NCN: [2023] EWHC 1116 (Comm)

CL-2022-000378

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 21 April 2023

Before:

MR JUSTICE BUTCHER

B E T W E E N :

(1) THE EUROPEAN UNION
(REPRESENTED BY THE EUROPEAN INVESTMENT BANK)
(2) THE EUROPEAN INVESTMENT BANK

Claimants

- and -

THE SYRIAN ARAB REPUBLIC

Defendant

MISS K GIBAUD KC and MS H GLOVER (instructed by Allen & Overy LLP) appeared on behalf of the Claimants.

THE DEFENDANT was not present and was not represented.

J U D G M E N T

(Heard remotely via Microsoft Teams)

MR JUSTICE BUTCHER:

1 I am going to rule on the question now of whether this application should proceed in the absence of appearance or representation by the Defendant. That is a matter which I have considered taking into account, by analogy, the factors identified by the Court of Appeal in *R v. Hayward Jones and Purvis* [2001] EWCA (Crim.) 168, in the same way as Mr Henshaw QC (as he then was) considered those factors, by analogy, in the case of *Certain Underwriters at Lloyd's v. Syrian Arab Republic* [2018] EWHC 385 (Comm.) at para.3. I have concluded that it is right to proceed in the absence of the Defendant being either present or represented.

2 In particular, I am satisfied that reasonable steps have been taken to give the Defendant sufficient notice of the hearing, as well as of the proceedings, and that the Defendant has been given ample opportunity to attend. Thus, I am satisfied on the evidence that the application and its listing has come to the Defendant's attention or, if it has not, it is a matter of choice on the part of the Defendant that it has not. Specifically, the application documents were emailed to the Syrian Ministry of Foreign Affairs and the Syrian Embassy in Brussels on 1 February 2023. The notice of the listing was subsequently sent to the same email addresses on 3 March 2023 and a copy of the link for today was sent to the same email addresses yesterday. It appears that no undeliverable messages were received in response to any of those. Furthermore, a copy of the application was also couriered to the Syrian Embassy in Brussels, although delivery of that was refused.

3 Secondly, I am satisfied that there is no reason to believe that an adjournment would be likely to result in the Defendant attending a hearing at a later date. It has not been suggested in any of the material that has been put before me that that is something that would occur if I were to adjourn the present hearing.

4 Thirdly, there is no reason to believe that the Defendant wishes to be represented at the hearing. There has been no indication of that and it follows, in my judgment, from the matters to which I have already referred, that the Defendant does not wish to be represented at the hearing because it has had the opportunity to be, if it had so wished.

5 Fourthly, and although, clearly, the claim is a serious one, there is a public interest in the matter proceeding without further delay. A delay and a rescheduled hearing would, obviously, occupy further court time and that has its own prejudicial effect for other litigants. So there is that public interest in the matter proceeding without unnecessary further delay.

6 For those reasons, I conclude, as indeed Mr Henshaw QC did in the case to which I have referred, that the Defendant has foregone its right to appear or be represented and is voluntarily absent and that the matter should proceed accordingly.

LATER

7 This is the hearing of the Claimants' application dated 1 February 2023 by which the Claimants seek a declaration that all documents required to institute this claim have been validly served on the Defendant (to which I will refer as "Syria") pursuant to CPR 6.44 and section 12(1) of the State Immunity Act 1978, by the Foreign, Commonwealth and Development Office (or "FCDO") by email dated 11 November 2022; alternatively, a declaration that all documents required to institute this claim have been validly served on Syria by the Claimants by email dated 29 July 2022, Syria having agreed to accept service in that manner, pursuant to section 12(6) of the State Immunity Act. In the further alternative,

the Claimants seek an extension of time for service of the amended claim form, pursuant to CPR 7.6(3), until at least 18 July 2023, or such later date as the court will permit in order to continue attempts to serve the proceedings. In any event, the Claimants seek an order validating the steps taken by them to serve the application notice, draft order and supporting evidence for this application on Syria and an order providing for future service of documents, other than the amended claim form, in these proceedings.

