Neutral Citation Number: 2011 EWHC 49 [Comm]

Case No: 2010 FOLIO 239

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

IN THE MATTER OF THE ARBITRATION ACT 1996 AND AN ARBITRATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/11

Before :

HIS HONOUR JUDGE MACKIE QC

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Between :

NOVASEN S.A.	**Applicant**
- and -	
ALIMENTA S.A.	**Respondent**

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Mr Dominic Happé (instructed by **Marine Law Solicitors**) for the **Claimant**
Mr Lawrence Akka (instructed by **Mr Tony Hall-Jones**) for the **Defendant**

Hearing dates: 22, 23 and 25 November 2010

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JUDGMENT

His Honour Judge Mackie QC:

1. The Applicant ("Novasen") challenges a decision by Arbitrators that the Respondent ("Alimenta") was an undisclosed principal of Sogescol S. A. ("Sogescol") and was entitled to enter into a contract made between Sogescol and Novasen.The challenge is brought under section 67 of the Arbitration Act 1996 ("the Act") against an award on jurisdiction in a first tier FOSFA arbitration no. 4076 ("the Award"). It also raises an issue under section 7 of the Act.
2. The application takes the form of a rehearing of the issues before the Arbitrators and for that reason in addition to considering the papers I have had the benefit of live evidence from Mr Abdoulaye Diop, Chairman of the Board of Novasen, through an interpreter, Mr Giani Ceccato, a trader at Sogescol and Mr Hans Beniamin, a director of Alimenta.
3. Mr R W Rookes and Mr J S Smid were appointed arbitrators by the parties and having disagreed they in turn appointed Mr B Leach as Umpire. I return later to the award of Mr Leach, a solicitor with great experience in this area.

Background and facts not in dispute

4. Novasen is a company based in Senegal which trades in vegetable oils and, amongst other things exports crude groundnut oil. Alimenta is a large trader in groundnut and other vegetable oils based in Switzerland. In the past Alimenta purchased products from Novasen and the parties dealt directly and not through brokers. Alimenta was at one point a board member of Novasen but the parties fell out mainly it seems because Alimenta became unhappy about Novasen's financial viability. Novasen claims that as a result of this disagreement it decided to refuse to do further business with Alimenta. Alimenta disputes that.
5. Sogescol is a trader in vegetable oils, both of those it produces and also as an agent or broker for others. It has acted in the past as a broker for Novasen.
6. The Italian market is important to Novasen because, for regulatory reasons, groundnut oil from Senegal is acceptable but that of its main export competitor, Argentina is not. But by 2007 Italian buyers were reluctant to deal with Novasen. Mr Ceccato says that this was because Novasen had repeatedly defaulted on contracts. Mr Diop denies this but the reasons for what was clearly the reluctance of Italian buyers to deal with Novasen do not matter. In September 2007 Novasen was seeking to sell groundnut oil into the Italian market and since it could not do so easily in its own name Mr Ceccato suggested that Sogescol would be willing to take the product, two thousand metric tonnes ("mt") and sell it on. Sogescol does not ordinarily purchase for its own account and Mr Ceccato told Mr Diop that he would test out buyers in the Italian market. When these efforts proved unfruitful Mr Ceccato contacted Mr Beniamin of Alimenta with whom he had dealt for some years. Alimenta was willing to take the product at the right price but only if its identity was not disclosed. Arrangements were then entered into which are at the heart of this dispute.
7. Following telephone conversations on 21 September 2007 Mr Ceccato sent by fax a recap of the terms agreed between Novasen and Sogescol. The *"seller"* was Novasen the *"buyer"* was Sogescol.
8. The product was two thousand mt of groundnut oil. The price was US dollars 1.620 Cif Geneva with payment CAD (i.e. cash against documents) , the

contract form was to be FOSFA 201, other conditions were *"usual"* and *"as per our agreement" we have provided that Sogescol will be able to receive a brokers fee of 0.5% on this contract". (*The fax like most of the other documents was in French and in this judgment I use the translations produced by the parties). Mr Diop agreed the contract but in a handwritten fax said that the commission should be deleted and the price changed to US dollars 1,612 per mt. This was accepted as appears from the short form contract then drawn up by Sogescol the same day which reflected the earlier terms except that presentation of cash against documents was to be in Brussels and the price was US dollars 1,612.

