In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 339

BETWEEN:

(1) BCPR PTE LTD
(2) BANCHAK CORPORATION PUBLIC COMPANY LIMITED

Plaintiffs

-AND-

SEACREST GROUP LIMITED

Defendant

RULING

(In Chambers)

Application for extension of time in which to set aside an Order granting leave to enforce a New York Convention award and/or set aside the Order and/or an adjournment or a stay of further proceedings pending appeal on a point of law
Sections 42 and 48 of 48 of the Bermuda International Conciliation and Arbitration Act 1986

Date of Hearing: **5 August 2025**
Date of Ruling: **7 August 2025**

Appearances: ***Ben Adamson*** **of Conyers Dill & Pearman Limited for the Plaintiffs**

John Hindess **of Wakefield Quin Limited for the Defendant**

RULING of Martin J

Introduction

1. The plaintiffs obtained an Arbitral Award on 27 September 2024 in London ("the Award"). The arbitration panel accepted the defendant's claim for damages in an amount of approximately US$24,000 but held that the plaintiffs were in reality the successful parties in the arbitration because the plaintiffs had succeeded in defending the overwhelming number and value of the claims that had been made against them, and the small award to the defendant represented a Pyrrhic victory. The arbitration panel concluded that the plaintiffs were in real terms the successful parties in the arbitration proceedings and awarded the plaintiffs their costs of the arbitration in the amount of over US$4.5 million.

2. The plaintiffs proceeded to apply for leave to enforce the Award as a Judgment of the Supreme Court of Bermuda under section 48 of the Bermuda International Conciliation and Arbitration Act 1986 ("BICA") as an UNCITRAL Award. This was done by administrative application on the papers to the court on 14 November 2024. Leave to enforce the Award was granted by Order of the Bermuda court on 13 December 2024 ("the Order"), and the defendant was given 14 days from the date of service of the Order to apply to set aside the Order. The Order was served upon the defendant at its registered office on 17 December 2024 in accordance with the rules as to service upon companies registered in Bermuda. The defendant did not apply to set aside the Order within 14 days of service and on 11 February 2025 final judgment was entered against the defendant in an amount of US$4,766,381.33 ("the Judgment").

3. On 9 December 2024 sought leave to appeal to the English High Court in relation to several points of law under section 68 of the English Arbitration Act 1996. In a ruling on the papers dated 18 March 2025, Foxton J refused the defendant's application for leave to challenge the award based on grounds of causation and implied terms because those grounds had no realistic prospects of success. However, Foxton J did not feel able to dismiss one ground of appeal raised by the defendant without oral argument. This ground relates to the alleged misapplication of the foreign exchange conversion rate in respect of the defendant's claims in the arbitration proceedings. Foxton J adjourned the determination of this ground to a hearing which is scheduled to take place in November 2025.

The present applications

4. On 13 June 2025 the defendant issued a summons in these proceedings seeking (i) an extension of time in which to apply to set aside the 13 December 2024 Order giving leave to enforce the Award as a Judgment (ii) an order setting aside the 13 December 2024 Order and (iii) an application for a stay of enforcement of the Judgment.

5. The factual grounds in support of the defendant's applications are set out in two affidavits sworn by Mr. Erik Tiller, who is an employee of the defendant. There are two main grounds which are briefly summarized below.

6. The first ground is that on 18 March 2025 the defendant obtained leave to appeal against the award on the grounds that the arbitration panel failed to consider the proper currency conversion rate of the defendant's claim in the arbitration proceedings. Mr. Tiller says that the upshot of that ground appeal is that if the appeal tribunal allows the appeal and decides

that the conversion rate should have been calculated at the date of payment, then that will have the effect of increasing the nominal award of US$24,000 to over US$3 million.

7. The defendant says that this will represent substantial success in the arbitration proceeding and will have the effect of (i) awarding the defendant a sum that will reduce the amount owed by the defendant by US$3 million and (ii) will cause the arbitration panel to review its costs award, and reverse it, so that the plaintiffs will owe both the US$3 million in damages and will have to pay the defendant's costs of the proceedings which are claimed to be £2.5 million (or approximately US$3.25 million). It was submitted that this would represent a total reversal of the Award in the defendant's favour.

