Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another
[2006] SGCA 46

Case Number : CA 51/2006

Decision Date : 27 December 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Judith Prakash J

Counsel Name(s) : Wendy Tan and Rajmohan (Haq & Selvam) for the appellant; Steven Chong SC, Sim Kwan Kiat and Kelvin Poon (Rajah & Tann) for the respondents

Parties : Otech Pakistan Pvt Ltd — Clough Engineering Ltd; William Harold Clough

Contract – Champerty – Agreement between plaintiff and defendant for plaintiff to assist defendant in securing settlement in legal proceedings between defendant and third party – Whether agreement champertous and unenforceable – Whether law of champerty applying to all kinds of legal disputes including those referred to arbitration

Contract – Formation – Agreement between plaintiff and defendant for plaintiff to assist defendant in securing settlement in legal proceedings between defendant and third party – Plaintiff alleging agreement subsequently revised and plaintiff entitled to larger percentage of settlement sum - Whether concluded agreement to revise plaintiff's compensation existing – Whether plaintiff entitled to payment under agreement

27 December 2006

Judith Prakash J (delivering the judgment of the court):

Facts

1 The first respondent, Clough Engineering Ltd ("Clough"), entered into two contracts with the Oil and Gas Development Company Limited ("OGDCL"), a government-owned corporation in Pakistan, in connection with the construction of two gas-condensate processing plants. The first, entered into in 1992, was for the upgrading and extension of the Dhodak gas plant ("the Dhodak project") and the second, concluded in 1995, was for the upgrading and extension of the Dakhni gas plant ("the Dakhni project").

2 Neither project went well. The Dakhni project was suspended in November 1996 by OGDCL which then sought to encash a performance guarantee furnished by Clough. In respect of the Dhodak project, Clough suffered loss and damage, and commenced legal proceedings in Pakistan against OGDCL in 1997. Considering that it needed local expertise to help it resolve its difficulties with OGDCL, Clough engaged the services of the appellant, Otech Pakistan Pvt Ltd ("Otech"), to assist it in relation to OGDCL's claims against it and in prosecuting its own claims against OGDCL.

3 On 2 April 1997, Clough entered into an agreement with Otech ("the 1997 Agreement") under which Otech agreed to do the following:

(a) assist Clough to defend its rights against OGDCL;

(b) present and negotiate Clough's claims against OGDCL in respect of both projects;

(c) retain, seek advice, and give information and instructions to lawyers and other professionals to protect Clough's rights against OGDCL and to negotiate its claims against OGDCL;

and

(d) assist Clough in reaching a negotiated settlement with OGDCL in respect of Clough's pending claims in relation to the projects.

4 In return for these services, Clough agreed to pay Otech:

(a) 40% of any sum in excess of US$8m recovered from OGDCL with respect to the Dakhni project dispute; and

(b) half of any amount in excess of US$3m recovered from OGDCL with respect to the Dhodak project dispute.

5 Despite Otech's engagement, Clough's disputes with OGDCL remained unresolved. At the end of 1999, Clough decided that a negotiated settlement with OGDCL was preferable as its claims against OGDCL were unlikely to succeed and Clough wanted to bid for further projects in Pakistan. As Clough wanted to offer Otech an incentive to conclude a negotiated settlement with OGDCL, the parties conducted discussions on a more advantageous remuneration package. At a meeting in Singapore on 1 November 1999, a possible revision of the compensation formula for Otech's services was discussed.

6 Subsequently, Clough became dissatisfied with Otech's performance. Its relationship with Otech deteriorated and on 26 February 2002, Clough terminated Otech's services. Otech accepted the termination.

7 In July 2004, Clough finally settled its disputes with OGDCL for US$7.515m. Otech then insisted that an agreement had been reached on 1 November 1999 for Otech to be paid 20% of any settlement sum paid by OGDCL to Clough. When Clough refused to pay Otech, Otech commenced an action against both Clough and one of its directors, William Harold Clough ("the second respondent"). It sued Clough for breach of the agreement allegedly concluded on 1 November 1999 and sued the second respondent for procuring the breach of that agreement. Otech's case had to be put on this basis because it was not entitled to any remuneration under the original terms of the 1997 Agreement since the settlement amount was less than US$8m.

