Case No: A3/2010/1413

Neutral Citation Number: [2011] EWCA Civ 826
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)
THE CHANCELLOR OF THE HIGH COURT
[2010] EWHC 1139 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2011

Before :

MASTER OF THE ROLLS
LORD JUSTICE THOMAS
and
LORD JUSTICE ETHERTON

- -

Between :

Barclays Bank PLC	**Claimant/Respondent**
- and -	
Nylon Capital LLP	**Defendant/Appellant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Nigel Tozzi QC and **Mr James Potts** (instructed by **The Khan Partnership LLP**) for the **Appellant**
Mr Graham Dunning QC and **Mr Nigel Dougherty** (instructed by **Allen & Overy LLP**) for the **Respondent**

Hearing date: 13 June 2011

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Judgment

Lord Justice Thomas:

1. The issue on this appeal is whether the court should stay proceedings brought for a declaration as to the interpretation of an agreement on the grounds that the issue falls within the expert determination clause of the agreement. It is necessary first to set out the facts.

The LLP agreement

2. In 2004, Mr Alan Burnell, who had worked for the claimants (Barclays) as head of its European rates business, established two hedge funds incorporated in the Cayman Islands. The hedge funds appointed Nylon Capital (Cayman) Ltd to be their manager and that company appointed Nylon Capital LLP (the LLP), the defendant to these proceedings, as the investment manager. Under the agreements, the hedge funds were obliged, in line with industry practice, to pay the manager a fee of 2% per annum of the net asset value of the funds and a performance fee of 20% of any increase in the funds' value in any particular quarter. Those fees were in turn paid by the manager to the LLP.

3. As Mr Burnell had been an employee of Barclays, Barclays helped the hedge funds get started by providing an initial capital investment of £250m on the terms of investment agreements to which it is not necessary to refer. Barclays also became a partner in the LLP along with Mr Burnell and other Nylon companies. At the material time the operation and management of the LLP were governed by an agreement known as the Amended and Restated Limited Liability Partnership Agreement (the LLP agreement) made between Mr Burnell, Barclays Bank, two Nylon companies and other parties; the parties to the agreement are referred to in the agreement as Members. It is the interpretation of that agreement which has given rise to the present dispute.

The disputes between Barclays and Mr Burnell on behalf of the LLP

4. The origins of that dispute began when Barclays gave notice to withdraw its investment in the hedge funds on 2 December 2009 followed by three further notices which resulted in the complete withdrawal of its funds. The circumstances of the withdrawal by Barclays have given rise to a dispute between Barclays and the hedge funds which has been subject to arbitration before the London Court of International Arbitration. What happened in that arbitration is not material to the present dispute. Nor is the petition which Mr Burnell presented under s.994 on 10 April 2010 in the Chancery Division of the High Court alleging unfairly prejudicial conduct by Barclays in relation to the operation of the LLP.

5. What is material, however, is that on 8 February 2010, Mr Burnell asked a firm of accountants, PKF, to calculate and report on the amounts due to or from parties under the LLP agreement, and in particular the amounts due to and from Barclays. PKF, in its report, assessed at approximately £10.585m, that part of the expenses of the LLP attributable to Barclays' investment in the funds. Mr Burnell on behalf of the LLP contended that Barclays should pay this amount. This was disputed by Barclays.

6. Clause 26.2 of the LLP agreement provided:

> "Governing Law
>
> This agreement and the rights of the Members shall be governed by and construed in accordance with English law and the Members hereby submit to the exclusive jurisdiction of the English courts."

7. On 17 March 2010, Barclays issued in the Chancery Division a Part 8 claim form in which it sought a declaration that it was not liable to contribute to or to reimburse the LLP for any of the LLP's expenses. In its acknowledgement of service the LLP indicated that it would seek a stay of the claim pending the resolution of the dispute under Clause 26.1 which provided for expert determination in terms which I set out at paragraph 18 below.

8. After an exchange of witness statements, the matter came on for hearing before the Chancellor on 12 May 2010. It had become clear before the hearing before the Chancellor that there was no longer any dispute in relation to Barclays' obligation to pay expenses in the circumstances explained by the Chancellor at paragraph 19 of his judgment. It is not necessary therefore to set out any further details of that dispute. The Chancellor made a declaration that Barclays was not under any independent and free-standing obligation to the LLP to pay the costs and expenses of the LLP.

The dispute in relation to profits

9. However, in the course of the hearing, Barclays were given permission to amend their claim form to seek a declaration that they were under no obligation to pay to the LLP Barclays' profits on its initial capital investment in the hedge funds, as there was a dispute between the parties in relation to that issue. It is therefore necessary to explain the nature of that dispute and the grounds on which the LLP applied for a stay of the proceedings relating to that dispute.

