IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2017] EWHC 3273 (Comm)

No. CL-2017-000080

Royal Courts of Justice

Tuesday, 28th November 2017

Before: MR

JUSTICE ANDREW BAKER

(In Private)

B E T W E E N :

P — Claimant

- and -

D, X and Y — Defendants

ANONYMISATION APPLIES

MR R. TEMMINK, QC (instructed by Fieldfisher LLP) appeared on behalf of the Claimant.

THE FIRST DEFENDANT was represented by Herbert Smith Freehills but did not participate.

THE SECOND & THIRD DEFENDANTS were not present and were not represented.

J U D G M E N T

MR JUSTICE ANDREW BAKER:

1 In this claim the claimant seeks remission of an LCIA award in arbitration pursuant to s.68 of the Arbitration Act 1996. More specifically, the claimant submits that there has been a failure by the LCIA arbitration tribunal to deal with all the issues that were put to it, resulting in substantial injustice to the claimant so that there is serious irregularity affecting the award under s.68(2)(d).

2 The underlying LCIA arbitration arose out of contractual arrangements for the acquisition by the first defendant of stakes in the third defendant. A first share sale and purchase agreement, dated 27 January 2012, provided for the acquisition by the first defendant of a 45% stake in the third defendant, 36% from the claimant and 9% from the second defendant. An agreement entered into at that same time anticipated the transfer of various trademarks to the third defendant. A further share sale and purchase agreement, dated 16 July 2012, provided for the acquisition by the first defendant of an additional 5% share in the third defendant from the second defendant. There were, in addition, shareholder agreements entered into to regulate the relationship between the parties and other associated companies as post-acquisition co-shareholders in the third defendant.

3 The claimant commenced the underlying arbitration, claiming among other things that it had not been paid in full for the shares in the third defendant transferred to the first defendant. The first defendant counterclaimed that there had been a failure by the claimant to transfer certain trademarks, so as to put the claimant and the second defendant as sellers, jointly and severally, in breach of warranty under the share sale and purchase agreements.

4 By a lengthy and detailed first partial award, referred to before me as the "Phase 1 Award", the LCIA arbitration tribunal dismissed the claimant's primary claim and held that breach of warranty had been established on the first defendant's counterclaim. The monetary or other relief to be granted on that finding on the counterclaim was reserved to what has been referred to as Phase 2 of the arbitration. For the purposes of that Phase 2, there was an exchange initially of substantive and detailed statements of case, between the claimant and the first defendant.

5 The second defendant played no active part in Phase 2 but it had played an active part in Phase 1 of the arbitration to the point, at all events, of submitting written submissions at the

interlocutory stages of Phase 1; it did not appear and was not represented at the substantial oral final hearing that took place to conclude Phase 1. Although it played no active part in Phase 2, it was fully on the record throughout with designated representatives and contact details in the normal manner of LCIA arbitral proceedings. It was kept copied into all relevant correspondence and provided with all pleadings and submissions.

6 Having said that about the second defendant, I shall mention now that it has neither appeared nor been represented before me today. I am, though, quite satisfied by the evidence that it was duly served with these proceedings in the Seychelles. It lodged an acknowledgment of service and submitted, addressed to the court, an emailed letter dated 9 June 2017, making observations about this s.68 claim, but has otherwise chosen not to participate in the proceedings. It has been kept aware of the progress of these proceedings, including being given notification of today's hearing. It was provided in advance with a copy of the skeleton argument lodged by Mr Temmink QC. I am quite satisfied, therefore, that the second defendant was both duly served and given, as a practical matter, more than ample notice of these proceedings and this hearing in particular, and that it has made an informed decision to play no active part. In those circumstances, I did not consider adjourning the matter but have heard Mr Temmink's argument for the claimant and will now proceed to deal with the application on its substance.

7 In the first Phase 2 Statement of Case submitted by the claimant, at para.35 the claimant pleaded as follows:

> "If [the first defendant] maintains its claim for damages for breach of warranty against [the claimant] only, [the claimant] claims against [the second defendant] for contribution as the liability of the sellers for breach of warranty is joint and several."

Under the heading "Relief" in the following paragraph the claimant claimed, amongst other things, an order for contribution against the second defendant in respect of any damages payable by the claimant to the first defendant for breach of warranty, again, stated contingently on the premise, "…if [the first defendant] maintains its claim for damages for breach of warranty against [the claimant] only."

8 In response, the first defendant submitted its Statement of Case in which for its part, at para.8, it asserted as its case that the claimant and the second defendant were jointly and severally liable for losses arising out of the breaches of warranty that had been held to exist.

