IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT (QBD)
[2019] EWHC 2833 (Comm)

No. CL-2019-000170

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 4 October 2019

Before:

MR JUSTICE JACOBS

B E T W E E N :

FBN BANK (UK) LIMITED — Claimant

- and -

MANSELL GHANA LIMITED — Defendant

MS. N SHAH (instructed by Norton Rose Fulbright) appeared on behalf of the Claimant.

THE DEFENDANT was not present and was unrepresented.

J U D G M E N T

MR JUSTICE JACOBS:

1 In this case I am asked to grant permission to the claimant to apply for summary judgment in circumstances where the defendant has neither acknowledged service nor put in a defence. It is permissible for the court to consider applications for summary judgment in those circumstances pursuant to CPR 24.4.1. The principles guiding the exercise of the court's discretion were summarised by Christopher Hancock QC, sitting as a Deputy High Court Judge, in *Punjab National Bank (International) Ltd v Boris Shipping Ltd* [2019] EWHC 1280.

2 The relevant requirements are that I should be satisfied that the defendant had an opportunity to participate in the proceedings and, if necessary, to challenge the court's jurisdiction; secondly, I should be satisfied that the claim has been validly served; thirdly, that the court has jurisdiction to hear it; fourthly, that there is a reason why summary judgment is being requested rather than simply the claimant applying for a default judgment. I am satisfied that all of those requirements are met.

3 First, for reasons which I will explain in a moment, this is a case where the defendant has had ample notice of the proceedings and at one stage had English lawyers acting on his behalf. The question of notice is tied up with the question of service, to which I will come in due course.

4 Secondly, there are questions as to whether the claim has been validly served. In the present case, numerous methods of service have been employed and I will describe those in due course, but I am satisfied that the claim has been validly served for reasons I will explain in a moment.

5 Thirdly, it is clear that the court has jurisdiction to hear the claim. I have been shown the relevant contractual arrangement, which is a facility agreement between the claimant bank and the defendant, who is a commodity trader. That contains an express jurisdiction clause giving the English court jurisdiction.

6 Finally, there is a perfectly good reason why the claimants are seeking summary judgment rather than default judgment, the reason being that if all the claimants had was a default judgment that may not be enforceable in Ghana. If, however, there is a summary judgment, then the judgment may be more readily enforceable there.

7 So, those are the requirements, but it is necessary for me to say something more about the question of service which is a matter governed by the English procedural rules on service which are set out in Part 6 of the CPR. In the present case, permission to serve out of the jurisdiction was not required because there was a contractual agreement which gave the English court exclusive jurisdiction. It was not therefore necessary for the claimants to come to court to ask for permission before they took steps to serve their proceedings out of the jurisdiction.

8 The question which arises, however, is how and where they, in those circumstances, were to go about serving the defendant. The starting point for that in the context of serving a claim form outside the jurisdiction is CPR 6.40. Under CPR 6.40(3) there are a number of ways in which of service of a claim form or other document can be served. One of the methods is in accordance with rules set out in CPR Rule 6.42, which I will come to in a moment. That is the effect of CPR 6.40(3)(ii). The other method provided for by CPR 6.40(3)(c) is:

"any other method permitted by the law of the country in which it is to be served".

9 The claimants in this case rely upon both 6.42 and any other method permitted by Ghanaian law and to some extent there is an overlap between them in terms of the steps which have been taken, but it is important to bear in mind that if either method has been complied with that is sufficient service for English purposes.

10 I start with 6.42, which is expressly referred to in 6.40. The relevant part of 6.42 which applies in this to Ghana, which is a Commonwealth country which is not party to the Hague Convention, is 6.42(3). This provides that certain other methods of service provided for in that rule are not available and "the party or the parties' agent must effect service direct, unless Practice Direction 6B provides otherwise". There is no suggestion that Practice Direction 6B provides otherwise in the case of Ghana. Therefore, the position is that the claimant was required, and indeed were entitled, to serve direct, in other words not through judicial or consular authorities as provided for earlier in CPR 6.42. A question arises as to what is meant by serving direct and there is no authority which has addressed this point. But Ms Shah, who has appeared for the claimant in this case before me this morning, the defendant not appearing, is correct in her submission that in order to understand service direct one can and should look at other provisions of the CPR dealing with service.

11 One of the provisions which is relevant in that context is CPR 6.5, which describes how certain documents can be served personally. I should say that the claim form is not a document which is required to be served personally, but of course it can be served personally. If a claim form is to be served personally it can be served or must be served under 6.5(3)(e) "on a company or other corporation by leaving it with a person holding a senior position within the company or corporation".

