[2013–14 Gib LR 502]

STM FIDECS INSURANCE MANAGEMENT LIMITED v. ENTERPRISE INSURANCE COMPANY LIMITED PLC

SUPREME COURT (Prescott, J.): April 4th, 2014

Companies—directors—relationship with professional services provider—wording of agreement between company and professional services provider excludes provision of directors—(a) directors not listed in agreement; (b) "engage and administer" in context means "employ and manage" and directors not employed or managed by professional services provider; and (c) directors provided not employed by professional services provider and owe it no duty of care, therefore not "personnel"

Documents—interpretation—ejustem generis rule—arbitration clause in agreement between company and professional services provider excludes provision of directors—words "attaching," "concerning," "connected" and "arising out of" clearly indicate connection with context (i.e. wider agreement) which excludes provision of directors—use of phrase "or otherwise" in middle of clause cannot extend clause beyond confines of agreement as a whole

The appellant claimed some £75,000 from the respondent for professional services rendered, subsidiary services, costs and interest, pursuant to an "Agreement for Insurance Management Services" ("AIMS") made between them. They sought to have their claims resolved at arbitration. The respondent did not defend the claim, but denied liability on the grounds that it had larger claims against the appellant which it was entitled to set off. The services to be provided were defined in AIMS:

> ". . . [T]o maintain such registered and principal offices and engage and administer such personnel for the insurance company as may be required by any law governing the operation of insurance companies in Gibraltar as may be considered by mutual agreement to be beneficial to the efficient operation of the insurance company."

AIMS also contained the arbitration clause:

> "All disputes or differences which shall at any time arise between the parties whether during the term or afterwards attaching or concerning this agreement or its construction or effect or the rights duties or liabilities of the parties under or by virtue of it or otherwise or any other matter in any way connected with or arising out of the subject matter of this agreement shall be referred to a single arbitrator . . ."

There was a preliminary hearing to determine the scope of that clause, at which the arbitrator found he had no jurisdiction to determine the claims in question as AIMS did not cover the provision of directors, the arbitration clause was limited to the subject matter of AIMS, and AIMS had not been varied to include the provision of directors.

On appeal against the arbitrator's ruling, the appellant submitted that (a) AIMS did not cover the provision of directors to the respondent, because (i) "engage and administer," given its natural meaning, meant "employ and manage," and directors were not capable of being administered or managed by the appellant as they owed their duty to the respondent; (ii) the appellant was merely putting forward suitable individuals who could then be appointed by the respondent, so they were not "engaged" by the appellant; and (iii) the extensive detail in AIMS regarding the secretaries compared with the lack of detail about directors indicated that the latter were not meant to be included; and (b) the arbitration clause could not govern disputes relating to the provision of directors, because (i) the arbitration clause was widely drafted but the words "attaching," "concerning," "connected with," "arising" and "subject matter" indicated that it did not extend beyond the disputes and differences which had a nexus with or arose in the context of AIMS; (ii) the words "or otherwise," were to be interpreted in line with the principle of *ejusdem generis* whereby general words were limited by the subject matter of the contract; and (iii) in context, the phrase "or otherwise" was not independent, but rather that "or otherwise or any other matter in any way connected with or arising out of the subject matter of this agreement" should be interpreted as "or otherwise in any way connected with or arising out of the subject matter of this agreement, or any other matter in any way connected with or arising out of the subject matter of this agreement."

The respondent submitted that (a) AIMS did cover the provision of directors as (i) AIMS was intended to govern the entire relationship between the parties; (ii) "personnel" was intended to refer to anyone employed by the appellant, which the directors were; and (iii) "administer" was not inconsistent with the fiduciary duty of directors and implied no duty to or control by the appellant; or, in the alternative, (b) even if AIMS did not cover the provision of directors, the arbitration clause was intended to cover the widest possible range of disputes (and that if there were any doubt, it should be interpreted *contra proferentem*), so that (i) "subject matter," should be interpreted as being anything which could reasonably be said to be within the aim, object or purpose of AIMS, even if not strictly covered by its terms; (ii) "arising out of" covered matters in

AIMS, so "connected with" would be redundant unless it covered something wider; and (iii) "or otherwise," was independent and was intended to cover matters arising other than in connection with or out of the subject matter of AIMS.

