Neutral Citation Number: [2007] EWHC 1542 (Comm)

Case No: 2007 FOLIO 587

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2007

Before :

THE HONOURABLE MR JUSTICE COOKE

- -

Between :

(1) DDT TRUCKS OF NORTH AMERICA LIMITED **(2) JOSEPH MARTIN THOESEN** **(3) PETER JOHN THOESEN**	**Claimants**
- and -	
DDT HOLDINGS LIMITED	**Defendant**

- -
- -

Louis Flannery and Jern-Fei Ng (instructed by **Howes Percival LLP**) for the **Claimants**
Neil Berragan (instructed by **Irwin Mitchell**) for the **Defendant**

Hearing date: 18 June 2007

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE COOKE

Mr Justice Cooke :

Introduction

1. The First Claimant (DDT NA) seeks enforcement of an Arbitration Award by Mr Ian Hunter QC dated 13 April 2007 pursuant to section 66 of the Arbitration Act 1996. This is an award on costs (the Costs Award) following an earlier award dated 18 December 2006 which was published in corrected form on 25 January 2007 after minor clerical errors had been put right (the First Award). The First Award is the subject of challenge by the Defendant (Holdings) with applications under sections 67, 68 and 69 of the Arbitration Act. Those applications were made out of time so Holdings also seeks an extension of time. On 11 May 2007 Langley J ordered that these matters be heard together and, pursuant to paragraph 3 of the Order, Holdings paid into an escrow account of its solicitors the full amount ordered in the Costs Award as a condition of proceeding with its applications.

2. The background and history of the arbitration is fully set out in the First Award. The Arbitration Agreement is contained in Schedule 3 of a Distributorship Agreement dated 12 February 1997 and made between Holdings (then known as DDT Engineering Limited) and DDT NA (then known as Trucks 2000 Limited). DDT NA was at all material times wholly owned by the two brothers, Messrs Joe and Peter Thoesen, whilst Mr Gordon Brown was the leading light and major figure in Holdings. Under paragraph 16.3 of the Distributorship Agreement, provision was made that if Holdings were sold or made an assignment of substantially all of its assets for consideration, it should simultaneously terminate the Distributorship Agreement and make compensation payment to DDT NA in accordance with the provisions of Schedule 3. That Schedule provided for valuation of DDT NA's assets and rights with a base amount to be paid in respect of products and spare parts in its possession and a compensatory amount to be negotiated (if the sale or assignment took place more than 14 months after the date of the Agreement), with a binding arbitration under the AAA, in the event of failure to agree.

3. In August 1997, Holdings changed its name from DDT Engineering Limited to its current name, having bought another company which then changed its name to become DDT Engineering Limited. The same three persons were Directors of both Holdings and the new DDT Engineering Limited.

4. The key issue determined by the Arbitrator and the subject of argument before me turned upon a document which was referred to as the "Airport Agreement". This document was on the new DDT Engineering Limited's notepaper with this company's registered number at the bottom. The text of the first page of the document which was signed by both brothers on behalf of DDT NA and by Mr Brown on behalf of DDT Engineering Limited read as follows:-

> "DDT ENGINEERING LIMITED
>
> AGREEMENT WITH
>
> TRUCKS 2000 LIMITED,

(HEREINAFTER KNOWN AS DISTRIBUTORSHIP AGREEMENT)

DATED 12 FEBRUARY 1997.

FULL AND FINAL SETTLEMENT

By mutual consent it has been agreed between the two parties as above, to terminate the said agreement on 4th November 1999 on the following terms -

Repurchase parts stock Value $382,000
subject to inventory check

Repurchase new ADT stock 4 units Value $629,000

Repurchase used ADT stock Value $

The above amounts to be paid in full within 30 days of today's date.

It has also been agreed that neither party will have any claim upon the other party at the conclusion and signing of this agreement, and the mutual agreement made is in full and final settlement between the two parties."

