Article

AIC Ltd v Federal Airports Authority of Nigeria [2022] UKSC 16: Reconsidering an Order before it is Sealed

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In recent years there have been a number of cases in the BVI in which the Court has been asked to reopen judgments or orders prior to their sealing. In those cases, the BVI Court has consistently found - adopting the principles laid down in the English cases, including ***In re Barrell*** [1973] 1 WLR 19, and more recently ***Re L*** [2013] UKSC 8, that not only does it have the jurisdiction to revisit unsealed judgments and orders, but that that jurisdiction is a broad one: to be exercised in accordance with the overriding objective of dealing with cases "justly": see for example ***Jitendra v Salgaocar and anr*** BVIHC (Com) 83 of 2017 (delivered 2 July 2020); ***Great Panorama International Ltd v Qin Hui and ors*** BVIHC (Com) 180 of 2019 (delivered 13 August 2020); and ***Bilzerian and ors v Byron and ors*** SKBHCVAP2020/0003 (delivered 22 October 2021) (Court of Appeal).

On 15 June 2022 the UK Supreme Court ("**the UKSC**") handed down a further decision on the (so-called) "Barrell jurisdiction", namely ***AIC Ltd v Federal Airports Authority of Nigeria*** [2022] UKSC 16, in which it re-considered and elaborated upon the principles that it had laid down ***Re L***.

The decision is likely to be of interest to BVI practitioners.

The Basic Facts of the AIG Ltd Case

The relevant facts of the case can be stated shortly.

AIC obtained a foreign arbitral award against FAAN in the sum of c.US$48 million (the "**Award**"). FAAN sought to challenge that award in the Nigerian courts. In the meantime AIC started proceedings in England seeking permission to enforce the award in England and Wales and obtained an *ex parte* order granting it permission to enforce the Award (the "**Enforcement Order**").

FAAN applied to set aside the Enforcement Order, and also applied to adjourn the enforcement claim pending the outcome of the Nigerian proceedings. In response, AIC cross-applied for a condition that any adjournment be on terms that FAAN provide security for the Award. Those applications were heard by the English High Court on 25 July 2019, and the Enforcement Order was set aside and the enforcement claim adjourned on condition that FAAN provided security in the amount of c.$24 million. Permission to appeal that decision was refused by the Court of Appeal.

FAAN subsequently obtained permission to provide the security in the form of a bank guarantee. AIC was in turn granted the right to seek permission to enforce the Award if the guarantee was not forthcoming by 29 October 2019. FAAN subsequently obtained an extension of time for the provision of the guarantee until 14 November 2019, and then sought a further extension of time until 5 December 2019.

At a hearing on 6 December 2019, and with the guarantee having not been provided, and no further extension of time sought, the High Court proceeded to give an immediate oral judgment permitting AIC to enforce the Award.

After the hearing, but that same day, FAAN obtained the guarantee and provided a copy to AIC: informing AIC of its intention to apply for the Judge to reopen her decision granting AIC permission to enforce the Award. That application was made on 8 December 2019, prior to the 6 December order being sealed. AIC also applied for relief from any sanction imposed by the late provision of the guarantee (namely permission to enforce the Award). Those applications were heard by the same Judge on 13 December 2019, whereupon she reopened her order, granted an extension of time for the provision of the guarantee and relied from sanctions, and adjourned the enforcement claim pending the outcome of the Nigerian proceedings.

AIC appealed that decision and succeeded in the Court of Appeal, with the result that the enforcement order was reinstated. AIC immediately called in the guarantee and obtained the sum of c. US$24 million.

FAAN thereafter applied and obtained permission to appeal to the UKSC, together with an order staying further enforcement of the Award pending that appeal. The UKSC was therefore tasked with considering whether or not the first instance judge and/or the Court of Appeal had applied the correct principles in relation to the ***Barrell*** jurisdiction and whether or not relief from sanctions (if relevant) should have been granted. We have not considered that latter issue in this article.