The decision below

8 The action was heard by Tan Lee Meng J ("the Judge") who dismissed Otech's claims. In his written judgment, which is reported as *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2006] 3 SLR 1 ("HC"), the Judge held that:

(a) there was no evidence of an agreement between the parties on 1 November 1999 for Otech to be paid 20% of the net settlement sum received by Clough from OGDCL (HC at [26]);

(b) even if the 1997 agreement had been revised on 1 November 1999, Otech was not entitled to the amount claimed because it had played no part in the conclusion of the settlement of the disputes between Clough and OGDCL (HC at [33]);

(c) as Otech's claim against Clough lacked substance, it was unnecessary to consider whether the alleged 1999 agreement was void on the ground of champerty (HC at [34]); and

(d) Otech's claim against the second respondent for inducing breach of contract was without foundation (HC at [35]).

9 Otech appealed against the above decision. We dismissed the appeal and now give the reasons for our decision.

The issues in the appeal

10 The issues that arose in the appeal were the same issues that arose before the Judge. They were:

(a) Whether there was a concluded agreement on 1 November 1999 to revise the compensation formula under the 1997 Agreement so that Otech would be entitled to receive 20% of any recovery that Clough obtained from OGDCL.

(b) Whether Otech had performed its side of the bargain in respect of the 1997 Agreement as varied so as to be entitled to the compensation claimed.

(c) Whether the 1997 Agreement was, in any event, champertous and therefore unenforceable.

(d) On the basis that the 1997 Agreement was valid, whether the second respondent was liable to Otech for inducing Clough to breach its contract with Otech.

Did the parties agree on 1 November 1999 to revise the payment formula in the 1997 Agreement?

11 The Judge considered this issue in the light of Otech's pleaded case that its claim was based on an oral agreement concluded on 1 November 1999. He noted that since a party is bound by its pleadings, Otech's case had to fail if no agreement was made on that date. The Judge referred to the evidence of Mr Sohail Latif ("Mr Latif"), the president of Otech, that the conclusion of the oral agreement was confirmed by two e-mails sent to him on 8 November 1999 and 10 November 1999 respectively by Clough's International Director, Mr Jeremy James Roberton ("Mr Roberton"). The Judge examined this correspondence and concluded that its contents made it clear that the proposed revision of the 1997 Agreement had not been finalised on 1 November 1999.

12 The Judge also considered Mr Latif's reply e-mail of 9 November 1999 and held that this was a counter-proposal to a draft proposal made by Mr Roberton and thus that the correspondence taken together showed that there had been no agreement on 1 November 1999. Of equal significance to the Judge was Mr Latif's concession during cross-examination that Mr Roberton's e-mails of 8 and 10 November 1999 did not refer to any concluded agreement between the parties. In the view of the Judge, "Mr Latif's *volte face* effectively scuttled Otech's case against [Clough] altogether" (HC at [24]). He concluded that there was no evidence whatsoever of an agreement between the parties on 1 November 1999 for Otech to be paid 20% of the net settlement sum received by Clough from OGDCL and therefore Otech's claim had to be dismissed.

13 On appeal, Ms Wendy Tan, counsel for Otech, submitted that the Judge had erred in finding that there was no evidence of an agreement in 1999 because he had not taken account of clear admissions made by Mr Roberton in correspondence after 1 November 1999. This correspondence was not that which was exchanged in November 1999 itself but correspondence that was generated much later, having been sent out between 8 November 2001 and 26 February 2002. The only contemporaneous document that she sought to rely on was an internal memorandum that Mr Roberton had sent to his colleagues on 4 November 1999. Ms Tan argued that the documents she was relying on admitted to the existence of a contract through the use of the words "agreed" and "agreement".

Although she accepted that the correspondence referred to by the Judge had used the words "draft" and "draft proposal" in relation to the remuneration terms discussed, Ms Tan argued that these e-mails merely reflected an attempt on Clough's part to further vary an agreement which had been reached on 1 November 1999.

