A3/2005/2673

Neutral Citation Number: [2006] EWCA Civ 222
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
(MRS JUSTICE GLOSTER DBE)

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday, 21 February 2006

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Phillips of Worth Matravers)

THE MASTER OF THE ROLLS
(Sir Anthony Clarke)

LORD JUSTICE MAY

- - - - - - -

AJAY KANORIA
ESOLS WORLDWIDE LIMITED
INDEKKA SOFTWARE PVT LIMITED

Appellants

and

TONY FRANCIS GUINNESS

Respondent

- - - - - - -

(Computer Aided Transcription by
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Official Shorthand Writers to the Court)

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MR LOUIS FLANNERY (instructed by Messrs Howes Percival)
appeared on behalf of **THE APPELLANTS**

MR TIMOTHY YOUNG QC (instructed by Messrs Myers Fletcher & Gordon)
appeared on behalf of **THE RESPONDENT**

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J U D G M E N T

Tuesday, 21 February 2006

THE LORD CHIEF JUSTICE:

1. This is an appeal against the order of Gloster J, dated 18 July 2005, setting aside an order made in the Commercial Court by Thomas LJ, dated 15 August 2003, granting permission under section 101(2) of the Arbitration Act 1996 for enforcement of an arbitral award in favour of the appellants made by a sole arbitrator, Mr Justice Chandrachud, a former Chief Justice of India, in Mumbai, India, dated 5 April 2003, under the rules of the Indian Council for Arbitration (the "ICA"). It is brought with permission granted by Longmore LJ.

2. The appellants were named as the first, second and third claimants in the arbitration. The two companies are incorporated under the laws of India.

3. The sole respondent to this appeal, Mr Guinness, was one of the two respondents in the arbitration, and the first defendant to the claim to enforce the arbitral award. The second defendant to that claim, Corporate Partnerships Ltd ("CPL"), was the second respondent in the arbitration. It has not sought to challenge enforcement of the award. CPL is a United Kingdom company, of which Mr Guinness is the major shareholder.

4. The case arises out of a business agreement dated 4 October 1999, which agreement includes an arbitration agreement. Mr Kanoria, Mr Guinness, Kanoria Information Technology and Systems Ltd (which later changed its name to eSols Worldwide Ltd) and CPL were parties to this agreement. It was governed by Indian law.

5. The business agreement was for the recruitment of software personnel in India to be provided to clients in the United Kingdom. The agreement provided for the creation, by Mr Kanoria and Mr Guinness, of an Indian joint venture company, to be called Indekka, which would be responsible for recruiting the software personnel, with assistance from eSols. CPL was to set up a new division, the Information Technology Division (they never in fact did so), which was to be responsible for placing the recruits under contract in the United Kingdom with United Kingdom clients. CPL was to account to Indekka for the revenues it received, less certain allowances that it was entitled to retain to cover its costs. A shareholders' agreement of the same date was entered into between Mr Kanoria and Mr Guinness, governing their respective holdings in the joint venture company.

6. The arbitration agreement in the business agreement provided that the seat of the arbitration should be Mumbai, India, and that the arbitration should be conducted under the rules of the ICA by a sole arbitrator, applying Indian law.

7. On 25 May 2001, Mr Guinness had the misfortune to undergo a radical retropubic prostatectomy, having been diagnosed with cancer. In due course he went home to convalesce.

8. On 11 October 2001, Mr Guinness received from ICA notice of arbitration. While this purported to be brought pursuant to the business agreement, Indekka was named as the third claimant, although that company had not been incorporated at the time of the arbitration agreement.