10. Clause 9 of the LLP agreement made provision for the allocation of profits as between the Members of the LLP. Clause 9.1 provided for the Managing Member (Mr Burnell) to procure that accounts were drawn up in accordance with the provisions of Clause 9 and generally accepted accounting principles and then audited. In each accounting period, audited accounts had been produced for the LLP. The accounts for the year ended 30 November 2005 (the first after the initial accounting period) showed that the sole income of the LLP was management fees; there was no reference to income derived from Barclays' initial capital investment or any other form of capital profit. All the subsequent accounts showed the same position.

11. Clause 9.2 provided for the determination of the allocation of profits amongst the Members:

> "The Managing Member [Mr Burnell] shall following the end of each financial year by reference to the Partnership Accounts drawn up in respect of that financial year by the Partnership determine the allocation of the profits amongst the Members in accordance with the provisions of Clause 9.3 and, having regard to anticipated, current or foreseen liabilities and expenditure of the partnership and the need to maintain a

> minimum level of financial resources, determine what proportion of such profits as have been so allocated shall be retained in the partnership or made available for drawing by Members."

Clause 9.3 then set out the principles of allocation:

> "Subject to Clause 9.4 (in relation to capital profits) and Clause 9.6, the profits of the Partnership in respect of each financial year of the Partnership shall be allocated amongst the Members as follows:
>
> (A)-(B) …..
>
> (C) Thirdly, there shall be allocated to the Investor Member [Barclays] an amount equal to 19.5% of the Third Party Profit.
>
> (D) …..
>
> (E) The remainder of the profits, being the remainder of the Third Party Profit and the BB Investment Profits, shall be allocated to the Corporate Member, the Second Corporate Member, the Managing Member and Executive Members in such proportions as the Managing Member shall in his absolute discretion determine, or as he may have agreed with any Member, including to the Corporate Member in relation to the provision of the HR Services."

12. It was contended by the LLP, principally by reference to Clauses 9.3(C) and (E) and the definition sections of the LLP agreement, that all the profit Barclays had made on its initial capital investment in the hedge funds should also be brought into account for the purposes of allocation under Clause 9.

13. Under Clause 9.3(C), the Third Party Profit has to be calculated. This is defined as:

> "'Third Party Profit' means the net profit attributable in any financial year to the management of funds or other managed accounts other than the BB Investment and any other profits (not being BB Investment Profits) of the Partnership after deduction of a pro rata proportion (by reference to the weighted average assets under management during the relevant financial year) of all fixed and variable costs and expenses of the Business (other than any amounts paid to any Member or Associate of any Member, save for amounts allocated to the Corporate Member pursuant to Clause 9.3(B) or paid under Clause 8, and provided that no amounts allocated to the Investor Member or the Corporate Member as capital to its Capital Contribution Account pursuant to Clause 9.3(A)(1) or Clause 9.3(A)(2) (respectively) shall be treated as costs or expenses of the Business)."

To arrive at the Third Party Profit it is necessary to have regard to the BB Investment (defined in the LLP agreement as "the sum of £250m to be provided by Barclays")

and the BB Investment Profits which are defined in the definition provisions as referring to the profit derived from the BB Investment:

> "'BB Investment Profits' means the net profit attributable in any financial year to the BB Investment after deduction of a pro rata proportion (by reference to the weighted average assets under management during the relevant financial year) of all fixed and variable costs and expenses of the Business (other than any amounts paid to any Member or the Associate of any Member, save for amounts allocated to the Corporate Member pursuant to Clause 9.3(B) or paid under Clause 8, and provided that no amounts allocated to the Investor Member or the Corporate Member as capital to its Capital Contribution Account pursuant to Clause 9.3(A)(1) or Clause 9.3(A)(2) (respectively) shall be treated as costs or expenses of the Business)."

14. It is contended by the LLP that under Clause 9.3(E), the remainder of the profits which have to be allocated include the BB Investment Profits. That is because, although Third Party Profit is defined to be the profit attributable to the "management of the funds", the definition of the BB Investment Profits does not contain that term, but simply refers to the net profit "attributable …. to the BB Investment" (the initial capital investment). It is therefore capital profit made by Barclays on its investment (as distinct from profit on the management of the fund) that has to be brought into account for allocation.

15. Barclays, however, contended that the allocation was to be carried out by reference to the accounts of the LLP. As the accounts contained no reference to investment profit made by Barclays on Barclays' initial capital investment in the hedge funds, that profit did not have to be brought into account.

16. The response of the LLP (and Mr Burnell) to Barclays' contention is twofold:

    i) The LLP agreement should be construed in its factual matrix.

    ii) There was a collateral agreement which related to the capital profits.

17. Although there was this dispute between Barclays and Mr Burnell and the LLP about the interpretation of the LLP agreement and the arrangements between them, Mr Burnell had (and still has) not made any allocation of the profits of the partnership under Clause 9.2.

