Case No: 2003 Folio 327

[2002] EWHC 121 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4th February 2004

Before :

THE HONOURABLE MR JUSTICE LANGLEY

- -

Between :

PETERSON FARMS INC	**Claimant**
- and -	
C & M FARMING LIMITED	
(Formerly known as Nasik Breeding and Research Farm Limited)	**Defendant**

- -
- -

Mr D. Foxton (instructed by **Messrs Baker & McKenzie**) for the Claimant
Mr A. Marriott QC (instructed by **Messrs Debevoise & Plimpton LLP**) for the Defendant

Hearing dates : 26 and 27th January 2004

- -

Judgment

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Mr Justice Langley :

THE APPLICATION

1. The Claimant ("Peterson") seeks a declaration that certain findings in an ICC Arbitration Award were made without jurisdiction. The application is made under section 67 of the Arbitration Act 1996 which, so far as material, provides that:

> "(1) A party to arbitral proceedings may … apply to the court –
>
> (a) …
>
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) ….
>
> (2) ….
>
> (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order –
>
> (a) …
>
> (b) …
>
> (c) set aside the award in whole or in part.
>
> (4) …."

2. Section 73, so far as material, provides:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the … tribunal … any objection –
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> ….
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
>
> …."

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THE ARBITRATION

3. The Arbitration involved a claim for damages by the Respondent ("C&M") as Claimant against Peterson as Respondent arising out of the sale by Peterson of live poultry. C&M is an Indian company. It changed its name from "Nasik" in the course of the material events. Peterson is a company organised under the laws of the State of Arkansas, USA.

4. The sales of poultry were made under a written contract entitled "Sales Right Agreement" made on 7 September 1996 ("the Agreement"). Clause 17 of the Agreement provided that:

> "All disputes … which may arise between the parties out of or in relation to or in connection with this agreement or for the breach thereof, shall be finally settled by International Chamber of Commerce, UK."

5. Clause 19 of the Agreement provided:

> "This agreement shall be interpreted and construed in accordance with the laws of Arkansas, USA."

6. The poultry was infected with an avian virus. C&M claimed some $US 16m in damages. C&M initiated the arbitration by a Request dated 27 April 2000. The appointed tribunal was Joel Hirschhorn, Judge Abraham Gafni and Julian D.M. Lew as Chairman. Terms of Reference were executed on 24 September 2001. The hearing took place in London between 1 and 11 July 2002. The Final Award, the subject of the present application, was dated 10 March 2003.

THE AWARD

7. The tribunal awarded C&M damages in the sum of US$ 6,747,217.

8. Under the Agreement Peterson sold to C&M male "grandparent" birds. C&M mated the birds to produce "parent" males which it would sell on as hatching eggs or day-old chicks. Those sales were made both to other "C&M group entities" (60%) and (40%) to other purchasers. The other C&M group entities used the parent males to breed with parent females to produce broiler chicks which they would sell on as chicks or hatching eggs.

9. The award of damages was made up of two parts:

   i) Losses suffered by C&M itself, consisting of lost sales because of the reduced numbers of parent male chicks and hatching eggs it was able to produce and lost market share and loss of future profits. The total of this award ("the

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grandparent losses") was US$ 1,222,448. There is no challenge to this part of the award.

ii) Losses suffered by the other C&M group entities consisting also of lost sales, lost market share and loss of future profits ("the parent losses") in the total sum of US$ 5,524,769. It is this part of the award which is the subject of Peterson's challenge. Essentially it is Peterson's submission that the tribunal had no jurisdiction to entertain claims by entities which were not named as parties to the Agreement.

THE BASIS OF THE DISPUTED AWARD

10. The jurisdiction issue was before the tribunal itself. Entirely sensibly, it was agreed that the issue should be dealt with in the course of the hearing and in the award. C&M, in its submissions, took the point that Peterson was out of time in making the objection under section 31 which provides (so far as material) that:

> "(1) ….
>
> (2) Any objection during the course of the arbitral proceedings that the arbitral Tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
>
> (3) The arbitral tribunal may admit an objection later than the time specified in subsection … (2) if it considers the delay justified
>
> (4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the Tribunal has power to rule on its own jurisdiction, it may –
>
> (a) …
>
> (b) deal with the objection in its award on the merits.
>
> If the parties agree which of these courses the Tribunal should take, the Tribunal shall proceed accordingly.
>
> (5) …."