Held, dismissing the appeal:

(1) AIMS did not govern the relationship between the parties as it related to the provision of directors. Despite a fairly detailed list and definition of services provided under AIMS, the services of directors did not feature. In particular, the role of a secretary was defined in detail—arguably a less important role than a director—and it would have been odd if only the role of a secretary warranted definition if the services of a director were also intended to be covered by AIMS. The phrase "maintain such registered and principal offices and engage and administer such personnel" clearly tied the engagement and administration of personnel with the maintenance of the registered and principal office, which was suggestive of administerial rather than directorial services. "Engage and administer," given their ordinary and natural meaning, meant "employ and manage," and directors could not be employed or managed. Directors provided by STM were not employed by STM and owed it no duty of care, and did not therefore qualify as "personnel" (paras. 40–45).

(2) The arbitrator had been correct to hold that that arbitration clause should be widely construed, but that it did not extend to the provision of directors, which was outside the scope of AIMS. While the intention to cover a wide range of matters was indicated by (a) the inclusion of both differences and disputes (the former were often a precursor to the latter); (b) the use of "all"; (c) specifying that disputes or differences might arise even after the term; (d) the use of the term "subject matter," suggesting the ambit of the clause extended beyond AIMS, notwithstanding that wide construction, the clause was however limited to the context of the parties' relationship under AIMS. The words "attaching," "concerning," "connected" and "arising out of" clearly indicated a connection with the context in which they were used and it was apparent that a nexus between the arbitration clause and AIMS was intended. Further, the words "or otherwise" were not independent, and a connection between AIMS and a dispute was required before the arbitration clause applied. The phrase "or otherwise" was in the middle of the arbitration clause, which in turn was in the middle of AIMS. The clause was an integral part of AIMS and could not be divorced from that context. Although the words "or otherwise" were general in nature, they are still limited by the subject matter of the agreement as a whole—to hold otherwise would render the specific detail elsewhere in the clause, and ignore the need for a connection between the words and the context in which they were found. The phrase "or otherwise" was immediately preceded by the phrase "under or by virtue of [the agreement]," which referred to the agreement in the strict sense, so "or otherwise" must have extended the application of the clause beyond those confines. However, because it was followed by a reference to

"subject matter," which had a broader reach than terms, "or otherwise" was intended to reach beyond the terms, but not beyond the subject matter. The role of a director was so separate from the administerial services that there was insufficient nexus between the provision of directors and AIMS (paras. 33–39; para. 46).

Cases cited:
(1) *Chandris* v. *Isbrandtsen-Moller Co. Inc.*, [1951] 1 K.B. 240; [1950] 2 All E.R. 618, considered.
(2) *Sun Fire Office* v. *Hart* (1889), 14 App. Cas. 98, considered.

R.M. Vasquez, *Q.C.* and *J. Gomez* for the appellant;
N. Cruz and *Ms. C. Wright* for the respondent.

1 **PRESCOTT, J.:**

Introduction

This is an appeal by STM Fidecs Insurance Management Ltd. ("STM") and a cross-appeal by Enterprise Insurance Co. Ltd. PLC ("EIC"), against a decision made on July 24th, 2012, by Mr. James Neish, Q.C. as arbitrator. STM claims the sum of £67,455.33 for professional services rendered to EIC pursuant to an "Agreement for Insurance Management Services" ("AIMS") dated July 1st, 2004, made between STM and EIC. In addition, STM also claims the sum of £7,672.78 in respect of subsidiary services, interest and costs. STM's claims are set out in its particulars of claim dated August 17th, 2011. EIC has not defended the claims made by STM, but denies liability on the grounds that it has claims against STM which exceed the claims made by STM, and which should be set off against STM's claims. EIC's claims are set out in its undated particulars of claim.

2 Mr. Neish, Q.C., the arbitrator, was appointed by the parties pursuant to cl. 11 of AIMS. There was a preliminary hearing to determine the scope of cl. 11. In brief, STM submitted that the provision of services of a director and the giving of advice by the director were not issues falling within its scope, and that therefore the arbitrator had no jurisdiction. The arbitrator made certain findings of fact, and found he had no jurisdiction to determine the claims in question.

The salient facts

3 Having heard evidence, the arbitrator made certain findings of fact which, not being in dispute, it is incumbent upon this court to accept, and which are fully set out at para. 22 of the decision.

The decision

4 Clause 11—the arbitration clause—provides as follows:

> "All disputes or differences which shall at any time arise between the parties whether during the term or afterwards attaching or concerning this agreement or its construction or effect or the rights duties or liabilities of the parties under or by virtue of it or otherwise or any other matter in any way connected with or arising out of the subject matter of this agreement shall be referred to a single arbitrator . . ."

