

22 May 2019

ZCCM INVESTMENTS HOLDINGS PLC v KANSANSHI HOLDINGS PLC & ANOTHER

[2019] EWHC 1285 (Comm)

BEFORE: MRS JUSTICE COCKERILL DBE

CASE SUMMARY

In a document entitled “Ruling on Claimant’s Permission Application”, an UNCITRAL arbitration tribunal dismissed the claimant’s application seeking permission to bring a derivative claim. The claimant challenged the tribunal’s ruling under section 68 of the Arbitration Act 1996. Among other issues, the Court was asked to decide whether the tribunal’s ruling was an ‘award’. Cockerill J articulated seven principles by reference to which ‘awards’ (which are open to challenge under sections 68 and 69 of the Arbitration Act) could be distinguished from ‘procedural orders’ (which are immune from challenge).

In February 2018, an UNCITRAL arbitration tribunal dismissed the claimant’s (“ZCCM”) application seeking permission to pursue a derivative claim on behalf of the second respondent (“KMP”). The tribunal’s decision took the form of a 22-page document entitled “*Ruling on Claimant’s Permission Application*”. The tribunal’s ruling gave rise to a raft of applications that came up before Cockerill J in May 2019.

Background

ZCCM was a Zambian parastatal entity. KMP and the second respondent (“KHL”) were companies engaged in the mining sector. KMP was owned by ZCCM and KHL; KHL held 80% of its shares and ZCCM owned the remaining 20%.

The dispute before the arbitration tribunal arose from certain transfers made by KMP to one of KHL’s indirect holding companies (“FQMF”). ZCCM alleged, *inter alia*, that KHL had dishonestly misrepresented the nature of the transfers to ZCCM. Since KMP was controlled by KHL, ZCCM had to apply to the tribunal for permission to bring a derivative claim on KMP’s behalf.

The tribunal dismissed ZCCM’s application. In a document entitled “*Ruling on Claimant’s Permission Application*”, the tribunal concluded that ZCCM had failed to establish a *prima facie* case as to falsity of the alleged representation by KHL and as to the loss suffered by ZCCM.

In March 2018, a month after the publication of the tribunal’s ruling, ZCCM issued an arbitration claim seeking to impugn the tribunal’s decision on the basis that the tribunal had failed to comply with its duty of fairness (section 68(2)(a)) and on the ground that the tribunal failed to deal with all the issues that were put to it (section 68(2)(d)). Subsequently, in June 2018, ZCCM added an additional prong to its challenge alleging that the tribunal’s decision was obtained by fraud (section 68(2)(g)).

At the outset, Cockerill J had to determine a threshold issue: was the tribunal’s decision an ‘award’ within the meaning of section 68 of the Act? The issue arose because KHL argued that the tribunal’s decision was a procedural order rather than an award and, therefore, that it could not be challenged under section 68.

Procedural Order or Award: The Principles

Cockerill J noted that the authorities did not enunciate a clear set of principles by reference to which awards could be distinguished from procedural orders (at [39]). She distilled a set of seven principles from the authorities by reference to which the question could be decided. Her articulation of the principles appears at [40] of the judgment and it merits reproduction in full:

- “a) The Court will certainly give real weight to the question of substance and not merely to form.*
- b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal functus officio, either entirely or in relation to that issue or claim.*
- c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award.*
- d) There is a role however for form. The arbitral tribunal’s own description of the decision is relevant, although it will not be conclusive in determining its status.*
- e) It may also be relevant to consider how a reasonable recipient of the tribunal’s decision would have viewed it.*
- f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning.*
- g) While the authorities do not expressly say so I also form the view that:
 - i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.*
 - ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award.”**

(citations omitted)

Procedural Order or Award: Application to Facts

Applying these principles, Cockerill J concluded that the tribunal’s ruling was not an award. She relied on four main factors to reach that conclusion.

First, Cockerill J considered the nature of the issues that the tribunal dealt with ([at 41]). She recognised that the question whether permission to bring a derivative claim ought to be granted is not a basic procedural issue akin to timetables, disclosures, form of statements etc. Nevertheless, the tribunal could not be said to have decided the claims on their merits either. She reasoned that a derivative claim was, ultimately, a procedural device. It must follow that the tribunal’s decision not to permit ZCCM to pursue a derivative claim is best characterised as a decision on a procedural issue.

Second, Cockerill J turned to the question whether the tribunal decision was ‘final’ (at [41]-[42]). Plainly, the arbitration was not over and the tribunal was not *functus*. For that to happen there would have to be an award on the merits. Although KHL could no longer pursue the arbitration to an award,

at least in theory, KMP could do so. In this context, she distinguished the tribunal's ruling from a decision to strike out the claim for want of prosecution (which was considered in *Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar) Limited* [2016] EWHC 1301 (QB)). A decision to strike out the claim brings the claim to an end. In this respect, it is dissimilar to a decision to refuse permission to pursue a derivative claim despite which the company could itself pursue the claim.

Third, Cockerill J focussed on the form of the ruling (at [43]-[45]). Although the ruling was not a simple procedural order, as far as its form is concerned, it is not what one would expect to see by way of Award in a multi-million pound multi-claim arbitration. The fact that the ruling was accompanied by reasons is inconclusive. This is especially so since the parties had indicated to the tribunal that they would expect reasons even with a procedural order. In any case, the tribunal's articulation of its reasoning was relatively compressed. As Cockerill J observed, "[t]here is not a point by point analysis of each claim raised. Rather there is a "triaging" of the issues, explaining what the Tribunal sees as the clear path through" (at [44]). This is more consistent with a ruling on a complex procedural issue rather than an award.

