Case No: A4/2018/1309

Neutral Citation Number: [2018] EWCA Civ 1896
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Robin Knowles
CL-2014-000070

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 August 2018

Before:

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE LEGGATT

- -

Between:

(1) ANATOLIE STATI	**Appellants**
(2) GABRIEL STATI	
(3) ASCOM GROUP S.A.	
(4) TERRA RAF TRANS TRAIDING LIMITED	
- and -	
THE REPUBLIC OF KAZAKHSTAN	**Respondent**

- -
- -

David Foxton QC, Thomas Sprange QC and Kabir Bhalla (instructed by **King & Spalding International LLP**) for the **Appellants**
Joe Smouha QC, Christopher Harris and Dominic Kennelly (instructed by **Herbert Smith Freehills LLP**) for the **Respondent**

Hearing date: 31 July 2018

- -

Judgment

Lord Justice David Richards:

Introduction

1. This appeal is against an order made by Robin Knowles J on 21 May 2018 whereby he set aside a notice of discontinuance filed by the Appellants as claimants in proceedings under section 101 of the Arbitration Act 1996 to enforce a New York Convention award. He directed that the allegations made by the Respondent of fraud by the Appellants in respect of the award should proceed to trial.

2. The award was dated 19 December 2013. The Respondent (the State) was ordered to pay damages in excess of US$500 million to the Appellants (the claimants). The arbitration had been instituted pursuant to the Energy Charter Treaty and had its seat in Sweden. The arbitral tribunal found that the claimants' companies in Kazakhstan and their businesses had been the subject of "a string of measures of a coordinated harassment by various institutions" of the State, including tax assessments and criminal penalties leading ultimately to the seizure of the claimants' investments. The tribunal held that this amounted to a breach of the obligation to treat investors fairly and equitably as required by the Treaty.

3. The damages awarded to the claimants by the tribunal included a sum of US$199 million in respect of the loss of a nearly-completed liquified petroleum gas plant near Borankol in Kazakhstan. The State's allegations of fraud relate to the evidence of the value of this plant adduced before the tribunal by the claimants.

4. The award is an "arbitral award" for the purposes of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and steps have been taken by the claimants to enforce the award in numerous jurisdictions, including the United States, Belgium, the Netherlands, Luxembourg, Italy and Sweden.

Procedural history

5. In February 2014, the claimants issued an arbitration claim form in the Commercial Court seeking permission to enforce the award pursuant to section 101(2) of the Arbitration Act 1996 (the 1996 Act) and judgment in the terms of the award pursuant to section 101(3). Permission to enforce the award was granted by Burton J by an order dated 28 February 2014, which, as provided by CPR 62.18 and is usually the case, was made without notice to the State. In accordance with CPR 62.18, the order was served on the State which had a period of 21 days in which to apply to set aside the order. The order provided, again as required, that the award must not be enforced until the end of that period of 21 days "or until any application made by the Defendant within that 21-day period has been finally disposed of".

6. The order (the enforcement order) was served on the State in January 2015 and the State issued an application to set it aside. Permission to enforce the award therefore, by the terms of the order, continued to be suspended and, as a result of later events detailed below, it has never come into effect and will not do so in the future.

7. The State's application was based on a number of grounds under sections 102 and 103 of the 1996 Act which it is unnecessary to detail. In August 2015, the State applied for

permission to amend its application to add a further ground, that enforcement would be contrary to public policy under section 103(3) because the award had, in so far as it relates to the liquified petroleum gas plant, been obtained by fraud. This allegation was made following the disclosure of documents from a related arbitration.

8. In the meantime, in March 2014, the State had commenced proceedings in Sweden, as the seat of the arbitration, to set aside the award on a variety of grounds. In October 2015, the State added its allegations of fraud in relation to the award. The application was heard by the Svea Court of Appeal (the Swedish court) over 13 days in September-October 2016. Judgment was given in December 2016, refusing the application to set aside the award.

9. The Swedish court did not determine the truth or otherwise of the fraud allegations. It is sufficient for the purposes of this judgment to say that the court held that they did not provide a ground in Swedish law for setting aside the award. It is not that under Swedish law fraud can never provide grounds for setting aside an award but that the allegedly false evidence must either have been directly determinative of the outcome of the arbitration or, if it had an indirect influence, it must be obvious that it had been of decisive importance for the outcome. In October 2017, the Swedish Supreme Court rejected the State's application to quash the Swedish court's decision and no further appeal is possible.

10. The English enforcement proceedings were stayed pending determination of the State's application to set aside the award in Sweden. Following the end of the stay, Knowles J heard the State's application to amend the grounds of its application to set aside the enforcement order.