8 I have already given my reasons this morning as to why I have concluded that it is appropriate for this hearing to proceed even though the Defendant has not appeared or been represented at this hearing.

9 The application is made in the context of what the Claimants say are debt recovery proceedings brought by the European Union and the European Investment Bank to recover sums which they say are owed by Syria under certain development loans entered into between 1 November 2004 and 8 December 2008. The claim form was issued on 18 July 2022 and was subject to a minor amendment, which is dated 27 September 2022. As at the date of issue, the claim value was stated to be EUR 130,820,233.97.

10 The application, the Claimants say, arises in the context of the ongoing civil unrest in Syria and the related disruption to diplomatic relations between the UK and Syria. As a result of these matters, it is said that the contractual service mechanisms contained in four of the relevant loan agreements, which appoint Syria's Ambassador to the UK as Syria's agent for service, are inoperable.

11 The declaration sought as the primary relief on this application by the Claimants - namely, that the claim has been validly served, pursuant to section 12(1) of the State Immunity Act, by email sent by the FCDO to the Syrian Ministry of Foreign Affairs (which I will call the "SMFA") - is, it is pointed out by the Claimants, the same as a declaration made by Teare J

in previous proceedings brought by the Claimants to recover earlier instalments that had fallen due under the same loan agreements in circumstances where diplomatic relations between the UK and Syria were similarly disrupted (see *The European Union v. The Syrian Arab Republic* [2018] EWHC 181 (Comm.)).

12 It appears from the evidence before me that Syria is, indeed, aware of these proceedings. On 28 September 2022, Syria served on Allen & Overy, the solicitors acting for the Claimants, a signed acknowledgement of service and a defence. In neither document did Syria seek to challenge service or the court's jurisdiction to hear this claim. Syria has, however, not filed either document, although it is apparent that it is aware of the requirement to do so.

13 The evidence also suggests that Syria may now be taking active steps to avoid service of further documents in the proceedings since the date of issue of the application which is now before me. The agents for service named by Syria in its acknowledgement of service and defence, namely, the Syrian Embassy to the EU and an individual within the United Kingdom called Dr Ali Aljratli, have disclaimed authority to act or have indicated an unwillingness to accept service.

Background

14 The claim is brought to recover what is said to be some EUR 130 million which have fallen due since June 2018 under five development loans made to Syria by the European Investment Bank, by agreements dated between 1 November 2004 and 8 December 2008, which, according to the Claimants, remain unpaid. As a guarantor of Syria's repayment obligations under those loan agreements, the EU has indemnified the European Investment Bank for its losses arising as a result of Syria's default and now seeks to recover those sums

from Syria on a subrogated basis. Alternatively, the same amounts are claimed by the European Investment Bank itself.

15 On 29 June 2018, Bryan J granted the EU summary judgment for about EUR 190 million on its claim to recover earlier instalments that had fallen due under the loan agreements, together with a prior loan agreement in respect of which no claim is made in these proceedings. Syria did not lodge any appeal or other challenge against that order. However, to date, no part of that judgment debt has been paid by Syria. That prior claim had been found to have been served on Syria under section 12(1) of the State Immunity Act by an email sent from the FCDO to the SMFA using the same email address, namely, info@mofaex.gov.sy, used by the FCDO in these proceedings, in a manner to which I will return.

16 The claim form in this claim was issued on 18 July 2022 and particulars of claim dated 15 July 2022 were filed on the same day. Each of the loan agreements is subject to English law and contains an exclusive jurisdiction clause in favour of the English court. Permission to serve out of the jurisdiction was not required pursuant to CPR 6.33(2B)(b). By clause 10.02 of each of the loan agreements, the parties waived any immunity from or right to object to the jurisdiction of the court.

