Neutral Citation Number: [2023] EWHC 3320 (Comm)

Claim Nos: CL-2019-000752 and CL-2018-000182

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building, Royal Courts of Justice
London

Date: 21/12/23

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

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Between :

The Federal Republic of Nigeria	**Claimant**
- and -	
Process & Industrial Development Ltd	**Defendant**

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- -

Mark Howard KC, Philip Riches KC, Tom Ford, Tom Pascoe, Sebastian Mellab instructed by **Mishcon de Reya LLP**) for the Claimant
Lord Wolfson KC, Alexander Milner KC, Henry Hoskins and Max Evans (instructed by **Quinn Emanuel LLP**) for the Defendant

Hearing dates: 8 December 2023

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Ruling on Leave to Appeal

(as handed down physically in open court, and electronically by email to the parties, and by publication in the National Archives)

Robin Knowles J CBE:

Introduction

1. On 23 October 2023 I gave judgment (the "Judgment": [2023] ECK 2638 (Comm)), after a major trial, on a challenge by Nigeria under section 68 of the Arbitration Act 1996, to arbitration awards made in favour of P&ID.

2. This Ruling uses the same abbreviations as the Judgment. Reference should be made to the Judgment for the facts and circumstances as found at the trial, and the law applied. The full text of relevant provisions of the Arbitration Act are set out in the Annex to the Judgment.

3. I decided that the Award on Liability and the Final Award were obtained by fraud and the Awards were and the way in which they were procured was contrary to public policy: Judgment [574].

4. As explained at Judgment [577] the question of the Order that the Court should make was left over to a later date so that the parties had the opportunity to present argument once they had considered the Judgment. I heard that further argument on 8 December 2023. I decided that the Award on Liability and the Final Award should be set aside (as Nigeria sought) rather than remitted to the Tribunal for reconsideration (as P&ID sought). My reasons are shortly expressed later in this Ruling.

5. At the hearing on 8 December 2023 P&ID also sought leave to appeal under section 68(4) of the Arbitration Act against the decision reflected in my Judgment and in the Order that will now be made after the trial. Nigeria's position was that leave to appeal should be refused. I had the benefit of written and oral argument on this question and have taken the time to reflect carefully. I have reached the conclusion that I must refuse leave to appeal, and in this Ruling I give my essential reasons for that conclusion.

6. On 8 December 2023 I also made a number of other decisions consequential on the Judgment, with reasons given orally at the time. I have since dealt with a final small number of further consequential matters with the benefit of written argument alone. All are reflected in the Order that will now be made.

Reasons for refusing leave to appeal

7. P&ID contends that, if given leave to appeal, there is (at least) a real prospect that P&ID will succeed in establishing that the Court was wrong to uphold Nigeria's challenge. P&ID also contends that there are other compelling reasons why leave to appeal should be given. There are 4 proposed Grounds of Appeal.

8. It is a major thing for a challenge under section 68(2)(g) of the Arbitration Act to succeed and for arbitration awards to be set aside. I am acutely conscious of the responsibility placed on this Court to decide whether to grant or refuse the leave required for any appeal. I approach the question of leave to appeal with respect for the huge significance of this matter to both parties.

9. At Judgment [493] and [497] I held that three things, central to Nigeria's challenge, brought the case within section 68(2)(g):

> "494. The first is P&ID's providing to the Tribunal and relying on evidence before the Tribunal that was material but was evidence that P&ID knew to be false. Specifically, this was the evidence of Mr Michael Quinn in his witness statement of 14 February 2014 that he was "explain[ing] how the GSPA came about" when he did not do that because he did not mention that Mrs Grace Taiga had been paid a US$5,000 bribe at the end of December 2009 and a £5,000 bribe on 29 March 2010 ….
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> 495. The second is P&ID's continued bribery or corrupt payment of Mrs Grace Taiga directed to the arbitration period in order to suppress from the Tribunal and Nigeria the fact that she had been bribed when the GSPA came about. This continued bribery or corrupt payment is fairly described by Nigeria as bribery "to keep her 'on-side', and to buy her silence about the earlier bribery". …
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> 496. The third is P&ID's improper retention of Nigeria's Internal Legal Documents that it had received during the Arbitration. It retained these (rather than returned them unread) so as to monitor Nigeria's position and awareness as the Arbitration continued. This included monitoring whether Nigeria had become aware of the deception being practised by P&ID on the Tribunal and on Nigeria as a party before the Tribunal. …"