11. The tribunal had jurisdiction to rule on its own substantial jurisdiction as there was no contrary agreement: section 30(1). It followed the course in section 31(4)(b) and dealt with jurisdiction in its award on the merits: paragraphs 78 to 102 and Section Fa of the Final Award. It ruled that it did have jurisdiction to consider and determine the damages claims of the other entities not named as parties to the Agreement. Nothing was said in the Final Award about delay in raising the jurisdiction issue (in contrast to another jurisdiction issue on which Peterson succeeded).

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12. The tribunal decided that it had jurisdiction on two bases:

i) First, and primarily, by application of what has come to be known as "the group of companies doctrine". The "doctrine" finds its origin in the interim award of an ICC tribunal dated 23 September 1982 in case No 4131 in which the Claimants were a number of companies in the Dow Chemical "group"; and

ii) Second, on the basis that C&M entered into the Agreement as agent for the other entities in the group who were thus parties to the Agreement and the arbitration clause contained in it.

THE ISSUES ON THE APPEAL

13. There is a dispute as to the nature of the hearing itself. Mr Foxton, for Peterson, submits that an application under section 67 is a re-hearing of the jurisdiction issue. Mr Marriott QC, for C&M, submits it is only a review. Notwithstanding that submission and understandably, Mr Marriott made submissions on the wider basis as well. Indeed C&M served evidence on Arkansas law from a Ms. Stewart for this appeal which was not before the tribunal. Peterson responded with a witness statement from a Mr Hollingsworth. Both are well qualified practising lawyers in Arkansas. Neither party sought to or did serve any further factual evidence.

14. Mr Marriott seeks to repeat the submission made to but not addressed by the tribunal that Peterson's delay precludes or should preclude the jurisdiction issue being raised at all. Mr Foxton submits that it is not open to Mr Marriott to take the point and in any event it has no merit.

15. The first substantive issue concerns the approach of the tribunal itself to the issue of jurisdiction. Mr Marriott submits the tribunal was entitled to follow the approach it did. Mr Foxton submits that it went wrong from the very first step in its reasoning by rejecting the application of Arkansas law to the issue.

16. The other issues relate to the application and validity or otherwise of "the group of companies doctrine"; the case based on agency; a further case advanced by C&M based on equitable estoppel and an ad hoc submission by Peterson. The case on equitable estoppel also raised an issue as to whether or not C&M could rely on certain passages in Ms Stewart's witness statement (paragraphs 23 to 26) or had agreed in correspondence not to do so. I ruled that C&M had indeed agreed not to pursue those matters and my reasons for doing so are set out in this judgment.

17. There was also some debate about the costs award made by the tribunal. In the event it was effectively agreed at the end of the hearing that should I grant Peterson's application the matter would have to be remitted back to the tribunal to be re-considered unless the parties were able to reach some other agreement. C&M was not willing to agree to my having jurisdiction to deal with the matter.

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18. After the hearing, Mr Foxton wrote to me (copied to C&M's solicitors) to submit that he had been in error in conceding that the court did not have power to vary the costs order made by the tribunal without the consent of both parties. Mr Foxton referred to section 67(3) of the 1996 Act. In response C&M's solicitors maintained that the concession was correct and in any event that the agreement made at the conclusion of the hearing should be honoured. Whilst I think Mr Foxton is right on the powers of the court I also think in the circumstances in which the matter arose that it would be wrong and unfair to C&M to depart from what was agreed. That said, as it seems to me, the costs award made by the tribunal is plainly not appropriate in the light of my decision on this appeal and it would be regrettable if the parties were to incur yet further expense in debating the matter before the tribunal.

RE-HEARING OR REVIEW

19. In Gulf Azov v Baltic Shipping [1999] 1 Lloyd's Rep 68 Rix J held that a challenge to jurisdiction under section 67 was a re-hearing. He pointed out that the court should not be placed in a worse position than the arbitrator in determining the issue which in a given case might turn on contested issues of fact. It is also to be noted that cases within section 32 of the 1996 Act (where a jurisdiction issue may be referred to and determined by the court and not the tribunal) or section 72(2)(a) (where a person alleged to be a party to an arbitration takes no part in it but challenges an award under section 67) would plainly require a full hearing whereas the Act does not appear to draw any distinction between these situations and it is not easy to see why in principle there should be any distinction. The ultimate arbiter of jurisdiction is not the tribunal itself.