5. Whilst there was a second page of this document, the Arbitrator attached little importance to it. It reads as follows:-

"November 4, 1999

Memo of Agreement of issues to be finalised to conclude distributor agreement between DDT Engineering Ltd and Trucks 2000 Ltd (DDT Trucks of North America Ltd) made and attached as part of final settlement agreement.

1) Outstanding warranty claims will be settled to mutual satisfaction of both parties and be paid within 60 days.

2) Interest cost of DDT North America Ltd will be paid for inventory holding period for d30-3 s/n 1801 + T630B s/n 1779 as per letter from Brian Thomson dated Oct 29 1999.

4) DDT to supply 4 new hydraulic ejector cylinders free of charge.

5) DDT North America will be able to purchase from DDT Engineering Ltd and/or LBX/Linkbelt 30 ton chassis as per last one purchased at same price in order convert 30 ton DDT trucks into water tankers."

6. This page was signed on behalf of "DDT Engineering Limited" by Gordon Brown and on behalf of "Trucks 2000/DDT NA" by Peter Thoesen.

7. It was DDT NA's case that these pages were signed at a meeting at Chicago Airport but that the agreement was a nullity or achieved nothing because the party to it was the new DDT Engineering Limited and not Holdings (previously named DDT Engineering Limited) (the identity issue). Thus there was no full and final settlement between the parties to the Distributorship Agreement and DDT NA could pursue a claim in arbitration for compensation under Schedule 3.

8. Additionally DDT NA claimed that the Airport Agreement of 4 November 1999 had been procured by a fraudulent misrepresentation of intention on the part of Mr Brown for Holdings when, in order to procure the signature of the Airport Agreement, he promised that DDT NA would receive a sum in excess of $5 million (the fraud issue).

The Arbitration

9. Mr Ian Hunter QC was specifically chosen by the parties from a list of potential arbitrators about whom the solicitors for the parties corresponded. It was recognised that the Airport Agreement was a critical issue and that an English commercial silk would be a good candidate to resolve these matters. The matter was referred to him therefore under the auspices of the AAA, with administration in London by the IDRC. At all times Holdings maintained that there was no valid arbitration, because the Distributorship Agreement had been brought to an end by the Airport Agreement of 4 November 1999, with the consequent termination of the Arbitration Agreement within it. DDT NA argue that the Distributorship Agreement remained extant, because of the ineffectiveness or voidability of the Airport Agreement, but do not appear to have argued before the Arbitrator that the Arbitration Agreement continued independently of the Distributorship Agreement, regardless of any alleged termination of the latter. Throughout the Arbitrator treated this dispute as one which related to his jurisdiction as appears from paragraphs 1 and 87 of the Award and the form of the first declaration which he made.

10. There was a 4 day hearing before the Arbitrator in November 2006 preceded and followed by lengthy written submissions from both parties. Three days were spent in cross-examination of the witnesses including the two brothers Mr Joe and Mr Peter Thoesen of DDT NA and Mr Brown, the Director of Holdings.

The First Award

11. In the First Award the Arbitrator described the history of the relationship between the Thoesen brothers and Mr Brown, both prior to and following the Distributorship Agreement in February 1997. He described the events which led to the sale by Holdings of its business to an Italian company called Astra and a deal involving Linkbelt, a company in Kentucky. As part of the Astra deal, he found that Mr Brown was required to resolve issues between Holdings and DDT NA, in order for that deal to go ahead. In consequence there was the meeting on 4 November 1999 at Chicago Airport which led to the allegations of misrepresentation and the execution of the two page document to which I have already referred. The Arbitrator had therefore to determine the credibility of the witnesses who said directly contrary things about what had taken place at that meeting.

12. At paragraphs 23, 41, 45, 46, 50, 56 and 57 he made express findings about the reliability of the Thoesen Brothers' evidence and the unreliability of Mr Brown's. He approached the allegation of a misrepresentation of an intention on the basis of the criminal standard of proof. He came to "a clear view as to who was telling the truth about 4 November meeting" and held that he was "satisfied that the evidence of Joe and Peter [Thoesen] that Brown did make such a promise is made good on the evidence and I am satisfied to the point that I am sure about this".