Steps taken to serve the claim

17 Detailed evidence as to the steps taken to serve the claim is set out in two witness statements of Ms Garvey. By way of outline, the following points emerge. On 19 July 2022, Allen & Overy sent the necessary documents, together with translations, to the Foreign Process Section (or "FPS") for service by the FCDO pursuant to CPR 644 and 645.

18 On 17 August 2022, the FPS emailed Allen & Overy to explain that,

> "The UK currently has no diplomatic presence in Syria and the FCDO advises against all travel to the country. For this reason, the FCDO regrets that it is unable to serve hard copy documents through Diplomatic Channels via the Syrian Ministry of Foreign Affairs."

19 On 11 November 2022, the FCDO sent the amended claim form, particulars of claim and other documents required to institute the proceedings, pursuant to CPR 6.44, by email to the SMFA using the email address which I have already quoted (which I will call the "SMFA email address") and the FCDO received an automatic message in response stating that the email had been delivered. I will return to that.

20 The FCDO has indicated that it will not provide a certificate of service. The FCDO has also, in fact, made further attempts to serve the proceedings at the SMFA by international courier, namely, DHL, and by international post. It appears that neither method has succeeded, including because, on at least one occasion, DHL required a copy of the Syrian Foreign Minister's passport before it would attempt delivery.

21 In the meantime, and in addition to the FCDO's actions to which I have referred, on 29 July 2022, Allen & Overy emailed to the Syrian Embassy in Brussels a copy of the documents that had originally been lodged for service on 19 July 2022 with the FPS, including a copy of the sealed claim form.

22 By response on 29 September 2022, and to which I have already referred, the Syrian Embassy in Brussels sent to Allen & Overy a series of documents, including a signed acknowledgement of service and a defence on behalf of Syria. As I have already said, neither has, in fact, been filed, despite Allen & Overy's letter dated 6 October 2022 sent to the Syrian Embassy in Brussels and Dr Ali Aljratli which informed Syria of the need to do so.

The Claimants' application for a declaration of valid service

23 The claimants' principal application is for a declaration of the claim form and all other documents required to institute these proceedings have been validly served on Syria, pursuant to CPR 6.44 and section 12(1) of the State Immunity Act, by the email from the FCDO to the SMFA on 11 November 2022.

24 So far as relevant, section 12 of the State Immunity Act 1978 provides:

> "**Service of process and judgments in default of appearance.**
>
> (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State and Service shall be deemed to have been effected when the writ or document is received at the Ministry.
>
> (2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.
>
> …
>
> (4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.
>
> (5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.
>
> (6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner."

25 CPR 6.44 requires a party to file the claim form and other documents required to be served, together with the translations required by CPR 6.45 and a request for service, with the Central Office of the RCJ for onward transmission to the FCDO by the Senior Master.

26 The procedure for service via the FCDO laid down in section 12(1) of the State Immunity Act is the exclusive and mandatory method for service on a foreign state in the absence of an agreement within section 12(6) of the State Immunity Act (see *General Dynamics v. Libya* [2022] AC 318 UKSC at para.37). Service, therefore, has to be effected by transmission through the FCDO to the Ministry of Foreign Affairs of a defendant state and takes effect when the document is received at that Ministry of Foreign Affairs.

27 It may be noted that the requirement is for service "at" and not merely "on" the Ministry of Foreign Affairs: see *Kuwait Airways Corporation v. Iraqi Airways Company* [1995] 1 WLR 1147 at 1155H to 1156D, where Lord Goff rejected the submission that service of a writ on the Iraqi Embassy in London, with a request for onward transmission, which was not effective, constituted service at the Iraqi Ministry of Foreign Affairs, for the purposes of section 12(1)).