5 Having reminded himself of the provisions of the arbitration clause, the arbitrator found that—

> ". . . the phrase 'or otherwise' is independent and covers a dispute which arises in ways other than under AIMS, but does not have to be connected with or arising out of the subject matter of AIMS . . . the phrase 'subject matter' has to be construed more widely than 'terms' but must arise in the context of the parties' relationship in respect of AIMS. The words 'or any other matter in any way connected with or arising out of the subject matter' are to be widely construed."

6 The arbitrator then went on to consider para. 2(d) of the Fourth Schedule of AIMS, which defines the services to be provided by STM as follows:

> "Maintain such registered and principal offices and engage and administer such personnel for the insurance company as may be required by any law governing the operation of insurance companies in Gibraltar as may be considered by mutual agreement to be beneficial to the efficient operation of the insurance company."

Drawing guidance from *Chitty on Contracts*, 31st ed. (2012), he concluded that if para. 2(d) were to be given its ordinary and natural meaning it could not be construed to cover the provisions of the services of the directors. He said:

> "Paragraph 2(d) refers to 'engage and administer.' This is conjunctive and means to employ and manage. Directors are not capable of being administered or managed—they owe their duties to the company on whose board they serve. Further, a director would not be 'engaged' by STM, but would be appointed by EIC following its own procedures. STM's obligations in this regard could only extend to making available individuals who were fit and proper to act as directors of an insurance company. Further still, the word 'personnel' denotes staff especially construed in conjunction with para. 7 of the First Schedule which states that 'the salaries of any personnel employed in accordance with para. 2(d) of the Fourth Schedule to this agreement.'"

7 The arbitrator's view that AIMS did not extend to the provision of services of a director was reinforced by the fact that whilst express provision was made in AIMS for the provision of secretarial services it was silent regarding the provision of directors' services. The arbitrator concluded that defining the role of a director was more important than defining the role of the secretary, so that failure to include a reference to, and definition of, the role of the director was indicative of the fact that it was not envisaged that AIMS would encompass the provision of directors' services.

8 The arbitrator then went on to consider whether in any event it had been the intention of the parties to include the provision of directors' services in AIMS. Having considered the evidence and made specific reference to it at para. 33 of the decision, the arbitrator concluded the parties did not so intend.

9 The next question which required consideration was whether AIMS had been amended by the subsequent conduct of the parties. The arbitrator stated:

> "There is considerable force in the argument by Mr. Vasquez, Q.C. that, given that the services of a director was being provided by STM since Mr. Stone's appointment on November 10th, 2003, and that Mr. Kentish was appointed as a director on June 10th, 2004, *i.e*. before AIMS was signed on February 1st, 2005, and before it came into effect on July 1st, 2004 there was no new or different subsequent conduct such as to vary AIMS. STM continued to make the services of Mr. Kentish available to EIC on the same terms and in the same way after AIMS came into effect as it did before then. The status quo was maintained in its entirety. I do not accept that AIMS was varied subsequently by continuation of the same conduct by conduct which had preceded its coming into effect. If the parties had intended the conduct in question to be covered by AIMS given that such conduct had preceded AIMS, they would presumably have provided for it in AIMS. I accept that in law a contract may be varied by subsequent conduct but find that it was not so varied."

10 By way of conclusion, the arbitrator found that the advice given by Mr. Kentish in relation to the EIG business incentive settlement did not fall within AIMS nor was it varied by the giving of such advice by STM through Mr. Kentish and the acceptance of such advice by EIC.

Case stated

11 Both STM and EIC made separate applications to the arbitrator pursuant to s.33 of the Arbitration Act for him to state a case for the opinion of this court.

12 STM puts forward three grounds upon which the arbitrator should state a case:

(i) that the arbitration clause is not independent of AIMS so as to cover a dispute which arises in ways other than under AIMS and that for the arbitrator to have jurisdiction over a dispute, the dispute must be connected to or arise out of the subject matter of AIMS;

(ii) that the arbitrator does not have jurisdiction to determine a claim for the provision of services of a director by STM to EIC nor does he have jurisdiction to determine a claim based on the advice given by STM acting by its director; and

(iii) that the arbitrator has no jurisdiction to consider or allow EIC to amend its particulars of claim or to issue a new claim.

13 EIC puts forward two grounds upon which the arbitrator should state a case:

(i) that the arbitrator has jurisdiction to determine the claims based on the provision of services and advice by directors; and

(ii) that whilst the arbitrator may be of the view that he can only determine the question of jurisdiction on the basis of the claim as pleaded, he has jurisdiction to consider and allow EIC to amend its claim or to issue a new claim and because he has ruled that the arbitration clause is to be widely construed, what is in essence a technical pleading issue can be cured by amendment of the pleadings or commencement of a new claim.

