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AIC Ltd v. Federal Airports Authority of Nigeria [2022] UKSC 16

By Kenneth Hamer

Court's discretion to reconsider judgment and order – formal order not sealed by court – importance of finality

AIC Ltd were the successful claimant in a Nigeria-based arbitration with the Federal Airport Authority of Nigeria (FAAN). FAAN were ordered to pay US$48.13 million to AIC, plus interest. AIC were initially granted permission by the High Court to enforce the award in England and Wales. This was set aside pending FAAN's challenge to the award in the Nigerian courts, on condition that FAAN provided security of US$24 million by way of a bank guarantee. The guarantee was not provided and at about 14:20 hours on 6 December 2019 the High Court judge gave an oral judgment and made an order permitting AIC to enforce the award (the enforcement order). The enforcement order was not sealed at this stage. FAAN obtained the guarantee later the same day and provided a copy of it to AIC at 17:17 hours, stating that it intended to apply to the judge to re-open her judgment and the enforcement order given earlier that afternoon. An application was made on 8 December, and the application was heard by the judge on 13 December, after she had ordered that the enforcement order should not be sealed in the meantime. At the hearing on 13 December, 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 judgment and reinstated the enforcement order. AIC called on the guarantee which was paid in full by FAAN's bank. The Supreme Court unanimously allowed FAAN's appeal to the extent of setting aside the enforcement order pending the outcome of the Nigerian proceedings, but, reflecting FAAN's failure to comply with deadlines imposed by the court, confirmed the judge's order for the provision of the guarantee which had already been called upon.

Lord Briggs and Lord Sales (with whom Lord Hodge, Lord Hamblen and Lord Leggatt agreed) said:

> 1.A judge delivers judgment in open court and makes an appropriate order. A few hours, or days, later, but before the formal written minute of the order has been sealed by the court, the judge receives a request from one of the parties to re-consider both the judgment and the order. What should the judge do? The problem may arise at all levels in civil litigation, from interim and case management hearings, to final orders made at the end of a trial and even to orders made, but not yet sealed, on appeal. There is no doubt that the judge has power to re-open the judgment and order at any time until the order has been sealed, but the question raised by this appeal is by what process, and in accordance with what principles, should the judge decide whether or not to exercise that power?

In *In re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, [2013] 1 WLR 634, at para 27, Baroness Hale said that the judge should seek to resolve the problem by doing justice in accordance with the overriding objective. *Re L* was a case which had come up from the Family Court, and the overriding objective gave emphasis to securing the welfare of children. The present case was governed by the Civil Procedure Rules. CPR Part 1.1.(1) states that the overriding objective is to deal with cases justly and at proportionate cost. These include "enforcing compliance with rules, practice directions and orders": CPR Part 1.1(2)(f). The Supreme Court said it was in full agreement with Coulson LJ, who in the Court of Appeal at para 50, said: "The principle of finality is of fundamental importance". This means that, on receipt of an application by a party to reconsider a final judgment and/or order before the order has been sealed, a judge should not start from anything like neutrality or even-balanced scales [32]. There may be cases where the judge cannot reliably gauge the weight of the factors put forward for the exercise of the discretion to depart from adherence to the finality principle without hearing submissions from both sides. There may be cases where (since the order already made is already enforceable) urgency requires an immediate *inter parties* hearing with notice to both sides [33]. More fundamentally it may be impossible to disentangle the factors for and against departing from finality from those for and against the re-making of the order on the merits. The judge will in the end be faced with a single decision: do I set aside the order which I have already made and replace it with a different order? The finality principle is better reflected by recognition that it will always be a weighty matter in the balance against making a different order [34].

> 35. [F]inality is likely to be at its highest importance in relation to orders made at the end of a full trial. But other kinds of final order, which end the proceedings at first instance, will attract the finality principle to almost as great a degree. Case

> management and interim orders lie towards the other end of the scale, and indeed many reserve liberty to the parties to apply to vary or discharge the order, even after it has been sealed. But the finality principle cuts in, as Coulson LJ said, when the order is made, not merely when it is sealed. After the order is sealed, the finality principle applies in a more absolute way, to put it beyond challenge which made it, subject to any liberty to apply in the order, the application of the power in CPR Part 3.1(7) to vary or revoke it and the slip rule.

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