OUTER HOUSE, COURT OF SESSION

[2024] CSOH 48

CA10/23

OPINION OF LORD RICHARDSON

In the cause

SMITH COGENERATION (BANGLADESH) PVT. LIMITED

Pursuer

against

BANGLADESH POWER DEVELOPMENT BOARD

Defender

Pursuer: J Mackenzie (sol adv); Shepherd & Wedderburn LLP
Defender: Ellis KC; Anderson Strathern LLP

7 May 2024

Introduction

[1] This case concerns an action by the pursuer to enforce an arbitration award made on 30 October 2003 by a tribunal of three arbitrators sitting in London in the ICC International Court of Arbitration. In terms of that award, the pursuer was awarded a series of five sums totalling over $11 million dollars.

[2] Arbitration proceedings were commenced by the pursuer in 1999 in order to resolve a dispute which had arisen between the pursuer, the defender and the Government of Bangladesh. The dispute concerned both a Power Purchase Agreement between the pursuer and the defender for the construction of a barge-mounted power plant in Haripur,

Bangladesh and an Implementation Agreement in respect of the Power Purchase Agreement between the pursuer and the Government of Bangladesh.

[3] Thereafter, a lengthy period of time elapsed before the summons in the present case was signeted on 3 February 2023. It was served on the defender by process server in Bangladesh on 15 February 2023.

[4] On 28 March 2023, solicitors contacted the pursuer's solicitors seeking a delay to the lodging of the summons for calling for a period of 8 weeks. The solicitors indicated that they were "to be instructed" by the defender and sought the 8 week period "while we complete housekeeping requirements and take instructions from our client". The pursuer's solicitors responded on 29 March 2023 saying that they had instructions to delay lodging the summons for calling for 4 weeks.

[5] On 28 April 2023, having given notice to the solicitors with whom they were corresponding, the pursuer lodged the summons for calling.

[6] On 17 May 2023, no appearance having been entered by the defender, the pursuer enrolled for decree in absence. As the court requested to be addressed in respect of the pursuer's motion, on 24 May 2023 the pursuer's agents contacted the solicitors who had previously indicated that they were to act for the defender seeking to draw attention to this. On the same day, the solicitors responded that:

> "Whilst we had anticipated getting instructions, those have not yet materialised. We are sending your email on to our contact and will be in touch once we hear back. …"

[7] On 29 May 2023, in response to an email from the clerk of court, the same solicitors emailed confirming that they were not instructed by the defender.

[8] On 31 May 2023, following a hearing at which the defender was not represented, I granted decree in absence.

[9] On 1 December 2023, the defender intimated a motion seeking both recall of the decree in absence and allowance of defences to be received in terms of Rule of Court 19.2(5). The motion was enrolled on 7 December 2023. Subsequently, I heard parties on the motion roll.

Rule of Court 19.2(5)

[10] Rule of Court 19.2(5) provides as follows:

> "(5) Where a summons has been served on a defender furth of the United Kingdom under rule 16.2 and decree in absence has been pronounced against him as a result of his failure to enter appearance, the court may, on the motion of that defender, recall the decree and allow defences to be received if–
>
> (a) without fault on his part, he did not have knowledge of the summons in sufficient time to defend;
>
> (b) he has disclosed a prima facie defence to the action on the merits; and
>
> (c) the motion is enrolled within a reasonable time after he had knowledge of the decree or in any event before the expiry of one year from the date of the decree;
>
> and, where that decree is recalled, the action shall proceed as if the defences had been lodged timeously."

The defender's arguments

[11] Senior counsel for the defender submitted that each of the three parts of Rule 19.2(5) were satisfied. He divided his submissions into three chapters.

Prime facie defence

[12] First, senior counsel addressed the issue of the defender's defence to the action. Senior counsel emphasised that what was required was a defence to the action brought

against the defender. The reference to "on the merits" was not intended to exclude defences based on jurisdiction, competence or relevance.