13. There were four elements which played a part in the Arbitrator's decision.

    i) First, cross-examination as to credibility on other matters led him to the conclusion that "Mr Brown was prepared to be more than a little careless with the truth if it suited his purpose" and was "prepared to forward to potential financiers a document which he knew to contain major falsehoods in order to obtain from them what he was seeking". He said "there is no doubt in my mind that Brown was prepared to circumvent or ignore DDT NA's distribution rights if he thought he could get away with it".

    ii) Secondly, he was influenced by the impression that the witnesses made on him as they gave evidence in relation to 4 November meeting. His expression was that Mr Brown "was lying and knew that he was lying". This appears to have been a classic example of a finding by reference to the demeanour of the witnesses.

    iii) Thirdly, he held that the commercial realities of the situation were such that Mr Brown's evidence could not be accepted.

        a) Both the Thoesens and Mr Brown knew that DDT NA had Schedule 3 rights to payments of a compensatory amount and that, on the sale of Holdings' assets, considerable sums of money were being made by Holdings. The Arbitrator expressed it thus:-

> "The question has to be asked, what conceivable reason would the Thoesens have to sign away their Schedule 3 rights and in particular their right to receive compensation for the termination of their distributorship rights in the event of a sale of DDT's business without proper and adequate consideration? The respondent is unable to provide any convincing answer to that question other than to say that if the promise to pay $5 million or not less than $5 million had been made it would have been documented. In my view the overwhelming probability is, as the Thoesens said, that they were only prepared to accept what they regarded as a thoroughly unacceptably low figure for the inventory on the basis of receiving a promise of "upside" as they consistently put it and they had a right to upside as a result of their Schedule 3 rights".

b) Another factor which the Arbitrator took into account in considering the commercial realities was the position that Mr Brown found himself in, with a deal in principle with Astra and a rich payday to come. The sale price was in the region of £9.5-10.5 million and even after payment of a considerable volume of creditors, the amount available for distribution was in the region of £7 million, of which Mr Brown was to receive a substantial sum. He was under pressure from his own Board and from Linkbelt and/or Astra to obtain DDT NA's signature on a Termination Agreement in order for that deal to be done.

iv) The conduct of the parties following the Airport Agreement was consistent with the Thoesens' account of what had happened because they pressed for compensation and provided a file dated 25 January 2000 addressed to Mr Brown entitled "What did Joe and Peter Thoesen do for DDT".

14. The Arbitrator also found at paragraphs 28-36 that the contract of 4 November 1999, whether constituting one page or two, was made with the new DDT Engineering Limited and that there was no consensus ad idem on determination of the Distributorship Agreement between the parties to the Airport Agreement. He relied on the decision of the House of Lords in Shogun Finance Limited v Hudson [2004] 1 LLR 532 and in particular upon paragraph 49 in the speech of Lord Hobhouse. He ruled out the admissibility of extrinsic evidence and held that, on a proper construction of the Airport Agreement, it was the new DDT Engineering Limited which was party to it. There was thus no termination of the Distributorship Agreement, with the result that the arbitration clause in Schedule 3 remained in being and a valid claim for compensation could be made under Schedule 3.

The Section 67 Application

15. Although Holdings' initial Claim Form contained no reference to Section 67, a claim under that section was included by amendment about a week later. In my judgment, first thoughts were best. I cannot see that the Arbitrator's jurisdiction would be in any way affected by the termination of the Distributorship Agreement. It was argued by Mr Berragan, who appeared for Holdings, that the 4 November 1999 Airport Agreement brought the Distributorship Agreement to an end and terminated all rights to compensation under Schedule 3 with the result that there was nothing left to arbitrate about and no possibility of triggering an arbitration by a failure to agree on such compensation. The right to a compensatory payment and the right to arbitrate in default of agreement about such a figure both came to an end.