8. Mr. Tiller has exhibited his counsel's advice which says that in his counsel's view the prospects of success in relation to the appeal are "good". In those circumstances, it is said that it would be unjust to allow the plaintiffs to pursue their enforcement of the Judgment pending the outcome of the appeal.

9. The second ground is a corollary of the first, namely that allowing the plaintiffs to proceed would cause the defendant prejudice by having to pay the Judgment and then seek recovery of the Judgment from the plaintiffs when the defendant succeeds in relation to the appeal, and then subsequently obtain a further revised award which will reverse the effect of the award itself and the costs associated with the arbitration proceedings.

The plaintiffs' position

10. The plaintiffs take three main points of objection to the defendant's application. First, the grounds on which it is possible to refuse enforcement of an arbitral award under section 42 (2) of BICA are extremely narrow, and none apply here[1]. Second, there is no challenge to the costs award directly: it is a challenge to the basis of the conversion calculation. It may be that a further challenge may be mounted depending on the outcome of the appeal, but there is no direct challenge to the costs award that is the basis of the Judgment. Third, no explanation has been given in respect of the reasons for the delay in seeking an extension of time to set aside the Order, or to explain the delay in bringing the present applications.

11. As to the alleged prejudice, the plaintiffs say there is no prejudice where it is a question of the payment of money. In any event, the plaintiffs say the defendant has not alleged that it cannot pay the Judgment sum or that paying the Judgment sum will impact its ability to conduct its business or cause any other prejudice.

The Court's approach to the extension of time application

12. The Court was referred to the commentary in the Supreme Court Practice (1999)[2] ("the White Book") in relation to the grant of an extension of time which set out the conventional grounds on which an extension of time will be granted where there is no prejudice to the opposing party, or where that prejudice can be met by an award of costs and interest.

[1] Section 42 (2) grounds on which enforcement may be refused are: (i) incapacity (ii) invalidity of the arbitration agreement (iii) no notice of the arbitration proceedings given (iv) the award deals with a difference not covered by the arbitration agreement (v) the arbitral authority or procedure was not in accordance with the arbitration agreement (vi) the award has not yet become binding.
[2] Pages 18-19 3/5/4

13. Particular reliance was placed upon the decision of Meerabux J in **Greene v Greene**[3] in which the learned judge held that even where no explanation for the delay in applying has been given, or an unmeritorious explanation has been given, the court should nevertheless be slow to shut out a hearing on the merits of an application where there is no prejudice to the other side that cannot be compensated in costs.

14. The Court accepts the statements of general principle set out in **Greene v Greene**, but notes that the commentary in the White Book makes it clear that the court will usually expect to be given an explanation for the failure to comply with the rules so that the Court can make an assessment of the degree to which the refusal of the extension of time would amount to a serious injustice.

15. In the context of an enforcement of an arbitral award under BICA there is a bias towards enforcement[4], and in the Court's view, this underscores the normal requirement that some explanation must ordinarily be given as to why the party who seeks to set aside the registration of an arbitral award as a judgment did not do so within the time limits provided by the Order. On the face of it, the defendant in this case has simply chosen to ignore the Court's Order and the Judgment, but now seeks to invoke the Court's discretionary power to grant an extension of time to apply to set aside the Order without any explanation as to the reasons for the delay, nor the grounds on which the application to set it aside are based.

16. The plaintiffs rightly point out that none of the established gateways for the refusal of enforcement set out in section 42 (2) of BICA are engaged, and so any application to set aside the Order granting leave to enforce the Award is bound to fail. This is not a case where the Court is shutting out an argument that would fall within the statutory parameters of section 42 (2) which would allow the Court to refuse to grant leave to enforce the Award.

17. The Court will therefore not grant an extension of time to a party to make an application which is doomed to fail, irrespective of whether the party seeking the extension has set out cogent grounds explaining the reasons for failing to apply to extend the time or make the application to set aside the Order within the 14-day period. In other words, even if there had been a compelling reason to explain the delay, the Court would not grant an extension to set aside the Order in the absence of some arguable ground that falls within the framework of section 42 (2) of BICA.

18. The Court is therefore not persuaded that it would be appropriate to grant an extension of time to set aside the Order of 13 November 2024.

