Neutral Citation Number: [2020] EWCA Civ 1585

Case No: A1/2019/3127

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM VERONIQUE BUEHRLEN QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)
TECHNOLOGY AND CONSTRUCTION COURT

HT-2019-000060

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2020

Before:

LORD JUSTICE FLAUX
LORD JUSTICE COULSON
and
LADY JUSTICE CARR

- -

Between:

AIC LIMITED **Appellant**

- and –

THE FEDERAL AIRPORTS AUTHORITY OF NIGERIA **Respondent**

Paul Key QC (instructed by Mc Dermott Will & Emery UK LLP) for the **Appellant**
Riaz Hussain QC (instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP) for the **Respondent**

Hearing date: 20th October 2020

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Thursday 26th November 2020."

LORD JUSTICE COULSON :

1 INTRODUCTION

1. At a hearing on 6 December 2019, Veronique Buehrlen QC, sitting as a Deputy High Court Judge ("the judge") ordered that the appellant ("AIC") have leave to enforce an Arbitration Award ("the Award") in its favour in the sum of US$ 48 million odd (together with interest). That order was not in substance opposed. However, a week later, on 13 December 2019, the judge allowed an application by the respondent ("FAAN") to reconsider her order of 6 December, and she rescinded AIC's right to enforce the Award. She also granted FAAN relief from sanctions. AIC now seek to appeal the reconsidered order of 13 December.

2. The appeal raises issues as to the correct approach to an application to reconsider an order after its pronouncement in open court but before the order itself has been sealed and whether, in all the circumstances of this case, the judge properly exercised her discretion in reversing her earlier order. There was also a secondary issue, raised by FAAN for the first time on this appeal, to the effect that the judge's earlier order did not contain any sanction, so that (despite the fact that FAAN originally made the application for relief from sanctions in accordance with the test set out in *Denton v TH White* [2014] EWCA Civ 906, [2014] 1 WLR 3926) this was not a case of relief from sanctions in any event.

3. In order to deal with these issues, it is unfortunately necessary to set out the history in some detail. I am satisfied that, throughout this tortuous process, the English Courts have endeavoured to do justice between the parties, and repeatedly made themselves available at short notice to resolve the seemingly endless disputes that have arisen between them. Little else in this unedifying story is deserving of the same approbation.

2 THE FACTUAL BACKGROUND

4. AIC is a Nigerian construction and property development company. FAAN is an entity incorporated by a Nigerian governmental decree. It operates and maintains Nigeria's federal airports. The evidence demonstrates that FAAN is, to all intents and purposes, a State Agency. Its revenues are its own, and its Governing Board has the power to decide how that revenue may be spent.

5. By a Deed of Lease dated 17 February 1998, FAAN leased a site at Lagos airport to AIC for a term of fifty years, in order that AIC could develop a hotel and resort complex there. However, by letter dated 16 May 2000, FAAN directed AIC to refrain from work on the hotel development, and AIC have never been permitted to continue with the construction of the hotel and resort. AIC claimed damages against FAAN for this breach of the Deed of Lease.

6. The dispute between the parties was referred to a Nigerian-seat arbitration in accordance with an agreed arbitration clause. The commencement of the arbitration was delayed for 6 years because FAAN refused to appoint (or agree to the appointment of) an arbitrator. Eventually there was a full hearing. On 1 June 2010, the Award was made by Mr Justice Kayode Eso in favour of AIC in the sum of over US $48 million

together with interest. It has never been suggested that this was anything other than a valid arbitration award.

7. In July 2010, FAAN applied in the Nigerian High Court to set aside the Award on various grounds. Although that challenge was upheld at first instance by Buba J, it was overturned on appeal (albeit on a jurisdictional issue). FAAN sought to appeal again, this time to the Supreme Court of Nigeria. Unhappily, ten years after the promulgation of the Award, the appeal in respect of the application to set aside has still not been resolved, and no-one can say when it might even be considered. Indeed, the gloomy view was expressed that resolution of the matter in Nigeria could still be many years away.

8. On 10 January 2019, AIC applied to the English Courts for permission to enforce the Award in the same manner as a judgment or order of the High Court, pursuant to section 101 of the Arbitration Act 1996. On 28 February 2019, an order giving such permission was made by Mrs Justice O'Farrell ("the O'Farrell Order"). This provided that, pursuant to sections 101(2) and 66(1) of the Arbitration Act 1996, AIC had permission to enforce the operative part of the Award and to enter judgment against FAAN. The O'Farrell Order also stated that FAAN was entitled to apply to the Technology and Construction Court to set aside the Order within 22 days of service of the order on FAAN and that, in accordance with CPR r.62.18(9)(b), the Award must not be enforced by AIC until after the expiry of that period.

9. On 27 March 2019, which appears to have been the 22nd day after service (and therefore at the last possible moment), FAAN applied to the Court to have the terms of the O'Farrell Order set aside and to adjourn AIC's application to enter judgment. On 28 June 2019, AIC applied for an order for FAAN to give security in the event that the O'Farrell Order was set aside.

10. On 25 July 2019, at the first hearing before the judge, these two applications were heard together. Having considered the matter, the Judge handed down her written judgment on 13 August 2019 ([2019] EWHC 2212 (TCC), [2019] Lloyd's LR, 211). The result was that she set aside the O'Farrell Order, adjourned AIC's application to enforce the Award, and ordered FAAN to provide security in the sum of $24,062,000 (i.e. half the principal sum found due in the Award).

11. The judge gave careful consideration to the merits of AIC's underlying claim to enforce the Award, and FAAN's application to set it aside. She was impressed by the former and dismissive of the latter:

> "43. In my judgment the grounds set out in Justice Buba's judgment in support of his decision to set aside the Award are not at all well founded. Notably, Mr Boeddinghaus did not seek to persuade me that they were. As to the four principal grounds relied upon to justify the set aside:
>
> (i) It is difficult to see how the Arbitrator can be said to have exceeded his jurisdiction, and thereby misconducted himself, by awarding AIC damages in the form of loss of profit for breach of the terms of the Deed of Lease calculated by reference to the hotel development contract and profit projections for the project. One would expect the Arbitrator to quantify the losses arising out of FAAN's breach by reference to the profit projections on

which the planned development was based and financed and for which the land had been leased. The Deed of Lease itself expressly provided that the sole purpose of the demise was for the development and management of the hotel (clause B(v)).

(ii) Contrary to Justice Buba's findings, I do not see how the Arbitrator could be said to have made a fundamental error of law by holding that AIC were entitled to "*unmitigated damages*". This is because it is perfectly clear when one reads the Award that the Arbitrator made a finding of fact on the issue of mitigation and that it was only because he found that it was not reasonable to expect AIC to develop a different site some 1.5 miles from the airport terminal, and in that context, that he went on to state that AIC was entitled to "*unmitigated damages*". He was not suggesting that there was no duty on the part of AIC to mitigate its loss.

(iii) Thirdly, Justice Buba considered that since the Nigerian Government had statutory powers of compulsory purchase, based on the principle of *volenti non fit injuria*, AIC had voluntarily waived the risk of all claims arising from that risk. However, the Nigerian Government had not exercised any such right of compulsory purchase over the land the subject of the Deed of Lease. It is therefore extremely difficult to see any proper legal basis for Justice Buba's conclusion.

(iv) Lastly, Justice Buba held that enforcement of the Award would be contrary to public policy because AIC had commenced construction without the requisite mandatory building regulation approval. However, this amounted to reversing one of the Arbitrator's findings of fact, namely that the project had the requisite government approvals.