16. I am unable to accept that submission. The terms of Section 7 of the Arbitration Act 1996 provide that "*unless otherwise agreed by the parties, an arbitration agreement which forms….part of another agreement…shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*". This is a statutory codification of the well recognised position which existed prior to the Act - see Harbour v Kansa [1993] QB 701. If the Distributorship Agreement had been brought to an end by accepted repudiation or frustration, the Arbitration Agreement would continue in being in order to deal with issues of compensation, should such arise. It is nothing to the point that the assignment of assets by Holdings occurred after the termination of the Distributorship

Agreement, since the allegation is made that compensation is due under the agreement. Whilst the effect of the Airport Agreement, if binding and effective, would be to negate any claim, it would not of itself bring the Arbitration Agreement to an end once a claim for compensation, which could not be agreed, was made. In my judgment there was no agreement to bring the Arbitration Agreement to an end within the meaning of section 7, when the Distributorship Agreement was allegedly brought to an end and Holdings could point to no wording which suggested that this was the case.

17. If I am right in this, to grant an extension of time would be an exercise in futility. If I am wrong about that, then Holdings requires an extension of time to bring its section 67 application as section 70(3) of the Arbitration Act requires any such application to be brought within 28 days of the date of the Award. The section 67 claim was brought some 15 weeks after the expiry of the relevant period. As an extension of time is also sought in respect of the section 68 and section 69 applications, I will deal with all these applications together. If an extension was to be given, it was agreed that the substantive section 67 issues would have to be decided at another hearing.

The Section 68 Application

18. Holdings challenged the Award on the ground of a serious irregularity affecting the Tribunal, the proceedings or the Award. The serious irregularity in question was alleged to affect all three and was the alleged procuring of the Award by fraud. This is an irregularity listed in section 68(2)(g) but, in order to satisfy the test of what is required for a "serious irregularity", the court must consider it such as to cause substantial injustice to the applicant.

19. It is alleged that the Thoesen brothers perjured themselves in their evidence to the Arbitrator in what they said about the meeting on 4 November 1999 and the file of documents which was said to have been provided to Mr Brown in January 2000 at the Fairmont Hotel in Chicago. The purpose of the latter meeting was for the Thoesens to present Mr Brown with all the information needed to justify their valuation of the business and their investment. The "recap of investment in DDT" in the file had a subtotal of retained earnings, recast for January 2000 of $160,000, to which was added the investment in DDT by way of expenses absorbed by other Thoesen companies amounting to $3,571,000. The total claimed amounted to $3,731,000 to which fell to be added additional sums for loss of time and money which would otherwise have been invested in other businesses and earned profits there.

20. Mr Peter Bell, a solicitor acting for Holdings, put in two witness statements. He stated that, on or about 20 April 2007, Holdings received copies of two depositions given by the two Thoesen brothers in January 2003 in proceedings in Pennsylvania brought against Holdings, DDT NA and other defendants arising out of a serious accident involving a DDT truck. The claim was for a fatal injury to a Mr Wolbert. Reliance was placed upon the depositions as being inconsistent with what was said in evidence in the arbitration about the Airport Agreement and the January 2000 file.

21. I was taken through the depositions by Mr Berragan, who appeared for Holdings. Particular reliance was placed on pages 53 and 56 of the deposition of Mr J Thoesen and page 33 of that of Mr P Thoesen.

i) The former, in his deposition, referred to a termination agreement at the end of 1999 and then later to a provision in the Distributorship Agreement requiring there to be "something in it for us as their North American distributor" if Holdings sold out. He went on as follows:-

> "So with that thought in mind, DDT and Gordon Brown were saying to Peter and I that we are in the process of selling out. You will be taken care of. No specifics were ever said, but "we're going to gain and therefore you're going to gain and they're going to make the trucks a whole lot more reliable" meaning the acquiring manufacturer."

