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equated with that of a branch manager of a high street clearing bank, I am quite unable to see on what basis, either in commercial reality or in common sense, it can be suggested that a reasonable person in Mr. Croft's position would have made some other assumption. It would have been most unreasonable to assume, or even to suspect, that Mr. Jamison did not have HIB's authority to act as a mere channel of communication.

It should be recorded that Judge Kershaw was not referred to *Armagas Ltd. v. Mundogas S.A.*, [1986] 2 Lloyd's Rep. 109; [1986] A.C. 717. His reasoning demonstrates that, like Lords Justices Steyn and Evans, he too would have distinguished it. I think that his decision of both questions was entirely satisfactory and I too would affirm it accordingly.

[Order: Appeal dismissed with costs; application for leave to appeal to the House of Lords refused.]

COURT OF APPEAL

Mar. 12, 1993

SOLEH BONEH INTERNATIONAL LTD. AND ANOTHER v. GOVERNMENT OF THE REPUBLIC OF UGANDA AND NATIONAL HOUSING CORPORATION

Before Lord Justice NEILL, Lord Justice STAUGHTON and Lord Justice ROCH

Arbitration — Foreign award — Enforcement — Swedish arbitration award made in favour of contractors — Application by contractors to enforce award in England — Judge adjourned application for three months but ordered employers to give security for full amount of award plus interest — Whether appeal against order should be allowed.

The plaintiffs (contractors), a consortium of companies registered in Israel, entered in 1968 into a contract to carry out building works in Uganda for the defendants which were an organization closely associated with the government of Uganda. The first defendants by their Minister of Finance guaranteed performance of the contract on behalf of the second defendants (the employers).

In March 1972 there was a decree or decrees of the government of Uganda which had the effect that participation of Israeli nationals in commercial matters quickly came to an end.

In 1972 the contractors claimed damages for breach of contract. The dispute was referred to arbitration and a Swedish engineer was appointed as sole arbitrator by the Court of Arbitration of the International Chamber of Commerce. The employers maintained that this appointment was invalid but they took part in the arbitration which was held in Sweden.

An interim award was made in 1974 and a final award on Dec. 31, 1978 under which $9.5m. was awarded to the contractors.

On Aug. 5, 1991 the contractors issued an originating summons seeking leave to enforce the award as a judgment.

———*Held*, by Mr. MICHAEL BARNES, Q.C. that leave for the enforcement of the award as a judgment would be declined forthwith; the application would be adjourned for three months and the employers were to provide security in the total sum claimed including interest.

The employers appealed against the order.

———*Held*, by C.A. (NEILL, STAUGHTON, and ROCH, L.JJ.) that (1) if the award was manifestly invalid there should be an adjournment and no order for security; if it was manifestly valid there should be either an order for immediate judgment or else an order for substantial security; and

the Court must consider the ease or difficulty of enforcement of the award and whether it would be rendered more difficult if enforcement was delayed (*see* p. 212, col. 1);

(2) the learned Judge was right to take into account the fact that an enormous period of time had already been spent in dealing with a preliminary point in the Swedish Courts and that there was an apparent lack of enthusiasm on the part of the employers to continue their application to the Swedish Court (*see* p. 212, col. 2);

(3) the contention that the arbitrator was not validly appointed was seriously arguable and in those circumstances it was a very strong measure to order that the whole amount of the award including interest for many years should be put up as security; that should have been done only as an exceptional measure; the right course would be to order security in a significant sum; that would provide a real incentive for the employers to proceed with their Swedish application expeditiously and also some protection for the contractors against any deterioration of their prospects of enforcement; security would be ordered in the sum of $5m. (*see* p. 212, col. 2; p. 213, col. 1);

(4) in the context of s. 13(2)(a) of the State Immunity Act 1976 (which provided that relief shall not be given against a state by way of injunction), it would not be held that a simple order for the payment of money from no specified source was an injunction; it was no different from a monetary judgment; the order would be varied; unless the employers provided security in the sum of $5m. within four weeks there would be leave to enforce the award as a judgment (*see* p. 213, cols. 1 and 2).

The following English case was referred to in the judgment.

Fothergill v. Monarch Airlines Ltd., (H.L.) [1980] 2 Lloyd's Rep. 295; [1981] A.C. 251;

SPP (Middle East) Ltd. v. The Arab Republic of Egypt, (C.A.) Mar. 19, 1984 unreported.

This was an appeal by the defendants the Government of the Republic of Uganda and the National Housing Corporation from the decision of Mr. Michael Barnes, Q.C., sitting as a Deputy Judge of the High Court that the application by the plaintiffs, Soleh Boneh International Ltd. and Water Resources Development (International) Ltd. to enforce the arbitration award made in the dispute between the plaintiffs and defendants would be declined forthwith and would be adjourned for a period of three months but the defendants would be ordered to provide security in the total sum of the amount claimed plus interest.

