Neutral Citation Number: [2008] EWCA Civ 1283

Case No: B2/2008/0489

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON CIVIL JUSTICE CENTRE
HIS HONOUR JUDGE KNIGHT QC
6CL05967

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2008

Before :

LORD JUSTICE LAWS
LORD JUSTICE RICHARDS
and
LORD JUSTICE LAWRENCE COLLINS

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Between :

	THE MAYOR AND COMMONALTY & CITIZENS OF THE CITY OF LONDON	**Respondent/ Claimant**
	- and -	
	ASHOK SANCHETI	**Appellant/ Defendant**

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Mr Sudhanshu Swaroop (instructed by Morgan Walker) for the Appellant
Mr Oliver Radley-Gardner (instructed by **Comptroller & City Solicitor**) for the Respondent

Hearing date : November 11, 2008

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Judgment **Lord Justice Lawrence Collins:**

I Introduction: Bilateral investment treaties and international law

1. The number of arbitrations on the plane of public international law has greatly expanded in recent years as a result of the widespread use of bilateral investment treaties ("BITs") under which each Contracting State agrees in advance that the nationals of the other Contracting State will have a right of recourse to international arbitration against it. The method of arbitration agreed may be arbitration under the auspices of the International Center for Settlement of Investment Disputes ("ICSID") or it may be ad hoc arbitration,

or (as in the present case) either method.

2. This application concerns the relationship between international arbitration under a BIT and national court proceedings, and, in particular, whether *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225 was right to give a very extensive interpretation of the stay provisions of what is now section 9 of the Arbitration Act 1996 so to apply it to persons who were not parties to the arbitration agreement.

3. Typically under a BIT the investor is given direct standing to pursue his own claim against the State of the investment in respect of any "investment dispute". The arbitration provision in the BIT can amount to a standing offer to investors to arbitrate, and acceptance of this standing offer to arbitrate by an investor gives rise to a binding arbitration agreement between the investor on the one hand and the host state on the other. In the absence of a specific choice of law, the law to which the agreement to arbitrate between the investor and the host state is subject is international law: *Republic of Ecuador v Occidental Exploration and Production Company* [2005] EWCA Civ 1116, [2006] QB 432; *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2008] 2 Lloyd's Rep 421.

4. On January 6, 1995 the United Kingdom-India BIT (an Agreement dated March 14, 1994, between the United Kingdom and India for the Promotion and Protection of Investments) came into force. The recitals to the BIT state that the respective governments desire to create conditions favourable for fostering greater investment by investors of one State in the territory of the other State. Article 1 defines "investment" very widely to include immovable property (Article 1(b)(i)). By Article 3(2) investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. By Article 4(1) each Contracting Party shall accord to investments of investors of the other Contracting Party treatment which shall be not less favourable than that accorded either to investments of its own investors or to investments of investors of any third State. Any dispute between an investor of one Contracting Party and the other Contracting Party is, as far as possible, to be settled amicably through negotiations: Article 9(1). Failing amicable settlement or, international conciliation, the dispute may be referred to ICSID arbitration or ad hoc arbitration under the UNCITRAL Arbitration Rules: Article 9(3).

II The dispute

5. By a lease dated September 16, 1998 the Corporation of London let the 4th Floor, 124 New Bond Street, London W1 to ALC Press Inc., a Japanese company, for a term of years expiring on March 24, 2003. By clause 4(4)(e) the lessors and the lessee "submit to the non-exclusive jurisdiction of the competent courts of England and Wales", and the

lease was to be construed in accordance with English law.

6. On April 3, 2001 Mr Sancheti, a solicitor of Indian nationality, took an assignment of the unexpired term of the lease. Mr Sancheti established a solicitor's practice at the premises.