44. Based on my review of the Award and the reasons set out in the judgment of Justice Buba to justify the setting aside of the Award, I would not consider the Set Aside Application to have a real prospect of success on appeal. However, the fact remains that on the one occasion on which the Set Aside Application has come before the Nigerian Courts (that is before a Nigerian Federal High Court Judge applying Nigerian law) for consideration on the merits, the application was allowed and the Award was set aside. Similarly, the fact also remains that if FAAN's appeal on the Preliminary Objection succeeds the immediate consequence will be to reinstate the decision of Justice Buba setting aside the Award. I am also mindful of the fact that it is not only FAAN that has challenged the validity of the Award. AIC has also taken issue with the Award since it has sought to challenge the Arbitrator's refusal to order specific performance of the Deed of Lease."

12. Balancing the various considerations, the judge's conclusions can be found at paragraph 54:

"54. Bringing the various factors together, in my judgment this is a case where the Award lies towards the "manifestly valid" i.e. top end of the scale, in which significant further delay is likely to ensue and in which some element of prejudice to AIC will result from a continuing delay in

> enforcement. However, those factors must be balanced against the matters set out in paragraph 44 of my judgment and in particular the fact that on the only occasion on which the Set Aside Application did come before the Nigerian Courts on its merits the Award was set aside. I am mindful of the fact that it is important to avoid conflicting judgments. Accordingly, I have concluded that this is a case in which an adjournment is appropriate and in which the factors militating against an adjournment fall to be addressed further in the context of AIC's application for security."

13. Thus, as at 13 August 2019, FAAN knew that it needed to provide security in the sum of US$24 million odd. Although Mr Hussain QC, on behalf of FAAN, argued that, because the form of the security had not yet been fixed, there was nothing that FAAN needed to do until that had happened, I do not agree. Security is traditionally provided either by the payment of money into court, or the provision of a guarantee or bond. Either way, FAAN had to start making the arrangements to provide that security from 13 August 2019. If (which I do not accept has been demonstrated by the evidence) these arrangements somehow necessitated FAAN's interaction with the respective Ministers of Finance, Justice and Aviation, then there was all the more reason for FAAN not to delay until the precise form of security had been fixed.

14. Further confirmation that FAAN did not need to know the form of the security before acting on the judgment can be found in the fact that, on 3 September 2019, FAAN filed an appellant's notice seeking permission to appeal it. It appears that, although it had successfully resisted enforcement of the Award, it objected to providing any security and wished to reargue all of the principal points raised before the judge at the hearing in July.

15. On 17 September, following oral submissions, an Order was drawn up by the judge ("the First Buehrlen Order") which provided:

    i) That the O'Farrell Order was to be set aside;

    ii) That AIC's application for an order for enforcement of the Award was adjourned on the terms that FAAN was to provide security by procuring the issue of a Bank Guarantee ("the Guarantee") from a European or American Bank, rated AA or better to be sent by SWIFT to the Barclay's Bank account of AIC in London by 4:30PM London time on 29 October 2019;

    iii) That the Guarantee, in the sum of $24,062,000, was to be valid and operative until 9 months after the final decision of the Nigerian Court and callable upon the English Court giving AIC permission to enforce the operative part of the award;

    iv) That AIC was at liberty to apply to enforce the Award, should FAAN fail to provide security in accordance with the above conditions;

    v) That FAAN must pay 75% of AIC's costs before 4:30pm London time on 15 October 2019;

    vi) That FAAN's application for permission to appeal against the order for security was refused;

vii) That FAAN's application for a stay in relation to the provision of security was refused.

16. Although we do not have a transcript of that hearing, some insight into what happened is provided by a letter from FAAN to the Attorney General of Nigeria dated 2 October 2019, in which FAAN identified at least two arguments which they advanced at the hearing, and on which they lost. One was that the Guarantee should be provided by a first-class Nigerian bank, not a European bank. The other was that they should have three months from 17 September 2019 (so over 4 months from the handing down of judgment) to provide the Guarantee.

17. This latter point is now of some significance. The judge refused to give FAAN three months to provide the guarantee. She gave them six weeks (or ten weeks from when she handed down her judgment) which expired on 29 October. It appears to have been her view, knowing as she did the details of FAAN's funding arrangements, that that was quite long enough for a State Agency to provide the Guarantee. Yet, as we shall see, FAAN did indeed take three months from mid-September to provide the Guarantee. As I put to Mr Hussain during argument, it might fairly be said that FAAN took as long as it had always intended to take to provide the Guarantee, irrespective of the orders of the court.

18. FAAN's disregard of the First Buehrlen Order can also be seen in the fact that the letter that it wrote to the Attorney General, on 2 October 2019, was the first letter put in evidence in which they had notified anyone in the Nigerian Government of the outcome of the hearings in July and September. This was despite the fact that the substantive judgment was already seven weeks old. Moreover, that letter made no attempt to obtain assistance with the provision of the Guarantee. Indeed, as was correctly pointed out at paragraph 35 of AIC's skeleton argument for the hearing on 6 December, there was no evidence that FAAN's Governing Board had then (or later) decided to provide the Guarantee. Its focus seems instead to have been on the application for permission to appeal, which, if successful, would have avoided the need to provide the Guarantee at all.

19. This focus is also confirmed by the evidence about the meetings between the Attorney-General of Nigeria, FAAN's existing lawyers and the firm who were endeavouring to replace them, Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis"). The change was eventually made because FAAN said that the existing lawyers "had no immediate/proactive solution to the present and urgent problem at hand". Since that present and urgent problem could only have been the order to provide the Guarantee, the logical inference is that, in some way, there was a belief at FAAN that Curtis may be able to help them avoid complying with that obligation altogether. Hence the focus on the application for permission to appeal.

20. Pursuant to the First Buehrlen Order, FAAN was required to pay AIC's costs, in the sum of about £34,000 odd, by 15 October. It failed to comply with that order. No reason was (or has ever been) given for this non-compliance. It appears that payment of that amount was not made until 11 December at the earliest, doubtless as a result of the pressing need by then for FAAN to demonstrate its willingness to comply with court orders, in advance of the hearing of its application to reconsider on 13 December.

21. FAAN's first request for financial assistance in respect of the provision of a guarantee came in a letter from FAAN to the Minister of Finance on 15 October 2019, two months after the judgment and a month after the order requiring that security be provided. The letter was not couched in urgent terms. FAAN wrote further letters to the Minister of Aviation on 21 October 2019, and to the Attorney General on 29 October 2019. These letters were asking the Ministers to ask the Minister of Finance to provide the guarantee. That was, or certainly should have been, a formality, because as an Agency of the Nigerian State, FAAN were part of the same entity as the Ministers.

22. This latter letter was written on the very day that the time for compliance with the First Buehrlen Order expired. No mention of the expiry of the relevant time limit, and the potentially catastrophic consequences for FAAN of non-compliance, was made in that letter. At the time it was written, 29 October remained the date by which security had to be provided.

23. It was only on 29 October 2019 that FAAN applied to the Court of Appeal for a stay of the First Buehrlen Order, pending the outcome of their application for permission to appeal (paragraph 14 above). That application was therefore made at the last possible moment, weeks after it must have been apparent to FAAN that they could not comply with the date in the First Buehrlen Order of 29 October 2019. No explanation has ever been given for that conduct.

24. On 30 October 2019, with no realistic alternative, this court granted FAAN an extension of time for complying with the First Buehrlen Order until resolution of their application for permission to appeal. Consequently, time for complying with the First Buehrlen Order was extended as follows:

    i) If permission to appeal was granted, until the resolution of the substantive appeal; or

    ii) If permission was refused, within 3 days of the notice of refusal.

25. On 11 November 2019, FAAN's application for permission to appeal was refused. I noted at paragraph 3 of my reasons for refusal that "on one view, the deputy judge's decision was generous to FAAN. On the material before the court another judge might well have refused the application to adjourn outright." Consequently, the security became payable by FAAN three days later, on 14 November 2019. Furthermore, it is important to note that FAAN had only achieved a stay from 29 October to 14 November by the making of an application for permission to appeal which had been found to have no real prospect of success.