11. In his judgment given on 6 June 2017 ([2017] EWHC 1348 (Comm); [2017] 2 Lloyd's Rep 201), Knowles J gave permission to the State to amend its application to include the fraud allegations. He held that the twin tests established by this court in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] EWCA Civ 1401; [2000] 1 QB 288 for permitting a party to pursue an allegation that a New York Convention award had been obtained by fraud were satisfied: the evidence to establish the fraud was not available to the party alleging the fraud at the time of the arbitration hearing and there was a sufficient prima facie case of fraud to overcome the extreme caution of the court in setting aside an award on grounds of public policy. He rejected the claimants' submission that the Swedish court's decision gave rise to an issue estoppel precluding the State from advancing its fraud case in the English proceedings. The Swedish court had not made any findings of fact as regards the fraud allegations and, if they were established as a matter of fact, it was for the English court as the enforcing court to decide the application of English public policy. He gave detailed case management directions to which it will be necessary to refer later in this judgment. The claimants applied to the Court of Appeal for permission to appeal, but it was refused on the ground that the application was made out of time.

12. The English proceedings thereafter continued in accordance with those directions, with both parties serving pleadings as directed and taking other steps. By consent, the directions were varied on 30 January 2018. On 22 February 2018, the State served its disclosure list and the claimants requested an extension of time to 1 March 2018 to provide standard disclosure, to which the State agreed.

13. On 26 February 2018, the claimants served notice of discontinuance of the enforcement proceedings under CPR 38.2. On 2 March 2018, the State issued an application seeking case management directions with respect to its claim that the award was obtained by fraud or, alternatively, for the notice of discontinuance to be set aside. The application was framed in this way to reflect the State's position that its "fraud claim" was an independent, free-standing claim that was unaffected by the claimants' notice of discontinuance. It sought in the alternative to set aside the notice of discontinuance, if it were wrong on its first point.

14. The State's application was heard by Knowles J on 26 March 2018 and he handed down judgment on 11 May 2018. By his order dated 21 May 2018, the judge set aside the notice of discontinuance and gave further case management directions for the State's fraud allegations, with a view to a trial to commence on 31 October 2018 with an 8-day estimate.

15. The present appeal is against the order of 21 May 2018, with permission granted on limited grounds by Leggatt LJ. The State has served a respondent's notice seeking to uphold the order on additional grounds.

Issues on the appeal

16. The issues arising on this appeal may be summarised as follows. First, does the State's "fraud claim" stand as a claim independent of the enforcement proceedings brought by the claimants, so that the notice of discontinuance does not apply to them? This is a point raised by the State in its respondent's notice and is described as its primary position. If that is well-founded, it provides a complete answer to the appeal. Second, assuming the State fails on the first point, what is the proper approach to the exercise of the power under CPR 38.4 to set aside a notice of discontinuance? By ground 3 of their grounds of appeal, the claimants challenge the approach adopted by the judge. Third, was the judge right to hold that the State had a legitimate interest in the pursuit in the English courts of its fraud allegations, notwithstanding that the award could not now or at any time in the future be enforced in this jurisdiction on account of undertakings offered by the claimants, and, if he was wrong, does that provide grounds for setting aside his order? This forms grounds 1 and 2 of the claimants' grounds of appeal. Fourth, is there a public interest in determining at a trial whether, as the State puts it, the claimants "have committed a fraud on the English courts" in seeking permission to enforce an award which, the State says, was obtained by fraud? The judge did not rely on any such public interest in reaching his decision, and this is a further ground raised by the State in its respondent's notice.

Is the fraud claim an independent claim?

17. The judge rejected the State's submission that its fraud claim was independent of the enforcement proceedings and so unaffected by the claimants' notice of discontinuance. The judge said:

> "31. The freestanding claims to which the State refers are claims for declarations. There is also a claim for indemnity costs that the Court should, says the State, take into account.

32. As to the first, it is true that the State by its statement of case asks the Court to make declarations that the Award was obtained by fraud. But is this Court in fact engaged with more than a defence to the Statis' claim for recognition and enforcement of the Award? It is hard to see that this Court would have been an appropriate forum in which to seek these declarations if recognition and enforcement were not sought here or in prospect. This Court was not chosen as the court of the seat. The parties and the dispute that went to arbitration, and the arbitration itself, have no material connection with this jurisdiction other than through the Statis' claim for recognition and enforcement of the Award.

33. However the State argues that the effect of the notice of discontinuance in this particular case turns on its own particular features. Paragraph 2 of the order dated 27 June 2017 for the trial gives effect, it is argued, to the reality in this particular case when it provides for "[the State's] claim that the Award was obtained by fraud shall proceed to trial as if commenced under CPR Part 7 …".

34. The claims for declarations by the State are not, it is argued, dependent for their existence on the claim by the Statis for enforcement. The State argues that the case has enough formality to enable the claims for declarations to survive the discontinuance of the claim for enforcement.

35. The State adds, by reference to the definition of counterclaim under the CPR, and to CPR 20.2 and 20.3, and without suggesting that the point need be decided in the present case, that as award debtor it should be treated as in substance the claimant.