9. The statement of claim alleged, among other things, that CPL had failed to pay a total of £144,571 sterling to Indekka pursuant to the business agreement. In particular, it alleged that CPL had made excessive deductions. No allegation was made that Mr Guinness had failed to make any payments to Indekka or to anybody else, although another allegation (which is not material to these proceedings) was made against Mr Guinness. Then, without more, the pleading stated:

> "The claimants, in the aforesaid facts and circumstances, submit that Claimant No 3 is entitled to claim and recover from the **respondents** [my emphasis] and the respondents are bound and liable to pay to Claimant No 3, the aforesaid sum of GBP 144,571 together with interest thereon at the rate of 24% pa with effect from 15th March 2001 ...."

The pleading subsequently made it quite plain that it deliberately averred that each of the respondents was liable in relation to this sum.

10. On 11 October 2001, Mr Guinness wrote to ICA referring to the documents that he had received in a letter which ended:

> "Due to health reasons I will not be in the office for twelve weeks from today as I am having a course of radiotherapy for cancer. I will not therefore be in a position to respond until the New Year."

ICA wrote back extending time to 31 December 2001.

11. On 1 February 2002, Mr Guinness wrote to the ICA as follows:

> "I refer to previous correspondence in this matter. I have not been in a position to respond and probably will not be able to due to my cancer not being cured. I have not worked since last March and will not be returning to work again. I am convalescing at the moment.
>
> Regrettably I have not therefore studied the bundle of documents sent to me or responded to them. I mean no disrespect by this action but I am incapable at the present time of working.
>
> I would however like to make two points as when I opened the bundle last year it was obvious what it was.
>
> Firstly, any financial agreement was between the claimant(s) and Corporate Partnerships Limited and not me personally."

The second point is of no relevance.

12. In due course, after a number of adjournments, the arbitration took place in Mr Guinness' absence. An award was issued dated 5 April 2003. After reciting particulars of the claim made, the award continued:

> "14. The Claimants, by their Advocates' letter dated 25th May 2001 addressed to both the Respondents, called upon them to pay the aforesaid sum of GBP 144,571 together with interest thereon at the rate of 24% per annum and also called upon Respondent No 1 to resist from employing Indian Software Personnel and recruiting their services to clients in the UK through entities other than Respondent No 2. [That relates to the other allegation made against Mr Guinness.] By the said letter dated 25th May 2001, the Claimants also called upon the Respondents to make available to the Claimants the income and expenditure statement for the period after 14th March 2001 up to date. The Respondents have not sent any reply to the said notice.
>
> 15. On the basis of the evidence of Shri Shriprakash Jain and the uncontradicted documentary evidence, I direct that the Respondents shall pay the sum of GBP 144,571 to Claimant No 3. The said amount shall be paid with interest at 12% per annum from 15th March 2001 till payment or realisation. I do not propose to pass any further order on merits."

The arbitrator then awarded the claimants the costs of the arbitration.

13. On 31 July 2003, the appellants issued their claim to enforce the arbitral award in the Commercial Court, supported by a witness statement from a solicitor, Mr Sigardsson. They claimed enforcement on the grounds (i) that India is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the Convention"); (ii) that the award was properly made according to the arbitration agreement and the rules of the ICA; and (iii) that the defendants had not complied with the award.

14. On 15 August 2003, Thomas LJ granted permission to enforce the award. This was served on 20 August 2003, whereupon, on 3 September 2003, Mr Guinness filed his application that the order of Thomas LJ be set aside pursuant to CPR 62.18(9)(a). He relied on section 103(2)(a), (c), (d), (f) and section 103(3) of the Act.

15. Section 103, headed "Refusal of recognition or enforcement" provides:

> "(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
>
> (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves --
>
> (a) that a party to the arbitration agreement was (under the law

applicable to him) under some incapacity;

....

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration ....;

....

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award."

16. When the case came on before Gloster J on 18 July 2005, three grounds were relied upon for setting aside Thomas LJ's order. They were:

(1) The arbitrator made an award which exceeded his jurisdiction as the arbitral award was made in favour of the third claimant, Indekka, although Indekka was not a party to the arbitration agreement.