14 Despite the valiant arguments made by Ms Tan, she was not able to overcome the wealth of contemporaneous evidence that showed that no agreement had been reached on 1 November 1999 itself. In our judgment, the Judge's finding on this issue could not be upset. We will discuss the evidence that supported his decision before dealing with the evidence on which Ms Tan relied.

15 The first document that was generated after the meeting of 1 November 1999 was an e-mail sent the very next day by Mr Roberton to his colleagues. The relevant portions of that read:

> Subject: Meeting with Otech
>
> Otech is willing to consider a change in arrangements – our ideas were floated but not detailed. I am to put something to him asap with a view to finalising something when I am back in Singapore next week.

That memorandum clearly indicated that the discussion with Mr Latif had been preliminary and had not resulted in a finalised contract.

16 Two days later, on 4 November 1999, Mr Roberton sent his colleagues an e-mail attaching the draft of a letter to Mr Latif that incorporated comments from his colleagues and saying that if they agreed he would send it to Mr Latif. The last sentence of the e-mail read:

> I would like to send it to Sohail as that was what we agreed with him and I believe I should be seen as the one dealing with him.

In her submissions, Ms Tan emphasised this last sentence and said that it showed that there had been an agreement on 1 November 1999. Mr Roberton was, however, asked about this e-mail in cross-examination and it was suggested that his use of the word "agreed" showed that a contract had been concluded on that date. He rejected that suggestion. He explained that in using the word "agreed", what he had been referring to was an agreement that he would be the one dealing with Mr Latif and therefore he had stated in his e-mail that he wanted to send the proposal to Mr Latif. Whilst this explanation might have seemed a bit weak to Ms Tan, it was consistent with the contents of the draft letter that Mr Roberton forwarded to his colleagues as that document contained no reference to any agreement arrived at on 1 November 1999. Instead, it said that it contained Clough's "initial ideas on a new fee arrangement between Otech and Clough". It then went on to say "We would like to renegotiate the arrangement we have with you. We suggest the following …" before setting out the terms of the proposed change in remuneration.

17 The next piece of correspondence was the e-mail of 8 November 1999 on which the Judge relied. The e-mail itself had as its subject "Draft Proposal". The relevant portions read:

> Further to our meeting last Monday attached please find a draft of our proposed revised agreement with you for the settlement of our outstanding matters in Pakistan.
>
> It is a draft and I would like to meet and discuss it with you this Tuesday or Wednesday.

Attached to the e-mail was the proposal itself which was basically the draft letter that Mr Roberton

had sent to his colleagues for approval under cover of his e-mail of 4 November 1999. At the end of the letter, an additional paragraph that had not been in the draft appeared. This read:

> As discussed we have tried to structure this proposal so you are not disadvantaged if a reduced settlement is accepted by Clough. I will be back in Singapore on Tuesday for a couple of days and would like to discuss this proposal and if possible finalise it with you at that time.

Mr Latif replied to Mr Roberton in an e-mail dated 9 November 1999 which read:

> Subject: Your Draft Proposal on E-mail of 9 November 1999
>
> Thank for the proposal. On the point 1, our friends suggested 30% instead of 20%.

As Mr Steven Chong SC, counsel for Otech, pointed out in his submissions, Mr Latif himself had referred to Mr Roberton's e-mail as a draft proposal. Further, during cross-examination, he had admitted that by suggesting 30% instead of 20% he had made a counter-proposal.

18 The next item in the chain was Mr Roberton's reply of 10 November 1999 which read:

> Subject: Re: Your Draft Proposal on E-mail of 9 November 1999
>
> Sohail,
>
> For your consideration

Settlement	Old Fee	Proposed Fee (20%)
4.0	Nil	0.8
8.0	Nil	1.6
10.0	0.8	2.0
12.0	1.6	2.4
13.6	2.24	2.72
16.0	3.2	3.2

> …
>
> The new proposal gives 20% on all claims.
>
> I look forward to seeing you at 10am.
>
> Regards

Jeremy

19 The e-mail quoted above was significant. As can be seen, it contained a table showing Otech the advantages of changing the compensation formula to 20%. Clough was obviously attempting to persuade Otech to agree to this new formula. Such an attempt at persuasion would not have been necessary had the parties already reached an agreement to replace the compensation formula in the 1997 Agreement with that contained in the table above.

