Neutral Citation Number: [2018] EWCA Civ 1732

Case No: A3/2016/2338

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
THE HONOURABLE MR JUSTICE KNOWLES CBE

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL
Date: 23rd July 2018

Before:
SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
DAME ELIZABETH GLOSTER DBE

B E T W E E N

SHAGANG SHIPPING COMPANY LIMITED
(IN LIQUIDATION)

Claimant / Respondent

and

HNA GROUP COMPANY LIMITED

Defendant / Appellant

- -

Mr Joe Smouha QC, Mr Michael Fordham QC, Mr Edward Brown and Ms Jessica Boyd (instructed by Hogan Lovells International LLP) appeared for the Appellant

Ms Dinah Rose QC, Ms Ruth Hosking and Ms Caroline Pounds (instructed by Holman Fenwick Willan LLP) appeared for the Respondent

Hearing dates: 26th and 27th June 2018

- -

APPROVED JUDGMENT

Sir Geoffrey Vos, Chancellor of the High Court, Lord Justice Newey, and Dame Elizabeth Gloster DBE:

Introduction

1. Some 70% of the cases that come before the Commercial Court, which is now part of the Business and Property Courts, have at least one overseas party. But even by those standards this was an unusual case. The judge was asked to decide on allegations of bribery and torture that took place entirely in the People's Republic of China (the "PRC"), when none of the individuals with first-hand knowledge of the events in question attended the trial to give evidence.

2. The appeal is entirely concerned with the facts. Mr Justice Robin Knowles decided, in an action brought by Shagang Shipping Company Limited ("Shagang") against a guarantor, that a charterparty had not been procured by a bribe paid by employees of Shagang to an individual connected with an employee of the charterer. The judge was faced with signed admissions[1] given by the main participants to the alleged bribe to officers of the relevant Chinese Public Security Bureau. Despite those admissions, he decided "on the limited evidence at this trial, and after careful consideration, on the balance of probabilities … that there was no bribe". The judge decided at a later stage of his judgment that "torture [could not] be ruled out as a reason for the confessions", and that "[t]he fact that [he could not] rule out torture further reduce[d] the confidence that [he could] put in the confessions".

3. It was common ground that this approach meant that the judge had, in fact, determined that the admissions had not been procured by torture. There was, however, very much an issue as to whether the judge had been entitled to take his doubts about whether torture had in fact taken place into account when deciding upon the reliability of the admissions.

4. Against this background, and in addition to the issue just described, the central issues between the parties resolved themselves into whether the judge had been justified in deciding the issue of bribery first and the issue of torture thereafter, whether he had provided sufficient reasons for rejecting the reliability of admissible admissions, and whether the Court of Appeal could or should interfere with his evaluation of the agreed primary facts.

5. Mr Joe Smouha QC, leading counsel for the appellant defendant guarantor, HNA Group Company Limited ("HNA"), submitted that the judge had not properly addressed the question of the reliability of the admissions and had provided no sufficient reasons for rejecting them. Ms Dinah Rose QC, leading counsel for the respondent claimant, Shagang, submitted that the judge had properly balanced the competing facts and that this court should not interfere with his reasoned conclusions.

6. The factual nature of the appeal entails a somewhat more detailed treatment of how the judge dealt with the issues than might be usual. The judge's judgment was concise, running only to some 16 pages after a 10-day trial.

---

[1] The judge called the admissions "confessions" throughout, because they had been largely obtained in the context of intended Chinese criminal prosecutions.

Factual background

7. Shagang and HNA are both companies based in the PRC. Shagang, which is in liquidation, is located in Hong Kong, and HNA in Haikou, which is the capital of Hainan province.

8. HNA's allegation of bribery was the foundation for its defences of fraudulent non-disclosure and illegality. It was contended that Mr Shen Wenfu ("Mr Shen"), then General Manager of Shagang, was the instigator of the bribe. Mr Shen had allegedly asked Mr Xu Wenxhong ("Mr Xu"), another employee of Shagang, to pay RMB 300,000 to his college acquaintance Mr Jia Tingsheng ("Mr Jia T"), so that Mr Jia T would persuade his father Mr Jia Hongxiang ("Mr Jia H") to approve the charterparty. Mr Jia H was a General Manager within HNA and the Chief Executive Officer of Grand China Shipping Co Ltd ("Grand China"), which was the charterer of the vessel and a subsidiary of HNA. Mr Jia T was not employed directly by HNA or Grand China, but was employed by an associate company, GCS Development Company.

9. HNA relied, to support its bribery allegation, on admissions that had been made by Mr Xu, Mr Jia T and Mr Shen to officers of the Public Security Bureau for Haikou (the "PSB") and, in the case of Mr Xu, on a plea of guilty in the Chinese criminal courts. The court did not see any confession by Mr Jia H, but the judge found that there was such a confession, based on the oral evidence of Mr Xu's lawyer, Mr Guo Zhilian ("Mr Guo"), who said he had seen it. He was not satisfied that Mr Jia H was prosecuted for Mr Xu's alleged bribe. Curiously, all the judge said as to the contents of the confession was that Mr Jia H mentioned he did **not** receive the RMB 300,000.

10. HNA is appealing Knowles J's order dated 16th May 2016, which awarded Shagang damages of some US$68.6 million, which was the amount payable under its guarantee securing the obligations of Grand China.

11. The chronological background can be summarised as follows.

12. In 2008, a charterparty was concluded between Dong-A Tanker Corporation ("Dong-A"), which owned the vessel the Dong-A Astrea (the "vessel"), and Shagang, pursuant to which Shagang would charter the vessel from Dong-A in 2010 for a period of 82-86 months.

13. On 6th August 2008, a further charterparty (the "charterparty") was concluded between Shagang and Grand China, whereby Grand China chartered the vessel from Shagang for the same period of time. HNA's guarantee of Grand China's obligations under the charterparty was also dated 6th August 2008 (the "guarantee").

14. On 9th December 2010, Shagang's solicitors made a demand to HNA under the guarantee, after Grand China had defaulted in making the payments due. HNA declined to pay, and on 17th January 2012, the charterparty was terminated by Shagang on the basis of Grand China's repudiatory breach.

15. On 13th September 2012, Shagang issued this claim against HNA under the guarantee. HNA filed its defence on 4th November 2013, initially not referring to any alleged bribery. By the time of the trial, it was agreed between the parties that the quantum of the claim was US$68,641,712.

16. On 11th November 2013, Mr Jia H was detained for suspected embezzlement. The precise nature of the charges against him at that time, and the extent to which they involved the bribery alleged by HNA, remains unclear.

17. On 22nd January 2014, Mr Xu was detained in Shanghai by the PSB on the charge of bribing a non-public servant. He was then taken to Meilan, where he was questioned by PSB officers overnight and during 23rd January 2014. According to the interrogation record, he gave an account of being asked by Mr Shen to use his relationship with Mr Jia T to cause Mr Jia H to charter the vessel from Shagang as soon as possible. He said that he was given RMB 100,000 in cash by Mr Shen, which he delivered to Mr Jia T in a single instalment. The record shows that his account was given voluntarily, and that he was willing to confess his involvement "for leniency". A document entitled "confession note", which was dated 24th January 2014 and was in Mr Xu's name, gave a similar account but with different details. It referred to a sum of RMB 300,000 being paid by Mr Xu to Mr Jia T in two instalments, one before and one after the signing of the charterparty.

18. Around the same time, Mr Jia T was detained on bribery charges. On 23rd January 2014, he was questioned by the same PSB officers as had interrogated Mr Xu. The interrogation record states that he said that Mr Xu gave him RMB 150,000 in the hope that his father would communicate with HNA to arrange the guarantee as quickly as possible. His father responded that he could only communicate with HNA according to the company's normal rules, and told Mr Jia T to send the money back. Mr Jia T did not do so, but rather met with Mr Xu again and received another RMB 150,000, about which he did not tell his father. A subsequent "confession note" recorded the same. The interrogation record shows that Mr Jia T's account was given voluntarily, without torture or deceit.

