Neutral Citation Number: [2023] EWHC 3165 (Comm)

Case No: CL-2022-000233

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 13 December 2023

Before :

MR JUSTICE BRIGHT

- -

Between :

(1) Doliaa SAS
(2) Ceca Gadis/Gaborprix

Claimants

- and -

Mediterranean Shipping Company S.A.

Defendants

- -
- -

Saira Paruk (instructed by Hill Dickinson LLP) for the Claimants
John Bignall (instructed by Sea Green Law Ltd) for the Defendants

Hearing date: 8 December 2023

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Approved Judgment

This judgment was handed down remotely at 10:00am on 13/12/2023 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

1. This judgment concerns the application of the Defendant to set aside the following Orders, which successively extended the time for service of the claim form:

   i) The Order of Robin Knowles J dated 6 October 2022 ("the First Order").

   ii) The Order of Waksman J dated 6 March 2023 ("the Second Order").

2. The underlying claim is for loss of or damage to cargo carried by MSC pursuant to a bill of lading dated 24 March 2021. Clause 5.1(b) of the bill of lading provided that carriage is subject to the Hague Rules. Pursuant to Article III Rule 6 of the Hague Rules, alternatively pursuant to clause 10 of the bill of lading, the claim was subject to a one-year timebar.

3. It is common ground that time started to run from 10 May 2021 and was due to expire on 10 May 2022. The Claimants issued their claim form against the Defendant on 9 May 2022.

4. The Defendant is incorporated in Switzerland and its registered address is in Geneva. That address was set out by the Claimant on the claim form. The initial period for service was until 9 November 2022.

5. The Claimant did not immediately seek to effect service on the Defendant in Switzerland. Rather, its solicitors, Hill Dickinson LLP, engaged the Defendant in correspondence, seeking both (i) to get its agreement to appoint English solicitors to accept service and (ii) to conduct negotiations with a view to settling the claim. Matters progressed over the next few months as follows:

   i) On 11 May 2022, the Claimants provided the Defendant with a copy of the claim form.

   ii) On 15 July 2022, the Defendant was invited to appoint solicitors to accept service.

   iii) On 18 July 2022, the Defendant asked for a copy of the bill of lading, which was sent the next day along with a further copy of the claim form.

   iv) On 20 July, the Defendant responded:

   > "… we are under no legal obligation to appoint [English solicitors to accept service] unless and until we are served properly with the claim form."

   This message also stated that the person handling the matter was away until 2 August 2022.

   v) Also on 20 July 2022, the Claimants replied suggesting that the Defendant should appoint solicitors to accept service in England, as it had done in the past. This message then stated:

> "If you are able to confirm the nominated solicitors, then we will recommend to our client that they wait until after 2 August to serve the same to allow your colleague to respond on the substantive points and with any settlement proposals. However, we cannot recommend to our client that they do nothing until 2 August. Can you please therefore confirm which English solicitors are nominated to accept service."

vi) The Defendant sent a without prejudice message on 21 July 2022.

vii) Further without prejudice messages were exchanged on 16 and 19 August 2022.

6. There were no further open or without prejudice exchanges and no other developments until 5 October 2022, when the Claimants applied under CPR 7.6 for a 4-month extension of time to serve the claim form, i.e., until 9 March 2023. The application was made without notice and on paper. It was not supported by a witness statement, instead setting out the grounds in the relevant section of the claim form, as follows:

> "The Claimants issued protective proceedings in this matter, due to the time sensitive nature of instructions and the pending time bar.
>
> The Parties have been engaged in ongoing discussions regarding the claim, whilst concurrently Hill Dickinson LLP made enquiries with the Foreign Process Section of the Court in relation to service out of the jurisdiction. Hill Dickinson were advised that it may take the Foreign Process Section of the Court up to five months to process and effect service of the required documents overseas. The Claimant would be prejudiced if they were not able to effectively serve proceedings on the Defendant.
>
> The Claim Form was issued on 09 May 2022 and the deadline for service out of the jurisdiction is 09 November 2022. This application for a 4 month extension of time up to and including 09 March 2023 is made within the period currently available for service.
>
> The Claimants respectfully request that the Court extend the time available for service of the Claim Form in order to facilitate the ongoing discussions with the Defendant and ultimately, if required, providing for additional time in which to serve the Claim Form if such a step is deemed necessary."

7. I pause here to note two things:

i) The Claimants thereby positively represented to the Court that they had been told by the Foreign Process Section ("FPS") that service of this claim form (and associated documents) might take up to five months. The Court was not told when the FPS had provided this information, but it was said to have been concurrent with the discussions with the Defendant. The implication was that the estimate of up to five months was the best information available to the Claimants at the time.

ii) The application notice further implied that the Claimants considered that an extension of four months, i.e., to 9 March 2023, would be sufficient. As at 5 October 2023, that extension gave the Claimants five months from the date of the application to complete service. Such an extension could only be sufficient if the Claimants either had already submitted the relevant documents with the FPS, or were just about to do so.

8. It was on this basis that the First Order was made, granting an extension to 9 March 2023. (When originally issued, the First Order stated that the period for service would end on 9 March 2022, but this was an obvious typographical error which appears to have been clarified.)

9. Also on 5 October 2022, the Claimants re-opened the without prejudice negotiations. I naturally know nothing about the substance of those negotiations except that they continued, one way or another, without success.

