

AIC Ltd (Respondent) v Federal Airports Authority of Nigeria (Appellant) [2022] UKSC 16 On appeal from: [2020] EWCA 1585

Date: 15 June 2022

Justices

Lord Hodge (Deputy President), Lord Briggs, Lord Sales, Lord Hamblen, Lord Leggatt

Background to the Appeal

The appeal concerns the court's discretion to reconsider a judgment and order after it has been given but before the formal order has been sealed by the court.

The Respondent, AIC Ltd ("AIC"), was the successful claimant in a Nigeria-based arbitration with the Appellant, the Federal Airport Authority of Nigeria ("FAAN"). FAAN was ordered to pay US\$48.13m to AIC, plus interest at 18% per annum ("the Award"). FAAN continues to challenge the Award in the Nigerian courts ("the Nigerian Proceedings").

AIC sought permission from the High Court to enforce the Award in England and Wales. This was initially granted, however the High Court set this order aside and adjourned the claim pending developments in the Nigerian Proceedings. This was on the condition, however, that FAAN provide security of around US\$24m by way of a bank guarantee ("the Guarantee").

Despite FAAN being granted an extension, the Guarantee was not provided on time. The High Court judge ("the judge") gave an oral judgment and made an order permitting AIC to enforce the Award ("the Enforcement Order"). However, the Enforcement Order was not sealed immediately.

FAAN obtained the Guarantee later the same day, provided it to AIC and applied to the judge to re-open the judgment and set aside the Enforcement Order. The judge set aside the Enforcement Order and retrospectively extended time for the provision of the Guarantee.

The Court of Appeal allowed AIC's appeal against the judge's revised decision and reinstated the Enforcement Order. As a result, AIC had both an unlimited right to enforce the Award and the benefit of the Guarantee as an asset against which to enforce. AIC accordingly called on the Guarantee, which was paid in full by FAAN's bank.

FAAN appealed to the Supreme Court, pursuant to which further enforcement of the Award was stayed pending the appeal's outcome.

Judgment

The Supreme Court unanimously allows FAAN's appeal, although only in part. Lord Briggs and Lord Sales give the judgment, with which the other members of the court agree.

Reasons for the Judgment

The present case is governed by the Civil Procedure Rules ("CPR"), the overriding objective of which is to "*deal with cases justly and at proportionate cost*" ("the overriding objective"). The judge said that the application of this objective in the context of deciding whether to re-consider an order not yet sealed was a question of balance. The Court of Appeal disagreed, ruling that a two-stage analysis was required: (1)

whether it was right to entertain the application to re-consider at all; and, if it was, (2) consider the application on its merits [3-4].

The Supreme Court considers that both the judge and the Court of Appeal were only partly right [5]. Previous caselaw shows that the task of a judge faced with an application to reconsider a judgment and/or order prior to sealing is to do justice in accordance with the overriding objective. The principle of finality in litigation is an important general principle of justice; moreover as defined in the CPR the overriding objective includes the need to enforce compliance with rules, practice directions and orders, which emphasises the importance of the finality principle [30]. This principle holds that parties should not ordinarily be able to raise new arguments after an order has been made which it should have raised at the relevant hearing [31].

Therefore, when determining an application to reconsider a final judgment and/or order before the order has been sealed, a judge should not start from evenly-balanced scales as the judge did but should give great weight to the finality principle. However, although it will often be a useful mental discipline for a judge to ask whether the application should be entertained at all, there is no rule of law or practice that such an application must always be addressed by a two-stage process as held by the Court of Appeal. The finality principle is better reflected by recognition that it will always be a weighty matter in the balance against making a different order, rather than always requiring a two-stage process of analysis [32-34].

The Supreme Court accordingly rejects the Court of Appeal's two-stage approach, but also finds that the judge did not give the finality principle the central importance which it deserved [44-45]. It therefore falls to the Supreme Court to re-exercise the discretion afresh as to whether to re-open the High Court's judgment and Enforcement Order [49]. In doing so the Supreme Court also assesses whether FAAN satisfies the test to be granted relief from sanctions, despite its failure to comply with the timetable set by the High Court for provision of the Guarantee [50-55].

The Supreme Court concludes that FAAN's appeal should succeed, but only in part. The Enforcement Order as re-made by the Court of Appeal should be set aside, and AIC's application for leave to enforce the Award should be adjourned to await the outcome of the Nigerian Proceedings. AIC should however be entitled to retain the proceeds of the enforcement of the Guarantee in the meantime [58].

Two large factors weigh in the scales against the re-opening of the Enforcement Order: (1) the finality principle and (2) FAAN's delay in providing the Guarantee for which no good reason has been provided [59, 61]. Nonetheless, the fact that the Guarantee was provided to AIC was an important change in circumstances. Being provided after the Enforcement Order was made meant that the Guarantee had become available to AIC as a partial means of enforcement of the Award immediately, rather than as a form of security for its possible future enforcement (if it survived challenge in the Nigerian Proceedings) as the court had intended. AIC had therefore got the benefit of both the Enforcement Order as well as the Guarantee against which the Award could be enforced in part. In the circumstances, the judge's view that justice demanded that this windfall received by AIC should be undone commanded real respect [62-63].

Although not clear cut, the Supreme Court is persuaded on balance that AIC should not retain the right to enforce the Award, pending the outcome of the Nigerian Proceedings, beyond the significant degree of enforcement which it has already achieved by calling on the Guarantee [64]. The Supreme Court therefore sets aside the Enforcement Order and confirms the judge's extension of time for the provision of the Guarantee.

References in square brackets are to paragraphs in the judgment