19. Mr Shen was then detained on bribery charges. On 16th February 2014, he was questioned by the PSB. According to the interrogation record, Mr Shen said that he had offered a bribe of RMB 300,000 to Mr Jia T. Mr Xu had suggested to him that Mr Jia T be approached. The same account was given in an undated "confession note".

20. Meanwhile, on 10th February 2014, HNA had written to the PSB requesting information on the PSB's investigation of the bribery charges, so that it could "explain and prove the facts" in the English court proceedings. On 17th February 2014, the PSB replied to HNA (the "PSB letter"), saying:-

> "In October 2013, we filed a case regarding [Mr Jia H's and Mr Jia T's] suspected offences and took criminal coercive measures accordingly. They confessed. And [Mr Jia T] confessed that: in July and August, 2008, during the negotiation of … charter party between [Grand China and Shagang], took bribes in amount of 300,000 RMB from [Mr Xu] … and persuaded his father [Mr Jia H] into approving this deal according to [Mr Xu's] request. At last, [Mr Jia H] approved this deal.
>
> In December 2013, our Bureau opened file for [Mr Xu] and took criminal enforcement measures against him on grounds of suspected crime of offering [b]ribery to non-state staff, and meanwhile he admitted the fact he had bribed [Mr Jia T] with RMB 300,000, and claimed that he did so because he was instructed by … [Mr Shen].
>
> …

> On 15th February 2014 [Mr Shen] … was filed and placed criminal enforcement measures, and [Mr Shen] confessed that he had [Mr Xu] to bribe [Mr Jia T and Mr Jia H] with RMB 300,000 …".

21. On 4th March 2014, Mr Xu was questioned again by the PSB. He remained at that time under "residential surveillance", which is a kind of house detention. According to the interrogation record, he was asked why he and Mr Shen would want to bribe HNA if the pricing of the charterparty was reasonable in any event. He responded that the vessel would otherwise have been difficult to charter quickly. Mr Xu was also asked about the discrepancy in the amount of the bribe between his initial interrogation and his confession note. He answered that his initial account had been false, and that he had subsequently confessed the full extent of his crimes "for leniency".

22. On 1st May 2014, Mr Zhang Jie ("Mr Zhang"), who had by then replaced Mr Shen as the general manager of Shagang, made a formal complaint (the "complaint") to the People's Procuratorate of Haikou City (the entity that has supervisory responsibility for the PSB). The complaint alleged that the confessions of Mr Xu and Mr Shen had been procured by torture, and that HNA had wrongly used the PSB to manufacture false charges with a view to interfering in an economic dispute. Mr Zhang requested the Procuratorate urgently to investigate these allegations.

23. On 23rd June 2014, the Procuratorate made a report on the outcome of its investigation into the complaint (the "investigation report"). It is unclear to whom the report was sent, but it concluded that none of the allegations made in the complaint were supported by the facts, the Procuratorate having "visited the [PSB], interviewed the concerned suspects, [and] retrieved from the Detention Centre relevant materials". Neither the complaint nor the investigation report was available to the judge, but HNA's application to adduce them as new evidence on the appeal was ultimately not opposed by Shagang. Shagang conceded that the complaint ought to have been disclosed, but denied having seen the investigation report at the time.

24. On the same day, HNA filed an amended Defence and Counterclaim alleging that the charterparty had been procured by the payment of bribes by or on behalf of Shagang to senior employees at Grand China. HNA pleaded that it would rely on the confessions of Mr Xu, Mr Jia T and Mr Shen. HNA then pleaded that it was entitled to rescind the guarantee due to Shagang's fraudulent non-disclosure of the bribery, or alternatively that the bribery meant that Shagang's claim was barred by the illegality principle.

25. On 27th June 2014, Shagang filed an amended Reply and Defence to Counterclaim denying that the charterparty had been procured by bribery, but without alleging that the admissions had been procured by torture.

26. On 23rd July 2014, Mr Xu was arrested for bribery of a non-public servant. Upon being admitted to Haikou City Second Detention Centre, Mr Xu confirmed that he had not been subjected to torture or corporal punishment, or suffered any physical injury, during interrogation. A medical examination was performed on him, the report of which (the "medical report") recorded no evidence of external physical injury. The medical report was also the subject of HNA's unopposed application to adduce new evidence.

27. On 21st August 2014, Mr Xu was interviewed at the detention centre by Mr Guo. Mr Guo's interview notes recorded that Mr Xu had said the following:-

> "I was brought to Hainan on 23rd January this year [2014]. Initially there weren't any charges. I was taken to the basement of the [PSB]. It was around 11pm and I was definitely there for over 48 hours. I came out on the afternoon of the 26th [January]. The least serious methods used against me were fists and truncheons. I was stripped of my clothes and cold air was blown on me. They covered my mouth with their hands after water was poured into me. I was also burnt with a cigarette butt.
>
> …
>
> At first I said that there had been no such thing [bribery], but they then tortured me and I couldn't take it any longer. On the morning of 24th [January], I said I had paid out 100,000 yuan. I made this up. On the afternoon of 24th [January], they tortured me again and poured water into me. I couldn't bear it any more. They told me it had been 300,000 and it had been paid in two batches – 150,000 each time. In the end, I had no other way out but to say what I was told to say …
>
> ...
>
> I definitely never did it. At that time, the market was dominated by ship-owners and we didn't have to ask any favours of [Grand China]. They had to ask help from us. Their company was a new company and we were an established company."

28. On 15th September 2014, in a further interview, Mr Xu again told Mr Guo that he had been tortured by the PSB. He also said that he had heard Mr Jia T screaming from another room. Finally, he was shown Mr Shen, whom he thought from his appearance had had water poured over him.

29. On 14th November 2014, Shagang filed a re-amended Reply and Defence to Counterclaim, in which it alleged that the confessions of bribery relied upon by HNA had been obtained by torture. The following sections of Shagang's Reply are directly relevant to the central issue in this appeal:-

> "1A. It is denied that the Charterparty was procured by the payment of bribes … whether as alleged in paragraph 4A or at all. Without prejudice to the generality of the foregoing, the Claimant pleads further as follows as to the particulars alleged in [paragraph 4A]:
>
> …
>
> (4) It is denied that Mr Xu paid the sum of RMB 300,000, or any sum, to Mr Jia, and/or denied that Mr Xu requested Mr Jia T to induce his father to approve the Charterparty, whether as alleged or at all.
>
> …
>
> 1B. Further or alternatively (and strictly without prejudice to the foregoing), if (which is denied) any sum of money was paid to Mr Jia T … as alleged, then:
>
> …

(2) It is in any and all events denied that the Charterparty was procured or induced by bribery and/or denied that any bribery was of any causative effect in relation to the negotiation or conclusion of the Charterparty. Without prejudice to the generality of the foregoing or the burden of proof, the Claimant will say that:

(a) The Charterparty was concluded at the peak, or close to the peak, of the market in 2008 when charterers were keen and willing to commit to long-term charters before rates rose even higher.

(b) The Charterparty was concluded at the market rate of hire and … alternatively, was to all material intents and purposes equivalent to, a bona fide commercial agreement entered into by parties acting at arms' length.

(c) [Grand China] would have entered into the Charterparty on the same terms even if no such payments as those alleged had been made.