[13] In respect of the assessment of a prime facie defence, senior counsel referred to Lord Emslie's opinion in *Governor and Company of the Bank of Scotland* v *Brigitte Kunkel-Griffin* 2005 SCLR 538 at paragraph 23:

> "In considering whether a prima facie defence has been disclosed, I do not of course have to reach a final view on relevancy, specification or prospects of success: cf *Cooney*, supra; *WAC Ltd* v *Whillock* 1989 SC 397, per Lord Justice Clerk Ross at p 410. There would, I think, have to be some reasonable basis for believing that the defence might turn out to be well founded but, as counsel for the pursuers accepted, the existence of a colourable, arguable or plausible case to try would be sufficient at this preliminary stage of assessment."

[14] The defences tendered by the defender set out a series of substantive defences to the action.

Jurisdiction

[15] First, in the defences, the defender challenged the court's jurisdiction. The only basis of jurisdiction set out in the summons was section 19 of the Arbitration (Scotland) Act 2010. Section 19 provided as follows:

> "19 Recognition and enforcement of New York Convention awards
>
> (1) A Convention award is to be recognised as binding on the persons as between whom it was made (and may accordingly be relied on by those persons in any legal proceedings in Scotland).
>
> (2) The court may order that a Convention award may be enforced as if it were an extract registered decree bearing a warrant for execution granted by the court."

A "Convention award" was defined in section 18(1) of the 2010 Act as follows:

> "New York Convention awards
>
> (1) A 'Convention award' is an award made in pursuance of a written arbitration agreement in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.
>
> (2) An award is to be treated for the purposes of this section as having been made at the seat of the arbitration.
>
> (3) A declaration by Her Majesty by Order in Council that a state is a party to the Convention (or is a party in respect of any territory) is conclusive evidence of that fact."

[16] The defender advanced two arguments in respect of jurisdiction. First, the defender submitted, straightforwardly, that the award that the pursuer sought to enforce was not a "Convention award" in terms of section 18 and, accordingly, this court had no jurisdiction. On the pursuer's averments, the award which it sought to enforce had been made in London.

[17] Secondly, the defender argued that, in any event, section 19 was a provision which was concerned with the recognition of "Convention awards" (as defined). It was not concerned with jurisdiction and did not confer any additional ground of jurisdiction on the Scottish courts (cf *Thoars' Judicial Factor* v *Ramlort Limited* 1998 SC 887 at 891-892).

[18] On this basis, the defender submitted that the pursuer would require to establish some other ground of jurisdiction. However, the defender averred further that this court had no jurisdiction either under Schedule 8 of the Civil Jurisdiction and Judgments Act 1982 or at common law. The defender had no place of business, assets or any other presence in Scotland. Senior counsel submitted that, properly construed, the provisions of the Power Purchase Agreement did not and could not amount to an agreement to the jurisdiction of this court.

Competency

[19] In the defences, the defender also challenged the competency of the pursuer's action.

[20] The Rules of Court provided a mechanism for enforcement of a Convention award under section 19(2) of the 2010 Act. In terms of Rule of Court 62.57 this was to be done by petition and Rule of Court 62.58 provided that the remedy in such circumstances was registration of the award which allowed enforcement of it.

[21] However, the pursuer's action concluded for declarator and payment. The pursuer had adopted this approach in order to obtain a decree for payment which could then be enforced in other jurisdictions. Senior counsel advised me that, following the grant of decree in absence, the pursuer had extracted that decree and then raised proceedings in the State of New York seeking enforcement of the Scottish decree.

Time bar

[22] In the defences, the defender argued that the pursuer's claim was subject to time bar. The defender advanced this argument primarily on the basis that the law applicable to question of the payment of the award was the law of Bangladesh. This arose as a result of the proper construction of the dispute resolution (article 18) and governing law (article 21) provisions of the Power Purchase Agreement. On this basis, the defender made averments to the effect that the pursuer's right to enforce the award was subject to limitation.

[23] In the alternative, in the event that English law was applicable to the question, the defender argued that the pursuer's claim was barred by section 7 of the Limitation Act 1980.

Validity and enforceability

[24] The defender also advanced defences in respect of the validity and enforceability of the award. These defences were advanced both on the basis that the award was a Convention award to which section 20 of the 2010 Act applied and, alternatively, that it was not and section 12 of the 2010 Act applied. The defender made averments both about its ability to maintain its defence in the arbitration proceedings and the enforceability of the award as a matter of Bangladeshi law. According to the defender, there were still proceedings concerning the enforceability of the award ongoing in Bangladesh.

