

WHEN ARE JUDGMENTS FINAL? THE UK SUPREME COURT HAS THE FINAL WORD

Introduction

The point at which a judgment becomes final, and when and if parties can seek amendments to it was recently considered by the UK Supreme Court in the case of **AIC Ltd v Federal Airports Authority of Nigeria**¹.

This is an issue of relevance to practitioners and courts users, and as highlighted by the Supreme Court:

"This problem may arise at all levels in civil litigation, from interim and case management hearings, to final orders made at the end of a trial and even to orders made, but not yet sealed on appeal."

The background

The matter arises from a dispute over a development lease, and an attempt by the appellant (**AIC**) to enforce a 2010 Nigerian arbitration award in the sum of US\$48 million against the respondent (**FAAN**) against its assets in England, under the New York Convention 1958² pursuant to sections 66 and 101 of the Arbitration Act 1996.

AIC sought permission from the English courts to enforce the award, and obtained an order in its favour. This was subsequently overturned on the basis that FAAN would provide security in the sum of approximately US\$24 million by a set date. As you may by now have guessed, and despite extensions being given, the security was not provided in time and the High Court gave an oral order enabling AIC to enforce the award.

Before the order could be drawn up and sealed, FAAN provided the bank guarantee and successfully applied to have the order rescinded on the basis that whilst the order had been given verbally, it had not been sealed or "perfected" and so was not a final order.

AIC appealed to the Court of Appeal, who applied a two-stage test in order to determine whether to maintain the order, which involved determining:

1. whether it was able to consider the application; and if so
2. whether the application should be considered on its merits.

The Court of Appeal found in favour of AIC and re-instated the order enabling AIC to enforce the award and also the guarantee, which although late, had been provided. AIC called on the guarantee, which was paid in full.

FAAN appealed to the UK Supreme Court.

The Supreme Court's decision

The Supreme Court considered its role in this case was to "*determine whether the judge and / or the Court of Appeal went wrong in their application of the relevant principles to those facts and secondly,if they both did, to re-exercise the judge's original discretion afresh, on the basis of those facts as they now are.*"

The Supreme Court's judgment:

1. sets aside the order allowing AIC to enforce the award;
2. stays AIC's application to enforce the award, until the appeal proceedings in Nigeria are concluded; and
3. allows AIC to retain the money it has already recovered under the guarantee provided by FAAN.

In reaching its judgment the Supreme Court considered:

- a. the basis on which the courts should review and vary judgments and orders made but not sealed; and
- b. the application of the *Denton test*³ on relief of sanctions.

¹ [2022] UKSC 16

² The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

³ *Denton v TH White Ltd and another*, [2014] EWCA Civ 906

Looking at these in turn.

Firstly, the basis and extent to which the courts should review and vary judgments and orders made but not sealed. The Supreme Court considered that the Civil Procedural Rules (**CPRs**) and the *Overriding Objective* had application in determining the approach to be taken in these circumstances, and in so doing effectively endorsed the approach taken by Baroness Hale of Richmond in *In re L (Children) (Preliminary Finding: Power to Reverse)*⁴.

CPR 1.1 (1) sets out the *Overriding Objective* in English litigation proceedings, which is namely to "deal with cases justly and at proportionate cost".

The Supreme Court determined that finality was a component of dealing with matters justly and therefore a key issue when considering whether to overturn a judgment or order already made but not sealed. It preferred the reliance on finality to the Court of Appeal's two-stage test, which it considered "....[as imposing] a straitjacket upon the judicial exercise of a discretionary jurisdiction which is contrary to the way in which it was addressed in *Re L* and alien to the essentially flexible nature of the judge's task when weighing competing considerations of potentially limitless variety against each other." It also found that the Court of Appeal had not given sufficient weight to the question of finality, and that it should therefore exercise its discretion to review the terms of the order.

The judgment recognises that the bank guarantee was provided by FAAN within minutes of the order being made and that this amounted to an important change in circumstances, sufficient to depart from the principle set down in the 1843 case of *Henderson v Henderson*⁵ and the subsequent line of authorities, namely that a party is precluded "from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones".

Secondly, in reviewing the application of the *Denton* test on relief of sanctions, and having determined that it was required to review the order afresh, the Supreme Court determined that the order giving leave to enforce the award was in effect a sanction on FAAN for their failure to provide the bank guarantee in time, and as such fell within the remit of the *Denton* test on relief of sanctions.

In looking at whether the three stages of the *Denton* test were satisfied, the Supreme Court held:

1. the failure to provide the guarantee in time was a very serious breach, as required under *Denton*;
2. there was no good reason for the failure to provide the guarantee; and
3. that in so far as the third limb was concerned, FAAN's eventual provision of the guarantee and its ongoing arbitration appeal proceedings in Nigeria were such that in the circumstances relief should be granted to FAAN, and so ordered that the enforcement of the award be stayed, pending the outcome of the Nigerian arbitration appeal proceedings.

What does this mean for court users?

This judgment gives helpful clarity over when the terms of an oral judgment or order may be varied before it is sealed, and serves as a reminder to parties to avoid delay in having the order sealed. Of particular note is that where the circumstances have changed between the oral order being given and it being sealed, the courts will be willing to grant relief under the *Denton* test.

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⁴ [2013] UKSC 8

⁵ (1843) 3 Hare 100

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