1C. As to the facts and matters alleged in paragraph 4B, the Claimant pleads as follows:

…

(11) By reason of the facts and matters set out above [the torture allegations], as to Mr Xu's alleged 'confession':

…

(b) … his confession was obtained by the use of torture, the treatment to which he was subjected by the [PSB] officers amounting to the infliction of severe pain and suffering upon him …

(c) Mr Xu's 'confession' (together with any other document purporting to record or evidence the same) is accordingly inadmissible as evidence in these proceedings …

…

(12) As regards the other individuals alleged to have confessed in paragraph 4B:

…

(c) If and to the extent that any confessions by Mr Jia T … or Mr Shen do exist … then it is the Claimant's case in light of the facts and matters … above [the torture allegations] that:

(i) The confessions were obtained by the use of torture by the [PSB] officers and are accordingly inadmissible as evidence in these proceedings …

> (ii) Further or alternatively (and strictly without prejudice to the foregoing), the confessions were obtained through the use of painful, inhumane and/or degrading treatment (e.g. water torture and/or beatings) with the consequence that they are unreliable and no (alternatively very little) weight is to be attached to them.
>
> …
>
> (13) Further or alternatively, and in any event, it is expressly denied that any payments or bribes were in fact made, whether as suggested in paragraph 4B or at all. Paragraph 1A above is repeated."

30. On 17th and 19th December 2014, Mr Xu was interviewed by another lawyer from Mr Guo's firm. According to the notes of that interview, Mr Xu decided to adhere to the account of events that he had given to the PSB officers (rather than changing it in the light of his alleged torture). He said that he took that decision because the PSB officers had indicated to him that he would receive a much-reduced sentence if he pleaded guilty to the allegations rather than contesting them and being found guilty.

31. On 22nd September 2015, Mr Xu pleaded guilty to bribery in respect of the charterparty before the Meilan District People's Court of Haikou City. He was subsequently sentenced to a term of imprisonment of one year and 8 months. He was advised of his right to appeal, but chose not to do so.

32. The trial of Shagang's claim against HNA was undertaken by Knowles J between 26th January and 9th February 2016, with his judgment being delivered on 16th May 2016. Longmore LJ granted permission to appeal at a hearing on 13th July 2017. On 10th November 2017, Shagang filed a detailed Respondent's Notice, the contents of which are summarised below.

Knowles J's judgment

33. Knowles J summarised the case at paragraph 5 as follows:-

> "… It is HNA's case … that the Charterparty was procured by bribery and is therefore unenforceable. The allegation of bribery is founded on confession evidence. It is Shagang's case … that the confession evidence was obtained by torture and is therefore inadmissible in legal proceedings."

34. The judge then summarised the alleged bribery (at paragraphs 6-9), the evidence before him (at paragraphs 10-17), the commercial context of the charterparty (at paragraphs 18-22), and the circumstances in which it had been approved within Grand China and HNA (at paragraphs 23-24). The judge said this about the evidence:-

> "10. There was little first-hand oral evidence available at the trial. None of Mr Xu, Mr Jia T, Mr Jia H or Mr Shen was available to give oral evidence at trial, and nor was any officer from the PSB.
>
> 11. Mr Zhang … of Shagang gave oral evidence, but he was not at Shagang at the time of the alleged bribe. Mr Xu's lawyer from August 2014, Mr Guo … gave oral evidence and I refer to this below. Mr Wu Lie ("Mr Wu"), General Manager of Audit and Legal Affairs at HNA gave oral evidence and I refer to this below.

> 12. I am invited by HNA to draw adverse inferences against Shagang from, in particular, Mr Xu's absence at trial and from the absence of his wife, Mrs Li Xueping ("Mrs Xue") at trial. I decline to do so. I am unpersuaded that Shagang could realistically be expected to procure their presence at this trial. Shagang is now in liquidation and Mr Xu is no longer employed by it. I am unpersuaded that the reason for their absence is because, as HNA suggested, they fear the truth.
>
> 13. The documentation available was substantially incomplete, and the reliability was challenged of some of what there was. To some extent it is a position that it is only realistic to expect in a case of this nature …
>
> 14. The documentation included some documentation from records of the PSB or from records of the relevant Criminal Court in [the PRC] … The focus was on Mr Xu; there was substantially less of this documentation in relation to Mr Jia T, Mr Shen and Mr Jia H."

35. At paragraphs 25-44, Knowles J set out the facts pertaining to Mr Xu's confession. In the course of doing so, he said the following:-

> "33. As I have mentioned, Mr Guo also gave evidence at this trial. I found myself able to accept substantial parts of his evidence, though there were other parts that I found unconvincing. At times my ability to place confidence in him was damaged: an example was in his explanation about the inclusion of an untrue allegation, in a bail application for Mr Xu, that Mrs Xue was pregnant. Overall, I found a pragmatic man who had tried to work for Mr Xu and Mrs Xue in difficult circumstances. I am quite satisfied that there is nothing in HNA's suggestion that Mr Guo was looking to help Shagang. There were times in his representation of Mr Xu when Mr Guo protected his own position. That said, Mr Guo did not have to attend this trial and it is to his credit that he was prepared to do so.
>
> 34. I do not doubt the essential accuracy of the interview notes Mr Guo made …".

36. The judge then set out the facts of Mr Jia T's confession (at paragraphs 45-50). He referred in this connection to "an unsigned document entitled "Report on torture suffered by [Mr Jia T] during the period detailed in Hainan" (the "Jia T report")", in relation to which he said that:-

> "46. … HNA asks me to treat this document with circumspection, and I do so. On Mr Guo's evidence it was given to him in late 2015 by Mr Jia H's lawyer who told him it came from Mr Jia T's wife.
>
> …
>
> "49. The Jia T report asserts Mr Jia T's innocence, and makes allegations of torture, both at the January 2014 interrogation and at previous interrogations for which no interrogation record is available but which are said in the Jia T report to have produced differing versions of events. The torture alleged to have occurred at the January 2014 interrogation again involved forcing water, but also mustard oil …".

37. Next, the judge set out the facts of Mr Shen's confession (at paragraphs 51-55). In relation to oral evidence given by Mr Zhang, he said that:-

> "53. Mr Zhang of Shagang gave evidence at trial that was tested in cross examination. Substantial points were added to his earlier witness statement testimony by later witness statements. I was not satisfied with his explanation for this and it left me viewing his evidence with caution. So too did his claim not to have remembered until late the existence of an audio file.
>
> 54. However what I do accept that is that in June 2014 Mr Shen said to Mr Zhang that he (Mr Shen) was innocent …
>
> 55. Mr Shen has also been accused of fraudulent breach of fiduciary duty, but this is not connected with the alleged bribe by Mr Xu."

38. In relation to Mr Jia H, Knowles J said the following:-

> "56. On the available materials it appears Mr Jia H was detained and prosecuted. Very little information is available. It is not clear to me that the offence for which he was prosecuted involved the alleged bribe by Mr Xu.
>
> 57. The documents available from the Procuratorate indicate that there was a confession from Mr Jia H, but a copy of that confession is not available to this Court. In evidence that I am prepared to accept, Mr Guo said that he had read it and that in it Mr Jia H mentioned he did not receive the RMB 300,000."

39. The judge then addressed (at paragraphs 58-61) a separate bribe which had been alleged by HNA (the "Sun bribe"). The judge found that a Mr Sun Che ("Mr Sun") of Grand China admitted and was convicted of receiving US$30,000 from Mr Hong Xiangbin ("Mr Hong"), a broker, in June 2011 after the charterparty and the guarantee had been entered into. HNA did not ultimately pursue the Sun bribe as a free-standing defence to Shagang's claim at trial, and the judge rejected HNA's contention that the fact of the Sun bribe supported its case regarding the alleged bribe by Mr Xu.

