Article for the Company Lawyer

Professor Michael Reynolds.[1]

International Arbitration: The Tide Rises and Falls, but the Sands of Error Crumble.[2]

It is often said that "justice must not only be done but must be seen to be done." In the context of arbitration that is controversial especially when as Lord Wolfson submitted in relation to arbitration generally in *The Federal Republic of Nigeria v Process & Industrial Developments Limited*[3]: "You have made your bed, and you lie on it." In that case questions of bribery, corruption and perjury were raised undermining the arbitration process. Not only that but the arbitrators suffered from a deliberate concealment on one side and mismanagement and incompetence on the other. The tribunal's Award was challenged in the Commercial Court, Mr Justice Robin Knowles CBE giving judgement on 23 October 2023. His thorough and comprehensive analysis of a such a serious case has raised questions as to how far arbitrators should go in dealing with allegations of fraud. A subject that was raised at the LCIA Symposium at Tylney Hall this year. The case has caused concern and debate amongst arbitrators, lawyers, academics and the judiciary because of the exceptional circumstances of the case. It must be emphasised that it is only in extreme cases where it can be said that "what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action."[4] Here the conduct of the arbitral tribunal was challenged under Section 68 Arbitration Act 1996 which opens up the prospect of serious reflection as to what steps can be taken to avoid such difficulties.

Justice Knowles said that where considerable amounts of public money are at stake as in this case $11billion,(including interest awarded by the tribunal) which amounts to a material percentage of a State's GDP or budget, it must be accompanied by public visibility or greater scrutiny by arbitrators. That is difficult because arbitration is private not public.[5] Arguably where a state is involved e.g. in ICSID cases there is a degree

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[2] Justice Benjamin Cardozo, Judicial process (Yale University press,1921) 177.

[3] [2023] EWHC 2638 (Comm)

[4] Report on the Arbitration Bill (which became the 1996 Act) of the Departmental Advisory Committee on Arbitration Law. para 280.

[5] As a young solicitor I acted in a public arbitration between the Greater London Council and Test Valley Borough Council before Mr Leslie Alexander FCIArb. The press attended for a day or two but

of publicity in terms of Award publication. In other state cases under treaty the proceedings are behind closed doors until the pronouncement of the Award is made.[6] Whether greater visibility or greater scrutiny of arbitrators can provide an answer is controversial. Privacy of the proceedings and independence of the state court system is perceived as a key advantage of the process. It would be difficult to oversee every arbitration save that experienced institutions like the LCIA and Chartered Institute of Arbitrators have rules of conduct applying to their members. These rules are reinforced by statutory sanctions which resulted in the application to challenge the Award in the Nigerian case. Those wishing to become arbitrators go through a testing process of examinations and practical training with continuing professional development courses and monitoring. Not only that but several leading universities now include arbitration in their post graduate curriculum covering forms of dispute resolution. Be that as it may these agencies do not effectively guarantee that a tribunal will avoid what happened in this case.

The underlying problem in this case was the drafting of a contract for Gas Supply and Processing Agreement for Accelerated Gas Development. ("the GSPA") where the defendant company had agreed to provide for the construction of Gas Processing Facilities by Process & Industrial Developments Limited (P&ID) utilising the provision of Wet Gas by the Nigerian Government then processing the Wet Gas to provide Lean Gas to the Government whilst retaining certain by-products of the process. The contract contained little detail that would normally be required in such cases, worse the evidence given to the arbitrators was tainted to conceal the circumstances as to how the contract came about. Mr Justice Knowles pointed to the witness statement of Mr Michael Quinn, a Director of (P&ID) [7] that he was "explain[ing] how the GSPA came about" when he did not do that because he did not mention that Mrs Grace Taiga[8] had been paid a US$5,000 bribe at the end of December 2009 and a £5,000 bribe on 29 March 2010.[9] Such bribery preceded the arbitration and succeeded it.[10] Evidence that together with other matters placed the Award in jeopardy of challenge under Section 68 Arbitration Act 1996. [11]

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that was all. the proceedings in County Hall were open to the public very few if any ever attended. I do not think the proceedings being in public made any difference to the outcome.

[6] The Geneva Arbitration between the United States of America and Great Britain constituted under the Washington Treaty 8 May 1871 ratified 22 May 1871 was in private until the Award was pronounced at an open session in the Geneva Town Hall. See; M. Reynolds, *Instruments of Peacemaking 1870-1914* (Hart Publications, Oxford, 2021) 14,22.

[7] [2023] EWHC 2638 (Comm) at para [494] Statement dated 14 February 2014.

[8] She was the Legal Director at the Ministry of Petroleum Resources wo had some involvement in all or most of the contracts between the Ministry and ICIL Group of Companies. ICIL Group was established as Industrial Consultants (International)Limited in 1979 in Ireland. Mr Michael Quinn and Mr Cahill both directors in P&ID each became directors in ICIL.

[9] It was not until after the Final Award that evidence of bribery involving Mrs Taiga became known to the government because of discovery orders by the US District Court of the Southern District of New York under S. 1782 of Title 28 US Code.

[10] [2023] EWHC 2638 (Comm) at paras [401]-[405].

[11] Section 68 Arbitration Act 1996.
Challenging the award: serious irregularity.