[25] Essentially on the same two bases, the defender also pled forum non conveniens.

Rule of Court 19.2(5)(a) and (c)

[26] Senior counsel addressed these two parts of the test together.

[27] In relation to paragraph (a) senior counsel referred again to Lord Emslie's opinion in *Bank of Scotland* (above at [13]) at paragraph 25 where his Lordship said the following:

> "As an essential prerequisite of success under that sub-paragraph, the defender must satisfy the court that 'without fault on her part' she did not have 'sufficient time to defend' in the period prior to the decree of 16 December 2003. In my view, counsel for the pursuers was well founded in submitting that a defender materially at fault in that (*pre*-decree) period is not entitled, even under the Convention and Service Regulation, to obtain recall on the ground of some excusable *post*-decree failure. If that were not so, then relief would illogically become available to such a defender on denial of the opportunity to pursue a baseless appeal, and I do not consider that that can realistically have been intended. Moreover, while accepting that the phrase 'sufficient time' must here be given a broad and extended meaning in accordance with the decisions of the European Court of Justice to which I was referred (that is, denoting a fair opportunity in all the circumstances, as opposed to the mere availability of a certain length of time), it seems to me that the existence or otherwise of such an opportunity must be judged on a common-sense basis by reference to the whole surrounding circumstances including, in particular, the reasonableness of the defender's actings. If, in a given case, an opportunity which would ordinarily have been deemed fair and adequate is lost by reason of acts or omissions which are wholly unreasonable, then in my view it is hard to see how the requirements of sub-paragraph (a) can properly be regarded as satisfied. In such a case, the loss of the

> necessary opportunity may be said to have been brought about by fault on the defender's part; an alternative approach would be to say that the court is not obliged to afford an opportunity sufficiently extensive to cater for a defender's own unreasonable conduct."

[28] Applying that approach to the present case, senior counsel submitted that in assessing whether the defender had "knowledge of the summons in sufficient time to defend", the court should, as Lord Emslie had indicated, have regard to the "whole surrounding circumstances". In the present case, those circumstances included taking cognisance of the fact that a very different governmental and legal culture existed in Bangladesh. Senior counsel drew attention to three particular factors. First, Bangladesh had been slow to adopt international arbitration. Second, in Bangladesh lawyers almost invariably quoted an entire fee for work to be carried out. Third, as a result of issues in relation to foreign currency reserves, it was very difficult for a government agency, such as the defender, to obtain authorisation to make payments in foreign currency outside the country. There were rigid procedures in place in respect of any such authorisation.

[29] Against that background, senior counsel submitted that, following service of the summons on 15 February 2023, the defender had sought to obtain advice initially from Bangladeshi lawyers and then, subsequently, from Scottish solicitors. On 17 March 2023, the defender's current solicitors had sent terms and conditions to the defender. On 28 March 2023, those solicitors had sent the defender an estimate of their total fees and had requested that the defender pay them before the solicitors could act. From a Bangladeshi perspective, the fees requested were very significant. Furthermore, the process of obtaining approval to make that payment required both a resolution by the board of the defender and, separately, approval by the Bangladeshi central bank. The process of obtaining board approval had taken until 14 June 2023. Senior counsel explained that the approval process was further

complicated because the defender had also received a separate stream of advice to the effect that the Scottish courts could not assume jurisdiction because the defender had no assets in Scotland. In any event, by the time that approval had been obtained, it was too late – decree in absence had been granted. The decree was formally served on the defender on 26 June 2023.

[30] Thereafter, looking at the sequence of events after decree in absence had been granted, having obtained board approval, the defender still required to obtain approval from the central bank. I was informed that this had involved a number of personal meetings with the deputy governor of the bank. Following the issuing of an invoice by the solicitor on 9 August 2023, the defender had instructed an initial payment to its solicitors on 3 September 2023. That payment had been received by the solicitors on 26 September 2023. This delay had been caused by the process of obtaining approval from the central bank. The defender had formally issued instructions to Scottish solicitors on 20 August 2023 and an initial video conference took place on 30 August 2023. Thereafter, the defender had consulted with counsel at the beginning of October, carried out further investigations and intimated defences to the pursuer at the beginning of December.

