

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

B E T W E E N: -

PROCESS AND INDUSTRIAL DEVELOPMENTS LIMITED

Claimant / Claimant in the Arbitration

- and -

THE FEDERAL REPUBLIC OF NIGERIA

Defendant / Respondent in the Arbitration

**CLAIMANT'S SKELETON ARGUMENT FOR CONSEQUENTIAL
HEARING ON 26 SEPTEMBER 2019**

*References in the form [Volume / Tab / page number] are to the Volumes (I to IV) of the
Hearing Bundle supplied by the Claimant on 24 September 2019*

Time allowed for the hearing: Two hours

Recommended reading:

- *This Skeleton Argument and that filed by the Defendant;*
- *The proposed form of Order [I/E15/244-5];*
- *The Defendant's proposed Grounds of Appeal [I/F16/259.01-.11];*
- *The Fifth Witness Statement of Mark Handley [I/C10/45-55];*

- *The Fourth Witness Statement of Mark Griffiths [I/C12/161-169].*

I. Introduction

1. This Skeleton Argument is filed on behalf of the Claimant (“**P&ID**”) for the adjourned hearing on 26 September 2019. The matters that fall to be addressed are:
 - 1.1. The appropriate form of Order and Costs;
 - 1.2. The Defendant’s application for permission to appeal;
 - 1.3. The Defendant’s application for a stay of execution; and
 - 1.4. P&ID’s request that the Court order the Defendant (“**Nigeria**”) to provide security as a requirement of any stay of execution or permission to appeal being granted.

II. P&ID’s Order and Costs

2. The form of order sought by P&ID – granting P&ID permission to enforce the Award pursuant to section 66 of the Arbitration Act 1996 – can be found in the bundle at [I/D15/244-245]. This was sent to Nigeria’s solicitors on 29 August 2019 [I/F16/246]. There has been no response from those solicitors joining issue with any of its provisions.
3. In relation to paragraph 3 of the draft Order, a summary of P&ID’s costs of the claim can be found at [I/F16/259.07-.11]. The amount of the interim payment sought is a modest proportion of the total costs incurred..

III. Permission to Appeal

4. P&ID opposes Nigeria’s application for permission to appeal. P&ID will make oral submissions at the hearing if and to the extent that the Court would find them helpful. In overall summary, however:
 - 4.1. None of the proposed Grounds of Appeal [I/F16/259.02-05] is properly arguable. They amount to no more than an attempt to re-argue points which have been dealt with conclusively and correctly in the Judgment. There is no reason to think that the Court of Appeal would reach any contrary conclusions.

- 4.2. There is no other compelling reason for the grant of permission. The size of the arbitral award cannot of itself afford such a reason, absent arguable grounds. There are no important points of arbitration law which require guidance from the Court of Appeal. The Judgment proceeds on the basis of well-established principles, applied to the particular facts.

IV. Stay of Execution

5. Nigeria seeks a stay of execution pending the determination of its appeal. This is opposed by P&ID.
6. Nigeria's evidence filed in support of its application ("**Handley 5**") [I/C10/45-55] advances two arguments upon the basis of which Nigeria asserts that it should be granted a stay: (i) professed concerns about the return of sums obtained by P&ID by way of execution; and (ii) the effects on the Nigerian economy if P&ID were permitted to execute on the Award. P&ID submits that these grounds form no proper or sufficient basis upon which to grant a stay of execution. Accordingly, no stay of execution should be granted if Nigeria is granted permission to appeal.
7. As the Court will be aware, the "general rule" for an application for a stay of execution pending appeal is that a stay of execution will not be granted (Potter LJ in *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474 at [12]). Nigeria must therefore present "*solid grounds*", which demonstrate that there will be some form of irremediable harm caused if a stay is not granted (Sullivan LJ in *Department for Environment, Food and Rural Affairs v Georgina Downs* [2009] EWCA Civ 257 at [8]).
8. Nigeria has failed to advance any credible, let alone solid, grounds for the need for a stay of execution:
- 8.1. Tellingly, nowhere in Handley 5 does Nigeria state that it cannot pay the Award in full, inclusive of interest. P&ID submits that this is because Nigeria **can** pay the Award, but it is unwilling to do so. Nigeria's evidence effectively accepts this point, confirming that payment of the Award would take less than a quarter of

Nigeria's gross foreign reserves.¹ P&ID submits that the Court should not countenance an application for a stay because the judgment debtor complains about the potential consequences that it will incur when it chooses to not comply with a judgment obtained against it.

