JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 108 OF 2004

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

BETWEEN: SANS SOUCI LIMITED APPELLANT

AND: VRL SERVICES LIMITED RESPONDENT

Lord Gifford, Q.C., Stephen Shelton and Miss Hayde'e Gordon, instructed by Myers Fletcher and Gordon, for the appellant.

Richard Mahfood, Q.C., and Dr. Lloyd Barnett, instructed by Hart Muirhead and Fatta, for the respondent.

April 11, 12; May 24 and November 18, 2005

PANTON, J.A.

1. This appeal from the decision of Sykes, J. (Ag.) (as he then was) was allowed on May 24, 2005. At that time, we set aside the order he had made on November 9, 2004, as well as the order of Reid, J. made on September 22, 2004. We awarded the costs of the appeal and of the hearing before Sykes, J. (Ag.) to the appellant, herein referred to as SSL. The costs are to be taxed if not agreed. We also ordered the Registrar of the Supreme Court to arrange for an early hearing of claim no. HCV 2161/2004.

2. Sykes, J. (Ag.) had been asked by SSL to set aside Reid, J's ex parte order of September 22, 2004, wherein he had granted permission to the

respondent, herein referred to as VRLS, to enforce an arbitration award against SSL. The learned judge refused the application.

3. McCalla, J.A. (Ag.), in her reasons for judgment herein, has given a full statement of the relevant facts and arguments. I shall not repeat them beyond that which is necessary for the presentation of my brief reasons for joining with my learned brother and sister in allowing this appeal.

4. There is in existence an arbitration award in favour of VRLS against SSL. The latter exercised its right to file a challenge to the award. This was done in the Supreme Court on September 6, 2004, and VRLS was advised. VRLS had itself applied to the arbitrators for clarification of the award as to the sum on which interest was payable, and as to the rate of interest.

5. Notwithstanding this state of affairs, VRLS filed an ex parte application for permission to enforce the arbitration award as an order of the Supreme Court pursuant to section 13 of the Arbitration Act and Rule 43.10 of the Civil Procedure Rules.

6. When Reid, J. considered the application on September 22, 2004, he was not informed of SSL's challenge to the arbitration award or of VRLS' application for clarification. Had he been given this information, it cannot be said that he would have necessarily granted VRLS the permission it sought. That being so, it is my view that Sykes, J. (Ag.) was in error when he said:

> "To my mind there has to be material that shows that a different order was likely had the additional information been brought to the attention of Reid, J." (para. 11 of his judgment).

He erred in failing to countenance the importance of the non-disclosure by VRLS. To say that had Reid, J. been informed of the full facts he would have decided as he did, is to indulge in speculation of the highest order.

7. A party who has received permission to enforce an arbitrator's award is just an hair's breath from the enforcement of that award. Given the huge sum of the award, and the seriousness of the challenge to it, it would have been too risky to have left such permission in force, without restraint, while the party likely to suffer from such enforcement had in train an application to set aside the award. The interest of justice requires that the challenge to the award be heard before permission to enforce it is granted.

K. HARRISON J.A:

I agree explicitly with the reasons for judgment given by McCalla, J.A (Ag.). For myself, I wish to say a few words on materiality and the relevance of the Civil Procedure Rules 2002, in without notice applications.

Materiality in without notice applications.

It is common ground that Reid, J. was not informed by the respondent that the appellant had filed proceedings in the Supreme Court challenging the award. Grounds (B) and (C) of the appellant's grounds of appeal complained therefore, that the order of Reid, J. ought to have been discharged due to non-disclosure of material facts.

Sykes, J. (Ag), (as he then was), in arriving at his decision for not setting aside the order, looked at what he perceived to be the merits of the appellant's

challenge and found that it had no prospect of success. Furthermore, he held that even if Reid, J. knew of the non-disclosure, it would not have affected his decision.