9. Meanwhile the discussions between Alimenta and Sogescol led to another short form contract in FOSFA 201 terms for the same quality and quantity of product. The seller was Novasen, the buyer was Alimenta and a third party, Sogescol was included as *"Agent acting for Buyers' Account"*. The price was US Dollars 1.620 and the payment, cash against documents was to be made in Geneva, not Brussels. *"Other conditions"* included *"special conditions: the buying agent, Sogescol S.A., is discharged by buyers Alimenta S.A. of any costs and consequences resulting from a failure of shippers/sellers Novasen S.A. in the execution of this contract, particularly short shipped weight, quality and late delivery."* Sogescol signed the document as *"Buyer's Agent"*. On the same day Sogescol sent two copies of that contract to Alimenta, but not to Novasen, adding *"our commmission as buying agent for your account: 1%"*. Like the Umpire I will call this end of the deal "the Alimenta contract".

10. The contract was not performed, no goods were shipped and as a result arbitration was started by Alimenta. In the arbitration process Alimenta used terms upon which Novasen places emphasis on this application.
The Notice of Arbitration was given to Sogescol who were asked to pass on the message to Novasen.The arbitration was started against both Sogescol and Novasen, holding them both in breach. On 7 May 2008 Alimenta appointed an arbitrator and called upon Sogescol and/or Novasen to appoint one also. By November 2008 Alimenta's case was that Sogescol acted as a buying agent for Alimenta and the arbitrators were asked to disregard Sogescol's responsibility. Alimenta has claimed in submissions on 24 November 2008 that all the correspondence went through Sogescol *"thus acting in string"*.

11. In June 2009 Alimenta requested information about the change of price from dollars 1.620 to dollars 1.612. Sogescol replied:

> "*We confirm that we have verbally advised and informed Alimenta S.A. of this modification of price at a time of the transaction. This change was due to a request of Novasen S.A. (see Novasen S.A. handwritten fax on that subject) and which was proposed by Novasen S.A. as a way to settle long time outstanding debts that Novasen S.A. had to pay to Sogescol S.A.*
> *We confirm also that it was agreed that, as agents acting for buyers (Alimenta S.A.) account, Sogescol S.A. would receive a commission of 1% as buyers agent as evidenced in our standard covering letter dated 21 September 2007…"*

The Award

12. As the Umpire saw it three issues arose. First were the buyers' undisclosed principals of Sogescol? Secondly if yes, did the contract by its express and/or implied terms and/or by reason of its context preclude buyers from claiming under the contract? Thirdly if the answer to issue one were yes, but on issue

two were no, are there any other facts or circumstances precluding the introduction of buyers to enforce the Contract. The Umpire knew that Novasen had not become aware of the existence of the contract with Alimenta until disclosure in the arbitration.

13. The Umpire saw the purpose of this contract as twofold. First it was an agreement between Sogescol and Alimenta by which Sogescol were to enter into the purchase of the goods on Alimenta's behalf but without disclosing that they were doing so as agents. Secondly the contract was to record the terms on which Sogescol was to contract with Alimenta ostensibly as principal but in fact as agent. After discussing the matter in some detail the Umpire concluded that the burden of proof lay on Alimenta but that it had established that it was the undisclosed principal of Sogescol and so a party to the contract. The Umpire saw his second issue as raising essentially the same point as the third issue. Having set out the law to which I refer in more detail below the Umpire concluded that the burden of proof was on Novasen to bring itself within an exception to the general rule that the undisclosed principal may enforce his agents contract in his own name. He concluded that Novasen had not proved that it would not have contracted with Alimenta as a principal. As a result he decided that Alimenta was a party to the contract and made the Award to that effect.

