CL-2021-000629

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

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

[2023] EWHC 2531 (Comm)

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

12 October 2023

Before :

MASTER DAVISON

- -

Between :

GPGC LIMITED

Claimant

- and -

THE GOVERNMENT OF THE REPUBLIC OF GHANA **Defendant**

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- -

Mr James Willan KC and **Ms Catherine Jung** (instructed by **Stephenson Harwood**) for the **Claimant**
Mr Stephen Houseman KC and **Mr Luke Tattersall** (instructed by **White & Case**) for the **Defendant**

Hearing date: 29 September 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Introduction

1. This is my judgment on an application to set aside an order permitting service of documents by an alternative method. The documents were served in the course of enforcement proceedings and the effect of the application, if upheld, would be to send those enforcement proceedings back to square one. I will first set out the essential background. On 26 January 2021, GPGC (a majority-owned Trafigura entity) obtained a final award in its favour against the Government of Ghana ("Ghana") in arbitral proceedings seated in England. The award was for approximately US$140m. It arose out of a written agreement for the installation and operation of two power plants, which Ghana (as the tribunal found) had unlawfully terminated prior to the expiry of the contractual term.

2. On 4 November 2021, Cockerill J made an *ex parte* order ("the Cockerill order") granting (i) GPGC leave pursuant to section 66(1) of the Arbitration Act 1996 to enforce the award in the same manner as a judgment or order of the High Court; (ii) judgment in the terms of the award. GPGC served the Cockerill order in accordance with section 12(1) of the State Immunity Act 1978 ("the SIA" or "the 1978 Act"), which provides, in relevant part, as follows:

> "(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 other 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 other document is received as aforesaid.
>
> (4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) has been complied with in the case of those proceedings."

3. Service was effected by this method on 10 May 2022; (so it took about 6 months). The deadline for challenging the Cockerill order was 2 months and 22 days after service – the two months having been added to the normal deadline by virtue of section 12(2). The deadline date was 1 August 2022. No challenge was made.

4. On 17 March 2022, GPGC issued applications for charging orders in relation to five London properties in which Ghana had a freehold or leasehold interest. On the same day, GPGC also issued an application for alternative service pursuant to CPR rule 6.15. On 11 April 2023 (having first forwarded the charging order applications to the FCDO for comment in accordance with paragraphs 22.99 to 22.102 of the King's Bench Guide), I made interim charging orders and directed that a hearing to determine whether those ICOs should be made final would be listed for 30 May 2023.

5. On 28 April 2023, Robin Knowles J made an order ("the Knowles order") permitting alternative service upon Ghana by (i) post to its London High Commission addresses; and (ii) email to a series of addresses listed in the order and its appendix.

6. GPGC served the ICOs, the Knowles order and other related documents on 5 May 2023 by post and by email. In response to one of those emails, Stephenson Harwood (GPGC's solicitors) received responses from Grace Mbrokoh-Ewoal, a legal counsel in the Ministry of Finance (whose email address was one of those listed in the appendix to the Knowles order). In particular, Ms Mbrokoh-Ewoal sent an email on 5 May 2023 specifically acknowledging receipt of the documents. On 24 May 2023 Stephenson Harwood received an email from White & Case stating that it expected shortly to receive instructions to act for Ghana and seeking to agree a revised timetable in relation to GPGC's applications. The 30 May 2023 hearing was subsequently vacated by consent.

7. On 23 June 2023, Ghana issued an application to set aside the Knowles order. That is the application before me. The substantial basis for the application was that GPGC had been

obliged to serve not only the Cockerill order but also the applications for the charging orders and the ICOs themselves by the diplomatic procedure set out in section 12(1) of the 1978 Act.

8. On 21 July 2023, Ghana filed the objections it wished to raise in relation to making the ICOs final. On 2 August 2023, (and as had been foreshadowed in the charging order application for that property), GPGC made an application for a receivership order in relation to Ghana's leasehold interest in one of the London properties, Regina House.

Grounds relied upon in support of the application to set aside the Knowles order

9. As stated above, Ghana's position is that the applications for charging orders over land and (as respects Regina House) the receivership application were all required to be served through diplomatic channels because each application engaged section 12(1) SIA 1978. And even if section 12(1) was not engaged, CPR rule 6.44 (see below) was engaged and could only be displaced under CPR rule 6.15 (as read with rule 6.27) if there was "exceptional reason".

