Neutral Citation Number: [2010] EWCA Civ 712

Case No: A2/2009/1963

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
(Mr. Justice David Steel)
[2009] EWHC 1364 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 June 2010

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE AIKENS
and
SIR RICHARD BUXTON

- -

Between :	
NURDIN JIVRAJ	**Claimant/ Respondent**
- and -	
SADRUDDIN HASHWANI	**Defendant/ Appellant**
and between :	
SADRUDDIN HASHWANI	**Claimant/ Appellant**
- and -	
NURDIN JIVRAJ	**Defendant/ Respondent**

- -
- -

Mr. Michael Brindle Q.C. and Mr. Brian Dye (instructed by **Zaiwalla & Co**) for **Mr. Hashwani**
Mr. Rhodri Davis Q.C. and Miss Shona Jolly (instructed by **Hill Dickinson LLP**) for **Mr. Jivraj**

Hearing dates : 2nd March 2010

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Judgment

Lord Justice Moore-Bick :

1. This is the judgment of the court to which all its members have contributed.

The issue in this case

2. The question that arises in this appeal is whether parties to an arbitration agreement in a commercial contract can stipulate that the tribunal is to be drawn from members of a particular religious group, in this case the Ismaili community. In January 1981 the appellant, Mr. Nurdin Jivraj, and the respondent, Mr. Sadruddin Hashwani, entered into a joint venture agreement for investment in real estate in various parts of the world, initially Canada and subsequently elsewhere. Article 8 of the contract provided, so far as material, as follows:

> "(1) If any dispute difference or question shall at any time hereafter arise between the investors with respect to the construction of this agreement or concerning anything herein contained or arising out of this agreement or as to the rights liabilities or duties of the investors or either of them or arising out of (without limitation) any of the businesses or activities of the joint venture herein agreed the same (subject to sub-clause 8(5) below) shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the H.H. Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.
>
> (2) The arbitration shall take place in London and the arbitrators' award shall be final and binding on both parties."

3. In 1988 the parties decided to terminate their venture. They appointed three members of the Ismaili community as a conciliation panel to assist them in dividing the assets, but certain matters remained unresolved and an attempt to resolve their remaining differences by means of an ad hoc arbitration came to nothing. The matter then fell into abeyance until July 2008 when solicitors acting for Mr. Hashwani wrote to Mr Jivraj putting forward a claim for £1,412,494, together with interest compounded quarterly from 31 May 1994, and notifying him of the appointment of Sir Anthony Colman as arbitrator under Article 8 of the agreement. They called on Mr. Jivraj to appoint an arbitrator within 7 days.

4. Mr. Jivraj's response was to start proceedings in the Commercial Court (2008 Folio 1028) seeking a declaration that the appointment of Sir Anthony was invalid because he is not a member of the Ismaili community. Six weeks later Mr. Hashwani issued an arbitration claim form (2008 Folio 1182) seeking an order that Sir Anthony be appointed sole arbitrator pursuant to section 18(2) of the Arbitration Act 1996. The application was made on the basis that the requirement that the arbitrators be

members of the Ismaili community, although lawful when the agreement was made, had been rendered unlawful and was void because it contravened the Employment Equality (Religion and Belief) Regulations 2003 ("the Regulations"). Mr. Hashwani also sought to rely on the Human Rights Act 1998 and public policy in support of his case.

Domestic and EU legislation on discrimination in employment

5. The Regulations provide, so far as is material, as follows:

> "**2.— Interpretation**
>
> . . .
>
> (3) In these Regulations –
>
> references to "employer", in their application to a person at any time seeking to employ another, include a person who has no employees at that time;
>
> "employment" means employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions shall be construed accordingly;
>
> . . .
>
> **3.— Discrimination on grounds of religion or belief**
>
> (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if –
>
> (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons;
>
> . . .
>
> **6.— Applicants and employees**
>
> (1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person –
>
> (a) in the arrangements he makes for the purpose of determining to whom he should offer employment; or
>
> (b) in the terms on which he offers that person employment; or
>
> (c) by refusing to offer, or deliberately not offering, him employment.
>
> . . .