26. Following the refusal of permission to appeal, on 12 and 13 November 2019, FAAN wrote to the Minister of Finance attempting to secure a guarantee. Curiously, only the first letter refers to the fact that time for compliance with the relevant order would expire on 14 November.

27. On 14 November 2019, the security became payable. On that day, FAAN made its next last-minute application to the High Court to vary or stay the First Buehrlen Order (as amended). In an accompanying witness statement by Mr Timi Balogun, FAAN's solicitor, it was argued by FAAN that a further stay was necessary due to difficulties that had arisen in efforts to secure the Guarantee. No details of these difficulties were

(or have ever been) given. A three-week extension was requested to enable FAAN to secure a guarantee, alternatively an extension to 5 December 2019. Mr Balogun further stated that, "should the Applicant be unable to finalise the Bank Guarantee within the short period of time requested, then the Respondent would be at liberty to enforce the Award". On 21 November 2019, AIC cross-applied to enforce the operative part of the Award, pursuant to the First Buehrlen Order.

28. After the letters of 12 and 13 November, FAAN provided no evidence that it did anything more to progress the provision of a guarantee for another three weeks. Although it received letters (or copies of letters) from the Minister of Finance dated 25 November and 2 December 2019, and from the Minister of Justice dated 29 November 2019, there was no evidence that FAAN itself was doing anything of any relevance. I note that the letter of 2 December was sent to the Central Bank of Nigeria ("CBN"), the first time it was involved in any of the correspondence. It now appears that CBN had to be involved in the releasing of the necessary funds. There is no explanation anywhere of why it was not involved weeks or months before 2 December.

29. A hearing was fixed on Friday 6 December to deal with FAAN's application to extend time and AIC's application to enforce the Award. The fixing of the date led to a modest increase in urgency on the part of FAAN.

30. Even if its own application to extend time was granted, FAAN had said it would provide the Guarantee by 5 December, the day before the hearing (paragraph 27 above). On that day, the Minister of Finance wrote to the Central Bank of Nigeria to block the $24 million odd "directly from" a particular account with JP Morgan Chase for the issue of a Bank Guarantee by an American or a European bank. At the same time, Dr Clifford Omozeghian, the General Counsel for FAAN, provided a short witness statement for the hearing in which he said that "I am confident that the guarantee will be in place unfailingly by Friday 13 December 2019 and crave the understanding and indulgence of the court in this regard". In similar vein, a skeleton argument prepared by FAAN's leading counsel, Mr Alun Jones QC, also dated 5 December 2019, referred to the ongoing arrangements with the CBN and JP Morgan Chase and said at paragraph 3: "The parties are now in a position where the claimant will have some form of security and the defendant is not prejudiced."

31. The opposing skeleton argument prepared by Mr Michael Collett QC, leading counsel then appearing for AIC, set out the history of the matter since August 2019 in much greater detail than the documents emanating from FAAN. It made many of the same points noted above concerning FAAN's dilatory (and in some instances, non-existent) attempts to comply with the First Buehrlen Order. It set out how and why FAAN should never have had any difficulty in providing the Guarantee; that there was no evidence that the Governing Board of FAAN had ever decided to provide the Guarantee; how the costs payable by 15 October had still not been paid; and, importantly, it set out how and why FAAN's application for an extension of time should be refused.

32. By the time of the hearing on 6 December, not only had the time to comply with the First Buehrlen Order (as amended) long since expired, but so too had the extended period which FAAN themselves had sought in their own application. No fresh or amended application was made or intimated.

33. The transcript shows that that hearing on 6 December started at 2:07pm. Mr Collett QC introduced the matter and said that, unless Mr Jones QC "makes an effective and successful application for an extension, the only matter before the court is the application to enforce, and there is no reason to refuse that. We are as it were back where we were before Mrs Justice O'Farrell right at the beginning of this matter. So on that basis, I say really it is for Mr Jones to explain what his position is."

34. The judge agreed. At her invitation, Mr Jones then said this:

> "My Lady, on the substance of the matter, your ladyship will see that we put in yesterday a statement from the General Counsel of FAAN yesterday afternoon with a document attached which was not in fact formally exhibited. We probably overstated the effect of that in our skeleton argument. But my Lady, we did the skeleton argument in a huge hurry just having had very recent notice of the document. The reality is that we have been acting in the hope that there may be further information today about this guarantee and the lodgement of the security in satisfaction of your Ladyship's order, and we have not had one. We see therefore no proper professional basis upon which we can apply for a further extension, not having fulfilled the terms of the previous order… I accept the chronology and the stings of principles of law set out by my learned friend in his skeleton arguments. And in the absence of further information, I do not think there is a lot I can say."

35. The judge asked Mr Jones to confirm that, in the absence of any further information, he was not making a further application to extend. Mr Jones said: "I do not believe I have the evidential basis to do so". Thereafter, the debate moved to the terms of the order. In this way, not only was no further application to extend time made, but FAAN's existing application to extend time was effectively abandoned.

36. After some brief discussion, the judge made an order in open court ("the Second Buehrlen Order"). By that order, she gave AIC permission to enforce the operative part of the Award and entered judgment against FAAN, pursuant to section 101(3) Arbitration Act 1996.

3. THE APPLICATION FOR RECONSIDERATION

37. At 5:17pm on 6 December, Mr Jones QC informed Mr Collett QC by way of an email that, just over an hour previously, FAAN had procured a Guarantee issued by Standard Chartered Bank ("SCB") in the sum of $24 million in favour of AIC. He further said that FAAN would be applying to re-open its application or to make a further application, before the Second Buehrlen Order was sealed.

38. At some point later that same day, AIC sought to call on the Guarantee and wrote to SCB making demand for payment, pursuant to the Second Buehrlen Order and pursuant to the terms of the Guarantee. On 9 December, SCB acknowledged the demand for payment made by AIC. AIC wrote again to SCB demanding payment. On 11 December, SCB notified FAAN that AIC's demand was "a complying demand for payment under the Guarantee" and that it intended to honour it on 13 December. On the same day, Curtis wrote to AIC's previous solicitors (Westbrook Law Ltd ("Westbrook")) disputing the validity of the demand.

39. On 8 December (a Sunday), FAAN made an application to the judge to reconsider the Second Buehrlen Order and to apply for relief from sanctions. On the same day, witness statements from Dr Omozeghian and Mr Balogun, were submitted in support of FAAN's application. The witness statements explained the very recent events and timings relating to the Guarantee. They did not address any elements of the delay from August to the beginning of December 2019.

40. On 13 December, FAAN's application for reconsideration and relief dated 8 December was heard by the judge. After hearing submissions from both parties, she granted FAAN's application for reconsideration and relief and made a third order ("the Third Buehrlen Order") which stated the following:

    i) That AIC's application to enforce the Award remained adjourned;

    ii) FAAN's security in the form of the Guarantee was deemed compliant with the First Buehrlen Order;

    iii) By virtue of the relief from sanctions, FAAN would be treated as having had until 9:00am Monday 9 December to produce the Guarantee;

    iv) FAAN were to pay AIC's costs in relation to the hearings on both the 6 December 2019 and 13 December 2019 at a total value of £34,540;

    v) AIC's application for permission to appeal was refused.

41. The judge's *ex tempore* judgment on 13 December 2019 is at [2019] EWHC 3633 (TCC). She set out the background at [2] – [13]. Amongst other things, at [8] the judge expressly referred to the first witness statement from Dr Omozeghian, his reference to the arrangements being almost concluded, and his statement that "he was confident that the guarantee would be in place 'unfailingly' by Friday 13 December 2019" (paragraph 30 above).