Now, it is not in dispute that a litigant is compelled to make full and frank disclosure in ex-parte applications. The principle goes back to ***Castelli v Cook*** (1849) 7 Hare 89, 94 and to the well-known case of ***Rex v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac*** [1917] 1 KB 486, 509, in which Warrington LJ said:

> "It is perfectly well settled that a person who makes an ex parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

It is abundantly clear therefore, that if an applicant does not make the fullest possible disclosure in an ex-parte application, this would lead inevitably to the conclusion that the Court can, and indeed should, remit or set aside the order that is obtained. See ***Rex v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac*** (supra). There are circumstances where the order may be set aside despite the fact that the successful party has acted innocently. It is incumbent however, on the applicant who wishes to have the order set aside, to satisfy the court that he or she has suffered substantial injustice as a result of this non-disclosure.

In the instant case it was submitted by Lord Gifford Q.C, that the appellant was exposed to immediate and serious prejudice since steps could have been taken to execute the award albeit, that there was an undertaking by the respondent not to carry out execution. There is merit in these submissions.

Mr. Mahfood Q.C, submitted however, that it was unnecessary for the respondent to have informed the learned judge of the letter of September 6, 2004 since Counsel was of the opinion that the letter concerning the challenge was irrelevant to the application seeking permission to enforce the award. I cannot agree with this submission.

The authorities have made it abundantly clear that an applicant need not go so far as to satisfy the court that the document would necessarily have led the tribunal to reach a different conclusion. It is the evaluation of the evidence that is ultimately a matter for the tribunal alone. In **Brink's-Mat Ltd v Elcombe and Others** [1988] 3 All ER 188, Ralph Gibson LJ stated:

> "The material facts are those which it is material for the judge to know in dealing with the application as made; ***materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers***: see the *Kensington Income Tax Comrs* case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J". (emphasis supplied)

The challenge of the award would be a relevant factor for Reid, J., to consider when he comes to decide whether or not to grant permission to the respondent to

enforce the award. Sykes, J (Ag.) in my view, had erroneously concluded that even if Reid, J. knew of the non-disclosure, it would not have affected his decision.

The relevance of the Civil Procedure Rules 2002

I now turn to the Civil Procedure Rules 2002 ("CPR") and in particular the provisions with respect to a Judge's overall management of cases. Part 43.10(1) deals specifically with the enforcement of awards and applies to:

> (a) the enforcement of an award not made by the court but which is enforceable by virtue of a statutory provision as if it were an order of the court; and;
>
> (b) the registration of such an award so that it may be enforceable as if it were an order of the court.

Part 43.10 further provides as follows:

> "(3) The general rule is that an application -
>
> (a) for permission to enforce an award; or
>
> (b) to register an award,
> may be made without notice but must be supported by evidence on affidavit".

Although the Rule provides that applications seeking permission to enforce an award may be made without notice, a Judge ought to bear in mind the overriding objective of the CPR. The powers of the Judge are set out in Part 26.2 of the CPR. He may:

> "(a) ...
>
> (d) adjourn or bring forward a hearing to a specific date;

(e) stay the whole or part of any proceedings generally or until a specified date or event;

(f) decide the order in which issues are to be tried;

...

(u) direct that notice of any proceedings or application be given to any person; or

(v) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective."

It is readily seen from these provisions, that a Judge has wide discretionary powers in the management of cases but, he must exercise his discretion fairly and justly in all the circumstances.

Had Reid, J. been informed of the challenge he would have had to consider his powers of management under Part 26.2 of the CPR. It would have been practical for both applications, that is, the seeking of permission to enforce the award and that of setting aside the ex-parte order, to be heard on the same occasion. This approach would certainly have saved time and expense. It is unfortunate that Sykes, J. (Ag.) did not direct his mind fully to the provisions of the CPR.