40. At paragraphs 63-82, the judge addressed English and Chinese law on confession evidence and torture, as well as the expert evidence before him concerning reported instances of confessions coerced by torture in the PRC. He concluded that confession evidence procured by torture is inadmissible in both jurisdictions, and that reforms made in 2012 to Chinese criminal procedure rules have substantially reduced instances of torture in that country, but that there continue to be some reported instances.

41. The judge then stated his "conclusions on bribery" as follows:-

> "87. On the limited evidence at this trial, and after careful consideration, on the balance of probabilities I find that there was no bribe by Mr Xu.
>
> 88. I fully acknowledge that the Meilan District People's Court of Haikou City found Mr Xu guilty of bribery and sentenced him. On the material put before that Court I can entirely follow its finding. However, material has been put before this Court that was not put before the Meilan District People's Court. In particular, the Meilan District People's Court had

evidence of Mr Xu (and others) admitting the alleged bribery, but did not have the evidence of his (and their) also denying the alleged bribery.

89. When Mr Xu, Mr Jia T and Mr Shen each first referred to a bribe they did so without a lawyer or representative present. Although it appears Mr Guo was not his first lawyer, when Mr Xu had access to Mr Guo as his lawyer Mr Xu denied that there was a bribe.

90. There is no evidence that any account of the officers of PSB who were present at any interrogation has been tested with them in [the PRC]. I appreciate the practical difficulties, but there has been no opportunity to test an account from them at this trial.

91. The reason given for the alleged bribing — concluding the Charterparty quickly rather than the pricing of the Charterparty — is unconvincing, in my judgment. Even if there was a desire for a quick conclusion I am unpersuaded, on the evidence, that bribes were introduced to achieve that end. On the documents, Mr Xu at one point suggested it as a reason for bribing. The same appears to be the case for Mr Shen. But both have also denied any such bribe. Further, the state of the market was not such as to provide an objective reason for a quick conclusion being so important, or being other than achievable in ordinary course in any event. The relevant chartering market was active and an owners' market …

92. Even when Mr Jia T gave an account consistent with receiving a bribe, that account supported the fact that Mr Jia H's response was to insist on normal procedures. I do not overlook HNA's point that a requirement for board approval was lifted and the Charterparty was not submitted for a required legal and financial review, but in the result the Charterparty was approved by, among others, a main board director of HNA, and by the Chairman of HNA. I do not overlook Mr Wu's own evidence that he did not become aware of the Charterparty until 2011, but in the next several years following the agreement of the Charterparty in 2008 I do not see anyone at HNA bringing out the point that the Charterparty was agreed too quickly so as to cause suspicion of bribery.

93. Further, I have seen no records to show withdrawal of funds used for the alleged bribe or expenditure of funds by Mr Jia T.

94. The reasons I have given would alone cause me to reach the conclusion that there was no bribe. I am not led to a different conclusion by the fact that Mr Xu pleaded guilty at trial, when I consider that plea in context. Further my conclusion is not disturbed by Mr Xu's admission of accepting a watch as a bribe in connection with an unrelated matter.

…

97. HNA argues that, in the absence of torture, there is no credible reason why Mr Xu, Mr Jia T and Mr Shen should falsely confess to crimes which they did not commit. However, the possibility of a large difference between the sentence that might follow an admission and the sentence that might follow a conviction was referenced expressly by Mr Xu in his exchanges with Mr Guo, and on his account reflected what had been indicated to him by officers of the PSB.

> 98. HNA argues that the prospect of a lighter sentence cannot be a reason for a false confession. I do not accept that argument …"

42. He then stated his "conclusions on torture" as follows:-

> "101. … I have considered the evidence available at this trial for and against the allegations of torture, and the limitations of that evidence, including the absence – emphasised by HNA – of medical evidence. Having done so, I find that torture cannot be ruled out as a reason for the confessions.
>
> 102. The fact that I cannot rule out torture further reduces the confidence that I can put in the confessions, although it will be apparent from my conclusions on bribery (above) that I already have insufficient confidence in the confessions to allow a finding of bribery.
>
> 103. HNA distinguishes the confessions from later admissions (including in bail applications) and pleas of guilty, at which later points torture is not alleged to have been practised. But in the present case the matters are interconnected. Once the confessions had been made, a departure from them, in the form of a denial or a not guilty plea, would likely require reference back to the torture allegations.
>
> 104. In the present case, in the circumstances of my conclusion that there was no bribe, it is not necessary to express a definitive conclusion on whether there was torture. I have said that I cannot rule it out; the evidence available does not equip me well to reach a firmer conclusion.
>
> 105. That I should so confine my view at this trial is also in the interests of leaving proper room for investigation in [the PRC] by the appropriate authorities, to include questioning of the officers who were on duty. I have not set out in this judgment the full extent and nature of the torture alleged to have occurred, but if the allegations were all true it would be hard to imagine a more comprehensive breach of the duties and responsibilities of the officers. …"

43. The judge concluded by saying that HNA was liable to pay Shagang under the guarantee of the charterparty of the vessel.

HNA's grounds of appeal

44. HNA has raised 5 grounds of appeal, as follows:-

i) **The admissions ground:** Having found that Shagang's allegations of torture were not established, the judge ought to have found, on the basis of the rules of evidence, that the admissions should be given effect so that the charterparty was procured by bribery.

ii) **The section 4 ground:** The judge failed to consider and apply section 4 of the Civil Evidence Act 1995 (the "1995 Act") when assessing the probative value of the evidence of the admissions.

iii) **The infection ground:** The judge allowed his reasoning and conclusions as to whether there was bribery to be infected by his residual suspicion that torture could not be ruled out.

iv) **The *Re A (No 2)* ground:** By taking into account his suspicion of torture, the judge misapplied the rule in *A and Others v. Secretary of State for the Home Department (No 2)* [2005] UKHL 71 ("*Re A (No 2)*").

v) **The comity ground:** The judge failed to afford due respect to the procedures and logical consequences of the outcome of a criminal investigation leading to confession and a guilty plea before the Chinese criminal courts.

45. At the start of the appeal hearing, HNA abandoned a proposed sixth ground of appeal to the effect that Mr Xu's conviction by a Chinese criminal court was itself evidence that the bribe had been paid, notwithstanding the exclusionary rule in *Hollington v. Hewthorn* [1943] KB 587.

Shagang's Respondent's Notice

46. Shagang relied on the following points in its Respondent's Notice:-

i) The burden lay on HNA to prove that the admissions were voluntary and unequivocal, which, on the judge's factual findings, it failed to do.

ii) HNA accepted at trial that, if torture were not proved, it remained a matter for the judge to weigh the admissions evidence, so that the admissions ground was not open to HNA.

iii) The judge's inability to rule out torture was a relevant factor when evaluating the admissions evidence, and led to the conclusion that no weight should have been afforded to that evidence.

iv) No weight should be afforded to the admissions evidence, because of (i) its inconsistencies and irregularities and (ii) the lack of a satisfactory explanation for the commencement of the PSB investigation.

v) The admissions were in any event incapable of establishing bribery, since they indicated that Mr Jia H rejected the bribe, never received the money in question, and said that normal procedures should be followed.

vi) Even if HNA had proved the alleged bribe, neither of HNA's defences was made out because of an absence of causation or inducement and the application of the rules laid down in *Patel v. Mirza* [2016] UKSC 42 ("*Patel v. Mirza*").

HNA's application to adduce new evidence

47. As we have said, HNA's application to admit the documents relating to investigations into Shagang's torture allegations undertaken by the Procuratorate of Haikou City was ultimately not opposed. The documents included the complaint, the investigation report and the medical report referred to in the chronological background above (together the "investigation documents").

48. The application to rely on two judgments of the Chinese courts dated 17th March 2017 and 23rd May 2017, in which Mr Jia H was found guilty of commercial dishonesty charges separate from the bribery alleged in the present case, was not pursued.