(2) The arbitrator made an award against Mr Guinness when the only claim submitted by the claimants against him had failed. Accordingly, section 103(2)(d) of the Act applied.

(3) Mr Guinness was under an incapacity at the relevant time and therefore unable to present his case (section 103(2)(c)).

17. Gloster J rejected the first ground. She held that the order that CPL should pay the sum claimed to Indekka was an order to which Mr Kanoria and eSols were entitled by way of specific performance of CPL's obligations under the business agreement.

18. The third ground succeeded. The judge held at paragraph 38 of her judgment:

"The fact is that, as the correspondence and the medical evidence shows, Mr Guinness was seriously ill and suffering from a life-threatening cancer at the relevant time which was followed by clinical depression. There was no factual dispute about this. It was, in my judgment, realistically impossible for him to concentrate on this matter during the relevant time so as to

> instruct counsel or solicitors in a meaningful way to appear for him in India and to present the defence that, on the pleadings and on the basis of the Award, was obviously available to him, namely that he personally had no obligation under the terms of the Business Agreement, merely because he was a director of the company, to make the payments which CPL clearly was obliged to make."

19. I have left the second ground until last because, although Mr Flannery (who has appeared today but not below) for the appellants challenges the judge's decision on the third ground, and, by cross- appeal, Mr Young QC for Mr Guinness challenges the decision on the first ground, it has proved unnecessary to resolve these challenges by reason of unforeseen developments in respect of the second ground. Gloster J was, understandably, perplexed as to how a former Chief Justice of India could make an award against Mr Guinness in respect of a debt owed by CPL. This was a matter that she explored with Mr Kennelly (who then appeared for the current appellants). She asked:

> "Before you start, I want you to tell me what is the juridical basis for the liability of Mr Guinness in relation to the claim under the relevant paragraph of the Agreement, under paragraph 13 of the Agrement. What is the juridical basis for that?"

Mr Kennelly replied:

> "The short answer to that is I have no material explaining why .... I cannot give you a reason. The corporate veil was clearly pierced, but there is no explanation of why that was or why that was done.
>
> ....
>
> MRS JUSTICE GLOSTER: No separate claim was brought against him. There is no allegation that it was appropriate in the case of this particular company to pierce the corporate veil and make this director liable.
>
> MR KENNELLY: My Lady, indeed.
>
> MRS JUSTICE GLOSTER: You cannot help on that?
>
> MR KENNELLY: Your Ladyship knows that I have the same documents your Ladyship has, and I cannot provide any more detail than the detail in those documents. I would submit to your Ladyship, however, that this is a matter of Indian law and we cannot guess the potential juridical basis there could be in Indian law.
>
> MRS JUSTICE GLOSTER: But there is no pleaded case

against Mr Guinness."

After further discussion Gloster J asked:

> "Can you just wait until I have put the proposition to you? Am I to proceed on the basis that, as the papers disclose, there is no juridical basis for the claim against the individual director?
>
> MR KENNELLY: Yes, is the short answer."

20. Mr Flannery has introduced into evidence this afternoon, without objection from Mr Young (and that is no matter for surprise), a document headed "Oral submissions made on behalf of Mr Ajav Kanoria, Indekka Software Pvt Ltd and eSols Worldwide Ltd at the time of the hearing in the arbitration proceedings held on 22nd March 2003 before the Sole Arbitrator Mr Justice Chandrachud (Former Chief Justice of India)". The document so far as relevant reads:

