Neutral Citation Number: [2011] EWHC 715 (Comm)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2011

Before :

MR JUSTICE ANDREW SMITH

- -

Claim no: 2005 Folio 534

Between:

Fiona Trust & Holding Corporation and 75 ors.	**Claimants**
- and -	
Yuri Privalov and 28 ors.	**Defendants**

And in the part 20 proceedings between:

Yuri Nikitin and anr.	**Pt. 20 Claimants**
and	
H. Clarkson & Company Ltd	**Pt. 20 Defendants**

Claim no: 2007 Folio 482

And between:

Intrigue Shipping Inc. and 50 ors.	**Claimants**
and	
H. Clarkson & Company Ltd. and 8 ors.	**Defendants**

And in the part 20 proceedings between:

Yuri Nikitin and anr.	**Pt. 20 Claimants**
and	
H. Clarkson and Company Ltd.	**Pt. 20 Defendants**

Claim no: 2009 Folio 91

And between:

Fiona Trust & Holding Corp. and 9 ors.	**Claimants**
and	
Dmitri Skarga and 3 ors.	**Defendants**

Claim no: 2009 Folio 281

And between:

Southbank Navigation Ltd. and 6 ors.	**Claimants**
and	
H. Clarkson and Company Ltd.	**Defendants**

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Jern-Fei Ng
(instructed by Stephenson Harwood) for **Mr. Tagir Izmaylov**

John Odgers and Ian Wilson
(instructed by CMS Cameron McKenna LLP) for **H. Clarkson & Company Ltd**.

Hearing dates: 24, 25 and 28 February 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW SMITH

Mr Justice Andrew Smith :

1. This judgment is supplemental to my judgment of 10 December 2010 ("the main judgment"), and I use the same definitions and abbreviations. It concerns in particular the claims in the Fiona action based on the contention that Mr. Nikitin (or his companies) bribed Mr. Skarga. In a draft notice of appeal the claimants seek permission to appeal inter alia on these grounds:

> "The Learned Judge wrongly recorded in paragraphs 5, 74, 1386, 1434 and 1488 of the Judgment that the Claimants' claims were pursued only on the basis that Mr. Skarga had acted dishonestly in relation to the transactions, and all the allegations of bribery added to the other claims was a presumption of influence where dishonesty in relation to a transaction had been established.
>
> "As a result of that error, and as a result of his incorrect conclusion that the law governing the claims was Russian law, the Learned Judge did not expressly consider whether Mr. Skarga and Mr. Nikitin had been dishonest in relation to the bribery"

2. The respondents to the application, Mr. Skarga, Mr. Nikitin and the Standard Maritime defendants, submitted that I should provide supplementary reasons and findings as to whether Mr. Skarga and Mr. Nikitin had been dishonest in relation to the bribery, and also to clarify para 178 of the main judgment, which concerns the applicable law. The claimants agreed that it is open to me to do so, but adopted a neutral position as to whether I should take this course. Although I do not consider that in the main judgment I did misunderstand how the claims, including those of bribery, were presented at the trial, I shall adopt the course urged by the respondents. It seems to me that recommended by the Court of Appeal in English v Emery Reimbold and Strick Ltd., [2002] EWCA Civ. 605 at para 25: and see the White Book, Vol 1, 40.2.1C.

3. I also give more extensive reasons than is usual for refusing permission to appeal against the main judgment because of its length. I hope that, by identifying the passages in it relevant to the points raised by the applicants for permission, I might assist others considering the applications. To identify the applications I shall state the number of paragraphs and pages of the notices:

   i) The claimants' notice in the Fiona actions has 15 paragraphs on 10 pages. (The claimants do not seek to appeal in the Intrigue action)

   ii) The notice of Mr. Nikitin and the Standard Maritime defendants in the Fiona action, the Intrigue action and the Second Fiona action has 58 paragraphs on 23 pages.

   iii) The notice of Mr. Nikitin and Milmont in the Part 20 proceedings in the Fiona action and the Intrigue action has 8 paragraphs on 9 pages.

iv) The notice of the claimants in the Southbank proceedings has 5 paragraphs on 2 pages.

I consider that none of the proposed appeals stands a real prospect of success, and there is no other compelling reason for an appeal to be heard.