7. The lease enjoyed the protection of Part II of the Landlord and Tenant Act 1954 and came to an end by service of a notice served pursuant to section 25 of the 1954 Act. The lease came to an end on October 15, 2004, and Mr Sancheti continued to occupy until December 24, 2004, when Mr Sancheti vacated the premises. He is now in practice in the firm of Morgan Walker at 115A Chancery Lane.

8. At that time, there was an outstanding rent review under the Lease. Clause 1(1) of the lease provided for a rent review as at March 24, 2002. In default of agreement the increase in rent was to be determined by a surveyor appointed by agreement or in default by the President of the RCIS. In July 2002 the Corporation of London had put forward proposals for an increase in rent, but no agreement was reached.

9. In due course, Mr Last FRICS was appointed by the President of the RICS in January 2005 to determine the increased rent. On March 15, 2005 Mr Last determined the amount of the full rack rental as £13,950 per annum with effect from March 25, 2002.

10. The Corporation sought to recover the balance of the revised rent from Mr Sancheti, who refused to pay.

Claim under the BIT

11. On May 4, 2005 Mr Sancheti served a notice of disputes under the BIT on the Treasury Solicitor, seeking amicable negotiation of those disputes, and notifying the Treasury Solicitor of arbitration under Article 9(3)(c) (ad hoc arbitration under UNCITRAL rules) if settlement was not possible. In paragraph 8 of this letter Mr Sancheti complained of "blatant discrimination by different organs and functions of the United Kingdom in their dealing with me in my capacity as an Inward Investor". He complained of discrimination by the Home Office, the Law Society, and the judiciary. His complaints against the Corporation of London were of targeted harassment and racial discrimination, and misfeasance.

12. On September 16, 2006 Mr Sancheti wrote to the Treasury Solicitor giving notice of arbitration. Mr Sancheti's request for arbitration relied on Articles 3(2) and 4(1), and complained that he had been a victim of racial discrimination in relation to his application for leave to remain in the United Kingdom indefinitely and in relation to his practice as a

solicitor by the Law Society. His complaints in relation to the Corporation of London were that: (1) while occupying the premises as a tenant of the Corporation he had been the subject of targeted harassment and racial discrimination to the extent that he had had to stop his legal practice to attend to their unreasonable demands, and as a result he was finally forced to move to other premises; and (2) the Corporation of London exercised influence on the local courts to have specific chosen judges to attend to his litigation.

13. Mr Sancheti has appointed Justice Umesh Chandra Banerjee, retired judge of the Supreme Court of India, as his party- appointed arbitrator. The United Kingdom Government appointed Professor Vaughan Lowe, and he was subsequently replaced by Professor Michael Reisman. The Vice-President of the International Court of Justice appointed H.E. Dr. Francisco Rezek, a former member of the International Court of Justice, as Chairman of the arbitral tribunal.

14. I should add that on November 18, 2004 Mr Sancheti had written to the Lord Mayor of London seeking to invoke the BIT procedures and alleging unfair treatment by the Corporation of London of Mr Sancheti as its tenant, and in particular racial discrimination and manipulation of rents. But this was plainly ineffective. Mr Swaroop, for Mr Sancheti, sought to argue that the request for arbitration in the proceedings against the United Kingdom should be read in the light of this document and should be interpreted to include a claim for manipulation of rents, but there is no basis for this argument.

County Court proceedings

15. On January 9, 2006 the Corporation of London demanded payment from Mr Sancheti of increased rent with effect from March 25, 2002.

16. On August 9, 2006 the Corporation of London commenced proceedings against Mr Sancheti in the Central London County Court claiming the sum of £20,144.85 allegedly due by way of rent plus interest and one-half of Mr Last's fee (subject to deducting a deposit of £9,000 plus interest).

17. Mr Sancheti acknowledged service contesting jurisdiction and on August 22, 2006 issued an application for a stay of proceedings under section 9 of the Arbitration Act 1996 or the inherent jurisdiction of the court on the grounds that he had invoked the arbitration provisions in the BIT.

