Case No: 2005 Folio 896

Neutral Citation Number: [2010] EWHC 1203 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 May 2010

Before :

MR JUSTICE BURTON

- -

Between :

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- -

Jonathan Nash QC and William Edwards (instructed by **Clyde & Co**) for the **Applicant/Defendant**
Ewan McQuater QC and John Odgers (instructed by **Freshfields**) for the **Respondent/Claimant**

Hearing dates: 20 May 2010

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Judgment

Mr Justice Burton :

1. This has been the hearing of an application by the Defendant, EFL Inc, a company registered in Belize, for summary judgment, so as to dismiss a claim by the Claimant, H J Heinz Co Ltd, an English company, for an injunction to prevent the Defendant from taking steps to enforce a Hungarian Arbitration Award, and seeking a declaration that the Award is not capable of being recognised or enforced in England, on the ground that it would be contrary to public policy to recognise or enforce it, pursuant to s103(3) of the Arbitration Act 1996. Mr Jonathan Nash QC, who has, together with Mr William Edwards, appeared for the Defendant, submits, as he is required to do in order to succeed on such an application, that the Claimant's claim has no real prospect of success.

2. The Hungarian Arbitration Award was made on 4 February 2005 by the Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry ("the Court of Arbitration") appointed pursuant to an arbitration clause providing for Hungarian law and arbitration (in Budapest, pursuant to the Rules of the Hungarian Chamber of Commerce) in a Stock Purchase Agreement, dated 11 February 2000. The dispute related to the Defendant's entitlement to certain baby food manufacturing equipment. The Arbitrators concluded, after eight days' hearing lasting over six months, that the Claimant was in breach of contract and liable to pay to the Defendant sums totalling more than one billion Hungarian forints (about £5m): something over half the amount was paid by the Claimant in March 2005, but the balance, in the sum of approximately 500m Hungarian forints, plus interest and costs, has not been paid by the Claimant, and is now sought to be enforced by the Defendant. That balance approximates to the consequential loss found by the Arbitrators to be recoverable by the Defendant in relation to three distribution agreements, which the Defendant claims to have been entered into for the sale of baby food, which it was unable to perform because of the Claimant's breach. There were three Distribution Agreements, one with O O O Ridmal ("Ridmal") (and a subsequent Settlement Agreement with Ridmal), one with Puszta-Garten Inc ("PG") and one with Aladin Co, with a subsequent Settlement Agreement. These three Distribution Agreements (and the two Settlement Agreements) were alleged by the Claimant in the Arbitration to have been sham contracts with no reality, and purportedly entered into by the Defendant simply for the purpose of inflating its claim against the Claimant.

3. Approximately half of the additional consequential damages relates to the Ridmal Agreements (about US$ 1.5m plus interest). In relation to the two Ridmal Agreements, it was said by the Defendant that both the Distribution and Settlement Agreements were signed by a Mrs Fisher. Mrs Fisher was not called to give evidence at the Arbitration hearings. Nor was Mr Schepp, the driving force behind the Defendant, who was said to have negotiated and signed both the Agreements. The evidence that was called at the hearing for the Defendant was from a Mr Tartsay, an associate of Mr Schepp, who (*inter alia*) stated that Mrs Fisher had negotiated on behalf of Ridmal in respect of the Ridmal Distribution Agreement, and a Mrs Horvath, who was a partner in PG, and said (*inter alia*) that "*Ridmal came to Hungary from Moscow*" and that, so far as she could recall, the Ridmal Agreement was concluded on 15 May 2002 (the date it bears).

4. The case that the Claimant put forward at the Arbitration, in relation to what it alleged was the sham contracts with all three alleged distributors, is summarised in paragraph

17 of the Particulars of Claim in this action, and in the evidence before me. So far as the Ridmal Agreements are concerned, evidence was adduced from a Mr Lamb, the Claimant's company director for Russia, who gave evidence (*inter alia*) that the company stamp on the Ridmal Distribution Agreement did not look like an officially registered stamp, and that the capacity in which Mrs Fisher signed the Ridmal Distribution Agreement was not indicated, which is very unusual in Russia, where the basis for authority is almost always indicated as a matter of routine in contracts. In addition, I take the following from paragraph 17 of the Claimant's Particulars of Claim, supplemented by particulars given under later paragraphs:

i) Close association

> "*17(b)* [PG] *and Aladin were closely associated with EFL and/or Mr Schepp and likely to have acted upon his directions or instructions.*
>
> "*22(a) None of Ridmal, nor* [PG], nor *Aladin was engaged in the business of distributing baby food.*

ii) Lack of commerciality

> "*17(c) The terms of the alleged Ridmal,* [PG] *and Aladin Distribution Agreements ... defy commercial common sense, such that they could not realistically have been negotiated and entered into between parties genuinely intending to trade with each other.*
>
> *22(f) Each of the Distribution Agreements included a term that, on the basis of a declaration by* [the Defendant]*, the parties understood that* [the Defendant] *was the exclusive owner of the Equipment. A term of this kind is unheard of in normal food distribution agreements. Its inclusion in the Distribution Agreements was highly disadvantageous to* [the Defendant]*, given that at the dates of the respective Distribution Agreements ownership of the Equipment was in dispute; whilst the ownership of the plant used to manufacture the product supplied to them should have been a matter of indifference to Ridman,* [PG] *and Aladin.*
>
> *22(h) Each of the Distribution Agreements imposed on* [the Defendant] *a very onerous and wholly arbitrary "penalty" in the event of termination for breach, being a sum of 15%, 10% and 20% (respectively for the Ridmal,* [PG] *and Aladin Distribution Agreements) of the minimum volume at the contractual price at termination, payable within 30 days of termination. Notwithstanding such high penalties,* [the Defendant] *also remained potentially liable for any further damage caused by its breach.*"

iii) Obvious defects

> "*17(d) The Distribution Agreements contained defects that should have been obvious and unacceptable to the parties.*"

iv) No performance of the Agreements

> "*17(e) Neither* [the Defendant] *nor the purported distributors did anything to perform the Distribution Agreements or the Ridmal and Aladin Settlement Agreements.....*
>
> *30. Notwithstanding that* [the Defendant] *alleged that each of the Distribution Agreements was terminated in or around December 2002, no baby food was marketed, ordered, delivered, invoiced for, or paid for under any of those "agreements". Nor was any, or any substantive, market research conducted. Nor were any marketing plans (such as were anticipated under the terms of the Distribution Agreements) formulated, proposed, negotiated or agreed.*"

5. Mr Eric Ordway, who acted as the Claimant's Counsel in the Arbitration, describes the evidence that was adduced for the purpose of establishing the Claimant's case that these Distribution Agreements (and consequently the Settlement Agreements) were shams: (1) an expert opinion from a Mr Easdale, an independent consultant with long experience in the food industry, (2) a report by AC Nielsen, said to be the world's leading market research institution, (3) an expert marketing consultant, Dr Farkas, (4) a specialist in export and distribution, Mr Loos, (5) the Claimant's Commercial Director for Africa and the Middle East with extensive experience of the baby food market, a Mr Ansari, (6) a Mr Jackson, dealing in particular with the Aladin Distribution Agreement, (7) Mr Lamb referred to above, relating in particular to the baby food market in Russia, (8) and the legal opinion of Dolomorov & Partners, experts in Russian law (a Mr Semenko), with regard to whether the Ridmal Agreements complied with the requirements of Russian law.