When, therefore, at para.16.1 at the end of that Statement of Case, the first defendant counterclaimed "damages as aforesaid", that was a counterclaim raised jointly and severally against both the claimant and the first defendant.

9 So as things then stood, the contingent claim for contribution asserted by the claimant appeared not to arise. Although the second defendant was playing no active part, there was no indication that it had acknowledged or conceded a joint and several liability in respect of the first defendant's successful counterclaim. In those circumstances, though upon that exchange of Statements of Case it had become common ground, if, indeed, it had not already been common ground before, between the claimant and the first defendant, that there was joint and several liability, it was an issue before the tribunal whether that was correct, which, all things being equal, the parties were entitled to have the tribunal determine in its Phase 2 award in due course so as to bind the second defendant if their conclusion was that the liability was, indeed, joint and several between the claimant and the first defendant.

10 In a Statement of Reply from the claimant, and a Reply to that by the first defendant, references were made to the responsibility for the counterclaim in consistent terms, so that as those formal written pleadings closed the position was as I have just described.

11 At that stage in the proceedings, the very experienced and well-known international firm that had been representing the claimant came off the record and, thereafter, the claimant was represented in the arbitration by Mr S. I mean him no disrespect whatever in saying that it is apparent from the written submissions under his name on the claimant's behalf, which I shall mention in a moment, that he is not a gentleman with the same degree of sophistication and experience in matters of large scale international arbitration as the firm previously representing the claimant.

12 Cutting short what I was told was a long and, in parts, messy story, a decision was obtained from the tribunal for Phase 2 to be determined on documents only following a further exchange of written submissions. On the claimant's side, those are the submissions to which I have just referred, provided to the tribunal by Mr S. On the first defendant's side, they were written submissions provided by another well-known international firm that had represented the first defendant throughout and who have been represented on a watching brief for the first defendant before me, although they have maintained, on the first defendant's behalf, a neutral stance in relation to today's hearing. In the case of those

submissions on behalf of the first defendant, they were settled by London-based leading and junior counsel. I shall come back to those submissions in due course.

13 The tribunal's Phase 2 Award, dated 11 January 2017, like the Phase 1 award, is lengthy and detailed. Much of it does not matter for present purposes. In particular, there was a substantial and complex dispute as to the application of contractual provisions regarding what was called a 'Deferred Amount', as to which the claimant was asserting a substantial sum due to it. The first defendant was asserting a nil amount. At para.91 of the Phase 2 Award the arbitrators record the structure of the main body of the Award. They say, at para.91(a), that in Part J of the Award they would set out the relief sought by the parties, and at para.91(c) that under Part K2 of the Award they would summarise the parties' respective positions as regards the first defendant's counterclaim.

14 In Part J the arbitrators first set out the relief sought before them by the claimant. In that regard, at para.93(b), they identified that the claimant claimed before them contribution against the second defendant in respect of damages payable by the claimant to the first defendant for breach of warranty if the first defendant maintained its claim for damages for breach of warranty against the claimant only. When then setting out the relief sought by the first defendant, the tribunal identified at para.94(b) that as regards damages for the breach of warranty the first defendant sought an award that the claimant pay it, the first defendant, damages in the sum of US$11 million.

15 On the face of things, taking those two paragraphs together, the tribunal recorded that, indeed, the first defendant was maintaining its claim for damages for breach of warranty against the claimant only, and in those circumstances the claimant's claim for contribution was live and required to be determined.

16 In Part K2 of the Award, summarising the parties' respective positions in relation to the first defendant's counterclaim, there is nothing to indicate that the tribunal had been given to understand that the claimant's contribution claim was withdrawn, abandoned or not pursued. To the contrary, at para.171, the tribunal records that the first defendant's submission in its Statement of Case, to which I have referred already, was that there was a joint and several liability between the claimant and the second defendant in respect of the losses arising out of breach of warranty, and at para.194(c) the tribunal records again the claimant's position that

if the first defendant maintained its claim for damages against the claimant only then it, the claimant, sought contribution from the second defendant.