The Evidence

14. The factual disputes which need to be resolved to decide this case are narrow and I will refer only to the directly relevant evidence of each witness.
15. Mr Diop explained the difficulties that Novasen had experienced in the past with natural and commercial conditions outside his company's control and how this had affected Italian buyers.
16. Mr Diop had been content to accept Mr Ceccato's suggestion that Sogescol buy the product and sell onto Italian buyers. He claimed that Alimenta knew full well that Novasen would not sell cargo to them and that it was for that reason that they had retained Sogescol in the middle. Mr Diop said that the two companies had been in competition to sell five thousand mt of groundnut oil in The Gambia. A director of Alimenta had tried to discredit Novasen. Novasen had still obtained the contract but Mr Diop decided that cargo would not in future be sold to Alimenta. He believed that Alimenta certainly were of his decision but he did not suggest that Sogescol would have known that. Mr Diop had not himself been involved in the events in Gambia.
17. Mr Diop said that when he saw the contract with a price of US dollars 1620 with an additional 0.5% to be paid as commission he objected because in this case Sogescol was a buyer, not a broker. He accepted however that Sogescol needed to make a profit which is why he suggested the reduction in price to dollars 1.612 thus giving Sogescol an equivalent return. Mr Diop said that this change was nothing to do with settling a debt as Novasen owed nothing to Sogescol at this point. Mr Diop was unaware of Alimenta's involvement until after the arbitration had started. If he had known of Alimenta's involvement at the time he would have cancelled the contract immediately.
18. Mr Ceccato said that Novasen had defaulted on a number of contracts with Italian buyers and owed Sogescol money for outstanding commission which had accrued due in 2005 and in 2006.The amount due was something over $14,000 so he asked for a commission of 0.5% to yield around $16,000.

19. Mr Ceccato had managed to sell the cargo to Mr Beniamin at Alimenta but only on the basis that that company's name would not be mentioned. In order to achieve this Mr Ceccato arranged a contract between Novasen and Alimenta with the latter as undisclosed principal. This was not an arrangement that he had entered into before but he was aware of it taking place in the oil industry. He agreed a commission of 1% with Alimenta as a return for providing this service at a point in the transaction when the selling price was the same on both sides of the deal. The Alimenta contract contained the special condition to protect Sogescol, what Mr Ceccato described as *"double protection"*. There was no need for equivalent protection from Alimenta. Alimenta's obligation was to pay money, not deliver goods, its credit was good and the two companies had had a long and trusting commercial relationship.

20. Mr Beniamin said that he did not accept that Novasen would refuse to deal with Alimenta and he had, despite looking into his company's records, no knowledge whatsoever of the alleged events in Gambia. It was improbable that there would have been competition between the two companies in Gambia since that country would not be importing product at all and Novasen would not be buying it. He had checked the records of his company and they confirmed first that there had been no such dispute and secondly that Alimenta's dealings in Gambia in 2006 had comprised one shipment of two thousand mt which had had nothing to do with Novasen.

21. Mr Beniamin's recollection of his negotiations with Mr Ceccato was substantially the same as the account which the latter had given in evidence. Alimenta did not wish it to be known in 2009 that they were in the market to buy groundnut oil. At that point Alimenta had taken a contrary view to most of the rest of the trade about the likely movement of the market and had turned out to be right. As one of the market leaders they would not have wished their involvement in this transaction to be known amongst those in the trade. The transaction was arranged so that Novasen was to sell the oil to Sogescol as an undisclosed agent for Alimenta. In return for the deal and the anonymity Alimenta was content to pay Sogescol a 1% commission.

22. Mr Beniamin said that he was content for Sogescol to change from a commission payable by Novasen to a reduction in price. As far as Mr Beniamin was concerned Sogescol were always free to negotiate a reduction in the price, it would be very welcome. However on this occasion all that was happening was a change in the arrangement which would have had no effect upon Alimenta. Had the transaction proceeded Alimenta would have paid Sogescol the price at 1620 as well as the 1% commission and Sogescol would have then retained the difference between that and the lower price paid on to Novasen. He accepted that he would have known about the change after it had been negotiated between the other two parties but on the same day as the deals were done.