ii) Mr P Thoesen referred in his deposition to a meeting in Chicago at the end of 1999 when the relationship with DDT Engineering came to an end. He was not asked for any details of what took place there, although his answers over the previous pages referred to a supposed benefit which DDT NA was to obtain on a sale of Holdings' business and the absence of any benefit actually obtained. He said that consideration had been given to suing Mr Brown and Holdings. It was in fact only a few months later that arbitration proceedings were first commenced, although they subsequently came to nothing.

iii) With regard to the file dated 25 January 2000 Holdings relied on a passage at page 47 in Mr J Thoesen's deposition where he was asked how much money his company lost as a result of the deal and at that point his guess was "over $1 million". When asked later at page 81 who was the last person he spoke to from Holdings, he replied that it was Mr Brown and that this took place at the end of 1999.

iv) In his brother's deposition at page 26, when asked whether he had ever calculated how much money he or the company had lost as a result of the relationship with Holdings, he answered in the negative.

The Test

22. There was no dispute as to the test to be applied in order to show serious irregularity affecting the tribunal, the proceedings or the Award, where the Award was alleged to have been obtained by fraud in the shape of perjury. I was referred to a decision of mine in Thyssen v Mariana [2005] EWHC 219 (Comm) where, obiter, I set out the test to be applied by reference to the judgment of Waller LJ in Westacre v Jugoimport [2000] QB 288 at pages 306-309. In the context of setting aside a judgment obtained by fraud, where the very issue decided was whether the witness or witnesses were lying and that was the point which the applicant was seeking to resurrect in the context of the application, Waller LJ citing a passage in Dicey & Morris on the Conflict of Laws, stated that summary dismissal of such an application would follow:-

> "Unless the plaintiff can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence and which is so material that its production at the trial would probably have affected the result and (when the fraud consists of perjury) is so strong that

> it would reasonably be expected to be decisive at the re-hearing and if unanswered must have that result".

23. Whilst Waller LJ had not considered fully the position under the Arbitration Act, he suggested that it was difficult to think that the test would be any different in the context of an arbitration award, rather than a judgment. In Thyssen, I held that it could not be a "black letter test" for applications under section 68(2)(g) of the 1996 Act, since the Act contained its own express criteria for such applications, but that the approach of the court in relation to domestic judgments must be a useful comparator when applications were made to set aside arbitration awards, particularly bearing in mind that the decision was reached by the Tribunal of the parties' choice. The question of "substantial injustice" in section 68 is one which should take full account of the factors mentioned in Waller LJ's test. That is the approach which, by the agreement of the parties, I adopt here.

Could the evidence have been produced at the Arbitration with reasonable diligence?

24. The effect of Mr Bell's evidence was that no order for disclosure was made in the arbitration and no formal disclosure was made by the parties. Each party put forward any document upon which it wished to rely. The depositions, as appeared on their face, were taken on 14 January 2003 and the transcripts were sent to each of the deponents and returned by them on 19 and 21 March 2003, duly signed as a correct record of what had been said.

25. The depositions were retained by the firm of Burns White & Hickton of Pittsburgh, Pennsylvania who were the lawyers appointed by Holdings' insurers to act for Holdings and DDT NA. As such, the depositions were available to Holdings, as was accepted in argument, since those lawyers acted for Holdings as well as for DDT NA and the insurers. The evidence of Mr Bell was that Mr Brown had provided evidence himself in that litigation and had answered interrogatories raised on Holdings. At some stage, "which may have been during pre-trial preparation, he was either shown or told about various documents, including depositions from the Thoesens. He was not given copies." Thus, long before the arbitration hearing Mr Brown knew of the depositions and, in general terms, of their contents. It is said by Mr Bell that Mr Brown did not commit the contents of the depositions to memory and thought no more about them after the Wolbert proceedings were resolved. When preparing for the arbitration hearing before the Arbitrator, he said that neither he nor Mr Brown had any reason to believe that the Wolbert proceedings would be relevant to the issues concerning the Airport Agreement made in November 1999, and it was Holding's case that the January 2000 file first emerged at the hearing.