In its proposed Grounds of Appeal, P&ID uses the shorthand of "Perjury Irregularity", "Bribery Irregularity" and "Documents Irregularity" for the three things, and I shall do the same here.

Proposed Ground 1

10. Proposed Ground 1 would contend that the Court "erred in law in that it failed correctly to identify and/or apply the test of causation under s.68(2)(g)". P&ID makes clear that the Proposed Ground does not challenge the Perjury Irregularity.

11. P&ID states in its written argument that "P&ID will argue that the Court did not correctly interpret or apply the causation requirement in s68(2), which required Nigeria to establish that any fraud was causative of the Awards" (P&ID's emphasis).

12. P&ID says that the Judgment correctly recorded its submission that the correct legal test required Nigeria to prove, in relation to any relevant irregularity, that but for the irregularity the Tribunal "might well" have reached a different conclusion. It uses the shorthand of "Different Result Test" for this, and I shall do the same here. The word "irregularity" comes from section 68.

13. In its argument P&ID draws on both on the reference in section 68(2) ("has caused or will cause substantial injustice") and section 68(2)(g) ("being obtained by fraud"). Section 68(2)(g) also refers to "the way in which" an award was procured "being contrary to public policy". The Judgment explored the difficulty of application of the "Different Result Test" in some situations. But the important thing is that in the present case P&ID plainly failed the "Different Result Test".

14. At Judgment [509] I summarised:

> 509. In the present case the core is the bribery of Mrs Grace Taiga when the GSPA was being made. It is the fact of that bribery that Mr Michael Quinn falsely concealed by the words of his witness statement [the Perjury Irregularity], and that the continued bribery or corrupt payments sought to suppress [the Bribery Irregularity]. It is that that P&ID was monitoring (among other things) by its retention of Nigeria's Internal Legal Documents [the Documents Irregularity]."

15. Judgment [510] was introduced by referencing P&ID's argument on causation by the Perjury Irregularity. But the paragraph goes on to make the broader findings that:

> "… The Awards were the result of the Arbitration that happened. There is not question to my mind that the Arbitration would have been completely different, and in ways strongly favourable to Nigeria, had the fact of bribery of Mrs Grace Taiga when the GSPA was being made been before the Tribunal. It would have brought in the issue whether the GSPA was procured by fraud, and as a result voidable. Discovery of the concealment would have completely altered the Tribunal's approach to the rest of Mr Michael Quinn's evidence."

Judgment [493] also expressed the finding that each irregularity "amounted to fraud by which the Awards were obtained".

16. P&ID contends that any analysis of causation in relation to "the payments to Ms Taiga in 2015-2016" (that is, the payments the subject of the Bribery Irregularity) would "inevitably have concluded that the Different Result Test was not satisfied".

17. P&ID justifies this contention as follows:

> "Nigeria never made any attempt to contact Ms Taiga during the arbitration; and it would be beyond fanciful to suggest that she might have spontaneously confessed to receiving bribes of her own motion, in circumstances where (i) she would likely face serious criminal sanctions, and (ii) it was common ground that she expected to receive a benefit from the proceeds of any award."

18. But P&ID does not challenge the findings at Judgment [404] and [495] (and see [509]) that the purpose of the payments was "to keep [Mrs Grace Taiga] 'on-side' and to buy her silence about the earlier bribery". In choosing to make the payments to her for that purpose, P&ID plainly did not have the confidence, now contended, that Ms Taiga would not otherwise confess. The payments were made, and she was silent as intended.