Another most serious question that places the case in the realm of serious irregularity was P&ID's improper retention of Nigeria's legally privileged Internal Legal Documents that it had received during the Arbitration.[12] It retained these (rather than return them unread) to monitor Nigeria's position as the Arbitration continued. This included monitoring whether Nigeria had become aware of the deception being practised by P&ID on the Tribunal and on Nigeria as a party before the Tribunal.[13] The court found that P&ID received over 40 such documents during the period of the Arbitration from commencement on 22 August 2012 to Final Award on 31 January 2017. Justice Knowles concluded that these facts were material consideration regarding Section 68 as they also showed to P&ID that Nigeria had no awareness that Mrs Grace Taiga had been bribed when the GSPA came about, and that bribery or corrupt payments continued to buy her silence.[14]

P &ID argued that the unauthorised use of these privileged documents did not cause any substantial injustice within section 68, because it had no effect whatsoever on the Awards, irrespective of how or from whom the documents were obtained; they did not cause substantial injustice because they gave P&ID no relevant advantage in the arbitration. [15] The Court found that this was a dishonest course of conduct. The nature and contents of the documents, and the scale, continuity and circumstances of P&ID's conduct were such that Nigeria's right to confidential access to legal advice was utterly compromised throughout all or most of the Arbitration.[16] It was effectively denied an important part of the process of arbitration. Justice Knowles then concluded: "Here too I have no doubt that had the Tribunal known, its approach would have been very different."[17] His reasoning is strongly supported by the DAC Report and substantial authority in point because a key question that arises in determining substantial injustice is whether had the irregularity not occurred, the outcome of the arbitration might well have been different.[18] He said that there was

> no question to my mind that the Arbitration would have been completely different, and in ways strongly favourable to Nigeria, had the fact of bribery of Mrs Grace Taiga when the GSPA was being made been before the Tribunal. It would have brought in the issue whether the GSPA

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(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
… (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.

[12] [2023] EWHC 2638 (Comm) at para [496].
[13] [2023] EWHC 2638 (Comm) at para [496].
[14] [2023] EWHC 2638 (Comm) at para [496].
[15] [2023] EWHC 2638 (Comm) at para [512].
[16] [2023] EWHC 2638 (Comm) at para [512].
[17] [2023] EWHC 2638 (Comm) at para [512].
[18] see, for example, Vee Networks Ltd v Econet Wireless International Ltd [2004] EWHC 2909 (Comm); [2005] 1 All ER (Comm) 303 at para 90 (Colman J) as per [2023] EWHC 2638 (Comm) at para [500].

> was procured by fraud, and as a result voidable. Discovery of the concealment would have completely altered the Tribunal's approach to the rest of Mr Michael Quinn's evidence.[19]

Thus, he had no hesitation in concluding that Nigeria suffered substantial injustice within the meaning of Section 68, even before taking into account what P&ID did with Nigeria's Internal Legal Documents.[20] The comprehensive analysis of Mr Justice Knowles judgement of 127 pages and 595 paragraphs leaves little room for doubt.

Reflections on the challenges

Whilst this case challenges the conduct of the tribunal many arbitrators will have experience of party obstruction and in some instances abuse and disrespect more so in the domestic field than international perhaps. Parties often are unaware of their obligations to co-operate with the tribunal. Justice Knowles to quote his words: found examples where legal representatives did not do their work to the standard needed, where experts failed to do their work, and where politicians and civil servants failed to ensure that Nigeria as a state participated properly in the Arbitration.[21] The result was that the Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work. And Nigeria did not in the event properly consider, select and attempt admittedly difficult legal and factual arguments that the circumstances likely required. Even without the dishonest behavior of P&ID, Nigeria was compromised.

So, what is the tribunal supposed to do?

Again, as Justice Knowles said[22] the Tribunal in the present case allowed time where it felt it could and applied pressure where it felt it should. Perhaps some encouragement to better engagement can be seen as well. The problem was that this was not a fair fight. The Tribunal took a very traditional approach. The judge asked:

> "But was the Tribunal stuck with what parties did or did not appear to bring forward? Could and should the Tribunal have been more direct and interventionist when it was so clear throughout the Arbitration that Nigeria's lawyers were not getting instructions, or when at the quantum hearing Nigeria's then Leading Counsel, Chief Ayorinde, was failing to put necessary points to experts to test their opinion and Nigeria's own experts (for whatever reason) had not done the work required? Should the Tribunal have taken the initiative to encourage exploration of new bounds of contract law and the law of damages that may today be required where major long term contracts are involved?

These are difficult questions, and it must be a matter for each tribunal to decide how to act in these cases. What I would suggest as a former President of an International Tribunal is that in such cases as this, whilst no member of the tribunal is in any way an advocate for the party that appointed him or her, if a situation arises as in the case

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[19] [2023] EWHC 2638 (Comm) at para [510].

[20] [2023] EWHC 2638 (Comm) at para [511].
[21] [2023] EWHC 2638 (Comm) at para [587].
[22] [2023] EWHC 2638 (Comm) at para [588].

of Chief Ayorinde that member of the tribunal appointed by that party in my view would have every right to seek some clarification. If it there was a risk of gross injustice, he might suggest an adjournment to discuss the matter privately with his colleagues especially in a case where counsel was without instructions through no fault of their own. This is not to say that the arbitrators in this case should have taken such a course as they were probably the most qualified and experienced tribunal to undertake such a case.

Finally, but for the decisive action taken by Sir Ross Cranston[23] in an interim hearing in July 2020 none of the untoward circumstances of this case come to light and as Justice Knowles said:[24]

> Without that decision and judgment an injustice would have remained, the population of an entire federation of states would have suffered from the economic consequences, and fundamental damage would have been left to the integrity of arbitration as a process.

[23] Sir Ross Cranston is a law professor of law since at the London School of Economics. He was a judge of the High Court, Queen's Bench Division for just over nine years from late 2007 and the judge in charge of the Administrative Court from January 2016. From 2017 he sat part-time in the Commercial and Administrative Courts. Previously he was Cassel Professor of Commercial Law at LSE and then a Centennial Professor.

[24] [2023] EWHC 2638 (Comm) at para [595].