Supreme Court Clarifies When the English Court May Re-Consider a Judgment and/or Order That Has Not Yet Been Sealed

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It is well established that a Court has the discretionary power to re-open its own judgment and order provided that the order has not been sealed. What has been less clear, until now, are the principles that the Court should take into account when exercising this discretion in relation to unsealed orders concerning matters other than appeals (the process for re-opening orders concerning final determination of appeals is set out in Civil Procedure Rule 52.30). Fortunately, the Supreme Court has now provided some much needed clarity in its judgment in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16.

Key Takeaways

- The task of a judge faced with an application to re-consider a judgment and order before the order has been sealed is to do justice in accordance with the Overriding Objective under the Civil Procedure Rules, which includes the finality principle.
- The Court will consider whether the factors favouring re-opening the judgment and unsealed order are, in combination, sufficient to overcome the finality principle, together with any other factors in favour of leaving the judgment and order in place.
- The Court will give significant weight to the finality principle in the exercise of its discretion. Therefore, strong factors will need to be present in order for the Court to re-open its judgment and order.

Background Facts

In 2010, AIC Ltd ("AIC") succeeded in obtaining an arbitral award of US$48.13 million in Nigerian arbitral proceedings against the Federal Airports Authority of Nigeria ("FAAN"). FAAN responded by commencing proceedings in the Nigerian courts to

overturn the arbitral award. At the time of writing—12 years later—the Nigerian challenge proceedings are still ongoing.

In early 2019, AIC (after presumably having become frustrated by the slow progress of the Nigerian challenge proceedings) sought to enforce the arbitral award in England. FAAN responded by seeking an adjournment of the English proceedings pursuant to section 103(5) of the Arbitration Act 1996 (which grants the Courts the discretion to adjourn enforcement of a foreign arbitral award in circumstances where an application has been brought to set aside or suspend the award). The High Court adjourned the enforcement application, but on the proviso that by 14 November 2019 FAAN provide security for its obligations under the arbitral award in the form of a bank guarantee of US$24.062 million (the "Bank Guarantee").

When FAAN failed to provide the Bank Guarantee by the deadline, the High Court made an order permitting AIC to enforce the Award (the "Enforcement Order"). However, before the Enforcement Order was sealed, FAAN provided the Bank Guarantee to AIC and applied to re-open the judgment and set aside the Enforcement Order. The High Court set aside the Enforcement Order and retrospectively extended the deadline for the provision of the Bank Guarantee, meaning that the adjournment remained in place.

AIC successfully appealed to the Court of Appeal, which reinstated the Enforcement Order. This placed AIC in a fortuitous position: it now not only had the right to enforce the arbitral award in England, it also had the Bank Guarantee which it duly called on in order to obtain payment from FAAN's bank for US$24.062 million (i.e., around half of the value of the arbitral award). FAAN then appealed to the Supreme Court.

Re-Opening a Judgment or Order: Key Principles

The Supreme Court held that the question of whether to set aside the Enforcement Order centred on the finality principle. The finality principle requires that once a court issues a judgment it should (save for any appeal) be treated as final. This is a long-standing legal principle (dating back at least 175 years) that is designed to ensure that litigation is conducted at proportionate cost and with expedition. This principle requires that, among other things, litigants put their best foot forward at a hearing rather than seeking to deploy new arguments or evidence afterwards. Putting things another way, litigants should bring their "*whole and best case to bear at the trial or other hearing when a matter in dispute is finally to be decided (subject only to appeal)*" (at [31]). The finality principle is also enshrined in the requirement in the Overriding Objective, specifically Civil Procedure Rule 1.1(2)(f), which provides that in order for cases to be dealt with

justly and at proportionate cost, orders should be enforced so far as is practicable. It is worth noting that *AIC Ltd v Federal Airports Authority of Nigeria* concerned cases under the Civil Procedure Rules; cases under different procedural rules (such as the Criminal or Family Procedure Rules) are subject to their own Overriding Objective and will therefore differ.

Accordingly, the Supreme Court held that when a court considers whether to re-open a judgment and unsealed order, it must assess whether the factors in favour of doing so carry sufficient weight to override: (i) the finality principle; and (ii) any other factors pointing toward retaining the order. In relation to this exercise, the following points are pertinent:

- The Court's discretionary power to re-open its own judgment and unsealed order is a "*structured*" form of discretion (at [37]), meaning that the Court must give greater weight to some factors over others. Due to the fundamental importance of the finality principle, when the Court performs its analysis it must start from the position that the scales are "*heavily loaded*" against the party seeking to re-open the order (at [45]). When deciding whether to re-open a judgment and unsealed order, "*a judge should not start from anything like neutrality or evenly-balanced scales*" (at [32]).