Fourth, she considered the debate at the arbitration hearing about the form that the tribunal's decision should take (at [46]-[47]). In her view, given that the point was raised, it is overwhelmingly likely that the tribunal would have called their decision an award if they intended to produce an award. Importantly, she noted that the evidence of the debate at the hearing may also be relevant to the 'reasonable recipient test'. As she put it, "[t]he reasonable recipient, in the light of the debate between the Tribunal and the parties would itself have expected the document not to be an award and that if, contrary to initial indications, an award was being produced, the tribunal would have said so" (at [47]).

Merits of ZCCM's Section 68 Challenge

In view of Cockerill J's decision on the threshold question, the merits of ZCCM's challenge did not arise for determination. Nevertheless, Cockerill J considered it for the sake of completeness. What follows is a skeletal summary of her conclusions on the merits of ZCCM's challenge.

The allegation that the tribunal failed to deal with all the issues

It was common ground that the court would only accede to an application under section 68 in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected (at [50]). Further, Cockerill J referred to the consistent guidance in the authorities that the tribunal's decision had to be read "*constructively rather than destructively*" (at [71]). Referring to *Secretary of State v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC), she also pointed out that if the tribunal had dealt with an issue, the court would not interfere regardless of whether the tribunal had done so well, badly or indifferently (at [60]).

As highlighted earlier, ZCCM's initial arbitration claim was based on the allegation that the tribunal had failed to deal with all the issues that were put before it. Cockerill J was not persuaded that the tribunal had failed to do so. She considered and rejected each of the grounds on which ZCCM sought to challenge the tribunal's decision: (a) the tribunal's failure to deal with the allegation that KHL expressly represented to ZCCM about how FQMF was holding the monies (at [64]-[80]); (b) the tribunal's failure to address the issue of breach of fiduciary duties (at [81]-[93]); (c) the tribunal's failure to deal with the issue of breach of the shareholders' agreement between KHL, KMP and ZCCM (at [94]-[96]); (d) the tribunal's failure to deal with the case put to it by ZCCM in relation to

the rate of interest paid by FQMF to KMP (at [97]-114); and (e) the allegation that the tribunal wrongly proceeded on the basis that it was undisputed that KMP's monies were repaid as and when required and/or failed to address the issue that KMP's monies were not always readily available (at [115]-[127]).

Exhaustion of alternative remedies

Even if she was wrong about the threshold issue and she was wrong to conclude that the tribunal had not failed to deal with all the issues, Cockerill J would have rejected ZCCM's challenge on the basis that ZCCM had failed to exhaust the alternative remedies that were available to it (at [128]-[135]). If, as ZCCM alleged, the tribunal had failed to deal with all the issues before it, ZCCM could (and should) have applied to the tribunal for an additional award pursuant to Article 39 of the UNCITRAL rules.

The Fraud Claim

In addition to the contention that the tribunal had failed to deal with all the issues, ZCCM also sought to impugn the ruling on the basis that it was obtained by fraud.

In essence, ZCCM's case was as follows. In the arbitration, KHL had argued that the arrangement between KMP and FQMF was a simple loan with interest. However, in its correspondence with the Zambian Revenue Authority ("ZRA") KMP had advanced the contrary view. In a series of letters to the ZRA, KMP had stated that the arrangement between KMP and FQMF was not a loan but rather a deposit. The divergence between KMP's letters and its position in the arbitration is such that it would be appropriate for the court to find that the ruling was obtained by fraud.

As noted earlier, ZCCM's fraud allegation did not form part of its initial arbitration claim. It was sought to be added by way of a late amendment. As such, ZCCM faced the preliminary hurdle that it had to persuade the court to grant an extension of time. Following the guidance in *Kalmneft v Glencore* [2002] 1 Lloyd's Rep 128, Cockerill J held that her decision on the extension would be contingent on the merits of ZCCM's fraud claim. As she put it, "*if a claim has merits, something beyond mere delay will usually be required; something akin to a deliberate decision not to pursue the application earlier, which was made because of some perceived advantage*" (at [158]).

On the merits of ZCCM's fraud claim, Cockerill J was persuaded that there was some conflict between the position taken by KHL in the arbitration and what was stated by KMP in its correspondence with the ZRA (at [182]). Nevertheless, she was not convinced that the ZRA material would have been of obvious utility to the tribunal or, indeed, that there was any real chance it would have had an impact on the tribunal's decision (at [186]). The tribunal reached its conclusions having considered a range of documentation much of which, just as the ZRA material, used the terminology of 'deposit'. Accordingly, it could not be said that the disclosure of the ZRA correspondence would "*probably have affected the outcome*" of the arbitration in any significant respect (at [196]).

In any case, it appears that Cockerill J would have rejected ZCCM's fraud claim for yet another reason: it was not based on any new material that emerged after the conclusion of the arbitration proceedings (at [200]-[220]). Had the point arisen, she would have found that ZCCM could, with reasonable diligence, have produced this material before the tribunal. It ought to have done so.

For those reasons, Cockerill J decided that ZCCM's original arbitration claim and its fraud claim should both fail. She did so on the primary basis that the tribunal's ruling was not an award.

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Alternatively, she would have reached the same result having considered the merits of ZCCM's challenge.

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>