Supplementary reasons about dishonest bribes

4. As I recorded in para 5 of the main judgment, the claimants made it clear at the start of the trial that the claims were pursued against the defendants on the basis that they had been dishonest and on no other basis. Further, as I understood it, the claimants pursued their claims against Mr. Skarga only on the basis that he had been dishonest *in relation to the transactions* which they impugned, and they pursued their claims other than the commission claims against Mr. Nikitin and the Standard Maritime defendants only on the basis that Mr. Skarga and Mr. Nikitin had both been dishonest *in relation to the impugned transactions*. They might have been dishonest in relation to a transaction either (i) because in relation to it Mr. Skarga dishonestly acted against the interests of Sovcomflot (or a Sovcomflot company) or in order to favour Mr. Nikitin (or one of his companies), and Mr. Nikitin dishonestly assisted him in this, or (ii) because Mr. Skarga knew that, having received bribes from Mr. Nikitin, he could not honestly deal with Mr. Nikitin on the transaction without making disclosure to his principals, and Mr. Nikitin dishonestly participated in the transaction in these circumstances. Hence, in various paragraphs of the main judgment, to which the claimants refer in their draft notice of appeal, I refer to the claimants pursuing the case on the basis that Mr. Skarga and Mr. Nikitin were dishonest in relation to the transactions. I rejected that case because the claimants did not establish that Mr. Skarga was dishonest in relation to the transactions in either of these senses.

5. The claimants' complaint is that they contended at trial that, even if Mr. Skarga and Mr. Nikitin were not dishonest in relation to the transactions in either of these ways, nevertheless they were dishonest in relation to bribes paid by Mr. Nikitin to Mr. Skarga and, under English law, they are entitled to recover in respect of subsequent transactions tainted by the bribes. They accept that no claim was pursued on the basis that Mr Nikitin (or his companies) arranged benefits for Mr Skarga which would be regarded by English laws as bribes, unless they were arranged and accepted dishonestly. At my request, when applying for permission to appeal the claimants formulated in writing their allegation about Mr Skarga and Mr Nikitin being dishonest in relation to bribes which, as they contend, they pursued at trial but was not considered in the main judgment. They presented their allegation as follows:

> "Mr. Skarga's dishonesty in the bribery:
>
> Mr. Skarga knew that (or suspected and was reckless whether) in receiving the benefit he was putting himself in a position in which there was (at least) a real possibility that he might feel beholden or incentivised to favour Mr. Nikitin or his companies when he (Mr. Skarga) was carrying out his duties to the companies within the SCF Group in relation to any transactions with Mr. Nikitin or Mr. Nikitin's companies (whether or not he

> believed it would in fact lead to his favouring Mr. Nikitin or his companies or acting contrary to the interests of his principals).
>
> Mr. Skarga was thereby acting contrary to the ordinary and/or normally accepted standards of honest behaviour (see Barlow Clowes v Eurotrust at paragraphs 15-16).
>
> Mr. Nikitin's dishonesty in the bribery:
>
> Mr. Nikitin knew that (or suspected or was reckless whether) in conferring the benefit he was putting Mr. Skarga in a position in which there was (at least) a real possibility that he might feel beholden or incentivised to favour Mr. Nikitin or his companies when he (Mr. Skarga) was carrying out his duties to the companies within the SCF group in relation to any transactions with Mr. Nikitin or Mr. Nikitin's companies (whether or not he believed that it would in fact lead to Mr. Skarga favouring him or his companies or acting contrary to the interests of Mr. Skarga's principals). Mr. Nikitin was thereby acting contrary to the ordinary and/or normally accepted standards of honest behaviour."

The claimants contend that, if there was "dishonesty in the bribery" in this sense, then they are entitled to relief even if Mr Skarga and Mr Nikitin were not dishonest in any way at the time of the transactions.

6. I do not consider that a claim on this basis was pursued at the trial: I refer in particular to section A para 19 of the claimants' closing submissions, which set out their position in relation to all the schemes and to which the claimants specifically directed my attention in their oral closing submissions:

> "Accordingly, the dishonesty of Mr Skarga and Mr Izmaylov in relation to the impugned transactions which is sufficient for the Claimants' case in bribery lies in their knowledge that they had received or been promised or given the expectation of corrupt benefits in the past. It is not necessary that they should have been consciously influenced by that corruption in each of impugned transaction, although it is of course the Claimants' case that they were, and that they acted dishonestly in relation to each transaction by consciously favouring Mr Nikitin's companies at the expense of their principals".

