Neutral Citation Number: [2023] EWCA Civ 867

Case No: CA-2022-002477

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MRS JUSTICE COCKERILL
[2022] EWHC 3286 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2023

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT

and

LORD JUSTICE UNDERHILL, VICE-PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION

- -

Between :

ZHONGSHAN FUCHENG INVESTMENT CO LTD	**Claimant/ Respondent**
- and -	
THE FEDERAL REPUBLIC OF NIGERIA	**Defendant/ Applicant**

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- -

Riaz Hussain KC and Omar Eljadi (instructed by **Squire Patton Boggs (UK) LLP**) for the **Applicant**
Christopher Harris KC and Mark Wassouf (instructed by **Withers LLP**) for the **Respondent**

Hearing date: 28 June 2023

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Approved Judgment

This judgment was handed down remotely at 10:30am on Thursday 20 July 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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Sir Julian Flaux C:

Introduction

1. Pursuant to the Order of Underhill LJ dated 6 April 2023, the Court held an oral hearing of the application by the Federal Republic of Nigeria (to which I will refer as "Nigeria") to re-open pursuant to CPR 52.30 the refusal by Males LJ on 30 January 2023 of permission to appeal against the judgment of Cockerill J dated 2 December 2022. By that judgment, the judge dismissed Nigeria's application to vary the Order she had made on 21 December 2021 on an *ex parte* basis in favour of the claimant, respondent to the present application (to which I will refer as "Zhongshan"), for enforcement of an arbitration award dated 21 March 2021 against Nigeria.

Factual and procedural background and the judgment below

2. The claimant's case in the arbitration was that it made certain investments in Ogun State in Nigeria, which Nigeria disputed. The arbitration took place pursuant to Article 9 of the Agreement between Nigeria and the Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investments ("the BIT"). In the arbitration, Nigeria raised a number of challenges to the jurisdiction of the tribunal. By its award, the tribunal (chaired by Lord Neuberger) dealt with these challenges in detail and rejected them all. The tribunal found that Nigeria was in breach of various provisions of the BIT, including the prohibition against expropriation and awarded Zhongshan US$55.6 million compensation for the expropriation of its investment.

3. Nigeria, which has not honoured any of the award, filed an arbitration claim under section 67 of the Arbitration Act 1996, contending that the tribunal lacked jurisdiction. It contended for the first time that the arbitration agreement in the BIT was invalid but otherwise ran again arguments it had run in the arbitration which the tribunal had rejected: that Zhongshan had failed to make a qualifying investment within the meaning of the BIT and that proceedings in Nigeria deprived the tribunal of jurisdiction under article 9(3) of the BIT (the so-called "fork in the road" provision). Zhongshan responded to that challenge and filed an application for security for costs and security for award under sections 70(6) and 70(7) of the Arbitration Act. Days before that application was due to be heard, Nigeria filed a notice to discontinue its section 67 challenge.

4. Zhongshan then issued an application under section 66 of the Arbitration Act to enforce the award as a judgment. That application was supported by a witness statement of its solicitor, Dr Kovacs. In accordance with the procedure laid down in CPR 62.18, that application was made without notice to Nigeria and, in order to provide full and frank disclosure, Dr Kovacs set out the history of challenges to the jurisdiction of the arbitration tribunal which Nigeria had made. He also drew the Court's attention to the possibility that Nigeria might argue that it was immune from the Court's jurisdiction under section 1 of the State Immunity Act 1978 ("the 1978 Act") but stated that argument would lack merit because of the exception to immunity under section 9 of the 1978 Act where the Court proceedings are in relation to an arbitration in respect of which the state agreed in writing (here the BIT). Dr Kovacs set out the various arguments which Nigeria might raise as to why section 9 did not apply, including its previous grounds of challenge to the tribunal's jurisdiction. He repeated that he did not consider those arguments would succeed for the reasons he had already given. In

addition, he said that, Nigeria having run those arguments in the context of the section 67 challenge and then withdrawn them, the Court might consider it abuse of process for Nigeria to seek to argue them afresh.