17 In the light of their lengthy summary of the parties' respective positions on a wide range of matters, but including the references I have just identified to the joint and several liability question and the claimant's claim for contribution, the tribunal sought to draw the threads together at para.225, with a list of matters with respect to the first defendant's counterclaim that required the tribunal's determination. Regrettably, and in this respect in light of the earlier paragraphs to which I have referred it seems to me in error, the tribunal failed to record that, the first defendant having maintained its claim for relief on its counterclaim against the claimant only, the claimant's claim for contribution arose and required to be determined. The arbitrators proceeded then to discuss and provide their conclusions upon the issues they had identified as requiring determination, culminating at para.273, having found that the first defendant's assertion that its proper measure of loss was US$11 million had been proved, with this finding:

> "The claimant shall pay the first respondent in respect of the first respondent's counterclaim USD 11,000,000."

That in turn led the tribunal in what it described as the dispositive section, Part L of the Phase 2 Award, to find, declare, rule, order and award that the claimant forthwith pay the first defendant US$11 million and that, save for that award and save in respect of interest and costs in respect to which the tribunal reserved its jurisdiction, "All other claims and counterclaims are dismissed."

18 In my judgment, the effect of that second dispositive determination dismissing all claims and counterclaims other than the award against the claimant only for US$11 million to be paid to the first defendant, had and has the effect of dismissing finally the claimant's claim for contribution that as I have described, on the face of the Phase 2 Award, had in fact arisen for determination. That is so although, as I have also described, the tribunal failed to identify that claim as a claim that was live before it for determination that gave rise to issues that it required to consider. As a result, there is no reasoned consideration given by the Award to that claim.

19 The court is always conscious in applications made under s.68(2)(d) that the serious irregularity jurisdiction is not to be used where the reality of the complaint is that a claim or

issue has been resolved otherwise than to the satisfaction of the claimant, for example, because findings have been expressed briefly or reasoning has been given that the claim asserts is inadequate. In short, as many cases have emphasised, the s.68 power is not to be used as a means of circumventing the restrictions created by the 1996 Act on the ability to challenge an award on its merits. If the matter should properly be regarded as a challenge to the soundness of a decision properly reached on the merits, then that challenge must be brought, if at all, under the auspices of s.69. However, it seems to me in this case that the matter is not one of a considered but allegedly erroneous decision to dismiss the claimant's contribution claim against the second respondent, but an erroneous failure to appreciate that that was a claim live before the tribunal requiring determination and as a result a dispositive award that, as I have described, in fact includes a dismissal of that claim, although it is not given any conscious consideration in the Award at all.

20 It seems to me, in those circumstances, that there has been within s.68(2)(d) of the Act, a failure by the tribunal to deal with all the issues that were put to it.

21 The LCIA Rules provide by Art.27 that the tribunal itself had power to correct an award or make an additional award in specified circumstances. By way of brief paraphrase, the power to correct an award arises under Art.27.1 in respect of computation errors, clerical or typographical errors or other errors of a similar nature. In this case, it seems to me that the tribunal has not been guilty of any error of a kind falling within Art.27.1, which indeed was the tribunal's conclusion as I shall describe in a moment. This is not a case of the award failing, as a result of error in its drafting or articulation, to record what the tribunal intended it to record. The other power provided by Art.27, under Art.27.3, is to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. I have said that, in my judgment, the arbitral tribunal has, on the face of things, fallen into error in failing to give conscious consideration to the claimant's contribution claim, but at the same time, as I have also already indicated, in my judgment, the Phase 2 Award's dispositive provisions did, in fact, determine that claim. That is to say there is no lacuna by way of a claim or counterclaim that was presented in the arbitration and in respect of which there is no dispositive award, but yet a tribunal that might have understood that it had dealt with every claim. If that had been the situation, then pursuant to Art.27.3 it would have been within the tribunal's power to make, as the rule allows, an additional award now determining and disposing of the relevant claim.

22 In those circumstances, without criticising the claimant for perceiving that it might be a situation in which the tribunal could be persuaded that either Art.27.1 or Art.27.3 applied, in my judgment the tribunal correctly concluded that it did not have power to remedy the problem with the Phase 2 Award that the claimant had identified.

23 I should, though, refer nonetheless to the basis upon which, in two further written decisions, the tribunal, in fact, declined to exercise any power of correction or to issue an additional award. I do so, in particular, because the fact that the claimant has persuaded me that there was a failing by the tribunal to deal with all issues put to it within s.68(2)(d) of the Act does not, without more, create a serious irregularity. The further question arises whether substantial injustice has been caused or will be caused to the claimant by that failure.