> **7.— Exception for genuine occupational requirement**
>
> (1) In relation to discrimination falling within regulation 3 (discrimination on grounds of religion or belief) –
>
> (a) regulation 6(1)(a) or (c) does not apply to any employment . . .
>
> where paragraph . . . (3) applies.
>
> . . .
>
> (3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out—
>
> (a) being of a particular religion or belief is a genuine occupational requirement for the job;
>
> (b) it is proportionate to apply that requirement in the particular case; and
>
> (c) either—
>
> (i) the person to whom that requirement is applied does not meet it, or
>
> (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

6. The Regulations were made to give effect to Council Directive 2000/78/EC, which established a general framework for equal treatment in employment and occupation. It was common ground, therefore, that they are to be construed as far as possible in a way that gives effect to the objective of the Directive: see *Marleasing S.A. v La Comercial Internationale de Alimentacion S.A.* [1990] ECR I-4135. A striking example of the lengths to which the court may go in giving effect to that principle is to be found in *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 A.C. 546. It was also common ground that, although the arbitration agreement was on any view lawful when it was made, it is now subject to the provisions of the Regulations.

7. It is unnecessary in our view to refer in detail to the recitals to the Directive, save to note that in them its objects are expressed in very wide terms which suggest that its purpose is to prohibit discrimination wherever it exists in relation to employment and occupation and in whatever form. The provisions of most relevance to the present appeal are to be found Articles 1 to 3, the material parts of which provide as follows:

> "*Article 1*
>
> **Purpose**

> The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
>
> *Article 2*
>
> **Concept of discrimination**
>
> 1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
>
> . . .
>
> *Article 3*
>
> **Scope**
>
> 1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
>
> (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
>
> (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
>
> (c) employment and working conditions, including dismissals and pay;
>
> (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations."

8. The Directive is concerned with discrimination on the grounds of religion or belief, disability, age or sexual orientation. It is therefore much wider in its scope than the Regulations, which are concerned only with discrimination on the grounds of religion or belief. The explanation lies in the fact that the United Kingdom had already introduced legislation dealing with discrimination on most of the other grounds covered by the Directive in connection with employment and occupation. Discrimination on the grounds of sex and sexual orientation was rendered unlawful by

the Sex Discrimination Act 1975, discrimination on the grounds of race by the Race Relations Acts 1968 and 1976 and discrimination on the grounds of disability by the Disability Discrimination Act 1995. Legislation dealing with discrimination on the grounds of age and religion or belief was still required to ensure compliance with the Directive. The Regulations deal with discrimination on the grounds of religion or belief and discrimination on the grounds of age is now covered by the Employment Equality (Age) Regulations 2006.

9. The form of the Regulations follows closely that of the earlier legislation, in particular in defining "employment" as including a contract personally to do work of any kind. Moreover, the language of regulation 6 is identical to, or differs in no significant respect from, that used in the other legislation dealing with discrimination. It follows that the Regulations must be understood as complementing all the other legislation prohibiting discrimination and that accordingly our decision has a far wider significance than the present case. This uniformity of the law relating to all the areas in which discrimination is forbidden has now been reinforced by the Equality Act 2010, chapter l of which will, when brought into force, extend its provisions to all of the cases protected by the earlier legislation.

The decision of Steel J and the appeal to this court

10. The applications were heard together before David Steel J. He held that the Regulations do not apply to arbitrators because they are not employees and that there is nothing in the Human Rights Act or public policy that renders the requirement that the arbitrators should be members of the Ismaili community void or unenforceable. He therefore granted a declaration that the appointment of Sir Anthony Colman was invalid and dismissed Mr. Hashwani's claim. In the course of his judgment he also expressed the view that, even if the Regulations did apply, this was a case which fell within the exception in regulation 7, which provides for the case where being of a particular religion or belief is a genuine occupational requirement. Finally, he expressed the view that the requirement that the arbitrators be members of the Ismaili community could not be severed from the rest of the clause and that, if it was void, the arbitration clause as a whole was void.

11. The judge himself refused permission to appeal, but permission was granted by this court in relation to the following three issues:

(i) whether the requirement that the arbitrators be members of the Ismaili community falls within regulation 6(1); if so,

(ii) whether it also falls within regulation 7; and if not,

(iii) whether it can be severed from the rest of the clause.

Permission was refused on the papers in relation to the claims under the Human Rights Act, and those applications were not renewed.