23. Oral evidence about many of these matters is of limited value and indeed both Counsel have emphasised this. Mr Diop was giving evidence through an interpreter. Mr Ceccato and Mr Beniamin were given evidence in their second language although very fluently. The events in issue took place more than three years ago in a series of short telephone conversations of which there was no record. Plainly Mr Ceccato and Mr Beniamin would not have been using the precise vocabulary of the law of undisclosed principal. Both sides in effect

agree that the record of the documents is likely to be more reliable than the recollection of the witnesses.

24. All three witnesses were honest and doing their best to assist the court. I drew the following conclusions from what they told me.

25. Mr Diop is in a senior position and his evidence was, as I have mentioned, filtered through an interpreter. Given the economic pressures on Novasen and the absence of documentary evidence it is unlikely that Novasen would, as a matter of principle, have refused to enter into a contract with Alimenta. Even if Novasen had taken such a view there is no tangible evidence that Alimenta was aware of it and I accept what Mr Beniamin told me. Sogescol would not have known of any such policy.

26. It seems likely that Novasen had owed money to Sogescol but there is no record of Sogescol sending invoices for what was due to Novasen or ever chasing the matter up. If the matter had not been written off Sogescol would or should have kept the debt on its books. It seems likely that Mr Ceccato in general terms considered that his company was due something from Novasen which is why the original commission was negotiated and then replaced by the price reduction. It also seems to me unlikely that the change from a commission to a price reduction was the result of Mr Diop's view of what remuneration was appropriate for the structure of the transaction. It is more likely that the change was made to facilitate permissions or exchange control requirements within Sogescol.

27. I have no doubt that Mr Ceccato and Mr Beniamin agreed the arrangement which they described so that Alimenta could retain its anonymity and Sogescol avoid taking a position of its own. The close and amicable relationship between Sogescol and Alimenta was such that they would have addressed to their mutual satisfaction any minor problems arising on the execution of the transaction as regards such matters as the presentation of the documents, on the face of it at two different places. Their conversations at the time were no doubt in terms less referable to the law of undisclosed principal than what they said to me but the objective was clear and made commercial sense.

28. The witnesses were properly and courteously cross-examined by reference to the documents and in particular to the Alimenta contract. While the pattern of the documents is at points inconsistent the picture is relatively clear. Alimenta and Novasen are to be the contracting parties with Sogescol as the buyer's agent having an exclusion of responsibility. There is an inconsistency between the status of Sogescol presented by Mr Ceccato in evidence and the need for specific protection against default by Novasen but I accept his evidence that this was introduced for additional protection.

29. It is clear that Alimenta's approval of the change from a commission to a price reduction was given in a telephone conversation between Mr Ceccato and Mr Beniamin after Mr Ceccato had negotiated with Mr Diop but those conversations took place over a short period of time on the same day. Mr Ceccato said that the matter was not agreed finally until after he had discussed matters with Mr Beniamin. Against that while one makes allowances for statements made perhaps loosely, in the course of preparing for an arbitration Alimenta did observe *"but needless to say this was not passed on to Alimenta as it did not concern him, hence the variation of dollars eight per metric tonnes, dollars 8.00 per m/t"*. I conclude, particularly where the burden of

proof is on Alimenta that it agreed the change between Novasen and Sogescol only after it had been made.

30. Alimenta would have been content to leave it to Sogescol to negotiate a reduction in the price so long as it did not prejudice Alimenta.

31. I place little weight on what these foreign parties wrote when progressing arbitration without the assistance of English lawyers.

32. In reaching that view I have in mind the submissions of Mr Happé that the recollections of Mr Ceccato and of Mr Beniamin are convenient for the case, not consistent with some of the passages in the documents produced for the purposes of the arbitration and may have been influenced by what the witnesses wished to believe, a tendency which Counsel illustrates with a quotation from Nietzsche. Nonetheless I conclude from the evidence that the arrangement they described was what the parties had in mind at the time. On the one hand it is perhaps surprising that Mr Ceccato should have proposed a novel structure with which he had not been involved before. On the other hand the arrangement made good commercial sense and is entirely consistent with the documents, particularly when one bears in mind that some are in standard form and that these need to be evaluated from the stand point of the business people completing them, rather than that of English lawyers they might have instructed at the time.