Mr. Michael Burton, Q.C. (instructed by Messrs. Edwin Coe) for the defendants; Mr. S. Brodie, Q.C. and Miss M. Carss-Frisk (instructed by Messrs. Denton Hall Burgin & Warrens) for the plaintiffs.

The further facts are stated in the judgment of Lord Justice Staughton.

JUDGMENT

Lord Justice NEILL: I will ask Lord Justice Staughton to give the first judgment.

Lord Justice STAUGHTON: The plaintiffs in this action are companies registered in Israel. In 1968, as a consortium, they entered into a contract to carry out building works in Uganda for the defendants, the National Housing Corporation. They are said to be an organization closely associated with the government of that country. The first defendants, the Government of the Republic of Uganda, by their Minister of Finance, guaranteed performance of the contract on the part of the National Housing Corporation. I shall call the parties "the contractors" and "the employers".

In March, 1972 there was a decree or decrees of the Government of Uganda, then controlled by President Amin, which had the effect that participation of Israeli nationals in commercial matters, including the present contract, quickly came to an end.

In 1972 the contractors resorted to arbitration and claimed damages for breach of contract. A Swedish engineer was appointed as sole arbitrator by the Court of Arbitration of the International Chamber of Commerce. The employers maintained that this appointment was invalid, but they took part in the arbitration (which was held in Sweden) subject to their protest. An interim award was made in 1974 and a final award on Dec. 31, 1978, under which the sum of $9.5m. was payable to the contractors. It is that award which the contractors now seek to enforce in this country. But much has happened meanwhile, and I must mention some (but not all) of the details.

The Swedish Court proceedings

The employers applied to the Swedish District Court in March, 1974 for a decision that the award was not binding upon them. To that the contractors replied that the Court had no jurisdiction to examine the validity of the award. In December, 1983 the District Court upheld that contention. But the decision was reversed by the Swedish Court of Appeal in July, 1985. A further appeal to the Supreme

Court of Sweden by the contractors was dismissed nearly four years later, in April, 1989. So the case went back to the District Court for a decision as to the validity of the award in March, 1990. It is still there. We in this country are in no position to stand in a white sheet, when delay in legal proceedings is under discussion. But 14 years does seem rather a long time for reaching a conclusion upon the validity of an arbitration award.

The two principal grounds put forward by the employers for maintaining that the award is invalid are, we were told, (1) that the arbitrator was not validly appointed and (2) the sovereign immunity of the Republic; there are other points taken, relating to the arbitration procedure.

I must pause to elaborate somewhat on point (1). The arbitration clause in the contract provided for the appointment of an arbitrator under the rules of the International Chamber of Commerce. But there is also said to be incorporated a document, called appendix to offer, which provided that the appointment would be made by the chairman of the Federation of Civil Engineering Contractors. In the event, the chairman of the Federation refused to make any appointment. The arbitrator was appointed by the International Chamber of Commerce; but the employers contend that on the true construction of the contract there was no right to do that.

It is agreed, as I understand it, that the interpretation of the contract is governed by English law. In the Courts of this country the issue would be treated as a question of law, to be decided by a Judge without the need for any, or at any rate much, evidence. I would have expected a Judge of the Commercial Court to decide it in half a day, although there would no doubt have been an appeal resulting in some additional delay. But in Sweden a question of English law is, of course, treated as a question of fact, to be decided on evidence. The Contractors have produced an opinion of Professor Goods, Q.C., which supports the validity of the arbitrator's appointment; the employers an opinion of Professor Guest, Q.C., which reaches the opposite conclusion; and there is an opinion in reply from Professor Goode. By now both professors have given evidence on commission in London and have been cross-examined.

What we are not asked to do is to decide the point ourselves, here and now. So I must be careful to express no opinion on it, except to say that in my judgment it is seriously arguable, although in a short compass. Indeed the very fact that two such eminent teachers of commercial law take opposite views shows that to be the case. And even if we had been able to decide the point on the validity of the arbitrator's appointment now, there would still be the other grounds on which the award is said to be invalid to consider.

The English proceedings

On Aug. 5, 1991 the contractors issued an originating summons in the Queen's Bench Division seeking leave to enforce the award as a judgment in this country. It was accompanied by an affidavit which expressly drew attention to the power of the Court, if if adjourned the summons pending a decision in Sweden, to order the employers to provide security. The originating summons was served, with leave of the Court, on the employers in Uganda. But at the hearing on Jan. 13, 1992 there was no appearance on behalf of the employers. The reasons now given in an affidavit for their non-appearance seem to me distinctly implausible.

