

English High Court refuses to enforce unchallenged arbitral award in light of new evidence

By Nicholas Peacock and Vanessa Naish

The English High Court (the "Court") has refused to enforce an unchallenged arbitral award because doing so would not be in the interests of justice. In the recent case of *David Sterling v Miriam Rand and Morris Rand* [2019] EWHC 2560 (Ch), the Court was asked to enforce an arbitral award of the London Beth Din (Court of the Chief Rabbi) (the "Beth Din"), which ordered the Defendants to transfer title of a disputed property to the Claimant. However, in a "serious and unusual case", the Court held that evidence put before it justifying the requested order was inconsistent with evidence put before the Beth Din, and revealed an interested third party in the property, meaning that enforcing the award would be inequitable.

Background

The dispute concerns the sale of a London property (the "Property") between a tenant (the "Claimant") and the freehold owners of the property (the "Defendants"). In March 2008, one of the Defendants entered into an agreement signed in Hebrew, known as a "Heskem", to sell the Property to the Claimant for £745,000. In order to avoid a penalty clause in the Defendant's existing mortgage on the Property, it was agreed in the Heskem that title to the Property would not pass to the Claimant immediately. Instead, the Claimant would take responsibility for paying the existing mortgage for two years, after which he would raise a new mortgage, discharging the Defendants' liability. Although title was not being transferred immediately, it was agreed that the Defendants would sign a declaration of trust stating that they held the Property beneficially for the Claimant.

Three months after the Heskem was signed, the Defendants did indeed enter into a deed of trust relating to the Property, but to hold the Property on trust for Mr Shimon Stern, a relative and the nominee of the Claimant (the "Claimant's Nominee"), not the Claimant himself.

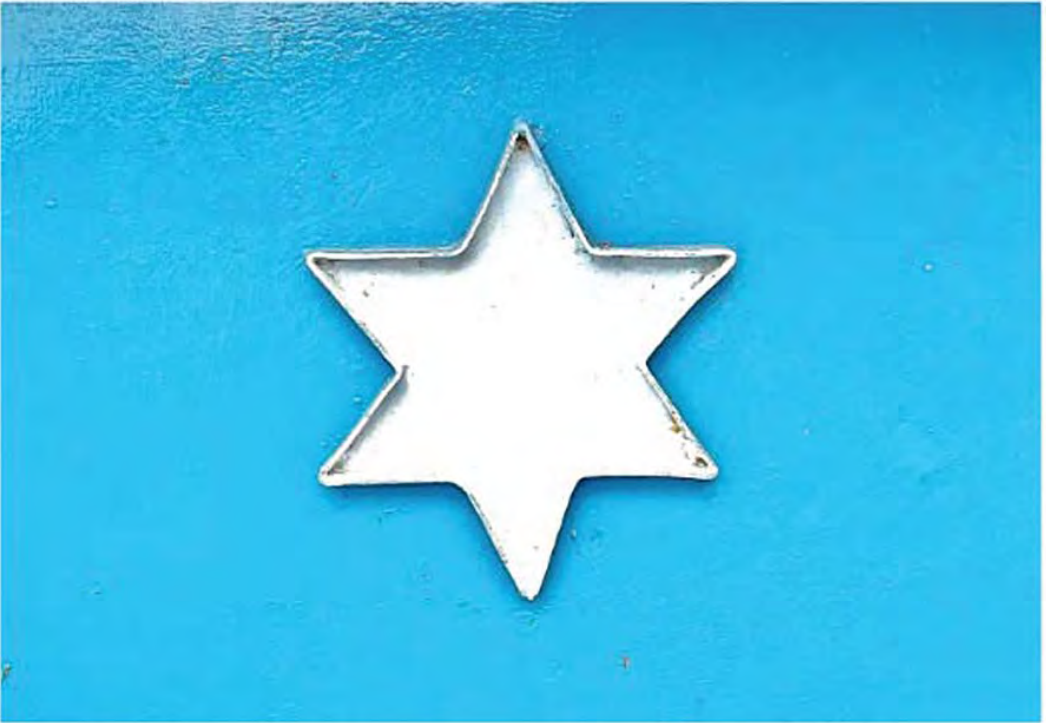
After the two-year deadline passed, the Claimant did not redeem the mortgage, as provided for in the Heskem, and it appeared as though both

parties were willing to leave the situation be. However, in 2010, the Claimant's Nominee made an application to register a restriction relating to his interest in the Property, which prompted a dispute between the parties over the ownership of the Property. The Claimant argued that the Heskem transferred ownership of the Property to the Claimant's Nominee if and when the existing mortgage was discharged, whereas the Defendants now disputed the validity of the Heskem.

In October 2014, both parties signed an arbitration agreement under which they agreed that their dispute would be referred to the Beth Din for a binding arbitration under the English Arbitration Act 1996 (the "Act"). The arbitration agreement stated that the "Beth Din's rules of procedure are those of Jewish law" and that the "Beth Din shall decide the matter under Jewish law incorporating such other laws as Jewish law deems appropriate".

In an award of 25 January 2015, the Beth Din held that the Heskem was binding, that Mr Stern was the Claimant's Nominee, and therefore ordered that the Defendants transfer title to the Property to the Claimant or the Claimant's Nominee upon discharge of the existing mortgage (the "Award").