36. In my judgment Mr Sprange QC for the Statis meets these arguments successfully. He too starts from the place of the real question being who is the claimant and who is the defendant. He points out that within the rules under which the claim was issued the Statis are the claimants and the State is the defendant. I consider that he is correct in submitting that paragraph 2 of the order of 27 June 2017 simply sets out the framework under which the parties' contentions would be set out.

37. In Gater Assets Ltd v Nak Naftogaz Ukrainiy [2007] EWCA Civ 988; [2007] 2 Lloyd's 588 at [78] Rix LJ, whilst carefully discussing the exercise of discretion in the context of security for costs, noted that in an issue ordered to be tried in connection with an application to set aside an enforcement order under CPR Part 62 "the award debtor might well be defined as the claimant, effective and formal". Reading the discussion as a whole, I do not consider that Rix LJ was

> examining whether the award debtor was to be treated as a claimant for all purposes under the CPR. I do not consider it a reliable course to transpose the discussion there to the different context under discussion here.
>
> 38. As to the claim for indemnity costs, I am quite clear that in the present case it is not necessary to have a trial of the question whether the Award was obtained by fraud in order to decide a question about indemnity costs. Nor would it be appropriate by reference to the overriding objective. The Court already has ample material with which to decide questions of costs alone."

18. I agree with the judge, for the reasons he gave.

19. I have earlier set out the procedural history. For present purposes, the salient points start with the State's application dated 7 April 2015 to set aside the enforcement order, which set out a number of grounds for doing so. In August 2015, the State applied to amend that application by adding the fraud allegations as an additional ground for setting aside the order. Because of the stay imposed pending determination of the State's application in Sweden to set aside the award, the application to amend was not heard until 2017.

20. By paragraph 1 of his order dated 27 June 2017, Knowles J gave permission for the amendment. Paragraph 2 of the order provided that "The Defendant's claim that the Award was obtained by fraud shall proceed to trial *as if commenced under CPR Part 7*, in accordance with the following directions" (emphasis added). The State submits that paragraph 2, and in particular the italicised words, constituted the fraud claim an independent claim or a counterclaim. It submits that, consistently with that, the judge directed it to serve points of claim. In its points of claim, it sought, as the judge said in the passage from his judgment quoted above, declarations and an order for costs.

21. Like the judge, I consider that the terms of paragraph 2 of the order were doing no more than giving case management directions for the disposal of the allegation of fraud made by the State which, if well-founded, would arguably provide a basis in English public policy for not enforcing the award in this jurisdiction. Not only was that the issue raised by the amendment to the State's application to set aside the enforcement order, but it was the effect of the declarations sought by the State in its points of claim:

> "Kazahstan is entitled and hereby claims a declaration that:
>
> (1) the Award as a whole was obtained by fraud with the result that the enforcement of any part of the Award in this jurisdiction would be contrary to English public policy; alternatively
>
> (2) the Award was obtained in part by fraud, such that the enforcement of any part of the Award in this jurisdiction would be contrary to English public policy; alternatively

(3) the Award was obtained in part by fraud, such that the enforcement of that part of the Award would be contrary to English public policy."

22. It is a commonplace for a court to direct the trial of an issue within existing proceedings, naming the party on whom the burden to establish the relevant point lies as the claimant on the issue, whether it is a claimant or a defendant in the proceedings. The effect of such an order is not to constitute the issue a separate, free-standing set of proceedings. The use of the language in paragraph 2 of "as if commenced under CPR Part 7" was doing no more than applying to the trial of this issue the procedural framework in the CPR applicable to Part 7 proceedings. Given the nature of the allegations being made by the State, it was appropriate to use a more formal procedure involving statements of case, standard disclosure and so on than would normally be required. It is to be noted that the order dated 27 June 2017 is headed in the existing proceedings with their case number, as were all subsequent orders, applications and pleadings, and that it starts with the recital "Upon the Defendant's application dated 7 April 2015 (the "Application") to set aside the Order of Mr Justice Burton dated 28 February 2014)".

23. If it had been intended to create a separate proceeding or a counterclaim, clear words would have been required and would have been used. Like the judge, I do not consider that the fraud claim was ever anything other than a defence to the enforcement claim.

24. It follows that the judge was right to proceed to consider the State's application as one to set aside the notice of discontinuance.

The correct approach to applications under CPR 38.4

25. CPR 38 makes provision for the discontinuance of claims. Rule 38.1 provides that the rules in Part 38 "set out the procedure by which a claimant may discontinue a claim or part of a claim". Under the heading "Right to discontinue claim", rule 38.2(1) states that a claimant "may discontinue all or part of a claim at any time", while rule 38.3 sets out the procedure to be adopted, which requires the filing and service of a notice of discontinuance. The right of a claimant to discontinue is subject to the need to obtain the permission of the court in certain cases not relevant to the present appeal and the right under rule 38.4(1) of a defendant to apply to have the notice of discontinuance set aside. Such application must be made within 28 days after service of the notice of discontinuance: rule 38.4(2). There is no separate provision dealing with the court's consideration of such an application, but rule 38.4(1) is expressed in general terms:

> "Where the claimant discontinues under rule 38.2(1) the defendant may apply to have the notice of discontinuance set aside."