20 The documentary evidence up to 10 November 1999 therefore clearly supported the Judge's finding and Mr Chong's submission that nothing had been agreed to on 1 November 1999, and that all the parties had had was an initial discussion on changing the compensation formula. Mr Latif's own evidence as the Judge pointed out substantiated that position. He agreed that the e-mails of 8 and 10 November 1999 did not mention an agreement but only referred to a draft proposal that had been given to him for his consideration. Plainly, at that stage, negotiations were ongoing and the parties were not yet *ad idem*. Otech was unable to point to any contemporaneous document that clearly indicated that it had accepted the changed compensation formula on 1 November 1999.

21 The documents on which Otech based its case were (apart from Mr Roberton's internal memorandum which we have already averted to) sent more than two years after the vital date of 1 November 1999. These documents were as follows. First, on 8 November 2001, Mr Roberton sent an internal e-mail to the second respondent stating that before any negotiation was commenced, Clough would have to agree on a realistic bottom-line number "taking into account withholding tax (8%) and other fees (20% of 92%)". Then, on 23 December 2001, Mr Roberton sent an e-mail to Mr Latif in which he stated that "a couple? of years ago Harold and I reached an agreement with you on how your fees from this settlement will be handled". Then, on 10 January 2002, in another e-mail Mr Roberton said "As agreed Clough will pay Otech 20% of any settlement figure". Fourthly, on 1 February 2002, there was another e-mail from Mr Roberton to Mr Latif in which he mentioned agreed fees of "20% of the settlement figure". Finally, on 26 February 2002, Mr Roberton told Mr Latif by e-mail "OGDCL – our existing agreement of 20% of settlement figure – when/if it happens. There was never any agreed minimum".

22 It was certainly arguable that the language used in the November 2001 – February 2002 correspondence was consistent with a belief on the part of Clough that an agreement had been reached to change the compensation formula. It was, however, also consistent with an attempt to persuade Otech that such an agreement had been reached. In our judgment, that language did not in itself establish that the agreement had been reached on 1 November 1999 as pleaded. The agreement, if any, could as well have been reached after that date as on it. As far as what happened on 1 November 1999 was concerned, we had to be guided by the contemporaneous correspondence. If such contemporaneous correspondence demonstrated, as both we and the Judge thought it did, that no oral contract had been concluded on 1 November 1999, the subsequent correspondence especially that exchanged years later, could not demonstrate the contrary.

23 It was also significant, in our view, that during the later exchanges of correspondence, Mr Latif was not behaving as if there had been an agreed variation of the compensation formula. For example, Mr Roberton's e-mail of 23 December 2001, was a reply to Mr Latif's e-mail of 18 December 2001 wherein the latter had referred to the need to discuss "additional fees" in the context of a "proposed settlement agreement". Mr Latif's subsequent correspondence contained repeated requests for more compensation. In his e-mail of 9 January 2002, he stated that the amount due to Otech would be "20% of this figure or more". This undermined his case that the compensation formula was revised on 1 November 1999 to 20% of any recovery and no more. Then, on 26 February 2002, after termination of the relationship between the parties, there was a meeting at which Clough offered

Mr Latif US$1m as a global settlement of all disputes between Clough and Mr Latif's companies. This offer was not accepted. In a subsequent e-mail Mr Latif requested compensation of US$12.5m of which he said he expected that there should be "at least USD2 million dollar compensation for working on [the OGDCL claims] without any charges to Clough and getting them all towards a stage of approved arbitration". At that stage, obviously, Mr Latif did not believe that the parties had agreed on a revised compensation formula at all, much less on 1 November 1999.