19. In its written argument P&ID also suggests that whether the Bribery Irregularity caused "a substantial injustice" is not addressed in the Judgment. P&ID refers to the sentence in Judgment [505] that reads "Section 68(2)(g) says simply that it is 'substantial injustice to the applicant' that must be shown".

20. However in the following sentence, I continued: "And this is substantial injustice that the serious irregularity "has caused or will cause"." At Judgment [508] I said:

> "508. … Perhaps there is much to be said for this aspect of these challenges to be left with the words of the section "serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause

substantial injustice to the applicant", keeping in mind the text of the DAC report to which the Privy Council referred."

21. Of the Documents Irregularity, P&ID accepts that "the Judgment purports to apply the law to the facts at [512]-[515]" but says that "the reasoning is, with respect, problematic in a number of ways". P&ID says that the question whether Nigeria's Internal Legal Documents were by their nature capable of giving P&ID a material advantage in the Arbitration is "not nearly so difficult a question" as the question of "what use P&ID actually made or might have made of the documents" and that the Different Result Test would have led to the conclusion "that none of Nigeria's Internal Legal Documents made it any easier for P&ID to obtain the Awards". In oral argument P&ID urges that the linkage between document and result was not explained.

22. In relation to Nigeria's Internal Legal Documents it is particularly material to keep in mind the reference to "the way in which [the award] was procured being contrary to public policy" in section 68(2)(g). But in any event, as P&ID accepts, the Judgment found that Nigeria's Internal Legal Documents enabled P&ID to track Nigeria's internal consideration of merits, strategy and settlement during the Arbitration, and to monitor Nigeria's position and awareness as the Arbitration continued, including whether Nigeria had become aware of the deception being practised by P&ID on the Tribunal and on Nigeria as a party before the Tribunal. The Judgment found that Nigeria's Internal Legal Documents showed to P&ID that Nigeria had no awareness that Mrs Grace Taiga had been bribed when the GSPA came about and that bribery or corrupt payments continued to buy her silence.

23. In written argument P&ID says that there is no causal link between knowledge of settlement strategy and the prospects of success if no settlement is reached. It also says that P&ID would know that Nigeria was unaware of payments to Mrs Taiga from the fact that Nigeria had not mentioned them. But one party's knowledge of an opposite party's settlement strategy, or degree of sureness through knowledge of what the opposite party does and does not know, is linked to whether the first party presses on for an award.

24. The detail of the contents of a number of the Documents, and the stage at which they were retained by P&ID, is included throughout the Judgment. The materiality of P&ID retaining them when it did is, I believe, apparent. P&ID at one point in its written argument says that Nigeria's Internal Legal Documents told P&ID nothing which it did not already know or would not "find out in the ordinary course". This is not borne out by the facts.

25. In oral argument P&ID highlighted the failings on the part of Nigeria in its own conduct of the Arbitration that are included within Judgment [397] to [400] (and see [587] to [588]). Given these failings, would the Awards have been the same regardless of the three Irregularities practised by P&ID? I believe the Judgment is clear that they would not have been the same; the three Irregularities made the difference: see in particular the references at paragraph 15 above, among others.

Proposed Ground 2

26. Proposed Ground 2 addresses section 73 of the Arbitration Act.

27. The proposed ground is expressed very generally. It contends that the Court "erred in law and/or reached a conclusion that was wrong" in holding that Nigeria had discharged its burden of showing that it could not with reasonable diligence have discovered the grounds for its objection during the Arbitration insofar as they included perjury and bribery. It contends that the Court's conclusion "lacked any logical and/or evidential basis" and/or "failed to take account of relevant matters" and/or "was in any event one which no reasonable Judge could have reached".

28. P&ID refers to Judgment [551], a paragraph that set out P&ID's own summary in its written closing argument at trial. The paragraph was reviewed in the course of Judgment [547] to [573]. The Judgment explained why the facts did not suggest bribery. P&ID has not gone on to show where the review and the conclusion reached "lacked any logical and/or evidential basis" or what relevant matters the Judgment "failed to take into account" or why the conclusion "was in any event one which no reasonable Judge could have reached". And no error in law is identified.