26. Before the introduction of the CPR, the Rules of the Supreme Court entitled a claimant to discontinue proceedings but made no provision for setting aside a discontinuance. On the basis of the court's inherent jurisdiction to prevent the abuse of its own process, the House of Lords held in *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 that if a discontinuance amounted to an abuse of process, the court could set it aside. The claimants submitted to the judge, and repeated the submission

to this court, that under the CPR a claimant had a substantive entitlement to discontinue proceedings, with which the court would not interfere unless it were shown that discontinuance was an abuse of process or was made to gain a collateral advantage or involved some other substantive vice.

27. Much the same submission had been made to Henderson J in *The High Commissioner for Pakistan v National Westminster Bank plc* [2015] EWHC 55 (Ch). Henderson J rejected the submission at [46]:

> "I am unable to accept this submission. The CPR formed an entirely new procedural code (see rule 1.1(1)), the provisions of which should as a matter of principle be construed in their new context, and not by reference to previous case law on provisions in the superseded RSC. In some areas, of course, cases on the old rules may continue to have strong persuasive authority, but the primary obligation of the court is to construe any rule in the CPR, and exercise any power given to it by the Rules, so as to further the overriding objective. Thus I consider that the court should approach an application to set aside a notice of discontinuance under rule 38.4(1) on the basis that the court has a discretion which it should exercise with the aim of giving effect to the overriding objective of dealing with the case justly and at proportionate cost. If the facts disclose an abuse of the court's process, that will no doubt continue to be a powerful factor in favour of granting the application; but it would in my view be wrong to treat abuse of process as either a necessary or an exclusive criterion which has to be satisfied if the application is to succeed."

28. Henderson J cited the similar view expressed by Aikens J in *Sheltam Rail Co Ltd v Mirambo Holdings Ltd* [2008] EWHC 829 (Comm) who said at [34] that "The wording of the rule does not impose any particular test that has to be satisfied before the court will set aside a notice of discontinuance that has been issued under rule 38.2 without the court's permission" and at [35] that, in addition to any question of abuse of process, a court exercising its discretion under rule 38.4 "must also be entitled to consider both the circumstances in which the notice of discontinuance was issued and what the claimant is attempting to achieve by issuing and serving the notice".

29. The approach of Henderson J has been followed in a number of first instance cases: *Singh v The Charity Commission* [2016] EWHC B33 (Ch), *Mabb v English* [2017] EWHC 3616 (QB); [2018] 1 Costs LR 1 (May J) (where it was common ground) and *Walton International Ltd v Verweij Fashion BV* [2018] EWHC 1608 (Ch) (Arnold J). In his judgment in *Singh*, HH Judge Simon Barker QC (sitting as a Judge of the High Court) said at [49]:

> "As to the general principles relating to permission to discontinue proceedings to be derived from the authorities cited by the parties' counsel in so far as relevant to the circumstances of this case, I bear in mind that (1) the rules do not prescribe any particular test for permitting discontinuance or, for that matter, for setting aside a notice of discontinuance; (2) a

> claimant's desire to bring proceedings to an end where there is no counterclaim should be respected, not least because a claimant cannot be compelled to prosecute a claim; (3) the court has an inherent discretion including as to the timing of any discontinuance; (4) as with any judicial discretion, it may only be exercised in accordance with principle but is otherwise unfettered; (5) the court's objective, both substantively and procedurally, is to achieve a just result according to law and to limit costs to those proportionate to the case; (6) the consideration required of the court is of all the circumstances and not merely those concerning only one party or only some of the parties; (7) when considering all the circumstances, conduct, particularly that aimed at abusing or frustrating the court's process or securing an unjust tactical advantage, is relevant and may well be important, but it is by no means conclusive; and, (8) when considering all the circumstances, the court should also have in mind its realistic options, which may include imposing conditions while the proceedings remain extant."

30. The judge accepted the approach adopted by Aikens J and Henderson J. He said at [44] that if there is an application to set aside a notice of discontinuance, the court will examine what the notice is attempting to achieve and the reason for it. He continued:

> "45. It is to be welcomed that the overriding objective will apply when a party wishes to end a case, as at any other stage in a case. It is also clear that the matter requires consideration of what is fair to all parties to the case, and not just to the party that wishes to discontinue. The CPR provides that the overriding objective of dealing with a case justly and at proportionate cost "includes, so far as practicable" ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the Court's resources. The latter reference to the Court's resources requires the Court to consider the impact, at least generally, on other parties in other cases.
>
> 46. Consistently, where the CPR allows a claimant to serve a notice of discontinuance that does not signify that the claimant has a right to discontinue. It is simply a procedural first step which will allow the matter to be judicially considered in the event that another party requires that. The procedural first step offers efficiency in that, under the CPR, specified consequences will hold should no application to set aside be made."