5. As the notes in the White Book at 2E-39 record the procedure under CPR 62.18 is intended to be a summary one, although the Court has a discretion as to whether to make an order or not and where disputed issues of fact arise the Court can give appropriate directions under CPR 62.7. Where the Court does make an order, sub-rules (9) and (1) of CPR 62.18 make clear that the respondent has a right to make an application to set the order aside and the award cannot be enforced in the meantime.

6. Applications to enforce arbitration awards are normally dealt with on paper by the judge, although if the judge considers that the respondent may have arguable grounds for resisting enforcement, an order may be made for the respondent to be served and for a hearing to take place. However, where the judge does not consider that on the material before the court there are any arguable grounds for resisting enforcement, the usual practice is to grant the order *ex parte*, leaving the respondent to make an application to set aside the order if so advised.

7. The application to enforce the award came before Cockerill J on paper and on 21 December 2021 she made the order *ex parte* in accordance with that usual practice, as she explained in [4] of the judgment which Nigeria seeks to appeal:

> "The basis of the challenge which the Federal Republic wishes to bring is State Immunity. I should note in passing that the possibility of such an argument being raised was noted in the *ex parte* application and duly reflected in the order which I made, which provided for a further period for other issues to be raised by way of challenge. I nonetheless granted the *ex parte* order despite the indication that there might be a state immunity challenge because of what was said there about the arguments which were in play, including their potential merits. That is a not unusual way of proceeding in relation to enforcement applications against state parties, though sometimes the decision is taken that the questions raised are such that there should be no *ex parte* order but that the application should first be served on the state and the matter brought on for argument."

8. The enforcement order which the judge made provided, inter alia, as follows:

> "4. This Order having been made without notice to the Defendant, the Defendant has the right to apply to set aside or vary this Order, if so advised, within two months and 14 days of the date on which this Order is served on the Defendant.
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> 5. Should the Defendant make an application to set aside this Order on the grounds that it is immune from the Court's jurisdiction, then it shall have a further period of 14 days from the date on which that application is determined within which it may apply to set aside this Order on any other ground."

9. Nigeria was served with the enforcement order on 30 May 2022. The deadline in [4] of the Order expired on 16 August 2022, Mr Balogun of Nigeria's solicitors having received the order, as the judge found at [15] of her judgment, on 11 August 2022. On 15 September 2022, Nigeria filed an application, supported by a witness statement from Mr Balogun which sought relief from sanctions in respect of the delay in making the application and sought an extension of 28 days of the period under [4] of the order for making an application to set aside or vary the order. Neither the application nor the witness statement mentioned state immunity.

10. Zhongshan filed evidence in response on 30 September 2022 stating that Nigeria's failure to comply with the deadline in [4] of the Order was significant and it had not identified any proper reason for its failure so that it did not satisfy the test for relief from sanctions in *Denton v White* [2014] EWCA Civ 906; [2014] 1 WLR 3926. Nigeria then missed the 7 day deadline of 10 October 2022 for evidence in response and on 29 November 2022 (three days before the hearing before Cockerill J) served a further extension of time application in respect of that missed deadline. It was only in the second witness statement of Mr Balogun in support of that further application that Nigeria first indicated that it might wish to raise state immunity.

11. The judge heard the two applications for extensions of time on 2 December 2022 and dismissed them, giving an ex tempore judgment. After describing the practice of the Commercial Court in relation to enforcement of awards at [4] which I quoted above, the judge summarised the parties' arguments before her at [5] and [6], then at [7] set out the summary of the principles of *Denton v White* in the judgment of Richards LJ in *Michael Wilson & Partners v Sinclair* [2015] EWCA Civ 774.

12. At [8] to [10] the judge dealt with the application for late reply evidence noting that no attempt was made to bring the application for an extension of time in time and that the delay until 29 November was a serious and deliberate breach in the context of the seven day time period for service of reply evidence and that there was no good reason for the breach. She had read the evidence *de bene esse* and it was not so significant that it would justify departing from the presumption against admission. Accordingly she dismissed that application. She also stated at [11] that she would have reached the same conclusion on the main application even if the reply evidence had been admitted.