Thus, their argument was that the dishonesty had to "[lie] in their knowledge" at the time of the transactions that *in the past* they *had* received or been promised *corrupt* benefits or been led to expect them, and knew that in these circumstances, even if they did not consider that the benefits influenced them, they had received them and should disclose them because they recognised that they were corrupt.

7. However that may be, I shall explain (i) why, although in the main judgment I conclude that Mr Nikitin arranged for Mr Skarga benefits that would, in English law, be regarded as bribes by way of holidays (paras 1352-1355) and the provision of a credit card (paras 1356-1363), it is, to my mind, implicit in the main judgment that these were not dishonest in the sense now advanced by the claimants, and (ii) that I do not consider that the holidays and the provision of the credit card involved dishonesty in this sense on the part of either Mr Skarga or Mr Nikitin.

8. With regard to the holidays, I state at para 1352 that, for some years before Mr Skarga joined Sovcomflot, Mr Nikitin's practice had been to arrange and pay for holidays for him and his family, and there was no suggestion that this was done for improper reasons. At para 1390 I concluded that the holidays that were provided after Mr Skarga joined Sovcomflot continued the same pattern and were not provided because Mr Skarga had become Director-General of Sovcomflot. The implication of this is that neither Mr Skarga nor Mr Nikitin knew or suspected that the holidays would put Mr Skarga in a position in which there was any real possibility that Mr Skarga might feel "beholden or incentivised" to Mr Nikitin when carrying out his duties; nor were they reckless in this regard.

9. The position is similar with regard to the provision of the credit card. I concluded at para 1390 that the claimants had not established that it had been provided because of Mr Skarga's appointment to Sovcomflot or because of his position with Sovcomflot: see too para 1363. Again, the implication is that the "bribe" was not dishonest in the sense for which the claimants contend.

10. I therefore do not consider that the claimants have shown that the holidays or the provision of the credit card involved dishonesty of this kind on the part of either Mr Skarga or Mr Nikitin. I add these observations:

    i) Mr Skarga said in evidence that he would have considered it wrong not to have reimbursed Mr Nikitin for the holidays: para 1355. See para 9(2)(b) of the draft notice of appeal. However, Mr Skarga went on to explain that he did not consider that they would be an incentive to favour Mr Nikitin in business with Sovcomflot. I accept that.

    ii) I accepted at para 1355 that, to some limited extent, Mr Skarga made payments to Mr Nikitin for the holidays, although not of anything like their full cost. I do not think that he would have done so if he and Mr Nikitin had seen the holidays as an incentive to favour Mr Nikitin.

11. There are three other more general reasons that I would reject the contention that the "bribes" were dishonest in the claimants' sense. First, Mr Nikitin had developed a close friendship with Mr Skarga over the years before 2000: paras 194-195. He was able to use this, and did use this, to his own advantage after Mr Skarga had joined Sovcomflot in any case. He had no need to cement their relationship by conferring benefits on Mr Skarga, and he would not, I think, have done so if he had thought that they might be considered or perceived to be improper. It might well have been counter-productive to do so in that: (i) Mr Skarga might have felt disquiet about promoting business with Mr Nikitin if he had felt compromised in this way, and (ii)

others could have seized the chance to discredit Mr Skarga, and so to undermine his authority generally and his ability to promote Sovcomflot's business with Mr Nikitin in particular. After all, Mr Skarga's appointment was not welcomed by all (see para 198), and others would happily have discredited him if given the opportunity.

12. Secondly, the value of the holidays and the sums funded through the credit card were far too small to be seen by Mr Skarga or Mr Nikitin as an incentive to influence business of the kind that Sovcomflot might do with Mr Nikitin's companies. They are in stark contrast with what Mr Privalov received.