6. The Arbitrators dealt very succinctly with this substantial evidence, in paragraph IX.2, a little over one page of their 53-page Award. They set out their conclusion at the outset of the paragraph:

> "*The defendants successfully showed that these distribution contracts were, in many respects, of a highly unusual content, and that they differed substantially from the content of contracts typically applied in the sector. However, the defendants did not succeed in proving beyond reasonable doubt that the three distribution contracts were sham contracts.*"

7. They then turn to deal with an argument which featured as a side issue at various times during the dispute between the parties, namely whether, in order to declare the Distribution Agreements shams (if such were necessary), the Claimant should have somehow had resort to the Stockholm Court of Arbitration, which was that provided for in the Ridmal Distribution Agreement itself (to which of course the Claimant was not a party). The Arbitrators then continued:

> "*In the present procedure, the sham nature of the distribution contracts – if such had been established by the Arbitration Court – could have been taken into consideration only where and to the extent that the Arbitration Court had decided on the allocation of the damages without formally declaring the sham nature of the contracts, concerning which no application was anyway submitted (the defendants only having referred to the nullity of the contracts.*
>
> *The supplier indirectly possessed the production capacity that would have allowed it to produce the contracted quantities. The buyers were existing firms;* [PG] *and Aladin are well-known players in the food industry in the given countries. The defendants were not able to prove that the distributors and the claimant had colluded in the matter – something to which they had indirectly averred several times in their documents of the legal actions, as had their private experts.*
>
> *Not even the perhaps excessive framework quantities stipulated in the contracts suggest that the contracts were of a sham nature. Even international firms with considerable experience in such matters have been known to occasionally overestimate their future sales, but we certainly cannot conclude from this that the underlying contracts are a sham. For this reason the Arbitration Court omitted to decide whether the private experts presented by the defendants, whose testimony should be treated as part of the defendants' arguments, had concluded correctly that the contracted quantities had been excessive.*"

8. The Arbitrators record that the Defendant successfully managed to secure a reduction in the penalty stipulations contained in the various Distribution Agreements in the course of settlement of them, so that "*the Arbitration Court does not consider the* [Defendant] *to be at fault in respect of its conduct*".

9. The Claimant applied to the relevant supervisory court, the Metropolitan Court of Budapest ("the Metropolitan Court") for the annulment of the Arbitration Award on 9 March 2005, relying on a number of matters, including s55(2)(b) of the relevant Hungarian Arbitration Act (Act No LXXI of 1994, seemingly shortened as Vbtv), which is in similar terms to s103(3) of the 1996 Act, translated variously as the Award being in conflict with the rules of Hungarian public policy, or of Hungarian public order. The Claimant's pleading before the Metropolitan Court states, at paragraph 3(d), that the Award:

> "*also violates the generally accepted values of the society that from the justification of an award it can be educed that in case the victim on behalf of the verification that he is a victim of a cheat proves any number of indirect evidences and arguments, however he cannot prove the cheating itself credibly, the victim shall pay …:* [in] *other words it violates the generally accepted values of the society that not the cheater is the one who is*

> *obliged to prove that he gave a fair deal but conversely, the victim has to prove that the cheater cheated.*"

10. It was subsequent to such pleading that the Claimant discovered the evidence upon which reliance is placed in these proceedings, namely that the signature of Mrs Fisher on the two Agreements was forged. It is common ground that there was no evidence of forgery relied upon before the Court of Arbitration: the half suggestion by Dr Lajer, the Hungarian lawyer who acted as Counsel for the Defendant in the Arbitration proceedings, when he said that the "*forgery evidence*" was "*only touched upon*" (paragraph 79 of his first witness statement) was inappropriate, and has been withdrawn: he has sought to explain, in paragraph 43 of his second witness statement, that he was referring to the "*alleged missing registration of the contracts by the relevant Russian authorities, the allegedly unofficial stamp used and … Ms Fisher's unexplained power to sign the Agreements*" (referred to in paragraph 4 above). As will be seen, the first of the issues before me to decide is whether the Claimant can rely in support of its case in respect of s103(3) upon this subsequently discovered evidence of forgery.

11. Mr Southwell, the Claimant's solicitor, explained what happened next in paragraph 49 of his first witness statement:

> "[A]*fter the Award,* [the Claimant] *continued to believe that* [the Defendant] *and the Distributors had colluded in order to perpetrate a fraud against it by advancing sham distribution and settlement agreements. In particular,* [the Claimant] *believed that the witness testimony of Ms Horvath, and the other evidence that* [the Defendant] *had served during the Arbitration regarding the alleged settlement of the sums due under the Settlement Agreements, demonstrated that there was a lack of reasonable commercial autonomy between* [the Defendant] *and the Distributors. Moreover, the evidence advanced by* [the Defendant] *during the Arbitration was fluid, and contained significant internal inconsistencies. At this point,* [the Claimant] *concluded that it had to take all steps that were available to it to try to establish what now seemed plain: that there was collusion between the Distributors and* [the Defendant]. *These steps included going so far as to try to locate and communicate with those by whom the Distributors appeared to have been represented.*"

12. He exhibits and describes what then occurred. Corporate investigators were instructed, one of whom was a Mr Budanov, who visited Moscow. He interviewed a Ms Vetyugova, who had been owner and general director of Ridmal from December 1998 until 26 June 2003. She told Mr Budanov that Mrs Fisher was an employee of Ridmal in 2000 and 2001 but that she, Mrs Vetyugova, had never seen or heard of either of the Distribution or Settlement Agreements before, that Ridmal had never received any of the sums or products purportedly to be transferred over under the Settlement Agreements, and that the signature on the Agreements was not that of Mrs Fisher. At a subsequent meeting with Mr Vetyugova on 26 July 2005, she told him she had spoken with Mrs Fisher by telephone, who had confirmed that she had never signed any such documents, but said that Mrs Fisher was unlikely to be prepared to

speak to Mr Budanov, and that she, Ms Vetyugova, while confirming that the statement of facts produced to her by Mr Budanov was true, was not prepared to sign it, because she feared that Mr Schepp could interfere with other business commitments that she had. Mr Budanov was able to speak with Mrs Fisher on the telephone on the same day, who confirmed that she had never signed any documents with the Defendant, but asked Mr Budanov not to call her again.

13. Mr Southwell explains that this evidence of forgery came as a total surprise to the Claimant. Advice was obtained from a Mr Legradi, the Claimant's Hungarian lawyer, that it was unlikely that the Metropolitan Court would admit the new evidence of forgery in the annulment proceedings, and that, because the new evidence raised issues of potential criminal liability in Hungary, the correct procedure to be followed was to commence a separate criminal process: Mr Legradi advised that, if a criminal conviction were obtained in Hungary upon the basis that the Ridmal Agreements had been forged, then the Claimant would be able to rely on that conviction as evidence in the Metropolitan Court. Further steps were then taken to obtain evidence and, after an attempt by a Freshfields partner to visit Mrs Fisher on 26 October 2005, Mrs Fisher's son telephoned to indicate that he was willing to act as contact person, requesting copies of the two Agreements, whereafter Mrs Fisher provided a notarised declaration dated 1 November 2005 confirming that she had never signed either Agreement.