- Notwithstanding the above point, the Supreme Court stressed that the courts have flexibility when considering whether to re-open a judgment and/or unsealed order. In particular, the Supreme Court rejected a rigid two-stage test set down by the Court of Appeal as it would "*impose a straitjacket upon the judicial exercise of a discretionary jurisdiction which is … alien to the essentially flexible nature of the judge's task when weighing competing considerations of potentially limitless variety against each other*" (at [33]).

- While the finality principle will always carry significant weight, its precise weight can vary from case to case "*depending in particular upon the nature of the order already made, the type of hearing at the end of which it was made and the type of proceedings in which it was made*". By way of example, where the order at issue would have the effect of ending the proceedings, the finality principle will carry the most weight. On the other hand, the finality principle is less acute in relation to orders such as case management and interim orders (at [35]).

- It would be wrong to attempt to identify a comprehensive list of factors that are capable of outweighing the finality principle. If such a list were created, there would always be a likelihood that a subsequent case could emerge which shows that the list is inadequate, either because it is missing items or because a particular factor can have variable weight in different circumstances. However, the Supreme Court indicated that it may be possible to identify factors that will never carry significant

weight, for example "*a desire by counsel to re-argue a point lost at trial in a different way*" (at [40]).

Application to the Facts

The Supreme Court held that both the High Court and the Court of Appeal had erred in how they had applied the structured discretionary power. The High Court had ignored the 'structured' aspect of the power as it started its analysis from a neutral position "*rather than one heavily loaded from the outset against [FANN]*", and therefore failed to give adequate weight to the finality principle (at [45]). The Court of Appeal had ignored the 'discretionary' aspect of the power by applying an unduly restrictive two-stage test (at [33]-[34]). The Supreme Court therefore considered the application afresh.

The Supreme Court noted that there were two large factors weighing against re-opening the Enforcement Order:

- **The finality principle:** Not only is the finality principle inherently important, it applied with "*full force*" in the present circumstances as the Enforcement Order was a final judgment which was determinative of AIC's application for relief in the enforcement proceedings.

- **FAAN's delay in providing the Bank Guarantee:** There was no good reason for FAAN's failure to provide the Bank Guarantee by the deadline. FAAN had been on notice for several months that it would need to provide the Bank Guarantee, yet it did not take any meaningful steps to do so until after the deadline for providing the Bank Guarantee and shortly before the hearing at which the Enforcement Order was issued. Once FAAN began the process of obtaining the Bank Guarantee in earnest, it was able to do so within just a few days, showing that if it had acted promptly at the outset, it would not have missed the deadline for providing the Bank Guarantee.

Weighing against the above two factors was the fact that FAAN provided the Bank Guarantee to AIC within a couple of hours of the making of the Enforcement Order. As a result, AIC had been able to call on the Bank Guarantee and receive payment of US$24.062 million of the US$48.13 million arbitral award. This was an "*important change in circumstances*" following the issue of the Enforcement Order and a factor that "*on balance*" justified the re-opening of the Enforcement Order (at [62]-[64]). The Supreme Court therefore set aside the Enforcement Order and adjourned AIC's application to enforce the arbitral award until after the outcome of the Nigerian challenge proceedings. However, in the meantime, AIC was permitted to retain the proceeds of the Bank Guarantee. The Supreme Court noted that this outcome put FAAN

in a worse position than if it had simply provided the Bank Guarantee by the original deadline, which was "*a result which serves the Overriding Objective in its modern form*" (at [64]).

Comment

We expect that the effect of the Supreme Court's decision in *AIC Ltd v Federal Airports Authority of Nigeria* is that in the future significant factors will need to be present in order for a court to re-open its own judgment and unsealed order. Although FAAN ultimately succeeded in re-opening the Enforcement Order in this case, it paid a substantial price (namely US$24 million) to obtain this. The Supreme Court's decision sounds a strong warning to all litigants: if you fail to raise any arguments or evidence at a hearing, then you do so at your own risk.

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Please do not hesitate to contact us with any questions.

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