- 8.2. Nigeria asserts that P&ID will have an “*entire arsenal of weapons*” available to it if a stay is not granted.² However, this is simply incorrect due to the protections afforded to Nigeria as a state. Public pronouncements of senior Nigerian officials indicate that they know this to be incorrect and intend to rely on Nigeria's state immunity to limit the options available to P&ID. For example, on 17 August 2019, the Nigerian Solicitor General stated that “*Nigeria therefore intends to strongly avail itself of all defences customarily afforded to sovereign states under the United Kingdom Sovereignty Act at any such enforcement actions.*”³
- 8.3. Nigeria's concerns about an enforcement campaign and the possible adverse effects such a campaign would have on its economy would simply dissipate if Nigeria was to comply with its legal obligations and pay the sum awarded by the Tribunal and found by this Court to be due and owing to P&ID.
- 8.4. Without any basis in fact, Nigeria argues in Handley 5 that “*there is a real risk that the assets [obtained by P&ID through legitimate enforcement applications] will not be returned and any monies obtained by P&ID will be lost to the Government and citizens of Nigeria.*”⁴ This assertion is entirely without basis and is rejected by P&ID. P&ID has in any event offered an undertaking that any

¹ [I/C10/47] at para. 8. Although Mr Handley asserts that the Award is “*well over a quarter of the gross foreign reserves of Nigeria*” it is presumed by P&ID that this is an error (\$9.6 billion not being quite a quarter of \$42 billion).

² [I/C10/51] at para. 25.

³ [I/C12/166] at para. 14.1.

⁴ [I/C10/47] at para. 10.

monies obtained by way of execution will be held in a client account of P&ID's solicitors pending the outcome of any appeal, thereby rendering this point moot.⁵

9. If this Court is satisfied that Nigeria has sufficient prospects of succeeding on appeal to warrant the grant of permission, the Court must then balance any prejudice faced by Nigeria with that faced by P&ID. When granting a stay of execution, "*the essential question is whether there is a risk of injustice to one or other of 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 unable to recover any money paid from the respondent?*" per Clarke LJ in Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] All ER (D) 258 at [22].
10. As submitted above, Nigeria has not provided any evidence that paying the Award would stifle any appeal or cause it any harm. Nigeria is able to pay, but it is refusing to do so. P&ID has given any necessary assurances as to repayment.
11. Nigeria incorrectly asserts that there is no prejudice to P&ID caused by a stay of execution, and that P&ID is "*fully protected*" by the accruing interest.⁶ This submission is wrong:
 - 11.1. Interest accruing upon the Award does not prevent prejudice unless that interest is actually received by P&ID. As the amount of time increases with Nigeria refusing to satisfy the Award, the amount owed to P&ID continues to grow, and therefore P&ID will need to take additional steps in order to be made whole.
 - 11.2. Granting a stay of execution would hand to Nigeria a further period of time in which to take steps to avoid paying P&ID. Since 5 February 2019, members of the Nigerian government have repeatedly asserted that they will refuse to satisfy the Award. Recently, this has included a contrived fraud investigation by the Economic and Financial Crimes Commission, which Godwin Emefiele,

⁵ [I/C12/165] at para. 12.

⁶ [I/C10/55] at para. 35.

Chairman of the Central Bank of Nigeria, suggested was intended to avoid paying P&ID: “*There are certain anomalies in the process leading to the award of that contract which is currently being looked into by the EFCC and I believe that the EFCC themselves have their own investigation reports about that... So we will follow through and aggressively too on ensuring that the execution of that judgement is stayed and that the appeal succeeds at every level both within Nigeria and abroad.*”⁷

12. Accordingly, an assessment of the risks of injustice points inexorably towards a refusal of the stay application.
13. Should the Court consider, however, that the balance is less clear, Potter LJ stated in Leicester Circuits that: “*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.*” ([13]) Even if the Court were to consider that permission to appeal should be granted, it is submitted that the strength of that appeal would be barely sufficient to entitle Nigeria to such permission.

V. Security

14. Should the Court be minded to grant Nigeria either permission to appeal or a stay of execution, P&ID respectfully requests that – as a precondition to any stay or appeal – Nigeria first make a payment into Court by way of security, and comply with the Court’s Order for payment of an amount on account of P&ID’s costs. As to the amount of security, P&ID submits that the amount that should be paid into Court is the amount of the unpaid Award – currently, US\$9,609,389,013.69.⁸
15. This Court has the power to order a stay subject to terms such as the provision of security – see the decision of the Court of Appeal in Micula & Ors v Romania [2019] Bus. L.R. 1394 at [219].