24 For the reasons given above, we could not accept Otech's submissions that the Judge's finding that no agreement was concluded on 1 November 1999 was against the weight of the evidence. In view of this conclusion, the appeal failed and had to be dismissed. This means that, strictly, we need not deal with the other issues raised on appeal. During the hearing, however, extensive submissions were placed before us on issues (b) and (c) which were issues relating to the nature of the 1997 Agreement. For the sake of completeness and because issue (c) raised an interesting legal point, we will address these issues.

Was the 1997 Agreement a success fee agreement?

25 A "success fee agreement" is an agreement that stipulates for payment only in the event of success. Before the Judge, Otech's counsel submitted that contractually, it was only required to provide assistance to Clough and that its remuneration was not dependent on a successful outcome of Clough's claims against OGDCL. The Judge noted that, contrary to that stand, during cross-examination Mr Latif had agreed that the nature of the 1 November 1999 agreement was that it was entirely based on a successful outcome. The Judge then considered Mr Latif's admission that Otech had nothing to do with the negotiations between Clough and OGDCL after February 2002 and the evidence given by OGDCL's Acting General Manager (Projects) that Mr Latif and his companies had done nothing to assist Clough in concluding negotiations with OGDCL or facilitating the ongoing negotiation process. The Judge therefore concluded that even if the 1997 Agreement was revised on 1 November 1999, Otech was not entitled to the amount claimed because it had played no part in the conclusion of the settlement of the dispute between Clough and OGDCL.

26 On appeal, Ms Tan submitted that Otech's role had been one of providing assistance and it was not a requirement under the 1997 Agreement that Otech had to effectively cause the settlement in order to be paid its remuneration. She noted that Clough itself had pleaded that payment would only be due if Otech had "contributed in facilitating and/or assisting" Clough to achieve the settlement. She contended that Otech had facilitated and assisted Clough in achieving the settlement because it had given substantial advice during the settlement process and had worked with Clough's Pakistani lawyers to prepare proposals for the settlement. Otech had put in five years' worth of work on behalf of Clough, and it could not be said that Otech had not played a part in laying the foundation for the eventual settlement between Clough and OGDCL. In response to these arguments, Mr Chong maintained Clough's position that Otech had to be the effective cause of the settlement in order to obtain payment. He emphasised that there was no nexus between Otech's contribution and the eventual settlement and therefore Otech was not entitled to payment.

27 We were not persuaded by Ms Tan's submissions. We noted that in its Statement of Claim, Otech had pleaded that it had "arranged for and assisted [Clough] to reach a negotiated settlement in respect of their claims against OGDCL without litigation". This pleading was an admission that the terms of service accepted by Otech included assisting Clough to obtain a negotiated settlement from OGDCL. In our opinion, the 1997 Agreement was a success fee agreement and in order to earn its remuneration, Otech had to play a part in achieving the settlement. We could not accept Ms Tan's argument that under the agreement Otech was simply a claims consultant and as long as it put in some effort in relation to the negotiations, it would be entitled to remuneration.

28 The terms of the 1997 Agreement appeared to us to negate Ms Tan's contentions, even assuming that the remuneration formula had been varied in 1999. The original agreement stated that Otech would not be remunerated at all unless the settlement achieved was above US$8m. If the settlement sum was less than that, Otech would receive nothing. In 1997, therefore, Otech was prepared to get nothing if Clough could not get more than US$8m. Moreover, there was nothing to stop Clough from terminating Otech's services at any time provided that such termination was not made in bad faith. Otech had therefore taken on the risk that having put in work it could yet be terminated by Clough at any time and receive nothing for its efforts. In our judgment, a concluded variation of the compensation formula under the 1997 Agreement would not have changed the essential nature of the agreement. The new formula provided for Otech to be paid 20% of the settlement figure and this would have been a substantial portion of any settlement achieved. It could not have been the intention of the parties that Clough would pay such a large amount to Otech for it to merely assist in the settlement process without ensuring that a settlement was reached. If indeed all that was required under the 1997 Agreement was for Otech to assist Clough, then, seeing as how Otech's services were terminated before a settlement was reached, the natural claim to be made by Otech would have been a claim in *quantum meruit* for the services that it in fact provided instead of a claim for a 20% cut of the settlement sum. Otech, however, made no such claim.

