Shagang v HNA: A non-binary approach to the weighing of evidence in a civil trial and taking into account the risk that evidence may have been obtained by the use of torture

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As the Supreme Court observes in the first paragraph of its judgment in ***Shagang v HNA***, handed down today, allegations that a bribe was paid to procure a contract are by no means unknown in international business disputes heard by the Commercial Court. Less common (at least in the context of commercial disputes) are allegations that key evidence was procured by the use of torture. In this matter, however, that is what was alleged by the appellants, Shagang, on behalf of whom Caroline Pounds, as junior counsel instructed by HFW, appeared at each stage of the proceedings.

It was common ground throughout that, if evidence was proved on the balance of probabilities to have been procured through the use of torture, then it was inadmissible in evidence pursuant to the decision of the House of Lords in ***A v Secretary of State for the Home Department (No. 2)*** [2005] UKHL 71. In issue on appeal, however, was the extent to which a judge is permitted to take their doubts as to the same into account when weighing the evidence (even if the judge is not satisfied that torture has been proved on the balance of probabilities).

In a decision that had obvious ramifications going well beyond commercial disputes (in consequence of which, Liberty was granted permission to intervene on the appeal to the Supreme Court), the Court of Appeal held that a judge was not so entitled. In its judgment upholding Shagang's appeal, the Supreme Court has overturned that decision, holding that, where there are reasonable grounds for suspecting that a statement was obtained by torture, that is a matter which a judge can and should take into account, along with all other relevant circumstances, in assessing the reliability of the statement as evidence of the facts stated.

The Supreme Court judgment also, again, reinforces the limited scope for intervention by an appeal court in relation not only to the factual findings of the trial judge, but also the inferences drawn therefrom and the judge's process of reasoning.

The Facts and the First Instance and Court of Appeal Decisions

Shagang's claim started life as a relatively straightforward claim for damages (*qua* disponent owners) for repudiatory breach of a long-term time charterparty concluded at the height of the market before the financial crash in 2008. HNA having guaranteed the charterers' performance of the charterparty, Shagang sought to recover its losses from HNA under the guarantee. Part way through the proceedings, HNA amended its case to plead that the charterparty had been procured by bribery (with the consequence that the guarantee was unenforceable), relying on confessions to the alleged bribe having been given to the Public Security Bureau (akin to a police force) in the People's Republic of China by the individuals who had allegedly paid and received the bribe. Shagang in turn alleged that the confessions had been obtained by torture and were therefore inadmissible in evidence, alternatively that no weight should be afforded to them.

At first instance before Knowles J, Shagang succeeded in its claim, the Judge finding that the alleged bribery had not been proved on the balance of probabilities. In his short judgment ([2016] EWHC 1103 (Comm)), which ran to only 16 pages after a 10-day trial, the Judge dealt first with his 'Conclusions on bribery' (explaining – albeit very succinctly – the factors that had led him to that conclusion) before then addressing his 'Conclusions on torture'. At [102], he stated that the fact that he could not rule out torture further reduced the confidence that he could place in the confessions (although he already had insufficient confidence in them to allow a finding of bribery). At [104], he stated that, in the circumstances of his conclusion that there was no bribe, it was not necessary to express a definitive conclusion on whether there was torture.

The Court of Appeal allowed HNA's appeal and remitted the matter back to the Commercial Court for redetermination. They accepted HNA's argument that the Judge had failed to ask and answer the correct legal question as to what weight should be accorded to the confession evidence and, in those circumstances, fell into legal error in failing to take all appropriate matters into account and failing to exclude irrelevant matters in considering whether the alleged bribe was paid. The Court of Appeal considered that those irrelevant matters included the Judge's finding that torture could not be ruled out as a reason for the confessions. Accepting HNA's argument in reliance on the decision in ***In re B (Children)***

(Care Proceedings: Standard of Proof) (CAFCASS intervening) [2008] UKHL 35, the Court of Appeal decided that, as a matter of law, if an allegation that a statement was made as a result of torture had not been proved on the balance of probabilities, a court when estimating the weight to be given to the statement as hearsay evidence in civil proceedings must entirely disregard the possibility that the statement was obtained by torture, even if on the evidence given at trial the court considers this to be a serious possibility which it cannot rule out.