26. It was only in the context of reading Mr Peter Thoesen's third witness statement, following the First Award and in the context of the forthcoming hearing in October on the amount of compensation, that (Mr Bell said) Mr Brown recalled something in the depositions which bore on the assertion made in that third witness statement that DDT NA had reworked every single truck. In consequence the depositions were obtained and, when read, Holdings' lawyers alighted on the passages to which I have already referred.

27. It is said that Holdings did not know and could not reasonably have been expected to know, prior to the making of the First Award, that there existed depositions in the

Wolbert proceedings made by the Thoesen brothers in which reference was made to the meeting with Mr Brown when the Airport Agreement was executed and to the fact that the Thoesen brothers had said that they had not previously calculated their losses. Mr Brown of Holdings did however know prior to the First Award that these depositions existed. He had, on Mr Bell's evidence, merely forgotten their contents. It is not disputed that he could, without difficulty, have obtained the depositions prior to December 2006 in the same way that they were obtained in April 2007. On Mr Bell's evidence, it was because he did not recall the contents that he did not ask. It is therefore plain, in my judgment that the depositions constituted evidence which could with reasonable diligence have been produced at the hearing. A failure in memory and a failure to obtain a document which could otherwise have been obtained is a lack of due diligence. It was for Holdings to consider what evidence it required at the hearing and to investigate the material available to it in order to decide what to adduce. It did not trouble to investigate the depositions, in sharp contrast to its actions in relation to the hearing scheduled for later this year.

Is the evidence so strong that it would reasonably be expected to be decisive at a re-hearing and if unanswered must have that result?

28. DDT NA did not put in any evidence to explain the passages in the depositions. The submission was made on its behalf that the passages were not addressed to the issues with which the Arbitrator was concerned and that there was no necessary inconsistency between what was said in the depositions and what was said at the arbitration and accepted by the Arbitrator as true. Whilst reliance was placed by Holdings on the absence of any specific reference to a promise of $5 million or more, it was suggested in argument that the questions in the depositions were aimed at ascertaining whether or not DDT NA had any money and was worth pursuing. It was in the Thoesens' interest not to refer to any potential claim for $5 million and if not asked about it specifically, not to volunteer it. Equally, the question as to how much money was lost as a result of "this deal" is different from a question about the amount lost as a result of the termination. The vagueness in Mr J Thoesen's reply (over $1 million) is again explicable for the reason already given. When Mr Peter Thoesen said that he never calculated how much money was lost as a result of the relationship with Holdings, there is no necessary inconsistency with a document produced in January 2000 by DDT NA, including calculations by someone else.

29. Whilst there are plainly arguments to be made as to inconsistency in the statements made, in my judgment it is clear that Holdings cannot satisfy the test as to the strength of the evidence which they now wish to adduce. The new evidence in the depositions could not reasonably be expected to affect the result, given the strength of the Arbitrator's findings on credibility and the other material upon which he relied, as set out earlier in this judgment. If this material went in unanswered, it certainly could not be said that it must necessarily be decisive in favour of Holdings.

30. For these reasons I conclude that any section 68 application is bound to fail. This is of direct relevance in the context of the application for an extension of time.

The Section 69 Application

31. This was an application for leave to appeal on a one-off set of events and, in my judgment, a question of construction of the Airport Agreement. The test is whether or

not the Arbitrator was, in the court's judgment, "obviously wrong". Whilst there was much argument about whether or not extraneous evidence could be adduced, this seemed to me to be beside the point. On the face of the document itself, there was an inconsistency, on the one hand, between the use of the name DDT Engineering Limited at the top of the letter heading, with a number which referred to the new company of that name and, on the other hand, the body of the document where DDT Engineering Limited was referred to as the company with a Distributorship Agreement with DDT NA (previously known as Trucks 2000 Limited). The agreement was said to be a full and final settlement and the Distributorship Agreement terminated by mutual consent of "the two parties as above".

