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February 1, 2021

You Better Watch Out: Extensions of Time for Challenging Arbitration Awards

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Introduction

In the recent case of *The Federal Republic of Nigeria* v *Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm), the High Court granted an extension of time to bring challenges to an arbitral award made under Sections 67 and 68 of the Arbitration Act 1996.

The unusual aspect of this decision was that it had been several years since the arbitral award was made. The court found that the applicant had established a strong prima facie case of fraud affecting both the underlying contract and the arbitral proceedings, of which it had reasonably been unaware. This, along with other factors, merited the grant of an unprecedented extension.

Background

The defendant, P&ID, is a company incorporated in the British Virgin Islands ("BVI") by two Irish citizens, Michael Quinn and Brendan Cahill. P&ID, like many other BVI companies, had no assets, only a handful of employees, and was without a website or other presence. Such trifling matters would not, however, stop P&ID from being awarded a multi-billion dollar contract by the government of Nigeria.

That contract, known as the GSPA, was entered into between Nigeria and P&ID on 11 January 2010. Under the GSPA, Nigeria was to supply wet gas to a facility to be constructed and operated by P&ID. That facility would process the gas to remove natural gas liquids, which P&ID would be entitled to use as it saw fit, and return lean gas to Nigeria at no cost. The contract was to run 20 years from Nigeria's first regular supply of natural gas to the facility.

The GSPA was never implemented. P&ID commenced an arbitration seated in London, claiming that Nigeria had failed to supply the natural gas, thus repudiating the contract. P&ID sought over $6 billion in lost profits over the 20-year lifespan of the contract.

The arbitrators issued their Final Award on 31 January 2017. By a majority they found that, had Nigeria not repudiated its obligations under the GSPA, P&ID would have performed its obligations and suffered loss. That loss was the income it would have achieved in the 20 years of the contract from the sale of the natural gas liquids, less capital expenditure of $500 million and $50m in operating expenses per annum. It awarded P&ID lost profits of $6.6 billion, together with interest of 7 percent.

In March 2018, P&ID applied to the English High Court to enforce the Final Award. That application was granted in August 2019, rejecting Nigeria's arguments on jurisdiction and public policy. No allegations of fraud were raised by Nigeria at or prior to this stage, some two and a half years after the Final Award was issued.

Meanwhile, the Nigerian government was investigating the surrounding circumstances of the GSPA in an attempt to find any wrongdoing which could overturn the Final Award.

Those investigations bore no fruit until September 2019, when Nigerian authorities discovered suspicious payments to various officials involved in awarding the GSPA to P&ID. Interviews were carried out under caution

by the Nigerian police, following which many officials admitted to receiving bribes of up to 20 times their annual salary to overlook the obvious shortcomings in P&ID's bid.

There were many colourful examples of how these bribes were made, ranging from the traditional $50,000 in a black bag qualified by "*we take care of our friends*", to a payment for an official's "*medical expenses*", of which no record could be found.

More strangely perhaps, the investigations discovered that Mr Shasore, the lawyer who conducted the arbitration for Nigeria, had made two unexplained payments of $100,000 to other senior officials in the Nigerian government. Some of the officials interviewed alleged that Mr Shasore was in fact a mole for P&ID, working against the interests of Nigeria.

These allegations of fraud were finally raised in December 2019, when Nigeria applied to the English High Court to challenge the Final Award under Sections 67 and 68 of the Arbitration Act 1996 (the "Arbitration Act"). As a reminder, Section 67 of the Arbitration Act allows a party to an arbitration seated in England to apply to the courts to challenge an award on the basis that the tribunal lacked substantive jurisdiction. Section 68 allows challenges to awards on the ground of serious irregularity which has caused or will cause substantial injustice, including the circumstances where an award is obtained by fraud.

The rather large fly in the ointment is that challenges under Sections 67 and 68 must be brought within 28 days of the award. Nigeria had waited almost three years. An application had never been granted after such a long period.

Section 80(5) of the Arbitration Act does, however, give the court discretion to extend the 28 day time limit. The question for Mr Justice Cranston, the judge hearing the application, was whether that discretion should be exercised when there had been such an extraordinary delay.

Kalmneft factors

Before examining the alleged fraud more closely, it is useful to set out the factors to be taken into account when the court exercises its discretion to extend the 28 day time limit. These are known as the *Kalmneft* factors, after the case of *AOOT Kalmneft* v *Glencore* [2001] 2 All E.R. (Comm) 577, which concerned an alleged procedural irregularity. Mr Justice Colman set out the following seven considerations which he considered were material:

(i) the length of the delay;

(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have;

(vi) the strength of the application; and

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

Mr Justice Colman emphasised that the relatively short period of time for making an application for relief under Sections 67 and 68 reflected the principle of finality. In other words, parties had to live with an arbitral award unless they moved quickly.