[31] Senior counsel also drew my attention to the fact that on 23 March 2023, a Bangladeshi lawyer, acting on behalf of the defender, had emailed the General Commercial Section of the court indicating that the defender intended to appear and deny the pursuer's claim. The email indicated that the defender was in the process of arranging for visas and for a solicitor to defend the case. The email requested until 22 June 2023 to achieve this. By letter dated 20 June 2023 but not received until 10 July 2023, the secretary of the defender had written again to the court indicating that the defender wished to appear and seeking

further time to make arrangements for the defender's officials to travel to Scotland and to arrange legal representation.

[32] In light of these submissions, senior counsel submitted that, without fault on its part, the defender did not have knowledge of the summons in sufficient time to defend. He accepted that the circumstances were unusual. However, the defender had expended considerable efforts in trying to enter appearance and prepare and lodge defences. The time was not sufficient because of the Bangladeshi controls imposed on the defender as a public body. Again, essentially for the same reasons, senior counsel submitted that the period of time that had elapsed from the defender's knowledge of the decree was not unreasonable.

Exercise of discretion

[33] Finally, senior counsel submitted that, insofar as the tests set out in Rule of Court 19.2(5) were met, the court should exercise its discretion in favour of the defender. It was plainly in the interests of justice that the defender should be given the opportunity to vindicate its defence given the very significant sums of money at stake.

[34] Senior counsel also drew my attention to the fact that, on the basis of the decree in absence, the pursuer had commenced proceedings in the State of New York. Unless the decree in absence were to be recalled, he informed me that the enforcement proceedings would continue in that jurisdiction. In this regard, he queried why the pursuer had elected to raise the present proceedings in Scotland given that, so far as the defender was concerned, the defender had no connection with this jurisdiction.

The pursuer's arguments

[35] The solicitor-advocate for the pursuer submitted that the defender's motion should be refused. He contended that the defender had failed in each part of the test set down by Rule of Court 19.2(5). He emphasised that, as had been noted by Lord Emslie in *Bank of Scotland,* it was necessary for the defender to satisfy each part of the test (paragraph 19). Further, he emphasised that, in any event, the court ought to refuse to exercise its discretion in favour of the defender.

[36] By way of background, Mr Mackenzie sought to challenge what he perceived as the characterisation of the defender as being an inexperienced litigant. The defender was a national power company with a significant operating revenue. So far as Mr Mackenzie's researches had revealed, the defender had been involved in several other international arbitrations.

[37] The pursuer did not shy away from the international approach it had adopted in seeking to recover the sums awarded to it in the arbitration which lay at the root of the present proceedings. The pursuer had been chasing for payment of these sums for 20 years. It had been litigating for some time in the courts of Bangladesh in this respect.

[38] In relation to Scotland, so far as the pursuer was aware, the defender did have assets within the jurisdiction. Mr Mackenzie referred to a contract between the defender and the Scottish company Aggreko. He also referred to the sums of money which the defender had paid on account to its solicitors. The pursuer had used the decree it had obtained to bring enforcement proceedings in New York State.

Rule of Court 19.2(5)(a)

[39] As a starting point, the pursuer's solicitor-advocate emphasised that this was an objective test. The question of whether the defender had been afforded "sufficient time" was to be assessed by reference to the whole surrounding circumstances including, in particular, the reasonableness of the defender's actions (*Bank of Scotland* at paragraph 25).

[40] Mr Mackenzie emphasised three dates from the timeline prepared by the defender: 16 March 2023 – the defender had been advised by a Scottish solicitor to lodge a defence at the earliest time possible; 29 March 2023 – the defender had been advised by a Scottish solicitor that defences required to be lodged by 3 May 2023; and, 30 March 2023 – the defender had been advised by a Scottish solicitor of the consequences of delay.

[41] On the basis of these three entries, Mr Mackenzie submitted that the actions of the defender fell properly to be characterised as being at fault. Following the initial engagement by Scottish solicitors on behalf of the defender with the pursuer's agents in respect of a request for an extension of time, nothing further had been communicated. That was despite the fact that the defender had been properly advised by Scottish solicitors. There had been no further request for an extension of time communicated to the pursuer. Further, when the motion for decree had been intimated by the pursuer's agents to those Scottish solicitors there had been no response and no indication of the procurement difficulties which were now relied upon. In this regard, Mr Mackenzie acknowledged that he had been unaware until the present motion hearing of the communications between the defender and the court.