42. The judge said at [14] that she had the necessary jurisdiction to reconsider the Second Buehrlen Order. At [15] she said "the next question is whether I should exercise that power in favour of FAAN". The most important section of the judgment for present purposes started at [17]:

> "17. In my judgment the circumstances of the present case are such as to justify reconsideration of the draft order. This is not a case of a mistake having been made, or of the court having changed its mind on the basis of the original material. Rather it is a case in which there has been a significant change in circumstances in that within some two hours of the order being made FAAN obtained the requisite guarantee.
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> 18. There are then further relevant factors which favour a reconsideration of the order. Firstly, there was no substantive consideration of the Parties' respective applications at the hearing on 6 December 2019. Rather, not having had the confirmation he expected of the guarantee having been issued, leading counsel for FAAN took the view that he could not properly in that moment maintain or renew FAAN's application for an extension of time. Second, there has been no detrimental reliance on the part of AIC on the

> order. Third, obtaining the guarantee clearly did involve FAAN, because of its parastatal status, in having to take a number of steps to obtain all the requisite authorisations from the various Nigerian ministries, as well as the cooperation of the Nigerian Central Bank. Although there clearly were delays, the fact that FAAN has obtained a valid and enforceable guarantee evidences the fact that it has *bona fide* sought to comply with paragraphs 2 and 3 of the order of 17 September 2019. I have also taken into account the difficulties that Mr Balogun (the solicitor instructed by FAAN) explains he had, having travelled to Nigeria to assist FAAN in obtaining the guarantee, and then communicating with FAAN, the bank, and leading counsel on 5 and 6 December 2019, as explained in his witness statement.
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> 19. Further, I am particularly mindful of the consequences of not revisiting the Order for the purposes of the Overriding Objective and dealing with cases justly. The purpose of the guarantee was to provide AIC with security whilst its application for enforcement of the Award was adjourned pending a final and unappealable decision of the Nigerian courts as to the setting aside of the Award. In effect, it was the price FAAN had to pay for the adjournment. It was not intended for immediate enforcement. However, having been provided with a copy of the guarantee through Mr Jones's email sent at 5.17 pm on 6 December 2019, by letter dated the very same day AIC made demand on Standard Chartered for payment of the sum of some US$24 million. I regard that demand as inappropriate, both because it was never intended that the guarantee should be called upon in these circumstances, and because, as Mr Jones's email made plain and AIC were therefore well aware, FAAN were in the process of preparing the requisite applications and supporting material to come back before the Court."

43. In dealing with some of the other points raised by AIC in opposition to the reconsideration, the judge said this:

> "22. Firstly, he [Mr Collett QC, on behalf of AIC] submits that FAAN's application is not really concerned with a reconsideration of the order dismissing FAAN's 14 November 2019 application but rather a fresh application for relief because, as at 6 December, FAAN had failed to provide a guarantee within the extension time sought by its 14 November 2019 application. It is correct that FAAN's 14 November application sought an extension of time until 5 December 2019. However I have no doubt that had the guarantee been available at 2.00 pm on 6 December, I would have exercised my discretion to allow FAAN the requisite extension of time pursuant to its 14 November application, and I would have dismissed AIC's enforcement application.
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> 23. Secondly, Mr Collett submits that the power to reconsider an unsealed order has not previously been exercised to give effect to something done by the applicant after the decision in question has been made. As to this submission, firstly the categories of case in which a judge may revisit his or her order are not closed. Secondly, I do not regard this case as an instance of a party having done something after the decision was made. In my judgment this is a case in which the fruits of FAAN's efforts to obtain the guarantee,

> and to comply with the Order, finally culminated in the issue of the guarantee by the bank shortly after the decision had been made. It was not a question of FAAN taking some new step following the making of the Order. To the extent that it is a case in which new evidence became available shortly after the hearing, the fact that the guarantee had been issued was not evidence FAAN could have adduced at the hearing. I do not doubt that if it could have done, it would have done so. The evidence of Mr Balogun is clear in this regard. He had even made arrangements with leading counsel for FAAN on a way to communicate the availability of the guarantee during the 6 December 2019 hearing itself. Although there is no evidence as to precisely when Standard Chartered issued the guarantee, all the indications are that it was not until shortly after the hearing that the guarantee became available. Accordingly, evidence of compliance with the Order of the 17 September 2019, albeit late, could not be put before the Court during the 6 December 2019 hearing itself…
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> 25. Fourthly, Mr Collett submits that to allow reconsideration of the Order on the grounds that the guarantee was provided within some two hours of the hearing would be contrary to the principle of finality of orders, and encourage litigants to delay the sealing of orders in the hope that " *something will turn up* ". I do not accept that submission. Finality (subject of course to appeal) is obtained upon the order being sealed. Further, it is inherent that where there is a power for a judge to reconsider an order, that power will inevitably erode, albeit only to a very limited extent, the principle of finality. It is to my mind a question of balance. The circumstances of this case are highly unusual, and I would not expect them to encourage litigants to think that they can delay the sealing of orders in the hope that " *something might turn up* "."

44. In the remainder of the judgment from [26] – [32], the judge dealt with FAAN's application for relief from sanctions by applying the three-stage test in *Denton*. As to stage 1, she agreed that the breach was serious and significant because of the 22 day delay (measured from 14 November).

45. As to the reasons for that delay, which is stage 2 of the *Denton* test, she said at [29]:

> "29. The second stage is to consider why the default occurred. It seems to me that whilst FAAN's evidence has not been as comprehensive as the Court would wish to see, and there are matters that certainly ought to have been better explained, for instance why CBN does not appear to have been approached until as late as 2 December, as well as the involvement of different third party banks, it does seem to me that on balance, and looking at the evidence as a whole, FAAN has provided sufficient, as well as good, reason for the delays:"

46. As to all the circumstances of the case, which is stage 3 of the *Denton* test, the judge said at [32]:

> "32. Lastly, I must evaluate all the circumstances of the case, to enable me to deal justly with the application. Militating against my exercising my discretion in favour of FAAN is the fact that litigation should be conducted efficiently, and at proportionate cost, and the Court's orders are made to be

> obeyed. FAAN's delays have certainly impacted the amount of Court time that has had to be devoted to this matter. I am also mindful of the fact that FAAN did not comply with the order for costs that I made on 17 September 2019. However, whilst I have taken that factor into account, I have balanced it against the fact that the costs have now been paid, and the fact that it would in my view be disproportionate to refuse FAAN relief from sanctions on this ground."

4 SUBSEQUENT EVENTS

47. AIC applied for permission to appeal the Third Buehrlen Order. Permission was granted on 5 February 2020. The appeal hearing was expedited and should have taken place in March. However, because the national lockdown resulting from the pandemic had been imposed the week before the appeal was due to be heard, the appeal hearing had to be adjourned until October.

48. In the latter part of December 2019, and throughout 2020, there has been copious correspondence and further disputes between the parties. That has included Curtis' efforts to prevent SCB from paying out under the Guarantee, and yet another non-payment by FAAN, this time in respect of the costs order that was the subject of paragraph 4 of the Third Buehrlen Order (paragraph 40 above). In other words, even after they had escaped again, this time by way of a successful application for reconsideration, FAAN still did not comply with the order that the court had made.

49. During the last week before the hearing, there was a blizzard of further applications, further documents, and late files, including one large file relating to the progress (or lack of it) of the appeals and applications in Nigeria. It is entirely consistent with the procedural mayhem and last-minute scrabbling that has gone before that a relatively clear-cut dispute became something of an advertisement for how not to conduct civil litigation.