McCALLA, J.A. (Ag.):

This appeal was heard on April 11 and 12, and May 24, 2005 and the Court allowed the appeal and the order of Sykes J. (Ag.)(as he then was) made on November 9, 2004 was set aside. The Court also set aside the order of Reid J. made on September 22, 2004 with the costs of the appeal and of the hearing

of the application before Sykes J. granted to the appellant to be agreed or taxed. These reasons are in fulfilment of the promise that written reasons for judgment would follow.

The appeal is against an Order of Sykes, J. refusing to set aside permission which had been granted by Reid J. to VRL Services Limited (VRLS) to enforce an arbitration award against Sans Souci Limited (SSL).

SSL had contended before Sykes J. that the application before Reid J. had been made ex parte and VRLS has failed to disclose material facts, including the fact that the award was being challenged by SSL.

Sykes J. refused to set aside the order granting permission to VRLS to enforce the award and he also refused to stay execution of the order until the final determination of the claim brought by SSL to set aside the award.

The award which had been made to VRLS was as a result of the arbitration of a dispute concerning its management of the Sans Souci Hotel. The relevant terms of the award are as follows:

> "ii. The Claimant ... is entitled to the total sum of SIX MILLION THIRTY FOUR THOUSAND SEVEN HUNDRED AND NINETY THREE DOLLARS (UNITED STATES CURRENCY) (US$6,034,793) comprising US$5,475,000 damages as claimed and US$559,793 ... which amount shall be payable in Jamaican currency computed at the prevailing 10 day moving average rate of exchange for sales published in the Jamaican press on the date of this Award and shall be accepted in full and final settlement of the Claimant's claim arising out of the matters in dispute in this reference.
>
> iii. The Claimant is entitled to interest on the said sum of US$46,034,793 calculated from the

> date of this Award at a rate equivalent to the average of the commercial bank's prime lending rates prevailing on that date."

Section 13 the Arbitration Act permits VRLS to enforce the award as if it were a judgment of the Supreme Court.

Section 13 reads:

> "An award on a submission may, by leave of the Court or Judge, be enforced in the same manner as a judgment or order to the same effect."

Rule 43.10 of the Civil Procedure Rules 2002 (CPR) permits VRLS to apply to the Supreme Court for permission to enforce the award without notice to SSL, but the application must be supported by evidence on affidavit.

VRLS was therefore not obliged to serve notice of its application for permission to enforce the award on SSL.

Events preceding the application

The circumstances leading up to the application before Reid J, briefly stated, were as follows:

On August 18, 2004 VRLS requested payment of the award by SSL. The latter responded intimating an intention to challenge the award and made enquiry as to whether or not VRLS would accept service of documents.

VRLS' attorneys-at-law in response, stated their lack of authorization to accept service and also indicated that failure to satisfy the award, in the absence of a stay of execution, would result in the taking of steps to enforce it.

On September 3, 2004 SSL commenced a claim to set aside the award. On September 6, 2004, it notified VRLS' attorneys-at-law in writing of the court

proceedings that had been filed and of its intention to serve documents on VRLS on receipt of a court date.

On September 16, 2004 VRLS filed an application, without notice to SSL, to enforce the award and subsequently made demand on SSL for payment with interest.

On September 22, 2004 VRLS' without notice application was heard by Reid J. supported by affidavits which failed to disclose the notification by SSL that it had filed a claim to set aside the award. Permission was granted to SSL to enforce the award of US$6,034,793 or its equivalent in Jamaican currency, amounting to $370,705,264.40 with interest of J$14,731,116.08.

Grounds B and C

Four grounds of appeal were filed. Grounds B and C dealt with non–disclosure and read as follows:

> "B. His Lordship erred in finding that the respondent's failure to disclose the existence of the appellant's challenge of the award was not a material non-disclosure.
>
> C. His Lordship erred in not finding the following acts of non-disclosure by the respondent, material:
>
> i. Non-disclosure of a letter sent by its own attorneys-at-law seeking clarification on the meaning of an ambiguous section of the award pertaining to the rate of interest on the award (Paragraph 1(iii)) and
>
> ii. ...

Ground C (ii) was not pursued.