13. Having set out the background, the judge then dealt with Nigeria's first and main point which was that the Court was required to determine state immunity of its own motion under section 1(2) of the 1978 Act even if the state did not appear in the proceedings. The Court had to make a determination as to state immunity and therefore the *Denton* principles do not apply and the Court should arrange for a hearing to determine state immunity. The judge said at [20] that she was unimpressed by this argument which taken to its logical conclusion was an assertion that procedural rules do not apply to a state which wishes to raise state immunity issues.

14. The judge then dealt with the various authorities relied on by Mr Hussain KC, noting at [27]:

> "None of these cases deal with a situation where a timeline is in place specifically to deal with challenges to enforcement, including state immunity. None of these involved a failure to comply with a court order. None of these are in the situation

> where there explicitly was an ability to bring arguments as to immunity and a specific timetable geared to arguments of immunity, which has not been used, despite there having been an opportunity to do so."

15. The judge concluded in relation to this point at [29]:

> "To the extent it was submitted (and I think it was submitted) that the enforcement process needs to incorporate a process whereby the court deals with immunity of its own motion, I would be of the view that any further consideration beyond that involved in the application is unworkable. In a number of cases issues will be apparent on the face of the application, and the court may then, as I have indicated, require there to be service of the application before an *ex parte* order is made. But it is also the case that sometimes immunity arguments are apparent, they are raised, they are described, and a *prima facie* case for non-application of state immunity is made, and that is regarded as sufficient to give an *ex parte* enforcement order. That process is not a case of the court disregarding its duty. It would, in my judgment, be entirely unworkable for there to be a responsibility of the court to embark in every case upon a process of considering each State Immunity Act argument which is not taken, rather than simply confining itself to the structure which is in place at the moment."

16. The judge then dealt with Nigeria's argument that because it was making an application for extension of time under CPR 3.1(2)(a) there was no sanction, express or implied so that the *Denton* criteria did not apply. At [30] she said this argument was misconceived, setting out what the notes in the White Book say about that rule:

> "Rule 3.1(2)(a) expressly confirms the court's powers to extend time limits even after they have expired. However, in such cases the court decides what, if any, extension to allow in accordance with the principles in *Denton*."

17. The judge then considered the application of the *Denton* principles, dealing with the first stage, whether the breach was significant. She rejected Nigeria's contention that in the context of the 74 days allowed for compliance under [4] of her order, a 30 day delay was neither serious nor significant. She considered the breaches were both serious and significant as well as being conscious if not necessarily fully deliberate. The context was enforcement of an arbitration award, where the Court had consistently emphasised the importance of speedy finality. Nigeria had taken no steps other than forwarding the award internally until the end of July and even after the expiration of the 74 days allowed, there was no apparent urgency. Although Mr Balogun had notice of the enforcement proceedings in late July and a copy of the order on 11 August, he only advised after the deadline expired on 17 August.

18. The judge said at [34] that the seriousness of the breach was compounded by the fact that this was not a case where there was an application for relief from sanctions with the application (i.e. to set aside the enforcement order) having been made but an

application for a variation of the timetable seeking a further three months in which to put in an application. The judge said the further continuing delay could not be ignored. The delay was conscious in the sense that Nigeria knew or ought to have known of the impending deadline.

19. The second stage of the *Denton* test was whether there was a good reason for the delay. There was no good reason. The judge noted that the authorities were very clear that a good reason was generally something beyond the reasonable control of the applicant, but there was no suggestion of that here. Quite the opposite, Nigeria's evidence positively relies on its own acts and omissions. The judge dismissed the suggestion that the internal delay in the federal authorities notifying Ogun state was a good reason, since it was Nigeria which was the respondent. Nor was this a case where the arguments to be advanced were new: any application to set aside the enforcement order would apparently be premised on the same arguments as advanced in the section 67 application. If there was a problem in complying within the deadline, the correct course was to seek an extension of time in time.