The provisions of the expert determination clause

18. It was in those circumstances therefore that the Chancellor had to decide whether the provisions of the expert determination Clause 26.1 applied to the dispute in relation to profit on Barclays' initial capital investment so that the proceedings brought by Barclays should be stayed. Under the terms of that clause, the expert appointed was to be an accountant. He was to act as an expert and not an arbitrator. He was to determine all matters in dispute including, "any dispute concerning the interpretation of any provision of this Agreement or his jurisdiction to determine the dispute". His decision was to be final and binding. The clause provided in full:

> "(A) In the event of any dispute regarding (i) the amount of any profit or loss allocations due to a Member pursuant to Clause 9 or (ii) any payment due to an Outgoing Member under Clause 17, then if such dispute has not been resolved within 30 days following any determination by the Managing Member under Clause 9.2 or allocation under Clause 9.3, or any calculation or valuation made or required under Clause 17, any affected party may refer the matter or matters in dispute to a partner in an independent firm of internationally recognised chartered accountants agreed upon between them, or failing such agreement within 7 days to be selected at the instance of any party by the President for the time being of the Institute of Chartered Accountants of England and Wales. The parties shall use their respective best endeavours to procure that the accountant delivers his decision within such time as may be stipulated in the terms of reference.
>
> (B) Such accountant shall act as an expert and not as arbitrator and shall determine the matter or matters in dispute (which may include any dispute concerning the interpretation of any provision of this Agreement or his jurisdiction to determine the dispute or the content or interpretation of his terms of reference) and his decision shall be final and binding on the parties hereto.
>
> (C) Each of the parties hereto shall provide to the accountant such information as the accountant may reasonably require a party to provide for the purpose of determining the dispute and which such party has in its possession or under its control.
>
> (D) The fees and expenses of the accountant shall be borne by the parties hereto equally or in such other proportions as the accountant shall direct."

19. It was the contention of Mr Tozzi QC that this wide clause should be given a generous interpretation. The clause entitled the expert to determine not only the meaning of the LLP agreement but also whether he had jurisdiction to determine that issue. It mattered not that Barclays disputed the meaning of the agreement or the jurisdiction of the expert to determine the dispute, as the specific clause bound Barclays to the interpretation of the agreement he gave and also to the initial determination on jurisdiction being made by him.

20. Barclays, on the other hand, submitted that it was the court that should determine the jurisdiction of the expert and that this should be done at the outset. There was therefore no ground upon which the proceedings it had brought should be stayed.

The determination of the jurisdiction of the expert

21. It is in my judgement clear, as was accepted on behalf of the LLP, that it is ultimately for the court to determine the jurisdiction of the expert, though the LLP contended that under the terms of Clause 26.1, the parties had agreed to the expert first

determining whether he had jurisdiction to determine the dispute. The use of the term "the jurisdiction of the expert" is a convenient way of encapsulating the question as to whether under the contract the expert has a mandate to enter into a determination of any part of the dispute between the parties. It is helpful to use this term to distinguish the different question of the extent and limits of his mandate (including the principles on which he determines a dispute), once he has entered into the determination of that dispute.

22. The principles applicable to the determination of the jurisdiction of arbitrators are analogous. Those principles are set out in the Arbitration Act 1996; they were recently summarised by Rix LJ in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at paragraphs 80-83. There is also extensive discussion of the principles in the literature often under the helpful title of *Competenz Competenz*. In many circumstances arbitrators may proceed to determine their own jurisdiction. However a respondent to an arbitration can always stand aloof, go to the court under s.72 of the Arbitration Act 1996 and ask the court to determine the question of jurisdiction, even in cases where the arbitration clause confers the right upon the arbitrators to determine their jurisdiction.

23. For reasons I explain at paragraphs 36-38 expert determination is a very different alternative form of dispute resolution to which neither the Arbitration Act 1996 nor any other statutory codes apply. It is clear, however, that in any case where a dispute arises as to the jurisdiction of an expert, a court is the final decision maker as to whether the expert has jurisdiction, even if a clause purports to confer that jurisdiction on the expert in a manner that is final and binding.

Should the court determine the issue of jurisdiction first?

24. The real issue which arises on the application to stay and on the appeal is whether that determination as to the expert's jurisdiction should first be made by the expert, even if one of the parties seeks the determination by the court. There are a number of issues to consider:

(i) The approach to the jurisdiction of an expert: Fiona Trust

25. It was submitted by Mr Tozzi QC that a generous construction should be given to the jurisdiction conferred on the expert by the expert determination clause as an expert determination clause in this respect should be treated no differently to an arbitration clause. It was established in *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40 that an approach to the construction of an arbitration clause by drawing a fine distinction between words such as "arising under" or "in relation to" (as had been drawn in the earlier cases) should no longer be made. The approach a court should take was that set out at paragraph 13 of the speech of Lord Hoffmann where he made clear that the construction of an arbitration clause should start on the assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship into which they had entered should be decided by the same tribunal. An arbitration clause should therefore be construed in accordance with that presumption, unless the language made it clear that certain questions were to be excluded from the arbitrator's jurisdiction.

26. It is also clear that where parties have made an agreement for a particular form of dispute resolution, then they should be held to that agreement as Lord Mustill explained in his speech in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353:

> "Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point."

27. However, although parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which must now be taken to an arbitration clause. The rationale for the approach in *Fiona Trust* is that parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes. As arbitration will usually be an alternative to a court for the resolution of all the disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court.