14 My understanding is that the arbitrator has given EIC leave to amend its pleadings and they have been amended.

15 The arbitrator stated the case in the following terms:

"The questions of law to be determined are—

(1) Did I err in law in finding that—

(i) the provision by STM to EIC of the services of director; and

(ii) the giving by Mr. Alan Kentish of the advice in question

did not come within the scope of the services to be provided by STM to EIC under AIMS?

(2) Did I err in law in my interpretation of the scope of the arbitration clause as set out in para. 24 of my decision, namely that—

(i) the phrase 'or otherwise' is independent, and covers a dispute which arises in ways other than AIMS but does not have to be connected with or arising out of the subject matter of AIMS;

(ii) the phrase 'subject matter' has to be construed more widely than 'terms,' but must arise in the context of the parties' relationship under AIMS; and

(iii) the words 'or any other matter in any way connected with or arising out of the subject matter' are to be widely construed?"

Mr. Vasquez's submissions on STM's appeal (para. 15(2) above)

16 Mr. Vasquez began by conceding that the arbitration clause is drafted in wide terms—a concession which did not, in his submission, call for its application to be extended beyond that which the clause was intended to capture. He submits that the words "attaching," "concerning," "connected with," "arising," and "subject matter," in the arbitration clause, are all indicative that only those disputes and differences having a nexus with AIMS or arising in the context of AIMS are caught by the arbitration clause. He submits that despite any wide interpretation which might be attached to those words, the necessity of a contextual nexus with AIMS, means that the arbitration clause cannot extend to cover claims relating to the provision of services of directors of EIC or to advice given by directors to EIC.

17 As to the words "or otherwise," Mr. Vasquez submits that they should be interpreted within the context of the arbitration clause and that the principle of *ejusdem generis* applies. He relies on *Sun Fire Office* v. *Hart* (2) as authority for the proposition that general words in a standard form contract are limited by the subject matter of the contract. Lord Watson said (14 App. Cas. at 103):

"It is a well known canon of construction that where a particular enumeration is followed by such words as 'or other,' the latter expression ought, if not enlarged by the context, be limited to matters *ejusdem generis* with those specially enumerated."

Mr. Vasquez submits that it is of relevance that the phrase "or otherwise" is located in the middle of the arbitration clause which, in turn, is found within AIMS which provides specified insurance management services. AIMS, submits Mr. Vasquez, "is not a standalone contract for a general submission by its parties to arbitration of all or any dispute or difference," so that the words "or otherwise" cannot be independent and can only cover disputes and differences which arise under AIMS.

18 The further submission advanced by Mr. Vasquez is that even if the *ejusdem generis* principle cannot be found, it might still apply to the interpretation of the document in question. What is important, submits Mr. Vasquez, is to determine the intentions of the parties. He relies on *Chandris* v. *Isbrandtsen-Moller Co. Inc.* (1) where it was held (as summarized in the headnote in the *Law Reports* ([1951] 1 K.B. at 240))—

> ". . . that the general words in a commercial document were, not less than in the case of a document such as a settlement, *prima facie* to be construed as having their natural and larger meaning, and not to be limited to things *ejusdem generis* with those previously enumerated unless there were something in the document showing an intention so to limit them . . ."

He submits that the intention of the parties was to regulate the provision of "insurance management services," and to arbitrate any dispute which arose related to those services provided and regulated under AIMS.

19 Mr. Vasquez stresses that the arbitration clause should be interpreted contextually, and that the phrase "or otherwise" fits contextually within AIMS, and does not strain the English language. In support, he draws attention to the commentary in Lewison, *The Interpretation of Contracts*, 2nd ed., at 156 (1997):

> "In order to arrive at the true interpretation of a document, a clause must not be considered in isolation but must be considered in the context of the whole of the document.
>
> In *Chamber Colliery Ltd*. v. *Twyerould,* Lord Watson said ([1915] 1 Ch. 268):
>
> > 'I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.'
>
> The expression of this principle of construction is no more than an enlargement of the general proposition that an individual word takes its meaning from the context in which it is found. So too an individual clause takes its meaning from the context of the document in which it is found."