49. HNA submitted that the relevance of the investigation documents was threefold. First, they showed that the PSB officers' account of events had in fact been tested in the PRC, contrary to what the judge had said at paragraph 90, and that the torture allegations had been investigated, contrary to what he had said at paragraph 105. Secondly, the complaint demonstrated that Mr Zhang had failed to make proper disclosure, and had misled the court when he said in cross-examination that he had never reported the alleged torture. With this knowledge, the judge would have concluded that Mr Zhang's evidence, including his report of Mr Shen's protestation of innocence, mentioned at paragraph 54 of the judgment, should be entirely disregarded. Finally, the medical report recorded no evidence of external physical injury to Mr Xu, contrary to Mr Guo's evidence that he had seen a faint burn scar on Mr Xu's body, and would therefore have significantly undermined Mr Guo's credibility. As we have already said, Shagang conceded that the complaint ought to have been disclosed. Ms Rose, however, went on to submit that the investigation documents supported Shagang's case as to the unreliability of the admissions.

Discussion of the parties' submissions on the judge's judgment

50. We will deal with the grounds of appeal and the points made in the Respondent's Notice in a rather different order from the way they were argued. We will approach the matter as follows:-

    i) The proper approach to an appeal on questions of fact, as shown in *Assicurazioni Generali SpA v. Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642 ("*Assicurazioni*") and *Datec Electronics Holdings Ltd v. UPS Ltd* [2007] UKHL 23 ("*Datec*").

    ii) The question of how the court should approach evidence of torture when it is used to impugn admissions, in the light of *Re A (No 2)* and *In Re B (Children) (Standard of Proof)* [2008] UKHL 35 ("*Re B*").

    iii) Was the judge wrong to deal with torture after dealing with bribery, and in the way that he did?

    iv) Does it follow automatically from the judge's failure to find that there was torture, as a matter of pleading or logic, that the admissions had to be accepted as reliable?

    v) Did the judge allow his doubts about torture to infect his findings about either the reliability of the admissions or whether there was bribery?

    vi) Was the judge justified in concluding that bribery had not been proved?

    vii) What, in all the circumstances, is the proper disposition of the appeal?

The proper approach to an appeal on questions of fact

51. It was not disputed that the applicable principles are set out in *Assicurazioni* and *Datec*. *Datec* concerned the loss of packages that were meant to be delivered to the claimants by UPS. The case turned on whether the most probable cause of the loss was wilful misconduct, as the claimants said, or accident, as UPS said. The trial judge found in favour of UPS. His decision was overturned by the Court of Appeal, and the Court of Appeal's decision was upheld by the House of Lords. In his leading

judgment (with which Lords Hoffmann, Hope, Walker and Neuberger agreed), Lord Mance set out, by reference to the key passages from *Assicurazioni*, the proper approach to appeals against a trial judge's findings of fact, as follows:-

> "45. Mr Flaux for UPS submits that the Court of Appeal, in concluding that employee theft was the relevant cause, paid insufficient attention to the primacy of the judge's findings, that it was lured into a process of elimination (which could at best arrive a conclusion as to which of many possible causes was the least unlikely, rather than a conclusion as to any cause which was more probable than all the others viewed together) and that, despite lip service to the need for clear and cogent evidence, it found wilful misconduct when there was an absence of any such evidence.
>
> 46. As to the correct approach in an appellate court to findings and inferences of fact made by a judge at first instance after hearing evidence, there was no disagreement between counsel. In *Assicurazioni* … Clarke LJ summarised the position … :
>
> > "14. The approach of the court to any particular case will depend upon the nature of the issues and the kind of case determined by the judge … In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.
> >
> > "15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere …
> >
> > "16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.
> >
> > …
>
> The judgment of Ward LJ in [*Assicurazioni*] may be read as advocating a different test, which would equate the approach of an appellate court to findings of fact with its approach to decisions taken in the exercise of a discretion … that is not the correct test, and it is the judgment of Clarke LJ

> in the paragraphs quoted above from his judgment that gives proper guidance as to the role of the Court of Appeal when faced with appeals on fact."

52. Lord Mance then applied those principles to the facts in *Datec* as follows:-

> 47. In the present case, the judge's findings of primary fact have not been challenged. One or two small points have been made on factual matters, but they are of no or minor relevance and do not justify Mr Flaux's submission that the Court of Appeal exceeded its proper role in reviewing the judge's conclusions. Essentially, what have been in issue have been the inferences with regard to the causation of loss to be drawn from primary facts which are not in dispute. Mr Flaux, in my view correctly, accepted this was a correct analysis of the central issues, when opening the appeal … in my view the situation is one where an appellate court is well placed and entitled to re-consider for itself the judge's findings as to what should or should not be inferred regarding causation from the primary facts which he found.
>
> 48 Nor do I accept Mr Flaux's submission that Richards LJ was lured, by a process of elimination, into accepting as the probable cause the least unlikely of a range of possibilities all of them unlikely. That was the error the House identified in the approach taken by the judge at first instance in *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 WLR 948. The reasoning of Sedley LJ in the present case may be open to criticism both for suggesting that sufficient was known for the court to base its conclusions on the least improbable cause and for doing this. But that of Richards LJ, with whom Brooke LJ agreed, is not.
>
> …
>
> 50 I find the reasons given by Richards LJ for reversing the judge compelling. None of the possibilities mentioned by the judge … affords any plausible explanation of the disappearance of the … packages … Inevitably, any systematic consideration of the possibilities is subject to a risk that it may become a process of elimination leading to no more than a conclusion regarding the least unlikely cause of loss. But, as I have said, I do not consider that Richards LJ fell into that trap. I share, without hesitation, the view which he formed overall that theft involving a UPS employee was shown on a strong balance of probability to have been the cause of this loss."

53. Ms Rose attempted to distinguish *Datec* from the present case on the basis that it did not concern the trial judge's weighing of hearsay evidence against other evidence, but a situation where the judge had to decide, in the absence of evidence, which of two possibilities was more likely to have occurred. In our view, this is a distinction without a difference. Like *Datec*, this is not an appeal against the judge's findings of primary fact. There is no appeal against the judge's finding that the reasons given for the alleged bribe were unconvincing, nor against his finding that the allegations of torture were not made out on the balance of probabilities. Instead, HNA challenges the manner in which the judge reasoned and his conclusion, drawn from his unchallenged findings of primary fact, that there was no bribe. This court must ask itself whether the judge made an error of law in reaching his ultimate conclusion, and/or whether it was a conclusion that no reasonable judge could have reached.

The question of how the court should approach evidence of torture when it is used to impugn admissions

54. Essentially, this was an argument between the parties about whether, having admitted the admissions as hearsay evidence on the basis that torture had not been found on the balance of probabilities to have occurred, the judge was nonetheless entitled to take into account his lingering doubts about torture when evaluating the reliability of that evidence. Ms Rose submitted, on the basis of *Re A (No 2)*, that he was, whilst Mr Smouha submitted, on the basis of *Re B* and the 'binary principle' of the law of evidence, that he was not. The judge had been referred by counsel to *Re A (No 2)* but not to *Re B*.

