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The Federal Republic of Nigeria v Process & Industrial Developments Ltd: $11bn Arbitration Award Successfully Challenged for Serious Irregularity

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By Poppy Watson
3PB

Introduction

1. Nigeria, energy and corruption are three words which unfortunately are all too frequently used in the same sentence. As set out by the Guardian in November 2021, Nigeria is arguably a 'cursed' nation: suffering from the curse of vast natural resources causing corruption rather than positive economic development.[1] At that time, fossil fuels were said to account for 60% of Nigerian government revenue and 90% of foreign exchange earnings.[2]

2. The case of *Federal Republic of Nigeria ("**FRN**") v Process & Industrial Developments Limited ("**PID**")* is another example of the corruption which sadly continues to plague Nigeria. In a recent judgment handed down in the High Court, Mr Justice Knowles upheld a challenge to an $11bn arbitration award obtained by PID against FRN, on the basis that it had been affected by fraud in the proceedings, noting that the case demonstrated *"what some individuals will do for money"* and accepting that the contract between the parties was tainted by *"greed"* and *"corruption"*.

Background

3. In 2010 PID agreed with FRN that it would build a gas processing plant in Calabar, Cross River State under a Gas Supply and Processing Agreement (**"the Agreement"**). However, neither party performed the Agreement.

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[1] https://www.theguardian.com/global-development/2021/nov/09/a-wealth-of-sorrow-why-nigerias-abundant-oil-reserves-are-really-a-curse
[2] https://edition.cnn.com/2021/11/03/business/nigeria-clean-energy-transition/index.html

4. The Agreement was governed by Nigerian law and provided for disputes to be resolved by arbitration under the rules of the Nigerian Conciliation and Arbitration Act 2004 and that the venue of the arbitration was to be London.

5. PID argued that the deal collapsed and FRN was in repudiatory breach of the Agreement because FRN did not fulfil its obligations under the Agreement by failing to provide gas to the plant. PID went on to secure an arbitration award against FRN in 2017 in the sum of $6.6bn plus interest. With interest, this award would now be worth over $11bn (**“the Award”**).

6. PID successfully applied for leave to enforce the Award in 2018 under section 66 of the Arbitration Act 1996 (**“the 1996 Act”**). FRN applied for an extension of time to challenge the Award under section 68(2)(g) of the 1996 Act and relief from sanction, which was granted in September 2020.

The Challenge

7. FRN brought a challenge in the High Court under section 68(2)(g) of the Arbitration Act 1996 (‘serious irregularity’) on the grounds that the Agreement was obtained by fraud and alleged that the Agreement was a scam conceived to defraud the country. FRN also sought to set aside the award on the grounds of fraud, misrepresentation and corruption and claimed PID had forged documents and bribed Nigerian officials.

8. PID denied FRN’s claims and accused FRN of false allegations and conspiracy theories. PID also argued that FRN had waived its right to challenge the award as FRN did not raise the fraud allegations during the arbitration, as required under section 73 of the 1996 Act.

Section 68 of the 1996 Act

9. Per section 68 –

    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.

Section 73 of the 1996 Act

10. Per section 73(1)(d) – "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making … any objection - that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

The Decision

The Section 68(2)(g) Challenge

11. In a judgment handed down on 23 October 2023, Mr Justice Knowles upheld FRN's challenge to the Award and found that it had been obtained by fraud and contrary to public policy within the meaning of section 68(2)(g) of the 1996 Act.

12. Mr Justice Knowles found *"without reluctance"* that PID had obtained the Award *"only by practising the most severe abuses of the arbitral process"*. This included that PID had -

    1. paid bribes to the Nigerian oil ministry official in connection with the Agreement;
    2. provided to the arbitral tribunal, and relied on, evidence that it knew to be false, which related to the circumstances in which the Agreement had been procured;
    3. had separately continued to bribe or corrupt FGN's staff before and during the arbitration in order to continue to conceal the bribery; and
    4. improperly secured access to and retained FRN's privileged documents during the arbitration which *"enabled PID to track Nigeria's internal consideration of merits, strategy and settlement"* and meant FGN's right to confidential access to legal advice had been *"utterly compromised throughout all or most of the arbitration"*.

13. One way in which a party may be considered fraudulent under section 68(2)(g) of the 1996 Act is if it fails to disclose documents during an arbitration which would have revealed that fraud. That may be the case even if disclosure has not been ordered if the party nonetheless advances a positive case (either expressly or implicitly) which is inconsistent

with the fraud. Mr Justice Knowles stated that, when considering the distinction between silence and positive untruths, *"context will be so important"*. In this instance, the relevant background was a witness statement that purported to explain how the Agreement came about, which failed to disclose the bribery involved. His Lordship found that PID's conduct had been *"dishonest by the standards of ordinary decent people"*.