The following findings of facts and law are challenged:

(C) The respondent's omission to inform Mr. Justice Reid of the existence of Claim HCV. 2004/2161 on the occasion when the application for leave to enforce the award was heard did not amount to a material non-disclosure on the part of the respondent.

(D) The settled principles regarding the consequences of material non-disclosure on *ex-parte* interlocutory applications ought not to be applied without qualification to the respondent's application for leave to enforce the award, although made without notice to the appellant, because unlike an interlocutory application, there had been a prior adjudication of the merits of the parties' dispute by the arbitrators.

At paragraphs 5 and 6 of his judgment Sykes J said:

Para.5. "Mr. Shelton contended that the non-disclosure to Reid J that the defendant was challenging the arbitration award is sufficient for the order to be set aside. Mr. Shelton relied on **Excomm. Ltd. v Ahmed Abdul – Qawi Bamaoadah** [1985] 1 Lloyds Report 403,411 **Citibank N.A. v Office Towers Ltd and Adela International Financing Company S.S.** (1979) 16 J.L.R 502; **Jamculture Ltd v Black River Upper Morass** (1989) 26 J.L.R. 244. When I had delivered my oral judgment, I had not accepted the point made by Mr. Shelton. However having read the cases and **Excomm Ltd.** in particular it does indeed support the point made by Mr. Shelton which is that on an ex parte application, even in one such as this, there is a duty to make full disclosure to the court. **Excomm Ltd.** was a case in which an application had been made to enforce an arbitration award.

Para. 6. Having said that I am of the view that the omission to state to Reid J that the award was being challenged was not a material omission in the context of this case. In the event that I am wrong on this, I consider that discharging the order is not an appropriate remedy in the circumstances of this particular case..."

With regard to the above finding on VRLS' failure to disclose, Lord Gifford Q.C. on behalf of the appellant, relied on the principles laid down by Ralph

Gibson L.J. in **Brink's-Mat Ltd. v. Elcombe** [1988] 3 All E.R. 188. He submitted that VRLS had a duty to make a full and fair disclosure of all the material facts. The material facts are those which are material for the judge to know in dealing with the application as made. Materiality is to be decided by the Court and not by the assessment of the applicant or its legal advisors.

Lord Gifford, Q.C. also relied on the case of **R. v Kensington Income Tax Commissioners ex p Princess Edmond de Polignac** (1917) 1 KB 486, where Warrington L.J. stated that:

> "It is perfectly well settled that a person who makes an ex parte application to the court- that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongfully been obtained by him. That is perfectly plain and requires no authority to justify it." (Page 509).

Counsel submitted further that the Court should be guided by the reasoning in the case of **The Arena Corporation v Schroeder** [2003] EWHC 1089 (Ch) and the approach adopted in the **Ex Comm Ltd.** case (supra). Lord Gifford, Q.C. also submitted that an application to set aside an award must be a material fact on an application being made for leave to enforce the award, especially when that fact was brought to the attention of the applicant prior to the application for permission to enforce.

VRLS had stated in an affidavit filed in support of the application for permission to enforce the award, that SSL had paid its moiety of the costs of the arbitration and umpire and had refunded to VRLS its moiety of the said costs. However, in failing to disclose that SSL had stated that payment was made subject to its intended challenge, the Court may have been led to infer that there had been no formal objection by SSL to the award. SSL contends that the award was uncertain in that the wording of the formula for the calculation of interest permitted for the choice of three possible monetary sums payable by SSL to VRLS. The latter did not exhibit to its affidavit any evidence to substantiate the interest rate it relied on.

Lord Gifford, Q.C. also complained that VRLS had failed to disclose that it had written to the arbitrators and copied to SSL, a letter seeking clarification as to whether interest should accrue on the United States dollar damages awarded or on the amount of those damages converted to Jamaican dollars.