20 Mr. Vasquez submits that:

> "The contextual interpretation of the phrase 'or otherwise' is disjunctive, whereas the second 'or' that appears before the word 'otherwise' is conjunctive. In this manner, the interpretation of the arbitration clause conforms to the context in which it is found namely AIMS because it is to be interpreted as follows:
>
> > 'or otherwise in any way connected with or arising out of the subject matter of this agreement,'

> 'or . . . any other matter in any way connected with or arising out of the subject matter of this agreement'."

21 Bearing the above in mind, Mr. Vasquez contends that a breakdown of the arbitration clause into its constituent parts will show that the disputes and differences that fall to be arbitrated must of necessity attach and concern—

(i) AIMS;

(ii) the construction of AIMS;

(iii) the effects of AIMS;

(iv) the rights of the parties under or by virtue of AIMS;

(v) the duties of the parties under or by virtue of AIMS;

(vi) the liabilities of the parties under or by virtue of AIMS;

(vii) otherwise or in any way connected with AIMS or its subject matter; or

(viii) otherwise on any matter in any way arising out of AIMS's subject matter.

Mr. Cruz's reply

22 Like Mr. Vasquez, Mr. Cruz agrees that the arbitration clause is widely drafted, but submits that it is evident from the terminology that the parties intended to refer to arbitration in the widest range of possible disputes. In the event that there was to be any doubt as to its interpretation, he relies on the principle of "construction against grantor," that a deed or other instrument shall be construed in favour of the party who drafted it and produced the document.

23 Like Mr. Vasquez, Mr. Cruz agrees that the phrase "subject matter" has to be construed more widely than "terms," but submits that "subject matter" should extend to "anything which can be said to be fairly within the aim, object or purpose of the AIMS or the achievement of the same even if not strictly covered by its terms."

24 Mr. Cruz points out that the phrase "or any other matter in any way connected with or arising out of the subject matter of this agreement" uses both "connected with" and "arising out of". He submits that "arising out of" already covers matters arising solely under the terms of AIMS, and "connected with" is a wider phrase which should be given a broad construction and by its definition contemplates something more than just the terms of AIMS and thus cannot be restricted to matters arising solely under the terms of AIMS.

25 In relation to the words "or otherwise," Mr. Cruz submits that upon their proper interpretation, they are independent from AIMS and cover disputes which do not have to be connected to or arise out of the subject matter of AIMS. In reliance on this proposition, Mr. Cruz turns to the wording of the arbitration clause, and makes two submissions which are made succinctly in his skeleton, as follows:

> (i) "The preceding words to the phrase 'or otherwise' in the arbitration clause are 'the rights, duties or liabilities of the parties under or by virtue of [the AIMS].' This covers all (the use of the word 'the' before 'rights' underlines that it is all not just some) rights, duties or liabilities arising under the AIMS. 'Or otherwise' can logically therefore only mean rights, duties or liabilities which arise not under the AIMS but 'otherwise' i.e. in ways other than under the AIMS. That can only mean rights duties or liabilities which arise pursuant either to contractual or non-contractual arrangements or relationships between the parties which do not arise out of the AIMS."
>
> (ii) "The phrase 'or otherwise' is followed by the phrase 'or any other matter in any way connected with or arising out of the subject matter of this agreement.' The appellant suggests that 'or otherwise' is governed by these following words. The respondent submits this strains the language of the clause and it ignores the 'or' which follows 'or otherwise'. The 'or' before 'other matter' in this phrase is disjunctive. On any sensible reading of the clause (and all the more so if it is to be given a wide construction so as not to limit the parties' intentions and/or if one applies the *contra preferentem* rule), the phrase 'or any other matter in any way connected with or arising out of the subject matter of this agreement' is independent of and does not control or qualify the phrase 'or otherwise' which precedes it. The use of the word 'other' in the phrase 'any other matter' underlines the disjunctive nature of the phrases."

Mr. Cruz's submissions on EIC's appeal (paras. 15(1)(i) and 15(1)(ii) above)

26 Mr. Cruz submits that if para. 2(d) is given its ordinary and natural meaning, pursuant to the established principles of construction, AIMS would extend to the provision of advice and services of a director. He submits that, given the extent and width of the services which STM was providing EIC, given that AIMS was intended to encompass the entire relationship between the parties and given that the arbitrator found that STM provided directors' services to EIC in the course of its business, para. 2(d) should be construed widely.

27 Mr. Cruz submits that AIMS governs the provision of management services to an insurance company. He refers to recitals 2.1 and 2.2 of AIMS, which provide:

> "2.1 The Management Company is engaged in the business of providing management and administrative services . . .
>
> 2.2 The Insurance Company has agreed to appoint the Management Company its managers and administrators and the Management Company has agreed to provide management and administrative services and generally assist the insurance company in terms and on the conditions contained in this agreement."