5 THE LAW

50. The principle of finality is of fundamental public importance: see *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514 at [65]. Parties who receive a judgment in open court are entitled to act on that judgment, because an order takes effect from the moment it is made by the court, not when it is sealed: *Holtby v Hodgson* (1890) 24 QBD 103; *Ashman v Thomas* [2016] EWHC 1810 (Ch). The successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory. The unsuccessful party cannot treat the judgment that has been handed down as some kind of rehearsal, and hurry away to come up with some new evidence or a better legal argument. As identified below, there is a particular jurisdiction which permits a judge to change his or her order between the handing down of the judgment and the subsequent sealing of the order. But in most civil cases, the latter is an administrative function, and it would be wrong in principle to allow parties *carte blanche* to take advantage of an administrative delay to go back over the judgment or order and reargue the case before it is sealed. Hence it is a jurisdiction which needs to be carefully patrolled.

51. The leading case on the court's power to change an order which has been made and pronounced by the court, but not yet sealed, is *Re L and Another (Children)* [2013] UKSC 8, [2013] 1 WLR 634. In her review of the authorities, Lady Hale said:

> "21. In 1972, however, the Court of Appeal decided *In re Barrell Enterprises* [1973] 1 WLR 19, in which it refused to allow the re-opening of an unsuccessful appeal in which judgment had been given some months previously dismissing the appeal but the order had for some reason never been drawn up. Russell LJ, giving the judgment of the court, stated, at pp 23-24, that:
>
> > "When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present."
>
> There was no such justification in that case.
>
> 22. In *Paulin* [2010] 1 WLR 1057, 1070, Wilson LJ also pointed out that the limitation thus placed on the proper exercise of the jurisdiction was "not universally welcomed". In *Pittalis v Sherefettin* [1986] 1 QB 868, Dillon LJ had in effect "emasculated [it] into insignificance" by pointing out that it was exceptional for a judge to be satisfied that the order he had previously pronounced was wrong.
>
> 23. In *Stewart v Engel* [2000] EWCA Civ 362, [2000] 1WLR 2268, the Court of Appeal unanimously held that the power to recall orders before perfection had survived the coming into force of the Civil Procedure Rules 1998. However, for some reason (probably the submissions of counsel) they termed this "the *Barrell* jurisdiction". By a majority, they affirmed the *Barrell* limitation, which Sir Christopher Slade said "must apply a fortiori where the judgment is a formal written judgment in final form, handed down after the parties have been given the opportunity to consider it in draft and make representations on the draft": pp 2274, 2276.
>
> 24. Clarke LJ dissented on this point. He did not think that the court was bound by *Barrell* to look for exceptional circumstances. He clearly took as a starting point the overriding objective in the Civil Procedure Rules of enabling the court to deal with cases justly. He considered that the judge had been right to direct himself that the examples given by Neuberger J in *In re Blenheim Leisure (Restaurants) Ltd (No 3),* The Times, 9 November 1999 - a plain mistake by the court, the parties' failure to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given - were merely examples: "How the discretion should be exercised in any particular case will depend upon all the circumstances": [2000] 1WLR 2268, 2285…

> 27. Thus one can see the Court of Appeal struggling to reconcile the apparent statement of principle in *Barrell* [1973] 1 WLR 19, coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case. This court is not bound by *Barrell* or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v Engel* [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in *In re Blenheim Leisure (Restaurants) Ltd*, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."

52. Although this exposition of the authorities is very helpful, three points should be made about it. The first is to note that the jurisdiction is founded in the overriding objective (CPR 1.1). It is therefore clear why a test requiring 'exceptional circumstances' - which is not articulated in r.1.1 (in contrast to, say, CPR 52.30, which does use those words) – must be illegitimate. But it is still fair to observe that, as a matter of fact, such applications are (and certainly ought to be) rare.[1]

53. Secondly, the facts of *Re L* were themselves unusual, because they concerned a judge giving a preliminary view and subsequently changing her mind after learning more about the case. Who could sensibly dispute that a reconsideration that arose in such circumstances was appropriate and in accordance with the overriding objective? As Mance LJ put it in *Robinson v Fernsby and Another* [2003] EWCA Civ 1820, at [113] "having changed his mind, the judge was in my view not only entitled but bound to give effect to his second thoughts". I would venture to suggest that the authorities analysed by Lady Hale did not support any contrary approach to that specific issue.

54. Thirdly, the Supreme Court described the power to reconsider an order as an exercise of judicial discretion. It has subsequently been suggested that it is more properly described as the formation of a value judgment (see, for example, Mostyn J in *AR v ML* [2019] EWFC 56 at paragraph 8). I consider that this debate misunderstands the basis of the wider jurisdiction and ignores the particular background of *Re L*. The vast majority of applications to reconsider are not triggered by the judge, as happened in *Re L*, but by one of the parties. What is the proper approach of the court in those circumstances?

55. There have been a few subsequent authorities addressing that topic. In *Vringo Infrastructure Inc v ZTE (UK) Ltd* [2015] EWHC 214 (Pat) Birss J identified the relevant principles at [38]:

> "38. I can summarise the principles in this way. The court has a jurisdiction, at least before the order is drawn up, to entertain an application of this kind

[1] For what it is worth, in my 16 plus years as a judge, I have never once been asked to reconsider an order in this way.

> as in here. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's resources to a dispute. In a case like this one, in which the application is to amend the statement of case, call fresh evidence and then have a further trial, the principles relevant to amending pleadings have a role to play but the *Ladd v. Marshall* factors are also likely to have real significance.

56. The reference to *Ladd v Marshall* [1954] 1 WLR 1489 relates to an application to admit new evidence after judgment has been handed down. The three factors are: (i) The evidence could not have been obtained without reasonable diligence for use at the trial; (ii) The evidence would probably have an important influence on the result of the case; and (iii) The evidence must be apparently credible. As Neuberger J noted in *Charlesworth v Relay Roads* [2000] RPC 9, [2000] 1 WLR 230, those factors were likely to be in the forefront of the mind of the court when considering an application to admit new evidence after judgment has been handed down but before the order has been drawn up, although he stressed that "the court must be somewhat more flexible" to reflect the fact that the order had not yet been sealed.

57. In *Heron Brothers Ltd v Central Bedfordshire Council (No2)* [2015] EWHC 1009 (TCC) Edwards-Stuart J handed down his original judgment and then, a few hours later, received submissions from the defendant raising a further point. As to principle, having referred to *In Re L,* Edwards-Stuart J said:

> "16. The examples given by Neuberger J (as he then was) in *In Re Blenheim (Restaurants) Ltd*, The Times, 9 November 1999, were:
>
> > "... a plain mistake by the court, the parties' failure to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given."
>
> 17. Whilst I accept that this is not to be treated as a closed list of categories, I consider that they are all examples of situations where either something has obviously gone wrong or relevant material was overlooked through no fault of the parties. In my view they do not sit easily with the situation where a party knows the relevant facts (or, where appropriate, the relevant law) but simply fails to appreciate a potential legal consequence of the matters of which it is aware.
>
> 18. It therefore seems to me that in principle there has to be something more than a post-judgment second thought based on material that was already in play. If it were otherwise, any fresh point that occurred to a party following the handing down of a judgment would entitle the party to require the court to hear further submissions with a view to revisiting the judgment. That would then become the rule rather than the exception. It seems to me that this would accord neither with the interests of finality of judgments nor with the overriding objective to deal with cases justly and at proportionate cost, particularly in the sense of ensuring that parties are on an equal footing, avoiding unnecessary expense and dealing with cases expeditiously. However, at the end of the day the court has a discretion which must be exercised judicially and not capriciously."

58. Edwards-Stuart J also dealt with the proper approach of the court to an application for reconsideration:

> "20. It seems to me that the court should approach this application in three stages. First, the court should decide whether the application should be entertained at all. Second, if it is appropriate to consider the application, the court should consider whether the point raised by the application is reasonably arguable. If it is not, the application should be dismissed. If it is, then the third stage is for the court to give directions for a short oral hearing to enable the point to be argued fully (unless the parties have agreed that it can be dealt with on paper)."