13. Thirdly, there was no secrecy about Mr Skarga's holidays, and the arrangements for the credit card were managed through PNP's offices in St Petersburg. In contrast, when Mr Nikitin paid bribes to Mr Privalov, he was careful to deal through off-shore companies and Swiss bank accounts, and to ensure that there was no detectable trace of the payments in Russia. I cannot accept that Mr Nikitin would not have been similarly secretive if he had thought that these benefits would or might amount to incentives to Mr Skarga or put Mr Skarga in the improper position that the claimants allege or even expose him to the criticism of others.

Clarification of para 178 of the main judgment

14. The other point that I was asked to clarify is my conclusion in the last sentence of paragraph 178 that, "If Mr Skarga received significant bribes from Mr Nikitin, it is likely that they were arranged and promised in Russia". This finding covers the arrangements for and promises of the holidays and the credit card. It would also have covered, had I found that there were bribes of these kinds, the payment in relation to the land at Donino and any payment or reward deriving from the SLB transactions. I qualify my conclusion by referring to "significant" bribes because, for example, small benefits incidental to the holidays might have been added by Mr Nikitin during them when he and Mr Skarga were outside Russia: when Mr Nikitin arranged for Mr Izmaylov to stay at St Moritz, apparently Mr Nikitin arranged for his accommodation to be upgraded (see para 1464) and this arrangement was probably made in Switzerland. Similarly in the case of Mr Skarga incidental arrangements *might* have been made outside Russia (for example, Mr Nikitin *might* have arranged a private jet for the return journey from a holiday): there is not sufficient evidence to show whether they were.

Refusal of claimants' application for permission to appeal

15. I refuse the claimants' application for permission to appeal. I have already explained why I am not persuaded by the arguments relating to the holidays and the provision of a credit card. I make these further observations on particular paragraphs of the draft grounds of appeal.

    i) Para 7(1): I rejected the allegation of bribery in relation to the Donino property at paras 1364-1384. It was accepted by the claimants that Mrs Skarga was honest in her evidence and in her dealings in relation to the property. This was important because:

a) If the vendor had been paid an extra $100,000 for the property, this would have increased the price paid by fourfold. I cannot accept either that Mrs Skarga would not have realised it if her property was worth so much more than what she paid, or that Mr Nikitin paid the vendor so much more than what the property was worth (para 1378);

b) Mrs Skarga's evidence was that, after the purchase, she and Mr Skarga completed the building works slowly as and when they could afford to do so (para 1368). It was not suggested to her or to Mr Skarga that he was deceiving his wife about what works they could afford, and it is, to my mind, improbable that, if the greater part of the price had been provided by Mr Nikitin, he would not also have financed the works;

c) Mrs Skarga did not make a "verbal agreement" with Mr Tsatsoura (para 1375); and

d) Mrs Skarga was introduced to the property by Mr Smirnov (para 1369).

ii) Para 7(2): It was not alleged that any interest that Mr Skarga might have had in the SLB transactions was by way of a *bribe* to him from Mr Nikitin (or his companies). The claimants' case was simply that Mr Skarga had a personal financial interest in the transactions.

iii) Para 8(1): I concluded that under the general rule in s.11 of the 1995 Act the most significant elements of the events constituting the wrong of bribery occurred in Russia: see para 177, where I adopt in relation to bribery the reasons (at paras 166-171) that led me to conclude Russian laws applied to the conspiracy claims. The elements of the wrong of bribery are (i) that an agent is paid or promised or led to expect bribes; (ii) that the briber knows that the recipient is an agent of a person with whom he has or is to have dealings; and (iii) that the bribe is not disclosed (para 70). In this case:

a) While the holidays were taken in different countries, Mr Nikitin made arrangements for them with Mr Skarga in Russia, and, while the credit card account was paid from a Swiss bank account, Mr Nikitin made arrangements with Mr Skarga in Russia and the provision of the card was organised from PNP in Russia.

b) Any relevant knowledge about Mr Skarga being a relevant agent of Sovcomflot and associated companies was, in reality, that of Mr Nikitin, who was based in Russia.

c) Any disclosure to Mr Skarga's principals would have been in Russia, where Sovcomflot's General Board and Executive Board met, and where the members of Fiona's board were based and purportedly held their meetings (para 261).