The Law

33. The relevant principles of law are common ground, the difference between the parties being in their application to the facts of this case.The law of undisclosed principal as it affects this case is summarised in the following passages from Lord Lloyd 's opinion in *Siu Yin Kwan v Eastern Insurance Ltd* [1994] 2 AC 199, 209

> *"The main features of the law relating to an undisclosed principal have been settled since at least at the end of the 18th century. A hundred years later, in 1872, Blackburn J. said in Armstrong v. Stokes (1872) L.R. 7 Q.B. 598, 604 that it had often been doubted whether it was originally right to hold that an undisclosed principal was liable to be sued on the contract made by an agent on his behalf, but added that "doubts of this kind come now too late."*
>
> *For the present purposes the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The Agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.*
>
> *"The present case is concerned with the fifth of the features noted above. The law in this connection was stated by Diplock L.J. in Teheran-Europe Co. Ltd. v. S. T. Belton (Tractors) Ltd. [1968] 2 Q.B. 545, 555:*
>
> > *"Where an agent has … actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he disclose to the other party the identify of his*

principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is wiling to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so A willing

Since the contract in the present case is an ordinary commercial contract, Axelson were entitled to sue as undisclosed principal unless Richstone should have realised that the insurers were unwilling to contract with anyone other than themselves."

If courts are too ready to construe written contracts as contradicting the right of an undisclosed principal to intervene, it would go far to destroy the beneficial assumption in commercial cases, to which Diplock J. referred in Teheran-Europe Co. Ltd v. S. T. Belton (Tractors) Ltd. [1968] 2 Q.B. 545, 555"

34. Mr Happé draws attention to features of the law of undisclosed principal. First he argues that it is anomalous and must be confined within narrow bounds. Secondly he shows by reference to a passage in *Chitty para 31.028* that an undisclosed principal cannot create the relationship of agency by ratification and any contract on which the principal seeks to intervene must be made within the actual authority of the agent.

35. Mr Akka emphasises that the test for deciding whether the agent must intend to act on the principal's behalf, principal (2) above is subjective. He also submits that the question in this case is not whether Alimenta was an undisclosed principal or authorised Sogescol to enter into, and is entitled to intervene in, a sale contract with Novasen. What matters is whether it authorised Sogescol and is entitled to intervene in an arbitration agreement.

He replies upon section 7 of the Arbitration Act 1996:

"*Unless otherwise agreed by the parties an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."*

36. He also relies on what Lord Hoffmann said in *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254:

"*17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he has never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is*

that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatsoever to conclude any agreement on his behalf that is an attack on both the main agreement and the arbitration agreement.

18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessary an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

19. In the present case, it is alleged that the main agreement was in commercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of agreement which section 7 was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other; the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement."

Submissions of Novasen

37. Mr Happe' submits that there was no agency agreement between Alimenta and Sogescol, there is no contemporaneous evidence of an agreement that Sogescol act as agent or a record of any instructions to that effect. The purpose of concealing Alimenta's role could have been achieved by a sale and a sub-sale by Sogescol acting for an unnamed principal, particularly where as Mr Ceccato accepted in evidence contracts are made without the identity of the buying party being disclosed. The evidence suggests that this was a string contract hence the difference in price, the requirement for the place of payment to be different under the two agreements and the inclusion of a special condition in the Alimenta contract consistent only with a belief that Sogescol would be liable if Novasen defaulted. Sogescol's habit of passing messages onto Novasen headed "*please consider these observations like*

coming from us" was a sign of it being an intermediary as were the manner and terms in which the arbitration was brought. In the real world Sogescol and Alimenta probably never thought through their relationship at the time of the contract. The agreement was probably no more than Sogescol should *"get"* the cargo for Alimenta at the price agreed.

38. Alimenta cannot prove the existence of an agency agreement. Novasen also submits that Alimenta cannot prove that the contract entered into was made within the terms of Sogescol's actual authority.The reduction in price, if intended to be a settlement of sums owed to Sogescol under previous contracts, was not consistent either with Alimenta being entitled to intervene or with it having given authority.The only actual authority given to Sogescol was to offer the price of dollars 1620 per metric tonne.