[42] The final basis upon which the pursuer asserted that the defender was at fault was that the defender had no proper system in place to deal with litigation. The procurement difficulties relied upon by the defender were implausible. The defender had not explained why there was no scope for a discretionary payment to be made. In this regard,

Mr Mackenzie referred to the judgment of Sheriff Principal Stevens in *Eui Limited* v *Mrs Anna Bialas-Krug* 2014 GWD 28-553.

[43] For these reasons, the pursuer submitted that the reason why the defender did not have sufficient time to defend the action arose from its own failure to follow the advice it had been given. Its failure to enter appearance and to lodge defences were of its own making. The defender's position compared unfavourably with the unsuccessful defender in *Bank of Scotland.*

Rule of Court 19.2(5)(c)

[44] In respect of this part of the test, Mr Mackenzie's submission was, in short, that almost 6 months from 26 June 2023, when the defender found out about the granting of the decree in absence, until the hearing of the motion was not, in the circumstances, reasonable.

Rule of Court 19.2(5)(b)

[45] In respect of this part of the test, Mr Mackenzie accepted that the defender only required to demonstrate that the defences disclosed a prima facie case. If the court were satisfied that that part of the test was met, it was not for the court, at this stage, to resolve the parties' dispute. However, the pursuer's position was that the defences did not disclose such a case.

Jurisdiction

[46] The pursuer submitted that the award that the pursuer sought to enforce was a "Convention award" in terms of section 18 of the 2010 Act. Mr Mackenzie submitted that section 18 was "clumsily worded" and require to be construed in a way which was

consistent with Article I of the New York Convention. In terms of Article I, the Convention was to apply both to awards made in the territory of a state other than the state in which enforcement was sought and to awards which were not considered domestic awards in the state where enforcement was sought. Approached on this basis, the pursuer submitted that the award it sought to enforce would be regarded as a non-domestic award and, therefore, a "Convention award".

[47] In any event, even if the award did not fall within the definition of "Convention award", it was still enforceable in Scotland whether on the basis of section 12 of the 2010 Act, section 18 of the Civil Jurisdiction and Judgments Act 1982 or at common law.

Competency

[48] The pursuer submitted that the defender's competency point was without merit. Both section 19 or, alternatively, section 12 of the 2010 Act allowed for enforcement of an award as if it were an extract decree bearing a warrant for execution. However, neither provision was mandatory. The ability to seek decree conform had not been abolished by the 2010 Act.

Time bar

[49] The pursuer's principal response to the defender's defence based on time bar was that it was misconceived because the law applicable to the pursuer's right to enforce was Scottish law. Article III of the New York Convention provided that Convention awards are to be enforced in accordance with the rules of procedure of the territory where the award is relied upon. Even if the award were not a Convention award, the applicable law for questions of procedure and enforcement was the law of the forum.

Validity and enforceability

[50] The pursuer submitted that the averments made in the defences (in Answer 10) relating to the validity of the award did not come close to showing that the defender had been unable to present its case in the arbitration for a cause outside its control.

[51] As to enforceability, Mr Mackenzie highlighted the fact that no challenge had been made by the defender to the award in England – the country of origin (*IPCO (Nigeria) Ltd* v *Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm) at 618). Furthermore, Mr Mackenzie's information was that there were currently no pending proceedings in Bangladesh in respect of the award.

[52] Mr Mackenzie also sought to highlight the differences in the lines of defence being advanced in the present defences and those which had formed part of the defender's application to the court in Dhaka in 2002 challenging the arbitration proceedings.

Exercise of discretion

[53] Finally, Mr Mackenzie submitted that even if I were satisfied that the test in Rule 19.2(5) has been met, I should still decline to exercise my discretion in favour of the defender. No meaningful defence was offered by the defender in respect of the underlying award which had been outstanding for 20 years.

[54] Having obtained decree, the pursuer had acted properly and sought to enforce that decree. It had incurred costs in so doing and would be prejudiced were the decree to be recalled.