59. Although, in the interests of speed and practicality, I would elide the first two stages to which he refers, I agree with Edwards-Stuart J that there are two distinct questions which the court must ask itself if it is asked by one of the parties to reconsider an order which has been pronounced but not yet been sealed[2]. The first is whether the application to reconsider should be entertained *in principle*: is there a reasonably arguable basis for the application? If the court answers that question in the negative, that is the end of the matter. If on the other hand the court concludes that reconsideration is appropriate in principle, then it becomes an open-ended matter of discretion, to be exercised in accordance with the overriding objective, as to whether the order should be changed, or not.

60. What should the court be looking for at the first stage, when asked to entertain an application for reconsideration? In my view, the court should be looking for a sufficiently compelling reason that may justify reconsideration; something which might outweigh the importance of finality and justify the opening up of a question or questions which, following the pronouncement of the order in open court, appeared to have been finally answered. Of course, it is quite right to say, as the authorities stress, that those categories of case are not closed. But, assuming that the request to reconsider comes from the parties and not the court, the court should instinctively be looking for something which has been missed or otherwise gone awry: a mistake or a fundamental misapprehension; a fundamental piece of evidence or a point of law that was overlooked. The Court's undoubted jurisdiction to reconsider its earlier order cannot be permitted to become a gateway for a second round of wide-ranging debate.

6 SHOULD THIS APPLICATION TO RECONSIDER HAVE BEEN ENTERTAINED BY THE JUDGE AS A MATTER OF PRINCIPLE?

61. It follows that the first question that the judge should have asked herself was whether, as a matter of principle, FAAN's application for reconsideration should have been entertained at all. The judge did not ask herself that question. Instead she said at paragraph 15:

> "15. Given that I have the requisite jurisdiction or power to reconsider the draft order, the next question is whether I should exercise that power in favour of FAAN."

[2] Of course, if the court itself wants to reconsider the order before sealing (as happened in *Re L*), the point does not directly arise, and it is a straightforward exercise of discretion.

In other words, having concluded that she had the requisite jurisdiction (which was not in doubt), the judge went straight on to consider whether she should exercise that jurisdiction in favour of FAAN. In my view that was an error of law, because she failed to consider the necessary first question: does the application, and the material in support of it, identify a sufficiently compelling reason for the court to entertain an application to reconsider the order of 6 December?

62. I do not want this to be taken as an undue criticism of the judge. On the contrary, FAAN had placed her in a very difficult position on 13 December, with a raft of late evidence, new skeleton arguments, and the developing situation with SCB in the background. Her judgment made plain that she was under considerable pressure to give an answer there and then. In those circumstances, the breadth of her *ex tempore* judgment was admirable. But because of the time pressures, all of which were of FAAN's making, she fell into error, because she did not consider the question of principle first.

63. In addition, I note that, although she was referring to it in a different context, the judge appeared to think that this was a case where there had been a significant change of circumstances. At [17], she said:

> "17. In my judgment the circumstances of the present case are such as to justify reconsideration of the draft order. This is not a case of a mistake having been made, or of the court having changed its mind on the basis of the original material. *Rather it is a case in which there has been a significant change in circumstances* in that within some two hours of the order being made FAAN obtained the requisite guarantee." (Emphasis supplied)

64. To the extent that it may be said that the judge had here identified the compelling reason in principle for entertaining FAAN's application to reconsider the Second Buehrlen Order, she was, in my view, wrong on the facts. The subsequent provision of the Guarantee was not a change, let alone a significant change, from those circumstances which existed on 6 December 2019. On the contrary, the fact that the Guarantee was imminent, and would "unfailingly" be provided by no later than 13 December, was front and centre in the evidence before the judge on 6 December.

65. In the artificial rush and hurry of the hearing of 13 December, it appears that the judge overlooked the significance of: i) the evidence from the second witness statement of Timi Balogun in support of the extension of time application to 5 December, when he said that a three week extension "will likely be sufficient to complete" the necessary arrangements; ii) the evidence from Dr Clifford Omozeghian who had said in his witness statement considered at the hearing on 6 December that he was confident "that the guarantee will be in place unfailingly by Friday 13 December"[3]; and iii) the skeleton argument produced by Mr Jones QC on 5 December, for use at the hearing on the following day (paragraph 30 above) which was so confident that the guarantee was imminent that it talked as if it had already been provided (paragraph 30 above).

66. In other words, the evidence before the judge on 6 December 2019 was that a guarantee was imminent and would "unfailingly" arrive by 13 December. That evidence must

[3] The judge referred to this evidence in her judgment at [8]. But because she had not approached the application in the two stages to which I have referred, and did not link the actual provision of the Guarantee after close of business on 6 December with the promise that the Guarantee would be provided by 13 December at the latest, she failed to see that it cut right across the suggestion of a significant change of circumstances.

have been taken into account in the order that the judge made on that day (the Second Buehrlen Order). So the actual arrival of the Guarantee within the promised time-frame could not constitute a change of circumstances at all, much less a significant change in circumstances. On the contrary, its production was in accordance with the evidence. There was therefore no significant change of circumstances here.

67. Although it does not arise on the facts of this case, I accept that, in principle, a significant change of circumstances occurring between the handing down of the judgment and the sealing of the order could justify an application for reconsideration. There are no authorities directly in point. In *In Re Harrison's Share* [1955] Ch 260, the power to reconsider was triggered by a subsequent change in the law: in that case, a decision of the House of Lords handed down a fortnight after the original order. But that is a rather different: reconsideration was permitted there because the subsequent decision made plain that the judge who had made the original orders did not have the jurisdiction to do so. If the judge had never had jurisdiction, the orders he made were always invalid.

68. In my view, particular care would be needed in a case where the significant change of circumstances relied on to justify reconsideration was, on analysis, the taking of a step (like the service of a pleading or the provision of security) which had not been taken in the time period required by the CPR or ordered by the court and, as a result of that breach, remained outstanding at the time of the judgment which the defaulter now seeks to have reconsidered.

69. In this way, the ramifications of the course that the judge adopted are potentially significant. For instance, it would permit a party who had failed to comply with an earlier court order, and who had in consequence been the subject of, say, summary or default judgment pronounced in open court, to use the period of time between the pronouncement of the summary judgment and the sealing of the order (which in hard-pressed county courts can be a matter of many days or even weeks) as an additional period to comply with the earlier order, knowing that, if his or her eventual compliance occurred before the order was sealed, they could then apply for reconsideration of the summary judgment. To put it more starkly: the defaulting party would be relying on its own breach to seek reconsideration. In my view, such a practice would generally be contrary to the overriding objective and the principle of finality. There was no authority to which we were taken in which such conduct was allowed to justify the reconsideration of an earlier order.

70. It is also worth considering briefly what the position would have been if, immediately following the hearing at 2:20pm on 6 December, a diligent TCC clerk had produced a written record of the Second Buehrlen Order which the parties had agreed and which had been sealed straightaway (i.e. before the Guarantee materialised). Then, the relevant test would have been that set out in *Ladd v Marshall*. In those circumstances, it seems tolerably clear that FAAN would not have been able to seek reconsideration. The evidence relating to the Guarantee did not exist at the time that the Second Buehrlen Order was made, so it could not be used to open up that order in accordance with the *Ladd v Marshall* test.

71. The alleged change in circumstances is the only ground that has ever been put forward by FAAN to justify the reconsideration of the order of 6 December. At one stage, I had wondered whether it might be suggested that Mr Jones QC made a mistake on 6

December when he effectively abandoned the extension of time application and did not seek either to renew it or ask to have it adjourned. Of course, I have noted his reference to there being "no proper professional basis" for doing so, and we cannot speculate as to what his instructions or professional concerns might have been. But there is no need to consider this aspect of the case any further, because no submission based on mistake was made to the judge on 13 December 2019, and nor was it made to us by Mr Hussain on this appeal.