55. *Re A (No 2)* concerned the Special Immigration Appeals Commission ("SIAC"), a superior court of record established by statute. The Anti-terrorism, Crime and Security Act 2001 (the "2001 Act") permitted the detention of persons who were not British citizens, provided that the Secretary of State for the Home Department (the "SSHD") reasonably believed that their presence in the United Kingdom posed a risk to national security, and reasonably suspected them of being terrorists (as defined in the 2001 Act). Detainees could appeal their detention to SIAC, which had to decide whether the SSHD's belief and suspicion were indeed reasonable. The issue before the House of Lords was whether SIAC could admit and rely on admission evidence that was or may have been procured by torture inflicted by officials of a foreign state. The minority (Lords Bingham, Hoffmann and Nicholls) considered that such evidence should not be admitted where there was a "real risk" that it had been obtained by torture, but the majority (Lords Hope, Rodger, Carswell and Brown) held that the applicable standard of proof was the balance of probabilities. As to the weight that SIAC should attach to such evidence, once admitted, Lord Hope said the following at paragraph 118 of his judgment (with which Lords Rodger and Carswell agreed at paragraphs 145 and 158, respectively):-

> "… SIAC should not admit the evidence if it concludes on a balance of probabilities that it was obtained by torture. In other words, if SIAC is left in doubt as to whether the evidence was obtained in this way, it should admit it. **But it must bear its doubt in mind when it is evaluating the evidence** … [emphasis added]".

56. The context of *Re B* was very different. The case concerned care proceedings in the High Court, in which the judge had had to decide whether the threshold criteria for the making of a care order under section 31(2) of the Children Act 1989 were satisfied. Allegations of sexual abuse had been made by one of the children against the potential carer. The judge had been unable to find on the balance of probabilities that the child was telling the truth, but concluded that there was a "real possibility" that the abuse had occurred. The judge did not take this possibility into account when considering the section 31(2) criteria, and it was contended on appeal that he should have done. The appeal was dismissed by the Court of Appeal, whose decision was upheld by the House of Lords, on the basis that the trial judge's conclusion amounted, in law, to a finding that the alleged abuse had not occurred. By way of explanation, Lord Hoffmann said that:-

> "2. 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."

57. This reasoning was echoed by Baroness Hale, as follows:-

> "32. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other …
>
> 59. To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions … is to confuse the role of the local authority, in assessing and managing risk … with the role of the court in deciding where the truth lies and what the legal consequences should be. I do not underestimate the difficulty of deciding where the truth lies but that is what the courts are for."

58. Mr Smouha submitted that *Re B* should be followed in this case because it was in line with established principles of the law of evidence, whilst the unique context of *Re A (No 2)* meant that it had no application in the present case. *Re A (No 2)* concerned a statutory tribunal, the task of which was to assess whether there were reasonable grounds for belief in the existence of a risk. That was very different to the task that faces a civil court, which is to determine whether a claim succeeds or fails based on findings of fact. Further, SIAC was subject to its own evidential rules and procedures, including that it could receive evidence which would not be admissible in a court of law (as explained at paragraph 7 of Lord Bingham's judgment). There was no hint in the judgments that the principles they articulated had any application outside SIAC. Nor was there any authority supporting the proposition that a civil court, having made a finding of fact on the balance of probabilities, may take into account a residual doubt as to that fact.

59. Ms Rose submitted in response that a trial judge has two different tasks to perform: (i) making those findings of fact which are necessary to decide the case before him, and (ii) evaluating the weight that should be attached to the evidence bearing upon those facts. The binary principle applied only to the first of those tasks, in which respect the judge in the present case had only to decide whether the alleged bribery had occurred. He had to make a finding for admissibility purposes on whether the admission evidence had been obtained by torture, but once that evidence had been admitted, the torture question was relevant only to its weight. In that context, the judge had been correct to apply the principle in *Re A (No 2)*, which reflected the constitutional abhorrence for torture and was therefore of general application.

60. We prefer the submissions of Mr Smouha on this issue. We agree with him that the context of *Re A (No 2)* is entirely different from that of the present case for the reasons he gave. Further, it would be surprising indeed if, in passages where they expressly referred to SIAC, and to SIAC alone, the House of Lords had intended to make a fundamental change to the established rules of evidence in civil proceedings.

Whilst we fully accept and endorse the constitutional abhorrence for torture, we do not consider that it bears on a civil judge's responsibility to decide whether something is more likely than not to have happened. In the present case, the judge was unable to find on the balance of probabilities that the admissions had been obtained by torture. That was, in law, a finding that there was no torture. We do not accept Ms Rose's submission that this finding should be confined to the context of admissibility of the admission evidence. It must apply equally to the question of what weight should be attached to those admissions once held to be admissible. In *Re A (No 2)*, the very question that SIAC had to determine was whether the SSHD reasonably believed that the appellants' presence in the United Kingdom posed a risk to national security, and reasonably suspected them of being terrorists. The reasonableness of her belief might be directly affected by any lingering doubts that the evidence had been extracted by torture. Whilst it might be possible, in theory, to apply an analogous argument in this case, namely that even if the admissions were held admissible, their weight could still be affected by the possibility that they might have been obtained by torture, such a process runs entirely contrary, as we have said, to the normal rules of civil procedure. In our judgment, once the judge had decided that torture had not been proved on the balance of probabilities, he was in our judgment bound entirely to disregard the possibility that the admissions had been obtained by torture. He had decided the point, and that was the end of it. If he took his lingering doubts as to torture into account in evaluating the weight to be attached to the admissions, he made an error of law. We return in due course to the question whether the judge did, in fact, make that error.

Was the judge wrong to deal with torture after dealing with bribery, and in the way that he did?

61. Mr Smouha's fundamental criticisms of the judge's judgment were that he had not decided the primary torture issue first, and that he had not properly applied his decision on that issue to his evaluation of the reliability of the admissions. Had he approached the matter in the right order, he would have concluded that torture was not proved on the balance of probabilities. On that basis, the challenge to the admissibility of the admissions was defeated, and the judge should have given them effect in deciding whether there was bribery. There was, according to Mr Smouha, no basis, apart from torture, on which the judge could have rejected the admissions. In reality, the judge never asked himself the right question, namely whether, having found that there was no torture, the admissible admissions should be given effect. We will return to that latter submission under the next heading.

62. Ms Rose did not really dispute that it would have been better for the judge to have dealt with the torture question first. She argued, however, that it was a criticism without any consequence. The judge had said expressly at paragraph 94 that the reasons given in paragraphs 88-93, which did not refer to torture, "would alone [have caused him] to reach the conclusion that there was no bribe", and at paragraph 102 that he had already had "insufficient confidence in the confessions to allow a finding of bribery". He must, therefore, have disregarded the torture allegations in deciding on bribery.

63. In our view, the judge ought to have decided the issue of torture first. It was the sole basis on which the admissibility of the admissions was resisted. All the other

arguments went only to the weight that should be accorded to them. Thus, the judge's first task was to decide on the facts whether or not torture had taken place in order to extract each of the three main admissions (leaving aside Mr Jia H) relied upon by HNA. Once he had done that exercise, the judge should have stated his conclusion that, since torture had not been proved, the admissions were admissible as evidence of their contents.

64. As is stated in Phipson on Evidence 18th edition, 2013 at paragraph 4-01: "[i]nformal statements against interest … are generally admissible, the task of the court being to determine the weight, if any, to be attached to the hearsay evidence". Section 4(1) of the 1995 Act provides that "in estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence". Section 4(2) then lists a number of particular factors to which regard may be had in that context. The factors are mainly concerned with the hearsay nature of such statements, such as whether the maker could have been produced as a witness and whether the evidence is multiple hearsay. Notably, however, section 4(2)(d) points the court to asking whether the person making the statement had any motive to conceal or misrepresent matters.

65. In our judgment, therefore, the proper approach in a case of this kind is to decide first whether torture is proved. If it is not proved, as in this case, the statements are admitted as hearsay evidence. The next step is to decide the weight that can be attached to that evidence in all the circumstances, including those in section 4 of the 1995 Act. Only then could the court properly move on to an evaluation of all the evidence, including the hearsay statements of admission, in order to decide the primary factual issue in the case, which was whether the alleged bribery occurred. We can quite see that the second and third stages of the process might be undertaken together, but it must be clear that both have actually been considered.