14. With the benefit of that notarised statement, and Mr Budanov's evidence, the Claimant took three steps on 2 November 2005. First it filed a criminal complaint in Hungary. Secondly, at the hearing on that day of the Metropolitan Court proceedings, the Claimant gave notice to the Court that it now intended to rely on the complaint of forgery to the Metropolitan Prosecutor's Office in support of its case that the Award was against public policy. The Claimant sought, and obtained, three stays of the Metropolitan Court proceedings, but as will be seen, in the event, the Metropolitan Court gave judgment on 10 September 2007, before the outcome of the criminal process. A handwriting expert was instructed by the Claimant, but the Defendant declined to produce the originals of either of the Agreements (and has still not produced them), so that such expert could only give his opinion on the basis of copy documents, which he makes clear, in his opinion dated 24 November 2005 (submitted in due course to both the criminal investigation and the Metropolitan Court), "*did not render possible the testing of the line quality and hand pressure …; a more precise opinion can only be issued on the basis of original signatures and a repeated examination of test writing*". On that basis his conclusion was that both signatures were "*probably not originating from the own hands of the owner of the name Marina Fisher*".

15. The third step that was taken on 2 November 2005 by the Claimant was the bringing of these proceedings, as it was apparent from the fact that the Defendant had served a statutory demand on the Claimant in England, which had been met by an injunction restraining presentation of a winding-up petition, that the Defendant intended to enforce here. That injunction was continued inter partes on 25 January 2006. At a hearing before Christopher Clarke J on 3 March 2006 the Defendant gave an undertaking not to seek to enforce the Award in this jurisdiction until trial or further order. The learned Judge was persuaded by the Defendant effectively to stay the proceedings. He had before him, unchallenged, the evidence of Mr Legradi, setting out the legal advice in accord with that which he had given to the Claimant, set out in

paragraph 13 above, and in particular stating that, unless, prior to the Metropolitan Court's judgment, there was a conclusion of the criminal procedure in relation to the falsification of documents:

> "*3.8 … At this stage in the proceedings, the likelihood is that the Metropolitan Court will either grant the stay or proceed to the final determination of the Hungarian Challenge without regard to the new evidence.*
>
> *3.9 Hence, regardless of whether the new evidence could be presented before the Metropolitan Court, now or in the past, and despite the fact that the Metropolitan Court retains competence to adjudicate on matters of public order generally, the Metropolitan Court does not, in this instance, have competence to make a determination based on the new evidence as the issues raised fall within the scope of a criminal procedure.*"

16. Christopher Clarke J said as follows, in his judgment:

> "*6. The position lies as follows. If* [the Claimant's] *challenge to the award in Hungary is successful, these proceedings will be moot. The award will have been set aside and the question of enforcement of the award in this or any other jurisdiction will no longer be relevant. If, on the other hand,* [the Claimant] *loses, the likelihood is that it will have lost without the court in Hungary, the arbitration court in Hungary, having made any decision as to whether or not the distribution agreements are or are not forged. I say that because it appears to be the position that* [the Defendant] *has not in the annulment proceedings in Hungary put in substantive evidence to the effect that the distribution agreements are not forged. They contend that the question of whether or not they are is an irrelevance to the challenge to the award.*
>
> *7. In those circumstances, if* [the Claimant] *loses, it is highly likely that the question as to whether or not the agreements are forged will arise for consideration in these proceedings, in which* [the Claimant] *contends that the award cannot be or should not be enforced in this jurisdiction because to do so would be against the public policy of the English courts.*"

Nevertheless, for reasons which he then gives, he granted the stay.

17. It seems that the basis of the criminal investigation was that criminal process could not go forward unless the case was proved beyond reasonable doubt on the evidence available to the prosecutor. The Claimant has in these proceedings set out the substantial evidence which it put before the prosecutor, and criticises the inadequacy of the investigation. Nonetheless, what occurred is that, on 11 July 2006, the criminal proceedings were terminated: that on 7 August 2006, after a complaint by the Claimant, they were ordered to be continued: that they were again terminated on 27

December 2006: after receipt of two further notarised statements by Mrs Fisher and one by her son, the prosecutors reopened the criminal process on 27 February 2007: the complaint was once again terminated on 20 July 2007, on the basis that "*no information or evidence emerged in the course of the investigation that had undoubtedly proved or disproved that Marina Fisher signed the documents in question. Even the graphologist expert institute commissioned by the Claimant was only able to make a probable statement*": at a date soon after that, a complaint was lodged by the Claimant which led to the renewal of the investigation on 3 October 2007: and it was again terminated on 17 January 2008, because "*it could not be established beyond reasonable doubt that the signature in question on the contract was fictitious*": and the Claimant's complaint against such termination of the criminal investigation was dismissed on 29 February 2008.

18. The judgment of the Metropolitan Court, dismissing the Claimant's challenge to the Award, was delivered on 10 September 2007. As it, together with the subsequent decision of the Hungarian Supreme Court on 16 June 2008, forms the basis of the second issue before me, namely whether the Claimant is estopped by the decisions of the Hungarian courts from pursuing its claim in these proceedings, I shall return below to the content of that judgment, and that of the Hungarian Supreme Court. There then followed reactivation of these proceedings and, by a consent order of 19 June 2009, the claim was ordered to proceed as if commenced under CPR Part 7, and pleadings were ordered, which resulted in Particulars of Claim on 18 June 2009, a Defence and Counterclaim on 28 August 2009, a Request for Further Information of Defence and Counterclaim on 18 September 2009, to which a Response was served on 12 October, directions, including provisions for a Case Management Conference, agreed in a Consent Order on 20 October 2009, and the Claimant's Reply and Defence to Counterclaim, served on 28 October 2009.

19. The Further Information that was sought by the Claimant included a request for particulars of the Defendant's plea that "*the Ridmal Distribution Agreement and the Ridmal Settlement Agreement were executed as they purport to have been*", asking for the name of the natural person whom the Defendant contended to have signed them both on Ridmal's behalf. It also asked for particulars of what steps were taken to perform the Distribution Agreement and how the alleged entitlement of Ridmal under the Settlement Agreement was satisfied by the Defendant. Such information, and other information, was refused by the Defendant on the basis that

> "*The Claimant has already argued unsuccessfully before the Hungarian Arbitral Tribunal that the Distribution and Settlement Agreements were fraudulent. In addition, the Claimant has made a complaint to the criminal authorities in Hungary and the authorities decided not to prosecute. This claim is an attempt to re-litigate issues raised both in that arbitration and in the criminal complaint …*"

No doubt, at the Case Management Conference, such requests would have been pursued by the Claimant.

20. On 11 December 2009 this application for summary judgment was issued by the Defendant, claiming that these proceedings, in which, as set out above, proceedings had been ordered to be served pursuant to CPR Part 7 and have been so served, should

be dismissed pursuant to Part 24, the effect of which application, if successful, would be that there will be no trial.

21. As I have indicated above, there are two issues before me:

    i) whether the Claimant is entitled to rely on the fresh evidence of forgery, discovered subsequently to the Arbitration hearing. Mr Nash accepts that he must show that there is no realistic prospect of success for the Claimant in that regard, and so asserts. Mr Ewan McQuater QC who has, with Mr John Odgers, appeared for the Claimant, submits that it is clear that the relevant tests for fresh evidence are satisfied, alternatively that at least there must be an investigation of whether they are satisfied at trial:

    ii) whether the Claimant is estopped by the decision of the Metropolitan Court, as upheld by the Supreme Court. Again Mr Nash submits that there is no realistic prospect of the Claimant avoiding such estoppel. Mr McQuater submits that, on an analysis of the two judgments, and certainly that of the Supreme Court, which trumps that of the Metropolitan Court, there is plainly no estoppel, alternatively that there is an issue for trial.