The application was made under the Arbitration Act, 1975, which deals with the New York Convention. The Act provides:

> 3(1) A Convention award shall, subject to the following provisions of this Act, be enforceable.
>
> (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950.
>
> 5(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves —
>
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
>
> (5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f) of this section, the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.
>
> 7(1) In this Act
>
> . . . "Convention award" means an award

made in pursuance of an arbitration agreement in the territory of a State other than the United Kingdom, which is a party to the New York Convention . . .

The procedure is governed by the Rules of the Supreme Court, O. 73, r. 10(1):

An application for leave under section 26 of the Arbitration Act 1950 or under section 3(1)(a) of the Arbitration Act 1975 to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made ex parte but the Court hearing the application may direct a summons to be issued.

The application came before Mr. Michael Barnes, Q.C., sitting as a Deputy Judge of the Queen's Bench Division. He declined to grant leave for the enforcement of the award as a judgment forthwith, and adjourned the application for a period of three months. But he also ordered that the employers should give security within four weeks of the service of the order in the sum of $29,355,808, which is said to be the principal amount of the award together with the interest claimed. The reasons of the Deputy Judge, both for adjourning the proceedings and for ordering security, were these:

It seems to me that having regard to the terms of s. 5(5) it would not be right simply to grant leave at this point to enforce the award, even though the defendants have not appeared in this court. I have in mind the nature of the defences and the points which are raised in support of the application to set aside in the Swedish courts. I have in mind the enormous time that it has already taken to deal with what are in essence preliminary issues on that application before the courts in Sweden. I have in mind, and I am informed by leading counsel on behalf of the plaintiffs, that there appears at present to be no great enthusiasm on the part of the Uganda parties, the defendants in these proceedings, to continue with their application in the Swedish court, although it remains extant, and I have in mind, of course, that the defendants are not present on this application for leave to enforce in this court in England.

It seems to me that bearing all those matters in mind the right course is that I should, under s. 5(5) of the Arbitration Act 1975, adjourn these proceedings. . . .

. . . It seems to me that in the circumstances which I have mentioned it would be right that there should be such an order for the giving of security and accordingly I order that security be given by the defendants in the total sum which is now claimed including interest.

There was a further hearing before the Deputy Judge on Apr. 28, 1992. On this occasion the employers were represented. They applied for an order (i) setting aside the order made in January, on the ground that it had been made ex parte, or (ii) granting them leave to appeal against that order. The Deputy Judge refused to set aside his earlier order, on the ground that it had not been made ex parte. But he granted leave to appeal from it, and also leave to appeal from his refusal to set it aside.

In the result there are now two appeals before this Court. We are told that, when the solicitors presented the documents to the Court of Appeal office, they were told that separate (and virtually identical) sets of documents were required for each appeal. That meant a great deal of unnecessary copying, and also an additional (physical) burden on those who have to carry the documents around, who fortunately do not include ourselves. If that is what the rules provide, the sooner they are changed the better.

In the event Mr. Burton, for the employers, was content to argue only what I call the substantive appeal, that is, the appeal against the order of Jan. 13, 1992, unless we felt minded to dismiss it solely on the ground that we ought not to interfere with the exercise by the Deputy Judge of his discretion.

The substantive appeal: (i) when to order security

Mr. Brodie for the contractors told us that there is no English authority on this question, and that the views of this Court might be of importance not only in our jurisdiction but also internationally. He also reminded us of the decision in *Fothergill v. Monarch Airlines Ltd.*, [1980] 2 Lloyd's Rep. 295; [1981] A.C. 251, which emphasizes the importance of uniformity in the interpretation of international conventions.

For my part I find only limited assistance in the foreign cases to which we were referred. The Swedish case of *AB Gotaverken v. General National Maritime Transport Company* shows that the mere existence of proceedings to challenge an award in another jurisdiction does not by itself require a Court to refuse enforcement for the time being and adjourn the proceedings. On the other hand, in the Cayman Islands' case of *The Republic of Gabon v. Swiss Oil Corporation* an adjournment was granted and security refused. Among a number of grounds it was

said that there was a serious argument for setting aside the award, and that a decision on its validity in another jurisdiction was expected shortly. It may also have been the case that there was no doubt as to the resources of the Swiss Oil Corporation, or as to their amenability to enforcement measures.

I do not find any help in the English case of *SPP (Middle East) Ltd. v. The Arab Republic of Egypt*, Mar. 19, 1984, where the application was for an order freezing the assets of a foreign sovereign state, rather than for an order that the award be enforced unless security was given.

