Neutral Citation Number: [2019] EWHC 2541 (Comm)

Case No: CL-2018-000182

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 September 2019

Before :

Mr Justice Butcher

- -

Between :

Process and Industrial Developments Limited — **Claimant**

- and -

The Federal Republic of Nigeria — **Defendant**

- -
- -

Ian Mill QC (instructed by **Kobre & Kim (UK) LLP**) for the **Claimant**
Harry Matovu QC (instructed **by Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Defendant**

Hearing date: 26th September 2019

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JUDGMENT

MR JUSTICE BUTCHER Thursday, 26th September 2019

(14.42 pm)

Ruling by MR JUSTICE BUTCHER

1. This has been the hearing to determine the orders consequential on my judgment which was handed down on 16 August 2019.
2. There is no issue about the form of the order granting the Claimant ("P&ID") permission to enforce the Final Award pursuant to section 66 of the Arbitration Act, although that is subject to the Defendant's ("Nigeria's") application that execution should be stayed, which I will come to. There will accordingly be an order in the terms of paragraph 1 of the draft at 1/E15/244 - 245.
3. There was also no dispute about the appropriate order in relation to P&ID being entitled to costs. There will be an order in terms of paragraph 2 of that draft.
4. There is equally no issue about the terms of paragraph 3 of the draft. That is to say, there will be an order for Nigeria to make an interim payment to P&ID on account of costs in the sum of £250,000 within 14 days.
5. Nigeria applies for permission to appeal. It does so in respect of the grounds which were set out in paragraphs 1 - 6 of the succinct statement of grounds which was served pursuant to my direction and which are at pages F16/259.02 - 259.05, and which are repeated in Mr Matovu QC's skeleton argument between paragraphs 14 and 25.
6. The test for permission to appeal under CPR rule 52 is whether an appeal has a realistic as opposed to a fanciful prospect of success. I have been persuaded that paragraphs 2 to 5 raise issues which have such a prospect. That is notwithstanding that I formed a clear view as to the correct position, which is as stated in my judgment.
7. I should say that Mr Mill QC submitted with vigour that there should not be permission to appeal in relation to the issue of whether the Tribunal was empowered to decide on the issue of seat because that was implicit in the arbitration agreement on the basis, as he said, that was not an issue which Nigeria disputed at the hearing before me.

8. I consider that he was right to say that it was not expressly disputed by Nigeria. Nevertheless I am of the view that it was impossible properly to consider what were undoubtedly Nigeria's submissions in relation to Procedural Order No. 12 not being determinative, including its submissions in relation to issue estoppel, without considering the basis on which the Tribunal was empowered to consider the issue of seat.

9. I expressed my views in relation to that in the judgment and I consider that Nigeria should have permission to appeal in relation to the arguments which it has identified on that score.

10. I should also say that I have read paragraph 5 of the succinct summary as constituting a challenge both to my conclusion on construction of clause 20 of the GSPA and also as to my alternative conclusion, consonant with that of the Tribunal, that there was an agreement by the conduct of the parties and the Tribunal. The heading to paragraph 5 is thus misleading.

11. In relation to what was paragraph 1 of the succinct note and which was reformulated into paragraph 24 of Mr Matovu's skeleton argument, I do not accept that the argument as reformulated was argued before me.

12. Be that as it may, the argument now mooted before me is that, even assuming that the Final Award was a domestic award because the seat of the arbitration was England, this court should not, as a matter of discretion, enforce it because an earlier award (ie the Liability Award) had purportedly been set aside by the courts of a country which, ex hypothesi, was not the seat, and in circumstances where an application to set aside that award had been made to the courts of what, on this assumption, was the seat and had been rejected. I do not consider that such an argument has a realistic prospect of success and I do not give permission to appeal on it.

13. I have carefully considered whether there should be permission to appeal in relation to issue 6, public policy. I have had reservations about whether this argument does stand a more than fanciful prospect of success. I have, however, been persuaded – just - that it does. In any event, I would have given permission in relation to this issue on the alternative ground under CPR rule

52.6, namely that there is some other compelling reason for an appeal on this issue to be heard. That is that the size of the award means that this is an issue of national importance to Nigeria, that this ground relates directly to the size of the award and what Nigeria says is its overstatement, and also because I have given permission on grounds 2 to 5.