29 If Otech's position on the nature of the 1997 Agreement was correct, it would mean that the agreement contemplated that as long as Otech provided some services no matter how few or for how short a period, it would be entitled to the 20% payment as and when the disputes were settled. The consequence would be that Otech would need only to provide one or two pieces of advice and then be able to sit back and wait for the settlement to materialise. Hypothetically, if Otech had worked extremely hard for two months and then had done nothing more for the next five years, Clough would still have been obliged to pay 20% of the settlement sum. We did not accept that that was the intent of the 1997 Agreement. In our view, it contemplated that, at the least, the efforts made by Otech would assist in achieving the settlement even if they were not the sole cause of the settlement.

30 Thus, Otech was required to show the extent of work it had done and how this work had contributed to the settlement. Otech did produce correspondence showing work that it had done but it did not relate its work to the eventual settlement. On this matter, the Judge set out the relevant portion of Mr Latif's cross-examination (HC at [31]):

> Q: After Otech accepted the termination on 26th February 2002, you would agree with me that Otech did not take any further steps to assist Clough to reach the negotiated settlement which was concluded in July 2004 – naturally?
>
> A: Naturally.

In any event, all the work that Otech had done was done before 26 February 2002. The settlement was eventually achieved only in July 2004, more than two years after the termination of Otech's services. Given that no work was done for two years, all the more did Otech have the burden of showing how its previous work had assisted in bringing about the settlement. This it did not do. As far as OGDCL was concerned, the evidence of its Acting General Manager was that Otech had nothing to do with the settlement. This evidence was not challenged by Otech in the court below. In the result, even if Otech had been able to prove that there was an agreed change in the compensation formula, it would have been unable to establish its entitlement to that compensation because it did not show that it had performed its obligations under the 1997 Agreement so as to entitle it to payment.

Applicability of the doctrine of champerty

31 Whilst the issue of whether the 1997 Agreement was unenforceable as being a champertous agreement was raised in the court below, the Judge did not deal with this issue as he considered that it was not necessary to do so in view of the findings that he had made in relation to the first two issues. This issue does, however, raise an interesting legal point on which we think we should give our views as it has not previously been considered by any Singapore court.

32 Champerty was raised by Clough as one of its defences to Otech's claim. Clough relied on the well-established doctrine that a champertous contract offends public policy and therefore is unenforceable. As *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Singapore and Malaysian Ed, 1998) put it at p 639, champerty exists where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. Public policy is offended by such an agreement because of its tendency to pervert the due course of justice. In *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 Lord Denning explained this public policy in the following oft-cited passage at 219–220:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law …

33 Applying the above principles, Clough submitted that it was plain that the 1997 Agreement was champertous because it involved Otech giving aid to Clough to bring or defend its claims against OGDCL for a share of what Clough might recover from OGDCL. Otech's response was that the 1997 Agreement was not champertous for two reasons. First, it argued, it had a genuine commercial interest in the dispute between OGDCL and Clough and thus, on the basis of *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, champerty did not arise. Its second argument was that the law of champerty does not apply to arbitration proceedings.

34 Whether Otech had a genuine commercial interest in the dispute in question is a question of fact which we do not intend to address since it is not necessary for the purpose of the appeal. It is not even necessary for us to decide whether the 1997 Agreement was in fact champertous, although in February 2002 Mr Latif apparently claimed that Otech had paid money to courts and judges in Pakistan, and if he had done this, he would have been committing the very mischief that the doctrine of champerty was developed to control. Rather, our concern here is with the legal issue raised by Otech, *ie*, whether champerty applies to agreements to assist litigants in arbitration proceedings in the same way as it applies when the proceedings concerned are before the court. On this issue there has been a conflict of judicial opinion in other jurisdictions.

