Neutral Citation Number: **[2019] EWHC 3218 (Comm)**

Case No: CL-2018-000182

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

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

Date: 22 November 2019

Before :

Mr Justice Butcher

- -

Between :

PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED	**Claimant**
- and -	
THE FEDERAL REPUBLIC OF NIGERIA	**Defendant**

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Ian Mill QC (instructed by **Kobre & Kim**) for the **Claimant**
Charles Hollander QC, Phillip Riches & Tom Pascoe (instructed by **Mishcon de Reya**) for the **Defendant**

Hearing date: 22nd November 2019

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RULING

Mr Justice Butcher Friday, 22 November 2019
(11: 16 am)

Ruling by MR JUSTICE BUTCHER

1. An application is made by the Defendant, the Federal Republic of Nigeria (to which I will refer as "Nigeria"), for an extension of the deadline which I have ordered for the payment of US$200 million into court until the hearing of Nigeria's application to vary that order.
2. The full background is set out in my judgment of 16 August 2019. In that judgment I concluded that the Claimant (to which I will refer as “P&ID”) should have leave to enforce the final award of Sir Anthony Evans, Chief Bayo Ojo SAN and Lord Hoffmann dated 31 January 2017 as if it were a judgment. That award is very substantial, being for US$6.597 billion plus interest at 7% per annum. The sum due under the award is currently approximately US$9.6 billion.
3. On 26 September 2019 a hearing was held to consider consequential orders as a result of my judgment of 16 August 2019. I granted Nigeria permission to appeal on grounds relating to the arbitral seat and to alleged errors by the Tribunal as to the amount of the award. I also ordered that execution of the order granting leave to enforce should be stayed pending the appeal subject to two conditions: firstly, that Nigeria should pay the sum of £250,000 to P&ID on account of costs within 14 days of the order; and secondly, that Nigeria should pay into court the sum of US$200 million by way of security within 60 days of the order, that is, by 25 November 2019. The conditions were only made conditions of enforcement and not of permission to appeal, and Nigeria was to have the protection, should it fail to fulfil the conditions and the stay end, of the undertaking by P&ID that any assets recovered on enforcement would be held by P&ID's solicitors until resolution of the appeal.
4. Nigeria has complied with the order to pay P&ID £250,000 on account of costs. It has not yet complied with the order to pay US$200 million into court.

5. At the consequentials hearing Nigeria sought, but I refused, permission to appeal from the condition which I had attached to the grant of a stay. Nigeria did not seek a stay of the operation of the condition pending an application to the Court of Appeal for permission to appeal.
6. On 17 October 2019 Nigeria issued a notice of appeal. I am told that included therein was a renewed application for permission to appeal against the imposition of the condition which I had attached to the grant of a stay. As I understand it, there was no application within the appellant's notice for a stay of the operation of the condition until the permission application had been determined.
7. On 18 November 2019 -- that is on Monday, today being Friday -- and just a week before the expiry of the period in which Nigeria was to put up the security, Nigeria served on P&ID in draft, and I am told without any notice, two applications. The first was the present application, which has been called the “extension application”, which seeks an extension of time for complying with the condition attached to the stay until the determination of the second application, which I will call the "variation application", and also seeks directions for the determination of the variation application at a date after 4 December 2019. The second was the variation application by which Nigeria seeks to revoke the imposition of the condition and to extend the operation of the stay of execution so as to apply until the determination not only of Nigeria's appeal but of prospective further applications challenging the final award and/or its enforcement.
8. The variation application is to be based on what are said to be material changes of circumstances, namely: first, that substantial evidence has recently come to light that the final award, the contract on which it was based and the arbitral process leading to the final award were procured by fraud and/or bribery; and secondly, that Nigeria is unable to comply with the deadline for compliance with the condition which I imposed.

9. The application before me seeks an extension of the stay on the basis that it is not practicable for P&ID to respond to the variation application and for that application to be decided prior to the deadline of 25 November 2019. The extension application therefore itself seeks a variation of the order which I made on 26 September in respect of the date for compliance with the condition for payment into court.