22. There were two other issues, with which for different reasons I can deal very shortly.

    i) Mr Nash submits that, even if the Claimant is not estopped, there is some other reason why it should not be allowed to pursue its claims in these proceedings, namely that it has appealed to the supervisory courts and failed. It is plain, and I believe in the end Mr Nash may have accepted, that this is not a separate argument, but that, unless the Claimant is estopped by the Hungarian decisions, there is no other basis upon which this claim in these proceedings could be found to be an abuse or otherwise fail. **C v D** [2007] EWCA Civ 1282, [2008] Bus LR 843 is a case where the parties, by agreeing arbitration in England, had thereby agreed that the supervisory court should be in England, and thus the unsuccessful party could be prevented from seeking to challenge the award in the New York courts. In my judgment that simply does not apply in this case where the unsuccessful party has exhausted the remedies in the supervisory courts, but now seeks to resist enforcement in the English court, asserting that he is not estopped by the decision of those courts in relation to the matters he wishes to have adjudicated here. This is made clear in **Dallah Co v Ministry of Religious Affairs Pakistan** [2010] 2 WLR 805 per Moore-Bick LJ at paragraph 56:

> "*… It is in my view clear that the purpose of article V(i) of the* [New York] *Convention was to preserve the right of a party to a foreign arbitration award to challenge enforcement on grounds that impugn its fundamental validity and integrity. The fact that it has not been challenged or that a challenge has failed in the supervisory court does not affect that principle, although a decision of the supervisory court may finally determine such questions and thereby itself create an estoppel by record.*"

ii) At one stage Dr Lajer was asserting (but no longer) in paragraph 34 of his first witness statement that:

> "*In my view* [the Claimant's] *lawyers made a legal mistake … when* [the Claimant] *failed to commence legal proceedings against Ridmal and* [the Defendant] *in order to establish the nullity of the allegedly sham Ridmal Agreements. (It was also obvious that Ridmal could not be joined to the arbitration, … it was not a party to the arbitration agreement between* [the Defendant] *and* [the Claimant]*). Thus it was* [the Claimant] *itself that prevented the arbitral tribunal from relying on the Ridmal Agreements as null and void contracts.* [The Claimant] *could have and should have initiated separate legal proceedings and could have requested the arbitral tribunal to stay the arbitration until the end of those separate legal proceedings.*"

This was obviously an unsustainable argument (and one which, as can be seen in paragraph 7 above, was not even adopted by the Arbitrators), but it was in response to that that the Claimant, understandably, ran an alternative argument, that in that case the ground under s103(2)(c) that the Claimant "*was otherwise unable to present* [its] *case*" would appear to have been available. But with the abandonment of that point by the Defendant, there was no need for the Claimant's alternative case, leaving the two issues above alone in the field.

23. Two important principles, relied upon by Mr Nash, remain common ground:

i) The New York Convention provides a presumption in favour of enforcement (subject to the established exceptions, of which s103(3) is of course one).

ii) The concept *sit finis litium* remains important (subject again to such exceptions).

24. If s103(3) applies, the task of this Court will be that of a rehearing not a review (**Dallah** at paragraphs 20-22).

Fresh Evidence

25. There was common ground between Counsel as to what the starting point is for admissibility of fresh evidence: namely the well known principles of **Ladd v Marshall** [1954] 1 WLR 1489 at 1491, as applied to foreign awards by the Court of Appeal in **Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd** [2000] 1 QB 288: and it was also common ground that (i) the second and third limbs of the rule in **Ladd v Marshall** (materiality and credibility) were satisfied and (ii) the relevant test is not that for perjury (if that be different, as indicated by Waller LJ in **Westacre** at 309G), but for undiscovered material fraud. The test is thus whether the fresh evidence was not reasonably available to the party seeking to rely on it, at the time of the hearing of the Arbitration (per Waller LJ at 306A-F, 308G (the words of

Colman J there cited are approved by Waller LJ) and 309F). However the parties disagree as to the application of the test generally and to this case.

26. I have already set out in paragraph 11 above the evidence of Mr Southwell, as to how the fresh evidence arose. Mr Ordway was responsible for the evidence that was adduced at the Arbitration. I have set out in paragraph 5 above the considerable body of evidence which he described in his witness statement, adduced at the hearing, "*suggesting that the terms of the Distribution Agreements differed fundamentally from what would normally have been expected in such contracts; that the purported distributors had not previously been involved in the business of distributing baby food; and that the quantities of the goods to be distributed under the agreements were far in excess of the quantities that a new entrant to the relevant markets could even hope to achieve*" (paragraph 9 of his witness statement). He then addressed the question of forgery:

> "*28. Notwithstanding that* [the Claimant] *managed to obtain a substantial body of evidence suggesting that the Distribution Agreements were highly unusual and contained terms that, in many respects, appeared unreal, none of the documents or evidence that* [the Claimant] *obtained indicated, or led* [the Claimant] *to believe that the signatures on the Ridmal Agreements were forged.*
>
> *29. Accordingly, while* [the Claimant] *believed that the Distribution Agreements were the result of a collusive scheme between* [the Defendant] *and the purported Distributors to enable* [the Defendant] *to extract value from* [the Claimant, the Claimant] *believed that, on the basis of the documents presented by* [the Defendant] *during the Arbitration, the Distribution Agreements and the Settlement Agreements had been executed as they were purported to have been, albeit that the parties to those agreements had no intention of actually performing their obligations thereunder.*
>
> *30. Given that we were under the impression that each of the Distributors had been willing to collude with* [the Defendant] *to the point of signing sham agreements,* [the Claimant] *had no reason to believe that anyone from Ridmal would voluntarily give evidence for* [the Claimant] *at a hearing in Hungary. Indeed, all the evidence that we possessed at the time of the Arbitration pointed to the contrary. Moreover, during the Arbitration,* [the Claimant] *was not aware, nor did it have any reason to believe, that the Ridmal Agreements were forged. Accordingly,* [the Claimant] *did not believe that there was any reason to approach the representatives of Ridmal (or any of the other Distributors) or that, if they did, those representatives would be prepared to assist* [the Claimant] *in the Arbitration.*
>
> *31.* [The Claimant] *therefore concentrated on the sources of evidence available to it – i.e. the Distribution Agreements and the Settlement Agreements themselves, and the expert reports*

> *and witness testimony that* [the Claimant] *was able to produce to demonstrate the irregularities and deficiencies in those agreements.*
>
> *32. Both my firm, and* [the Claimant], *devoted a considerable amount of time and resources to investigating the legitimacy of the Distribution Agreements. It is inconceivable to me that if we, or* [the Claimant], *had had any indication whatsoever that the Ridmal Agreements were forged, that we would not have sought to locate and produce evidence to demonstrate that fact.*
>
> …
>
> *34. At all points throughout the Arbitration,* [the Claimant] *understood that the Ridmal Agreements had been signed by Ms Fisher. It had no evidence that her signature was forged and no reason to believe that it had been. The evidence it possessed was circumstantial evidence to the effect that the Ridmal Distribution Agreement, like the other two Distribution Agreements, had been entered into without any intention that it should be performed, but rather as a mechanism for extracting "compensation" from* [the Claimant] *for its failure to obtain the baby food manufacturing equipment for* [the Defendant].
>
> …
>
> *38. The point in issue, … was … whether there was any intention to perform the Ridmal Agreements. There was no suggestion, nor would* [the Claimant] *have had any evidential basis for suggesting, that the signatures on those documents were forged.*"