20. Rix J's judgment in Gulf Azov has found approval with David Steel J in Astra SA Insurance v Sphere Drake Insurance [2002] 2 Lloyd's Rep 550; with Colman J in Aoot Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep 128; with Gross J in Electrosteel Castings v Scan-Trans Shipping [2002] EWHC (Comm) 1993; with Tomlinson J in Zaporozhyve Production Society v Ashly Limited [2002] EWHC 1410 and with Thomas J in Peoples' Insurance Co of China v Vysanthi Shipping Co [2003] EWHC 1655. The only contrary voice (if it can be so described) to which Mr Marriott referred the court was Toulson J in Ranko Group v Antartic Maritime SA [1998] LMLN 492 in a judgment delivered a month after Rix J's judgment which was plainly not cited to Toulson J. I think the law is now clearly established as Rix J stated it and I should follow it even if I did not, as I do, agree with it. The fact that the court is concerned with a re-hearing does not of course mean that it has no control over the evidence, if any, it should permit to be adduced. In this case the nature of the hearing involves no great extra burden. But I am satisfied that as Gross J put it in Electrosteel Castings at paragraph 22 "the question for the court is … not whether [the tribunal] was entitled to reach the decision to which [they] came but whether [they were] correct to do so".

DELAY

21. Mr Foxton submits that the effect of Section 31(4) of the 1996 Act read with the fact that the tribunal "dealt with" the jurisdiction issue on the merits in its award means

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that, despite the fact there is no mention of it in the decision, it must have been satisfied that the objection to the jurisdiction of the tribunal was "duly taken" and so taken in accordance with subsection 31(2) or at least subsection 31(3).

22. On that basis Mr Foxton further submits that Peterson's right to object to the award for lack of jurisdiction has not been lost under section 73(1)of the 1996 Act because the objection was made within such time as was allowed by the tribunal. In my judgment, following the wording of the Act as it does, that submission is correct and it follows that the present application cannot be defeated by C&M's complaints of delay.

23. Nonetheless, because it was fully argued and my conclusion may be wrong, and because they have some relevance to other issues, I will consider the circumstances in which the objection came to be made.

24. C&M's Request for Arbitration was served on 25 April 2000. C&M (then Nasik) was named as Claimant and Peterson as Respondent. The Agreement was referred to in paragraph 1 as an agreement entered into by C&M and Peterson. Although (paragraph 3) references to Nasik were to "include Nasik and some or all of Nasik's affiliates" I think the Request read as a whole identifies only C&M as the Claimant and only C&M as party to the Agreement. Certainly I do not think Peterson can be criticised for not taking the jurisdiction objection at this time.

25. Peterson's Answer and Counterclaim, dated 18 July 2000, made no admissions as to paragraph 3 of the Request and denied and put C&M to proof of the damages claimed which then were expressed only in general terms.

26. Terms of Reference were agreed and approved on 24 September 2001. Again the parties both to the Arbitration and the Agreement were expressly identified as C&M and Peterson. In Paragraph 32 it was said that as a result of Peterson's breach of the Agreement:

> "Claimant suffered direct losses in the amount of $5million due to high mortality … in the imported [grandparents] as well as high mortality … in the progeny of such [grandparents] …. Claimant also suffered consequential damages in the amount of $10million due to loss of market share and loss of reputation. Claimant possesses detailed proof of such direct and consequential damages which affected Claimant's domestic as well as export markets."

The balance of the claim was for triple damages for alleged RICO violations.

27. The Terms of Reference under the heading "applicable substantive law and place of arbitration" recorded (paragraph 58) that Clause 19 of the Agreement provided for it to be interpreted and construed in accordance with the laws of Arkansas and

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(paragraph 62) that "the applicable procedural rules" were to be any mandatory rules of law of the place of arbitration and, subject to the ICC Rules of Arbitration, as agreed or, failing agreement, determined by the tribunal.

28. C&M's full submissions and evidence were served on 19 November 2001. They included a lengthy memorandum on Arkansas law which addressed the claim as a claim by C&M. They also included an Affidavit from Ramesh Shah, the auditor of C&M and all the "group" companies listed in paragraph 8 of the Affidavit. Mr Shah (paragraph 10) exhibited "a certificate … in respect of losses … and in respect of loss of market share and damage to Nasik's reputation … incurred by C&M … as a result of grandparent breeding stock supplied to C&M by Peterson …."

29. The certificate itself referred to losses incurred "directly or indirectly" by C&M. There were references in the schedules to C&M group companies but nothing to indicate that they were claiming the losses as principals.