28 The documents must be transmitted to the Ministry of Foreign Affairs through the FCDO, which is a process called, in *General Dynamics*, "service through a diplomatic channel" in which the FCDO acts as a channel of communication. The word used in section 12(1) is "transmitted". There is no prescription in section 12(1) as to the method by which transmission must take place. I accept the submission, which is made by the Claimants, that the FCDO can and should exercise its own discretion as to the manner in which service may be attained. Thus, in *General Dynamics*, at para.33, Lord Lloyd-Jones JSC stated that, where there are practical difficulties in effecting service, '… the FCDO will, no doubt,

exercise its judgment, its expertise and its experience in deciding what may be attainable and the time and manner in which it may be attainable.'

29 I consider, therefore, that the FCDO may serve a defendant state by transmitting documents to that state's Ministry of Foreign Affairs by such available method or methods which result or results in those documents being received at the Ministry of Foreign Affairs and which the FCDO considers appropriate, subject to the condition that the method of service employed by the FCDO must not be contrary to local law, in the sense that it involves acts prohibited by the law of that state. That exception is supported by the decision in *Embassy of Brazil v. De Castro Cerqueira* [2014] 1WLR 3718, per Lewis J, at para.31. More specifically, I consider that relevant documents may be transmitted to the state's Ministry of Foreign Affairs by the FCDO by the sending of an email to that MFA which is received at the Ministry of Foreign Affairs' email address.

30 As I have already said, in *European Union v. Syria* [2018] EWHC 181 (Comm.), Teare J held that email transmission of the claim form and other documents required to institute the claim by the FCDO to the SMFA by email was good service for the purpose of section 12(1). Teare J accepted, by analogy with the Court of Appeal decision in *Anson v. Trump* [1998] 1WLR 1404, that transmission under section 12(1) is achieved by email when the relevant email arrives in the electronic depository of the recipient (see para.7). It may be noted that that decision was cited with apparent approval in *General Dynamics* at para.38 by Lord Lloyd-Jones JSC in the context of the requirement that service must take place at the MFA. In any event, I, with respect, agree with Teare J's reasoning, approach and conclusion in *European Union v. Syria* and I will adopt the same approach here.

31 It is, however, right to refer, and it is right that I was referred, to the decision of Stewart J in *Heiser v. The Islamic Republic of Iran* [2019] EWHC 2074 and, in particular, to para.239,

where Stewart J expressed the view that service of a default judgment on a state under section 12(5) of the State Immunity Act could not be effected by email. With respect, I do not consider that that decision on this point should be followed, at least not in the present context of service of a writ or other document required to be served for instituting proceedings against a state under section 12(1).

32 I consider that the Claimants are correct in identifying Stewart J's core reasoning as being that the term "received" in section 12(5) requires some act of volition in receiving the documents and that email service offers the state no opportunity to refuse documents. This core reasoning appears to me to be inconsistent with certain other authorities, albeit they are not in the context of email service, which have held that even a refusal to accept physical documents does not prevent receipt of those documents for the purpose of section 12(5) or 12(1). That was the case in the decisions of Mr Henshaw QC in *Certain Underwriters v. Syria* [2018] EWHC 385 (Comm.) at paras.19 and 23 and of Jacobs J in *Unión Fenosa Gas v. Egypt* [2021] 1 WLR 4732, especially at para.90. The first of those decisions was one where only one party was represented but the second was a decision where both parties were represented.

33 It is also relevant to note that in *Embassy of Brazil v. De Castro Cerqueira*, a case to which I have already referred, service was effected under section 12(1) by the delivery of documents by a diplomat into a document drop-off facility at the Brazilian Ministry of Foreign Affairs without, as far as one can see from the report, any positive act or acknowledgement of receipt by Brazil. While Brazil asserted that service was invalid under Brazilian law, no point was apparently taken that the claim had not been received at the MFA.