Are arbitrators "employees" in the terms of the Regulations?

12. The first question for consideration is whether the Regulations apply to arbitrators at all. The judge held that they do not. He considered that there was nothing in the

Directive which prohibited discrimination in the engagement of a person to provide personal services or work otherwise than as an employee and held that, whatever its precise nature, the relationship between an arbitrator and the parties to the dispute is not one of a contract of employment, either in the conventional sense or within the meaning of the Regulations. In reaching that conclusion he was influenced by the nature of the arbitrator's role, which he likened to that of a judge, and by the fact that judges, magistrates and those in similar positions are not normally regarded as employees. He relied on *Knight v A-G* [1979] I.C.R. 194 (magistrates), *Perceval Price v Department of Economic Development* [2000] IRLR 380 (tribunal chairmen) and *Department for Constitutional Affairs v O'Brien* [2008] EWCA Civ 1448 (unreported) (Recorders) as supporting that conclusion.

13. Mr. Brindle Q.C. submitted that the judge concentrated too much on the nature of the arbitrator's position and failed to recognise that the Directive and the Regulations are intended to apply to all forms of employment in the broadest sense, including the provision of services under any form of contract. He submitted that the Regulations apply to the appointment of an arbitrator, because a person who appoints another to act in that capacity employs that person to provide a service. "Employment" for these purposes is defined in the Regulations as including any contract personally to do any work and "work" in this context is apt to cover the provision of services of any kind. He submitted that the precise nature of the relationship between the arbitrator and the parties to the dispute is irrelevant; all that matters is that it arises out of a contract under which the arbitrator agrees to determine the dispute referred to him.

14. We agree with those submissions. Whatever may be the correct analysis of the nature of that relationship, it must be a very rare case in which it is not supported by a contract of some kind. Typically an arbitrator expects to be paid for his services and we doubt very much whether his right to recover his fees can be supported otherwise than on the basis that a contract has come into existence between him and each of the parties. That has certainly been the accepted view hitherto: see *K/s Norjarl A/s v Hyundai Heavy Industries Co Ltd* [1991] 1 Lloyd's Rep. 524, to which the judge referred. That is not to say that when he enters into the reference an arbitrator does not take on a particular status which determines some aspects of his powers and duties see *Mustill & Boyd, Commercial Arbitration*, 2nd ed., page 220; *Companion Volume*, page 60. However, in most cases he assumes that status only as a result of entering into a contract to do so. Exactly when and how that contract comes into existence is an interesting question, but not one that it is necessary to examine further for the purpose of this appeal. It has been said that members of the Ismaili community do not seek or accept remuneration for acting as arbitrators, but, even if that is correct, we doubt whether it means that there is no contract of any kind between the arbitrator and the parties. Arbitration rests fundamentally on agreement, both agreement between the parties themselves and agreement between the parties and the arbitrator (what Sir Nicholas Browne- Wilkinson V.-C. described in *K/s Norjarl A/s v Hyundai Heavy Industries Co Ltd* as a 'trilateral contract'). It is not difficult to identify consideration of a kind sufficient to support a contract passing from each party to the others.

The scope of the Directive and of the Regulations as applied to this case

15. Article 1 of the Directive identifies its purpose as being to combat discrimination as regards employment and occupation ("*travail*" in the French text). Its scope is defined by Article 3 which refers to conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, whatever the branch of activity. It also extends to access to all types of vocational guidance and training, employment and working conditions and membership of trade unions and professional associations. Our attention was not drawn to any case in which the meaning of Article 3 has been considered by the Court of Justice of the European Union and accordingly we think it is to be interpreted in the light of the recitals and given its natural meaning consistent with the Treaty and the existing case law of the court. The recitals to the Directive and the structure and language of Article 3(1) as a whole indicate that it is concerned with discrimination affecting access to the means of economic activity, whether through employment, self-employment or some other basis of occupation, access to vocational guidance and training (which can be expected to provide a means of access to economic activity), conditions of employment (which affect those who have gained access to a means of economic activity) and membership of bodies whose purpose is to affect conditions of recruitment or employment or to regulate access to a particular form of economic activity, such as professional bodies that directly or indirectly control access to the profession or a significant means of obtaining work.