30. On 21 December 2001 Peterson made a request for documents which extended to the documents of "any other company in or connected to the C&M Group". Insofar as Mr Marriott sought to submit that the request recognised that the claim was being made by other group companies I reject the submission. It was an unsurprising reaction to the references made by C&M to the group.

31. Also on 21 December, Peterson served its legal submissions. In paragraph 3.21 it was stated that no "credible evidence of loss" had been adduced apart from Mr Shah's "certificate" and so no "definitive response" could be provided. The submissions were accompanied by a statement from a Dr Fryar, an expert agricultural economist instructed by Peterson. Dr Fryar said he was unable to give any definitive opinion on C&M's losses pending receipt of further documents and answers to various questions which he listed. The first request related to the "damages suffered by" C&M. Dr Fryar wrote:

> "Mr Shah appears to have attempted to calculate losses for C&M Farming Limited which he also refers to as C&M Group. By Mr Shah's testimony, C&M Group includes the following companies: Nasik Breeding and Research Farm Limited, C&M Farming Limited, C&M Hatcheries Limited, Nicholas Breeders (India) Limited, Central Breeders Limited, Nasik Egg Enterprises, Silvassa Poultries, and Nicholas Poultries. As the lawsuit is between Nasik Breeding and Research Farm Limited and Peterson Farms, Inc, Mr Shah needs to indicate what portion of the damages he has calculated relate to Nasik Breeding and Research Farm Limited and what portion is related to other members of the C&M Group."

32. In my judgment this statement supports Peterson's submission that at this time the Arbitration and the claim were seen to concern only C&M. It also shows that Peterson was alive to the need to clarify the extent to which the losses were losses of

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C&M both as a consequence of the references to the group by Mr Shah and because of the named parties to the Arbitration.

33. On 15th March 2002 C&M served a second Affidavit from Mr Elias D'Souza (who together with his brother had founded and controlled C&M and its group entities). Mr D'Souza described "the C&M Group" as involved in "an integrated activity" with grandparent breeding, parent breeding and hatchery "all part of that integration". He added "even if the parent breeding activity was considered a separate activity, the grandparent breeder would still be required to compensate the parent breeder, although a sister concern, for the losses arising out of the supply of … infected parent chicks".

34. Thus Mr D'Souza appeared to be acknowledging that some of the losses claimed had been suffered by other group entities and was making the unexceptional and legally sustainable (if established) point that that was no reason why C&M should not claim those losses itself on the basis that it was liable to indemnify the other entities.

35. On 5 April 2002 C&M served an "Opinion on losses suffered by C&M Group" prepared by Deloitte Haskins & Sells. This document did express the loss claimed in terms of losses suffered by various group entities. In paragraph 6.5 of the Opinion it was explained how C&M itself carried out grandparent breeding, parent breeding was carried out by three other group entities, hatchery by four others and the marketing and sale of hatching eggs and day old broiler chicks by two others. Some of these entities were in fact partnerships of which Mr D'Souza was a partner.

36. A further witness statement by a Mr Kokil was served by C&M at the same time. This made the point that the entities formed "an integrated and inseparable part of the Group" and "in any event, even if we were to consider each company as separate and distinct from the other companies in the Group, the calculation of losses would remain the same" because "Nasik must bear responsibility to its sister concerns" for their losses.

37. On 28 May 2002 Peterson served a supplemental memorandum on law. In paragraph 1.6 the present jurisdiction point was squarely taken on the basis that "it is now apparent that the vast majority of the damages claimed in this arbitration are brought, not in respect of Nasik's alleged losses, but instead for losses allegedly suffered by other C&M Group companies". The point was also accurately made that it had never been suggested that there was an agent/principal relationship between C&M and the other entities nor was there any evidence to that effect. The lack of evidence (or pleading or submission) of any liability on C&M to compensate other entities for their losses was also expressly noted (paragraph 1.8).

38. The issue was thereafter addressed in the parties' further submissions to the tribunal both in writing and orally. In the Statement of Case dated 3 June 2002 C&M took the delay point, referred to the fact (unsupported by evidence) that Nasik had "to some extent" compensated its sister companies, but made no other new arguments on the issue such as the agency or estoppel arguments put before this court.

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39. Peterson's Response dated 17 June 2002 again clearly made the point (paragraph 92) that if any attempt was made to advance claims on behalf of other C&M entities it would be opposed on the basis of lack of jurisdiction.