28. In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of *Fiona Trust* does not therefore apply, as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement. The LLP agreement illustrates this: the parties agreed by Clause 26.2 to submit to the exclusive jurisdiction of the English courts, but reserved specific disputes under Clause 26.1 to the expert. They carved out of the exclusive jurisdiction of the English courts, to which they had submitted all disputes between the parties, a limited class of dispute. Therefore, quite unlike the position under agreements with arbitration clauses (as exemplified by *Fiona Trust*), the parties have chosen two alternative forms of dispute resolution. There is, therefore, no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert conferred by the expert determination clause as the reasoning in *Fiona Trust* is inapplicable. The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way.

(ii) The mandate of the expert in a dispute within his jurisdiction

29. It was submitted by Mr Tozzi QC that expert clauses in general and Clause 26.1 in particular, gave to the expert who had jurisdiction a wide scope of determination under the mandate conferred by the contract with which the court would not ordinarily interfere. The courts had consistently held that they would not interfere

with the determination of an expert save in narrowly circumscribed circumstances. Barclays should not therefore be entitled to circumvent that established principle by an application to the court prior to a determination in circumstances where the court would not intervene after the expert had made his decision.

30. Mr Tozzi QC referred us to the line of the authorities beginning with *Jones v Sherwood Computer Services Ltd* [1992] 1 WLR 277, a case decided in 1989, arising out of an expert determination by an accountant of the amount of sales for the purpose of the valuation of shares. The accountant had made his determination in the form of a non speaking certificate. Dillon LJ giving the leading judgment took as "the starting point for the modern statement of the law" the judgment of Lord Denning MR in *Campbell v Edwards* [1976] 1 WLR 403 at 407 where the court made clear that the approach suggested in the older cases was incorrect:

> "It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."

Dillon LJ summarised his view of the modern law:

> "On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in *Campbell v Edwards*, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect – e.g., if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (M.) v Jones (R.R.)* [1971] 1 W.L.R. 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.
>
> The present case is quite different, however, as [the experts] have done precisely what they were asked to do."

31. That decision was applied by Knox J in *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103 where an expert had made his determination under what was described as an unusual rent review provision. In a passage that has frequently been cited, Knox J said at 108, after referring to *Jones*:

> "In my judgment it [*Jones*] provides for a contractual analysis of the task set for the expert to perform and it gives full effect to the parties' agreement regarding with what it was that the expert should be entrusted.

> The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."

32. In *Norwich Union Life Insurance Society v P&O Property Holdings* [1993] EGLR 164 a property development agreement provided for expert determination in the event of a dispute over the required funds. The funder sought to prevent the matter being determined by the expert, but failed before Sir Donald Nicholls V-C and the Court of Appeal. There was a dispute involving issues of fact to be determined. There was no bare point of law. The funder could not therefore obtain from the court its decision on the construction of the agreement by bypassing the machinery upon which the parties had agreed. The Vice-Chancellor summarised the principle:

> "If, on the proper construction of the agreement, the question sought to be put to the court is an issue within the scope of the matters remitted to the nominated arbiter, then (by definition) the parties have chosen, for better or for worse, to have that question determined by a tribunal other than the court."

33. These cases were then considered in *Mercury Communications Ltd v The Director General of Telecommunications* [1996] 1 WLR 48 (HL), [1994] CLC 1125 (CA). Although Lord Slynn in the House of Lords affirmed the approach in the cases to which I have referred beginning with *Jones,* it is, in my view, now evident that the importance of that decision is the analysis in the dissenting judgment of Hoffmann LJ (with whom the House of Lords agreed at least to the extent of allowing the appeal). After drawing a distinction between expert determination clauses where the parties had prescribed principles by which the expert was to determine the matter entrusted to him and those where the parties had not, he said at 1,140:

> "So in questions in which the parties have entrusted the power of decision to a valuer or other decision-maker, the courts will not interfere either before or after the decision. This is because the court's views about the right answer to the question are irrelevant. On the other hand the court will intervene if the decision-maker has gone outside the limits of his decision-making authority.
>
> One must be careful about what is meant by 'the decision-making authority'. By 'a decision-making authority' I mean the power to make the wrong decision, in the sense of a decision different from that which the court would have made. Where the decision-maker is asked to decide in accordance with certain principles, he must obviously inform himself of

> those principles and this may mean having, in a trivial sense, to 'decide' what they mean. It does not follow that the question of what the principles mean is a matter within his decision-making authority in the sense that the parties have agreed to be bound by his views. Even if the language used by the parties is ambiguous, it must (unless void for uncertainty) have a meaning. The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority. Ambiguity in this sense is different from conceptual imprecision which leaves to the judgment of the decision-maker the question of whether given facts fall within the specified criterion."