The claimants contend that the transactions resulting from the bribes are "events constituting the tort" for the purposes of applying the general rule in section 11. Even if this is so, I would not conclude that therefore under the general rule

English law rather than Russian law would be applicable: paras 168-169 identify the elements of the transactions that the claimants say occurred in England, and see paras 170-171.

iv) Para 8(2): I concluded that, if the applicable law is not Russian under the general rule, it is because of the secondary rule in s. 12 of the 1995 Act: paras 172 and 177. In reaching this conclusion I took account of the parties' choice of English law for various contracts (although, in relation to the claim in bribery, the Russian governing law of Mr Skarga's contract with Sovcomflot is more significant), and the fact that the various schemes were "played out on the international stage": para 174.

v) Paras 9 and 10: I do not see a proper basis for appeal against these findings of fact.

vi) Para 13(1): I consider that my conclusion about Mr Skarga's liability (under English law) to account is governed by Regal (Hastings) Ltd v Gulliver, (20 February 1942) [1967] 2 AC 134, 151E-152C.

Defendants' applications for permission to appeal in the Fiona action, the Intrigue action and the second Fiona action

16. I come to the applications of Mr. Nikitin and the Standard Maritime defendants for permission to appeal against their liability for commissions claims. I have already (in court on 25 February 2011) refused the application. In large measure the applicants challenge findings of primary fact or inferences from primary findings of fact. I do not comment upon every paragraph in the draft notice, but make these observations by reference to particular paragraphs:

i) Para 5: With regard to documentary evidence of dishonesty on the part of Mr. Nikitin, he was party to letters purporting to record an arrangement with Clarkson, the so-called "2004 letters". It was not disputed that they were backdated. I concluded that their purpose was to deceive: see paras 511 to 519, esp. at para 519.

ii) Para 6.1: My conclusion (based on the evidence of Mr. Simon Day, the expert witness of Mr. Nikitin and the Standard Maritime defendants) about when introductory commission can properly be paid was qualified: see para 343, "…the position would be otherwise if the broker knew that the principal would object to the payment, or, I would add, thought that the principal might do so, or if the broker had reasonable grounds for thinking this … The question whether a particular payment is by way of an introductory commission of a usual kind described by Mr. Day depends upon the circumstances of the case …" . I concluded at para 1493 that, even on Mr. Nikitin's account, the payments to his companies were not of the kind commonly paid.

iii) Paras 6.2 to 6.4: I did not need to determine, and did not determine, the extent of dishonesty and corruption within Clarkson and Galbraith's. Undoubtedly Mr. Richard Gale of Clarkson and Mr. Neil Rokison of Galbraith's were

dishonest, and that sufficed for my purposes. I did not find that they alone were dishonest at Clarkson and Galbraith's, although there was no evidence of wider corruption within Galbraith's: see paras 1491 and 1499.

iv) Para 6.5: My conclusions about Mr. Nikitin's part in introducing business to Clarkson are at para 565 for Sovcomflot's business and at para 619 for NSC's business. His part in introducing Galbraith's to NSC is described at para 606.

v) Para 11: Para 1504 does not identify all my findings of dishonesty on the part of Mr. Nikitin in relation to commissions. There were others: for an example relating to Galbraith's, see para 633. Para 1504 is largely directed to dishonesty relating to the Sovcomflot Clarkson commissions scheme, but it was never suggested during the trial that, if this scheme was dishonest, the NSC Clarkson commissions scheme or the Galbraith's commissions scheme arrangement might nevertheless have been honest. On the contrary, in their closing submissions Mr. Nikitin and the Standard Maritime defendants said:

a) Of the NSC Clarkson commissions arrangement: "It is common ground that the Clarkson Agreement was extended to Novoship business and that the nature of the agreement as it applied to Novoship was materially the same as it was with Sovcomflot": part IX para 199; and

b) Of the Galbraith's arrangement: "Again, there is no suggestion that the Galbraith's Agreement was conceptually any different from the SCF Clarkson Agreement": part IX para 206.

vi) Para 12: I found at para 1504 itself that the payments to Mr. Privalov were dishonest. It is said that the payments were "not themselves attended by dishonesty", but some were made under sham agreements: see para 1281.