Mr. Mafood Q.C., counsel for VRLS agreed that an order that has been obtained by an ex parte application could be set aside for material non-disclosure. However, he said that the Court has discretion notwithstanding proof of material non-disclosure, to permit the order to stand or to renew it, (**Bank Mellat v. Nikpour** [1985] FRS 87 (90); **Jamculture Ltd. v. Black River upper Morass Development Corp.** (1989) 26 J.L.R. 244 at p. 350).

Mr. Mahfood, Q.C. argued that by virtue of Section 4(b) of the Arbitration Act, the award of the arbitrators is final and binding on the parties. It may only be set aside if, in accordance with section 12 (2) of that Act, the arbitrators had

misconducted themselves or if the award had been improperly procured (**Middlemiss and Goned (a Firm) v. Hartlepool Corp** [1972] 1 W.L.R. 1643). He asserted that an examination of the award makes it clear that there is only one possible interpretation with regard to interest, and that position was stated by VRLS in its letter to the arbitrators.

With regard to failure by VRLS to disclose the filing of proceedings by SSL to set aside the award, counsel contended that since the arbitrators had jurisdiction to adjudicate and to make an award, it became final and binding on the parties unless it is set aside. VRLS therefore had the right to enforce it. There was no impediment to VRLS in seeking to enforce the award as at the time of its application no stay of execution had been applied for or been granted to SSL. Mr. Mahfood Q.C also submitted that the filing of an application to set aside the award is irrelevant to its enforceability and was irrelevant to the application before Reid, J.

It is not being disputed that there was non-disclosure of certain information to Reid, J. by VRLS on its without notice application. It is my view that even if there had been no necessity on the part of VRLS to write to the arbitrators for clarification of the interest, such an enquiry ought to have been disclosed. It seems to me that VRLS' failure to inform Reid J. of SSL's filing of an application to challenge the award, far from being irrelevant to the proceedings for permission to enforce the award, was non-disclosure of a material nature.

I agree with counsel for VRLS that in the absence of a stay of execution VRLS was legally entitled to proceed to take steps to enforce the award.

However in doing so, it ought to have had regard to the rules governing without notice applications. VRLS had been notified from September 6, that an application had been filed to challenge the award. While it is true that the filing of those proceedings without more could not prevent VRLS from proceeding to enforcement, it was the duty of VRLS to have made full disclosure to the Court in order for the Court to decide whether the information was material, (See **R. v Kensington Income Tax Commissioner**).

In considering the duty of an applicant to make "a full and fair disclosure of all material facts," Ralph Gibson L.J. in the **Brink's-MAT Ltd** case (supra), at page 192, said in part:

> " The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisors..."

I am in agreement with Counsel for SSL that given the powers available to the Court under the CPR, it was material for Reid, J. to have been informed of SSL's claim. Under Rule 26.1 of the CPR, it was open to Reid J. to adjourn the application until the final determination of SSL's claim, to consolidate or to order that the matter be adjourned to be heard inter partes. I am of the view that Sykes J. fell into error when he found that VRLS' failure to disclose the matters complained of was not material.

Grounds A and D

Grounds A and D are as follows:

A. His Lordship erred in deciding that there was no error on the face of the record of the award in the absence of any argument by counsel on the evidence or the law considered by the arbitrators and without reviewing, in their entirety, the exhibits relied on by the appellant;

D. In wrongly deciding not to set aside the order of Mr. Justice Reid His Lordship erred when he:

(i) took into account an irrelevant consideration or alternatively attached inappropriate weight to a relevant consideration, being that there had been a prior adjudication of the parties' dispute by a tribunal other than the court; and

(ii) failed to take into account relevant considerations or alternatively failed to attach appropriate weight to relevant considerations being:

a. the respondent's application was made without notice to the appellant;

b. the court's long established practice of denying an applicant an advantage from a failure to comply with the obligation of full and frank disclosure on ex-parte applications;

c. the respondent had at the hearing of the said application failed to inform Mr. Justice Reid of several material facts being: the existence of the appellants challenge of the award (see Ground [B] herein) ; its own uncertainty as to the meaning of paragraph 1(iii) of the award {See Ground (C) (i) herein); and the parties' disagreement on the meaning of the ambiguously worded paragraph 1(iii) of the award (see Ground (C) (ii); herein).

ii. the overriding objective of the Civil Procedure Rules 2002, to deal with cases justly.