29. In its written argument for leave to appeal, P&ID asserts that it was "obvious that a bribery defence should be explored, whatever [Mr Quinn's Witness Statement] said". But this assertion does not show why the Judgment was wrong to reach a different conclusion. P&ID says that "[t]he EFCC was effectively directing Mr Malami to interview Ms Taiga" in 2016" and that had the advice of the EFCC been acted upon "it cannot seriously be disputed that Nigeria would have discovered the grounds for its s.68 challenge". However the facts do not support the proposition that there was a direction to interview anyone about bribery. The Judgment deal with this at [562] and [568]-[571].

30. When Mrs Grace Taiga was later interviewed in 2019, P&ID says that the Judgment does not identify what was revealed by Mrs Taiga's interview statement. But that was then and not 2016, and what is material in 2019 was that even that interview did not reveal the first of the bribes at the time of the GSPA: Judgment [570].

Proposed Ground 3

31. Proposed Ground 3 is framed by P&ID as follows:

> "In relation to the Perjury Irregularity, the Court wrongly held that Mr Quinn's witness statement contained an express representation capable of amounting to perjury. It was not open to the Court so to hold in circumstances where Nigeria had (correctly) not pleaded a case to that effect. Further and in any event, the witness statement on a proper reading did not contain any express representation that, or to the effect that, no bribery had occurred in relation to the GSPA. Correctly analysed, the case could only have been one of non-disclosure, which in the absence of any duty of disclosure was not capable of satisfying the requirements of s.68(2)(g)."

32. The case was in fact pleaded, at paragraph 61 of Nigeria's statement of case. There is also no doubt that P&ID knew the case it had to meet.

33. As the Judgment finds, in the witness statement Mr Michael Quinn stated that it was to "explain how the GSPA came about". Mr Michael Quinn knew that bribery of Mrs Grace Taiga was involved in bringing about the GSPA. However his explanation in the

witness statement of how the GSPA came about deliberately and dishonestly excluded that fact, rendering what he did state false.

34. I held there was an express representation that was false. P&ID says that that is an untenable conclusion "it was at most a case of deliberate exclusion, not positive misrepresentation". When a person represents that 5 things happened knowing that in fact 6 things happened there is a positive misrepresentation.

35. P&ID say that the reference by Mr Michael Quinn to "how the GSPA came about" was "nothing more than bland introductory wording". But I have found that not to be so, and P&ID have not shown why this is wrong: Judgment [254].

36. P&ID further argues:

> "As well as being wrong (or at least arguably wrong) as a matter of analysis, the Court's findings regarding the Perjury Irregularity are troubling in terms of their implications for litigation and arbitration generally. If a failure to mention a fact or defence that a party is aware of amounts to perjury (subject only to niceties of drafting) then mere introductory sentences or even headings are liable to create a duty of disclosure (indeed full and frank disclosure) which applies at all times, regardless of what is provided in the relevant rules or has been ordered by the Court or tribunal. The consequence is that a losing party which later discovers a fact or defence it did not rely on earlier is entitled to parse all the witness evidence adduced by the winning party and argue that the failure to mention the fact or defence amounted to perjury – even just because of an introductory statement or heading – and should lead to the judgment or award being set aside. It is submitted that that cannot be right; at all events, it raises an important question of principle and practice which deserves appellate consideration."

37. With respect, there is nothing in this. There is a world of difference between an intentional misrepresentation (even if in an introduction) designed to conceal the truth, and an introductory statement or heading that does not and is not intended to do that. The former should have serious implications in litigation and arbitration. It is not realistic to countenance that appellate consideration would see things otherwise.

"Other compelling reasons"

38. P&ID contends there are 5 "other compelling reasons" why an appeal should be heard. These are framed by P&ID as follows::

    (1) "The value of the proceedings, which is extraordinarily high even by the standards of the Commercial Court."