Management in that context, he submits, includes the Board of Management and those people who contribute to it such as directors—in fact in his view the role of management of a company is vested in its directors. He submits that on the basis that the arbitrator has found that the directors were provided by STM in the ordinary course of business, and the business in question being insurance management, the directors are part of that business and are caught by para. 2(d).

28 Mr. Cruz submits that the common intention of the parties was for STM to provide an "A–Z" service for EIC, part of that service was to "engage and administer personnel." In his submission, "personnel" refers to an individual employed by STM, and the directors were employed by STM, therefore they qualify as personnel, and this was a service which formed part of the services envisaged by AIMS. In so far as "engage and administer" is concerned, Mr. Cruz submits that the act of administering under para. 2(d) is not inconsistent with the role of a director because it does not detract from any fiduciary duty that the director may owe to EIC. The word "administer," he submits should not be used in the sense of "instruct" or to denote any element of control, for whilst the directors were employed by STM, this was for the purpose of being provided as directors to EIC, the duty was owed to EIC and that duty is not diminished by the fact that they are engaged by STM.

29 The question of provision of advice relates largely to advice given by one of the directors on a business scheme called the EIG Business Incentive Scheme. Mr. Cruz makes scant reference in his oral submissions and in his skeletons on the issue of whether the advice given by the directors falls within the scope of AIMS save to say that the provision of services and advice by the directors should be subject to the same general interpretation.

Mr. Vasquez's reply

30 Mr. Vasquez submits that AIMS is a clearly drafted contract intended by the parties to govern their business relationship which revolves around

the provision by STM to EIC of management services limited to those specified in AIMS. He submits that there is no need for this court to, nor should it give a meaning to words in the contract other than that they ordinarily bear.

31 Mr. Vasquez relies on and endorses the views of the arbitrator, namely:

(i) The words "engage and administer" in para. 2(d) are conjunctive and mean to employ and manage. Directors are not capable of being administered and managed—they owe their duties to EIC.

(ii) STM cannot engage a director, the director would be appointed by EIC, and STM's obligation in this regard would go no further than putting forward individuals who were fit and proper to act as directors.

(iii) The word "personnel" denotes staff, and this is more particularly so when construed in conjunction with the seventh paragraph of the First Schedule which refers to "the salaries of any personnel employed in accordance with para. 2(d) of the Fourth Schedule to this agreement."

(iv) Paragraph 2(d) should not be interpreted in isolation: it sits with a section in the Fourth Schedule that has as its heading "Statutory Returns, etc." Statutory returns are those required to be made by the insurance regulator, evident that para. 2 therefore creates obligation to ensure compliance with regulatory requirements.

(v) Paragraph 6 of the Fourth Schedule makes express and fairly extensive provision for the provision of secretarial services, but a similar provision for the provision of directors' services is absent.

32 In relation to the question of the provision of advice, Mr. Vasquez points out that EIC is unable to identify a single clause, schedule, or paragraph in AIMS to support its contention that advice given by a director in relation to EIG Business Incentive Scheme falls generally within AIMS and specifically under para. 2 of the Fourth Schedule. Mr. Vasquez takes no issue with the fact that advice may have been given in the ordinary course of business but submits that advice—

> "provided in the ordinary course of business does not bring that service within the terms of an agreement that makes no provision for that service to be extended. AIMS has no such provision. The provision of such service was clearly outside the scope of AIMS and consequently within the scope of a separate engagement agreement that does not fall to be considered in this appeal."

Conclusions

Arbitration clause

33 Upon consideration of the arbitration clause, there is no doubt that it is drafted in wide terms. There is a reference to "disputes" as well as "differences." To my mind, differences are often the precursors to disputes, and the fact that both should be included signifies the intention to cover a broad spectrum of the parties' relationship. The fact that the words "differences" and "disputes" are preceded by the word "all" extends the net even further. The clause further extends to all disputes and differences arising not only during the term, but afterwards. The use of the words "subject matter" suggests an extension of the catchment area of the clause beyond the terms of the AIMS. The question is, notwithstanding the wide construction of the clause, whether its reach be nevertheless curtailed to "the context of the parties' relationship under AIMS." In my view the answer to that question is "Yes."