24 The tribunal issued simultaneously on 2 March 2017 two separate decisions on the claimant's request for correction or additional award under Art.27. It is not immediately apparent why they chose to deal with it in that way. Nor, in particular, is it apparent from the way in which the first of those decisions to which I shall refer is phrased, that it is limited to a consideration of the request for the tribunal to take action under Art.27.1. That said, however, the distinction between the two decisions does appear to be that the tribunal intended the first of them, as I shall summarise them, to deal with the request for the existing award to be corrected, which would be a matter for Art.27.1, and the second of them to deal with the request for an additional award. In the first decision, in dealing with the request for the award to be corrected, the arbitrators record at para.44 that their view on the issue of joint and several liability was "not expressly included in Part K2.3", that is to say their analysis and decision of the live issues. They say that their view on that issue was also "not implicit nor obvious, since the parties' arguments on this issue, if any, were not addressed in Part K2.3".

25 The remainder of that para.44, with great respect to what is an eminent and distinguished panel of arbitrators, is not easy to follow. In particular, it appears to assert that because the tribunal's view on the question of joint and several liability cannot be easily discerned from the award, a failure to deal with that question could not be a clerical or similar error of the type addressed by Art.27.1 of the LCIA Rules. That seems to me to be illogical and wrong. However, I take the gist of what is said at para.44 to be confirmation from the arbitrators that they had not intended by the Phase 2 award to say anything about the issue of joint and several liability or, I add, therefore, the claimant's claim for contribution based upon any

such liability. For that reason, the tribunal's conclusion, that the award was not susceptible to correction under Art.27.1 is ultimately sound, as I have already indicated.

26 In para.45, the arbitrators go on to say that if the matter is one of failing to deal with an issue put before them then they would conclude that such a failure would not constitute an error capable of correction under Art.27. In not limiting that observation to Art.27.1, it seems to me that the tribunal again erred. That said, again as I have already indicated, whether a failure to deal with an issue does or does not give rise to an ability in the tribunal to act pursuant to Art.27.3, will depend upon whether, in the round, a claim or counterclaim put before the tribunal has not been determined as a result of the failure to deal with one or more particular issues; only if so will Art 27.3 be engaged. If, as in this case, all claims or counterclaims before the tribunal have been disposed of by the relevant award, but in arriving at that disposition an issue or question that ought to have been considered has not been, then the aggrieved party's remedy, if any, lies with the court under s.68 and not with the tribunal under Art.27.3.

27 That brings me, then, to paras.46 to 48 of that first decision, which are, in substance, repeated in paras.41 to 43 of the second decision rejecting the request for an additional award. In those paragraphs, the arbitrators describe the claimant's contribution claim made by its Phase 2 Statement of Case as having been, in effect, superseded by the written submissions provided by Mr S on behalf of the claimant, to which I have already referred. The first of those opens by indicating that, for the purposes of those submissions, the claimant would focus on two particular matters, the first relating to the Deferred Amount dispute and the second being particular reasons why (the claimant said) the first defendant's counterclaim in fact had no value, that is to say should not result in any substantial monetary award at all. There is nothing in those submissions that could, in my judgment, even arguably have been thought to amount to an abandonment or withdrawal or non-pursuit of the claimant's contribution claim. Indeed, at the time those submissions will have been filed, the first defendant had not said anything that might be taken to have limited its claim in respect of monetary relief to a claim against the claimant only. There is therefore no reason why, in preparing those written submissions, anybody acting on the claimant's behalf should have appreciated that the contingent contribution claim would, in fact, be live. That position changed with the submission of the first defendant's written response. It dealt at length with all of the matters raised by the claimant by way of detail. It advanced the first defendant's submissions on both the Deferred Amount dispute and the quantification of its

losses. It did not address in any way the question of joint and several liability in respect of its counterclaim. It, therefore, could not be taken to be a withdrawal by the first defendant of its stated position that the liability, strictly speaking, was joint and several.

28 However, in its closing paragraph, para.42, the first defendant concluded with an invitation to the tribunal to make an award in specified terms. At (b) it sought an award that "[the claimant] shall pay [the first defendant] damages for breach of contract in the sum of USD 11,000,000". Nothing in the other provisions of the award there said to be sought referred to any potential award against the second defendant. In those circumstances, in my judgment, the tribunal was correct, in any event fair or entitled, to conclude that the first defendant was seeking monetary relief only against the claimant, although in its earlier Statements of Case it had sought damages jointly and severally also against the second defendant.

29 In Mr S's written submissions in reply to those, he set out arguments again as to the Deferred Amount dispute and then, as regards the first defendant's counterclaim, further detailed submissions all to the effect that there was no loss suffered. His reply submission concluded "by reference to the mentioned above" with a statement that the claimant claimed a declaration for the dismissal of the first defendant's counterclaims.