31. In my judgment, the discretion conferred by CPR 38.4 is not confined to cases of abuse of process or collateral tactical advantage. It is a discretion expressed in general, unqualified terms and there is no ground for limiting it by reference to implied gateways or restrictions. Of course, it is a judicial discretion to be exercised by reference to the relevant circumstances of the particular case and the application of consistent principles. While no statement can be treated as comprehensive, I regard

HH Judge Simon Barker QC's statement of relevant considerations cited above as helpful.

32. I would therefore reject the claimants' challenge to the judge's decision on this point. I think there is some substance in the criticism of the judge's characterisation of a notice of discontinuance as "simply a procedural first step". A claimant is entitled to serve a notice of discontinuance which will have the effect of discontinuing a claim without any order, unless a defendant applies to set the notice aside, in which case the burden lies on the defendant to satisfy the court that it should be set aside.

Does the State have a legitimate interest in a continuation of the proceedings?

33. The principal challenge made by the claimants to the judge's order was that he was wrong to conclude that the State had a legitimate interest in seeing the proceedings continue, once the threat of any possible enforcement of the award in this jurisdiction was removed, as it was by the notice of discontinuance and by the undertaking offered by the claimants, and expanded by them at the hearing before the judge, not to seek to enforce the award in this jurisdiction at any time in the future. At the hearing of the appeal, the claimants renewed an offer made at the hearing below to consent to the enforcement order being formally set aside. This would meet the concern of the State that the claimants might attempt to use the existence of the enforcement order in applications for permission to enforce the award in other jurisdictions, albeit that it had been deprived of all effect.

34. The legal framework against which Mr Foxton QC on behalf of the claimants set this challenge is that created by the New York Convention and those parts of the 1996 Act that give effect to it in the United Kingdom.

35. So far as relevant to the present appeal, the purpose of the Convention was to simplify and standardise the enforcement of arbitration awards in countries other than the seat of the arbitration, and to prevent discrimination between the enforcement of foreign and domestic awards. The Convention draws important distinctions between proceedings in the country of the seat of the arbitration and enforcement proceedings elsewhere, and corresponding distinctions between the roles of the courts in the country of the seat and courts elsewhere.

36. Arbitrations are subject to control by the laws and courts of the country of their seat. The Convention recognises that the validity of an award is primarily a matter for the country of the arbitration's seat (the curial law), and that is the case even though the issue referred to arbitration is to be determined in accordance with the laws of another country (see *C v D* [2007] EWCA Civ 1282; [2008] Bus LR 843). Article V of the Convention sets out the only grounds on which enforcement of a foreign award may be refused. These include in art V(1)(e) that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". There is no similar ground based on an order of the courts or other competent authority of any other country setting aside, or purporting to set aside, the award. Article VI provides that, if an application to set aside an award is made in the country of the arbitration's seat, the courts of other countries may adjourn enforcement proceedings. This is what in effect occurred when the enforcement proceedings in the present case were stayed pending determination of the State's challenge to the award before the Swedish court.

37. The role of the courts of all other countries is limited to enforcement of the award. Enforcement proceedings are, in the words of Rix LJ in *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988; [2008] Bus LR 388 at [72] "clearly intended to be, in the absence of a challenge by the award debtor, highly summary and essentially quasi-administrative proceedings". The grounds on which enforcement may be refused are prescribed by art V. Apart from the specific grounds stated in art V(1), art V(2)(b) provides that enforcement may be refused if the court or other competent authority finds that "The recognition or enforcement of the award would be contrary to the public policy of that country". This safety valve, commonly found in international conventions and other instruments for the recognition and enforcement of foreign proceedings and orders, is to be used only with "extreme caution": *Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v Ras Al Khaimah National Oil Co* [1987] 2 Lloyd's Rep 246 at 254; *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2015] EWCA Civ 1144; [2016] 1 Lloyd's Rep 5 at [191].

38. The role of the English court, under the provisions of the 1996 Act giving effect to the New York Convention, is limited to the issue of enforcement of the relevant award in this jurisdiction. For that purpose, the court must determine the grounds on which a respondent seeks to resist enforcement and to set aside the enforcement order. If fraud in obtaining the whole or part of the award is alleged and established, there is clearly a strong case for a refusal to enforce the award on grounds of English public policy, irrespective of whether it provides a ground for setting aside the award in the country of the seat of the arbitration. Public policy is a matter for the courts of each country to decide for their own jurisdiction. In the context of art V(2) of the Convention it is the local concern of each country: see *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855; [2014] 1 QB 458. So, in this case, Knowles J was not deterred, when giving permission in 2017 to amend the State's challenge to the enforcement order in this country, by the decision of the Swedish court to reject on legal grounds the State's challenge to the validity of the award on the basis of the same fraud allegations. It represented in this respect a potential difference to questions of public policy between England and Sweden.

39. Once the claimants discontinued and undertook not to seek to enforce the award in this jurisdiction, Mr Foxton submitted, there was no longer a substantive role for the English court and the State ceased to have a legitimate purpose in pursuing its defence of the proceedings.