27. Dr Lajer responds to this at paragraph 41 of his second witness statement:

> "*At paragraph 28, Mr Ordway suggests that* [the Claimant] *had no basis to believe that the signatures on the Ridmal Agreements were forged. This is said as an attempt to justify* [the Claimant's] *failure to investigate the signature upon the Ridmal Distribution Agreement at the time of the arbitration and to justify why the "Forgery Evidence" was only obtained after the Arbitral Tribunal had issued its award. I consider Mr Ordway's explanation to be wholly unsatisfactory and incredible given the way in which* [the Claimant was] *running their case at the arbitration.*"

28. Mr Nash was not able to explain precisely what Mr Lajer meant by saying that Mr Ordway's explanation was "*incredible*". If it is intended to say that Mr Ordway is not telling the truth, I do not see how he could possibly be disbelieved without his evidence being cross examined at trial. Mr Nash addresses Mr Ordway's evidence by effectively accepting that it is not possible for him without a trial to challenge Mr Ordway's subjective state of mind – whether in fact for example he and his team did

not turn his or their minds to the issue of whether the Agreements were forged, or believed that they were not, or suspected that they might be - either by the kind of head-on disbelief of Mr Ordway, which seems to be exhibited by Dr Lajer, or by dint of detailed analysis of the precise words used by Mr Ordway in his witness statement. He is content however to rely on the objective proposition, namely that Mr Ordway and his team should have considered the issue of forgery, or that, even if he or they did not consider the issue of forgery, that he should have investigated the evidence of Mrs Fisher (and/or Mrs Vetjugova) in any event. He points out that there was no absence of resources nor, given that the Arbitration was spread over some seven months, any shortage of time.

29. Mr Nash submits that, in the light of **Westacre**, the **Ladd v Marshall** rule applies as much to fresh evidence of fraud as to any other fresh evidence which is said to be sufficient to found an appeal against a judgment, or to justify an action to set aside a judgment obtained by fraud (e.g. **Owens v Noble** [2010] EWCA Civ 224) or to amount to a challenge to an award, English or foreign, pursuant to s103(3). Mr McQuater points out that a more flexible approach to fresh evidence of fraud was adopted by the Court of Appeal in **Hamilton v Brodie Brittain Racing Ltd** [1996] CLY 654 (CA) (13 December 1995) where invoices, produced three weeks before a county court hearing, about which, even by the time of the trial, the appellant had some suspicion, were subsequently shown to have been forged, as a result of investigation after the trial. Butler-Sloss LJ considered that the first limb of **Ladd v Marshall** should be approached with a greater degree of flexibility in cases of deception or impropriety or fraud than in cases in which such serious allegations are not raised: "*It would not spring immediately to the mind of the legal advisers of the party in question that the invoices were actually false … fraud by its very nature is generally concealed*". Mr McQuater submits that, as in **Hamilton**, it is relevant that evidence is not simply subsequently discovered, but that circumstances may indicate that wool has been pulled over the eyes of the court as well as the unsuccessful party. Mr Nash however submits that any such flexibility in **Hamilton** is out of line with the authorities on the application of **Ladd v Marshall**, and, in particular, with **Westacre**, where the fresh evidence did indeed consist of evidence said to establish fraud.

30. Mr Nash submits that evidence was reasonably available at the hearing if it could have been available to a reasonable solicitor – i.e. if a reasonable solicitor could have discovered the evidence, then it was reasonably available. He thus submits that, whatever the subjective belief of Mr Ordway, whatever the justification he puts forward, without even its being tested in cross-examination, or, indeed, however blinkered or blinded the approach of a solicitor, however diligent in other respects he might be, however justified tactically a decision might be, nevertheless, if a reasonable solicitor could have discovered the evidence, then the first limb in **Ladd v Marshall** is not established. Hence:

    i) He points to **DDT Trucks of North America v DDT Holdings Ltd** [2007] 2 Lloyd's Rep 213, where Cooke J found that evidence was reasonably available when the existence of the relevant depositions had been known about but had been forgotten.

    ii) He submits that, whereas it might be arguable that there could be some inhibition about investigating forgery if there were no evidence of it, that could not be said to be so in a case where the Claimant was alleging bad faith against

the Defendant, in the sense of suggesting that the Distribution Agreements were shams so as to inflate the damages claim.

iii) He points out that this is not one of those cases in which there was, for example, a whistleblower providing evidence after a hearing, but simply that an investigation was made after the hearing which had not taken place before, and once that investigation was commenced, Mr Budanov was able to nose out the evidence.

31. Mr McQuater does not accept that Mr Nash's approach to reasonable availability of evidence is correct. He submits that, far from it being whether a reasonable solicitor could have discovered the evidence, the test is whether the reasonable solicitor should have discovered it – i.e. it is a test of whether the party, or in this case the solicitors on the party's behalf, acted reasonably. I agree with Mr McQuater that this approach is right, at least arguably, and for the purpose of Part 24 that is all that is necessary. The **Ladd v Marshall** first limb, as set out by Waller LJ in **Westacre** at 306E is that "*first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial*". Mr Ordway has described in his evidence (and I have summarised in paragraph 5 above) the very substantial efforts he took to put in the evidence he did on the Claimant's behalf. Was it a "*lack of due diligence*" (Cooke J in **DDT** at para 27) or a failure to use reasonable diligence, not to have chased up the possibility of forgery and to have sought out the evidence of Mrs Fisher before the trial?

32. As to the points made by Mr Nash:

i) Mr McQuater points out that in **DDT** Cooke J concluded (at paragraph 27) that (on the facts of that case) "*a failure in memory and a failure to obtain a document which could otherwise have been obtained is a lack of due diligence*".

ii) The issue of the failure to investigate is very fact-intensive. Mr Ordway has explained that the case he was pursuing was that (by reason of the closeness of the relationship between Mr Schepp and the three alleged distributors) there was collusion in the creation of the Distribution Agreements. The three alleged distributors, in particular Mrs Fisher and Mrs Vetyugova, were consequently in 'the enemy camp'. Mr McQuater referred to **Bills v Roe** [1968] 1 WLR 925, in which a driver succeeded in negligence at trial against road contractors who had left construction works on a road, when, notwithstanding a road closed sign, beacons and a fence, he ploughed into the works, and only subsequently to the trial did the defendant's solicitors interview the plaintiff's passenger, who gave evidence that the plaintiff was absolutely drunk, and quite unfit to drive. Harman LJ concluded, in the Court of Appeal, that the subsequent evidence was evidence which "*could not with reasonable diligence have been obtained earlier*". He continued (at 930):

> "*… It was said that the contractors' solicitor knew that* [the passenger] *had been in the car: she had only, as it is said, to go to him, ask him for a statement, and the whole matter would have come out at a much earlier stage, and there would have been no need to come at this date and*

> *ask for the admission of fresh evidence. It is said that the solicitor made an error of judgment which, although perhaps understandable, be it said, was not excusable in the sense that she could have been said to have acted with reasonable diligence. In my opinion, that charge entirely fails. I cannot see that there was any default at all on the part of the very experienced solicitor acting for the contractors in not approaching* [the passenger]. *He was a man directly in the other camp. He might be expected at any moment to start proceedings himself for damages, although he had not done so nor sent any letter making any claim hitherto. He was a person who was unlikely in the extreme, it might reasonably be supposed, to be willing to give evidence against his friends in the car that they were all drunk at the time. And I cannot think that it was any part of the duty of this lady acting as solicitor to the contractors to the contractors to go and try to worm something out of* [the passenger]."