34. I accept the broad proposition which Mr Tozzi QC has advanced on the basis of these cases. The court will not generally intervene in a matter which is within the jurisdiction of the expert save in the narrow circumstances circumscribed as a matter of contractual interpretation of such clauses. However, it is important to make clear that in none of these cases was there, on the analysis undertaken by the court in each case, an issue which was solely one of law relating to the scope of the expert's mandate (including the principles on which he determines the dispute) as derived from the contract which governed his determination. Although the way in which an expert may approach the issues referred to him for determination is one where there is no statutory code, an expert must nonetheless determine the issue referred to him in accordance with the mandate conferred upon him by the agreement; the scope of that mandate (including the principles as derived from the contract upon which that determination must be made) is a question of law.

35. The decisions in *Nikko*, *Sherwood* and *Norwich Union* all involved mixed issues of fact and law. In the present case it is not necessary to decide whether, if an issue of the kind described is determined by the expert and is solely one of law, a wrong determination of law may have the consequence that the expert is not determining the issue in accordance with the mandate given to him. That is because Clause 26.1 is a wide clause that allows issues of interpretation to be left to the expert and, more importantly and, as I shall explain, there is no issue yet within the jurisdiction of the expert. However I consider that the cases to which reference has been made do not decide that, where a pure issue of law of the type I have described arises in the course of a determination by an expert acting under the usual form of clause, a wrong determination by the expert of that issue cannot be challenged in the courts in circumstances where the interpretation adopted by the expert has the consequence that he is not determining the matter in accordance with the mandate given to him. That remains to be decided applying the approach set out in *Jones* as elucidated by Hoffmann LJ in *Mercury Communications.* Since preparing the draft, I have had the advantage of reading the observations of the Master of the Rolls at paragraphs 63 to 72. I see force in his observations but the issue needs detailed examination when it arises. I would prefer to express no concluded view.

(iii) The informality of expert determination

36. It was next submitted by Mr Tozzi QC that a court has to take into account the speed and informality of expert determination as important considerations to which the parties agreed by selecting that form of procedure. As the expert determination would be carried out quickly without recourse to the formalities of court or arbitration, a court should not deprive the parties of that upon which they had agreed, even if the process was not, on an objective basis, suitable for the dispute which had arisen.

37. As I have said, there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate given. Unless the parties specify the procedure, the expert determines how he will proceed; it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert. (See *Expert Determination* (4th Edition 2008) by Kendall, Freedman and Farrell, chapter 16.)

38. I therefore accept that if the parties have chosen such a process and the dispute falls within the jurisdiction of the expert, then they must be held to it, whatever view might be taken as to the appropriateness of the procedure for the matters submitted to the expert.

(iv) The entitlement of the expert to determine the issue of jurisdiction first

39. It was contended by Mr Tozzi QC that although it was for the court ultimately to determine the question of the expert's jurisdiction, it should not do so, given that the clause provided for issues of jurisdiction to be determined by the expert. It should allow the expert to determine the issue of jurisdiction first in accordance with the approach to expert determination clauses set out in the cases. Mr Tozzi QC relied on what Hoffman LJ had gone on to say in *Mercury Communications* at page 1140:

> "It does not follow, however, that because the court will intervene to correct a decision-maker who has gone outside his authority, it will declare in advance what the limits of that authority are. The reason for this reluctance is not one of substantive law but procedural convenience. It is because in advance of the decision, the true meaning of the principles upon which he has to decide is usually a hypothetical question. It is hypothetical because it will only become a live issue if one of the parties think that the decision-maker has got it wrong. It is always possible that he may get it right and therefore wasteful and premature to come to the court until he has made his decision. The practice of the courts is not to decide hypothetical questions: see *Re Barnato* [1949] Ch 258."

40. That approach was affirmed by Lord Slynn at page 59C:

> "The defendants under this head are entitled to say that the court normally will not give a ruling as to the meaning of words to be applied by another decision-maker before he has had a chance to express his own views about it and that the courts will not answer questions which are wholly academic and hypothetical"

41. Lightman J in *British Shipbuilders v VSEL Consortium plc* [1997] 1 Lloyds Rep 106 at page 109 summarised the applicable principles. Reliance was placed by the LLP on his fifth principle:

> "The Court has jurisdiction ahead of a determination by the expert to determine a question as to the limits of his remit or the conditions which the expert must comply with in making his determination, but (as a rule of procedural convenience) will (save in exceptional circumstances) decline to do so. This is because the question is ordinarily merely hypothetical, only proving live if, after seeing the decision of the expert, one party considers that the expert got it wrong. To apply to the Court in anticipation of his decision (and before it is clear that he has got it wrong) is likely to prove wasteful of time and costs – the saving of which may be presumed to have been the, or at least one of the objectives of the parties in agreeing to the determination by the expert."

42. In my view it is not necessary to go further than the statement of principle by Hoffmann LJ in *Mercury Communications*; it does not assist to describe the circumstances in which a court will intervene as "exceptional". The court has to determine first whether it is faced with a dispute which is real and not hypothetical and then if it is real, whether it is in the interests of justice and convenience to determine the matter in issue itself rather than allowing the expert to determine it first. The matter in issue in this appeal is the issue of jurisdiction. In my view, very different considerations apply to those which apply where the issue is one relating to interpretation of the mandate given to the expert in relation to a dispute where it is accepted the dispute is within his jurisdiction.