16. The paradigm case of appointing an arbitrator involves obtaining the services of a particular person to determine a dispute in accordance with the agreement between the parties and the rules of law, including those to be found in the legislation governing arbitration. In that respect it is no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, consulting a doctor about a particular ailment or an accountant about a tax return. Since an arbitrator (or any professional person) contracts to do work personally, the provision of his services falls within the definition of "employment", and it follows that his appointor must be an employer within the meaning of Regulation 6(1). Mr Brindle reinforced that conclusion by drawing our attention to the fact that arbitrators have been treated as providing services: see *von Hoffmann v Finanzamt Trier* (Case C-145/96) [1998] 1 C.M.L.R. 99 (Value Added Tax) and domestic legislation relating to the supply of goods and services.

17. Mr Brindle further drew our attention to *Kelly v Northern Ireland Housing Executive* [1999] 1 A.C. 428 and *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, [2006] IRLR 195, which, although addressing slightly different points from the present proceedings, illustrate the width of the expression "a contract personally to do any work" which is found throughout the legislation prohibiting discrimination. They confirm our view that the expression is apt to encompass the position of a person who provides services as an arbitrator, and why we think the judge was wrong to hold that the nature of the arbitrator's function takes his appointment outside the scope of the Regulations. Moreover, a contract of that kind, once made, is a contract of employment within the meaning of the Regulations. It follows, therefore, that for the purposes of the Regulations a person who has entered into a contract under which he is to obtain such services is an employer and that the person engaged to provide them is an employee.

Is discrimination permitted in respect of private hirings or when directed at the self-employed?

18. Mr. Davis contended that these conclusions do not follow in the present case for two reasons. First, he submitted that regulation 6 as a whole has no application to the mere selection from among those offering their services to the market at large of a particular person to provide services of the kind required; in short, that an arbitrator is not an "employee" within the meaning of the regulation, any more than any other person who offers his services to the public. This submission, if correct, is of very wide significance.

19. That the choice of a solicitor, plumber or arbitrator, whether on religious, racial or any other grounds, should fall foul of regulation 6(1), even if made entirely privately, may strike some people as surprising. However, in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* (Case C-54/07) [2008] I.C.R. 1390 Advocate General Maduro expressed the opinion that the Directive must be understood in the framework of a wider policy to foster conditions for a socially inclusive labour market and to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin. That case arose out of a statement by a company that supplied and fitted up-and-over garage doors that it would not employ immigrants as fitters because its customers were unwilling to have them in their homes. One can well see why a public statement of that kind might be regarded as discriminatory: it was liable to deter potential applicants for employment and thereby militate against a socially inclusive labour market. The court itself did not expressly adopt the Advocate General's expression of opinion; rather it confined itself to holding that a general statement of the kind under consideration constituted direct discrimination because it was likely to deter some potential applicants and thus hinder their access to the labour market (paragraph 25). Nonetheless, the Advocate General's view of the broad policy objective of the Directive is in our opinion supported by the recitals. It is also one which is essentially incompatible with an acceptance of the right to discriminate between any providers of services on the basis of race, sex, religion or any of the other grounds covered by the Directive.

20. Mr. Davis sought to meet that broad analysis by saying that the primary concern of the Directive is access to employment and economic activity, not private choices by consumers between those who have already gained access to the market. The language of Article 3 could be construed in that more limited way, but the expression "access to employment, to self-employment or to occupation" is capable of a broader interpretation consistent with the policy objectives we have described. In any event, we are concerned with the language of domestic legislation, which is not restricted by the scope of the Directive and which is underpinned by broadly the same policy considerations as those identified by Advocate General Maduro in the *Firma Feryn* case, whether it was introduced before or after the publication of the Directive.