Although of course every case must depend on its own facts (facts which, Mr McQuater emphasised, must be investigated at trial) he submitted that there is even less scope for criticism of Mr Ordway in this case. In **Roe** the sobriety of the plaintiff was put in issue at the trial (he had said he had only had three half pints of beer that evening), and it was found not only to be understandable, but "[no] *default at all*" for the very experienced solicitor in that case not to approach a man directly in the other camp. A similar approach was adopted (approving **Roe**) by the House of Lords in **Skone v Skone** [1971] 1 WLR 812, where a husband was allowed to adduce further evidence, after a trial in which the wife had taken no part and a co-respondent had denied adultery, from the wife. Lord Hodson stated, at 816:

> "*The situation of the wife is or was, however, at the material times a peculiar one in that she was in the opposite camp in the sense that she was anxious not to do anything without the approval of the co-respondent, feeling that her interests were bound up with his. The petitioner was advised by counsel, as I have said, and I find it impossible to hold that in these circumstances it is right to hold that the petitioner failed to exercise due diligence in this matter.*"

I consider it arguable that it was not a failure of due diligence to probe and investigate the *opposite camp.*

iii) As to the fact that the Claimant did carry out that investigation after the hearing, and did then turn up the evidence of forgery (and not without difficulty, not least in that Ms Vetyugova has subsequently 'recanted' her evidence, and supplied a statement to the Defendant) Mr McQuater submits that it is the same perseverance as was shown after the hearing by the solicitors in **Hamilton**, in which case (in contradistinction, Mr McQuater submits, to the present case) it could be said that there was already some suspicion at the

hearing, but no adjournment was sought: and such perseverance afterwards does not mean that the evidence should have been obtained before.

33. I am not persuaded that the Claimant is entitled to rely on **Hamilton** as a more flexible operation of the first limb of **Ladd v Marshall**. But I do consider that, in a case of concealed fraud (concealed forgery) it may be, particularly where the source of the evidence is contained in the opposite camp, that, upon analysis of the facts an approach more favourable to the party defrauded in respect of what is due, or reasonable diligence, may be adopted.

34. In any event, I am unable to conclude without evidence and cross-examination at trial that the evidence sought to be relied on in respect of the forgery of Mrs Fisher's signature was reasonably available to the Claimant at the hearing.

Estoppel

35. I must first set out the relevant passages from the two Hungarian judgments which are said to found an estoppel. The Metropolitan Court, when it dealt with the issue of the fresh evidence relating to forgery (there were other issues before it, all of which it resolved against the Claimant) reached the following conclusion in that regard, translated at p352C of the relevant trial bundle. I shall for ease add my own paragraph numbering:

> "*1. Public order may … also be breached if it can be shown by analysis of the reasoning of the arbitral award that the arbitration court considered items of evidence which were indicated as resulting from such means of evidence as – recognisably even by the arbitration court – were connected to the committing of a crime or were created through the committing of a crime.*
>
> *2. Based on the allegation pertaining to the existence of reasons for annulment, during the hearing of the case for annulment the claimant was obliged to indicate those means of evidence that contained items of evidence from which it could have been established that – perhaps even all – the stated reasons for annulment could be taken into account as actual facts when considering the application for the alteration of a right.*
>
> *3. The criminal proceedings that were initiated based on the report made by the claimant's representatives were not yet closed by time of the closing of this hearing; the criminal proceedings are pending, with such procedural actions being performed which are not suitable for drawing conclusions as to whether the arbitration court in its ruling considered items of evidence deriving from means of evidence provided by the parties that lend themselves to being traced back to the committing of a crime. The court could not state this as an actual fact on the basis of the evidence that had arisen solely from the means of evidence brought to the hearing by the*

claimant in this lawsuit. In respect of this annulment procedure, the criminal proceedings – in light of the procedural actions performed to date in relation thereto – cannot be a precursory issue. It was not possible to infer from the investigating authority's findings in the criminal proceedings, or from the repeated termination of the investigation – not even at the level of probability – that the arbitration court had intentionally been provided for the purposes of consideration with falsified means of evidence, and that it had then passed its ruling based on such evidence. …

4. The court was in no position to establish as an actual fact, based on the evidence produced by the claimant, that the means of evidence considered in the rendering of the arbitral award had been supplied in the arbitration proceedings by either party in relation to a crime."

36. The Supreme Court upheld the decision of the Metropolitan Court but, as seems to me clear, on different grounds. The Court first addressed the issue of invalidity of the Distribution and Settlement Agreements, concluding that the Supreme Court agreed with the standpoint in that regard of the Metropolitan Court. It is apparent from what follows that the Supreme Court is addressing the issue of such validity including the fact that the other parties to the alleged Agreements were not before the Court of Arbitration, and it concluded that "*the arbitration court proceeded in compliance with adopted Hungarian legal practice when it confined itself to examining whether the contracts presented to it for the purpose of proving the incurrence of the losses were contracts that appeared valid*". The Supreme Court then proceeded to address the issue of fresh evidence of forgery, and I set out the two relevant passages below, numbering them respectively A and B:

"A. *In its request for a judicial review, the complainant discussed, at length and with a pronounced focus on the data of the investigative procedure launched based on the complaint submitted by it during the lawsuit for nullification, on 5 November 2005, claiming that the ruling by the Court of Arbitration ran counter to public policy on the grounds that during the investigate procedure data had been identified to the effect that the contract concluded with Ridmal had been signed by a party that was unauthorised to do so, or that the signature could well turn out to have been falsified. Even the final ruling addressed this issue in unjustified detail despite the fact that, according to the Supreme Court, this, even if true, could not have helped establish the conflict of the Court of Arbitration's ruling with public policy and, hence, nullify the ruling. In the opinion of the Supreme Court, the only that that can be checked in a lawsuit initiated for the purpose of annulling a ruling by a court of arbitration is whether the proceeding adopted and the ruling passed by the Court of Arbitration may be deemed to be art variance with public policy. Obviously, the ruling passed by the Court of Arbitration cannot be deemed as one that is at*

variance with public policy on the basis of subsequent facts or items of evidence that were not mentioned or referred to during the arbitration proceeding. No lawsuit aimed at the annulment of a ruling by a court of arbitration can be used in lieu of re-opening a case, nor does it substitute for one that remains unknown during an arbitration proceeding, nor can it perform the function of one. A state court may, in a lawsuit initiated for the purpose of annulling the ruling by a court of Arbitration and even that, only within the limited scope allowed by the Vbt. The Vbt does not specify a single reason for annulment that allows examining the circumstances that emerge after the passing of a court of arbitration ruling. This also conforms to European practice. To the best of the Supreme Court's knowledge, a provision that went into force on 1 July 2006 of a 2006 act modifying the Austrian court of arbitration law permits the annulment of a court of arbitration ruling if the preconditions exist based on which a court ruling may be challenged by filing for the re-opening of a case ... The Vbt contains no such provision, however. In light of the foregoing, in the opinion of the Supreme Court, no new circumstances or items of evidence can serve as a basis for the annulment of a court-of-arbitration ruling even if reference is made to conflict with public policy. Therefore, the argument in the final ruling concerning the investigative procedure was entirely unnecessary, as would have been the suspension of the trying of the case until the closing of the investigative procedure. Accordingly, the argument on this issue in the complainant's request for a judicial review is unfounded and erroneous.