34 The use of words in the arbitration clause such as "attaching," "concerning," "connected" and "arising out of" are by their very nature and definition, words which propound the notion of joining and which necessarily conjure some coherent linkage between themselves and the context in which they are used. I agree with Mr. Vasquez that they are suggestive of a nexus to AIMS having been envisaged, and when they are read in the context of the arbitration clause as a whole, it is apparent that the presence of such a nexus was intended. The arbitrator was right to hold that the arbitration clause should be widely constructed with the proviso that reference to "subject matter" should be within the context of the parties' relationship under AIMS.

35 I turn now to consider whether the words "or otherwise" are independent of the arbitration clause. Let me say straight away that I approach this issue from the premise that the arbitration clause is an integral part of AIMS, further, given the specificity with which AIMS defines the relationship between the parties, the arbitration clause should not in my view, be divorced from the agreement which gives rise to it. AIMS, is not a general contract governing a wide range of issues and relationships between the parties, but a specific contract relating to the provision of insurance management services. I am persuaded that a word or phrase must take its meaning from the context in which it is found.

36 The fact that "or otherwise" sits in the middle of the arbitration clause is of some relevance. I do not ignore that there may be some merit in Mr. Cruz's submission that because the reach of the clause is so specifically defined, the words "or otherwise" can only extend the ambit of the clause further and result in making the phrase "or otherwise" independent. However the fact that the words "or otherwise" are general by nature and precede the words "rights" "duties" and "liabilities" of the

parties does not mean they are not limited by the subject matter of the agreement as a whole. To attribute a larger meaning to them would in my view pauperize any connection between AIMS and the arbitration clause and make redundant the specific detail already existent in the clause.

37 The phrase "or otherwise" is immediately preceded by the phrase "under or by virtue of [the agreement]." To my mind, the phrase "under or by virtue of it" refers to the agreement in the strict sense of the word, that is, it strictly confines it to its terms. The words "or otherwise" must extend the application of disputes/differences beyond those strict confines. However, because they are followed by a reference to "subject matter," which has a broader reach than "terms," it is my view that the words "or otherwise" were intended to reach beyond the strict confines of terms of the agreement, but not beyond its subject matter and therefore it is only to the extent that the subject matter relates to the agreement that any dispute or difference can be caught by it. They are not in my view independent. The very architecture of the arbitration clause is in its configuration demanding of a nexus between the dispute and the agreement, and that should not be ignored, even at the expense of the more timely and cost effective option of arbitration, being removed from the equation.

38 I take no issue with Mr. Cruz's exposition of the law that according to the established principles of construction a document should be construed in favour of the party who did not draft it (and that because EIC did not draft AIMS it should be construed in its favour). However the proviso to that principle is that it should "only be applied to remove (and not to create) a doubt or ambiguity and . . . where the issue cannot otherwise be resolved by the application of ordinary principles of construction" (*Chitty on Contracts*, 30th ed., at para. 12–083 (2008)). The application of such ordinary principles of construction results not in the creation of doubt, but rather in the conviction that the meaning of AIMS and this clause in particular needs no protracted interpretation.

Provision by a director of advice and services

39 Whilst Mr. Cruz submits that AIMS was intended to encompass the entire relationship between the parties, upon the facts before me I find that description a little too generous. In my view, the most that can be said is that AIMS was intended to encompass the entire relationship between the parties as defined under AIMS. Clause 5.1 of AIMS states that: "The Insurance Company appoints the Management Company to provide it with the services for the term. " Recital 3.11 defines services as "the services specified in the Fourth Schedule relating to the Insurance Company's business of underwriting licensed classes of insurance." The Fourth Schedule, headed "Services," lists and defines six categories of services as:

(1) Financial Services

(2) Statutory Returns, etc.

(3) Tax Returns

(4) Investments

(5) Management Reports

(6) Secretarial

Had the issue of services not been so specifically defined and described, there might have been some merit in the argument that the provision of services, generally defined, included the provision of services of a director. In reality, however, despite the fairly detailed list and definition of services, the services of directors do not feature. This suggests to me that they were not intended to feature.