On 26 June 2018, the Claimant issued an arbitration claim form in the Chancery Division for



summary enforcement of the Award.

In enforcement proceedings before the Court, new evidence was submitted which was not put before the Beth Din. In particular, evidence was submitted which demonstrated that (1) the Claimant was at all times acting as an agent for the Claimant's Nominee, including when he signed the Heskem; and (2) the Claimant was in receipt of housing benefit from Hackney Borough Council ("Hackney BC") at the Property, on what appeared to be an unlawful basis after the Heskem was signed.

The Court's judgment

The Court had to deal with three legal issues in deciding whether to enforce the Award: (1) whether the Beth Din had the power to order the transfer of Property to begin with, (2) if the Beth Din lacked such a power, whether the Court had the power to order the transfer itself, and (3) whether the Court should exercise its discretion under section 66 of the Act to enforce the Award.

(1) Did the Beth Din have the power to order the transfer of Property to begin with?

Neither party disputed that the Beth Din had the
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power under Jewish law to order the transfer of the Property — Jewish law expressly states that the Beth Din has the power to grant an order for specific performance of a contract relating to land.

However, the Defendants argued that the Beth Din did not have jurisdiction to make the transfer because section 48(5)(b) of the Act, which lists the powers of an arbitral tribunal "unless otherwise agreed by the parties", does not include the power to order the transfer of property. According to the Defendants, to give effect to the "unless otherwise agreed" provision, the parties had to specifically agree that the tribunal could make an order to transfer property, rather than simply choosing Jewish law as the governing law of the arbitration.

The Court rejected this objection because the Defendants did not challenge the Award on this ground or otherwise at the appropriate time, therefore under section 73 of the Act, the Defendants had lost their right to object.

However, the Court nonetheless went on to consider the substance of this argument, had it been made at the appropriate juncture, and also rejected it. The Court held that the choice of Jewish



law to govern both the substance and the procedure of the arbitration had the effect that section 48 of the Act did not apply. Where, as English law allows, parties in a London-seated arbitration choose for the Act to apply but choose a different procedural law, the Act will apply as a residual framework to fill gaps, as well as by reason of mandatory provisions. Since section 48 is not a mandatory provision, and Jewish law covers the matter of remedies including the Beth Din's powers to transfer title to Property, section 48 does not apply. Therefore, even if the Defendants had raised this objection in good time, it would have been rejected. The Beth Din had the power to order the transfer of the Property under Jewish law.

(2) If the Beth Din lacked such a power, does the Court have the power to order the transfer itself?

Because the Court held that the Beth Din did have power to make the order, it was not necessary for the Court to decide this question. However, the Court held that it would have been willing to find that it had jurisdiction under section 66 of the Act to make an order transferring the Property even if the Beth Din lacked the power to make such an

order. The Court said that its discretion on enforcement is unfettered and it has wide power to give effect to an award.

(3) Should the Court exercise its discretion under section 66 of the Act to enforce the Award?

The Court said that any arbitration award that has not been challenged is final and treated as binding. It should ordinarily be enforceable, and section 66 (which gives the Court the power to enforce arbitration awards) should be a straightforward remedy for achieving that. However, the Court also noted that it has a wide discretion in deciding whether to enforce, and that section 66 is never a "rubber-stamping exercise". In particular, the enforcement of a mandatory injunction is more likely to generate specific consideration than the enforcement of a monetary award. Specific performance is an equitable remedy and will not be granted by the Court if it interferes with the rights of third parties, or if a party has not come to court with clean hands. On this basis, the Court held that the new evidence produced in relation to the Claimant's conduct meant that it would be inequitable for the Court to enforce the Award.

First, the new evidence that the Claimant was acting as an undisclosed agent for the Claimant's Nominee (and therefore that the Claimant's Nominee was the true owner of the Property) was directly inconsistent with the case put before the Beth Din regarding the contracting party to the Heskem and the person to whom ownership of the Property was to be transferred.

Second, the new evidence that the Claimant had been claiming and receiving housing benefit for the Property (on the purported basis that he was paying rent, when he was actually the owner of the Property) meant that Hackney BC may have a claim against the Claimant for an unlawful housing benefit scheme. If the Court were to order the transfer of the Property in these circumstances, it might prejudice an Interested third party since Hackney BC would have no recourse against the Property as security for any potential claim.

For these reasons, the Court stated that an order enforcing the Award would not be in the interests of justice, it could be contrary to public policy, and it could damage the integrity (and reputation) of the Beth Din system.

Accordingly, the Court declined to make the order sought and suggested that the parties ask the Beth Din to reopen their Award on the ground that new factual evidence had arisen.

Comment

This rare example of the English Courts not enforcing an unchallenged arbitral award demonstrates that section 66 of the Act is never a rubber-stamping exercise. The Court has discretion under this provision and will consider the interests of justice before enforcing an award, particularly where the arbitral award is a specific performance order relating to land.

This case also demonstrates that the qualification contained in section 48 of the Act, allowing the parties to determine the powers of the tribunal by agreement, can be engaged where the parties choose a different procedural law to English law without requiring a specific agreement on particular tribunal powers. Since section 48 is a non-mandatory provision of the Act, it can be disapplied, or superceded, if the parties' agreement grants different or greater powers such as through the choice of a procedural law which grants powers

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