34 I consider that to require a positive act of receipt by the defendant state before service can be effected under section 12(1) would be wrong as a matter both of policy and principle, and would give rise, potentially, to unsatisfactory consequences. In my judgment, any such

interpretation fails to give proper effect to the wording of section 12(1) and, in particular, to the fact that the provision is for "receipt at" rather than, for example. "receipt by" the Ministry of Foreign Affairs. I consider that that indicates Parliament's intention was that receipt should be defined by reference to the arrival of the document at the Ministry of Foreign Affairs and not to the acceptance of the document by the Ministry of Foreign Affairs. To require an undefined act of volition in receiving the document to be served would remove clarity from the deeming service provisions in sections 12(1) and 12(5). It is obvious, and has been emphasised in a number of decisions, including *General Dynamics* itself, and also in *Barton v. Wright Hassall LLP* [2018] I WLR 1119 at para.16, that service rules need to identify the point from which time runs for the purpose of taking further steps.

35 Further, I would be reluctant to adopt a construction of the provisions which would have the effect of permitting a party to evade service by electing not to accept delivery of a claim form. This is a particularly important consideration in a case such as the present where the court's jurisdiction is engaged by reason of the state's (here Syria's) contractual agreement to submit to English jurisdiction and to waive any immunity it might otherwise have and, further, where the section 12(1) State Immunity Act statutory service mechanism is mandatory and exclusive in the absence of agreement under section 12(6). In such circumstances, to adopt a construction whereby a defendant state could evade service by refusing to receive documents would leave a claimant without practical means of prosecuting a claim, which is a problem which would be particularly acute in cases such as the present, where there has been a disruption to normal diplomatic relations with the defendant state.

36 As to the other points which were relied on by Stewart J in *Heiser*, namely, at paras.239(2) and 239(3), I do not consider it to be a concern that email service - by the FCDO - under section 12(1) of the State Immunity Act, would not be good service on a defendant within

the jurisdiction under the CPR, which would require prior consent under CPR PD 6A 4.1(1). The two service regimes reflect different policy considerations. Furthermore, as to the principle of prior consent, it appears to me that there is much force in the Claimants' submissions that where, as in this case, a state makes an email address for its Ministry of Foreign Affairs publicly available, the position is not materially different from making a document drop-off facility available, as seems to have been the case in *Cerqueira,* or, indeed, having a letter box; and that the state cannot, in those circumstances, complain when and if it is used, by, for example, the FCDO for service by diplomatic means.

37 The basis of the point made in para.239(3) of *Heiser* - namely, that the conclusion in that case accorded more closely with the Basle and 2004 Conventions and the CPR 6.44 procedure - is not entirely clear to me, but, in any event, I doubt that it can be considered as good law following what was said in *General Dynamics* at para.33 to which I have already referred, namely, that the FCDO may use its judgment, expertise and experience to decide on the manner of service on a state.

38 Applying those principles to the facts, I consider that it is appropriate to declare that service of the amended claim form and other documents required to institute the claim was made by email sent by the FCDO to the SMFA email address on 11 November 2022. Thus, it appears in the evidence before me that the claim was served through diplomatic channels. The FCDO served the claim on Syria in that email under cover of a full diplomatic note. It provided,

> "His Britannic Majesty's Foreign, Commonwealth & Development Office, London, the United Kingdom, presents its compliments to the Ministry of Foreign Affairs & Expatriates of the Syrian Arab Republic, and has the honour to transmit by way of service the attached 2 documents regarding the matter of the European Union –v- The Syrian Arab Republic, this being a proceeding instituted in the United Kingdom.

> Receipt of these documents by the Ministry of Foreign Affairs & Expatriates of the Syrian Arab Republic is deemed as service upon the defendant State under the State Immunity Act 1978 of the United Kingdom.
>
> His Britannic Majesty's Foreign, Commonwealth & Development Office, London, the United Kingdom, avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Syrian Arab Republic the assurances of its highest consideration."

That service had taken place following a review of the claim by the relevant geographical desk of the FCDO, namely, the Syria Unit, Middle East and North Africa Department, for any political sensitivities arising.