40. The absence of a legitimate purpose was the subject of submissions before the judge, although they have been developed to a greater extent before us. The judge held that the State did have a legitimate purpose in a continuation of the proceedings. The State's case before the judge, as summarised by him in his judgment at [48]-[50], appears to have had two main elements.

41. First, it was the claimants who elected to enforce the award and thereby put the State to substantial expense in proving its fraud allegations. The proceedings were at an advanced stage. The court had been led to make the enforcement order by the claimants and "the question whether that order should be set aside on the merits remains. Once (as here) a prima facie case of fraud is established against an award creditor then it should not be allowed to disengage".

42. Second, the question of whether the award was obtained by fraud remains a live issue between the parties because the claimants are pursuing enforcement proceedings in other countries. A judgment of the English court with detailed findings, after disclosure and full evidence at trial, will assist the courts in other countries where the claimants seek to enforce the award.

43. Evidence was put before the judge as to enforcement proceedings in other countries and whether findings made by the English court on the fraud allegations would assist the courts in those countries. On the basis of that evidence, he found that "it is possible that it will be of assistance and that some weight or evidential value will be given in Belgium, Luxembourg and The Netherlands" and that "it is possible that an English judgment following a trial here would be available before proceedings before the US courts are complete and that it would be of assistance and given some weight".

44. The grounds on which the judge held that the proceedings should continue so as to determine the State's fraud allegations are set out in his judgment at [61]-[67].

45. Before identifying those grounds, it is important to note that the judge did not accept the claimants' explanations for filing the notice of discontinuance, namely that they did not have the resources to continue with the proceedings and that their enforcement proceedings elsewhere would attach sufficient assets for the payment of the award. The judge found that "the real reason for the notice of discontinuance is that the [claimants] do not wish to take the risk that the trial may lead to findings against them and in favour of the state". He was not, however, prepared to find that the real reason was that the claimants have no answer to the allegations.

46. The first ground for the judge's decision reflected the first submission made by the State. At [61] the judge said:

> "The question of whether the English Court would enforce the Award, and allow a judgment of the English Court to be entered in the terms of the Award, was first put to it by the Statis. It remains a question that the State would wish to be answered. The State has a legitimate interest in seeking to have the order of Burton J set aside on the merits."

47. The second ground reflected the judge's findings as to the possible utility of a judgment of the English court to the courts in other countries. He said at [63]:

> "In the context of a global multi-jurisdiction enforcement exercise by the Statis I respectfully take the view that it will not be without use to the Courts of at least some other countries to have a concluded answer on the question of fraud described in my judgment of 6 June 2017, and therefore on the question whether the English Court would enforce the Award."

48. While acknowledging that an English judgment would not have the status of a judgment of the court of the seat of the arbitration, it would be "an answer from a court of a jurisdiction to which all parties have submitted". He added that "the important, and relevant, thing is not an answer to a question of English public policy but an answer to the question whether there was the fraud described". A determination

of that question later in 2018 by the English court "with the benefit of disclosure and after hearing full evidence at trial…can only assist the interests of finality".

49. The judge took into account that, by his order in June 2017, he had permitted the allegations to be raised and had given directions for a trial after being satisfied that the allegations were far from speculative. He took into account that the parties had already invested substantially in the proceedings and had reached a point of near readiness for disclosure, all of which would be wasted by discontinuance. He also took into account that the "resources to be committed ahead by the court itself are reasonable, and there is good reason to make the most of the resources of the court that have already been used". The arrangements for trial would ensure that the matter would be dealt with fairly and expeditiously and "Progression to trial is not disproportionate given the very substantial sums involved and the importance of the case, to all parties".

50. As I have earlier mentioned, the claimants' challenge is focussed on the judge's decision that the State had a legitimate interest in a continuation of the proceedings. Mr Foxton submitted that, because the English court is involved only as an enforcement court, its role ceases once enforcement is no longer pursued and there is no possibility of future enforcement. The only issue for the English court in the present proceedings was to determine whether, if the State's fraud allegations were established on the facts, it would be contrary to English public policy to permit enforcement in this jurisdiction. That issue is not, and cannot, now be a live issue. Under the scheme of the New York Convention and the 1996 Act, the English court has no role outside domestic enforcement and in particular has no role in ruling generally on the validity of the award. The validity of the award is the exclusive province of the law and courts of the seat of the arbitration, subject only to the engagement of the courts of countries where enforcement is sought in determining issues, including local public policy, raised under art V of the Convention.

51. This submission was put in two ways. First, Mr Foxton put it as, in effect, an absolute bar to the continuation of the present proceedings. While not saying that the court lacked jurisdiction in the matter, it was a "higher order" factor that would always tell conclusively against a continuation of proceedings in these circumstances. It followed that, even if it were established that a decision of the English court would create an issue estoppel in countries where enforcement was still sought or even if the trial was about to start or was in progress, the court would not allow the proceedings to continue. Alternatively, Mr Foxton submitted that, on the facts of this case, the judge was wrong to conclude that the State had a legitimate interest in the continuation of the proceedings and that, without a legitimate interest on its part, the discretion could only be exercised to permit the discontinuance of the proceedings to stand.