The findings of fact and law being challenged are:

(A) That the order of Mr. Justice Reid ought not to be disturbed unless the appellant was able to demonstrate that there were good reasons why Mr. Justice Reid ought not to have granted leave to enforce the award, which said reasons must affect the validity of the award itself, for example, a clear error on the face of the record.

(B) It would have been an inappropriate exercise of the court's discretion for Mr. Justice Reid, on an application for leave to enforce the award, to decline leave on the ground that the appellant had commenced proceedings prior in time by way of Claim No. HCV 2004/2161 to set aside the said award, pursuant to section 12 of the Arbitration Act.

Lord Gifford Q.C. referring to passages at paragraphs 7-11, paragraph 12 and the conclusion of the judgment of Sykes , submitted that the learned judge erred in finding that SSL's challenge to the award had little substantive merit. He said the learned judge attached inappropriate weight to what he thought were the considerations relevant to the exercise of his discretion on SSL's application to set aside the order of Reid, J. Further, he maintained that the Court applied a more stringent test to the merits of SSL's application because of the prior adjudication of the parties' dispute.

He contended that even if the nature of the undisclosed information was insufficient to disentitle a claimant from relief, the Court could still exercise a discretion not to grant a continuation of an ex parte relief on an inter partes hearing. He relied on a number of authorities, which included the cases of **ExComm Ltd.** (supra) and the **Arena Corporation Ltd.** (supra).

Counsel also submitted that the learned judge failed to give appropriate consideration to the evidence of the merits of the challenge to the award having regard to unchallenged affidavits exhibited by SSL stating:

a) The grounds of SSL's challenge;

b) That the challenge raised substantial issues as to validity of the award and could not be dealt with appropriately in a summary manner;

c) The issue as to the rate of interest, which was being disputed and consequently the uncertainty of the award which would make it unenforceable; and

d) The honest belief that SSL had more than an arguable case for the award to be set aside.

Lord Gifford Q.C. also said that in the absence of legal submissions regarding its claim, the force and strength of its ground of appeal might not have been apparent to the learned judge. The circumstances under which the Court could set aside an award in whole or in part under section 12 (2) of the Arbitration Act for misconduct could involve an error of law by the arbitrators (**Kaiser Bauxite Co v National Workers Union** (1956) 9 J.L.R. 283).

In urging the Court to decline to set aside the ex parte order, Mr. Mahfood Q.C. referred to the case of **Clarendon Alumina Production Ltd. v. Alcoa Minerals of Jamaica** (1988) 25 J.L.R. 114. He submitted that the test as to whether or not an order made on an ex parte application ought to be set aside for non-disclosure of material facts, is whether the party making such application:

(a) had suppressed material facts so as to deceive the court and to obtain a benefit therefrom; or

(b) deliberately understated the facts with a view of deceiving the court.

Counsel asserted that there was no such allegation or finding in the instant case and Sykes J. was therefore correct to refuse to set aside the order granting leave to enforce the award. He maintained that the learned judge was correct in his approach at paragraph 19 of his reasons where he said in part that:

> "...I have not seen any material that suggests that SSL has any prospect of success."

Mr. Mahfood Q.C. relied on the case of **Investors Compensation Scheme Ltd. v. West Bromwich Building Society and others** [1998] 1 W.L.R 896 and **BCCI v. Ali** [2002] 1 AC 251. He also argued that an award could not be set aside merely because the arbitrators had made an error in deciding on a question of law, which was submitted for their determination. Nor can it be set aside where the question is one of construction, even if the court would take a different view of the meaning of the document (**In re King and Duveen** [1913] 2 K.B. 32).