39 The claim had been transmitted through the FCDO to the SMFA. The FCDO's email was transmitted by being sent electronically from the FCDO to the SMFA's email server or inbox and it was, in my judgment, received at the time that it arrived by such electronic transmission. That the email was transmitted to the SMFA through the FCDO appears to me to be clear from the evidence before me. Thus, the FCDO received a "read" receipt immediately after sending its email indicating that its email of 11 November 2022 had been received. This "read" receipt provided,

> "This is the mail system at host mofaex.gov.sy.
>
> Your message was successfully delivered to the destination(s) listed below. If the message was delivered to mailbox you will receive no further notifications. Otherwise you may still receive notifications of mail delivery errors from other systems.
>
> The mail system"

and then it specifies that the mail system was "info@ mofaex.gov.sy … virtual service".

40 Conversely, the FCDO did not receive a mail delivery error or other bounce-back message indicating that the emails were undeliverable. There is, thus, no reason to believe that the SMFA email address was out of date or out of use. On the contrary, all the evidence presented to me indicates that the relevant SMFA email address was accurate at the time of the sending. Thus, the email address was sourced from the public website of the SMFA. The Syrian Embassy to the EU in Brussels, itself, copied the SMFA email address into its correspondence with Allen & Overy or, at the least, did not amend or remove that email address when responding to Allen & Overy's correspondence. The SMFA email address is the same email address that the FCDO used to serve Syria in the 2017 proceedings, and which Allen & Overy used to serve documents in those earlier proceedings, and Syria has had notice of this claim and has served a defence. Despite that, it has never contended that the SMFA email address was incorrect nor that the emails sent to that address were not received or could not be accessed, nor that the FCDO's email of 11 November 2022 did not count as an effective transmission and receipt for some other reason.

41 The procedural requirements of CPR 6.44 and CPR 6.45 have, in my judgment, been complied with. Furthermore, I have expert evidence before me from Mr Ian David Edge to the effect that none of service by email, by post or by courier is prohibited under Syrian law.

42 For those reasons, it appears to me that the Claimants are entitled to a declaration that Syria was validly served on 11 November 2022, being the day on which the FCDO's email was received on the SMFA's email server.

43 In light of that conclusion, it is not necessary for me to consider the Claimants' alternative claim for a declaration that service was validly effected by the email of 29 July, on the basis that Syria had agreed to accept service in that manner pursuant to section 12(6) of the State Immunity Act 1978, and it appears to me to be inappropriate to do so. Also, given my conclusion in relation to the validity of the service by the FCDO on 11 November 2022, I do not need to, and do not, consider the application to extend the time for service, which is made only on the contingency that the court should find that the claim form has not been validly served.

44 I do, however, make orders validating the steps which were taken to serve this application on Syria and to provide for the future service of documents, other than the amended claim form, in these proceedings. The relevant principles are set out in CPR 6.27, by reference to CPR 6.15, namely, that the court may authorise service of a document, other than the claim form, by an alternative method or in an alternative place and may validate such service, retrospectively, where there is good reason to do so.

45 It is established that those powers may be exercised in relation to service out of the jurisdiction (see, in particular, *Abela v Baadarani* [2013] UKSC 44; [2013] 1WLR 2043 at paras.19 to 20).

46 There appears to me to be good reason to authorise the Claimants to serve the application on Syria by email to the SMFA and by email and courier to the Syrian Embassy in Brussels, because I can be satisfied, and am satisfied, that the application and its listing has come to Syria's attention, that Syria has failed to provide any operative address for service within the jurisdiction, and that there is some evidence to support the inference that Syria, acting through employees of the Syrian Embassy in Brussels, is now taking steps to avoid or delay service.

47 For those reasons, I will make orders which validate the steps which have been taken to serve the application on Syria, and to make similar provision for future service of documents in these proceedings.

48 Those being my conclusions on the application, I will now consider in more detail the terms of the orders which should be made.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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