The application to set aside the 13 November 2024 Order

19. The defendant also seeks an Order setting aside the 13 November 2024 Order under the general jurisdiction of the court to set aside any order which has been made in the absence of the party affected by it[5]. The defendant submitted that there had been a non-disclosure by the plaintiffs on the *ex parte* application by failing to tell the court that the defendant had sought

[3] [2002] Bda LR 31
[4] See **IPCO Nigeria Ltd v Nigerian National Petroleum Corp** [2005] 2 Lloyds Rep 326 at paragraph 11 per Gross J.
[5] White Book commentary RSC Order 32 rule 6.

leave to appeal against the Award. It was submitted that had the court been informed of the application for leave to appeal the court would have refused the Order[6].

20. The defendant submitted that it would be 'grossly' unjust to allow the plaintiffs to pursue the enforcement of the Judgment when the pending appeal may have the effect of reversing the decision of the arbitral tribunal.

21. The Court is unable to accept these submissions. In the first place, the procedure for obtaining leave to enforce an arbitral award under BICA is on the papers, and when those papers were filed the defendant had not applied for leave to appeal. Although it is true that the application for leave to appeal was dated 9 December 2024, there is no evidence as to when notice of that fact was communicated to the plaintiffs, but in practical terms it would not have been feasible to apprise the court of this development in the four days before the court issued its Order.

22. If and to the extent that the omission to advise the court of this change of circumstances might represent a breach of the ongoing duty of full and frank disclosure that applies to a party who has made an *ex parte* application, it is not of such a character that the Court would set aside the Order.

23. In the second place, the framework for giving leave to enforce an arbitral award is statutory and the court's jurisdiction to refuse leave is restricted. It would require a very unusual set of circumstances for the court to conclude that although it had no jurisdiction under section 42 (2) to refuse an application for leave to enforce an arbitral award, the court would nonetheless set aside the Order based on an alleged failure to allow the defendant to oppose the grant of the Order when no substantive grounds of opposition to the making of the Order have been advanced. The case is put solely on the basis that there is a pending challenge against the Award. Of itself, that is not a ground for the court to refuse leave to enforce an award.

The application for the adjournment or a stay of the Order of 13 December 2024

24. The defendant says that in light of the appeal that will be heard in November 2025 it would be unjust to allow the plaintiffs to pursue their enforcement applications when the ultimate result of the appeal would (i) result in a reversal of any enforcement measures and (ii) prejudice the defendant by its having to make payment of the Judgment sum and then have to take steps to recover the sums paid thereunder.

25. The defendant submits that it would suffer prejudice if the Judgment were to be enforced in the short period between now and the appeal hearing in November 2025: the mere payment of money is said to be a sufficient prejudice. It is said that the defendant should not run the risk of having to take steps to recover the payment of the Judgment in the event that the appeal is successful.

26. The defendant therefore applies for an order to stay further enforcement proceedings under section 42 (5) of BICA which provides that where an application has been made to a

[6] The defendant's submissions paragraph 40.

competent authority in the jurisdiction where the award was made to set it aside, the court may adjourn the enforcement proceedings.

27. The Bermuda court has approved and applied the principles set out in the leading authority under the equivalent provisions to section 42 (5) of BICA in the English Arbitration Act 1996 in **LV Finance Group Limited v IPOC International Growth Fund Limited**[7] adopting the relevant passages set out by Gross J in **IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation**[8].

28. These principles are summarized[9] below:

a. The legislation embodies a predisposition in favour of enforcement of a New York Convention award.
b. Unless there has been an order made by the court in the country of origin, the fact of an appeal does not trigger the grounds under section 42 (2) (f) of BICA to refuse enforcement.
c. In considering whether an adjournment under section 42 (5) of BICA, the court should ordinarily take into account (i) whether the application in the foreign court is brought *bona fide* and not for tactical reasons of delay (ii) whether the application in the foreign court has a realistic prospect of success (iii) the extent of the delay occasioned by the adjournment.
d. In assessing the application the court will consider these factors on a 'sliding scale' on which a manifestly invalid award would justify an adjournment with no order for security pending the outcome of the appeal, and a manifestly valid award would justify either a refusal of the application or the provision of substantial security pending appeal.

The Court's assessment

29. Strictly speaking, an application under section 42 (5) is for an adjournment of the application for leave to enforce the Award as a judgment of the Bermuda court. That order has already been made. However, the Court is prepared to entertain the application on the basis that this is an application that the defendant could have made before the Judgment was entered and will apply the principles set out above on that footing.