> "Tony Guinness as the person owning and controlling Corporate Partnerships Limited had an obligation to ensure that he himself and Corporate Partnerships Limited acted only in terms of the agreement and no other with respect to these agreements. Thus, Tony Guinness is the person liable for any breach of business in terms of the conduct of business to be carried out by the Information Technology Division.
>
> Tony Guinness has acted with a deliberate and malafide intention in not spinning out the division into a separate company so that he can continue to exercise control on the business using the proceeds generated therein for his own purpose and not for the purposes defined in the agreements. Clause 18 and 19 of Business Agreement where under the two individuals were restricted from alienating their controlling interest in the companies which were parties to the agreement and were responsible for operating the business also substantiate the contention [that] the two companies were merely a vehicle to conduct the business on behalf of the two individuals. The companies were controlled by two individuals and the fact that they were restricted to part with their interest in their companies, clearly establishes that the companies were merely vehicles of convenience and that the business was actually that of the two individuals and the two individuals were in their personal capacity responsible for running the business and incurring costs as provided for by the Business Agreement.
>
> This is a clear case where the beneficiaries were the two individuals with power to exercise all business decisions vested in the two individuals and such powers were indeed exercised by the two individuals. Thus Tony Guinness in his individual capacity is directly responsible for any break-up of the terms of the agreement specially where expenses in excess of those

> specially provided for in the agreement were incurred by the Information Technology Division of CPL.
>
> To sum up, this is a clear case where two individuals join to start a business and for reasons of convenience the conduct of business is so structured that the two companies owned by some individuals are used as vehicles for conducting the business but the business is owned by the individuals run both through their respective companies for benefits to each of them. But where one of the two parties acts in a malafide manner because it has control over the funds to the detriment of the other."

21. Mr Flannery accepted that this document evidenced submissions that were put before the arbitrator, and also that this document provided for the first time an explanation for what on the face of it was the surprising result reached by the arbitrator. What Mr Flannery could not explain was how it was that this document has been placed before this court for the first time and that Gloster J was not informed of it. He has also accepted, as he must, that no notice of these allegations was given to Mr Guinness at any stage -- neither in time for him to meet them in the arbitration, nor afterwards by way of explanation for the award made against him, nor indeed at any moment up to this day.

22. This evidence greatly alters the nature of the case to be advanced on behalf of Mr Guinness that he was unable to present his case. It seems to me quite clear on the natural wording of that clause that a party to an arbitration is unable to present his case if he is never informed of the case that he is called upon to meet. That was the position in this case. So far as Mr Guinness was concerned, there did not appear to be any valid case that he had to meet. There appeared to be an allegation that he was liable for the debt of a company, and he sought to meet that allegation by writing a simple letter, drawing attention to what appeared to be the obvious fact that he was not liable for the debt of the company. That, as we now see, was not the case that he had to meet. He never had a fair chance to meet that case.

23. There is not much authority on the meaning of section 103(2)(c) of the 1996 Act. In Minmetals Germany GmbH v Ferco Steel Ltd [1999] 1 All ER (Comm) 315, 326, Colman J observed:

> "In my judgment, the inability to present a case to arbitrators within section 103(2)(c) contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice."

That observation accords with the interpretation that I have reached in relation to that clause. It also appears to have received the approval of Buxton J in Irvani v Irvani [2000] 1 Lloyd's Rep 412, 426.

24. Accordingly, I find that there is good ground for applying the provision that recognition or enforcement of the award may be refused. Mr Flannery has emphasised that the provision says "may", and submitted that this court has a jurisdiction whether to refuse

enforcement, which it should not exercise. It should not exercise that jurisdiction, he submits, because Mr Guinness failed to take advantage of the opportunity that had been open to him to challenge the award before the Indian court. That is correct. Mr Guinness made such a challenge, but it was ruled out as being out of time.

25. As to that submission, I would first express doubt as to whether the broad discretion that Mr Flannery suggests exists is available to the court. Mr Young has drawn our attention to the observation of Mance LJ in Dardana Ltd v Yukos Oil Co [2002] 2 Lloyd's Rep 326, 330:

> "8. .... Mr Malek QC maintains that the appellants can also resist recognition and enforcement, on the basis that it was and is for the respondents, under sections 100 and 102, to show a valid arbitration agreement in writing. He suggests that this is fair, since section 103(2) offers no more than what he described as 'discretionary' relief, whereas any entitlement to rely on sections 100 and 102 would be as a matter of right. I am not impressed by that suggestion. Section 103(2) cannot introduce an open discretion. The use of the word 'may' must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel. Support for this is found in van den Berg, The New York Convention of 1958 (Kluwer), page 265."