12 In addition, CPR 6.9 provides a set of rules which are applicable where the personal service rules do not apply and the claimant does not wish to effect personal service under r.6.52. The position here is that the claim form must be served on the defendant at a place shown in the table set out in 6.9(2). In the case of a foreign company, that means "any place within the jurisdiction where the corporation carries on its activities or any place of business of the company within the jurisdiction". CPR 6.9, as I have described, identifies the place at which service is to be effected. It does not describe the manner in which service is to be effected, applying English principles. Those are to be found CPR 6.3, which sets out various ways in which a claim form can be served. These include personal service, first class post and leaving it at a place specified in r.6.7, 6.8, 6.9 and 6.10.

13 So, that is the structure of the CPR. The position is that the claimant has taken numerous and exhaustive steps to serve the defendant with the claim form and subsequent application notice.

14 As far as English law service is concerned, by which I mean service coming within CPR 6.42, it seems to me that there has, in this case, clearly been service which has been direct. This has been effected in a number of ways, any one of which is sufficient. The first and primary method of service which has taken place, and upon which the claimant relies, is service by a gentleman whose job is to act as bailiff in Ghana. He has sworn an affidavit which explains what he did on 28 March 2019. He is Mr Vincent Abu Tetty and he has explained how he left the claim documents with a personal assistant to the manager of the defendant at an office of the defendant company in Adabraka, Accra. The reason that he went to that particular office is that he made inquiries of the defendant's Ghanaian lawyers

and he was told that he should go there. It seems to me that what has happened, therefore, is that there has been personal service within 6.3 by leaving the relevant documents at a place specified in r.6.9, namely a place in the jurisdiction of Ghana where the corporation carried on its activities or any place of business of the company within the jurisdiction.

15 That seems to me to be sufficient, but there were other steps which were taken as well, each of which seem to me to qualify and I will just identify those. The claim form and other related materials were posted to a post office box address which had been specified in cl.32.2 of the facility agreement and which had also been used by Mansell by the defendant in correspondence. Again, it seems to me that that is sufficient service because it is permissible to serve by post. That is an appropriate method of service. The relevant place is that identified in CPR 6.9.

16 The next qualifying method of service is that the claimants, through their Ghanaian lawyers, posted the claim documents to a number of other addresses. The addresses which were identified were in the Tema Heavy Industrial Area of Tema in Ghana. This appears to be part of Greater Ghana. The addresses there had been identified by the claimants through company searches and they had also been used by the defendants themselves in Ghanaian proceedings and I have been shown a number of documents in which those addresses are set out. Again, it seems to me that posting to those addresses is an appropriate method of service provided for in 6.3 and the relevant addresses are places where the corporation carries on its activities or has a place of business within 6.9.

17 Another address was also identified, PO Box 14951, Accra, Ghana, which had been listed on a company search. The documents were posted there as well. Again, it seems to me, for reasons which I have given, that that qualifies as appropriate service.

18 Finally, the position is that the company secretary of the defendant is a law firm called Minkah-Primo & Company in Accra. The documents were hand delivered on 13 June 2019 by Mr Tetty, the bailiff, and again it seems to me that that would qualify as service, this time under CPR 6.5, which, as I have already indicated, permits personal service by leaving it with a person holding a senior position within the company or corporation. It seems to me that in circumstances where the documents are delivered to the company secretary, which is a law firm, that the requirements of 6.53(b) are satisfied.

19 I have hitherto dealt with service under CPR 6.42. As I indicated at the outset, it is permissible, in addition, under CPR 6.40, to serve any other method permitted by the law of the country in which it is to be served. In that context, I have been referred to the provisions of Ghanaian law which are set out in s.263 of the Companies Act 1963 (Ghana). This statute provides for a principal method of service and it describes an alternative method of service. Section 263(1) provides that:

> "A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company or the latest office registered by the Registrar as the registered address of the company."

Section 263(4) provides for a default or alternative method:

> "If it shall be proved that any document was in fact received by the board of directors, managing director or secretary of a company such document shall be deemed to have been served on the company notwithstanding that service may not have been effected in accordance with the foregoing subsections of this section."

Although Ms Shah did not put the case this way in her written argument, it seems to me that on the materials which I have been shown that service has, in fact, been effected in accordance with s.263(1).

20 The position here is that the Registrar General's Department in the Ministry of Justice has identified, in a letter dated 28 May 2019, two registered addresses of the defendant company. The letter reads:

> "We refer to your letter dated 7 May 2019 in relation to the abovenamed company. A search conducted on our records revealed the following registered address, Plot No IND/4/444/12A, Tema Heavy Industrial Area, Tema, Ghana, PO Box GP3146 Accra."