52. In my judgment, the starting point has to be the purpose of the present proceedings and the purpose of the case raised by the State. The only purpose of the claimants' proceedings was to enforce the award against assets of the State located within the jurisdiction of the English court. The only purpose of the case of fraud raised by the State is to defend those proceedings and set aside the enforcement order. There is otherwise no connection with this jurisdiction. The parties are foreign, their dispute relates to investments in Kazakhstan, the arbitration was held in Sweden and is subject to the supervision of the Swedish courts in accordance with Swedish law, and the law applicable to the parties' dispute is not English law.

53. The jurisdiction of the English courts in civil matters is invoked for the purpose, and only for the purpose, of obtaining relief in the form of orders of the court, including where appropriate declarations. It is not the function of our courts to hear cases which have no relevant result. The purpose of the claimants in the present proceedings was only to enforce the award. That purpose has ceased. The purpose of the fraud case raised by the State was limited to defeating the claimants' attempt to enforce the award in this jurisdiction. That is clear from the declarations sought by the State and set out in paragraph 50 of its points of claim, quoted earlier in this judgment. Each declaration is in terms directed to establishing that enforcement of the whole or part of the award "in this jurisdiction would be contrary to English public policy". Paragraph 2 of the points of claim states that it is the State's case that the award was obtained by fraud and that "Consequently, enforcement of the Award (in whole or in part) would be contrary to English public policy". Issues of English public policy no longer have any relevance between the parties. As the judge recognised, the purpose of continuing the proceedings is not to give a ruling on English public policy, but to make findings of fact. But, those findings of fact lead to no relevant relief that can be given by the English court. Where there is no possibility of enforcement in this jurisdiction, no purpose is served by making declarations that enforcement would be contrary to English public policy – save as a peg for findings of fact about the alleged fraud.

54. These considerations lead me to consider that, if it is permissible at all for these proceedings to continue, there must be demonstrated a very strong case for a continuing interest. In a case such as the present where it is unnecessary to do so, I would not wish to rule out the possibility of exceptional circumstances justifying the continuation of proceedings whose purpose has ceased but which, when commenced, properly invoked the jurisdiction of the court. If it had been demonstrated that a finding of fraud by the English court would create an issue estoppel in countries where enforcement proceedings were pending, that might be thought a circumstance that justified the continuation of the proceedings. A discontinuance at the start or during the trial might do so, but all would depend on the particular circumstances.

55. The facts of the present case are a long way from these examples. This is not a case where the judge found that a finding of fraud would create an issue estoppel in any other country. On the contrary, the judge found on the evidence before him only that it was "possible" that it might assist the courts of other countries. He went no further than concluding that "it will not be without use" to the courts of at least some other countries.

56. There is in general a disinclination on the part of the courts to give what amount to advisory rulings on issues for the benefit of foreign courts, although in some circumstances it may be appropriate: contrast *Howden North America Inc v ACE European Group Ltd* [2012] EWCA Civ 1624; [2012] CLC 969 with *UBS AG v Omni Holding AG* [2000] 1 WLR 916 and *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 34 (Ch); [2014] 2 BCLC 662. However, these cases concerned possible rulings on issues of English law which arose or might arise in foreign proceedings. There is no evidence that a ruling in the present case on English public policy would be relevant to any of the enforcement proceedings being taken in other countries.

57. As to the findings of fact to be made by the court after a trial, counsel were unable to find any case in which the courts of one country have made unsolicited findings of

fact for the supposed benefit of the courts of other countries. The possibility of doing so arose in proceedings to enforce a New York Convention award in Alberta, Canada. In *Karaha Bodas Company LLC v Perushaan Pertambangan Minyark Dan Gas Bumi Negara* 2011 ABCA, the claimant (Karaha) obtained an award of US$260 million which it sought to enforce in a number of jurisdictions. Allegations of fraud with regard to the award were made by the respondent (Pertamina) and rejected in enforcement proceedings in the United States and Hong Kong. Having obtained full satisfaction of its award in the United States, Karaha discontinued the Alberta proceedings, leaving only the issue of the costs of those proceedings which were awarded to Pertamina. Pertamina wished to continue the proceedings so as to assert its fraud claim with a view to using the Alberta court's findings, if favourable, to persuade the US court to reverse its prior rejection of Pertamina's case. In affirming the first instance decision to permit the discontinuance of the Alberta enforcement proceedings, the Court of Appeal of Alberta said at [11]:

> "Alberta is very plainly not the appropriate forum for any attempt to upset the arbitral award for fraud. It got involved originally just to chase assets here which probably never existed. Getting a judgment in an inappropriate forum in the hopes of influencing a court elsewhere is (and will always be) a novel idea, tending to destroy all conflict of laws rules on jurisdiction and recognition."