The other cases show, perhaps, a general tendency to order security, but no more than that. I certainly cannot accept the opinion of Mr. W. Michael Tupman in Arbitration International [1987] vol. 3, p. 223 that —

> . . . it is difficult to think of any circumstances in which security would not be warranted.

If, for example, the challenge to the validity of an award is manifestly well-founded, it would in my opinion be quite wrong to order security until that is demonstrated in a foreign Court.

In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.

The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.

The Deputy Judge's decision

I am reluctant to criticize the lucid and workmanlike judgment of the Deputy Judge. But we have had more elaborate argument, including argument on behalf of the employers; and it does seem to me that he must have misdirected himself to a limited extent.

Three points are mentioned by him as relevant: (i) the nature of the points taken in support of the application to set aside the award, (ii) the enormous period of time already spent in dealing with a preliminary point in the Swedish Courts, and (iii) the apparent lack of any great enthusiasm on the part of the employers in continuing their application to the Swedish Court.

Dealing with the third point first, I consider that it was well-founded in fact, and that the Deputy Judge was right to attach significance to it. Nearly a year elapsed between the decision of the Swedish Supreme Court and the resumption of the proceedings in the District Court; and it took eight months for the employers to produce the opinion of Professor Guest in response to that of Professor Goode. I hope that it is not unduly cynical to say that one would not expect the employers to show much enthusiasm for the Swedish proceedings; although they are nominally plaintiffs and presumably have the carriage of the application, in reality they are defendants and have no reason to see that it is decided promptly.

As to point (ii), I think the Deputy Judge was also right to take that into account. The contractors could understandably feel aggrieved by the lack of progress in Sweden, although it was partly their own fault in taking a preliminary point on which they failed. They could reasonably expect the English Court to attempt to inject some sense of urgency.

It is on point (i) that I felt that the Deputy Judge went wrong. The contention that the arbitrator was not validly appointed is, as I have said, seriously arguable. In those circumstances it was a very strong measure to order that the whole amount of the award, including interest for many years, should be put up as security. In my opinion that should only have been done as an exceptional measure, for example, if the Deputy Judge thought it plain that further delay would seriously prejudice the ability of the contractors to enforce the award in England. We do not know what assets the employers have here, or how long any assets are likely to remain here. Mr. Burton has no instructions on the point; and the contractors may not be able to produce evidence as to the employers' disposition of their resources. But it [illegible] opinion be said that further delay will [illegible]

not prejudice the enforceability of the award here, as would be the case of a substantial company carrying on business in this country.

In those circumstances the right course, in my judgment, would be to order security in a significant sum, that should provide a real incentive for the employers to proceed with their Swedish application expeditiously, and also some protection for the contractors against any deterioration of their prospects of enforcement here. But I think that the whole amount of the award and interest came to a figure which was too high. I would order security in the sum of $5 m.

Mr. Burton urged upon us seven points, which he described as factors against ordering security. For the most part they were based on the contractors' delay in seeking enforcement in England. I do not see that the employers can complain of that, or that there is any substance in Mr. Burton's other points under this head.

The State Immunity Act, 1976

Section 13(2)(a) of this Act provides:

> . . . relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property.

Mr. Burton submits that the order of the Deputy Judge in this case did grant relief by way of an injunction. He points to the fact that a copy of the order was endorsed with a penal notice, directed at the High Commissioner of Uganda in the United Kingdom personally.

Mr. Brodie submits that the order is plainly not an injunction and that is the end of the point. Had he elaborated his robust submission, he might have added that O. 23 of the Rules of the Supreme Court enables the Court to order a plaintiff to give security for costs, and is not a sub-head of O. 29 which deals with interlocutory injunctions.

In the context of s. 13(2)(a), and despite the doubts of Sir John Donaldson M.R. in the *SPP (Middle East) Ltd.* case, I would not hold that a simple order for the payment of money from no specified source is an injunction. It is no different from a monetary judgment. But in case I am wrong on that, I would vary the form of the Deputy Judge's order. He ordered (1) that the proceedings be adjourned for three months, and (2) that the employers provide security in the sum of $29m. within four weeks. I would substitute an order that, unless the employers provide security in the sum of $5m. within four weeks there be leave to enforce the award as a judgment; and that if security is so provided, there be liberty to apply in the Queen's Bench Division after a further period of nine months has elapsed. There should be no penal notice.

There is no need, in the event, to consider the employers' other appeal, and I would make no order upon it. I would allow the substantive appeal by varying the order to the extent indicated, and otherwise dismiss it.

Lord Justice ROCH: I agree.

Lord Justice NEILL: I also agree.