72. I note that the judge dealt with the decision not to pursue the extension application at [18], where she said:

> "18. There are then further relevant factors which favour a reconsideration of the order. Firstly, there was no substantive consideration of the Parties' respective applications at the hearing on 6 December 2019. Rather, not having had the confirmation he expected of the guarantee having been issued, leading counsel for FAAN took the view that he could not properly in that moment maintain or renew FAAN's application for an extension of time."

73. I have to say that this passage strikes me as being the wrong way round. The fact that there was no substantive consideration of the application for an extension on 6 December is a point against FAAN, rather than a point in their favour. The purpose of the hearing on 6 December was to deal with the two outstanding applications, with any consideration of FAAN's extension application inevitably coming before AIC's application to enforce the Award. But FAAN chose not to make its own application for an extension of time or to seek its adjournment. In consequence, FAAN was not in a position to resist enforcement of the Award. The judge erred in somehow using that as a point in FAAN's favour: it instead demonstrated the major difficulties that FAAN had created for itself in failing to grapple with the clear terms of the First Buehrlen Order.

74. Accordingly, I consider that there was no reason, let alone a sufficiently compelling reason, for the judge to entertain a reconsideration of the Second Buehrlen Order. The judge erred in two respects. First, she did not identify the first question she should have asked herself: should this application to reconsider be entertained as a matter of principle? Secondly, to the extent that she did do so at [18], she was wrong as a matter of fact: the arrival of the Guarantee was not a significant change of circumstance, but simply the culmination of all that FAAN had been saying in their evidence for some time, which had been taken into account when the Second Buehrlen Order had been made. I also consider that she was wrong in principle to permit the reconsideration jurisdiction to be utilised in circumstances where the relevant event (the production of the Guarantee) occurred after the order was made, and in breach of earlier orders of the court. There was no or no arguable basis for reconsideration.

75. I would therefore allow this appeal on that ground. However, given both the potential consequences of that conclusion and the importance of arriving at a fair and just conclusion in all the circumstances, I go on to consider the judge's exercise of her discretion.

7 THE EXERCISE OF DISCRETION

7.1 General

76. Throughout his submissions, Mr Hussain made much of the fact that the judge's decision on 13 December was an exercise of her discretion and therefore, even if this court might have taken a different view, that was not sufficient reason to justify interference with the exercise of that discretion. It is trite that this court will not interfere if it concludes that the decision-maker has "applied the correct principles and has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge": see Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 at [33].

77. Applying that test, however, and leaving aside the error of principle to which I have already referred, I have concluded that the judge failed to take into account matters which she ought to have taken into account, and gave weight to other matters which I consider to be irrelevant. I therefore consider that this is one of those rare cases where interference with the exercise of the judge's discretion is justified.

7.2 Delay

78. Doubtless because of the pressurised situation in which the judge found herself, she did not take into account all of the relevant matters when considering the question of delay.

79. In the judgment of 13 December, the judge addresses delay in a very cursory fashion. Her observations can be summarised thus:

    (i) It was difficult for FAAN to arrange the Guarantee because they were answerable to a number of different Ministers [30].

    (ii) In early December, in the days leading up to the provision of the Guarantee, FAAN was working hard to comply with the order and "although their evidence is not as comprehensive as it might be", looked at as a whole, there was good reason for the delays [29]-[30].

    (iii) As a result, if the Guarantee had been available at 2pm on 6 December, the judge would have granted a short extension from 5 to 6 December [22].

80. The fundamental difficulty with those observations is that they ignore the vast majority of the delay which had occurred since August, and the reasons for it (or lack of them). They erroneously assume (without explanation) that FAAN was entitled to an extension to 5 December, so that all that mattered was the further short delay to the evening of 6 December. In this way, the judge looked at the question of delay through the wrong end of the telescope, focussing just on the last few days before the provision of the Guarantee. I identify below eight factors relating to delay and FAAN's application for an extension of time which the judge should have considered, but wholly failed to address, in her judgment on 13 December.

81. First, there was the delay between the handing down of the judgment on 13 August, which made plain that security for US$24 million was required, and the consequential hearing on 17 September, which identified the form of the order. For the reasons set out at paragraphs 13 - 14 above, although FAAN knew that it would either have to find the

money or a guarantee/bond, there was no evidence that any steps were taken to set this in train. That was a delay of 1 month for which FAAN was responsible.

82. Secondly, at the hearing on 17 September, FAAN argued that it needed three months to provide the security. The judge rejected that submission, and gave it until 29 October (which was six weeks from the hearing, or 10 weeks from the judgment). In my view, that was generous. By the time of the hearing on 13 December, the judge should have considered whether, on all the evidence, FAAN had always acted on the basis of its own 3 month period, and paid no regard to the orders of the court (paragraph 17 above).

83. Thirdly, the judge should have noted that there was no evidence that any steps were taken by FAAN to do anything about the guarantee between 17 September and early October 2019. That delay was and is unexplained: see paragraph 18 above. Although the date for compliance expired on 29 October, FAAN took no steps to ensure even potential compliance before that date. The correspondence with the Ministers was desultory and did not make plain the urgency of the judge's order (paragraphs 18-22 above).

84. Fourthly the judge should have noted that it was only on the very day that the period in her first order was due to expire, namely 29 October, that FAAN applied to the Court of Appeal for a stay pending their appeal. The court dealt with that the following day. Plainly, it had no real option but to make the order it did. But the order meant that, if permission to appeal was refused, FAAN would only have a very short period in which to obtain the Guarantee. Yet no steps were taken in consequence of that order either (paragraphs 23-26 above).

85. Fifthly, the judge should have noted that, not only was refusal of permission to appeal notified on 11 November (which meant that the stay expired on 14 November) but that the stay between 29 October and 14 November was palpably not a stay on the merits, but a stay granted on the back of what turned out to be a meritless application for permission to appeal.

86. Sixthly, on 14 November, again therefore on the very last day on which they had to provide the security, FAAN applied for another extension of time. This one was due to expire on 5 December. The judge should have noted that nothing had been done between 29 October and 14 November to comply with the order, save for the desultory correspondence referred to at paragraphs 27 - 29 above. It is not the sort of correspondence one would expect from a State Agency like FAAN, facing a clear and unequivocal order of the court.

87. Seventhly, the judge should have noted that FAAN's last-minute application for a further extension of time was, to all intents and purposes, abandoned (paragraph 35 above). It was not advanced on 6 December, and neither was any application made for an adjournment. Accordingly, the due date for compliance with the order was 14 November 2019, and even that was based on a mechanical rather than meritorious extension from 29 October. The judge should have noted that 14 November was 3 months after judgment requiring the provision of security had been handed down.

88. Eighthly, although FAAN's correspondence accelerated slightly (both in volume and tone) in early December, this was only by comparison with what had gone before. Any sense of urgency was still hard to find, and the increase was doubtless the result of the

fact that 6 December had been fixed for the hearing of AIC's application to enforce. The judge should have noted that there has never been any explanation as to why the CBN was not involved prior to 2 December 2019, since it now seems that the necessary guarantee could not be provided without their involvement (paragraphs 28-31 above).

89. On 13 December, the judge failed to take account of these factors at all. She did not note the fact that, by the time of the reconsideration hearing, it was four months after FAAN had first become aware of the need to provide security, more than 5 weeks after her date of 29 October had expired and more than 3 weeks after the extended date of 14 November had also expired. As I have said, she wrongly assumed (without any explanation whatsoever) that FAAN had an entitlement to an extension to 5 December. On my analysis, set out above, they had no such thing.

90. In my view, those considerations of delay on the part of FAAN were highly relevant considerations to any application to reconsider the Second Buehrlen Order. They would strongly militate against revisiting that order. None of those matters were referred to by the judge and were not apparently taken into account when she exercised her discretion. They plainly should have been. Had they been, they would have provided a clear basis for exercising the court's discretion against FAAN's application for reconsideration.