14. So I give permission to appeal limited to the points in paragraphs 2 to 6 of the succinct statement.

15. I should state expressly that there has been some mention before me of there being an investigation conducted by Nigeria into the award of the GSPA and related matters. There is a suggestion that there may have been some sort of fraud, conspiracy or tax evasion. Those were not grounds which were relied upon before me at the hearing in June as reasons why the Final Award should not be enforced. They are not relied upon now as reasons for the grant of permission to appeal nor as grounds of appeal. On the contrary, Mr Matovu's skeleton argument states in terms that "The court is not asked to act on these investigations or convictions at the present hearing." Those allegations have accordingly played no part in my decision in relation to permission to appeal.

16. Given that I am going to grant permission to appeal, Nigeria applies for a stay of execution pending the appeal. P&ID opposes any stay.

17. P&ID also contends that permission to appeal should be on terms that Nigeria provide security. This contention was not eventually strongly pressed, although it was not abandoned, by Mr Mill. P&ID alternatively submits that if I were minded to order a stay, then that stay should itself be on terms that Nigeria should provide security. P&ID's primary case is that security should be provided in the full amount of the Final Award (including interest).

18. I was referred to a number of authorities on these matters. In relation to the grant of a stay, I was referred in particular to Leicester Circuits Limited v Coates Brothers Plc [2002] EWCA Civ 474, at paragraphs 12 to 13 per Potter LJ.

19. In paragraph 12, Potter LJ had recorded that it was uncontroversial that the general rule is that a stay of judgment will not be granted, but that the court has an unfettered discretion.

20. In paragraph 13 Potter LJ said:

"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."

21. I was further referred to Hammond Suddard Solicitors v Agrichem International Holdings Limited [2001] All ER(D) 258. At paragraph 22 Clarke LJ said:

"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

22. In relation to an order for security as a condition of a stay, I was referred to Micula v Romania [2019] Bus LR 1394, which itself refers, amongst other things, to CPR rule 83.7(4) and CPR rule 3.1(3). Those provisions make it clear that the court has the power to order any stay of execution to be on such conditions as it thinks fit. In particular, as specified in rule 3.1(3)(a), the court may make such an order subject to a condition that money should be paid into court.

23. In relation to an order for security as a condition of permission to appeal, it is apparent from CPR rule 52.6(2)(b) and from CPR rule 3.1(3) that this court, in giving permission, may impose conditions on the appeal. Again, rule 3.1(3)(a) makes it explicit that this condition may be one of payment into court.

24. I was referred to Merchant International Company Limited v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy [2016] EWCA Civ 710. That was specifically concerned with the circumstances in which an appeal court may impose conditions on the bringing of an appeal under what is now CPR rule 52.18. That rule provides that, while the appeal court can impose such conditions, it will exercise that power only where there is a compelling reason for doing so.

25. It is not clear to me that there is a good reason why there should be a different test for the imposition of such a condition by the first instance judge, although I was not referred to much in the way of authority in relation to this. As suggested by Clarke LJ in paragraph 39 of Hammond Suddard Solicitors v Agrichem, it would be somewhat surprising if there were a different and higher test for the imposition of a condition by the appeal court than by the judge at first instance. I proceed on the basis that there needs to be a compelling reason why permission to appeal should be on terms of the provision of security and, as I understood it, there was no dispute between the parties in relation to that.

26. In relation to what may constitute a compelling reason, Christopher Clarke LJ gave guidance at paragraphs 37 and 40 of the Merchant International Company case and I have those points in mind.

27. I turn to the question of whether there should be a stay. The grounds on which Nigeria seeks a stay are those set out in Handley 5. Nigeria's evidence does not suggest that the refusal of a stay would result in the appeal being stifled. The points made in Handley 5 are in essence twofold and are as follows.

