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COURT OF APPEAL PERMITS DISCONTINUANCE OF PROCEEDINGS TO ENFORCE FOREIGN AWARD AGAINST KAZAKHSTAN

Stati v Kazakhstan [2018] EWCA Civ 1896

Introduction

By a decision handed down on 10 August 2018 in *Stati v Kazakhstan* [2018] EWCA Civ 1896, the English Court of Appeal held that Kazakhstan's allegations (raised in the course of seeking to set aside permission to enforce a foreign arbitral award in the United Kingdom) that the award against it was procured by fraud did not constitute an independent claim (with the result that the fraud allegations had not survived the claimant's discontinuation of the enforcement proceedings) and that there was no legitimate interest in the fraud allegations continuing.

Background

The claimants were successful in a Swedish-seated arbitration against Kazakhstan and sought to enforce the award against Kazakhstan's assets in various different jurisdictions, including England. The claimants obtained permission to enforce the award from the English Commercial Court and Kazakhstan filed an application to have that permission set aside. Kazakhstan also unsuccessfully sought to have the award set aside at the seat on the grounds that the award was procured by fraud. The Swedish court held that fraud did not provide grounds for setting the award aside but did not actually give a ruling on the merits of Kazakhstan's fraud allegations. In England, Kazakhstan was granted permission to add the fraud allegations to its set aside application and directed that those fraud allegations should proceed to trial as if they had been a claim commenced under Part 7 of the English Civil Procedure Rules. Then, the claimants sought to discontinue their enforcement proceedings by serving a Notice of Discontinuance and offering undertakings to the court not to enforce the award in the English jurisdiction. Kazakhstan made an application to the court for directions for the trial of its fraud allegations, contending that the fraud allegations were a free-standing claim that was not covered by the claimants' Notice of Discontinuance. In the alternative, Kazakhstan applied for the Notice of Discontinuance to be set aside.

First Instance Decision

The Commercial Court (Robin Knowles J) held that the fraud allegations were not an independent claim that had survived the service of a Notice of Discontinuance of the enforcement proceedings. However, the Commercial Court held that Kazakhstan had a legitimate interest in seeking to have the enforcement order set aside on the merits of its fraud allegations. Further, the Commercial Court held that it would be useful to the courts of the other countries where enforcement was sought for there to be a concluded answer on the fraud allegations. On that basis, the Notice of Discontinuance was set aside and directions were given for the trial of the fraud allegations.

The claimants appealed against the setting aside of their Notice of Discontinuance.

Decision

The Court of Appeal (Patten LJ; David Richards LJ; Leggatt LJ) allowed the appeal.

The Court of Appeal held that the fraud allegations were not a freestanding claim. In English litigation, it was commonplace for there to be a direction that an issue should be tried within existing proceedings and for the party that bore the burden of establishing the relevant point to be identified. But, such a direction did not entail that that issue became a separate, free-standing claim. When the Commercial Court had directed the fraud allegations to be tried “*as if commenced under CPR Part 7*”, all it was doing was applying the CPR Part 7 procedural framework to the trial of that issue – a formal procedure was required in light of the nature of Kazakhstan’s allegations. Kazakhstan’s fraud allegations were a defence to the claimants’ enforcement action, and the judge had been correct to find that they were not themselves an independent claim.

The Court of Appeal held that the English courts had a discretion to set aside a Notice of Discontinuance which was unqualified and not limited by reference to implied gateways or restrictions. A Notice of Discontinuance was not “*simply a procedural first step*” – it had the effect of discontinuing a claim without any further order, unless the defendant made an application for it to be set aside. The burden of proof was then on the defendant.

The Court of Appeal held that the English courts’ civil jurisdiction was only to be invoked for the purpose of obtaining relief. It was not the function of the English court to hear cases that had no relevant result. The purpose in commencing these proceedings had been to enforce the arbitral award, however that purpose had ceased. Kazakhstan’s fraud allegations were limited to defeating the English enforcement proceedings. If there was no possibility that the award would be enforced in England, then no purpose would be served by a declaration that such enforcement would be contrary to English public policy. The Court of Appeal recognised, however, that there might be exceptional circumstances that justified continuing with such a case, for example where a finding of fraud by an English court would create an issue estoppel in other jurisdictions where enforcement proceedings were on foot. The judge’s decision that a finding of fraud by the English courts might be of assistance to foreign courts and, therefore, Kazakhstan had a legitimate interest in continuing the proceedings was wrong.

The Court of Appeal held that, whilst the English courts had the power to require continuation of proceedings to determine whether English court processes were knowingly abused, Kazakhstan's fraud allegations in the instant case were not sufficient to invalidate the arbitral award and were not capable of establishing that the enforcement proceedings were a fraud on the English court.

Concluding Remarks

The Court of Appeal's judgment contains important guidance on the proper approach to be taken on an application to set aside a Notice of Discontinuance, as well as on some of the considerations that arise where the English court is one of multiple courts dealing with proceedings to enforce an arbitration award.