Does it follow automatically from the judge's failure to find that there was torture, as a matter of pleading or logic, that the admissions had to be accepted as reliable?

66. HNA argued that the effect of the pleadings that we have recited above was that, once the torture allegations were rejected, there could be no other challenge to the acceptance of the admissions as establishing the bribe. There was, argued Mr Smouha, no plea that the admissions were untruthful because they had been given in order to obtain leniency from the courts of the PRC. Ms Rose submitted in response that those arguments were not open to HNA in circumstances where both sides had addressed at trial, without objection, the issue of the weight to be attached to the admissions evidence in the absence of torture.

67. We disagree with Ms Rose that the above arguments are not open to HNA, but in any event consider those arguments unsustainable because, as we have already recorded, Shagang's re-amended Reply and Defence to Counterclaim made a quite general denial that the charterparty had been procured by bribery. That denial was a free-standing one, separate from the allegations that there had been torture. In support of the general denial, paragraph 1B of the re-amended Reply specifically pleaded the market conditions that Shagang argued militated against there having been a bribe.

68. As it seems to us, it would defy the logic of Mr Smouha's main argument for the judge to have been bound to decide that the admissions proved bribery without evaluating the other evidence. Further, as Ms Rose pointed out, pleadings are

intended to plead facts, not evidence. Shagang did not have to plead all the points that it might derive from the evidence that it was going to ask the court to take into account in evaluating the weight of the admissions and how they should be balanced against any other relevant evidence.

Did the judge allow his doubts about torture to infect his findings about either the reliability of the admissions or whether there was bribery?

69. We have already decided that the judge ought not to have allowed his doubts about whether torture had occurred to infect his findings on the central issue in the case. We must now decide whether he did so. As we have already mentioned, Ms Rose submitted that paragraphs 94 and 102 of the judgment made clear that the judge had not fallen into this error. Mr Smouha, on the other hand, relied on at least two aspects of the judge's crucial paragraphs 88-94 (which give the judge's reasons for finding that there was no bribery) as demonstrating that he did take his doubts about torture into account at that stage. Mr Smouha pointed to the judge's references to the absence of a lawyer when the relevant individuals first referred to a bribe, and to the absence of any evidence that "any account of the officers of PSB who were present at any interrogation ha[d] been tested with them in [the PRC]".

70. It is first worth noting that the judge's finding that the PSB officers' account had not been tested was reached in ignorance of the new evidence that tended to show that their accounts were tested in the PRC. But that does not really matter, since HNA's challenge simply contends that the judge's reference to the PSB officers' account could only have been relevant to the torture question, and not to the issue whether the bribery actually occurred. We agree with that challenge. It seems to us that one consequence of the judge leaving to the end of his judgment his consideration of whether there was torture was to allow him to confuse matters that might be relevant to whether there was torture with matters relevant to whether there was bribery. It is also noteworthy that the judge was considering whether at least three individuals had been tortured in different circumstances, and yet he did not make a separate finding for each or provide separate reasons for either his finding or his doubts in each of the cases. This may not matter, since the finding that there was torture in none of the cases is not challenged on appeal, but we would note that in such a situation, it would have been better if the judge had separately considered each of the very serious allegations of torture.

71. We do not, however, agree with Mr Smouha that the judge's reference to the absence of a lawyer when bribery was first mentioned can only mean that the judge was allowing his doubts about torture to infect his consideration of bribery. We can well see that the absence of legal representation is itself a relevant factor in considering the weight to be attached to the admissions.

72. In conclusion on this point, therefore, it does seem to us that the judge was to some limited extent influenced by questions that related to the torture issue in considering the bribery issue. That error by itself might, however, not be sufficient to require us to allow the appeal. The crucial issue is really the next one, namely the judge's evaluation of the evidence relating to bribery.

Was the judge justified in concluding that bribery had not been proved?

73. On the basis of what we have said thus far, if the judge properly evaluated the weight to be accorded to the admissions and the other evidence, and decided the question of bribery taking into account the other relevant factors, it would on the principles we have outlined be inappropriate to interfere with his decision.

74. HNA's main challenge under this heading was that the judge simply never asked the right legal question, namely what weight he should attach to the admissions. Had he done so, a range of other questions would have come to mind, for example: how relevant was it that there were three (or perhaps four) relevant admissions; what was the detail of those admissions, and how did they tally one with another; what reasons could there be for the individuals each admitting a bribe, giving details that were entirely made up; and what was the relevance of the offers of leniency that had undoubtedly been made to the individuals before they made the admissions? Mr Smouha submitted that the judge instead simply moved to the ultimate question of whether there was bribery, disregarding the admissions on the flimsiest of grounds.

75. Conversely, Shagang submitted that the judge properly weighed the relevant issues. Ms Rose pointed to 9 factors that he had taken into account in the crucial paragraphs 88-94. Those factors were, in summary, (i) the fact of the admissions and the guilty plea of, at least, Mr Xu, (ii) the fact that the admissions had been made without a lawyer present, (iii) the fact that the PSB officers' evidence about the admissions had not been tested, (iv) the fact that all three individuals had retracted their admissions and asserted their innocence privately, (v) the reason given for the bribe in the admissions, namely the need to conclude the charterparty speedily, was unconvincing, and the bribe made no sense commercially, (vi) there was no evidence that the bribe had ever been received by Mr Jia H, and Mr Jia T's evidence was that he had been told to return the bribe and abide by normal procedures, (vii) there was no contemporaneous evidence or records of withdrawal of funds used to pay the bribe or expenditure of those funds by Mr Jia T, (viii) the charterparty was approved not by Mr Jia H, but by an unconnected HNA board director and the chairman of HNA, and (ix) the offer of leniency was a credible reason for the admissions having been made falsely.

76. The first point to deal with in this context is whether Ms Rose was right about her first contention in the Respondent's Notice, namely that the burden lay on HNA to prove that the admissions were voluntary and unequivocal, which, on the judge's factual findings, it failed to do. In our judgment, the concept of the burden of proving a confession is one taken from the criminal law. We have already dealt with the position of hearsay admissions in civil proceedings: they are dealt with in the same way as any other admissible hearsay statements. No authority has been produced that suggests that admissions in civil proceedings attract the same special treatment as they do in criminal proceedings. Accordingly, we reject Shagang's contention.

77. In any case, the judge's treatment of the weight to be given to the admissions was inadequate. As HNA submitted, he did not really address the point at all. He seems to have omitted that step in the argument. Once he found that the admissions had not been obtained by torture, if he was going to reject them as unreliable, he needed in our judgment to say why he was doing so. There are a number of reasons why he might, in theory, have done so, and we accept that some of Ms Rose's 9 points do bear on the weight to be attached to the admissions. For example, the fact that the admissions

were made at all in the terms they were, the fact that Mr Xu pleaded guilty to a crime of bribery, the fact that the admissions were made without a lawyer present, the fact that the admissions were retracted, and the fact that leniency was offered to induce them, are all factors relevant to the weight to be attached to the admissions. Moreover, at least one of the matters dealt with in the judgment, under the heading "confession evidence and torture", as to criminal practice in the PRC might also be relevant, namely the finding in paragraph 70 that the expert evidence showed that a high proportion of criminal convictions in the PRC follow admissions by the accused. We can also envisage other factors, connected to the detail of the admissions, their timing, and their provenance, which would be relevant to the weight to be attached to them, in addition, of course, to some of the factors mentioned in section 4(2) of the 1995 Act.