10. GPGC's position is that the "writ or other document required to be served for instituting proceedings" against Ghana for the purposes of section 12(1) was the Cockerill order, which was served through diplomatic channels. The applications for charging orders and a receivership order were simply steps in the enforcement proceedings so instituted and could therefore be served by one of the ordinary methods of service, or by alternative service. CPR rule 6.44 simply reflected and was coterminous with section 12(1) and so did not present GPGC with a further hurdle substantially to the same effect as section 12(1) itself. But, if it did, it could be displaced for "good reason" (the actual wording of CPR rule 6.15), which test was amply met.

General Dynamics United Kingdom Ltd v State of Libya

11. In serving the Cockerill order via diplomatic channels in compliance with section 12(1) of the SIA 1978 GPGC was following the principle established in *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22 [2022] AC 318. In that case, Teare J had dispensed with diplomatic service of an arbitration claim form and enforcement order because of the state of civil unrest and instability in Libya. Libya applied to set aside Teare J's order on the basis that diplomatic service under section 12(1) SIA was mandatory. General Dynamics' response was that the arbitration claim form did not have to be served (see CPR rule 62.18(1)) and the order giving permission to enforce the award was not one "instituting proceedings". Therefore section 12(1) was not engaged. This argument found favour with the minority. The majority however held (quoting from the Headnote in the Appeal Cases report) that "in the particular context of proceedings to enforce an arbitral award against a state, the need for proper notice and a fair opportunity to respond required that the state be served with either the arbitration claim form, in a case where the court required the claim form to be served, or, if it did not so require it, the order granting permission to enforce the award; that in either case that document was a 'document required to be served for instituting proceedings against a state' and fell to be served in accordance with section 12(1)".

12. *General Dynamics United Kingdom Ltd v State of Libya* did not directly confront the issue that Ghana has raised in this application, perhaps put most pithily in paragraph 6(b) of Mr Houseman KC's Supplemental Note for the hearing, *viz*: "What matters post-Libya is whether "distinct" proceedings are initiated against a sovereign state, i.e. proceedings of a kind which international comity, sovereign equality, administrative practicality and due process require to be brought to that state's attention by the formal means of diplomatic service". Mr Houseman KC submitted that the essential focus in the *Libya* case was on the "nature and substance" of the legal process before it. Here, he submitted, the Cockerill order was an adjudicative process which led to a final monetary judgment. What then followed was "enforcement in the strict sense" involving one or more "distinct process[es]". These processes engaged section 12(1) because each was a separate set of "proceedings" for the purposes of the section. By contrast, Mr Willan KC submitted that the applications for interim charging orders were merely steps within the existing "arbitration enforcement proceedings" (the wording of CPR rule 62.17).

Discussion

13. The starting point is that the statutory perspective of section 12 is the commencement of proceedings. The document(s) requiring service through diplomatic channels are "any writ or other document required to be served for *instituting proceedings* against a State" and it is the "time for entering an appearance" which, by section 12(2), is stipulated to be extended by a period of 2 months. In most cases, the "writ or other document" will be a form of originating process, classically a claim form. But it could be, for example, a referral to the court by the Chief Land Registrar by originating summons, as happened in *Westminster City Council v Islamic Republic of Iran* [1986] 1 WLR 979, or, as here and also in the *Libya* case, an arbitration enforcement order, or, to take an example given by Mr Willan KC in his oral submissions, an application against a state for third party disclosure. The important characteristic of each such document, for present purposes, is that it marks the point at which the court's jurisdiction is asserted over the state and that party is brought before the court for the first time. This, Mr Willan KC submitted, was the relevant dividing line. Once that stage had been passed, anything done to progress those proceedings was not subject to section 12.

14. The statutory purpose of section 12 SIA was described at paragraph 76(3) of the majority's judgment in *Libya* (given by Lord Lloyd-Jones JSC):

> "A particular purpose of section 12 is to provide a means by which a state can be given notice of proceedings against it and a fair opportunity to respond. This rationale applies fully to the service of an order giving permission to enforce an arbitral award. As Kannan Ramesh J pointed out in *Van Zyl* [2017] 4 SLR 849, para 43, although the order is not in itself an originating process, it will often be the first notice to the defendant state of an attempt to enforce the arbitral award in the forum in question. (See also Hamblen J in *L* [2015] 1 WLR 3948, para 40 .) The defendant state must be given notice of the proceedings so that it has adequate time and opportunity to apply to set aside the order for enforcement, *inter alia* on grounds of state immunity, before any further steps are taken to enforce the award. A document giving such notice is a document required to be served for instituting proceedings against a state within section 12(1)."