40 I find this to be particularly so in light of the submissions advanced by Mr. Vasquez and accepted by the arbitrator regarding cl. 6 of the Fourth Schedule. That clause starts off by stating: "The Management Company shall provide an officer to act as company secretary" and goes on to define the secretarial services to be provided. The arbitrator said this:

> "I accept Mr. Vasquez's point that express provision was made in relatively extensive terms in para. 6 of the Fourth Schedule for the provision of secretarial services and that this highlights and contrasts with the omission of provision regarding directors' service. Mr. Joffe's response to this point is that it was necessary to deal separately with the secretary because it was necessary to list the most important functions of the secretary in the schedule, to make sure those tasks were catered for. A director's functions are not so required, in the sense that his role is less capable of definition. I do not accept that explanation. If anything, it is more important than defining the secretary's role to set out the terms on which directors' services would be provided given the serious responsibility that the latter entails. If it had not been considered necessary to make provision in respect of the services of a director because it was covered by para. 2(d), why was an identical view not taken in respect of secretarial services? The omission to make provision in respect of directors similar to the provision made relating to secretarial services reinforces my view that on its true construction AIMS does not encompass the provision of directors' services."

I can add nothing to that reasoning which is in my view both logical and sound.

41 Mr. Cruz relies (although not exclusively) on cl. 2(d) as the portal through which the provision of directors' services enters the field of

reference of AIMS. It is of relevance that s.2 is headed "Statutory Returns," because instantly this suggests a domain not of a directorial nature but rather of an administrative nature. Much has been said about the phrase "engage and administer such personnel," which I shall come to in a moment, but it is pertinent that that phrase is immediately preceded by the words "Maintain such registered and principal offices and . . ." The word "and" is undoubtedly conjunctive, and thus ties in the engagement and administration of personnel with the maintenance of the registered and principal office again in my view suggestive of administrative services.

42 In so far as the words "engage and administer personnel" are concerned, they provide further insight into the reach of the clause. When considering these words I attribute to them their ordinary and natural meaning, as demanded by well-rehearsed principles of the construction of contracts. These are common words of ordinary usage and no greater or wider meaning need be conferred upon them, in fact, when taken in the context of the clause and document in which they appear, their meaning leaves little room for doubt.

43 The ordinary and natural meaning of "engage and administer" is in my view that attributed by the arbitrator, *i.e*. to employ and manage, and trite the concept that directors cannot be employed or managed. To contend as Mr. Cruz does that the word "administer" denotes no element of control is to detract from its ordinary meaning.

44 The words "engage and administer" are followed by a reference to "personnel." Mr. Cruz submits that because the directors are employed by STM they qualify as personnel. The flaw in this argument in my view, is, that the directors were not employed by STM in the proper sense of the word, they are, as found by the arbitrator, "provided by STM," and this is not the same thing. They owe no duty of care to STM but as the arbitrator found "they owe their duties to the company on whose board they serve," and importantly they are appointed not by STM but by that company. That "personnel" is intended to refer to employed staff as distinct from directors is reinforced by the reference to personnel at para. 7 of the First Schedule, which reads: "The salaries of any personnel employed in accordance with para. 2(d) of the Fourth Schedule to this agreement." It is apparent that the reference to "personnel" in para. 7 ties in to the reference to personnel at para. 2(d), and in view of the fact that the reference in para. 7 relates to salaried employed personnel, I am in no doubt that "personnel" in para. 2(d) does not include directors.

45 I do not deal with the provision of advice specifically, because I agree with Mr. Cruz that the provision of advice is subject to the same general interpretation as that applied to the provision of services.

46 Having determined that the provision of advice and services is not caught by AIMS, I must nevertheless consider whether in light of my

finding that the arbitration clause should be given a wide interpretation, its scope is wide enough to catch the provision of services and advice by directors. In my view it is not. The role and function of a director in a company is so intrinsically separate and different from any other administrative role therein, that there is insufficient nexus to connect it to AIMS. It is not inconsequential also that AIMS excludes from its definition of "Insurance Management Services," any reference to directors, this in my view this supports my conclusion that the arbitration clause does not extend to the provision of advice by or services of a director.

47 Finally, there is one last issue with which I need to deal. I am cognizant of the fact that this is an appeal by way of case stated. It is incumbent upon me, therefore, to accept the findings of fact as determined by the arbitrator, and to restrict the matters under consideration to those questions of law raised by the arbitrator as reflected in para. 20 herein. Mr. Vasquez raises the issue that because throughout EIC has not defended the claims but has relied on its entitlement to set off the amounts that it claims are owed, there is no dispute or difference between the parties which requires arbitration. I agree with Mr. Cruz that this issue is irrelevant to this appeal which must be confined to the case stated by the arbitrator. Similarly, although there has been some reference in submissions as to whether the arbitrator had jurisdiction to consider or allow EIC to amend its particulars of claim and as to whether AIMS has been varied by the subsequent conduct of the parties, for similar reasons I do not determine those points.

Orders accordingly.