21. Second, Mr. Davis submitted that the critical distinction for the purposes of regulation 6 is between those who are employed and those who are self-employed, arbitrators falling clearly on the side of the self-employed. In support of that submission he relied on a passage in the speech of Baroness Hale in *Percy v Church*

of Scotland Board of National Mission (supra, at paragraph 16), in paragraph 146 of which Baroness Hale of Richmond appears to endorse a comment in paragraph A[4] of *Harvey on Industrial Relations and Employment Law* to that effect. However, we do not think that it provides the assistance that Mr. Davis sought to gain from it. The issue before the House in that case was whether Ms Percy was "employed" for the purposes of the Sex Discrimination Act 1975, in which, as in the Regulations, "employment" is defined as including a contract personally to execute any work or labour. We think it is clear from the context that what Lady Hale had in mind was the distinction between those who are "self-employed", in the sense that they have complete control over their working arrangements, and those who are "employees", in the broad sense that their working arrangements are controlled to a greater or lesser extent by others. Judges, for example, are to be regarded as employees in that broad sense because their pattern of working is dictated to a considerable degree by others, although in nearly all other respects their position is very similar to that of the self-employed. Persons in that position, as was the case with Ms Percy, although not employees by ordinary standards, are engaged under a contract personally to carry out work of a particular kind. Accordingly, we are unable to accept this part of Mr. Davis's submissions.

The application of regulation 6(1) to the present case

22. We turn next to consider how regulation 6(1) applies in the present case and in particular to whether the selection of an arbitrator in accordance with Article 8(1) of the agreement falls within the scope of the regulation. It was not suggested that paragraph (1)(b) applies in this case, but paragraphs (1)(a) and (1)(c) are potentially relevant.

23. The word "arrangements" in paragraph (1)(a) has been construed widely, as can be seen from *Brennan v J.H. Dewhurst Ltd* [1984] I.C.R. 52, in which the conduct of an interview was held to fall within its scope. The appointment of a person to act as arbitrator creates a contract between that person and both parties to the dispute and it follows, in our view, that an arbitration agreement constitutes "arrangements" made by both parties for the appointment of one or more arbitrators which, depending on its terms, may restrict the class of those to whom they are able to offer employment.

24. Article 8(1) of the agreement requires both parties to refuse, or deliberately omit, to offer employment as arbitrator to any person who is not a member of the Ismaili community. In our view the language of regulation 6(1)(c) ("refusing to offer, or deliberately not offering, him employment") is entirely apt to cover the case in which a person, on purely religious grounds, deliberately avoids offering the work in question to a person whom he believes is willing and able to do it. Accordingly, we consider that to comply with the terms of Article 8(1) would be to act contrary to regulation 6(1)(c). One consequence of this conclusion may be that, in theory at any rate, the number of potential complainants may in some cases be very large; but in practice few, if any, of those who were willing and able to offer their services, and who may therefore have suffered from unlawful discrimination, are likely to become aware of the fact; and the policy behind the Regulations is that those who do and have suffered prejudice as a result should have a remedy. We think that that analysis is supported by the obiter observations of this court in paragraph 51 of its judgment in *Lord Chancellor v Coker* [2002] ICR 321.

Conclusion as to the scope of the Regulations in this case

25. For all these reasons we do not think that the Regulations can be interpreted in way that excludes from their ambit private discrimination of that kind under consideration.

26. Paragraph 1(1) of schedule 4 to the Regulations provides that a term of a contract is void where the making of the contract is, by reason of the inclusion of the term, unlawful by virtue of the Regulations or where the contract provides for the doing of an act which is unlawful by virtue of the Regulations. In our view, because the last sentence of clause 8(1) offends both regulation 6(1)(a) and 6(1)(c), it is void unless it can be brought within regulation 7.

Regulation 7

27. Mr. Davis sought to rely on sub-paragraph (3) of regulation 7, arguing that, as an Ismaili, Mr. Jivraj has a particular ethos based on religion or belief and that, having regard to the nature of the arbitrator's function, being an Ismaili is a genuine occupational requirement for appointment which it is proportionate to apply and which no one other than an Ismaili can meet.

28. The judge accepted that argument. He held that a strict approach must be adopted when considering whether the exception applies. Having considered the history and development of the Ismaili community, he held that one of its more significant and characteristic spirits is an enthusiasm for dispute resolution contained within the Ismaili community. He had no difficulty in finding that that spirit was an "ethos based on religion" within the meaning of regulation 7(3).