20. In relation to the third stage, justice in all the circumstances of the case, even balancing all the factors and with careful regard to the justice of the case, the judge concluded that it would be unjust to grant Nigeria relief. Nigeria had displayed complete indifference to compliance throughout in a way that had delayed the court's determination of the present application itself. In any event, the merits of the case strongly favoured Zhongshan, as Nigeria's arguments seem identical to those in its discontinued section 67 application. The judge considered that there was a strong argument that a further application based on the same grounds as the discontinued application would be an abuse of process. For those reasons, the justice of the case weighed in favour of not granting relief from sanctions.

The grounds of appeal

21. Nigeria seeks to advance four grounds of appeal:

(1) that the Judge erred in law in refusing to give directions to determine on the balance of probabilities whether an exception to state immunity under section 1(1) of the 1978 Act applied and refusing to stay enforcement pending such a determination (to the extent an enforcement order could have been made at all pending such a determination even subject to a stay).

(2) that the Judge erred in law and fact in finding that Nigeria's application to extend time to apply to vary or set aside the Judge's enforcement order had to satisfy the test in *Denton*.

(3) to the extent that the *Denton* test applies, the Judge erred in law and fact in declining to give directions for a determination of state immunity.

(4) there are other compelling reasons for the appeal to be heard, namely the need and general public importance for the Court of Appeal to issue guidance on the issues arising from the Judge's judgment.

The refusal of permission to appeal

22. Males LJ gave the following reasons for refusing permission to appeal:

> "1. It is not arguable that the court is required to schedule a hearing to determine issues of state immunity in every case where it is sought to enforce an arbitration award against a state.
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> 2. The judge complied with section 1(2) of [the 1978 Act] by considering the question of immunity at the time when she made her *ex parte* order. Having concluded that there was a *prima facie* case that there was no immunity, she was entitled to make an order for the enforcement of the award coupled with a stay which enabled [Nigeria] to challenge the order, including (if so advised) on the ground that it was entitled to immunity.
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> 3. However, that challenge had to be made in accordance with the timetable set out in the court's procedural rules, which are more generous in the case of states than other litigants.
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> 4. If a claim to immunity had been made within that timetable, the court would have been required to determine it. However, as no such claim was made, the court is entitled to proceed on the basis that there is no applicable immunity in this case and that the initial stay on the order for enforcement should no longer apply.
>
> 5. The judge was right to apply the *Denton* criteria and there is no arguable basis for saying that she applied them incorrectly.
>
> 6. In these circumstances an appeal would not have any real prospect of success. I do not accept that there is any general importance in the issues raised which would constitute some other compelling ground for granting permission."

The CPR 52.30 application and the hearing before this Court

23. Nigeria issued its application to re-open the refusal of permission under CPR 52.30 on 14 February 2023. As already noted, Underhill LJ then directed that the application be determined at an oral hearing. Nigeria put in a detailed skeleton in support of its application. The first criterion which has to be satisfied under CPR 52.30(1) is that "it is necessary to [re-open a final determination of an appeal] in order to avoid real injustice" and that criterion cannot begin to be satisfied unless the grounds of appeal have a real prospect of success. Even if Males LJ's reasons were insufficient or did not deal adequately with Nigeria's arguments, this Court will not reopen his determination if he was right to refuse permission to appeal, since if he was Nigeria cannot satisfy that criterion: see for example [50] of my judgment in *Ceredigion Recycling v Pope* [2022] EWCA Civ 22. Accordingly, at the outset of the hearing we asked Mr Hussain KC to concentrate his oral submissions on the merits of Nigeria's proposed appeal.

Summary of the parties' submissions

24. Before this Court as before the judge, the focus of Mr Hussain KC's submissions was the contention that where any issue of state immunity arises, the Court is obliged to make a determination as to whether or not, on a balance of probabilities, state immunity is established. This is said to follow from section 1(2) of the 1978 Act which provides: "A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question." Accordingly, he submitted that in every case, the Court must make a determination to the civil standard of proof, which the Court had not done here, because all the judge had done at the time when the enforcement order was made *ex parte* was to decide that there was a *prima facie* case that state immunity was not available to Nigeria.