(v) Is there a real dispute?

43. There is clearly a present dispute between the parties as to the jurisdiction of the expert. The position is not hypothetical or academic.

(vi) What course is in the interests of justice and convenience?

44. The position is very different to the other cases to which I have referred where a party has sought the intervention of the court. First, whatever the expert decides on jurisdiction, his decision is not final. It can always be challenged, unlike his determination of a matter within his jurisdiction. This is the principle applicable to arbitrations. It would be wasteful and contrary to principle to have any different rule applicable to expert determinations. It would be wasteful because if the expert determined he had no jurisdiction and that was challenged, then the court would have to determine it. If the expert determined he had jurisdiction but in fact the court held he was wrong, then nothing could be more wasteful than the expert entering into a determination of the substance of the dispute when he had no jurisdiction to do so. It would be contrary to principle for the reasons I have set out at paragraphs 21-23 above.

45. Second, the issue as to whether, in circumstances where Mr Burnell has made no allocation, there is jurisdiction under Clause 26.1, has been debated before the court.

There would be no sense in deferring a decision. It is a short point of construction which I consider at paragraphs 50-55 below. In essence the issue depends on whether the making of an allocation is a condition precedent to the expert's jurisdiction to make a determination.

46. Barclays is not pre-empting the contractual machinery. A dispute has arisen before allocation. If the jurisdiction of the expert depends on an allocation being made by Mr Burnell (as Barclays contends) then Barclays is entitled to have determined the issue of the interpretation of the agreement as to whether Mr Burnell is entitled to make an allocation. In those circumstances the expert's jurisdiction is dependent on the entitlement to make an allocation, if an allocation is a condition precedent to his appointment.

47. But even if Mr Burnell had purported to make an allocation, it would be nonetheless also just and convenient to decide whether the expert had jurisdiction. That is because the determination of whether Mr Burnell was entitled to make an allocation governs the issue of whether the expert had jurisdiction, if the court determines the issue set out in paragraph 45 in the manner contended by Barclays.

48. It is, in my view, therefore in the interests of justice and convenience that the court should determine the issue of jurisdiction on Barclays' application. It is neither just nor convenient to defer that decision until after the expert has determined whether he has jurisdiction.

Conclusion

49. In my view therefore, the Chancellor was right to determine the issue of jurisdiction on the application before him. I therefore turn to consider the interpretation of Clause 26.1, the expert determination clause.

The scope of Clause 26.1

50. On its ordinary reading a dispute is within Clause 26.1 if it is a dispute "regarding" either the amount of any profit or loss allocation under Clause 9 or any payment due to an outgoing member under Clause 17. As there is no dispute under Clause 17, the only relevant question is whether the dispute is a dispute regarding the amount of the profit or loss allocation under Clause 9.

51. It was submitted on behalf of Barclays that as there had been no allocation by Mr Burnell (as I have set out under paragraph 17), there could be no dispute about the allocation. The response of the LLP was that the word "regarding" was to be read widely, so that even if there had been no allocation the dispute still fell within the clause, as the expert had jurisdiction to decide whether Mr Burnell was entitled to make an allocation bringing into account the profits on Barclays' initial capital investment.

52. In my view, even if it was appropriate to give Clause 26.1 a wide and generous construction (which for reasons I have set out at paragraphs 25-28 above I do not consider I should), then this particular clause makes it quite clear that the word "regarding" could not be given such a wide construction. Under the clause 30 days were to elapse after the allocation before the reference to the expert. That provision in

my judgement makes it clear that the expert determination clause was only to apply to a dispute about the allocation, as the making of an allocation was a condition precedent to the appointment of an expert. Furthermore the clause refers to "any affected party"; that can only be a reference to a party affected by the allocation, again making it clear that allocation was a condition precedent to the reference to an expert.

53. Notwithstanding the clarity of that part of the clause, it was argued that Clause 26.1(B) was in such wide terms that the accountant to be appointed as an expert was to have a wide jurisdiction to decide upon his own jurisdiction, even if an allocation had not been made. Again it seems to me that the clear language of the clause points to a contrary conclusion. Clause 26.1(B) begins with the words, "Such accountant". Those words plainly refer back to the provisions of Clause 26.1(A) which therefore make it clear that the person who is to exercise the jurisdiction under 26.1(B) is the person who can be appointed under 26.1(A). In short sub-clause (B) cannot enlarge the jurisdiction of the expert unless the expert can validly be appointed under 26.1(A).