58. Mr Smouha QC for the State fairly pointed out that *Karaha* was a case involving what the Court of Appeal called "endless repetition of failed litigation" but, in my view, paragraph 11 of its judgment states a more general principle. As the researches of counsel bear out, the continuation of the present proceedings for the purpose of making findings of fact which might be of use to foreign courts is indeed a novel idea.

59. In my judgment, and with great respect to the judge, he was wrong to conclude that this provided a legitimate interest for the State in the continuation of the proceedings or a proper basis on which to allow their continuation. The judge rightly took account of the use of the limited resources of the court that his order would involve, but I am unable to see any interest in the present case that can justify an 8-day trial in the Commercial Court, particularly when account is taken of the many cases waiting to be heard in that court.

60. The judge was right, in my view, to say at [32]:

> "It is hard to see that this Court would have been an appropriate forum in which to seek these declarations if recognition and enforcement were not sought here or in prospect. This Court was not chosen as the court of the seat. The parties and the dispute that went to arbitration, and the arbitration itself, have no material connection with this jurisdiction other than through the Statis' claim for recognition and enforcement of the Award."

61. The judge distinguished that analysis from the present position essentially on the grounds that the fraud issue had been properly raised by the State in the English court once the claimants invoked the court's jurisdiction to recognise and enforce the

award. But, once there is no longer any question of recognition or enforcement here, his analysis in [32] in my judgment holds good.

62. Equally, in my judgment, the judge was wrong to conclude for the reasons given by him in his judgment at [61] that the State had a legitimate interest in seeking to have the enforcement order set aside "on the merits". My reasons are the same as stated above. Once that order is set aside, as the claimants accept it should be, there is no continuing interest on the part of the State to justify a trial of the fraud issue in the English courts. The judge said that it remained "a question that the state would wish to be answered" but a desire on the part of the State to have the issue tried cannot provide a justification for the continuation of the proceedings in the face of the considerations discussed above.

Fraud on the English court?

63. The State submits that the judge's order should be upheld on the additional ground that there is a strong prima facie case that, by applying for and obtaining the enforcement order, the claimants committed a fraud on the English court. The continuation of the proceedings to a trial of the fraud allegations is therefore in the public interest, irrespective of any private legitimate interest of the State. If the fraud allegations are upheld, the claimants will have invoked the jurisdiction of the English court in order to enforce what they knew to be an award obtained by fraud. Reliance is placed on the Chancellor's decision in *Re Dalnyaya Step 11c (in liquidation) (No 2)* [2017] EWHC 3153 (Ch); [2018] Bus LR 789.

64. I certainly accept that the court has the power to require the continuation of proceedings in order to determine whether its processes have been knowingly abused. This is a necessary incident of the court's control of its own proceedings. The decision in *Re Dalnyaya* provides a good illustration. If an application is made without notice, the applicant is under the important duty to the court to make full and frank disclosure of all material facts and matters known to it. It is a duty which is essential to the fair and proper functioning of the court's process. A deliberate breach of the duty is a very serious matter. In *re Dalnyaya*, a liquidator appointed by the Russian court obtained, on an application made without notice, an order recognising his appointment pursuant to the Cross-Border Insolvency Regulations 2006. The managers of the entity concerned alleged that that there had been material non-disclosure to the court on the recognition application. The liquidator applied to terminate the recognition order. Rather than acceding to that application, the Chancellor went on to consider the allegation and held it to be well-founded. It was, he said, "a wholly exceptional case" for the reasons he gave at [76]-[83].

65. The circumstances in the present case are very different. This appeal is not put forward on the basis that there was material non-disclosure on the application without notice for the enforcement order. The claimants had the benefit of an award which was valid under its curial law and which they were entitled to seek to enforce in other countries, including England. The State's allegations of fraud were insufficient to invalidate the award. The most that those allegations provided were a defence to enforcement as a matter of English public policy. They are therefore incapable of establishing that the original application was a "fraud on the English court". As Leggatt LJ observed during the hearing, under some arbitral regimes, such as the ICSID Convention, fraud is not a ground for setting aside an award and the fact that it

is against English public policy to obtain an award by fraud is irrelevant. An application to enforce such an award could hardly be a fraud on the English court. In the present case, where the Swedish court has ruled that the State's allegations do not invalidate the award, enforcement in Sweden is clearly not a fraud on the court, and it is difficult to see how it could nonetheless be so in England.

66. Although this submission was made to the judge, he did not give any weight to it and, in my judgment, he was right not to do so.

Conclusion

67. In conclusion, I consider that the judge was right on three of the issues raised on this appeal but was wrong to conclude that the State had a legitimate interest in a continuation of the proceedings. Accordingly, I would allow the appeal, on terms that the enforcement order is set aside and that the claimants give to the court the undertakings offered by them to the judge.

Leggatt LJ:

68. I agree.

Patten LJ:

69. I also agree.