    (2) "The public importance arising from the fact that the Applicant is the Nigerian state."

    (3) "The important questions of public policy and arbitration practice raised at [578]-[591] and their implications for arbitrators and other participants in arbitral proceedings."

    (4) "The important questions of law raised by Grounds 1 and 3 above, in particular regarding (i) the proper approach to causation under s.68(2)(g)

> generally and in the context of improperly obtained documents in particular; (ii) when a witness statement which does not expressly mention a relevant fact or defence can nevertheless be considered to contain an express representation that such fact or defence does not exist; and (iii) whether or when a party to arbitration is under a duty to disclose adverse facts or defences on pain of perjury."

(5) "The potential consequences of the Judgment for Mr Burke KC and Mr Andrew, and the possible implications for any regulatory proceedings of any conclusions reached by the Court of Appeal as to whether or not their conduct was causative of the Awards."

39. As to (1), the value is high, but that is not a reason in itself for an appeal. As to (2), the fact that a state is a party is important, but that too is not a reason in itself for an appeal. As to (3), paragraphs [578]-[591] of the Judgment raise matters that I respectfully see as deserving reflection.

40. As to (4), I have already concluded that proposed Grounds (1) to (3) have no real prospect of success. On a close examination, the questions framed at (ii) and (iii) are not, with respect, the precise questions of law that the facts of this case engage: this case concerned an express, false, statement in Mr Michael Quinn's Witness Statement.

41. As to (5), I have addressed causation above. The Judgment has been referred to the regulators of Mr Burke KC and Mr Andrew (Judgment [593]). That course recognises that regulatory proceedings are a separate matter.

Conclusion

42. P&ID has had a fair trial and it has lost. For P&ID, Lord Wolfson KC said in oral argument that: "This really is, given what my Lord has said, the most important case about international arbitration to be heard in London for a very long time". I make no comment on that, because the question is whether leave to appeal should be granted. Of course, the case may attract consideration elsewhere, and I have, in terms, encouraged reflection. But that does not require an appeal. P&ID has no real prospect of success on the grounds of appeal proposed to be raised. The other reasons given are not compelling reasons for an appeal. The grant of leave to appeal has consequences, just as its refusal does. The grant of leave to appeal would not be just in all the circumstances.

Setting aside or remission to the Tribunal

43. By section 68(3) of the Arbitration Act:

> "The court shall not exercise its power to set aside …, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.".

44. P&ID cites *Merkin and Flannery*'s work on the 1996 Act at [68.18]:

> "Setting aside in our view really must be reserved for the most serious cases, where there is no real prospect of justice being done by the same tribunal upon reconsideration, and where the irregularity really goes to the root of the award (and where there is a real sense of the tribunal having behaved very badly indeed)."

45. In the present case the phrase in parentheses has, of course, no application. However the balance of the opinion of *Merkin & Flannery*, relied on by P&ID itself, well describes the present case. As the Judgment shows, this case is on any view one of the most serious. There is, in my judgment, no real prospect of justice being done by the Tribunal upon reconsideration. That is not, in this case, because of the behaviour of the Tribunal. It is because of the behaviour of P&ID.

46. The Tribunal has been caused to consider and reach and publish to the parties its substantive conclusions on liability and quantum on foundations that were false. This is a clear case where, using the terminology of *Merkin and Flannery*, "the irregularity really goes to the root of the award" P&ID has made that position worse still by persevering for many years since in its efforts to prevent the Awards being remitted. Things have gone so far and so deep that that I am satisfied that it would be inappropriate to remit the matters in question to the Tribunal for reconsideration.

47. It is clear now that the Awards should not have come into existence; they should be removed now.

Conclusions

48. I shall make an Order today that sets aside the Awards, in whole, and refuses leave to P&ID to appeal.

49. Other consequential matters, argued on 8 December or determined by me since on the written arguments, are also addressed in that Order.

50. I remain grateful to the legal teams on both sides for their assistance.