10. Variations to orders may be made pursuant to CPR 3.1(7). That power may be exercised in relation to interim as opposed to final orders, that is to say, in relation to orders which do not finally decide anything as of right between the parties, and include case management decisions. The notes to the White Book, by reference in particular to Tibbles v SIG Plc [2012] EWCA Civ 518, make it clear that the power to vary or revoke an order is subject to a "principled curtailment" which takes into account considerations of the need for finality and the need to avoid undermining the concept of an appeal. The circumstances which will justify a variation or revocation are normally only: (a) where there has been a material change of circumstances; and (b) where the facts on which the original decision was made were misstated.

11. The justification for the variation sought in the extension application is based on two matters: first, that in the variation application it will be sought to rely on fraud and/or bribery in the way which I have described; and secondly, that Nigeria cannot now comply with the condition by the deadline. I consider that only the second of these is actually relevant to the application to extend the deadline. If the first stood alone there would be no good reason why the security should not be provided in accordance with the Court's order by Monday, although Nigeria might subsequently seek to have the security returned if a court were persuaded that that was appropriate in the light of developments, including any reliance on the alleged fraud and/or bribery.

12. In any event, and even if that is not right, I consider that it has not been shown that this aspect of the variation application has been brought forward with reasonable diligence. As I said in my

judgment on 26 September 2019, there had been a reference in the papers then before me to an investigation into whether fraud induced the GSPA, and into conspiracy and tax evasion. More specifically the skeleton argument then put in by Mr Matovu QC for Nigeria stated at paragraphs 3 to 7 that: first, serious concerns had been expressed in the international press, especially Bloombergs, concerning P&ID and its founders; secondly, that the EFCC was investigating the award of the GSPA; thirdly, that a number of criminal charges had been brought against P&ID and its Nigerian subsidiary in relation to the GSPA; fourthly, that at a hearing in the Federal High Court in Abuja on 19 September 2019 P&ID by its Commercial Director entered pleas of guilty to ten charges including fraud, conspiracy to deal in petroleum products without an appropriate licence and tax evasion, and P&ID Nigeria also pleaded guilty to the same charges; and fifthly, that on 20 September 2019 the Federal High Court had passed sentence. At that point I was not asked to act on any of those matters.

13. The matters which are now said by the Honourable Abubakar Malami to be those that are likely to be relied on in the variation application in this regard appear to be largely ones which were available and known to Nigeria on 26 September, a point confirmed by an examination of the exhibits to Mr Malami's witness statement. As far as I can see or was told only one document actually contains matters which are new since 26 September.

14. While I stress that I am making no decision one way or the other at this stage as to whether these matters constitute a material change of circumstances for the purposes of the variation application, I consider that there has been no satisfactory explanation as to why any application for a variation based on the raising of these matters was not made before this week. While I was told that the decision to rely on these points was only taken recently, it appeared to me likely that this decision had been delayed as a result of a change of solicitors and counsel. In circumstances where the reasons for that change have not been explained to me, I have been left to conclude that this aspect of the variation application could and should have been made earlier.

15. The second matter relied on for the purpose of seeking a variation of the date for compliance with the condition is that Nigeria contends that it is unable by Monday to pay the sum of US$200 million into court. What is said on Nigeria's behalf is that there is no room remaining in its national 2019 budget or the contingencies in that budget; that it would in principle be possible to pass a supplementary appropriation bill authorising expenditure of US$200 million, but the process for this is laborious and could not be completed by 25 November, and it is uncertain whether the necessary bill would pass; and that while funds could in theory be reallocated from other heads of the existing national budget, this would have to follow a lengthy approval process before the National Assembly. It is said that in the absence of other options, the Finance Minister has recently -- that is to say on 13 November -- begun the process of placing a proposed supplementary appropriation bill before the President, who in turn will present it to the National Assembly.

16. The evidence as to the reason why the proposed supplementary appropriation bill was not placed before the President earlier than 13 November is thin and unparticularised. Thus:

    (1) It is said that this was because it is usually necessary to identify the source of additional funding. Yet Mr Malami says that nevertheless the request has now been made in order to demonstrate to the Court that Nigeria is making positive efforts to comply with its order. This, however, seems to show that the request could have been made at an earlier stage without identification of the source of additional funding.

    (2) Mr Malami says that prior to the formal request being made efforts were focused on obtaining political approval from the National Assembly to increase the chances that additional funding would be approved. No details, however, are given as to these political efforts and Mr Malami indicates that there remain difficulties in persuading the National Assembly to vote in favour of the appropriation, so it appears that these political efforts were inconclusive.