The Supreme Court's Decision

(1) *The Court of Appeal was wrong to interfere with the factual findings of the trial judge*

As encapsulated at [79] of its Judgment, the Court of Appeal had made four main criticisms of the Judge's reasoning: (i) the Judge had failed to approached the issues in correct (and logical) order, in that he ought first to have considered whether the confession evidence was admissible before then assessing its weight; (ii) the Judge had failed to assess the weight to be given to the confession evidence (having regard, in particular, to the considerations set out in section 4(2) of the Civil Evidence Act 1995); (iii) the Judge had fallen into legal error in failing to take all the appropriate matters into account when deciding the bribery issue; and (iv) he had also fallen into legal error in failing to exclude irrelevant matters (namely his 'lingering doubt', as the Court of Appeal described it, as to whether the confessions were procured by torture).

The Supreme Court firmly quashed each of these criticisms. As to the first, whilst the Supreme Court accepted that it was logical to decide the admissibility issue first, before going on (if necessary) to consider the weight to be afforded to the confession evidence, it rejected the notion that such an approach was mandatory, emphasising that *"how and in what order questions concerning the admissibility and weight of evidence are dealt with is very much a matter for the trial judge. There is no "one size fits all" approach"*. The Supreme Court further noted that, in many cases, issues of admissibility can be dealt with efficiently by admitting the evidence de bene esse. Whilst the Judge in his Judgment had not stated (as he ought to have done) that this was what he was doing, reading his conclusions as a whole, it was apparent that that was in fact the approach that the Judge had taken. That approach was both permissible as a matter of principle and consistent with the way in which Shagang had argued its case at trial. Moreover, the Court of Appeal had been wrong to conclude that, since the Judge treated the confessions as admissible, then he must have held that torture had not been proved on the balance of probabilities. On the contrary, the Supreme Court considered it clear that the Judge had – as he was entitled to – deliberately refrained from deciding that question (it being unnecessary for him to do so given that he was in any event satisfied that there was no bribery).

The Court of Appeal's second criticism fared no better. The Supreme Court acknowledged, in this regard, that: (i) the Judge did not address the question of what weight should be given to the confession evidence as a separate step in his reasoning; (ii) did not refer to section 4 of the CEA 1995 or any of the considerations there set out; and (iii) *"stated his conclusions in what may be described as thumbnail terms without any detailed discussion of the evidence underlying them"*. The Supreme Court nonetheless did not accept that the Judge had failed to address the question of what weight should be given to the confession evidence or say why he had rejected it as unreliable. In particular, Lords Hamblen and Leggatt (with whom Lords Hodge, Briggs and Burrows agreed) emphasised that, in the circumstances of the case, the question whether the confession evidence was reliable and the question whether bribery had taken place were simply different ways of framing the same issue, for the confessions had been the only evidence to support to allegation of bribery made by HNA. Thus, in addressing the issue of bribery, the Judge was necessarily engaged in estimating the weight to be given to the confession evidence.

The Supreme Court equally rejected the notion that the Judge had failed to take all appropriate matters into account. In short, and whilst the Supreme Court agreed that *"it would have been more satisfactory for the judge to have addressed the confession evidence in greater detail"*, reading his conclusions together with the earlier parts of his Judgment (where he dealt in some detail with the confessions made by each individual), it was clear that the Judge had considered the confession evidence of all three individuals in conjunction with the other factors upon which he relied (e.g.: the fact that the alleged bribe made no sense in the commercial context; the approval of the charterparty through normal procedures; the subsequent retraction of the confessions; the fact that they were not given in the presence of a lawyer and the evidence that the individuals were offered leniency in exchange for their confession). The Supreme Court accordingly concluded that *"This is therefore not a case in which it can be said that the judge failed to have any regard to material evidence ...*

The real complaint is as to the degree of depth in which he did so and that he did not do so in a sufficiently systematic way. Such a shortcoming, whilst regrettable, does not involve an error of law or otherwise justify intervention by an appellate court".