30 The tribunal's decisions in relation to the Art.27 request by the claimant would seem to indicate that, at all events as of the date of those decisions in March, the omission from Mr S's reply submission of a mention of the pleaded claim for contribution was being characterised as a withdrawal, abandonment or non-pursuit of that claim. It seems to me that is in error. As it seems to me to the contrary, in context Mr S's reply submissions are plainly focused and focused entirely, so far as the counterclaim is concerned, upon the claimant's continued contention that no loss had been suffered, the logical consequence of which was the dismissal of the first defendant's counterclaim if the contention were accepted.

31 The omission to say anything about the consequences or the further claims arising if the counterclaim were upheld in some substantial amount seems to me quite different in character to the first defendant's explicit request, dealing with the award sought by it on the counterclaim, for an award only against the claimant. Bearing in mind, in addition, that the tribunal would be dealing with the matter on documents alone, without the opportunity to clarify the issues through oral discourse at a final hearing, and the change of representation

to which I referred earlier in this judgment, in my view it was at best ambiguous whether the claimant was really intending by that exchange of written submissions no longer to pursue any claim for contribution against the second defendant.

32 In those circumstances, I agree with Mr Temmink QC, for the claimant, that as a minimum, following, for example, the guidance of the Court of Appeal in *The Vimeira* [1984] 2 Lloyds Rep 66, which in my judgment remains sound although it was not guidance on the 1996 Act, it was incumbent upon the tribunal to clarify with the claimant whether indeed its contribution claim, which had become live and required a determination as a result of the first defendant's written submissions, was (unexpectedly) being abandoned or withdrawn by omission. In fact, as I indicated in the earlier part of this judgment, and again with the greatest of respect to the tribunal, taking the Phase 2 Award at face value it is not apparent to me that the tribunal, at the time of that Award, in fact thought that the claim for contribution had been withdrawn, abandoned or not pursued. Rather, the Phase 2 Award records it as being a claim raised and requiring to be determined, but in error that is not carried through to the identification, discussion and analysis of the issues so as to be given conscious consideration in the Award.

33 In those circumstances, whilst it is not for this court to say anything directly or indirectly about how the tribunal ought to have determined the questions that arose in respect of the claimant's contribution claim, I am satisfied that the tribunal ought to have dealt with it, if necessary by calling first for the sort of clarification I have already mentioned. Whether that would have resulted in yet further submissions dealing with that specific point, whether that would have included any participation from the second defendant restricted to that point, although it had hitherto not participated at all, or whether instead the tribunal would have concluded that they were in a position to deal with the claim without any further submissions are all, as regards what would have happened, speculative considerations, and as regards what ought or could properly now happen, those are all matters for the tribunal to consider without any attempt on my part to influence their judgment in that regard. What I can say is that as things stand a potentially very valuable right of the claimants, namely to a contribution from the second defendant, based on the proposition that, as the claimant has always asserted and, for what it is worth, the first defendant has always likewise asserted, the second defendant has a joint and several liability in respect of the US$11 million claim now upheld, has been defeated without any proper consideration of its merits by the tribunal.

34 In those circumstances, I am satisfied that there is a serious injustice here to the claimant and that is so without attempting to speculate or forecast how the matter will ultimately turn out when that part of the award is remitted to the arbitrators for reconsideration. For all those reasons, in my judgment, the claim under s.68(2)(d) is, in substance, well-founded and succeeds.

35 To be clear, however, on my analysis of the matter, there is no error or shortcoming in the arbitral tribunal's conclusion, at para.273, that the claimant was liable to pay the first defendant US$11 million on the first defendant's counterclaim, or, at para.274(f), in the dispositive section, that there be an award against the claimant only in respect of that amount. That reflects the choice of the first defendant, notwithstanding it had pleaded a joint and several liability, to ask finally for an award only against the claimant. However, again on the analysis I have provided, the error then comes at para.274(g), whereby all other claims and counterclaims which, objectively construing the Award, included the claimant's claim for contribution, are dismissed.

36 In those circumstances, I shall ask Mr Temmink QC, to draft an appropriate wording for me to consider and approve after this judgment is concluded. It seems to me that the appropriate relief is the remission to the tribunal of para.274(g) of the Part 2 Award, with a direction that the arbitrators now give due consideration to the claimant's contribution claim as recorded by them at para.93(b) of the Award, by reference to such further process in the arbitration as they, the arbitrators, may, in their discretion, decide to be appropriate.

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