40. C&M took "the Group of Companies" point in further written submissions dated 24 June. It also repeated the indemnity argument on the basis that C&M was "the seller to its sister concerns". Again not only was there no reference to agency (which would be inconsistent with a seller/buyer relationship) or estoppel but the submission acknowledged that "an arbitration agreement exists only" between C&M and Peterson. On delay the submission took issue with Peterson's apparent submission that it was only the Deloitte's Opinion that had alerted it to the issue.

41. Peterson's further Response on the eve of the hearing contended that the real challenge was one of proof of loss by C&M but even if it was jurisdictional it had been raised promptly on consideration of the Deloitte's Opinion and that "it was also very clearly flagged in the evidence of Dr Fryar served on 21 December 2001". Mr Marriott relied on this to submit that if that was the case the time to raise the issue was in December 2001. I do not agree. Dr Fryar was seeking clarification. There were bases on which C&M itself could recover the losses. C&M and its advisers no doubt were alerted to the potential problem if they had been unaware of it before and indeed addressed it in Mr D'Souza's Affidavit. But for Peterson to do more to raise the issue at the time would in my judgment have been premature.

42. I have referred to these exchanges in some detail but I simply cannot discern in them any fair basis on which Peterson can be criticised for not raising the present issue before or in any other manner than it did. If, therefore, it was open to C&M to make a case that Peterson had lost its right to object to the Award for lack of jurisdiction under section 73(1) of the 1996 Act I would in any event have rejected it.

THE APPROACH OF THE TRIBUNAL

43. The tribunal recorded Peterson's submissions that C&M had not mentioned a principal and agent relationship (paragraph 80) and that reliance on the group of companies doctrine was misplaced because identification of the parties to the Agreement was a matter of substantive law governed by Arkansas law (paragraph 85). The Award continues:

> "86. The Tribunal does not accept Peterson's arguments. Under the doctrine of separability, an arbitration agreement is separable and autonomous from the underlying contract in which it appears. The autonomy of arbitration agreements has become a universal principle in the realm of international commercial arbitration. A corollary to the separability doctrine is that the law applicable to the arbitration agreement may differ from the law applicable both to the substance of the contract underlying the dispute and to the arbitral proceedings themselves. The right of C&M to make claims for the C&M Group is a question of interpretation of the arbitration

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agreement contained in the Agreement, including the intention of the parties. In the absence of any choice of law made by the parties with regard to the arbitration agreement itself, this Tribunal will determine this question in accordance with the common intent of the parties.

87 The Tribunal considers that Peterson was aware throughout the negotiating period and at the time of contracting that it was dealing with the C&M Group. Furthermore, Peterson intended to deal with C&M Group. This is apparent from the correspondence and internal reports ….

88 ….

89 ….

90 ….

91 Furthermore, the draft Sales Right Agreement attached to Peterson's Submission in Response to the Claimant's Memorandum on Jurisdiction dated 28 June 2002, again indicates the parties understanding and intention. The Tribunal finds that this supports C&M's contention that Peterson knew it was contracting with and would have obligations to all C&M Group companies.

92 The Tribunal considers that it was logical to have the name of one member of that group as the contracting partner with Peterson. One company had to take formal legal responsibility for the contract with Peterson. C&M Group, as such, was not a legal entity and therefore could not contract in its own name. There would have been greater uncertainty had it sought to do so. Nasik contracted on behalf of and as the agent for the whole C&M Group. This was clearly understood by Peterson.

93 The Tribunal does not consider that it is legally precluded from considering C&M's damages claims to cover and embrace the damages of all C&M Group companies. The group of companies doctrine provides that an arbitration agreement signed by one company in a group of companies entitles (or obligates) affiliate non-signatory companies, if the circumstances surrounding negotiation, execution, and termination of the agreement show that the mutual intention of all the parties was to bind the non-signatories. Following the Dow Chemical decision and ICC case numbers 2375 and 5103, the Tribunal recognised that because a group of companies constitute the same "economic reality" one company in the group can bind the other members to an agreement if such a result conforms to the mutual intentions of all the parties and reflects the good usage of international commerce. This