14. Mr Justice Knowles also noted the doctrine of separability which *"treats the arbitration agreement as a separate agreement from the [Agreement]"*. His Lordship found that, while the effect of bribery on the substantive contract (the Agreement) was a matter for the tribunal, that did not exhaust the court's ability or duty to consider the effect of the bribery on the arbitration agreement within it *"where the substantive jurisdiction of a tribunal is in issue"*. The fact that the Agreement had been procured by fraud might be equally relevant to the existence of serious irregularity "affecting the tribunal, the proceedings or the award" under section 68(2)(g) of the 1996 Act.

15. Although bribery might not necessarily have the same effect as in the law of contract, it could be seen to indicate the existence of fraud or that an award had been obtained by conduct contrary to public policy. His Lordship further remarked that *"fraud or conduct contrary to public policy that does not strictly or technically amount to a bribe or the practice of bribery"* can nonetheless meet the requirements of section 68(2)(g) of the 1996 Act.

16. Moreover, a challenge under section 68(2)(g) of the 1996 Act is concerned, among other things, with the impact of fraud in obtaining the award. Jurisdictional boundaries exist between the arbitral tribunal and the Court (as discussed above) and, in order to respect that distinction, a party must prove more than a direct link between bribery in procuring the substantive contract and the fact that an award was based on that contract. His Lordship found that section 68(2)(g) of the 1996 Act might therefore cover *"a case where there is an overall fraudulent enterprise or plan from the start, to procure an award"*. Nevertheless, this was not established in this instance as PID was found to have entered into the Agreement as a genuine obligation which it intended to perform.

The Section 73 Argument

17. His Lordship rejected the suggestion that FRN had lost the right to object under section 73 of the 1996 Act: FRN could not, with reasonable diligence, have discovered the bribery of its officials that had permeated the arbitral proceedings.

18. Section 73 of the 1996 Act differs in its approach to that which applies to setting aside court judgments based on fraud. In relation to the latter, as a matter of law it is not open

to the fraudster who obtained a judgment by fraud, including through perjured evidence, to profit from it by contending that the innocent party has acted negligently in failing to uncover his fraud sooner. By contrast, while a similar approach might justify a more liberal ground for extending time to challenge an arbitral award under section 80(5) of the 1996 Act, an award debtor can lose the right to object if he fails to exercise *“reasonable diligence”*. For challenges to arbitration awards, the requirement to exercise reasonable diligence (to uncover the fraud) is a feature of statute under section 73 of the 1996 Act, which the Court cannot displace.

19. Ultimately, his Lordship found that the arbitration was described as *“a shell that got nowhere near the truth”* and FRN had acted diligently and reasonably in investigating and exposing PID’s fraud. Mr Justice Knowles concluded that it would be unjust to allow PID to enforce the Award on the basis of a fraudulent agreement.

Implications of the Judgment

20. Mr Justice Knowles emphasised that the facts and circumstances of this case were remarkable but also very real. He stated that they have *“provide[d] an opportunity to consider whether the arbitration process, which is of outstanding importance and value in the world, needs further attention where the value is so large and where a state is involved…The present case shows that having a tribunal of the greatest experience and expertise is not enough. Without reflection, then a case such as the present could happen again, and not reach the court”*.

21. This judgment is a landmark victory for FRN. Had PID been successful, Nigeria would have been required to pay a substantial sum, at a time when Nigerian public debt stands at around 87 trillion Naira: the highest the country has seen with a growth rate of around 75% on a quarter-by-quarter basis[3].

22. Nonetheless, this judgment also provides an opportunity for reflection and discussion. Considerable time and expense were required in order for FRN to reach this outcome, with the knowledge that if the Award were upheld it would have done further damage to an economy already suffering from high debt and inflation. A 140-page judgment with a detailed analysis of fact and law by a High Court judge has led to almost unbelievable findings. However, if this matter had not been pursued in the courts by FRN, serious

[3] https://nigerianstat.gov.ng/elibrary/read/1241381; https://www.imf.org/en/News/Articles/2023/10/13/tr101323-transcript-of-africas-regional-economic-outlook

injustice would have occurred. Bribery and corruption would not only have been waived through but others, whether that be organisations or individuals, would perhaps have felt encouraged to pursue the dangerous path of fraud.

23. The judgment outlines the importance of ensuring the arbitration process is fit for purpose and indicates that the circumstances of this case ought to be considered in further discussions amongst the arbitral community when considering how parties can remain confident in the integrity of the process.

24. The full judgment is available to read here.

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Poppy Watson

Barrister
3PB

020 7583 8055
poppy.watson@3pb.co.uk

3pb.co.uk