…

B.*Conflict with public policy can be established only if consequences interfering with fundamental rights, general moral standards and societal norms going beyond the legal relationship between the parties may ensue. A court of arbitration ruling may be annulled on the grounds that it is at variance with public policy only if the fundamental pr4inciples of the rule of law are obviously and grossly violated.*

In establishing whether public policy has been violated, it must, first and foremost, be examined whether the Court of Arbitration ruling, by virtue of its content and stipulation, runs counter to the public interest.

This may be the case if, in the arbitration proceeding, the Court of Arbitration relies on evidence that is subsequently acknowledges has been, or that can otherwise be proven to have been, generated through the committing of a criminal act; the precondition for such is that this can be established from the documents of the court-of-arbitration proceeding, and that

> *such evidence be the subject matter of the court-of-arbitration proceeding, which, however was not the case here.*"

37. A foreign court's judgment can found an estoppel. In **House of Spring Gardens v Waite** [1991] 1 QB 241 an action in Ireland was brought to set aside a judgment obtained in Ireland as having been obtained by fraud, and that second action failed. The English Court of Appeal held that, in the absence of any new evidence affecting the issue of fraud, there was both cause of action and issue estoppel.

38. There is thus no doubt that "*if an application to the local court is made and fails, the result may be an estoppel*" (per Waller LJ in **Westacre** at 309H): see also **Dallah** at paragraph 56 per Moore-Bick LJ and paragraph 90 per Rix LJ. But the question is whether in this case there is no realistic prospect of success for the Claimant – i.e. on the basis that the Defendant is very likely to establish such an estoppel. There are principles by reference to which such estoppel must be established. The decision of the House of Lords in **Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)** [1967] AC 853 is that, to establish such an estoppel (and I here use the summary given by Lord Brandon in **The Sennar (No 2)** [1985] 1 WLR 490 at 499), "*the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction (b) final and conclusive and (c) on the merits*". But the decision in **Carl Zeiss** makes entirely clear the approach which an English court must adopt in relation to construing the effect of a foreign judgment. Lord Reid said at 918B:

> "*I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter.*"

The speech of Lord Wilberforce was to similar effect at 967A-E.

39. In the **Good Challenger** [2004] 1 Lloyd's Law Rep 67, the Court of Appeal considered the effect of a Rumanian judgment, and after referring to Lords Wilberforce and Reid in **Carl Zeiss** and to Lord Brandon in **The Sennar**, at paragraph 60 of his judgment Clarke LJ "*stressed the importance of the Court being satisfied that the relevant issue was clearly decided*" and raised the question whether the court could be "*confident that the decision of the* [Romanian] *Supreme Court on the English time bar point … was, as Lord Reid put it … the basis of the foreign judgment and not merely collateral or obiter.*" He pointed out (at paragraph 54) that the "*courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue, because the procedures of the Court may be different and it may not be easy to determine the precise identity of the issues being determined*, [and] *the decision of the Court must be necessary for its decision*", and at paragraph 75 he cited the words of Lord Upjohn in **Carl Zeiss**:

> "*All estoppels are not odious, but must be applied so as to work justice and not injustice, and I think the principles of issue*

> *estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.*"

40. I turn first to the Metropolitan Court judgment. It is quite clear that there are two views as to what the Metropolitan Court decided in the passages which I have set out in paragraph 35 above. I have referred in paragraph 15 above to Mr Legradi's opinion, put before Christopher Clarke J, unchallenged at that stage, as to the likely outcome in the Metropolitan Court. The Claimant's preparatory brief in the Annulment proceedings stated as follows:

> "*271 The Claimant has initiated a criminal procedure to investigate into this potential crime. The ground for annulment the Claimant has stated in this regard is the violation of public policy by the fact that the arbitration award has been based on ill factual grounds most probably created as a result of a crime. Thus the Claimant intends the criminal authorities to investigate whether or not a crime has been committed and expects the* [Metropolitan Court] *to base its judgment – if it does not already annul the award on the basis of the other grounds raised by the Claimant – on the outcome of the criminal proceedings.*"

41. Dr Lajer's first explanation of the judgment, and in particular of the passages set out in paragraph 35 above, is at paragraph 100 of his first witness statement:

> "*In connection with the "forgery evidence" the Metropolitan Court established that it is impossible even to deduct that the evidences produced in the Arbitration are in any connection with any crime or infraction. On the basis of the conclusions of the criminal authorities and the repeated closing of the investigation file, the court held that it could not have established even as a possibility that one of the parties intentionally requested the arbitration tribunal to evaluate falsified evidence. That is, the court established that* [the Claimant] *did not prove that a crime might have been committed.*"

42. However in his second witness statement (at paragraph 9) he takes a different approach. He suggests that the Claimant "*made a number of legal mistakes with respect to the Metropolitan Court proceedings*", consisting of the Claimant's not calling oral evidence before the Metropolitan Court from Mrs Fisher, Mrs Vetyugova or the forgery expert:

> "*9.3* [The Claimant] *could and should have led evidence on the alleged forged nature of the Ridmal Agreements before the Metropolitan Court separately from the criminal investigation.*"

43. The Claimant (unlike the Defendant) instructed an independent expert on Hungarian law on these proceedings. He is a Dr Varga, head of the Department of Civil Procedure at ELTE Faculty of Law, Budapest, and a practising lawyer with a specific

area of expertise in civil litigation and commercial arbitration. He gave the following opinion as to the effect of the Metropolitan Court judgment:

> "*5.1 If in a setting aside procedure the plaintiff relies on the fact that the arbitral award was influenced by a crime (e.g. forgery or perjury), and therefore the award is in conflict with the public ordre of Hungary, he has to prove the commitment of the crime. Since the qualification of the relevant conduct as a crime falls within the criminal jurisdiction, the crime is a prejudicial question to be adjudicated on in a separate criminal procedure. Consequently, considering that in the setting aside proceedings* [the Claimant] *based its claim regarding the incompatibility of the Arbitral Award with Hungarian order public upon the commitment of a crime (forgery, perjury), the commencement of the criminal investigation was not only a correct step, but the only correct step, as only a criminal court has the power to qualify a conduct as a crime.*
>
> *5.2 It is clear from the judgment of the Metropolitan Court that the Court considered that a criminal conviction was a necessary precondition for it to find that the arbitral award infringed the public order of Hungary (or at least that the criminal investigation was pending in a phase when the commitment of the crime could have been established from the evidence gathered by the criminal authorities). On the basis of the status of the on-going criminal investigation at the time that it made its judgment, the Metropolitan Court came to the conclusion that, due to the uncertainty of the result of the criminal procedure, it could not assess the infringement of public order. Consequently, the Metropolitan Court declared that it could not make a finding in relation to* [the Claimant's] *allegation that the award was based on forged documents, that is, it could not decide the question. The Metropolitan Court also ignored (and made no ruling in relation to)* [the Claimant's] *claim that the award infringed public order on the grounds that it was based on non-existent agreements (irrespective of whether that non-existence was the result of a crime).*
>
> *5.3 The Metropolitan Court did not exclude the Forgery Evidence (that is, it did not prevent* [the Claimant] *from submitting the evidence to it during the setting aside procedure). However, because the Court deferred to the results of the criminal investigation rather than making its own finding on the basis of the evidence that had been presented to it, I do not agree with the suggestion in paragraph 7 of Dr Lajer's second witness statement that the Metropolitan Court considered the Forgery Evidence in reaching its judgment. As a result, I believe it would have been futile for* [the Claimant] *to have led evidence in relation to the alleged forgery of the*