For reasons which I have already indicated when dealing with English service, the evidence before me is that documents were, indeed, sent by post to both of those registered offices and it therefore seems to me that service has been effected in accordance with a method permitted by the law of Ghana and coming within s.263(1).

21 But even if that conclusion were wrong, there is very considerable evidence in this case that the documents have, in fact, been received by the managing director or the secretary of the defendant so as to come within s.263(4). The position here is that a number of steps have been taken which evidence this. First of all, the documents had been sent to the PO box address at GP3146, GPO Accra. According to information received from the Registrar General's Department, that address is not only the address of the defendant, but also the address of Rami Mohammed Adnan El-Ashkar, who is the managing director. That seems to me to indicate the document was, in the ordinary course, received by him. That, to my mind, is confirmed by the fact that Thomas Cooper had been previously instructed, although not formally on the record in these proceedings, and corresponded with the claimant's solicitors on a number of occasions. The only sensible conclusion to be drawn from that correspondence is that senior management of the defendant, who must include the managing director or possibly the board of directors in the context of major litigation, are aware of the proceedings and the service which has been effected upon them.

22 In addition, the documents have been sent directly by email to the managing director as well to the general manager and no bounce backs have been received. Finally, the documents have been hand delivered to the company secretary, namely the law firm that I previously identified, and that seems to me to come within s.263(4) because the secretary of the company is expressly identified as a person who is relevant for the purposes of that section.

23 So, having considered all of those matters, there is no doubt in my mind that there has been proper service of the claim form. It is still necessary to serve the application notice for summary judgment. That was done by sending the documents to five addresses by first class post and also by delivering the documents to the company secretary as well. The addresses to which the documents were sent include the two addresses in Tema and the PO box 3146, to which I have already referred. I indicated the documents were hand delivered to the secretary, but they were sent by post to the company secretary as well at two addresses. There is no doubt in my mind that that is sufficient service, applying the same principles that I have previously identified under the CPR which entitled documents to be sent by post to the business addresses in the manner which has happened.

24 So, for all those reasons, it seems to me that there has been proper service in this case. The defendants had a full opportunity to participate in these proceedings. The time for making any jurisdictional challenge has elapsed. There is a good reason for seeking summary judgment and I am prepared to hear the application.

LATER

25 This is an application by the claimant pursuant to permission which I granted early this morning for summary judgment against the defendant in relation to sums of principal interest and related expenses which are alleged to be due under a facility agreement between the parties. The test for summary judgment is set out in CPR 24.2 and I need to be satisfied that the defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why the case should be disposed of at a trial.

26 The background to the case is as follows. The claimant is a bank incorporated in England. The defendant ("Mansell") is a commodity trader registered as a company in Ghana and has been a customer of FBN, the claimant, for several years. The parties entered into an uncommitted revolving stock import finance agreement on 3 September 2010 and this was amended and restated on a number of occasions thereafter, but I will simply refer for convenience to the "facility agreement" as encompassing the original agreement and all the subsequent changes.

27 Under the agreement, the bank made available to Mansell a facility which enabled them to borrow monies towards importing various commodities into Ghana, warehousing them and distributing them and the particular commodity which gives rise to the present claim is sugar. The facility agreement is governed by English law and, as I indicated in the earlier judgment, contains a jurisdiction agreement in favour of the English court. There were a number of terms of the facility agreement which are fairly standard. The provide essentially for repayments to be made on a particular date and for interest to be paid. I will come to the details of that in a moment.

28 The claimant adduced evidence through a witness statement of Mr Thomas Kelly which was served dated 2 July 2019. That witness statement goes into some detail in relation to explaining the background to the transaction and the monies which are said to be owed and, as will be apparent from the judgment I gave earlier this morning, the defendant has not put in any evidence of its own to contradict anything which Mr Kelly has said. The defendants were previously represented, although not formally, by solicitors who were not formally on the record, but nevertheless at one stage did give an indication that this was a matter which would be heavily litigated. But notwithstanding that, the defendants have not acknowledged service or put any materials before the court to explain what their position is and why the sums which the claimant says are owed are not, in fact, owed.

29 There are three claims which the claimants advanced in these proceedings. The first is for certain storage advances which were made in the total sum of USD 6,637,061.94. The position under the facility agreement is that those advances should have been repaid on 22 December 2015. That is the effect of cl.9.1.2 of the contract, which in its restated form provided as follows:

> "Subject to the terms of this agreement, the borrower shall repay each storage advanced by the earlier of…" and then a number days are set out and the final one is (e): "… the final maturity date or the final repayment date of that advance if earlier."