26. Even if there is a wider discretion, I would not exercise it on the facts of this case. This is an extreme case of potential injustice. It hardly lies in the mouths of the appellants to seek the exercise of discretion in circumstances where the facts that could have led to injustice have only come to the attention of the court at the ninth hour. For those reasons I would dismiss this appeal.

27. **THE MASTER OF THE ROLLS:** I agree.

28. **LORD JUSTICE MAY:** I also agree that this appeal should be dismissed.

29. The limited circumstances in which an English court could be persuaded to refuse recognition or enforcement of an arbitration award to which the New York Convention applies are those to be found in sections 103(2) and (3) of the Arbitration Act 1996. The authorities make clear that the court is not concerned to investigate the merits of the dispute which is the subject of the award.

30. Section 103(2) and (3) are more concerned with the fundamental structural integrity of the arbitration proceedings. Section 103(2) of the 1996 Act is expressed in discretionary terms. Paragraph 8 of the judgment of Mance LJ in Dardana v Yukos Oil [2002] 2 Lloyd's Rep 326 at 330 suggests that section 103(2) cannot introduce an open discretion. Speaking generally, that is not surprising when the limited circumstances in which an English court can be persuaded to refuse enforcement of a New York Convention award concern, as I think, the structural integrity of the arbitration proceedings. If the structural integrity is fundamentally unsound, the court is unlikely to make a discretionary decision in favour of enforcing the award.

31. In the present case the arbitrator made a money award against Mr Guinness personally when the claim which had been submitted to arbitration contained no material which showed in any way that Mr Guinness rather than his company might be personally liable. Gloster J was told in terms on behalf of the appellants that the papers before her disclosed no juridical basis for the claim against the individual director. The same in substance appeared in the written submissions to this court. All that might be said was that the written claim in the arbitration appeared to contain a prayer that an award should be made against Mr Guinness personally. The antecedent material did not plead a case in support of that prayer.

32. Only today Mr Flannery has referred us to a document, to which the Lord Chief Justice has referred, which was not before the judge. This document appears to contain an account of oral submissions made to the arbitrator in Mr Guinness' absence. This document records that the very well-known case of Saloman v Saloman was referred to. I agree with the Lord Chief Justice that it makes an argument for lifting the corporate veil only on account of malafides. It is accepted that no notice was given to Mr Guinness, in the arbitration claim or otherwise, that it would be said that the arbitrator should lift the corporate veil by reason of malafides or, as I would call it, fraud. It is elementary in this jurisdiction that a case of fraud may not be advanced without the party alleged to have been fraudulent having been given due notice of it. No apparent case was made against Mr Guinness in the written claim that was made and served on him to that effect. The failure to give him notice of this kind of case such as I have described does, I think, amount to a failure in the nature of a breach of natural justice. I agree that it comes within section 103(2)(c) of the 1996 Act. Mr Guinness was not given proper notice of at least a highly material part of the arbitration proceedings so far as he was concerned, and he was unable to present his case because he was never given notice of the basis of the case against him personally.

33. I agree that this is not a case where the discretionary points made by Mr Flannery have any bearing upon what the court should do in these circumstances.

34. I would only add that in my judgment it would not be every case where facts have not been brought to the attention of someone who had not turned up to arbitration proceedings to which the result of this appeal might apply. This is an exceptional case, as I see it, where no notice was given of an allegation of fraud. I would limit what I have said for present purposes at least to that.

ORDER: Appeal dismissed with costs; the sum of £153,874.81 plus interest paid into court to be paid out forthwith; £15,000 to be paid on account within seven days; the balance to be assessed if not agreed.