⁷ [I/C13/210-211].

⁸ [I/D14/243].

16. Regarding security as the price for a stay, Clarke LJ in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz* [2016] EWCA Civ 710 – having reviewed the authorities on this point at [16]-[40] – stated (at [37] and [40]):

“(a) The essential question is whether or not there is a compelling reason to make payment in of the judgment sum, plus costs and interest (or some part thereof) a condition for further pursuit of the appeal – hereafter “a security payment order”;

(b) Whether there is a compelling reason is a value judgment to be made on the particular facts of the case under consideration;

(c) The fact that a judgment has been entered against the appellant and no stay has been sought or granted does not mean that, as a matter of course, compliance with the judgment should be made a condition of appeal nor does it, alone, afford a compelling reason for a payment order;

(d) On the contrary the power in CPR 52.9 was not designed to be no more than an alternative means of securing enforcement and is only to be exercised with caution;

(e) Whilst every case depends on its particular facts the court is likely to find there to be a compelling reason to make a security payment order which has that effect if the judgment debtor has in the past (Dumford Trading) or is likely in the future (Wittman) to take steps to denude itself of assets or put its assets beyond the reach of normal enforcement processes.

...

(f) There may be a compelling reason to make a security order even if it is not established that the appellant has acted as in (e) above. This may be the case if there are considerable practical difficulties in effecting execution.”

17. It is submitted that there are compelling reasons in the present case:

- 17.1. P&ID submits that this is within the mischief outlined in another context by Gloster LJ in *Cruz City I Mauritius Holdings v Unitech* [2013] EWCA Civ 1512 (Comm): *“in circumstances where a judgment debtor (in respect of a debt that is no longer subject to appeal), who has participated in liability proceedings in this jurisdiction, is able to pay a judgment debt, but has no intention of doing so, and is taking all possible steps to avoid enforcement of the judgment against its assets,*

whether in this jurisdiction or elsewhere, the courts may well consider that it is appropriate to attach a condition of payment in full of the judgment debt” (at [29]).

- 17.2. Statements issued by Nigerian officials have indicated that Nigeria now intends to take steps in order to protect itself from execution. On 19 August 2019, the Governor of the Central Bank of Nigeria, Godwin Emefiele, stated that “[w]e know that the implication of that judgment has some impact on monetary policy and that is why the Central Bank [of Nigeria] is going to step forward and... defend the reserves.”⁹
- 17.3. Nigeria has stated that it will take every step possible to defend its assets and that it intends to shelter assets behind the defence of sovereign immunity rather than pay the award voluntarily. A press release from the Nigerian Solicitor General stated that “*the [Federal Government of Nigeria] is making vigorous efforts to defend its interest in this matter and would not relent in exploring every viable option in doing so.*”¹⁰ On 27 August 2019, Nigeria’s Minister of Information and Culture, Alhaji Lai Mohammed, insisted that “*Nigeria is NOT about to lose any of its assets to P&ID. There is no immediate threat to Nigeria’s assets!*”¹¹
- 17.4. Nigeria has a demonstrable track record of failing to pay arbitral awards. As P&ID’s evidence sets out, other award holders are still litigating the enforcement of awards handed down in 2008 and 2012 respectively.¹²
- 17.5. The Award has been unpaid now for 2 years and 9 months. In *Micula v Romania* [2017] Bus LR 1147, Blair J held that the Claimant had made a “*persuasive case*” for security in circumstances where the Award had been unpaid for 3 years (see [192]). Here, if Nigeria is granted a stay without security, and the resulting appeal

⁹ [I/C11/62].

¹⁰[I/C13/207].

¹¹ [I/C12/166] at para. 14.3.

¹² [I/12/167-168] at para. 15.

is dismissed, P&ID will have had to wait considerably longer than 3 years before it has any opportunity to enforce the Award.

18. As to the amount of security, P&ID's submission is that Nigeria should pay the full Award plus interest accrued to date is premised on the fact (as set out above) that Nigeria is in a position to make that payment. Should the Court, however, be of the view that some different or lesser amount should be paid, then P&ID's application would be that such other amount should be paid in as a condition of permission to appeal and/or of a stay pending appeal.

VI. Conclusion

19. For the reasons set out above, the Court is invited to:
 - 19.1. Make an Order in the terms of P&ID's draft;, together with,
 - 19.2. An Order refusing Nigeria's applications for (a) permission to appeal and (b) a stay of execution pending appeal.

Ian Mill QC

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25 September 2019