25. Mr Hussain KC relied upon the decision of the Court of Appeal in *J.H. Rayner Ltd. v. Department of Trade* [1989] Ch 72 in support of his proposition, submitting that until there had been such a determination, the proceedings against the state could not continue and the Court had no jurisdiction over the state. At 194F-G, Kerr LJ said:

> "In the upshot, therefore, I am persuaded that whenever the question arises under the Act of 1978 whether a defendant state is immune by virtue of section 1 or not immune by virtue of one of the exceptions, then this question must be decided as a preliminary issue in favour of the plaintiff, in whatever form and by whatever procedure the court may consider appropriate, before the substantive action can proceed."

26. At 252E-F, Ralph Gibson LJ said:

> "I would accept Mr. Pollock's submission that, if proof of the exception to state immunity turned upon issues of fact - as in this case upon the matters dealt with by Staughton J. it did not - the court could give directions for the trial of those issues, including directions for discovery, for the calling of witnesses, and for cross-examination of witnesses upon affidavits. The sovereign state could not be placed under any sanction with reference to discovery but, in deciding issues of fact, the court could have due regard to any failure to disclose relevant documents."

27. Mr Hussain KC pointed out that *JH Rayner* had been followed and applied by appellate courts many times since, most recently by this Court in *Corinna Zu Sayn-Wittgenstein-Sayn v His Majesty Juan Carlos* [2022] EWCA Civ 1595; [2023] 1 WLR 1162 at [21]-[22] per Simler LJ. He submitted that the Court must make a determination of state immunity to the civil standard even if the state does not appear in the proceedings, relying on statements to that effect in *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880; [2009] 1 WLR 665 per Lawrence Collins LJ at [110] and Stanley Burnton LJ at [128].

28. When I asked Mr Hussain KC during the course of argument what the judge should have done in all the circumstances, he submitted that she should have made a determination on a balance of probabilities by looking at all the documents submitted in the arbitration to determine whether there was state immunity.

29. We heard some short submissions from Mr Christopher Harris KC for Zhongshan. He drew attention to the summary procedure for enforcement of arbitration awards under CPR 62.18, which precisely tracks what the judge said and did. He submitted that the point about the *ex parte* determination being on the basis of a *prima facie* case was a red herring: unless the Court is satisfied that an exception to state immunity applied, it would not make an order *ex parte*. This was a determination for the purposes of section 1(2) of the 1978 Act.

30. Mr Harris KC submitted that the merits in relation to the *Denton* criteria were relevant. As the judge had indicated at [43] Nigeria had come before the Court empty-handed with an application out of time for an extension of time but without putting any immunity argument forward. Their application of 15 September said not a word about immunity.

Discussion

31. In my judgment, there is nothing in Mr Hussain KC's suggestion that the judge had to make some further determination as to state immunity beyond that made by her in granting the enforcement order, in circumstances where Nigeria had failed to comply with the procedure laid down by the Court for any application to set aside that order. The judge followed the normal summary procedure laid down in the Civil Procedure Rules for enforcement of arbitration awards, 62.18 of which contemplates that the Court will make an order *ex parte* unless the judge considers that there is some argument against enforcement which requires determination at an *inter partes* hearing, in which case the judge will give appropriate directions for such a hearing. If the judge considers that, on the evidence before the Court, the award should be enforced, then he or she will make an order for enforcement which includes a provision for the defendant to apply to set aside or vary the order within the set time limit, if so advised. This procedure is equally applicable where the defendant is a state and an issue of state immunity might arise, as the judge herself made clear at [4] and [29] of her judgment.

32. In other words, when the judge made the enforcement order, she made a determination that, on the evidence before the Court, she was satisfied that the award should be enforced and that there was no arguable case for state immunity. There is nothing surprising in that conclusion given that Nigeria had raised issues of state immunity in the section 67 application which it had abandoned and to seek to raise the same issues again would arguably be an abuse of process. Of course, it was open to Nigeria, given that the order was made *ex parte*, to make an application to set aside the order on grounds of state immunity or any other grounds, but if it wished to do so, it had to comply with the procedural timetable laid down by the Court, which in fact gave a generous period of 74 days for such an application to be made.