(2) *The relevance of the possibility of torture to the weighing of evidence in a civil trial*

In rejecting the Court of Appeal's fourth criticism of the Judgment, the Supreme Court has reaffirmed the general principle of the law of evidence that, in assessing what weight (if any) to give to evidence, a court should have regard to any matters from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence (which principle, in the case of hearsay evidence in civil proceedings, in embodied in section 4 of the CEA 1995). As the Supreme Court observed, it is difficult to conceive of a matter which might more seriously undermine the reliability of a confession than the desire to escape the pain and suffering caused by torture. The Court of Appeal nevertheless held that to take account of such a matter was an *"error of law"* and contrary to *"the established rules of evidence in civil proceedings"*. The Court of Appeal did so in reliance on certain passages of the House of Lords decision in In re B, in particular that of Lord Hoffmann (at [2]) where he said:

> *"If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."*

HNA had argued – and the Court of Appeal accepted – that, applying this "binary principle", the fact that the Judge had not found on the balance of probabilities that the confessions had been procured by torture *"was, in law, a finding that there was no torture"* with the consequence that, in estimating the weight to be attached to the confession evidence, the Judge was *"bound entirely to disregard the possibility that the admissions had been obtained by torture"* and, to the extent that he took this possibility into account, the Judge had *"made an error of law".*

The potential ramifications of the Court of Appeal's approach were as concerning as they were far-reaching, both specifically in relation to evidence which might have been obtained by torture and more generally as regards the factors that a judge may take into account when weighing up evidence. As to the former, in light of the public policy considerations underpinning the total exclusion of evidence shown to have been obtained by torture (see ***In re A (No. 2)***), it would be illogical (not to mention inconsistent with moral principle) if, in circumstances where evidence was not proven to have been obtained by torture, the possibility (even the serious possibility) that it might have been were to be altogether ignored when weighing up the evidence alleged to been so-procured. As the courts have often observed, torturers rarely boast of their trade and the use of torture is more often than not inherently difficult to prove given that it tends to happen in secret. Were there to exist a rule (as the Court of Appeal held) which excluded from consideration evidence that a confession had been obtained by torture unless that had been proved on the balance of probabilities, such a rule would serve positively to encourage the practice of torture to obtain evidence for use in legal proceedings, provided that it was done in a way which was deniable. That would not only put evidence that a confession was obtained by torture in a uniquely advantageous position (there being no such rule which applies to other less severe forms of ill-treatment or other forms of oppression or inducement) but, in the words of the Supreme Court, *"would turn the law in this area upside down".*

The Supreme Court accordingly endorsed the view, already expressed by both the majority and the minority in the House of Lords in ***In re A (No. 2)*** that, where there is a real risk that evidence was obtained by torture, that risk should be taken into account when evaluating the evidence. The Supreme Court rejected HNA's argument that such reasoning was confined to the context (as applicable in ***In re A (No 2)***) of proceedings in the Special Immigration Appeals Commission. Rather, the reasoning followed from the general rules of the law of evidence. Nothing in In re B (which was ultimately a decision about the meaning and effect of particular provisions in the Children Act 1989) dictated a contrary conclusion given that: (i) in the first instance, the absence of a finding on the torture question was not the same as a finding that torture had not been proved on the balance of probabilities; (ii) even if the Judge had reached any such conclusion, there would have been no inconsistency between that conclusion and the Judge's finding that torture was

a real possibility which affected the reliance that should be placed on the confessions; (iii) whilst it is correct that, if a legal rule requires a fact to be proved the law operates a binary system, not all legal rules do require relevant facts to be proved in a binary way. In particular, the rule governing the assessment of the weight to be given to hearsay evidence in civil proceedings (indeed, the assessment of the weight to be given to any evidence) does not admit of such a binary approach. The assessment of weight is an evaluative exercise and the circumstances to which a court may have regard are not limited to facts which have been proved to the civil standard of proof. It would, therefore, the Supreme Court has held *"be a mistake to treat assessments of relevance and weight as operating in a binary, all or nothing way".*