35 In the Hong Kong case of *Cannonway Consultants Limited v Kenworth Engineering Ltd* [1997] ADRLJ 95, the High Court held that champerty applied in Hong Kong but that it did not apply to arbitration proceedings. Kaplan J observed (at 101):

> It is clear from the observations of both the Court of Appeal and the House of Lords in *Giles v. Thompson* that in the light of the history of champerty it is not appropriate to extend the doctrine. If it were to apply in the present case, it would be extending champerty from the public justice system to the private consensual system which is arbitration. The trend in recent years has all been the other way. …
>
> It seems to me unwise to make any extension to the law of champerty given that the reasons for its introduction have long since passed.

36 The English case that Kaplan J referred to, *Giles v Thompson,* came before both the English Court of Appeal ([1993] 3 All ER 321) and the House of Lords ([1994] 1 AC 142). In the Court of Appeal, Steyn LJ observed (at 331–332) that the head of public policy which condemned champerty had only done so in the context of civil litigation and it would involve a radical new step to extend the doctrine to private consensual arbitration. He thought that the boundaries of the doctrine might exclude arbitration and were drawn rather narrowly and possibly even anomalously. When the case went on appeal, Lord Mustill, who delivered the only judgment, stated (at 164) that "the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants" but made no observations relating to the place of the doctrine in arbitral proceedings as that issue was not before him. Analysing that case, we cannot agree with Kaplan J's observation that there was a strong inclination among the judges in England not to apply the doctrine of champerty to arbitration proceedings. As we see the position, the purity of justice and the interests of vulnerable litigants are as important in such proceedings as they are in litigation. Thus the natural inference is that champerty is as applicable in the one as it is in the other.

37 The view that we express above is also that adopted in robust terms by Scott VC in *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch 239. The judge said, at 249:

> Arbitration proceedings are a form of litigation. The lis prosecuted in an arbitration will be a lis that could, had the parties preferred, have been prosecuted in court. The law of champerty has its origins in, and must still be based upon, perceptions of the requirements of public policy. I find it quite impossible to discern any difference between court proceedings on the one hand and arbitration proceedings on the other that would cause contingency fee agreements to offend public policy in the former case but not in the latter. In principle and on authority, the law of champerty ought to apply, in my judgment, to arbitration proceedings as it applies to proceedings in court. If it is contrary to public policy to traffic in causes of action without a sufficient interest to sustain the transaction, what does it matter if the cause of action is to be prosecuted in court or in an arbitration? If it is contrary to public policy for a lawyer engaged to prosecute a cause of action to agree that if the claim fails he will be paid nothing but that if the claim succeeds he will receive a higher fee than normal, what difference can it make whether the claim is prosecuted in court or in an arbitration?

38 With respect, we entirely agree with the observations of Scott VC. The law of champerty stems from public policy considerations that apply to all types of legal disputes and claims, whether the parties have chosen to use the court process to enforce their claims or have resorted to a private dispute resolution system like arbitration. In our judgment, it would be artificial to differentiate between litigation and arbitration proceedings and say that champerty applies to the one because it is conducted in a public forum and not to the other because it is conducted in private. The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation. This case, in fact, is a good example of why the doctrine must apply to arbitration. The evidence showed that Mr Latif had repeatedly urged Clough to increase the amount that it was demanding from OGDCL to settle its claim. This must be because Otech had everything to gain from a higher settlement figure. The need to deter such behaviour was one of the reasons for the development of the doctrine. It would be absurd, in our judgment, to condone behaviour of this kind by saying that it was permitted because the parties were looking to resolve their dispute by way of arbitration instead of in the courts. We must reiterate that the principles behind the doctrine of champerty are general principles and must apply to whatever mode of proceedings is chosen for the resolution of a claim.

Conclusion

39 This appeal had to be dismissed because on the facts no agreement was reached to vary the remuneration formula on 1 November 1999. Even if there had been such an agreement, Otech could not have succeeded because it had not proven that its efforts had contributed to bringing about the settlement. Finally, the choice of arbitration as the mode for settling disputes would not have prevented the 1997 Agreement from being considered champertous, if the facts had justified such a finding.