15. The "further steps" referred to by Lord Lloyd-Jones JSC would not be further "proceedings" and Mr Houseman KC did not argue otherwise – if they were merely interlocutory or intermediate steps on the way to a final judgment in the relevant proceedings. His point was that the applications for charging orders in this case could not be so characterised because each was a distinct set of proceedings in its own right. For the reasons that follow, I cannot accept this:

    1) The jurisdictional basis for the charging orders is the Cockerill order. That order is the root source of the power to enforce and a challenge to that power would be in the form of an application to discharge or vary the Cockerill order. The enforcement proceedings bear the same claim number as the Cockerill order and, so far as limitation is concerned, have no separate existence. So, even if the test to be applied was to ask whether the proceedings were "distinct", that test would not be made out in this case.

    2) To the contrary, enforcement proceedings are a classic example of "further steps" in existing proceedings. In *L v Y Regional Government of* X [2015] EWHC 68 (Comm) [2015] 1 WLR 3958 Hamblen J (as he then was) held that an arbitration claim form issued to enforce a peremptory order made by the arbitral tribunal fell within section 12(1) SIA. But he went on to say that "applications within those proceedings would not be subject to section 12(1)"; see paragraphs 35 – 36. Given the context, he must clearly have had in mind enforcement proceedings. So must the Supreme Court in the *Libya* case because (having just referred to Hamblen J's judgment with approval) they refer specifically to "steps to enforce the award".

    3) This approach which, as Mr Willan KC contended, characterises the "document required to be served for instituting proceedings" as that which first seised the court of jurisdiction over the relevant party and brought that party before the court for the first time is the natural and ordinary construction of the words of section 12 and one which marks a clear distinction between that category of document and others – a distinction which is easy to draw in practice. By contrast, Mr Houseman KC's approach is vague and offers no such clear dividing line. A particular vice is that many interlocutory steps could be called "distinct".

And many could be said to have their own peculiar "nature and substance" and raise their own particular issues. But that would not detract from their character as "further steps" in existing proceedings or "the continuation of ongoing proceedings"; (see next paragraph). A test of "distinctness" would, it seems to me, generate unwanted and undesirable confusion and satellite issues.

4) As a footnote to the two preceding paragraphs, I note that the cases of *Van Zyl* and *L v Y*, both cited with approval by the Supreme Court, clearly adopted the test proposed by Mr Willan KC. In the Singaporean case of *Van Zyl*, Kannan Ramesh J, having held that an order enforcing an arbitral award had to be served via diplomatic channels given that it "will often be *the first hint* that the respondent State has of the impending enforcement proceedings in Singapore, particularly if the award is a foreign one", said:

> "The important distinction in section 14 [the Singapore equivalent of s. 12 SIA 1978] is not between originating processes and non-originating processes as a matter of form, but between the 'institution' of new proceedings (of which the State is unaware) and the continuation of ongoing proceedings (of which the State already has notice) …" (paragraph 44)

And in *L v Y* Hamblen J referred to the arbitration claim form in these terms:

> "It involves bringing the YRG before the court *for the first time* in order to participate in court proceedings for the purpose of obtaining a court order." (paragraph 40)

5) The construction urged by Mr Houseman KC would not only be contrary to the approach taken hitherto by high (indeed, the highest) authority and difficult to apply in practice, but it would also be productive of great inconvenience. A judgment creditor will often take multiple steps to enforce. If each one required service through diplomatic channels it would greatly prolong the enforcement process and leave many orders in place on a protracted but "interim" basis. Courts strive to avoid such a construction; see Bennion on Statutory Interpretation 8th Ed at 13.4. Although Mr Houseman KC's submissions laid emphasis on the need for international comity and respect for sovereign states, it is hard to see how either principle would be advanced or, indeed, how the underlying aims of the State Immunity Act 1978 would be served if his construction was adopted. So far as the latter point is concerned, the statutory purpose of the section (as described in that part of the judgment in *Libya* quoted in paragraph 14 above) was fulfilled by service of the Cockerill order. That purpose would not be further promoted if the requirement of diplomatic service were extended to each particular enforcement process. It is, indeed, notable that the language of the Act draws a distinction between "instituting *proceedings*" (section 12(1)) and "*process* for the enforcement of a judgment or arbitration award" (section 13(2)).

CPR rule 6.44

16. CPR rule 6.44, in relevant part, is in these terms:

> "(1) This rule applies where a party wishes to serve the claim form or other document on a State.
> (2) In this rule, 'State' has the meaning given by section 14 of the State Immunity Act 1978.
> (3) The party must file in the Central Office of the Royal Courts of Justice –
> (a) a request for service to be arranged by the Foreign and Commonwealth Office;
> (b) a copy of the claim form or other document; and
> (c) any translation required under rule 6.45.
> (4) The Senior Master will send the documents filed under this rule to the Foreign and Commonwealth Office with a request that it arranges for them to be served."