32. I discern nothing in the decision of the House of Lords in Shogun Finance Limited v Hudson [2004] 1 LLR 532 which impacts upon this at all. The question is simply one of construction of the contract, which is a question of law, and it appears to me self-evident that the party contracting for the termination of the Distributorship Agreement, undertaking to pay various sums for re-purchase, to deal with warranty claims, to supply hydraulic ejector cylinders and interest cost is the company which was party to the Distributorship Agreement, namely Holdings, previously known as DDT Engineering Limited.

33. If there is ambiguity and extraneous evidence is allowable, then the evidence that Mr Brown had forgotten the change of name and the Thoesens were unaware of it, necessarily means that all those concerned intended the parties to the agreement to be DDT NA and the other party to the Distributorship Agreement, Holdings (previously known as DDT Engineering Limited). I am driven to the conclusion that the Arbitrator was obviously wrong on this point and that permission to appeal would ordinarily be given if this was the only point in issue and if it substantially affected the rights of the parties.

34. I have however come to the conclusion that it cannot substantially affect the rights of the parties since Holdings cannot succeed on its section 67 or section 68 applications, nor on its application for an extension of time for any of the three applications, a matter with which I now deal.

Extension of Time

35. It was common ground between the parties that the test for an extension of time is that set out by Colman J in Kalmneft v Glencore [2002] LLR 128 at paragraph 59. These criteria, it is common ground, have to be applied more strictly in relation to section 67 applications where the jurisdiction of the Arbitrator is challenged. The policy of finality in the Arbitration Act, in particular in regard to jurisdictional issues, is of paramount importance in the context of the usual CPR considerations and objectives, a point made in Leibinger v Stryker Trauma GMBH [2006] EWHC 690 at paragraph 33.

36. The criteria set out by Colman J in Kalmneft are as follows:-

> "59. Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:

> (i) the length of the delay;
>
> (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
>
> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
>
> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
>
> (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the Court might now have;
>
> (vi) the strength of the application;
>
> (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

37. The length of the delay in relation to the section 68 and section 69 applications is of the order of 14 weeks and in relation to the section 67 application is about 15 weeks. There is only one reason advanced in relation to this delay and that is the obtaining of the depositions on 20 April 2007. As I have held that these could, with reasonable diligence, have been obtained prior to the hearing, this presents little justification. There would of course have been no point in seeking to appeal under section 69 in relation to the identity of the party to the Airport Agreement as long as the findings of fraudulent misrepresentation remained unchallengeable. However because the depositions could have been obtained earlier, it cannot be said that Holdings was acting reasonably in all the circumstances. It had no intention of launching a challenge until, by chance, its lawyers came across passages in depositions which were obtained for a different purpose. It is not asserted that DDT NA or the Arbitrator caused or contributed to the delay.

38. There is some evidence before me of prejudice to DDT NA, in addition to the mere loss of time, if any of the applications are permitted to proceed, because Howes Percival LLP acted under a CFA in relation to the hearing before the Arbitrator and have either entered, or are about to enter, a new CFA in relation to the further hearing on compensation which is scheduled for later in the year. DDT NA is in liquidation in the USA. Because Holdings has refused to pay its 50% share, in accordance with AAA Rules, the Thoesen brothers have funded all the AAA fees. The brothers themselves are impecunious, as appears from the evidence filed, and could not proceed in arbitration at all without the benefit of a CFA. Costs have been incurred (since December 2006 and the expiry of the time limit for the section 67, 68 and 69 applications) in relation to the forthcoming hearing which would be wasted and irrecoverable, should Holdings' applications proceed and ultimately be successful.