29. The judge's findings about the nature and ethos of the Ismaili community were not challenged, but in our view he failed to pay sufficient regard to the other requirements of regulation 7(3), in particular, to whether, having regard to the ethos of that community and nature of the arbitrator's function, being an Ismaili was a genuine occupational requirement for its proper discharge. If the arbitration clause had empowered the tribunal to act ex aequo et bono it might have been possible to show that only an Ismaili could be expected to apply the moral principles and understanding of justice and fairness that are generally recognised within that community as applicable between its members, but the arbitrators' function under clause 8 is to determine the dispute between the parties in accordance with the principles of English law. That requires some knowledge of the law itself, including the provisions of the Arbitration Act 1996, and an ability to conduct the proceedings fairly in accordance with the rules of natural justice, but it does not call for any particular ethos. Membership of the Ismaili community is clearly not necessary for the discharge of the arbitrator's functions under an agreement of this kind and we are unable to accept, therefore, that the exception provided in regulation 7 can be invoked in this case.

30. It follows that the final sentence of clause 8(1) of the contract offends against the Regulations and is void.

Severance

31. The question then arises whether it is possible to sever the requirement that the arbitrators be members of the Ismaili community, leaving the arbitration clause

otherwise intact, or whether the clause fails in its entirety. It was common ground that the arbitration clause is to be regarded as a contract separate from, albeit ancillary to, the joint venture agreement itself. It was also common ground that the final sentence of clause 8(1) could be struck out without rendering the remainder unworkable. Severance of part of a clause in that way is possible, however, only if it does not render that which remains substantially different from that which the parties originally intended: see *Marshall v NM Financial Management Ltd* [1995] 1 W.L.R. 1461, [1997] 1 W.L.R. 1527. If it does, the clause must stand or fall as a whole. The question, therefore, is whether in the context of this case an arbitration agreement which does not require the arbitrators to be members of the Ismaili community is fundamentally different from one that does.

32. The judge held the clause could not survive in its amended form, because it involved an agreement on carefully structured terms to forgo the right to have disputes determined by the courts and that to remove the last sentence would amount to re-writing that agreement. He expressed the view that the choice of arbitration as a method of resolving disputes involves a wide range of considerations, including privacy, rights of appeal, cost, the size of the tribunal and the ability to determine how it is to be constituted. He considered that the removal of the requirement that the arbitrators be drawn from members of the Ismaili community, with its potential significantly to increase the costs of the proceedings, would render the whole process fundamentally different from that which had originally been contemplated.

33. Mr. Davis effectively adopted the judge's reasoning, but Mr. Brindle submitted that the judge's view was wrong and that the arbitration agreement could work perfectly well without the restriction. Mr. Hashwani could appoint an arbitrator of his choice; if Mr. Jivraj wanted to appoint a member of the Ismaili community he would be free to do so and the third member of the tribunal would be an Ismaili in any event, since no one was seeking to challenge the contractual appointment of the third arbitrator. One might add (although Mr. Brindle did not expressly make the point) that costs would be a matter for the tribunal who would have the power to decide how much of his costs Mr. Hashwani should be entitled to recover, if he were successful.

34. Although there would be no difficulty in operating the arbitration agreement if the final sentence were struck out, we think the judge was right to hold that it would render the agreement substantially different from that which had originally been intended. Parties may agree to refer disputes to arbitration for a variety of reasons and different factors may weigh more or less heavily with each of them. Privacy is often a motivating factor, but the ability to influence the composition of the tribunal through the appointment of one of its members is often viewed as of fundamental importance. Equally, the ability to restrict appointment to persons who are considered to have specific experience or qualifications may be critical in obtaining the agreement of one or other party to arbitration. Although from a purely objective point of view such experience or qualifications may not be required for the fair and effective resolution of disputes, the parties' own view of the matter is entitled to respect. In this case they stipulated that the arbitrators should be drawn from the Ismaili community and no doubt considered that they had good reason for doing so. In our view that choice is to be seen as an integral part of the agreement to arbitrate and not one that can be disregarded as being of no real significance. We therefore agree with the judge that

clause 8(1) stands or falls as a whole and that if the final sentence is void, the remainder of the clause cannot stand.

Conclusion

35. For these reasons we have reached the conclusion that clause 8(1) of the joint venture agreement is void in its entirety and that the appeal must be allowed to the extent of setting aside the first declaration made by the judge. It follows from what we have said in paragraphs 31 to 34 of this judgment that the declaration that the nomination by Mr. Hashwani of Sir Anthony Colman as an arbitrator is invalid must be affirmed.