

**IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
(JUDGE CHAMBERS Q.C.)**

Royal Courts of Justice
Strand
London WC2
Friday, 6th July 2001

B e f o r e :

LORD JUSTICE TUCKEY

YUKOS OIL COMPANY

Applicant

- v -

DARDANA LIMITED

Respondent

Computer Aided Transcription by
Smith Bernal International
190 Fleet Street, London EC4A 2AG
Telephone 020 7404 1400 Fax 020 7831 8838
(Official Shorthand Writers to the Court)

MR. A. MALEK Q.C. (instructed by Messrs. Reid Minty, London W1K 4PS) appeared on behalf
of the Applicant.

THE RESPONDENT was not present and was not represented.

JUDGMENT

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Friday, 6th July 2001

1. LORD JUSTICE TUCKEY: On 21st March 2000 a Swedish arbitral award now worth more than US\$12.5 million was made against Yukos Oil Company, the applicant before me today. The benefit of this award has been assigned to Dardana Limited, who are the other party to these English proceedings.
2. Yukos have applied to set aside the award in Sweden because they say they were not party to any arbitration agreement, so the arbitrators had no jurisdiction to make any award against them. That application was due to be heard in September 2001, but Mr. Malek Q.C., who appears for Yukos this morning, tells me that the date has slipped but there is some prospect of a hearing later in the year or perhaps early next year, but no definite date has been fixed.
3. In the meantime, Dardana sought to enforce the award in England and were given permission to do so on a without notice application under Part III of the Arbitration Act 1996 on the basis that it was a New York Convention award.
4. Yukos then applied to set aside this order. Their application was heard by his Honour Judge Chambers Q.C., who gave judgment on 21st March 2001.
5. Yukos contended that the 1996 Act required Dardana to satisfy the English court that there was an arbitration agreement as defined by section 100 of the Act. The judge disagreed. He held that Yukos' right to challenge the existence of any arbitration agreement was only to be found in section 103(2) of the Act and so (because that section says so) the onus was on Yukos to prove that there was no such agreement. Rather than decide whether Yukos had done so, the judge adjourned the application under the provisions of section 103(5) of the Act to await the Swedish decision.
6. Yukos challenge each of those decisions and I have given them permission to appeal because the points raised are of some importance and are sufficiently arguable. However, section 103(5) also gives the court power, on the application of the party claiming enforcement of the award, to order the other party to give suitable security. The judge ordered Yukos to provide security of US\$2.5 million. This security has already been provided in the form of a solicitor's undertaking. I refused to stay this part of the judge's order on the ground that it would prejudice the outcome of the argument on the other issues.
7. Today Mr. Malek renews Yukos' application for such a stay. His first submission is made on the back of an argument that the judge had no jurisdiction to adjourn because Yukos had not asked for an adjournment; so, it is submitted, section 103(5) was not engaged and there was no jurisdiction to order security. Whether the judge should have adjourned is one of the issues in the appeal. But it seems to me that the discretion to adjourn, given to the court by section 103(5), is not dependant upon any application being made to it. The section simply says that the court may adjourn if it considers it proper to do so, so the court may do so on its own initiative. If it does adjourn under these provisions, then it

clearly has the power to order security since section 103(5) says in terms that it may do so.

8. Mr. Malek, in his skeleton argument for the purposes of today's application, takes a point about the way the judge justified his decision to adjourn which he says can be seen from the way in which the order was drawn up. It was drawn up in such a way as to suggest that Yukos applied for an adjournment when they had not done so. He says that their position was quite clear: they wanted the judge to decide the issue as to whether there was or was not an arbitration agreement and, in the event they lost and only in that event, they wanted a stay of the order allowing enforcement of the award pending the decision in Sweden. But I do not think (as I attempted to explain to Mr. Malek in argument) that I need grapple with the niceties with what I (perhaps rudely) characterised as a pleading point of that kind today. The simple decision I have to review is whether it is right that the order for security should stand pending the hearing of the appeal by this court.
9. Mr. Malek submits that the judge's order was perverse. He relies firstly on the fact that they had not asked for an adjournment. Why, he asks, should they have to provide security as the price of something which they did not themselves want? He relies also on the fact that their case for saying that there was no agreement was, as the judge accepted, strongly arguable; that there was no evidence that Yukos would move assets out of this jurisdiction, absent an order that they provide security; and that they had taken immediate steps to challenge the award in Sweden.
10. The judge, in making the award, followed the approach suggested by this court in the case of Soleh Boneh v. Government of the Republic of Uganda and National Housing Corporation (1993) 2 Lloyds Rep. 208, where Staughton L.J., in considering whether to require a party to provide security in circumstances such as these, identified two important factors. The first was the strength of the argument that the award was invalid. Based upon (as he described it) "brief consideration" by the court, he continued:

"If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the judge must be guided by his preliminary conclusion on this point."
11. The second point (which I do not think arises here) was that the court should consider the ease or difficulty of enforcement of the award.
12. It seems to me that the judge in this case followed this approach and reflected his view of Yukos' prospects by ordering them to provide security of only about 25% of the full value of the award. Whether or not to order security was a matter, as Mr. Malek accepts, for his discretion. I do not think I can at this stage characterise his exercise of discretion as perverse. There were reasons for ordering security and I have no doubt that, in ordering the modest security which he did, the judge took into account the factors for and against doing so.

13. Mr. Malek submits that I was wrong to say that staying the order for security would prejudice the outcome of the appeal. He says it will maintain the status quo before the judge made his order, which was that Dardana did not have any security for their award here or anywhere else. In saying what I did, I meant only to reflect the fact that in granting permission I did not think it necessarily followed that Yukos would win the appeal. The order for security protected Dardana's position as the successful party before the judge in the meantime.
14. For those reasons, I do not think it would be right to disturb the order made by the judge that Yukos should provide security. This renewed application is therefore refused. I add that if the Swedish court makes its decision before the appeal is heard (at the moment it is fixed for March 2002) the position will change. If that court upholds the award, Dardana's right to have security will have strengthened. On the other hand, if the award is set aside in Sweden, then the English proceedings become entirely academic because there will be no award to enforce here. In that event, the order for security will inevitably be discharged.

ORDER: Application dismissed.