54. This view also accords with the commercial rationale of sensible businessmen. They would have considered it sensible to entrust to an accountant for expert determination questions relating to the allocation once an allocation had been made or it had been determined that Mr Burnell was entitled to make an allocation. The parties would not have gone beyond this. In contradistinction to arbitration, they would not have had any procedural safeguards and would have wanted a tribunal suited to the broader issues, in accordance with Clause 26.2. It was suggested by the LLP that an accountant might be able to take legal advice because of the provisions of Clause 26.1(D) which makes provision for the payment of fees and expenses of the expert. It may be that the clause is wide enough to enable the accountant to employ a lawyer to advise him on the interpretation of the clause, but it is difficult to understand why, save in relation to narrow questions of interpretation relating to the process of allocation, it would have been contemplated by rational and sensible businessmen that general issues of interpretation of the agreement in its contractual matrix would fall to be determined by an expert accountant relying on the advice of a lawyer rather than by a judge to whom the opposing arguments would be put briefly and a decision obtained within the well understood procedures of the Chancery Division or the Commercial Court as the courts chosen by the parties under Clause 26.2.

55. In my view, therefore, there can be little doubt about the meaning of the clause, even if a very generous construction is given to it. The expert does not have jurisdiction to determine any issues until there has been an allocation. There has been none. Moreover, the question whether Mr Burnell was entitled to make an allocation which brought into account the profit on Barclays capital investment was an issue which went to the jurisdiction of the expert for the reasons I have explained at paragraphs 46 and 47 above.

Conclusion on the stay

56. In my judgement, therefore, the Chancellor was correct in concluding that the proceedings brought by Barclays should not be stayed.

The determination of the dispute on whether the profits on Barclays' initial capital investment has to be brought into account.

57. I have outlined at paragraph 14 above the contention made by the LLP as to the reason why under the LLP agreement the profits made by Barclays on its initial capital investment have to be brought into account for the purpose of allocation by Mr Burnell under the LLP agreement.

58. The Chancellor at paragraphs 22 and 23 of his judgment reached a view as to the meaning of the provisions.

59. However, as explained by the Master of the Rolls at paragraphs 73 to 78 below, the parties have reached an agreement. It is not necessary therefore to say any more than the following. I would have taken the view that as the factual matrix and the existence of the alleged collateral agreement were matters that could only be determined by evidence, the proper interpretation of the agreement should be finally determined at a hearing in the Chancery Division at which such evidence could be adduced.

Conclusion

60. I would therefore dismiss the appeal.

Lord Justice Etherton

61. I agree with the judgment of Thomas LJ.

Lord Neuberger MR

62. I also agree with Thomas LJ that this appeal should be dismissed for the reasons which he gives in his admirable judgment. I only wish to deal with two points, one of which involves an expansion on an important aspect of his judgment, and the other addresses the rather unusual question of whether we should be giving these judgments at all.

63. The first point concerns the issue of the mandate of the expert, discussed in paras 29-35 above. There is, in my view, a powerful argument for saying that, depending, of course, on the terms of the particular contract in question, a valuation by an expert, even whose valuation is agreed to be "final and binding", can be challenged in court if it can be shown to have been arrived at on the basis of a mistake of law.

64. The analysis of Dillon LJ in *Jones v Sherwood* [1992] 1 WLR 277 quoted in para 30 above is unexceptionable as far as it goes, but it can be said to raise almost as many questions as it answers. If the expert "valued the wrong number of shares", it is scarcely controversial to suggest that his decision could not stand if it was challenged in court (unless, perhaps, the parties' agreement had, bizarrely, plainly excluded such a mistake from being challenged). But what if the expert had valued the right number of shares on the wrong basis (e.g. because of his misinterpretation of the company's articles of association, he had valued the shares on the assumption that they could not be transferred without the concurrence of the board, whereas they could, in fact, be freely transferred)? It seems to me that in such a case, it could be said to be an open

question whether the test propounded by Dillon LJ, namely that the valuation will be binding unless "the expert had not done what he was appointed to do", is satisfied.

65. Of course, it is very dangerous to generalise, as the extent of the expert's mandate in any case must depend on the words of the particular contractual provision and the documentary, factual and commercial matrix of that provision. Nonetheless, in the absence of any other direction or indication, it seems to me that a contractual provision which simply required an expert to value specified shares in a company may well not mean that his determination was immune from attack if it could be shown that, as a matter of law, he had valued the shares on the wrong basis. His contractually agreed instructions could, (I emphasise again) in the absence of a provision or indication to the contrary, be said to be to value the shares in accordance with the legal rights and obligations they carry with them. To value shares on the assumption that they could not be freely sold, when, as a matter of law, they could be, would not, it can be said with force, result in a valuation of the shares according to the contractual arrangement between the parties.

66. Accordingly, despite the fact that it has, as Thomas LJ says, been frequently cited, I do not consider that Knox J's observation in *Nikko Hotels v MEPC plc* [1991] 2 EGLR 103, 108, as quoted above in para 31, can safely be relied on. Of course, the parties may expressly or impliedly agree, either in their original contract or thereafter, that, if the valuation exercise entrusted to an expert "necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts", but I do not consider that this by any means necessarily represents the general rule. After all, if there is a dispute between the parties as to the number of shares owned by the party whose shares are to be valued, a mistaken conclusion on the point by the expert would, according to Dillon LJ, render the valuation assailable in court, whereas, according to Knox J's approach, the conclusion would appear to be unassailable as being one which "necessarily" had to be decided in order to effect the valuation.