In the current case, Mr Justice Cranston reviewed several authorities where fraud had been alleged to see what impact it had on the exercise of the court's discretion. He found two circumstances where allegations of fraud generally failed to overturn an award.

- First, where the applicant was aware of the fraud at the time the award was made. Thus, in *Thyssen Canada Ltd* v *Mariana Maritime SA* [2005] EWHC 219 (Comm), involving a five-month delay, evidence of the alleged fraud was available during the arbitration, but there was a deliberate tactical decision by the applicant not to rely on it since the new evidence could have damaged its own case. Similarly, in *DDT Trucks of North America Ltd* v *DDT Holdings Ltd* [2007] EWHC 1542 (Comm) the judge had no difficulty in refusing an extension of 15 weeks because evidence of the alleged fraud was available to the appellant throughout the arbitration, but its lawyer had simply 'forgotten' to raise it.

- Second, where the fraud allegations are weak. Fraud is a serious allegation and judges must be presented with concrete evidence of fraudulent behaviour if they are to overturn an otherwise valid arbitral award. The case reports are littered with decisions of judges who have thrown out poorly supported allegations of fraud.

A more nuanced question came before the Supreme Court in *Takhar* v *Gracefield Developments Ltd* [2019] UKSC 13. In that case the claimant had suspected fraud, but had not alleged it, and only later obtained evidence that a key document had been forged. The court found that the claimant could have discovered the fraud with reasonable diligence at the time of the trial if she had pursued her suspicions. The issue was whether that prevented the claimant from later relying on the fraud to overturn the decision.

Lord Kerr, giving the judgment of the majority, held that where a party seeks to set aside a judgment on grounds of fraud, it is not necessary to show that the evidence of fraud could reasonably have been uncovered sooner. This remains distinct from the scenario, discussed above, where the applicant is aware of the fraud and does not present the case. Although this decision should be welcomed, it seems inevitable that future arguments will revolve around the grey line between whether an applicant merely suspected or was fully aware of the alleged fraud.

Takhar was a case of setting aside fraud in litigation, not arbitration, so was not directly applicable to the case between P&ID and Nigeria. Predictably, Nigeria argued that the principle in *Takhar* should be extended to challenges to arbitral awards under the Arbitration Act, while P&ID argued that its scope should remain limited to litigation.

Mr Justice Cranston favoured the arguments of Nigeria, stating that "*there seems to be no reason why the finality of arbitration awards should be afforded greater importance than the finality of judgments in circumstances of fraud.*"

Fraud and the GSPA

Nigeria's case was that there was a strong prima facie case of fraud against P&ID, which justified postponing enforcement of the Final Award until a full trial of the issue could be heard. P&ID, on the other hand called the fraud allegations "startlingly ambitious" and argued that at most the case for fraud could be described as weak.

Mr Justice Cranston examined three strands of Nigeria's argument on fraud in order to determine the strength of the case and subsequently apply the *Kalmneft* factors. First, that P&ID procured the GSPA by paying bribes to Nigerian officials. Second, that P&ID gave perjured evidence to the arbitrators to give the false impression that P&ID was able and willing to perform the GSPA. Third, that Nigeria's own counsel in the arbitration, Mr Shasore, acted dishonestly.

On the first strand, the judge unsurprisingly found there was a strong prima facie case that the GSPA had been procured by bribery. Substantial payments had been made by P&ID to senior officials in charge of the procurement process. P&ID's defence, that these payments were made towards certain "medical expenses", was unsupported by any evidence. In any event, even if that were true, benefits received by public officials from persons seeking to obtain a contract are assumed to be bribes under Nigerian law.

On the second strand, Nigeria argued that Mr Quinn, the chairman of P&ID, gave perjured evidence to the tribunal that P&ID had (i) invested $40 million in the project and had completed 90 percent of relevant engineering design work (including 100 folders of technical documents); (ii) put in place all necessary project finance; and (iii) acquired a plot of land for the gas stripping. Nigeria's case was that, contrary to this evidence, P&ID was never willing or able to perform the GSPA.

Mr Justice Cranston agreed that Mr Quinn's witness statement contained several major inaccuracies. The $40 million referred to in Mr Quinn's statement had not been spent by P&ID at all, but by another company for the engineering and design of a different project in another part of Nigeria. Further, despite Mr Quinn's assertion that all project finance was in place, there was no evidence that any funding had been secured. Finally, P&ID had not in fact secured a plot of land as Mr Quinn had stated.

The judge concluded that Nigeria had established a strong prima facie case that Mr Quinn gave perjured evidence to the tribunal to give the impression that P&ID was a legitimate business and was able and willing to perform the GSPA. P&ID had relied on that evidence in the knowledge of its falsities.