The UKSC's Analysis of the Barrell Jurisdiction

In its unanimous judgment (delivered by Lord Briggs and Lord Sales), the UKSC re-reviewed the relevant authorities in relation to the ***Barrell*** jurisdiction and confirmed, as it had done in ***Re L*** (albeit a case concerned with the English Family Procedure Rules, not the English CPR), that the exercise of the power of revision is one that should now be determined by the application of the CPR, rather than the earlier English authorities, including ***re Barrell***. It is important to note, for the avoidance of doubt, that the EC CPR contains an overriding objective provision that is materially identical to rule 1.1 of the English CPR (save that the EC CPR does not include a provision equivalent to r.1.1(2)(f)).

However, the UKSC went on to consider what sorts of factors the Court should bear in mind when determining how to apply the overriding objective in the context of ***Barrell*** applications.

It was at pains to point out that the jurisdiction remains a limited one, which has to be "*carefully patrolled*" (no doubt aware of the risk of encouraging a raft of ***Barrell*** applications by unsuccessful parties). They therefore agreed with the Court of Appeal that:

> "*The principle of finality is of fundamental importance [and] the successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory. The unsuccessful party cannot treat the judgment that has been handed down as some kind of rehearsal, and hurry away to come up with some new evidence or better legal argument*."

Accordingly, upon receipt of a ***Barrell*** application a judge should not start from anything like a position of neutrality or evenly-balanced scales, and should often ask himself or herself whether the application should be entertained at all.

The UKSC went on to add that even *if* a Judge decides to consider the application, the finality should be given great weight when deciding whether or not to make a different order. The UKSC explained that the finality principle kicks in from the moment the order is made, not merely when it is sealed.

In terms of the weight that should be attached to the finality principle, the UKSC explained that that will invariably differ, depending on the nature of the existing order. For example, finality is likely to be of high importance in relation to an order made after a trial, but of less importance in relation to case management and interim orders.

In terms of a readymade test, the UKSC intentionally eschewed the use of any particular word or phrase to reflect the weight attributable to the finality principle, or the weight of the factor or factors which would be needed to prevail over the finality principle (it expressly deprecated the phrase "exceptional circumstances"). Instead, the Court stated that an evaluative judgment has to be made, and that, in the context of commercial disputes:

> "*The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place*."

Once again, the UKSC intentionally refrained from identifying a list of factors that might qualify for inclusion as being in principle sufficient to displace the finality principle, stating that those factors would no doubt be revealed in subsequent cases. However, the Court was clear in stating that the mere desire of counsel to re-argue a point lost at trial would have no significant weight.

The Outcome of the AIG Ltd Appeal

In light of those principles, the UKSC unanimously determined that the first instance judge's exercise of her discretion had been wrong, in that *inter alia* she had seriously undervalued the importance of the finality principle. However, the Court of Appeal's reasons for setting aside her order had also been wrong. On that basis, the UKSC decided to exercise the discretion afresh, by reference to the facts as they now were (i.e. following the provision of the guarantee). Accordingly, the appeal was allowed, but the Court of Appeal's decision was only set aside in part, in that the Enforcement Order was once more set aside and the enforcement claim adjourned until after the outcome of the Nigerian proceedings, but AIC permitted to retain the proceeds of the guarantee (c. US$24 million) in the meantime.

Potential Impact for BVI Practitioners

It is increasingly common to see parties seeking to persuade the BVI Court to revisit a judgment or order before it has been sealed. Although it has been clear for a number of years now that the overriding objective is the appropriate test for determining such applications, it has not been clear precisely how the Court should apply that test, given its potential breadth. Therefore, the guidance provided in the ***AIG Ltd*** case is likely to be of some assistance. Although the UKSC's judgment is not binding on the BVI Court, it is highly persuasive and is very likely to be adopted and applied in future ***Barrell*** applications in this jurisdiction.

A copy of ***AIC Ltd v Federal Airports Authority of Nigeria*** [2022] UKSC 16 can be downloaded here.

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