vii) Para 12: The background to the payment of $200,000 is set out at paras 454 to 458 (where I reject Mr. Nikitin's evidence about the routing of the funds). Paras 1274 and 1277 recited Mr. Privalov's account about this payment, but I did not accept it. My conclusion about it is at para 1279, and it did not rest on Mr. Privalov's evidence.

viii) Paras 14 and 15: I found at para 1500 that Mr. Privalov was in breach of duty in not disclosing to his principals the payments by the brokers to Mr. Nikitin's companies.

ix) Para 17: Mr. Nikitin's explanation for the Tam commissions of $1.2m being paid into Milmont's account is set out at para 1286. My reasons for rejecting it are at paras 1288 to 1292. Para 1292 refers to the spreadsheets provided by Mr. Privalov to Mr. Nikitin and to what Mr. Nikitin said generally about spreadsheets of payments provided to him by Mr. Privalov. The spreadsheets are explained at paras 520 to 529. I rejected Mr. Nikitin's evidence (which contradicted his first witness statement) that he did not receive the early spreadsheets: see paras 524 and 526.

x) Para 21: I reached no conclusion whether RTB were a broking company or whether they were "otherwise unknown". As far as I can recall, there was no evidence about either point (although Mr. Cepollina certainly had another broking company, Italia Chartering srl). RTB were "associated with" Mr. Cepollina, a broker: para 34.

xi) Para 22.5: No other reason for routing the payment through Gruber was suggested other than that which I described at para 392(ii).

xii) Para 23: Mr. Gale later sought to channel more payments through Gruber, and the evidence did not explain why this was not done: see para 466.

xiii) Para 27: My conclusion about Mr. Nikitin's role in the Genmar transaction is at para 565. It is not referred to in para 1505(v) as an example of a transaction in relation to which he did nothing at all.

xiv) Para 29: It is not clear that the sale of vessels to Genmar were "the first set of transactions": the Genmar transaction (paras 382ff), the Astro vessels transaction (paras 394ff) and the Athenian transaction (paras 433ff) all appear (as far as the incomplete evidence goes) to have started at about the same time in January 2001.

xv) Paras 31 to 35: The so-called "confirmation letters" are explained at paras 497 to 509. I reject Mr. Nikitin's explanation for them at para 507. He never provided a credible explanation for them dealing with transactions that had already been documented in letters dated 14 February 2002. The implication, as I inferred, was that they were produced in order to record a misleading description of the payments as introductory commissions.

xvi) Paras 36 to 42: Mr. Nikitin provided no credible explanation why he thought it proper to sign the back-dated 2004 letters. His evidence that his concerns were allayed as a result of his meeting with Mr. Richard Fulford-Smith did not withstand cross-examination: see para 518.

xvii) Paras 43-46: Certainly persons within Clarkson and Galbraith's must have known that the payments were being made, but what is unclear is how many people knew *why* they were being made.

xviii) Para 56: The observation of Lewison J in Ultraframe (UK) Ltd v Fielding, [2005] EWHC 1638 (to which I refer at para 1507) and the principal enunciated by Lord Hoffman in Barlow Clowes International Ltd. v Eurotrust International Ltd, [2006] 1WRL 1476 para 10 (to which I refer at para 1561) were not challenged.

xix) Paras 57 to 58: This part of the application was not pursued because I did not rule in the main judgment upon whether the claimants are entitled to any (and if so what) relief in respect of HHI hulls 1585 and 1586 and Daewoo hulls 5272 and 5274.

Applications to appeal in respect of the part 20 claims.

17. The proposed appeals in respect of the part 20 claims of Mr. Nikitin and Milmont against Clarkson depend on displacing the findings in the main judgment of Mr Nikitin's dishonesty. I add these observations:

    i) Para 2: The closing words of para 558 ("I do not consider that … in giving [such a commitment], Clarkson are to be taken to have evinced any intention that it should be contractual") apply an objective test with regard to the intention to create legal relations.

    ii) Para 4: Para 559 introduces the following paragraphs about (i) lack of coherence in the case that Mr. Nikitin and Milmont sought to advance (developed in paras 560 to 563); (ii) the parties' conduct (para 564); (iii) lack of commercial sense of the applicants' case (paras 565 and 566); and (iv) fictitious documentation and misleading devices (paras 567 and 568).