33. The suggestion that it was somehow open to Nigeria to fail to comply with or disregard that timetable, but that the Court would still have to make a determination as to state immunity, is as startling as it is misconceived. Although, if state immunity is established, the Court has no jurisdiction over the state in respect of the substantive dispute, in relation to the prior determination of whether state immunity arises at all, the Court does have jurisdiction, as Lord Sumption said in *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62; [2019] AC 777 at [19]:

> "Proceedings brought against a state entitled to immunity are not a nullity. But the court's jurisdiction to entertain the proceedings is limited to examining the basis on which immunity is asserted and determining whether it applies."

34. That jurisdiction must encompass the imposition of whatever procedural rules are appropriate for that determination. This is clear from what Kerr LJ said in *JH Rayner* where he spoke of the issue of state immunity being determined "in whatever form and by whatever procedure the court may consider appropriate". In the present case, Nigeria was given two months and fourteen days under the CPR to make an application to set aside the enforcement order and raise state immunity if so advised. If Nigeria needed more time to make an application, it was incumbent upon it to make an application in time under CPR 3.1(2)(a) for an extension of time. If such an application was not made in time (as in the present case) then Nigeria would need to seek relief from sanctions as the notes in the White Book make clear and, if it could not satisfy the *Denton* criteria (as the judge found here), then the sanction of not obtaining an extension of time would follow, so that Nigeria could not raise state immunity because it was too late. There is nothing in the CPR or the authorities which suggests that these normal procedural consequences do not follow merely because the defendant is a state.

35. The Court having made an enforcement order *ex parte* on the basis that, on the evidence before it, it was satisfied that the arbitration exception to state immunity under section 9 of the 1978 Act applied (albeit subject to Nigeria applying to set aside the order), that is a determination in relation to the non-application of state immunity which stands if Nigeria does not apply to discharge the enforcement order or cannot do so, because it has failed to make an application in time and cannot satisfy the *Denton* criteria for relief from sanctions. The assertion by Mr Hussain KC that this introduces a further exception to state immunity not in the 1978 Act, of sanctions is a fallacy. The relevant exception is that in section 9 of the 1978 Act, in relation to which the enforcement order is a sufficient determination for the purposes of that Act. The proposition that, even in a case where the state did not make any application to set aside the enforcement order, the Court would need to make some form of further determination that state immunity did not apply on the balance of probabilities is pointless and absurd. Nothing in the authorities points to some such formalistic requirement. The extent of the absurdity was demonstrated by Mr Hussain KC's submission that in some way the judge was obliged to go through the documents in the arbitration conducting an investigation of state immunity.

36. The EAT case of *Mauritius Tourism Promotion Authority v Wong Min* [2008] UKEAT 0185 on which Mr Hussain KC placed much reliance is certainly not authority for his proposition. That was a case in which there was a determination that state immunity did not apply by an employment judge at a hearing which the authority did not attend and a review hearing at the authority's behest which the authority again did not attend. Neither of those decisions was appealed and a full merits hearing then ensued which the authority again did not attend, after which the employment tribunal entered judgment for the claimant on all her claims. Thereafter, there was an application by the authority for a further review at a hearing which it did attend. The employment tribunal refused to permit that review out of time on the grounds that the authority had had every opportunity to put forward evidence in support of its assertion of state immunity but had chosen not to do so. The EAT dismissed the appeal on, inter alia, the same basis,

that the authority had been afforded every opportunity to put in a response and evidence on state immunity but had chosen not to do so. The EAT rejected the submission that the authority should be given further leeway in relation to state immunity. Elias J stated at [50]-[52] of the judgment:

> "50 There is no doubt that there is a considerable leeway which is given. A court is under a duty, when the issue of state immunity arises, to consider the position carefully and make appropriate inquiries to satisfy itself that the court can properly exercise jurisdiction. It must allow the state to appear and submit evidence and argument with respect to any disputed issues of fact.
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> 51 However, in this case the court did raise the matter of its own motion, and even after the Authority had purported to put in a response on the merits. It also notified the Authority of its initial decision and gave them every opportunity to counter the evidence which had been advanced on behalf of the claimant.
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> 52 It seems to us that this was the equivalent in the Tribunal context to the kind of approach envisaged by the Court of Appeal in the *Rayner* case. The Authority chose not to take up that opportunity at that time. Not only that but they continued to do nothing in response until some five months after the review application had failed, and after a substantive hearing had been determined against them."