28. First, that there is a real risk that if P&ID is permitted to enforce the Final Award as a judgment and to seize Nigeria's assets, then those assets will not be returned in the event that the appeal is successful and will be lost to the government and people of Nigeria. In this context, he refers to the fact that P&ID is a BVI company, that it has no operations in the BVI, that there is no information regarding its assets or balance sheet, that this claim may be its only asset, and that P&ID has an opaque ownership structure.
29. Secondly, that there is the risk of immediate, serious and potentially irreparable damage to Nigeria as a result of any attempts to enforce the award. In particular he suggests that it is likely that there may be attempts to enforce against assets which may prove to be sovereign assets; and that there may be attempts to obtain without notice third party debt orders over accounts owned by nominated third party paying agents who are put in funds to disburse sums that are due to be paid as a coupon on sovereign bonds with potentially serious consequences for Nigeria's sovereign debt.
30. P&ID disputes that these constitute good grounds for a stay. Specifically in relation to the first, it says - while denying that there is any basis for considering that, in the absence of a stay there is a real risk that assets obtained by P&ID would be lost to Nigeria even if it were successful on appeal - that it has in any event offered an undertaking that any monies obtained by way of execution will be held in a client account of P&ID's solicitors pending the outcome of the appeal.
31. I consider that, that undertaking apart, there clearly is a real risk, given what I have been informed as to its place of incorporation, its level of activity and the comparative paucity of information about its financial position and ownership, that assets obtained pending an appeal would be irrecoverable by Nigeria in the event of a successful appeal. I consider that without the existence of the undertaking this would be a weighty consideration in favour of there being a stay.

32. Even with the undertaking, there are reasons to consider that there may be immediate and potentially severe damage to Nigeria if there is not a stay. I consider that there is reason to believe, including in particular from the matters referred to in paragraphs 29 to 30 of Handley 5, but also from the article in Mealey's International Arbitration Report which refers to Kobre & Kim's approach of seeking to use "the right combination of high-pressure tactics, an aggressive, creative, multi-jurisdictional approach … to efficiently monetise judgments or arbitration awards against sovereign debtors", that P&ID may indeed use aggressive and creative approaches to enforcement which carry with them a risk to Nigeria of the sort which I have described.
33. Yet there is, I find, also a risk of injustice to P&ID if there is a stay. P&ID contends with force that a stay of execution would give to Nigeria a further period of time in which to take steps to avoid paying P&ID and that P&ID is only very imperfectly protected by the accrual of interest. As P&ID says, the nominal accrual of interest is not of great value to it unless it can be enforced. All the indications, it says, are that it is going to be difficult to enforce the award in the amount which it currently stands at; a delay, giving rise to a larger sum to have to seek to enforce, will prejudice it.
34. Any solution is likely to give rise to the risk of injustice to one or other party. In my judgment the best solution, and the one which most accords with the interests of justice to both parties, is that there should be a stay on terms.
35. These terms are that Nigeria should, within a period of 60 days, pay into court the sum of $200 million; and should also, within the period of 14 days, pay to P&ID the amount of the interim payment on account of costs.
36. The assessment of the amount of security which should be provided is not straightforward. I have started by making an estimate based on an assessment of the likely period of delay, but I have taken into account what Mr Matovu submitted in relation to the size of the amount to be ordered. Nigeria has not put in any evidence as to its inability to pay the award or, I should add,

as to its reserves and revenues. Indeed, P&ID stressed that Nigeria had not suggested or put in evidence to the effect that it could not pay the entire amount of the award; and nor has it put in any evidence that an order for security for permission to appeal, even in the amount of the award, would stifle the appeal.

37. Accordingly, as I say, the condition in relation to a sum to be paid into court is for a payment of $200 million within 60 days, and non-compliance with that condition or with the other condition of payment of the interim amount on account of costs within 14 days will mean that the stay comes to an end. This is subject to an application being successfully made, on the basis of materially changed circumstances, that the order should be varied.

38. For the avoidance of doubt, I should make it clear that the undertaking by P&ID still applies. What that means is that if the condition in relation to the payment into court or the payment of costs is not met, while execution will then be able to take place, any proceeds are to be kept in P&ID's solicitors' client account. That is because without that undertaking I would have stayed execution unconditionally.

39. I turn to whether there should be a condition on Nigeria’s ability to appeal. I am not prepared to make an order that the permission to appeal should be conditional on either of the two matters which I have referred to as conditions for the stay. I am not persuaded that there are sufficiently compelling reasons to make such an order.

40. As I have already indicated, I am persuaded that the grounds of appeal meet the threshold of having a more than fanciful prospect of success. I do not consider that Nigeria should, as a condition of being able to pursue those points, have to put up security. The appropriate balance is struck, in my judgment, by Nigeria having to put up security if there is to be a stay of execution. Ultimately, as I have said, Mr Mill did not strongly press the suggestion that there should be security as a condition of the appeal.

41. I should also add that, although it is ultimately a matter for the Court of Appeal, I would hope that this appeal can be accorded a degree of expedition. The material put in before me suggests that the matter is considered to be one of national importance in Nigeria, and it involves the question of whether there should be enforcement of an arbitration award where undue delay is always particularly undesirable.