30. There is no material on which the Court could conclude that the appeal is being brought for purely tactical reasons or is otherwise not *bona fide*.

31. The Court is not in a position to assess the merits of the defendant's proposed appeal and expressly refrains from doing so. However, the Court must make some high-level evaluation of where the defendant's prospects of success lie on the 'sliding scale'.

32. On the one hand, the defendant's English counsel has given an opinion that the prospects of success on the appeal are 'good', albeit without explaining why. On the other hand, Foxton J expressed the view that he should not refuse leave to appeal on one ground, having rejected

[7] [2006] Bda LR 67 at paragraphs 21-29 per Kawaley J as he then was.
[8] [2005] 2 Lloyds Rep 326
[9] These principles have been restated and applied more recently in **Hulley Enterprises Limited and Others v The Russian Federation** [2021] EWHC 894 in the judgment of Henshaw J at paragraphs 58 to 67.

the others as being without any arguable merit, because he did not feel that the issues on the currency conversion point had been *"sufficiently comprehensively explored in the written materials filed that they could be fairly resolved without an oral hearing"*. Foxton J also noted that the plaintiffs had articulated a powerful point in response to the defendant's application which may ultimately prove decisive[10]. It seems to the Court that this indication moves the needle on the 'sliding scale' firmly in the direction of "manifest validity".

33. Nonetheless, the Court does not foreclose the potential for the defendant to achieve ultimate success and, in order to give appropriate deference to the curial court under the arbitration agreement, the Court is prepared to grant an adjournment of the enforcement proceedings until the outcome of the appeal has been determined. However, that adjournment is to be on terms that sufficiently safeguard the interests of the plaintiffs who have been successful in the litigation, and who are presently entitled to enforce the Award.

34. The Court has also taken into account that the delay in the determination of the appeal may be only for a few months if the defendant is unsuccessful, but recognizes that it may be much longer if the appeal is successful, and the matter is remitted to the arbitration panel for rehearing or a further award. It is not readily apparent that the outcome will be quite as 'open and shut' as the defendant suggested in argument. However, the likely delay occasioned by an adjournment (or stay) is not such as to require the Court to refuse the application on those grounds.

35. However, the order staying or adjourning the enforcement proceedings will be subject to the provision of security by the defendant to reflect the Court's evaluation that the Award is much closer to the "manifestly valid" end of the sliding scale than the middle.

36. The Court has considered the options presented and has concluded that the appropriate balance will be struck if the defendant is ordered to pay the sum of US$1.4 million into Court or alternatively to its Bermuda attorneys on terms that it is to be held by those attorneys until further order of the Court (supported by the usual form of undertaking).

37. The sum of US$1.4 million represents the difference between the sum claimed by the defendant to represent the amount it will recover if it is successful (although the Court does not have any evidence of the precise basis for this calculation) of US$3 million and the amount of the amended Judgment sum of US$4,402,840.69.

38. This does not take into account any potential claim for costs which may or may not be awarded in the defendant's favour if it succeeds: the allowance of those costs would be the subject of the future exercise of a discretion which is too uncertain for this Court to predict today. The Court also notes that the Judgment is for the payment of a sum of money, and there is no evidence that either party is unable to pay (or repay) any sum ordered. Thus, there is no real prejudice to the defendant.

39. The Court therefore orders that upon the defendant paying into court the sum of US$1.4 million, or otherwise paying that sum into the US$ trust account of its Bermuda attorneys in Bermuda on their undertaking to hold those funds to abide the further Order of this Court, the

[10] Paragraph 4 of the Order of 18 March 2025 at HB 252.

proceedings to enforce the Judgment will be stayed until further Order of this Court, such payment to be made within 14 days of the date of this Order.

40. The Court will grant an interim stay of further proceedings for the period of 14 days to enable those funds to be paid, and in default of payment, the stay shall cease to have effect in 14 days' time.

41. Given the uncertainty of the outcome of the appeal, the Court reserves the costs of the application until the determination of the appeal proceedings.

42. The parties will therefore submit an Order in the terms reflected above as soon as possible.

Dated this 7th August 2025

THE HON. MR. ANDREW MARTIN

PUISNE JUDGE