I take that from one of the amendments to the agreement which was dated 10 June 2014. The term "final maturity date" is itself referred to and defined in that letter.

> "Final maturity date means the date 560 days after the effective date, unless the facility is extended in accordance with cl.2.3 (extension)."

The claimant's case, which has not been contradicted, is that the effect of that provision is to provide for a repayment date of 22 December 2015 and that is the earliest date of the various dates which are set out in cl.9.1.2.

30 As far as the sums outstanding are concerned, Mr Kelly's witness statement indicates that the sums which I have indicated are outstanding and that is supported by documents which he has annexed to his statement. The documents are of some importance in light of two contractual provisions in the facility agreement to which I should refer and to which reference has been made in the course of argument. Clause 33.1 provides:

> "Accounts in any litigation or arbitration proceedings arising out of or in connection with a finance document. The entries made in the account maintained by the lender are *prima facie* evidence of the matters to which they relate in the absence of manifest error."

Clause 33.2 provides, under the heading "Certificates and Determinations":

> "Any certification or determination by the lender of a greater amount under any finance document is, in absence of manifest error, conclusive evidence of the matters to which it relates."

31 The evidence before me in the form of the exhibit to the witness statement of Mr Kelly includes two documents which are relied upon as being sufficient documents which fall within the provisions which I have just referred to. One document is in the form of a spreadsheet sets out the detailed figures which it is said by Mr Kelly are taken from the claimant's accounts. Those figures show entries for various items, including those which are claimed in these proceedings.

32 That document may well be sufficient for the purposes of the claimant, but that was put beyond any doubt by a document which is at p.184 of the file which I have been provided. This is headed "Mansell Ghana Limited Overall Position" and is signed by Mr Zac Wahar and Mr Chris Hinds and against their signatures are the words "Certified correct and up to date". The sum which they certify as correct and up to date are those which are claimed by the claimant as principal is USD 6,637,061.94.

33 It seems to me that in the light of those documents and in the absence of any argument advanced as to why there is any error, some manifest error, the claimant has sufficiently demonstrated that this money is due and owing to them and that there is no real prospect of the defendant advancing a successful defence in relation to it.

34 As far as interest is concerned, I have been provided with a detailed schedule which explains how interest has been calculated for various sums which were outstanding at different points in time and how credit has been given for certain receipts which came in in the course of 2018. The overall claim, up until 2 October 2019, is USD 692,673.56. That is the sum that is claimed in these proceedings.

35 The basis of that claim are the provisions which are set out in cl.13.1.1 of the facility agreement and I should just identify what that says. "The rate of interest on each element of the outstandings (excluding short collateralised advances) is the percentage rate per annum, which is the aggregate of (a) margin and (b) LIBOR." The relevant figures with which I am concerned are 5.5 per cent, being the applicable margin to which LIBOR has been added. I have been provided with, as I have indicated, a detailed calculation of interest which explains how the figure has been arrived at on a day by day basis. It seems to me that Ms Shah, who has appeared for the claimant, is correct in her submission that the document which I have been provided with is a determination by the lender which, in the absence of manifest error, is conclusive evidence of the matters to which it relates. As I have indicated, there has been no suggestion by the defendants of any manifest error in this document, which is an updated version of documents which were previously in the exhibits and which were served upon them.

36 In those circumstances, again, there is no real prospect of success of the defendant successfully defending the claim for interest.

37 The final element of the claim concerns certain costs which were incurred in relation to the stamping of certain documents in Ghana and which had been invoiced by the claimant's Ghanaian lawyers. The sum claimed is USD 140,000. There are various provisions of the contract which were relied upon by Ms Shah, but the simplest one to which reference can be made is cl.16.3, which is headed "Stamp Taxes", and provides: "The borrower shall pay and, within three business days of demand, indemnify the lender any cost, loss or liability the lender incurs in relation to all stamp duty, registration, other similar taxes payable in respect of any finance documents." I have been shown the demand that was made and the evidence indicates that the demand was not met. It seems to me again that there is no real prospect of the defendant defending the claim for this and no defence has been put forward notwithstanding the demand and the case advanced in these proceedings.

38 So, for all those reasons, there is no real prospect of the defendant defending the case and I see no reason to have a trial and in the circumstances it is appropriate for the court to grant summary judgment for the sums which the claimant has claimed.

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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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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