39. Whatever the analysis of the price reduction this step was not authorised by Alimenta until after the step had been taken whether an hour or a day later.The fax of 16 June 2009 suggests that Alimenta did not know what the basis for the price reduction was or how it had been agreed.

40. Novasen also contends that the contract contemplated that Sogescol alone would be the buyers, a position not consistent with the requirement summarised in Chitty at 31 – 067 *"an undisclosed principal cannot intervene where such intervention would be incompatible with the terms of the contract itself."*

The contract signed by Novasen identified Sogescol as the *"buyer"* and omitted any reference to a broker. Payment was to be made against a presentation of documents in Brussels, i.e. to Sogescol. The price reduction was intended to settle debts due to Sogescol and Novasen had to receive payment from and had to contract with Sogescol for that settlement to work.In addition Sogescol and Alimenta were aware that Novasen would not contract with Alimenta because of their previous falling out.Whether or not Novasen's refusal to deal with Alimenta was justified is beside the point.

Submissions of Alimenta

41. Mr Akka submits that the generally accepted view of the law is that the contract is made between the agent and the third party in which the undisclosed principal can intervene. Alimenta's authority to Sogescol can be express or implied and need not be contractual. The gist of the conversations between Mr Ceccato and Mr Beniamin was that Sogescol should act as buying agent without mentioning Alimenta's name and the documents are consistent with that. The authority given to Sogescol as an *"agent acting for Buyers account"* would extend, if necessary, to bring a lower price. There was no great price difference but an allowance against previously agreeing a lower price. The only plausible explanation for the apparent reduction in price is that Novasen recognised the existence of indebtedness but saw that payment of this would be more straightforward if made by reducing the price rather than payment of a commission. In cross examination Mr Ceccato said that Mr Beniamin knew of the allowance before *"this business"* was concluded.

42. The post contractual correspondence is either consistent with Alimenta's case or a reflection of the fact that those concerned with the decision to arbitrate were not lawyers and did not have English as their first language. The payment mechanism as both Mr Beniamin and Mr Ceccato pointed out was workable and there were several possible solutions. Given the longstanding relationship between Alimenta and Sogescol Mr Beniamin was content to

leave Mr Ceccato to arrange whatever was necessary. The mechanics by which Sogescol recovered the US $ 8 per mt difference are irrelevant as they would have readily been accomplished between Sogescol and Alimenta.

43. There was no reason for Alimenta not to be able to intervene in this contract. It was not a personal contract. None of the features of the contract remove the *"beneficial assumption in commercial cases"* referred to in *Siu Yin Kwan*. On the evidence the court should find that Novasen had taken no decision to refuse to contract with Alimenta or that if it had that neither Alimenta nor, more important, Sogescol were aware of it.

Section 7 Arbitration Act 1996

44. It follows from section 7 and the decision in Fiona Trust that if Sogescol was authorised by Alimenta to enter into a FOSFA arbitration clause with Novasen then it does not matter whether Sogescol acted outside the scope of its authority when and if it agreed a reduction in price in the Novasen contract. The effect of any agreement to reduce the price, and whether that means that Alimenta is not entitled to intervene, is a matter for the Arbitrators.

45. Contracts for this commodity are invariably on FOSFA terms which include an arbitration clause. All three parties knew that any disputes between them would be resolved by FOSFA arbitration. If Alimenta is entitled to enforce the arbitration agreement the separate question of whether it is entitled as undisclosed principal to intervene in the sale contract with Novasen is a matter solely for the arbitrators. But the first issue requires consideration of the second one.

46. Novasen accepts that the relevant principles of law apply but distinguishes the facts from those in Fiona Trust. This is not a case where it is contended that an agreement between two parties should be set aside or not enforced but one where Novasen denies that it has any contract at all with Alimenta or that it is one in which Alimenta has a right to intervene. It follows that until the contractual link between the parties has been established at least to the extent of an agreement to arbitrate, and Novasen contends that it has not, there is no practical distinction between the sale contract and the agreement to arbitrate.