Decision

[55] Determination of the defender's motion turns on, first, whether it has satisfied the three conditions of Rule of Court 19.2(5) (see above at [10]) and, second, on the assumption that the conditions of the rule are met, whether I should exercise my discretion in favour of the defender. As Lord Emslie made clear in *Bank of Scotland* (at paragraph 19), it is necessary for the defender to satisfy each of the three conditions set out in subsection (5).

Rule of Court 19.2(5)(a)

[56] The first condition is, paraphrasing, that the defender, without fault on its part, did not have knowledge of the summons in sufficient time to defend. Accordingly, the rule requires the court to assess the sufficiency or otherwise, for the purpose of defending the action, of the period of time from when the defender had knowledge of the summons until decree in absence was granted. In the present case, there was no dispute that the summons was served on the defender in Bangladesh on 15 February 2023. Decree in absence was granted on 31 May 2023. Accordingly, the relevant period is 106 days. In carrying out this assessment, it is important, as Lord Emslie made clear in *Bank of Scotland* (at paragraph 25) to judge matters on a common sense basis by reference to the whole surrounding circumstances including, in particular, the reasonableness of the defender's actions.

[57] In the present case, I consider that "whole surrounding circumstances" includes the issues of governmental and legal culture highlighted by senior counsel for the defender (see above at [28]) and, in particular, the difficulties which apparently exist for public bodies in Bangladesh, such as the defender, in making payments in foreign currency. I recognise that these difficulties might appear somewhat surprising from a Scottish perspective. However, having considered all the documentation available in light of the submissions made to me, I

reject the pursuer's assertion that these difficulties were "implausible". Such a characterisation is inconsistent with what appear to have been sustained and genuine efforts by the defender both to enter appearance and defend the action.

[58] Considering the sequence of events from the date of the service of the summons in light of the chronologies submitted by both parties, it is apparent to me that the defender: (i) obtained legal advice from Bangladeshi lawyers including advice in respect of identifying appropriate Scottish legal advisers; (ii) by 15 March 2023, had made contact with Scottish lawyers which resulted in advice being given to them; and, (iii) by 23 March 2023 had corresponded directly with the court indicating that the defender intended to appear and deny the pursuer's claim and requesting additional time to do this. Thereafter, as senior counsel for the defender explained, the remainder of the time appears to have been taken up, so far as the defender was concerned, with trying to obtain board approval together with permission to release the sums of foreign currency required to pay Scottish solicitors and thereby enable those solicitors to act.

[59] In these admittedly highly unusual circumstances, I am satisfied that the defender did not have knowledge of the summons in sufficient time to defend. I also do not consider that the defender's actions can be characterised as unreasonable. The defender indicated to the court that it wished to appear to defend the action and then sought to obtain the legal representation necessary to achieve this. I do not consider that the defender can properly be characterised as being at fault for the difficulties which it experienced in seeking to obtain legal representation which appear to have arisen from Bangladeshi constraints.

[60] In this regard, the present case falls to be distinguished on the facts from *Bank of Scotland*. In that case, the defender, a German national married to a Scot resident in Germany, took no steps to obtain Scottish legal advice during a period of two months

following the service of the summons on her prior to decree in absence being granted. That was despite the fact that the defender in that case had a home in Scotland where she spent about half the year. During this period, she also made no contact with either the pursuer or its agents. The reason for this seemed to be an erroneous misreading by the defender of the citation which was described by Lord Emslie as being "inexplicable" (paragraph 26).

[61] I also do not consider that the *Eui Limited* (above at [42]) is of any assistance. The position of the defender in that case – a major motor insurer based within the United Kingdom which dealt regularly with multiple claims – was not comparable with the defender in this case.

Rule of Court 19.2(5)(b)

[62] I turn then to the condition provided in Rule of Court 19.2(5)(b) – namely, whether (b) the defender has disclosed a prima facie defence to the action on the merits. I do so bearing in mind that as Lord Emslie emphasised in *Bank of Scotland*, it is not for the court at this stage to reach a final view on the relevancy, specification or prospects of success of the defences (at paragraph 23). Rather, the court requires only, at this preliminary stage, to be satisfied that there is some reasonable basis for believing that the defence might turn out to be well founded: the existence of a colourable, arguable or plausible case to try would be sufficient.