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> Tribunal considers that such circumstances are present in this case.
>
> 94 ….
>
> 95 ….
>
> 96 …. Thus, Peterson was aware not only of the integrated nature of the poultry business but also that an agreement with Nasik would impact the operations of all of the C&M Group.
>
> 97 ….
>
> 98 ….
>
> 99 Peterson, therefore, was aware of the integrated nature of the poultry business. It also fully recognised and expected that on the international level, providing grandparent level stock to a company like Nasik was but the first step in the process under which Nasik would, through the integrated complex of businesses of which it was a part, complete the further production and distribution of the Peterson Breed. In short, it understood that the Agreement with Nasik was, in effect, an agreement with and would impact the operations of all the entities comprising the C&M Group.
>
> 100 In summary, the record of correspondence between the parties and internal documents of Peterson, the preliminary documents exchanged between the parties, and the general nature of the poultry business demonstrate that Peterson intended to enter into and perform under a contract with all the entities forming the C&M Group of companies. Peterson knew that it was contracting with the group as a whole and that its product would be used in an integrated operation that involved all members of the C&M Group. The Tribunal considers that C&M is fully entitled to claim all damages suffered by the C&M Group and arising out of the contractual relationship with Peterson."

44. In my judgment, the tribunal's approach to the issue is open to a number of substantial criticisms and is seriously flawed in law.

45. The predicate (paragraph 86) of the tribunal's approach was that the Agreement contained no choice of law with regard to the arbitration agreement in clause 17. Yet, as the tribunal also and rightly recognised, the issue raised a question of interpretation of the Agreement and such questions were expressly subject to Arkansas law by Clause 19. The identification of the parties to an agreement is a question of substantive not procedural law.

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46. "The autonomy" of the arbitration agreement is not in point. The question is whether it is governed by Arkansas law. In my judgment it plainly is.

47. There was, therefore, no basis for the tribunal to apply any other law whether supposedly derived from "the common intent of the parties" or not. The common intent was indeed expressed in the Agreement: that is both English and Arkansas law (paragraph 17 of Mr Hollingsworth's statement). The "law" the tribunal derived from its approach was not the proper law of the Agreement nor even the law of the chosen place of the arbitration but, in effect, the group of companies doctrine itself.

48. Mr Marriott submitted that the tribunal's approach was in accord with section 46 of the 1996 Act. It is not. Section 46(1)(a) sets out the basic rule that the tribunal "shall" decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. That was Arkansas law. Section 46(1)(b) provides only that "if the parties agree" the tribunal shall decide in accordance with that agreement. There was no relevant agreement within this provision. It was (a) not (b) which should have been applied.

49. The reference in paragraph 91 to an early draft of the Agreement, whilst understandable in the light of the submissions by Peterson before it, is in fact mistaken. Not only was the draft just that, but it in fact named as party another supposed corporate entity "C&M Group" which it transpired did not exist. C&M was the named party in the final agreement in recognition of that.

50. The reasoning of the tribunal in paragraph 92 is in my judgment inconsistent with paragraph 91 even on the basis of the misunderstanding. Far from there being "greater uncertainty" had the Agreement named "C&M Group" as a party, on the tribunal's reasoning that would have been both accurate and well understood. In contrast the nomination of Nasik on that reasoning created or at least increased any uncertainty.

51. The last two sentences of paragraph 92 represent all that the tribunal said about "agency". Not only do those sentences ignore the fact that no case in agency was ever advanced by C&M before the tribunal but had there been an agency relationship between C&M and "the whole C&M Group" there would have been no need for C&M to advance the group of companies doctrine as it did nor for "one company to take formal legal responsibility for the contract". That company could indeed have signed as agent as well as for itself.

52. In my judgment, therefore, the tribunal's award on this issue cannot stand. As I have decided that the present application is a re-hearing the question arises whether or not the result can nevertheless be supported on other grounds.

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THE GROUP OF COMPANIES DOCTRINE

53. It was not suggested to the tribunal that the group of companies doctrine was recognised by Arkansas law. The witness statements prepared for this appeal by Ms Stewart and Mr Hollingsworth addressing Arkansas law are plainly at odds on a number of matters. Those matters include the question whether or not Arkansas law would by one legal route or another permit resort by the tribunal to the doctrine. Yet the parties have agreed that neither expert in Arkansas law should give oral evidence. It is important to consider the basis of that agreement as it provides for the approach I should follow in considering the expert statements both on the group of companies doctrine and equitable estoppel.