Decision of the Court

47. For the reasons I have given when making findings of facts Alimenta has established the existence of an agreement with Sogescol to act as its undisclosed agent in this transaction. I accept the evidence of Mr Ceccato and Mr Beniamin but rely particularly on the Alimenta contract, with its two references to Sogescol being the buyer's agent and the documentary and commercial picture I have described.

48. I do not consider that Sogescol's authority to enter into the contract with Novasen arose only as a result of ratification, a form of authority not permitted by the law of undisclosed principal. In the ordinary way one would expect the change in price to have been agreed without being communicated first to Alimenta, partly because it was such a minor matter. It is quite clear however that Alimenta saw a change in price that had no effect upon it in the same way as it would have regarded a reduction, as being within the scope of the authority it had given to Sogescol.

49. I do not consider that intervention by Alimenta as undisclosed principal would be incompatible with the terms of the contract negotiated between Novasen and Sogescol. I have already indicated that I do not accept, as matter of fact, that Novasen had decided that it would refuse to contract with Alimenta or

that this had been communicated to it or to Sogescol. Mr Diop, who is a very senior person with wide commitments, may genuinely have believed that to be the case but was mistaken.

Apart from the aspect of undisclosed principal this transaction was *"an ordinary commercial contract"* of the kind referred to by Diplock LJ as he then was in *Teheran-Europe*. This was the sale of a commodity on a standard form of contract to a buyer, a classic example of the sort of case to which the *"beneficial assumption"* applies.

50. If I am wrong in the conclusions I reach about authority and ability to intervene this application still fails because there is, as I see it, no doubt that an agreement to arbitrate arose between Novasen and Alimenta. It is argued that the agreement to arbitrate is not made unless and until there is a valid contract for sale incorporating the relevant clauses. There is here an agreement between Alimenta and Sogescol that Sogescol will act as the undisclosed agent of Alimenta in a contract with Novasen. Subject to the questions of authority and intervention that is not an arrangement to which Novasen could object. That arrangement includes, as in this sort of case everyone would know, a provision for disputes to be resolved by FOSFA arbitration. I recognise the distinction drawn by Mr Happe' in that in *Fiona Trust* there was no dispute about who the parties to the contract were. But as I see it the issues of authority and power to intervene are closer to the question of authority in *Fiona Trust* than to the contrasting example given by Mr Happé of the situation where someone's signature has been forged so that there is neither sale contract nor arbitration agreement.

51. Alimenta's rights in respect of this contract, including the arbitration agreement, would be unquestioned but for the issues of ratification and intervention. As I see it there is therefore an arbitration agreement between Alimenta and Novasen by which arbitrators are to resolve these particular issues.

52. That approach seems to me appropriate given in particular, the guidance about the reach of section 7 of the Act at Paragraph 10 of Lord Hoffmann's speech in Fiona Trust *"this section shows a recognition by Parliament that, for the reasons I have given in discussing the approach to construction, businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way."*

At paragraph 18 Lord Hoffman says *"even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration"*

The approach that I am taking also appears to be consistent with the review of the law by Gross J, as he then was, in *UR Power v Kuok Ails [2009] 1 Lloyds's Rep 495* which led him to conclude, at 503, *"in principle, therefore an arbitration agreement may be binding even though the underlying contract has not come into existence"*.

Conclusions

53. It follows that this application fails. Novasen seeks orders to set aside the arbitration award as to jurisdiction pursuant to section 67 of the Act on the basis that Novasen are not a party to any contract with the Defendants, Alimenta and/or Alimenta were not entitled to intervene as an undisclosed principal in any contract with Novasen and that the tribunal had therefore no jurisdiction to determine any dispute between Novasen and Alimenta. I refuse those orders. In substance I agree with the umpire.

54. I shall be grateful if the parties will, not less than 48 hours before the hand down of this judgment, let me have corrections of the usual kind, a draft order agreed if possible and a note of any matters which they wish to raise at the hearing. If the parties are able to resolve all outstanding matters by agreement then attendance by the parties at the hand down is not required.

55. Finally I thank Mr Happé and Mr Akka, and the solicitors instructing them for the very high quality of their written and oral submissions.