The fallacy in HNA's argument lay in the proposition that, if a failure to prove a fact to the requisite standard of proof required a value of zero to be returned for the purpose of a particular legal rule (e.g. in relation to the admissibility of evidence), then that fact must be treated as not having happened for the purpose of other legal rules as well (e.g. in relation to the weight to be afforded to the evidence). The Supreme Court has held that there is no logical reason why (and no authority to the effect that) that should be so. In particular, the requirement to discharge the legal burden of proof, which does operate in a binary way, applies to facts in issue at trial (which the Supreme Court referred to as *"those facts which as a matter of law it is necessary to prove in order to establish a claim or defence"*) but does not apply to facts which make a fact in issue more or less probable. Thus, in ***Shagang v HNA***, the key fact in issue was whether there had been bribery. The torture allegations, on the other hand, were not such a fact in issue for the purposes of the claim and the defence, it not being legally necessary for the purposes of its claim for Shagang to prove that torture had been used. It was therefore unnecessary for the Judge to make any finding as to whether, on the balance of probabilities, torture had taken place in order to decide the facts in issue in the case. The possibility that it had taken place, however, was a factor that the Judge was not only entitled to, but should, take into account when weighing up the reliability of the confession evidence.

Conclusion

The Judgment demonstrates how the most unexpected of cases can give rise to important statements of principle by the Supreme Court. The decision in ***Shagang v HNA*** serves not only to uphold (as opposed to undermine as per the Court of Appeal's approach) the constitutional and moral prohibition against the use of evidence procured by torture, but further contains important statements as regards the manner in which a judge should approach the task of weighing up the evidence in a civil trial. That approach is evaluative and multi-factorial and is not a binary exercise which requires the court to have regard only to proven facts. Rather, the court's task is to have regard to all the available evidence before it and to afford that evidence such weight as the court deems appropriate in all the circumstances.

The decision also provides a salutary reminder of the restraint that an appeal court should exercise before interfering with a judge's factual findings (or inferences drawn therefrom) or a judge's process of reasoning. The Supreme Court was careful to conclude its Judgment by observing that the Judge's reasoning had been not merely succinct, but sparse. In particular, he did not spell out the fact that he was admitting the confession evidence *de bene esse*, did not in his essential reasoning discuss the confession evidence in any detail and did not directly address the reliance placed by HNA on the fact that three individuals had separately confessed. In these circumstances, the Supreme Court considered that *"the judge approached this task in too cursory a manner"*. The question on appeal, however, was whether the decision was wrong, which the Supreme Court was clear it was not for the reasons summarised above. In the final analysis, the Judge had identified reasons for reaching the conclusion that bribery had not been established and those reasons were sufficient to support his conclusion. It had not been shown (as it is well-established would be necessary for the appeal to have succeeded) that the Judge had made an error of law or reached a conclusion which no reasonable judge could have reached. Thus, and notwithstanding the shortcomings of the first instance judgment, it was nonetheless not one with which the Court of Appeal ought to have interfered.

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"She is able, responsive and diligent; an outstanding lawyer." (Legal 500, 2019)

Caroline is an experienced and sought-after senior junior (popular with leaders, instructing solicitors and lay clients alike), particularly in the shipping and energy/offshore fields. She was awarded 'Shipping Junior of the Year' at the Chambers UK Bar Awards 2015 and was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2019. She was also recognised as one of Legal Week's 'Stars at the Bar', (*"Her attention to detail and analysis are first class and advocacy skills are excellent"*) and is further praised by Chambers UK for being *"Hard-working, thorough and user-friendly"; "responsive, available and highly intelligent" and "tough as nails, very bright and very succinct".*

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