mr. Tugushev. Thus it would not be possible to bring the present case within the circumstances accepted by the House of Lords in *Arnold v Natwest* as being an exception to the doctrine of issue estoppel, namely, where further material is available relevant to the correct determination of a point involved in earlier proceedings, being material "which could not by reasonable diligence have been adduced in those proceedings"; see [1991] 2 AC at p.109 B per Lord Keith.

104. In support of the argument advanced on behalf of Mr. Roth it was suggested that if Mr. Tugushev only obtains an order for the payment of damages there can be an appropriate adjustment of the state of account between Mr. Orlov and Mr. Roth pursuant to the contribution notices that each has served on the other. If Mr. Tugushev obtains an order for the transfer of shares (which he only claimed by amendment in May 2020 after the Hong Kong judgment) it would be unjust if an appropriate adjustment to the state of account between Mr. Orlov and Mr. Roth could not be made. I was not persuaded by this particular point. Although I was told that there has been no application to strike out Mr. Roth's contribution notice it does not follow that Mr. Orlov cannot rely upon the suggested issue estoppel at trial.[1]

105. It was also suggested that it was significant that Mr. Tugushev only claimed an order for the transfer of shares in May 2020 after the Hong Kong judgment. However, the claim being made by Mr. Tugushev in 2018-19 was understood to be a claim to ownership of one third of the shares in TTC; see the Skeleton Argument filed by Mr. Roth in support of his stay application at paragraphs 7, 26, 45, 59 and 62 and his Closing Submissions at the trial, paragraphs 278 and 283. Thus the form of relief sought by Mr. Tugushev does not appear to have prevented Mr. Roth from appreciating the nature of the rights asserted by Mr. Tugushev.

[1] This final sentence, when seen in draft, caused counsel for Mr. Roth to be concerned that it "could be read as suggesting that Mr Orlov would be free to raise the same estoppel points as he has raised on this application in response to Mr Roth's existing contribution claim in respect of TTC. " Counsel suggested that since "the draft judgment, and in particular paragraph 110, resolves the estoppel issues in Mr Roth's favour, it follows that the same estoppel defence to the existing contribution claim would no longer be available, because that defence has already been resolved". A form of words making that clear was suggested. Counsel for Mr. Orlov objected, saying that "the question of the availability of any estoppel as a defence to the contribution claims not having been an issue before the Court on this application….the Court has accordingly not heard submissions on, nor considered, whether the elements of an estoppel are made out in relation to any aspects of the possible contribution claims or whether or how any considerations of justice such as those considered in paras 100 to 110 of the draft judgment might apply to such claims." The final sentence was not intended by me to enable Mr. Orlov to pursue an estoppel argument which was not open to him in the light of my judgment. I was merely responding to (and rejecting) the particular argument on "justice" raised by Mr. Roth. However, if there are additional estoppel arguments which can only arise in the context of the contribution claim and which in consequence I have not rejected I was not intending to decide them.

106. However, Counsel for Mr. Roth correctly noted that Mr. Orlov cannot prevent Mr. Tugushev from pursuing his claim that he was entitled to one third of the TTC shares. Thus Mr. Orlov must face that claim in any event. In my judgment this circumstance reduces significantly the injustice to Mr. Orlov in having to face a claim by Mr. Roth, based upon an assumed finding by this court in favour of Mr. Tugushev's claim, that Mr. Tugushev was entitled to one third of the TTC shares. It is a special circumstance of this case.

107. Counsel for Mr. Roth also relied upon the principle noted in *Spencer Bower and Handley on Res Judicata* at paragraph 8.17 that issue estoppel will not prevent a party from litigating an issue founded on "any new or later state of circumstances". If this court holds that Mr. Tugushev is entitled to one third of TTC it will do so in proceedings to which Mr. Tugushev, Mr. Orlov and Mr. Roth are party. It will be a decision binding upon each of them. That would appear to be a new or later state of circumstances which did not exist at the date of the Hong Kong judgment. Moreover, it would, it seems to me, be an event capable of causing injustice if the court were able to give effect to that holding in Mr. Tugushev's claim but not able to do so in Mr. Roth's Part 20 Claim. The court would be saying one thing in the main action and another thing in the Part 20 Claim. Whilst giving effect to the principle of issue estoppel would prevent the risk of inconsistent decisions between London and Hong Kong, giving effect to that principle would create a risk of inconsistent findings by the same court in London. Whilst issue estoppel is not primarily concerned with avoiding the risk of inconsistent decisions but with avoiding a party being harassed twice in respect of the same claim, this is another special circumstance of this case. Inconsistent findings by the same court are not the hallmark of justice.

108. In the present case the particular result of inconsistent findings would be that Mr. Orlov would be able to keep the amount paid by Mr. Roth equal to "the Excess Shares", a right which this court would have held he did not have.

109. These considerations appear to me of such weight and significance that if ignored, as they would be were the doctrine of issue estoppel to be operated inflexibly, they would work an injustice. I have taken into account the circumstance that Mr. Roth could have adopted the same stance in Hong Kong as he adopted in this court but I remain of the view that the operation of the doctrine of estoppel in the circumstances of this particular case will work an injustice.

110. I have therefore concluded that there are special circumstances in this case which would make it unjust to apply the principle of issue estoppel.

Abuse of process

111. Mr. Orlov said that if the principle of issue estoppel did not apply then Mr. Roth should still be denied permission to advance the TTC Claim because it is an abuse of the process of this court for Mr. Roth to take a point here which he could and should have taken in Hong Kong. That involves a "broad merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before"; see *Johnson v Gore Wood*

& Co. [2002] 2 AC 1 per Lord Bingham. I have sought to take account of the public and private interests involved when considering whether it would work an injustice to apply the doctrine of issue estoppel in this case. I concluded that it would. For the very same reasons I do not consider that it can be said to be abusive of the process of this court for Mr. Roth to advance the TTC Claim in the event that this court holds that Mr. Tugushev is entitled to one third of TTC.

Conclusion

112. Mr. Roth's application for permission to bring the Partnership and Alex Bundle Claims as Part 20 claims is refused because they have been referred to arbitration by the 2016 Framework Agreement. Mr. Roth's application for permission to bring the TTC Claim as a Part 20 claim is granted. It would work an injustice were Mr. Roth to be estopped from advancing that claim.