78. In our judgment, the judge's approach in the section of his judgment entitled "conclusions on bribery" was inadequate to answer the two necessary evidential questions: (i) what weight should be attached to each of the admissions relied upon by HNA, and (ii) was a bribe paid by Mr Xu to Mr Jia T? The judge never addressed the first directly, took into account an irrelevant factor (namely the testing of the PSB officers' evidence), and never reached any conclusion on the relevance of the leniency that was offered. As to this last point, the judge did say that the possibility of leniency was "referenced expressly by Mr Xu in his exchanges with Mr Guo", and he rejected an argument made by HNA that, as a matter of law, the prospect of a lighter sentence could not be a reason for a false confession. He did not, however, say whether or not he thought, in the case of each of the relevant individuals, that the prospect of leniency was a reason why the admissions in question were false. It is to be noted that, whilst one can quite understand how an offer of leniency might bring forth a truthful confession that might otherwise not be made, it is somewhat harder to see why a suspect would make up something wholly untrue in order to get a lenient rather than a harsher sentence. It can be observed too that Mr Xu principally attributed his admissions to torture (as, seemingly, did Mr Jia T in a document passed to Mr Guo in late 2015), yet the claims to that effect must be taken to have been false given the judge's conclusions on the subject. But these points may not be critical to the outcome here. Leniency could certainly have been a relevant factor.

79. In our judgment, the combination of the flaws we have pointed to renders the judge's decision unsustainable. The judge did not follow the logical steps necessary to reach a proper evaluation of the admissible evidence. He failed to ask and answer the correct legal question as to what weight should be accorded to the admissions evidence. The judge ought to have said why he was unable to place any reliance on the admissions, if that was his view. The judge also fell into legal error in failing to take all the appropriate matters into account in deciding the crucial bribery issue. As we have also said, the judge failed to exclude irrelevant matters (including his lingering doubt as to whether the admissions were procured by torture) in considering whether the alleged bribe was paid. The appeal must, therefore, be allowed.

80. In the circumstances, it is not necessary to address HNA's submission that the judge erred in his approach to judicial comity by failing to pay due regard to an investigation leading to a confession and guilty plea by Mr Xu before a criminal court in the PRC. We would, however, have rejected that submission. As the judge explained at paragraph 88, he was in a fundamentally different position to the PRC court, in that he also had evidence of Mr Xu and others denying the bribery.

81. The next question is whether, in these circumstances, this court can undertake the necessary process of evaluation itself.

What, in all the circumstances, is the proper disposition of the appeal?

82. HNA's primary submission was that this court should determine that there had been a bribe and that we should, therefore, simply allow the appeal and reverse the judgment given by the judge in favour of Shagang. Ms Rose submitted that, if we allowed the appeal, the case should go back to the judge to make the required evaluation.

83. In our judgment, neither of these solutions is satisfactory. Whilst we are certain that the admissions deserved greater weight than the judge gave them, we have not had the opportunity to hear detailed argument on the admissions themselves, their timing, surrounding circumstances and provenance. We understand that the judge placed some reliance on the commercial circumstances of the charterparty in finding that no bribe had been paid, but we take the view that the way he described those circumstances was somewhat simplistic. To understand whether there was or was not a proper reason why Shagang would want to pay a bribe, we would want to be able to evaluate the evidence in some detail.

84. Ms Rose argued that, even if the payments were found to have been made, they did not amount in law to a bribe, because the recipient, Mr Jia T, was not an agent of Grand China, and in any event they were not causative of Grand China's entry into the charterparty. We reject both arguments on the basis of the following *dictum* of Christopher Clarke J in *Novoship (UK) Limited v. Mikhayluk* [2012] EWHC 3586 (Comm), with which we entirely agree:-

> "107. The payments (or other benefits) do not have to be made directly to the fiduciary. Bribes may be paid to third parties close to the agent, such as family members or discretionary trusts, or simply to those whom the agent wishes to benefit. The test is whether the payment (or other benefit) puts the fiduciary in a real (as opposed to a fanciful) position of potential conflict between interest and duty.
>
> 108. The recipient of the bribe (or the person at whose order the bribe is paid) must be someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal. There is, however, no need to show that the payer intended the agent to be influenced by the payment or whether he was in fact influenced thereby. There is an irrebuttable presumption as to both …".

85. If the bribe were indeed paid, it seems to us that it put Mr Jia H into a position of conflict, even if it was only received by his son and not by him. The fact that Mr Jia H did not sign the charterparty is also irrelevant, once the bribe is proved. There is an irrebuttable presumption that the payment of a bribe intended to influence a commercial event in fact does so.

86. We would also not expect the *Patel v. Mirza* questions to be answered in such a way as to make the illegality of the payment of the bribe, if one is found, inoperative. Those questions are, of course, (i) whether the underlying purpose of the prohibition transgressed will be enhanced by denial of the claim, (ii) whether any other public policies would be rendered less effective by denial of the claim, and (iii) whether

denial of the claim would be a proportionate response to the illegality. In our judgment, however, these questions should be answered by the judge deciding the question of bribery on the basis that the individuals making the admissions in question were not tortured.

87. We regret to some extent being unable to reach a final decision on the conclusions that the judge ought to have reached as to the weight to be attached to the admissions and the issue whether the bribe was made. After careful consideration, however, including consideration (or in some cases, further consideration) of the documents contained in the reading lists provided by both sides after the hearing of the appeal, we think that the exercise is a relatively detailed one that will certainly necessitate further argument after a close review of the documents and of the evidence that was before the judge, as well as the additional evidence we have admitted on the appeal. We have not, as we have said, heard such argument.

88. We will, therefore, allow the appeal and send the matter back for reconsideration of the issue of the weight to be attached to the admissions and of the issue of bribery in the light of this judgment, and on the basis that the issue of torture has already been decided. We emphasise that we see no need for a full retrial. The parties should not be able to adduce new evidence beyond that which we have admitted.

89. The next question is whether the reconsideration should be undertaken by Knowles J or by another judge. In the unusual circumstances of this case, we do not see that the original trial judge will have any real advantage over another Commercial Court judge looking afresh at the admissions and the evidence of bribery. The oral evidence was of limited value on these points, and there is an advantage in a judge looking at the matter entirely free from the burden of considering the difficult question whether there was or was not torture. We think, in these circumstances, it would be better to send the matter back to a different Commercial Court judge.

Conclusions

90. For the reasons we have given, therefore, we will allow HNA's appeal on the grounds that:-

    i) the judge failed to ask and answer the correct legal question as to what weight should be accorded to the admissions evidence; and

    ii) in those circumstances, the judge fell into legal error both in failing to take all the appropriate matters into account, and in failing to exclude irrelevant matters (including his lingering doubt as to whether the admissions were procured by torture), in considering whether the alleged bribe was paid.

91. After we provided the parties with a draft of this judgment, Shagang put in written submissions contending that there was an obvious error in paragraph 60 above. Our judgment stated that Knowles J had been "unable to find on the balance of probabilities that the admissions had been obtained by torture", when Shagang submitted he had actually made no finding as to whether or not, on the balance of probabilities, the admissions had been obtained by torture. Accordingly, Shagang asked that we should remit the question of torture to the judge rehearing the matter. In our judgment, Shagang misunderstands our decision. We have determined that the judge ought to have decided the question of torture before he decided the question of bribery. In fact, as we say above, he did not. He may have avoided deciding the question of torture partly for the inappropriate reasons he gave in paragraph 105. But

his judgment made clear that, whilst he could not rule out torture, he had not found it proved on the evidence. Had he found it proved on the evidence, he would not have used the language he did. We have held that the consequence of his approach, as a matter of law, was that he had not found torture proved. Shagang is seeking an inappropriate second bite at the cherry when it did not appeal the refusal to find torture (see paragraph 53 above).

92. In these circumstances, the case will be remitted, as we have said, to another Commercial Court judge for reconsideration of the issue of the weight to be attached to the admissions and of the issue of bribery in the light of this judgment. There will be no full retrial, and the parties will not be permitted to adduce any further new evidence.