18. On December 8, 2006 Mr Sancheti offered to deposit the sum claimed in the County Court proceedings with the Corporation of London pending the determination of the dispute in the BIT arbitration. The Corporation of London did not respond to that offer.

19. Mr Sancheti's application for a stay was refused by District Judge Mathias on January 5, 2007 on the ground that the BIT "is not intended in any way to affect the relationship between an individual of a contracting State and a local authority of the other contracting State." Mr Sancheti then filed a defence on January 17, 2007 "without prejudice to [Mr Sancheti's] contention that the Court has no jurisdiction over the dispute by virtue of the provisions" of the BIT, and without prejudice to his appeal from the order of District Judge Mathias. His defence essentially was that the Corporation was not entitled to appoint Mr Last to determine the rent.

20. Mr Sancheti's appeal was dismissed by HH Judge Knight QC in a written judgment handed down on February 12, 2008.

21. The judge held that section 9 of the Arbitration Act 1996 "can have no application" to the case. There was a distinction between breaches of contract and breaches of the BIT such that the claims under Articles 3(2) and 4(1) of the BIT "do not relate to the issues arising under this contract in these proceedings" and "the claims under the BIT are to be regarded as separate and independent from the claims in these court proceedings." The Corporation of London was not a party to the arbitration agreement and any award made in Mr Sancheti's favour in the BIT arbitration would not bind the Corporation: para 16. Section 9 of the 1996 Act had no application; and it would not be right to grant a stay under the inherent jurisdiction: para 17.

22. On May 15, 2008 I refused permission to appeal, but directed that if the application were renewed for oral argument, this should be on notice to the Corporation of London and to the Treasury Solicitor, so that they could consider whether they should be represented. The Corporation of London has appeared on this application. The Treasury Solicitor wrote to the court on June 20, 2008 to say that the United Kingdom would not be represented at the renewed application. But the Treasury Solicitor's representative said that she had been instructed that (1) it was not alleged in the notice of arbitration that the Corporation of London had engaged in the manipulation of rents, nor did Mr Sancheti allege any breach of contract; (2) irrespective of whether the United Kingdom was responsible for the acts and omissions of the Corporation as a matter of public international law, a tribunal under the BIT could not exercise jurisdiction in respect of contractual claims against the Corporation, and jurisdiction would only be asserted over claims for breach of treaty where the facts or contentions alleged by the claimant would (if ultimately proven true) be capable of constituting a violation of the treaty.

III The proposed appeal

23. The argument on behalf of Mr Sancheti for a stay under section 9 of the Arbitration Act 1996 is as follows. First, section 9 does not require the claimant in the "legal proceedings" also to be party to the "arbitration agreement." Instead it requires that "the legal proceedings" must be brought "in respect of a matter which under the agreement is

to be referred to arbitration." That requirement is met in this case. One of the issues in the BIT arbitration is whether the Corporation of London has acted unfairly towards him as its tenant through, amongst other things, racial discrimination and the improper manipulation of rents. The effect of the judge's ruling is that there will now be two sets of proceedings, two sets of costs and a risk of inconsistent decisions.

24. Second, even if it is necessary to show that in some sense the Corporation of London is also party to the relevant arbitration agreement, then that requirement is met. References to "a party to an arbitration agreement include any person claiming under or through a party to the agreement" (section 82(2)). Accordingly the Corporation of London can be said to be "claiming under or through" the United Kingdom in circumstances where: (1) the United Kingdom is responsible for the acts of the Corporation of London as an emanation of the state and/or (2) the United Kingdom central government in practice controls the Corporation, in particular, via legislation: *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225. Alternatively, it was said that the Corporation of London was a party to the arbitration agreement because the BIT was entered into by the United Kingdom Government on behalf of the nation (which includes the Corporation of London).