Finally, and perhaps most shockingly, Nigeria alleged that their counsel in the arbitration, Mr Shasore, was in effect a mole for P&ID who had worked to sabotage Nigeria's case from within. It was alleged that Mr Shasore made purposefully bad arguments or omitted obvious defences throughout the case. For example, Mr Shasore failed to make any significant challenge to the facts set out in Mr Quinn's statement, including failing to ask the obvious question of how a BVI company with no experience, assets or finance intended to perform the GSPA. While this might be excused as mere incompetence, other factors pointed more directly to Mr Shasore's dishonesty.

This was most clearly shown by two payments of $100,000 made by Mr Shasore to senior officials in the Nigerian government, which had been discovered by the Nigerian police investigation. Mr Shasore described these as gifts, but Cranston J dismissed that suggestion with the rather understated remark that this was not a "*complete and honest explanation*" for why he should make those payments to senior public servants with whom he had no previous dealings.

Who were these two senior officials? They comprised Nigeria's negotiating team in the settlement discussions with P&ID. Immediately after receiving the payment, one of the officials wrote a letter to the Nigerian government recommending a settlement with P&ID. Mr Justice Cranston concluded that there was a prima facie case that Mr Shasore had been corrupted.

Having discussed the nature of the fraud, the judge also briefly addressed P&ID's argument that Nigeria could not discharge the burden of establishing that it did not know and could not with reasonable diligence have discovered the alleged fraud. Although the point relating to reasonable diligence had already been addressed in the judge's discussion of the *Takhar* case, one of the *Kalmneft* factors remained the reasonableness of the applicant's actions, such that it was appropriate to examine Nigeria's conduct.

It was true that Nigeria had acted relatively slowly in investigating the matters surrounding P&ID, but Mr Justice Cranston found that on the whole Nigeria had acted reasonably in pursuing a wide-ranging fraud investigation across many government departments. It understandably took time to investigate and build a case based on fraud.

It was also a significant factor that the two senior officials in charge of Nigeria's negotiating team in the settlement discussions with P&ID, who had received large payments from Mr Shasore, had strongly advocated settlement and suppressed an investigation into the underlying transaction.

Application of the *Kalmneft* factors

Having discussed the nature of the fraud and the delay, Mr Justice Cranston returned to the *Kalmneft* factors to decide whether to grant Nigeria's application.

The first factor, the length of the delay, was described as unprecedented. At the time of judgment, it had been almost 3 years since the Final Award had been made. This factor weighed heavily in favour of refusing Nigeria's application given the importance of providing finality to arbitral awards.

On the second factor, the reasonableness of Nigeria's actions, the judge held that there was nothing which Nigeria ought to have been aware of to act as a trigger causing a reasonable person, exercising reasonable diligence, to have discovered the alleged fraud.

On the third factor, P&ID's contribution to the delay, the strong prima facie case of fraud against P&ID weighed heavily in favour of granting the application.

On the fourth factor, the prejudice that P&ID would suffer if the application was granted, P&ID argued that it would suffer great prejudice both in the further delay in receiving the money due to it and in further costs involved in fighting a substantive fraud trial. Dismissing this, Mr Justice Cranston held that where a party has a strong prima facie case of fraud, there can be no prejudice to the other party in being subject to a full inquiry into that fraud at trial.

The fifth factor, whether the arbitration had continued during the period of delay, was not applicable on the facts.

On the sixth factor, the strength of the application, the judge referred to his prior conclusion that Nigeria had established a strong prima facie case of fraud against P&ID.

Finally, on the seventh factor, fairness in the broadest sense, Mr Justice Cranston stated that in challenges involving a strong prima facie case of fraud it will be in the interests of fairness to grant the application. He finished his analysis with the following powerful remark:

> "*Not only is the integrity of the arbitration system threatened, but that of the court as well, since to enforce an award in such circumstances would implicate it in the fraudulent scheme.*"

The court concluded that, despite the extraordinary delay, the preponderance of factors weighed in favour of granting the application.

Comment

The decision is a welcome one insofar as it reinforces the well-known passage by Lord Denning in *Lazarus Estates Ltd* v *Beasley* [1956] 1 QB 702:

> "*No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever …*"

Fraud continues to unravel everything, including arbitral awards that have been tainted by fraud. That being said, it must be noted that this decision is exceptional because of the extraordinary circumstances of the case.

Parties should assume that the English courts will not exercise their discretion to extend deadlines for challenges to awards in anything other than the most exceptional of circumstances. Here, the integrity of both the arbitration system and the court were threatened, which outweighed the principle of finality. The prudent course for a party against whom an award is made remains, of course, to analyse it and bring any challenge within the time limits set out in the Arbitration Act.