[63] Viewed from this perspective, I am satisfied that the defences do disclose a prima facie defence to the action on the merits.

[64] I have reached this conclusion on the basis of the arguments which are disclosed in the proposed defences in respect of jurisdiction. The pursuer's action, as pled, founds solely upon section 19 of the 2010 Act. I am satisfied that there is a reasonable basis for believing

that this aspect of the proposed defence (see paragraphs [15] to [18]) may turn out to be well founded.

[65] On the basis of the submissions which I heard, I fully appreciate that, were the case to proceed further, the pursuer might, in response to the defender's arguments, seek to challenge the defender's position on jurisdiction and, perhaps, further to develop its position in respect of jurisdiction. However, to consider or seek to resolve those arguments and counter-arguments at this stage would, in my opinion, go far beyond what is required of the defender in terms of Rule of Court 19.2(5)(b). Further, as I anticipate from the submissions which I heard that these matters would be likely to be the subject of further development, pleading and argument were the case to proceed further, I do not consider that it would be appropriate to do so.

[66] I also consider that the defender has a prime facie defence in terms of Rule of Court 19.2(5)(b) in respect of time bar based on its argument in respect of the applicable law. I consider that the defender has set out an arguable basis for its position that the relevant applicable law is either Bangladeshi or English. I am not persuaded based on the submissions that were made on behalf of the pursuer that I can conclude the defender is bound to be unsuccessful in this regard.

[67] Having reached the conclusion that the defender has met, through its averments, the condition provided in Rule of Court 19.2(5)(b), I do not consider it either necessary or appropriate to consider the other arguments advanced by the defender in the defences.

Rule of Court 19.2(5)(c)

[68] The final limb of the test requires the defender to have enrolled a motion seeking recall of the decree in absence within a reasonable time after it had knowledge of the decree or, in any event, before the expiry of one year from the date of decree.

[69] On a straightforward reading of this provision, it appears that it provides two alternatives. In other words, the defender requires to enrol the motion "within a reasonable time after he had knowledge of the decree or in any event before the expiry of one year from the date of the decree" (emphasis added). On this construction, there is no dispute that the defender satisfies the requirement as the motion was enrolled on 7 December 2023.

[70] However, lest I am wrong about this, I consider that, in the unusual circumstances of this case, the defender has, in any event, enrolled the motion to recall within a reasonable time of the defender becoming aware of the decree following service on 26 June 2023.

[71] In my opinion, the reasonableness of the time taken by the defender to enrol the motion has to be assessed against the same surrounding circumstances which I have set out in relation to the first limb of the test provided in Rule of Court 19.2(5)(a) (see [57] above) and, in particular, the difficulties which the defender experienced in instructing and paying its Scottish solicitors. When these difficulties are taken into account I do not consider that the period of time taken by the defender to instruct solicitors, receive advice, investigate and formulate defences can properly be characterised as being unreasonable. It is apparent to me from the submissions that I have heard that the present dispute, which concerns a claim for very significant sums and which dates back more than 20 years, raises a number of potentially complex issues. The tendered defences are substantial.

Exercise of discretion

[72] For these reasons, I am satisfied that the defender has met each of the conditions set out in Rule of Court 19.2(5).

[73] The remaining question is whether I should exercise my discretion and grant the defender's motion. In all the circumstances and essentially for the reasons which I have set out in respect of the three parts of the rule, I am satisfied that I should grant the motion. In summary, I consider that it is in the interests of justice that, in the particular and unusual circumstances of this case, the defender ought to be given an opportunity to vindicate its position as articulated in the defences in response to the very significant claim being advanced by the pursuer. In particular, I am not persuaded that the prejudice to the pursuer highlighted in submissions (see above at [54]) is such that it requires a different outcome. Apart from anything else, it appears to me that these issues might well be relevant to any future discussion on expenses.

Disposal

[74] Accordingly, I will recall the decree in absence pronounced by the court on 31 May 2023 and I will allow the defences to be received although late. Thereafter, the action will proceed as a commercial action before me.

[75] I will reserve all questions of expenses meantime.