54. On 1 December 2003, Peterson's solicitors (Baker & McKenzie) wrote to C&M's solicitors (Debevoise & Plimpton) saying:

> "As regards oral evidence on Arkansas law, there are two issues on which we believe there may be disagreement between the experts which would require oral evidence:
>
> 1. It is unclear to us to what extent the parties disagree on the issue of equitable estoppel. Please confirm whether or not your client accepts that the law as stated by Mr Hollingsworth at para. 29 of his statement (commenting on paras. 23 to 27 of Ms Stewart's) is correct.
>
> 2. Please also confirm whether or not your client intends to maintain the argument set out at para. 15 of Ms Stewart's statement that submission of the dispute to an ICC tribunal entails an agreement to enable the Tribunal to decide the dispute by applying the group of companies doctrine."

55. In paragraphs 23 to 27 of her statement Ms Stewart had put forward the theory that Arkansas law would "apply the doctrine of equitable estoppel to allow a non-signatory to enforce an arbitration clause against a signatory if … (b) the claims against the non-signatory are *fundamentally grounded* in, *intimately founded in and intertwined with* or *arise out of and relate directly to* the agreement containing the arbitration clause". This "estoppel theory" she described as in essence very similar to the tribunal's group of companies doctrine. In paragraph 29 of his statement Mr Hollingsworth had stated that "the theory of estoppel provides no basis for the C&M affiliates to participate in the arbitration" and had set out the elements of estoppel in Arkansas law in terms which are equally familiar to an English lawyer and which bear no resemblance to the theory put forward by Ms Stewart.

56. In paragraph 15 of her statement Ms Stewart had expressed the opinion that by referring disputes to arbitration under the auspices of the ICC the parties "would be deemed by an Arkansas court to have submitted every dispute under the contract, including the question of the proper parties thereto, to the ICC arbitral tribunal to be resolved in accordance with the ICC's rules and practices", and that was sufficient to entitle the tribunal to apply the group of companies doctrine if the doctrine was "an

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accepted feature of ICC practice". Mr Hollingsworth said Arkansas law, like English law, would consider the question one of substantive law governed by the proper law.

57. Debevoise & Plimpton replied by letter dated 2 December. They wrote:

> "We remain of the view that oral evidence on Arkansas law is not necessary and we seek your urgent agreement to this. You refer to two issues which might require oral evidence. Neither of these, in our opinion, justify the costs and effort of bringing Ms. Stewart and Mr. Hollingsworth to London for what would effectively be the best part of a week. On both the issues which you mention, Mr. Hollingsworth has had an opportunity to answer Ms. Stewart in his witness statement. Both of these expert views will be before the Judge, who will be perfectly able, with the assistance of whatever authorities on which the parties seek to rely, to take a view. As to the questions which you ask in your letter, Ms. Stewart's witness statement stands for itself and we do not see the need to comment further. Equitable estoppel and group of companies are both doctrines which we can expect any Commercial Court Judge to be sufficiently familiar with and to come to his own view."

58. Baker & McKenzie were not satisfied with this response and by a further letter dated 17 December Debevoise & Plimpton offered "the following clarifications" in order to avoid the need for oral evidence:

> "On the issue of equitable estoppel, we agree that, with the exception of the first sentence of paragraph 29, Mr. Hollingsworth has correctly stated the law in that paragraph. However, as you will expect, we do not accept Mr. Hollingsworth's application of such general principles to the circumstances of this case. In any event, as noted earlier, any Commercial Court Judge will be sufficiently familiar with the doctrine of equitable estoppel to make his own determination of this issue.
>
> As to your second question, it is our primary case that the Tribunal was correct in holding that it was the intention of the parties that C&M should enter into the SRA with Peterson as agent for all the companies in the C&M Group. We say there is no impediment in Arkansas law to the Tribunal's finding of fact on this point or to its application of the principles of agency. We also maintain the quite independent argument that the Tribunal, acting pursuant to the agreement for arbitration under ICC Rules and given its finding of fact as to the intention of the parties, was free to apply ICC jurisprudence, part of which is the Group of Companies doctrine. You will, of course, respect that the point about the Group of Companies doctrine is not simply a question of Arkansas law, nor is it a question we anticipate taking up any great amount of time at the hearing."

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59. Baker & McKenzie replied on 18 December saying:

> "We note that there appears to be no significant dispute as to the principles of Arkansas law regarding equitable estoppel.
>
> As regards the application of ICC rules, please confirm that on your client's case, the position as to the applicability of the Group of Companies doctrine would be the same if the Sales Right Agreement were governed by English law rather than Arkansas law. If our understanding is correct, we can agree to dispense with live expert testimony on Arkansas law."