i) The arbitration has continued and the effect of an extension of time for a section 67 application would result in a re-hearing as of right, by this court, which would reach the conclusion that I have, although the parties would have had to prepare for the argument which took place before the Arbitrator, for which no CFA is currently in place.

ii) The effect of an extension of time for the section 68 application would be the hearing of such an application which would fail for the reasons already given. Once again, to grant an extension would be a futile exercise. If successful, it would result in the setting aside of the Award and a further hearing, probably before another Arbitrator, of the compensation claim with the additional evidence which Holdings wish to adduce. Once again no CFA is in place for this.

iii) The effect of an extension of time for the section 69 application would be limited, since permission to appeal would be refused as the rights of the parties would not be substantially affected and no injustice would be done, because of the failure of the other applications. If permission were given under section 69, and the appeal succeeded, this would avail Holdings nothing, since without success on sections 67 and 68, the Airport Agreement would still not be binding.

iv) Nonetheless, it is clear that the effect of an extension of time for one or more of these applications would be the protraction of proceedings and the need to engage lawyers, which would create real problems for DDT NA with the need for further CFAs to be agreed, if DDT NA were not to give up. The suspicion is that this is Holdings' aim and that the applications are pursued with that purpose in mind, regardless of whether or not they are likely to fail.

39. I have already dealt with the strength of the applications. In my judgment the applications under sections 67 and 68 could not succeed even though that under section 69 would have real prospects of success but for the failure of the other two.

40. Last I have to consider whether or not it would, in the broadest sense be unfair to Holdings to be denied the opportunity of having its applications determined. I do not consider this to be the case. The policy in favour of finality in arbitration is a strong one and, in circumstances where the parties deliberately chose a commercial silk to deal with what was known to be the essential dispute between them in relation to the Airport Agreement, I consider that there is no unfairness to Holdings, which now wishes to overturn the decision of the Arbitrator of its choice, in circumstances where it cannot, for the reasons I have already given, ultimately succeed.

41. In my judgment all these factors militate against any extension and, taking them into account in the exercise of my discretion, I refuse to give an extension for any of Holdings' three applications under the Arbitration Act.

Conclusion

42. In these circumstances, all four of Holdings' applications must be dismissed - the application for extensions of time and the applications under sections 67, 68 and 69. It also follows that DDT NA's application for leave to enforce the Costs Award of 13

April 2007 in the same manner as a judgment or order of the court must succeed and that judgment may be entered in the terms of the Award. I did not understand there to be any separate objection to this beyond the points taken in Holdings' applications. In consequence the Thoesen brothers are entitled to enforce the Costs Award, along with DDT NA, because the Costs Award, as an asset of DDT NA, passes to its former stockholders as a matter of the corporate law of the place where DDT NA is incorporated.

43. Before the formal hand down of this judgment the parties addressed the question of costs in written submissions. I have considered those submissions fully and decided that, notwithstanding the points made by the claimants, that costs should be awarded to the claimants on the standard and not the indemnity basis. I am asked to summarily assess the costs and have considered the defendant's objections to the schedule served. There is no disproportionality in the bill put forward and there are only three areas where I consider the fees put forward unreasonable. First, I consider that the time spent in preparing bundles at 15 hours is excessive and reduce the bill by £600 on that account. Secondly, I do not consider it appropriate for a Trainee Solicitor to have attended court when the claimants were represented by Mr Flannery and Junior Counsel. A deduction of £787.50 is therefore to be made. Thirdly, I consider that excess time was spent in preparing the costs schedule and have deducted £200 for that reason. The total profit costs figure is therefore £21,459.00. To this is to be added the uplift on fees subject to the CFA. The base figure there is, with the deductions I have mentioned, £18,559.50 and I consider an uplift of 50% to be appropriate, which gives rise to a figure of £9,279.75. The total recoverable profit costs therefore amounts to £30,738.75. In addition the claimants are entitled to disbursements in a total figure of £7,376. The total for the purposes of paragraph 5 of the order is therefore £38,114.75.