25. In *Republic of Ecuador v. Occidental Exploration and Production Co* [2006] QB 432 it was held that the agreement to arbitrate under a BIT is subject to international law and that the rights created by the BIT are rights under international law. Consequently, the rules of attribution of international law relating to state responsibility are applicable in a dispute under the arbitration provisions of a BIT. A state is responsible for the acts of organs of the state "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the state, and whatever its character as an organ of the central government or of a territorial unit of the state:" Article 4 of the draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001; Brownlie, *Principles of Public International Law*, 7th ed 2008, pp. 445 *et seq*.

26. The arbitral tribunal in the BIT arbitration has jurisdiction to consider issues arising out of the contractual relationship between Mr Sancheti and the Corporation of London, and in particular whether the additional rent claimed by the Corporation must be paid by Mr Sancheti. The arbitration agreement gives the Arbitral Tribunal jurisdiction over "any dispute" between Mr Sancheti as an Indian investor and the United Kingdom Government (or any emanation of the state for which it is responsible) in relation to Mr Sancheti's investment in the lease, including contractual disputes between investor and state in relation to the investment: *SGS Soc Gen de Surveillance SA v. Philippines* (2004) 8 ICSID Rep 515, at paras 130-135.

27. Alternatively it is argued that a stay should be granted under the inherent jurisdiction. There is going to be an arbitration before an arbitral tribunal established under Article

9(3)(c) of the BIT. That arbitration will consider whether the Corporation of London discriminated against Mr Sancheti and manipulated his rent. It would be "good sense and litigation management" for the arbitral tribunal to consider the whole matter first: *Al Naimi v. Islamic Press Agency Inc.* [2000] 1 Lloyd's Rep. 522 at 525; Douglas (2003) 74 BYIL 151, 257.

IV Conclusions

28. Section 9 of the Arbitration Act 1996 provides:

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

29. I have no doubt that section 9 cannot apply if the parties to the court proceedings are not the parties (or persons claiming through or under a party: section 82(2)) to the arbitration agreement. It would be wholly inconsistent with the purpose and structure of the 1996 Act in general, and of section 9 in particular, if a stay could be obtained against a claimant who was not a party to the arbitration agreement. The fact that section 9 refers only a "party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration" does not obviate the need for the claimant also to be a party. It is not sufficient that there simply be "a matter" which is to be referred to arbitration.

30. Nor is it sufficient for there to be a mere connection between the claimant and another person who is bound by the arbitration agreement. For Mr Sancheti, reliance was placed on a case in which a subsidiary of a party to an arbitration agreement was held entitled to a stay because of an arbitration agreement with its parent company. In *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225, 231-232, Graham J held (in relation to the stay provisions of section 1 of the Arbitration Act 1975) that a wholly owned subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were "so closely related" that it could be said that the subsidiary was "claiming through or under" the parent.

31. In that case the plaintiffs were exclusive patent licensees of the second defendants under an agreement covering a base compound and containing an arbitration clause. The plaintiffs marketed the drug in various countries including the United Kingdom. The first defendants were a wholly owned subsidiary of the second defendants and performed the

function of selling and distributing the second defendant's products throughout the United Kingdom. The plaintiffs contended that their licence extended to a derivative product and brought the action against both defendants to restrain infringement. Both defendants applied for an order that all further proceedings in the action be stayed pursuant to section 1 of the Arbitration Act 1975, or under the inherent jurisdiction of the court on the ground that the plaintiffs and the defendants had, by the agreement between the plaintiffs and the second defendants, agreed to refer to arbitration the matter in respect of which the action was brought.

32. Graham J held that, in the exercise of the inherent jurisdiction, a stay of the action against both defendants ought to be granted. But he held also that there was no reason why the words "claiming through or under" in section 1 of the 1975 Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming a right to sell patented articles which it had obtained from and been ordered to sell by its parent. The defendants and their actions were so closely related on the facts that it would be right to hold that the subsidiary could establish it was within the purview of the arbitration clause, on the basis that it was claiming through or under the parent to do what in fact it was doing. He said (at 231):

> "… I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. … The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is 'claiming through or under' the parent to do what it is in fact doing whether ultimately held to be wrongful or not."