67. I do not consider that this view is called into question by the observation of Sir Donald Nicholls V-C in *Norwich Union v P&O* [1993] EGLR 164, quoted in para 32 above. As is clear from reading the decision of the Court of Appeal, the relevant issue in that case did not involve a "bare point of law" – per Dillon LJ at [1993] EGLR 164, 168M. It was for the expert to decide what constituted the relevant documents, which was more an issue of fact (and, possibly, professional assessment) than an issue of law. In any event, the reasoning of Sir Donald, although worthy of great respect, is not binding on this court, and was much more widely expressed than that of the Court of Appeal.

68. It seems to me that the correct position is that identified by Hoffmann LJ in his dissenting judgment (whose authority derives much support from the fact that his view prevailed in the House of Lords - [1996] 1 WLR 48) in *Mercury v The Director General* [1994] CLC 1125, 1140, quoted in para 33 above. It also appears to me that, while the point was not so fully or clearly discussed by Lord Slynn of Hadley, who gave the sole reasoned speech in the House of Lords, he appears to have taken the same view – [1996] 1WLR 48, 58G-59B. (It is true that the approach of Knox J was apparently approved by the Court of Appeal in *RE Brown v GIO Insurance Ltd* [1998] Lloyd's LR Ins and Reins 201, 208, but the court in that case does not appear to have

been referred to the decision or reasoning in *Mercury v The Director General* [1994] CLC 1125, [1996] 1 WLR 48).

69. Accordingly, it seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. As Hoffmann LJ said in *Mercury v The Director General* [1994] CLC 1125, 1140, "The parties have agreed to a decision in accordance with this meaning and no other. Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority", and, it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision. While certainty and clarity are highly desirable, it is, regrettably, inappropriate to consider that issue further in this case.

70. I appreciate that, in cases of this sort, the advantage of leaving all points of law to the final determination of the expert is that it results in a relatively quick and cheap process for the parties. However, it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations. It would, I suggest, be surprising if that were the effect of an expert determination agreement, when the Arbitration Act 1996 gives a right (albeit a limited and prescribed right) to the parties to refer points of law to the court. That Act applies where the parties have entered into an arbitration agreement, which gives them a much greater ability, in law and in practice, to make representations and to involve lawyers in connection with the arbitration, than parties enjoy in connection with the great majority of contractual expert determinations.

71. After a point of law has arisen, the parties may often be well advised to consider whether to refer it to court as a preliminary issue. If they do not, they may also think it sensible to try and agree whether the expert's decision on the point will be treated as final and binding or whether the disappointed party should have the right to refer the issue to the court. If the latter, then the expert should indicate whether, and in precisely what way, his determination would have been different if he had decided the point the other way: that may help the disappointed party decide whether it is worth challenging the decision, and it may also assist the parties in arriving at a settlement.

72. Sometimes, it is not possible to show that the expert has made a mistake of law in arriving at his valuation, because he has not expressed a view on the issue of law, and it cannot be said that he was under a duty to do so, and it is not clear from his determination how he must have decided the issue. In such a case, it seems to me that there would be no basis for challenging the determination on the basis of error of law. For the reasons already given, if the expert needs to determine a point of law which divides the parties, he may think it right not only to decide the point and say how he has decided it, but to indicate what the valuation would have been if he had decided the point the other way.

73. I turn now to deal with a very different issue. After Thomas LJ had prepared his judgment in draft, and circulated it to Etherton LJ and me, the parties notified the

court that they had reached agreement and effectively requested the court not to give judgment.

74. Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties. Obvious examples of such cases are where the case raises a point of law of some potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest.

75. It will also be relevant in most cases to consider how far the preparation of any judgment had got by the time of the request. In the absence of good reason to the contrary, it would be a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case. On the other hand, where the judgment is complete, it could be said (perhaps with rather less force) that it would be a retrospective waste of judicial time and effort if the judgment was not given.

76. The concerns of the parties to the litigation are obviously also relevant and sometimes very important. If, for their own legitimate interests, they do not wish (or one of them does not wish) a judgment to be given, that request should certainly be given weight by the court. (Of course, in some cases, the parties may request a judgment notwithstanding the fact that there is no longer an issue between them).

77. Where there are competing arguments each way, the court will have to weigh up those arguments: in that connection, the reasons for any desire to avoid a judgment will be highly relevant when deciding what weight to give to that desire.

78. In this case, I consider that the argument for handing down our judgments is compelling. First, by the time we were informed that the parties had settled their differences, the main judgment, representing the views of all members of the court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we are doing so on a rather different basis, so it is right to clarify the law for that reason as well. Fourthly, so far as the parties' understandable desire for commercial privacy is concerned, we have not said anything in our judgments which are not already in the public domain, thanks to the judgment below. Finally, so far as the parties' interests otherwise are concerned, no good reason has been advanced for us not giving judgment.