17. The evidence put before me, and which I have just summarised, simply does not satisfy me that proper and timely steps were taken, after I had made the order of 26 September, to secure the relevant funds. I consider that, if proper and timely steps had been taken then, considerably before now, it would have become apparent either that the funds could be obtained in time or that they could not. In the latter case, I would have expected an application for a variation to be made well before now.

18. I also do not understand why the possibility of obtaining a bank guarantee as an alternative to payment into court had not been explored before, on the evidence, it was. Mr Malami says that it is a possibility which Nigeria has begun to investigate as it can be issued by the Central Bank of Nigeria upon the President's approval. Mr Malami states that the Central Bank of Nigeria meets bimonthly. He also gives evidence that he was informed on 19 November that the Central Bank's foreign correspondent bank has confirmed that it could issue a bank guarantee. He then says that for a bank guarantee to be issued will now require the President to provide approval to the Minister of Finance and the Minister of Finance would submit a request to the Central Bank of Nigeria to proceed with procuring the bank guarantee. Those steps, Mr Malami says, will take up to ten working days. The Central Bank of Nigeria will then submit the request to a foreign correspondent bank to issue the bank guarantee from London. That he says, will take one working day. The foreign correspondent bank will then issue the bank guarantee within 72 hours of receiving the request from the Central Bank of Nigeria. Accordingly, Mr Malami says this process could take up to 14 working days.

19. Faced with any difficulties in complying with the condition of payment into court, the idea of proposing a bank guarantee as a substitute must have been an obvious one, as indeed is shown by the fact that Nigeria has now investigated it. It is not explained, however, why this investigation has only begun at a time which would mean that the guarantee could not be provided within the 60 days. If this investigation had been carried out earlier, it seems clear that

Nigeria would have been in a position to apply to the court for a variation to permit the submission of a bank guarantee, rather than a payment into court, without the need for any extension of the period involved. This has caused me to question whether Nigeria has actually been trying to find ways of complying with the order as opposed to leaving efforts so late in order to suggest to the Court that there is no alternative but to extend time.

20. In my judgment, there has not been shown to be any true change of circumstances relevant to whether the condition could be complied with within 60 days, and thus no grounds have been shown for extending that period. Possible difficulties in meeting the deadline, unless prompt and active steps were taken immediately, were always obvious. I have not been satisfied that prompt and active steps were so taken. That is not a change of circumstances on which Nigeria can rely. Furthermore, I consider that, had proper steps been taken to comply, either the condition would have been met or, if Nigeria had found that it could not be met in accordance with its terms within the 60 days, that would have become apparent some time ago and an application could and should have been made significantly before it was to seek a variation of the condition. As a result I do not consider that there is a good ground for extending the period of compliance pending the hearing of an application which, on this basis, should, if it needed to be made at all, have been made well within the 60 days.

21. Further, I consider that what is being sought does in many ways seek to bring about a way of challenging the imposition of the condition without successfully appealing it, while nevertheless maintaining an application for permission to appeal against it. This counts against allowing the variation sought. Equally, a concern for the overriding objective of dealing with cases justly includes enforcing compliance with rules, practice directions and orders of the court. That again militates against allowing the variation sought.

22. I have considered the points which Nigeria, through Mr Hollander QC, has made as to the balance of hardship and the lack of prejudice to P&ID. Such considerations were taken into

account when the original order was made on 26 September and influenced the solution which I then ordered. In any event, as set out by Turner J in Kagalovsky v Balmore Invest Ltd [2014] EWHC 108 (QB), absence of prejudice to an opposed party is no longer the litmus test for indulgence. I reiterate, moreover, that Nigeria will be protected, even on the termination of the stay, from the risk of any sums recovered from it becoming unavailable to it if its appeal is successful by the undertaking from P&ID which continues to apply. Though that undertaking is at present one pending the appeal in respect of which permission has been granted, Nigeria could presumably, if it makes the other applications which it has indicated, seek a variation of the undertaking or seek to ensure that any funds recovered by P&ID were not paid out to P&ID pending a different eventuality and on grounds other than those relied on before me on 26 September. Whether such attempts would succeed would, of course, depend on precisely what they were and the precise grounds on which they were made, and is not a matter on which I can or do express any view.

23. For the reasons set out above, I do not consider that my discretion to vary the order of 26 September should be exercised in favour allowing the extension sought. I thus refuse the extension application.