    iii) Para 4.2.4: My conclusions about what Mr. Nikitin did to justify the payments are at paras 565 and 619.

    iv) Para 5: Others within Clarkson knew that the payments were being made, but that does not mean that they knew of the Clarkson arrangements and why they were being made, still less that they knew these matters from the start.

    v) Paras 6.2 and 6.3: The receipt of payments would not constitute consideration. There was no evidence that Mr. Nikitin agreed "to continue to consider introducing business to Clarkson in the future", but in any case an agreement to "consider" this would not provide consideration.

    vi) Para 8: As for the application to amend the pleading, the contentions which the applicants sought to introduce could not succeed because there was no evidence (i) that Mr. Nikitin made the Clarkson arrangements or the Galbraith's arrangement as agent for Milmont and (ii) that justified the application of the Contracts (Right of Third Parties) Act 1999). (It was not submitted that "potential corporate recipients of payments" would amount to a particular class or be regarded as answering a particular description for the purposes of section 1(iii).) In his oral submissions in support of the application for permission to appeal, Mr. Steven Berry QC did not pursue these points. He observed that permission had not been granted to make an uncontroversial amendment to para 2 of the particulars of claim, but the judgment was concerned with controversial amendments, and Mr. John Odgers, representing Clarkson, confirmed that Clarkson did not contend that the uncontroversial amendments (including that to para 2) should not be made, if it avails the applicants.

The Southbank Proceedings

18. I describe this action at paras 1556 to 1562. My observations on the draft notice of appeal are these:

    i) Para 2.1: I did not determine that the "relevant question" in the Southbank action was whether the defence of "address commission fraud" defeats the

claims. I dealt only with that question because I considered that it answered the claims and that I would have required further submissions about Clarkson's other arguments.

ii) Para 3: The Southbank claimants were not Clarkson's only principals in relation to the relevant transactions: so too were Fiona. With regard to the claims of Southbank, Buckthorn, Titanium and Pendulum, the vessels were purchased under options granted by HHI to Fiona (paras 935 and 944), which Clarkson negotiated on behalf of Fiona; as for the claims by Accent and Severn, the vessels were acquired pursuant to negotiations conducted by Clarkson for Fiona, Fiona signed a letter of intent to purchase Severn's vessel, hull no 5272 (para 995), and Accent's vessel (hull no. 5274) was acquired pursuant to the exercise of an option which Daewoo had granted to Fiona (para 987); and Hayes acquired their vessel pursuant to an arrangement recorded in a letter of intent that Fiona entered into with HHI (para 1020). Clarkson acted for Fiona in relation to all these purchases, and Clarkson acted in breach of a duty owed to Fiona in respect of them all.

iii) Para 4: I drew no distinction between Southbank claimants owned by Mr. Nikitin at the time of negotiations and those later acquired by him or of which he later became the sole owner because nobody suggested that this distinction was relevant.

iv) Para 5: In their closing submissions the Southbank claimants accepted that if, contrary to the case of Mr. Nikitin and the Standard Maritime defendants, Mr. Nikitin were party to the "address commission fraud" (or the "shipbuilding contracts fraud"), then, because Mr. Nikitin's knowledge of the frauds is to be attributed to them, "the Southbank claimants would not be entitled to recover the address commission from Clarkson" (para 259.2 of their closing submissions): see para 1558. No relevant distinction can be drawn between Mr. Nikitin actually knowing of the "address commission fraud" and what I concluded had been Mr. Nikitin's state of mind, that he deliberately refrained from enquiring about that aspect of how the Clarkson arrangement was operated and so did not learn of it: see para 1561. In any event, by the Southbank action the Southbank claimants seek to benefit from the dishonest and fraudulent Clarkson schemes. Under them Mr. Nikitin and Clarkson together acted dishonestly to defraud Clarkson's principals, including Fiona. Mr. Nikitin, through the Southbank claimants, seeks the court's assistance to acquire commissions which Clarkson unlawfully negotiated to fund dishonest payments to him or his companies. The Southbank claimants, to whom Mr. Nikitin's state of mind is to be attributed, are not entitled to the court's assistance to benefit from their fraudulent arrangements.