60. The answer was, in effect, "Yes" and that was the basis on which it was agreed to dispense with oral evidence of Arkansas law.

61. Despite (as regards estoppel) Mr Marriott's valiant efforts to argue that the qualification in the 17 December letter concerning the "application" of the principles stated by Mr Hollingsworth "to the circumstances of this case" was sufficient to justify continued reliance by C&M on Ms Stewart's estoppel theory in paragraphs 23 to 27 of her statement I am quite satisfied that is neither a reasonable nor sensible reading of this correspondence. The opposite is the case. The qualification related to the application by Mr Hollingsworth of the principles he stated to the facts. I would add that this Commercial Court Judge at least is wholly unfamiliar with the theory propounded by Ms Stewart.

62. In the context of the group of companies doctrine the agreement was that Arkansas law was the same as English law. As I have already said, English law treats the issue as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law.

AGENCY

63. The principles of the law of agency in Arkansas law are also in substance the same as those of English law. The questions whether there is a relationship of principal and agent and whether an agent acted as such are questions of fact. Unsurprisingly, as agency was not alleged or addressed in the evidence before the tribunal, there was no evidence to establish either fact. Indeed the evidence and commercial reality was to the contrary and there is no further evidence on the matter before me.

64. The Agreement itself is drafted and signed in terms of an agreement between the two named companies. Clause 10 forbad assignment of the rights acquired by C&M to any other entity. It contains no reference to any other companies or entities. It is true, as Mr Marriott pointed out, that the restriction on C&M selling any other "meat-type Male Parent" in Clause 6 was arguably ineffective unless it applied to other group entities but I think that is of no real significance. Clause 12, in contrast, restricted sales by C&M of "Peterson Male Parents" to third parties outside the agreed territory "directly or indirectly". The evidence was that C&M itself sold parent chicks to other

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group entities which bought them from C&M. That was the basis on which, albeit not pursued or proved before the tribunal, it was said that C&M was liable to indemnify those entities. It was also the basis on which C&M itself recovered damages (included in the award which is not challenged) for the loss of sales to those entities. That is consistent with the relationship of buyer and seller, not principal and agent, along the chain starting with C&M purchasing the grandparent chicks from Peterson.

65. In commercial terms the creation of a corporate structure is by definition designed to create separate legal entities for entirely legitimate purposes which would often if not usually be defeated by any general agency relationship between them. Moreover the corollary of C&M acting as agent for the other group entities named would be that those entities would themselves be bound by C&M's obligations under the Agreement, including the obligation to pay for the chicks. That would extend, for example, to Mr D'Souza personally insofar as he was a partner in any of those entities. As Mr Foxton also submitted the only identification of those entities for which it is said C&M acted as agent in entering into the Agreement are those who happened subsequently to suffer losses when the infected poultry was delivered.

66. In my judgement the Award cannot be sustained on the basis of agency. There is no evidence to support it and the evidence there is contradicts it.

ESTOPPEL

67. There was no evidence before the tribunal and there is no evidence before me to establish an estoppel. Further the conclusions I have already reached that the Agreement clearly names the parties to it and that C&M was not acting as an agent in making it are themselves inconsistent with a case that Peterson represented that the Agreement was made with other group entities or that such entities or C&M relied on any representation or suffered any detriment in doing so.

68. In my judgment, therefore, the Award cannot be sustained on the basis of estoppel. Again, there is no evidence to support such a case and the evidence there is contradicts it.

AD HOC JURISDICTION

69. Mr Marriott also submitted (his "last ditch" submission) that Peterson had or was to be taken to have consented to the tribunal having jurisdiction over the claims made by other group entities. This submission appeared to be founded on some submissions made by Mr Foxton to the tribunal inviting the tribunal to deal with jurisdiction issues at the end of the evidence, to which counsel for C&M and the tribunal agreed, and on the very fact that the tribunal was invited to deal with the issues.

70. Mr Marriott's submission is in my judgment misconceived. At all times during the hearing it was clear that Peterson was contending that if and insofar as claims were

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advanced by other group entities in their own right the tribunal had no jurisdiction over them. That is the opposite of accepting jurisdiction.

CONCLUSION

71. Peterson is entitled to have that part of the Award which awarded payment of losses by other C&M group entities set aside for want of jurisdiction. It is also entitled to have the award of costs (and expenses) remitted to the tribunal for further consideration in the context of this judgment. I will hear the parties on the form of order to be made and any other matters they wish to raise when this judgment is handed down.

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