33. In Mustill and Boyd, *Commercial Arbitration* (2nd ed 1989) it is said (at 137) that the decision can perhaps be explained on the basis of agency, and otherwise it is difficult to see how the subsidiary could have taken any part in the arbitration, and elsewhere (at 472) the decision is described as "curious". In *Grupo Torras S.A. v Sheikh Fahad Mohammed Al-Sabah* [1995] 1 Lloyd's Rep. 374 Mance J (as he then was) said (at 451) that he did not find it easy to extract any principle from the reasoning.

34. *Roussel-Uclaf v GD Searle & Co Ltd* was a case in which the subsidiary was seeking a stay of court proceedings brought against it and claiming the benefit of an arbitration agreement to which it was not a party. Here Mr Sancheti seeks a stay of proceedings brought against him by the Corporation of London and thereby seeks to impose upon the Corporation the burden of an arbitration agreement to which it is not a party. But even without such a distinction I do not consider that *Roussel-Uclaf v GD Searle & Co Ltd* assists Mr Sancheti. In my judgment, it was wrongly decided on this point and should

not be followed. A stay under section 9 can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient.

35. In the present case the Corporation of London is not a party to the arbitration agreement. The relevant party is the United Kingdom Government. The fact that in certain circumstances a State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of its local authorities, does not make that local authority a party to the arbitration agreement.

36. But there is a further matter which would have been decisive, even if *Roussel-Uclaf v GD Searle & Co Ltd* had been correctly decided and even if it could have been extended in the way which Mr Sancheti propounded. As I have said, by clause 4(4)(e) of the lease the lessors and the lessee "submit to the non-exclusive jurisdiction of the competent courts of England and Wales." That amounts to a contractual agreement that if sued in England, the party being sued will not object to the jurisdiction of the English court. Consequently there is no possible basis for the view that the subject matter of the County Court proceedings is in respect of a matter which under the agreement is to be referred to arbitration. On the contrary it has been agreed that it may be submitted to the English court.

37. It follows that none of the elaborate arguments presented to this court on the distinction between contractual claims and claims for breach of treaty in BIT arbitrations under the auspices of ICSID arise for consideration or decision: see especially *SGS Soc Gen de Surveillance SA v. Pakistan* (2003) 8 ICSID Rep 384, at para 147; *Compania de Aguas del Aconquija S.A. v Vivendi Universal*, Decision on Annulment (2002) 6 ICSID Rep 340, at paras 95-96; *SGS Soc Gen de Surveillance SA v. Philippines* (2004) 8 ICSID Rep 515, at paras 130-135; Douglas, *The Hybrid Foundations of Investment Treaty Arbitration* in (2003) 74 BYIL 151, 256-7 and 285; McLachlan, Shore and Weiniger, *International Investment Arbitration* (2007), chap 4.

38. Nor is there any criticism to be made of the judge's exercise of his discretion not to order a stay under the inherent jurisdiction. It is true that he did not elaborate on the point, but it is plain that he did not consider there was a sufficient nexus between the claims in the County Court under the lease and the very vague claims made in the arbitration about the conduct of the Corporation. No elaboration was required, and there is no basis for interfering with the exercise of the discretion.

39. It follows that I do not accept Mr Sancheti's criticisms of the judgment. This is an application for permission to bring a second appeal, with appeal to follow if permission granted. Since the application involved a point of some general importance, namely whether *Roussel-Uclaf v GD Searle & Co Ltd* 1978] 1 Lloyd's Rep 225 was correctly decided on the ground of what is now section 9 of the 1996 Act, I would give

permission to appeal, and dismiss the appeal.

Lord Justice Richards:

40. I agree.

Lord Justice Laws:

41. For the reasons given by Lawrence Collins LJ, I would grant permission but dismiss the appeal.