He submitted further that in exercising his discretion, Sykes, J. quite properly took into account that the Court should approach an award with a desire to support rather than destroy it. Further, he said that the learned judge was correct in stating that the grounds for setting aside an award are extremely limited where there had been a full prior hearing on a consensual reference.

I now turn to the question as to whether or not in refusing to set aside the permission to enforce the award, Sykes, J. wrongly exercised his discretion.

At paragraph 11 of his written judgment he said in part:

> "To my mind there has to be material that shows that a different order was likely had the additional information been brought to the attention of Reid J."

It is not correct to say that when the application was made it would have been inappropriate for Reid J. to refuse leave to enforce the award. Had full disclosure been made to the learned judge, he could also have deferred making the order so as to take any action which in his opinion was in furtherance of the overriding objective of the C.P.R. to deal with cases justly. Dealing justly with a case includes the saving of expenses and ensuring that matters are dealt with expeditiously. Reid J. could have ruled that the application be heard inter partes. Also, "It is the duty of the parties to help the court to further the overriding objective" (Rule 1.3 CPR).

In **Bank Mellat v. Nikpour** (supra), with regard to material non-disclosure, Donaldson L.J. at page 91 said in part:

> "...the court will be astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ..."

The effect of the application of the above principles in the case of **The Arena Corporation Ltd. v. Schroeder** (supra) was that the court deprived the company of the benefit of a freezing order which it had obtained on faulty evidence.

In the **Excomm Ltd.** case (supra), notwithstanding the failure to make full disclosure, the Court of Appeal restored a judgment that had been set aside for such failure.

In his judgment, at page 411, Lloyd, L.J. states:

> "Where a party fails to make a full and fair disclosure the court will often, and perhaps, usually, deprive the applicant of the benefit of his order, even if, had he made full disclosure, the end result would have been the same. But that will not always be so. It must depend on the nature of the ex parte application, the circumstances of the non-disclosure, the contingencies of setting aside the order, and all the other circumstances of the case."

In my opinion, the learned judge's finding that:

> "There has to be material that shows that a different order was likely had the additional information been brought to the attention of Reid J. That is to say there has to be some examination of the award to see if there are errors, whether patent or latent."

and his conclusion that:

> "There is no evidence before me that suggests that Reid J. would or might have made a different order had he been told that SSL was challenging the award. The applicant has not demonstrated any prime facie error in logic or legal principle in the award ..."

are incorrect as those findings do not take into account the overriding objective of the C.P.R. In any event materiality was a matter for the Court. Had full disclosure been made to Reid J., it would have enabled him to exercise his discretion in accordance with the provisions of the CPR. After the Court granted permission to enforce the award, VRLS could have proceeded to enforcement if it had not voluntarily declined to do so, by giving an undertaking not to enforce it until the hearing of an application for stay of execution. VRLS' response is that it was entitled to enforce the award since there was no stay of execution. However, it is not as if the Court, on being presented with such an application, had no other option than to grant it forthwith. If Reid J. had ordered an inter partes hearing, a

saving in time and expense might have been achieved by an order that the matter be consolidated with SSL's application. I find that there is merit in the above grounds of appeal.

Conclusion

I have already stated that in my view there was material non-disclosure by VRLS in its without notice application. The question now arises as to whether in the circumstances of this case this Court ought to interfere with the exercise of the learned Judge's discretion in refusing to set aside the order.

In my view VRLS had secured an advantage by failing to disclose that SSL had filed proceedings to challenge the award as in the absence of its undertaking, VRLS could have proceeded to enforcement. Having regard to the matters alluded to by SSL in its affidavit, its claim which is yet to be heard and the material non-disclosure by VRLS, I am of the opinion that the order made by Sykes J. dismissing SSL's application, ought to be set aside. I would also set aside the permission granted to VRLS to enforce the award. It was for these reasons that I agreed to the orders made, as stated at the outset.