17. There is already authority that the rule is coterminous with section 12 SIA. This authority is the decision of Bryan J in *The European Union v The Syrian Arab Republic* [2018] EWHC 1712 (Comm). The judge made an order for alternative service in relation to an application for summary judgment brought against Syria (where a claim form had already been served via the

section 12(1) route and Syria had not engaged with the proceedings). Bryan J noted CPR rule 6.44 and said:

> "It was submitted to me today by [counsel for the EU] that this provision of the CPR is directed at service of the claim form, or other document required to be served for instituting proceedings. In other words the words 'or other document' are referring to documents which are identified in section 12(1) of the State Immunity Act 1978. It is those documents, i.e. the claim form or other document required to be served for instituting proceedings which must follow the service procedure set out in CPR 6.44. It seems to me that this is the proper and right construction of CPR 6.44. Therefore, CPR 6.44 is not concerned with service of documentation once proceedings have been served upon a State." (See paragraph 44.)

18. Mr Houseman KC submitted that Bryan J was wrong and that the rule applied to every document that required to be served upon a state. If that were so, it would mean that the Civil Procedure Rule Committee had hugely extended the scope of section 12 and imposed a requirement of diplomatic service for all documents – even down to (as Mr Willan KC observed) a costs schedule. A more unrealistic construction would be hard to imagine. Albeit that Bryan J did not have the benefit of argument (because Syria took no part) I respectfully consider that he was correct.

19. But even if rule 6.44 did apply to all documents to be served on a state (including therefore the applications for the charging orders and the interim charging orders themselves) there was, in my view, "good reason" to depart from it and authorise alternative service under rule 6.15.

20. First, given that these documents did not fall within the scope of section 12(1), I see no basis to apply any stricter test than "good reason", which is the wording of rule 6.15. No authority was offered for the proposition that a stricter test should apply. On the contrary, Bryan J applied the "good reason" test in the *Syrian Arab Republic* case; see paragraph 57 of the judgment. And Butcher J did likewise in later proceedings between the same parties.

21. Second, the reasons set out in paragraphs 132 – 138 of Mr Bailey's second witness statement in support of the application before Robin Knowles J appear to me (as they appeared to him) to amount to "good reason". This is a case where to require service through diplomatic channels would generate multiple periods of serious delay. There is the added feature that the lease of Regina House will shortly expire and that property is therefore a rapidly diminishing asset. Lastly, delays in enforcement proceedings are inimical to justice; see paragraph 15(5) above.

22. Ghana had other complaints concerning the Knowles order. That part of the order authorising service by email on a range of individuals in or connected to the Ghanaian Ministry of Finance (rather than the Ministry of Justice) was submitted to be inappropriate. I disagree. These were individuals with whom GPGC had had personal dealings and recent correspondence in connection with the underlying arbitration. They seem to me to have been appropriate candidates for service. Further, service by this method was indeed effective to transmit the papers to the Attorney General, (though precisely when and how this happened has not been disclosed by Ghana).

23. That part of the order authorising service by post to the High Commission addresses in London was attacked as being unlawful under the Vienna Convention (a point raised by Mr Houseman KC for the first time in his oral submissions). But it was not unlawful; see *Reyes v Al-Malki* [2019] UKSC 61 at [16]. This case was specifically drawn to Robin Knowles J's attention.

24. More generally, the Knowles order, or the procedure adopted to obtain it, was attacked on the grounds that no skeleton argument was provided to the judge, he was not invited to list an oral hearing and the period provided in which to apply to set aside or vary (7 days) was too short. Mr Houseman KC went so far as to invite me to make observations about the proper practice and processes to be followed when making an application of this sort. But I do not consider that appropriate and I will confine what I have to say to the case before me. The statement in support of the application from Mr Bailey ran to 150 paragraphs. It very fairly set out the issues

for the judge and it drew attention to the relevant authorities. A skeleton argument was not required by any rule or practice and, having regard to the full and cogently expressed statement from Mr Bailey, would have added very little other than reading time. It was open to the judge to list the application for a hearing if he felt that appropriate. He did not and I do not think that I would have done so either. I would agree that 7 days was too short a period, (though it was the time that is stipulated by CPR rule 23.10). I think that 21 would have been more appropriate. But that period was extended by agreement. No point has or could realistically have been taken by GPGC that the application to set aside the Knowles order was made too late. Taken on its own, a small criticism of this part of the order is not a basis to set the whole order aside (and nor did Mr Houseman KC so submit).

Conclusion

25. I refuse to set aside the Knowles order and so the bifurcated hearing must now proceed to consider whether to make the interim charging orders final and/or whether a receivership order should be made over Regina House.