> *Ridmal Agreements separately from the criminal investigation (as Dr Lajer suggests) because the Metropolitan Court took the view, not only in it judgment but also in the course of proceedings, that it was not able to make a ruling in relation to* [the Claimant's] *claims in the absence of a finding by the criminal authorities that a crime had taken place (or that, at the time of the judgment, it was likely that such a finding would be made.*"

44. I accept that I must act with due circumspection in attempting to arrive at a construction of a foreign judgment, particularly in the light of the cautionary words in **Carl Zeiss** and the **Good Challenger**. Mr Nash submits that the words in paragraph numbered 4 of the passage cited in paragraph 35 above constitute a conclusion (irrespective of the criminal procedures) that the Claimant had failed to prove forgery. Mr McQuater submits, with the benefit of Mr Varga's expert opinion, that such paragraph cannot be read separately from the paragraphs which immediately precede and lead up to it, and that it is clear from reading the passage as a whole that the Metropolitan Court concluded that, in the absence of findings by the criminal procedure (which had not yet closed), the Metropolitan Court was unable ("*in no position*") to reach any conclusion.

45. Were it only a question of construing the effect of the judgment of the Metropolitan Court, I would still be left in doubt as to its effect, as to whether it constituted (or could constitue) a decision on the merits as to the existence or non-existence of evidence of forgery discovered subsequent to the Arbitration hearing sufficient to impugn the Arbitration Award. However the Metropolitan Court judgment was not the last word – not the final judgment, the Court being subject to review by the Supreme Court. It is clear that the Supreme Court upheld the decision of the Metropolitan Court. But it does not appear to have adopted the same reasoning, and in any event was clear that the Metropolitan Court "*addressed* [the] *issue in unjustified detail*" (paragraph A in paragraph 36 above).

46. Mr McQuater submits that the Supreme Court concluded as a matter of law that the Hungarian courts, and in particular the Metropolitan Court, were not entitled to consider evidence discovered subsequently to the Arbitration so as to impugn the Award. Dr Lajer, in a passage in paragraph 27 of his second witness statement, which is difficult to understand or accept, states that:

> "*The Supreme Court's point was that the Forgery Evidence was in truth an attempt to rerun allegations which had been before the Arbitral Tribunal, but which had failed because* [the Claimant] *had set about seeking to prove its case on the nullity or invalidity of the contracts in an incorrect way.*"

47. He continues in paragraph 39 of his second witness statement as follows:

> "*Finally, Mr Southwells' assessment of the Supreme Court's decision in paragraph 90 of his statement is incorrect. … In particular it is not correct that the Supreme Court ruled that it was not possible to adduce after-acquired evidence in annulment proceedings. What the Supreme Court held was that*

> *the Metropolitan Court was right to consider that if an Award had been based on evidence produced as a result of crime then an Award could be set aside as being contrary to public policy; but that it was not possible to have an Award set aside by simply re-opening a case or introducing a new ("substitute") case. In any event,* [the Claimant] *failed to make out its allegations of fraud before the Metropolitan Court and the Supreme Court found no basis to interfere with that decision.*"

48. However:

i) The Claimant pleaded at paragraph 41(d) of the Particulars of Claim in these proceedings, that the Hungarian Supreme Court held that:

> "[The Claimant's] *allegation, based on the Forgery Evidence, that the signature to the Ridmal distribution Agreement was a forgery and unauthorised by Ridmal provided no basis for annulling of the Award, as new circumstances and evidence emerging subsequent to the rendering of an arbitral award cannot constitute grounds for annulment.*"

This, which is entirely the same as "*Mr Southwell's assessment of the Supreme Court's decision in paragraph 90 of his statement*" (which Dr Lajer describes, as set out in paragraph 47 above, as "*incorrect*"), is admitted in paragraph 64 of the Defence and Counterclaim.

ii) Again, Dr Lajer appears to have had second thoughts since his first witness statement in which, at paragraph 103, he plainly stated:

> "*In connection with the forgery evidence, the Supreme Court added that it is impossible to examine in the annulment procedure whether an arbitration award is against public order based on such facts or evidences that were not raised or referred to in the arbitration and highlighted that this approach is in line with European legal practice.*"

iii) If this was indeed the decision of the Supreme Court, it would have accorded with, and substantially found in favour of, the Defendant's own submissions to the Metropolitan Court (at page 3 of its November 2006 preparatory brief) to that very effect.

iv) Dr Varga addresses Dr Lajer's position in paragraph 39 of his second witness statement as follows:

> "*6.1. Contrary to Dr Lajer's position, the Supreme Court's judgment is, in my view, clear that the Court's main reason for ruling against* [the Claimant's] *objections to the Metropolitan Court decision regarding the forgery issue was that it is not possible to have an*

> *award set aside on the basis of facts or evidence that was not referred to in the arbitration, as such facts and evidence had not been appreciated by the arbitration court.*
>
> *6.2. As regards the criminal aspect of the case and the Forgery Evidence, the Supreme Court ruled that no new facts or evidence could be introduced in the setting aside proceedings, thus the infringement of the public order could not be established on the basis of the new facts and evidence, either. In relation to this ruling, the Supreme Court pointed out that the setting aside proceedings are not a substitute for the renewal of the procedure ... which is an extraordinary remedy provided for by the HCCP. The renewal of the procedure remedy is one which enables a party to litigation to rely on new pieces of evidence but it is not available against arbitral awards.*"

He also deals persuasively with Dr Lajer's paragraph 27.

49. Mr Nash submits that the Supreme Court left open the possibility of proof of a crime by subsequent evidence. Even if that were the case (and it would still leave open the question as to the relationship between such evidence and the criminal processes - a difficult question in the light of the penultimate sentence of paragraph A), it is at least strongly arguable that that is not the ratio of the Supreme Court judgment. I am obviously influenced by the strenuous repetition on no less than four occasions in the passage of the Supreme Court judgment set out in paragraph 36 above that (as admitted by the Defence and in Dr Lajer's first witness statement) subsequently discovered evidence is not admissible to impugn the Award. Insofar as there is a *final* judgment on any point in issue, it is at least strongly arguable that that, and that alone, is it.

50. I am consequently satisfied that there is at least a strongly arguable case that there is no estoppel, and such that the reverse is, though arguable, nowhere near sufficient to justify a summary conclusion on this application that the Claimant has no realistic prospect of success.

51. I accordingly dismiss this application.

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