37. In the present case, as I have said, the determination in making the enforcement order in the first place was a determination by the judge that state immunity did not apply (subject to Nigeria having the opportunity to apply to set aside the order). Nigeria failed to comply with the generous time limit of two months and fourteen days to make such an application and, indeed, did not raise state immunity until 29 November, three months after the time limit expired. In those circumstances, Nigeria needed relief from sanctions in order to obtain an extension of time to which the judge held Nigeria was not entitled. Nigeria had every opportunity to make an application in time to set aside the order but did not do so even though it was well aware of the time limit.

38. The judge concluded, as she was entitled to on the evidence before the Court, that the delay was conscious if not fully deliberate and that there was no good reason for it, so that the breach by Nigeria was serious and significant. The judge also concluded, as she was entitled to, that, given the need for speedy finality in the enforcement of arbitration awards and the fact that, in seeking to rerun the arguments about state immunity that it had run in its section 67 application and then abandoned, Nigeria was arguably abusing the process of the Court, justice in all the circumstances weighed against the grant of relief from sanctions. Consideration of whether the *Denton* criteria are satisfied is quintessentially a matter for the judge at first instance exercising her case management powers and discretion. This Court will not interfere with such a decision unless it can be said the judge was plainly wrong which she was not or committed an error of law, which she did not.

39. It follows that there is nothing in the first three grounds of appeal, none of which has any real prospect of success. Given that conclusion, there is no basis for saying that there is some point of general public importance in this case which requires guidance from this Court. The fourth ground of appeal is thus equally hopeless. In the circumstances, although Males LJ dealt with the grounds of appeal in fairly short order, his reasons for refusing permission to appeal were entirely correct. Accordingly, Nigeria cannot satisfy the first criterion for re-opening an appeal under CPR 52.30. There is no question of it being necessary to reopen the appeal to avoid real injustice and Nigeria cannot show that it has suffered any injustice from its application for permission to appeal being refused. The application under CPR 52.30 is dismissed.

Lord Justice Underhill

40. I agree with the Chancellor, for the reasons which he gives, that Nigeria would have no chance of successfully appealing against Cockerill J's order. The procedure that she followed properly respects the requirements of section 1(2) of the 1978 Act as expounded in *J.H. Rayner* and the subsequent case-law. Her *ex parte* order represents a provisional determination that Nigeria did not enjoy state immunity, which would stand unless and until a successful application were made to set it aside. She was in a position to make such a determination on the basis of Dr Kovacs' witness statement: see para. 4 above. As the Chancellor says, that is a course often taken in the Commercial Court. Of course, if the judge is not satisfied on the material before them that the state is not entitled to immunity they will direct a preliminary hearing on that issue; but there is no reason to take that course where that is not so. Nigeria failed to make any application within the time specified, and the Judge was amply justified in refusing relief for the reasons given by the Chancellor. Accordingly Males LJ was plainly right to refuse permission to appeal and there is no question of any injustice.

41. In my order directing an oral hearing of the application to re-open I said that I was doing so because of "the importance which in principle attaches to state immunity and the comparative brevity of Males LJ's reasons". As regards the latter point, I made it clear that the brevity of the reasons "may turn out to have been appropriate in the circumstances". Having heard the argument, I take the view that that is indeed the case, at least as regards paras. 1-4: the reasoning is no doubt economical, but it goes to the heart of the issue. I would add that in any event that was not the only reason why I ordered a hearing. It is certainly not the case that where a party who is rightly refused permission to appeal makes an application to re-open the decision the fact that the reasons given may have been inadequate will of itself justify an oral hearing.