7.3 Detriment

91. It follows from the judge's failure to consider all the relevant matters in respect of delay at paragraphs 77 - 89 above, that this court must revisit the exercise of the judge's discretion. That throws into starker relief the question of any detriment suffered by AIC.

92. Although Mr Hussain said that it was a "supreme" factor in justifying reconsideration of the Second Buehrlen order that AIC had suffered no detriment as a result of reconsideration, he properly recanted from that emphasis during subsequent questioning by the court. Detriment is one factor that might be relevant in any application to reconsider, as Lady Hale noted at [27] of *In Re L.* But I would be anxious to avoid any suggestion that the need to prove detriment is somehow required by the party resisting an application to reconsider. That would be unacceptably and uncomfortably close to the pre-CPR days when defaulting parties were allowed to do pretty much as they wanted, provided they could show that the other side had not suffered any detriment.

93. Further and in any event, it is now clear that AIC have potentially suffered detriment. Once it knew that the Guarantee was in existence, and being the beneficiary of the Second Buehrlen Order of 6 December, AIC made a demand on the Guarantee. At the time of the reconsideration hearing, the relevant bank, SCB, had said that the demand was compliant with the Guarantee and seemed to be on the point of paying out (see paragraph 38 above) Accordingly, as at 13 December, it may be that AIC would not have suffered any detriment as a result of reconsideration because it appeared that they were going to be paid the security that they had long sought.

94. However, in the event, and under pressure from Curtis, SCB did not pay out on the Guarantee. AIC is now concerned that, because the Guarantee limited their rights to make "one valid demand" only, and if the Third Buehrlen Order is allowed to stand, it would be said that they had made their one demand and could have no further recourse under the Guarantee. Although SCB have indicated that they would not take that point,

the relevant letter is hedged with qualifications. On that basis, AIC maintain that they have suffered a real and potentially fatal detriment as a result of the reconsideration.

95. Mr Key realistically accepted that this this court could not decide whether AIC had in fact lost its one chance of making a valid demand. However, he said that the fact that it had crystallised into a debate about liability under the Guarantee - and it has certainly used up enough inter-solicitor correspondence for that point, at least, to be common ground - meant that there was at least a risk of potential detriment to AIC, and that that was something which he was entitled to rely on in further support of his submission that the court should not have entertained reconsideration. I accept that submission.

96. Mr Hussain argued, correctly, that this was not a point that had been taken before the judge on 13 December. But that does not mean that it is not a point which this court can ignore now that it has been established that the discretion must be re-exercised anyway. These sorts of complexities are not always apparent straightaway. Moreover, as I have said, at the hearing on 13 December, the demand was deemed by SCB to be compliant and so it may have been thought that there had not been any detriment. That position has now changed. It is another factor that points towards this being a case where, on a consideration of all the relevant circumstances, reconsideration of the Second Buehrlen Order should not be permitted.

97. I note in passing that the judge said at [19] that the guarantee "was not intended for immediate enforcement" and that she regarded the demand "as inappropriate". Neither of these conclusions are explained. On the face of it, the judge was wrong on the first point, given that SCB themselves considered that the demand complied with the terms of the guarantee. Moreover, I consider that the judge was wrong to rely on these observations at all in support of her reconsideration decision. Her talk of a "windfall" to AIC is, in the circumstances of this case, unfair; in any event, it is not relevant to the exercise of her discretion to reconsider. Further, the fact that AIC acted in accordance with the Second Buehrlen Order cannot possibly become a proper reason for its reconsideration.

7.4 All The Circumstances

98. Finally, it is necessary to consider the case in the round. Where does justice lie? There was a good deal of debate at the hearing about whether this was properly a claim for relief from sanctions and whether the well-known three stage test in *Denton v T H White* was of any application. Mr Hussain said that, although FAAN had originally made an application for relief from sanctions, this was not in fact a relief from sanctions case, because the First Buehrlen Order made clear that, if the security was not provided, all that AIC could do was to *apply* to enforce the Award, rather than actually to enforce that Award.

99. In my view, that distinction was a false one. Given that AIC had already made an application to enforce the Award, and the First Buehrlen Order in respect of security was the outcome, then, in circumstances where that security was not provided, FAAN could have no answer to any further application by AIC to enforce the Award. The application had already been decided in their favour, subject to one condition which FAAN had then failed to fulfil. Moreover, AIC had applied to enforce the Award on 21 November 2019, and it was that application on which the judge ruled on 6 December.

On either basis, the sanction for the failure to provide security was clear: the enforcement of the Award.

100. That this was not primarily a relief from sanctions case was because the critical debate was instead about whether or not a proper case for reconsideration had been made out. That is not to say that this is not a relief from sanctions case. More importantly, I consider that the underlying principles outlined in *Denton* are of assistance in endeavouring to identify where justice lies. Although I have dealt with them under slightly different headings, my analysis thus far could be said to equate to a consideration of stages one and two of *Denton*: for the reasons I have given, FAAN were in serious and significant breach of the First Buehrlen Order in not providing security by 14 November at the very latest, and there has been no or no proper explanation for that delay. Stage three of *Denton* is, of course, a consideration of all the circumstances of the case.

101. On a consideration of all the circumstances, I believe that the answer also points towards upholding the Second Buehrlen Order of 6 December and refusing any reconsideration of it. In particular:

(i) The relevant events in this case occurred over 20 years ago. FAAN delayed the resolution of AIC's original claim by at least 6 years by the simple expedient of failing to agree an arbitrator.

(ii) The Award itself is over ten years old. There is no suggestion that it is anything other than a valid arbitration award. AIC have therefore been kept out of a very large sum of money for a very long time.

(ii) FAAN's points in the Nigerian courts are properly described as "technical". The judge was careful in her judgment of 13 August 2019 to say that she did not consider FAAN's application to set aside the Award to have a real prospect of success on appeal and that the Award lay towards the "manifestly valid i.e. top end of the scale." As I noted when I refused FAAN's meritless application to appeal against the judgment of 13 August, many would regard FAAN as fortunate that it avoided enforcement of the entire award last August.

(iii) Since then, instead of taking advantage of what might be thought to be their good fortune in avoiding enforcement, FAAN's approach to the orders of the court has been dilatory in the extreme, each time making applications on the very last day possible, and on at least two occasions not paying the costs which they were ordered to pay to AIC.

(iv) FAAN said expressly that, if it did not provide the Guarantee by 5 December, then AIC was entitled to enforce the full Award. FAAN did not provide the Guarantee by then: it follows that, on FAAN's own case, AIC was entitled to enforce the Award.

102. In my view, that solution, which was the one encapsulated by the Second Buehrlen Order, represents the closest that anyone is likely to get to overall justice in this case. Its reinstatement would be a consequence of AIC's successful appeal. I consider that the alternative, where a disputed guarantee remains in existence and any substantive

resolution is kicked into the longest of long grass, would be a denial of justice. The application to enforce the Award would be adjourned generally, to await a process in Nigeria which all are agreed might take many years to resolve. It would also mean that FAAN's wholesale failures to comply with the orders of the court would be accepted, at least to the extent that no effective sanction would have resulted from their repeated breaches. That would not be a result that accorded with the overriding objective, and in particular r.1.1(2)(f): the court must deal with a case justly and at proportionate cost, including "enforcing compliance with rules and orders".

103. Against all of that, of course, the Guarantee was eventually produced. In any balancing exercise, that is a strong point in FAAN's favour. But, for the reasons that I have explained, I do not consider that it is sufficiently strong to tip the scales in favour of a reconsideration of the Second Buehrlen Order. I would reinstate the Second Buehrlen Order, allowing AIC to enforce the material parts of the Award.

LADY JUSTICE CARR

104. I agree.

LORD JUSTICE FLAUX

105. I also agree.