10. It seems that, in the course of those negotiations, there was discussion about the fact that the Claimants had obtained the First Order. This led to the Defendant saying on 10 January 2023 that they were confident that the First Order would be set aside, once proceedings had been served in Switzerland. This was a clear indication that the Defendant did not intend to appoint solicitors to accept service in England. I have seen nothing to suggest that this was prompted by a request to appoint solicitors to accept service in England, or that there had been any further request to that effect since 20 July 2022.

11. The message of 10 January 2023 prompted the Claimants to write asking the Defendant to appoint solicitors to accept service in England, but this was a forlorn hope in circumstances where (i) the Claimants had left this point lying since 20 July 2022 and (ii) they had just received a clear indication that the Defendant intended to be served in Switzerland. There was no further answer on this point, but the reality was that the Claimants had known for months that service of the claim form would have to be done in Switzerland.

12. The Claimants first submitted documents to the FPS on 6 February 2023. Thereafter, the Claimants made several efforts to check with the FPS that the documents were being processed, but were told by the FPS on 27 February 2023 that they could not be located and appeared to have been lost. On the same day, the Claimants submitted the documents again.

13. The Claimants had further communications with the FPS. On 27 February 2023, they were told that the documents had still not been processed and that service in Switzerland could take up to two months.

14. An estimate of two months was more encouraging than the figure of five months that had been referred to in the application of 5 October 2022. However, it was obviously not rapid enough that service was likely to be completed within the extension granted by the First Order, i.e., to 9 March 2023. By 27 February 2023, this was only 10 days away.

15. The Claimants therefore made a further application dated 3 March 2023, seeking a further extension of three months, i.e., to 9 June 2023. It was supported by a witness

statement made by Elizabeth Anne Elliott of Hill Dickinson LLP. Ms Elliott's statement explained (among other things) that documents had first been submitted to the FPS on 6 February 2023 but had been lost, resulting in a second submission on 27 February 2023. She also stated that the FPS had said on 1 March 2023 that they were presently processing applications dated 4 January 2023. She also said:

> "7. To expedite service, the Claimants invited the Defendant to provide details of a nominated English solicitor upon whom to effect service. The Defendant has consistently refused to do so, despite England being the Defendant's elected contractual jurisdiction."

16. Pausing for a second time:

i) Ms Elliott did not say that the claim had been time-barred since 10 May 2022, although she did quote the text from the earlier application, set out in paragraph 6 above.

ii) Ms Elliott did not say that the Claimants had known since early October 2022 that there was a backlog at the FPS and that it was taking a long time for documents to be processed. Unless read very carefully, her witness statement might have given the impression that this was only discovered on 1 March 2023.

iii) She said that the Claimants had initially been advised that service might take up to five months, but she did not say when. Nor did she highlight that, when received, this information made it logically necessary for the Claimants to lodge documents with the FPS immediately, i.e., in early October 2022; but that the Claimants had not acted as the information required.

iv) Paragraph 7 of Miss Elliott's statement (particularly the word "consistently") implied that there had been a continuing series of invitations to the Defendant to appoint solicitors to accept service in England, all of which had been declined. This was not the case.

17. It was on this basis that the Second Order was made, granting an extension to 9 June 2023.

18. Service was effected on 2 May 2023. This was two months and 3 days after the Claimants lodged the second set of documents with the FPS, on 27 February 2023. This confirms that the estimate of two months was reasonably accurate.

19. The Defendant issued this application on 26 May 2023. It was supported by a witness statement made by Margot Wastnage of the Defendant's solicitors, Sea Green Law Ltd. Ms Wastnage suggested that the Claimants had failed to take any steps to effect service of the claim form until February 2023, and that there was no reason why service could not have been effected during the claim form's initial period of validity. Ms Wastnage queried whether the Claimants had been full and frank with the Court in their application for the First Order, in early October 2022, by reason of the failure to draw attention to these matters and to point out that the claim was now time-barred.

20. Ms Wastnage also queried when the Claimants first asked the FPS how long it would take to effect service (she tentatively inferred not until shortly before the application of 5 October 2022) and queried whether the estimate of five months related specifically to service in Switzerland, given that on 27 February 2023 the FPS's estimate in respect of Switzerland was only two months, which seems to have been accurate.

21. The Claimants responded with a witness statement from Thomas Turner of Hill Dickinson LLP, which provided a fuller account of the sequence of events (as reflected earlier in this judgment), with a view to rebutting the general criticism of the Claimants' position.

22. Mr Turner did not answer Ms Wastnage's queries regarding the information provided to the Court in October 2022 in respect of the estimate of five months. All Mr Turner said about this was:

> "It was made clear in the application that the proceedings had not yet been served, and that we had been informed that the FPS was taking approximately five months to serve out of the jurisdiction at this time due to a backlog."

23. In her submissions on the Claimants' behalf, their Counsel, Ms Saira Paruk, said that it was reasonable for the Claimants to engage in settlement discussions before seeking to serve the claim form in Switzerland.

24. Ms Paruk also re-confirmed that, when the Claimants applied for the First Order, their understanding from the FPS was that service out of the jurisdiction could take up to five months and might do so in this case. Accordingly, she said, the information given to the Court when the Claimants applied for the First Order was correct, to the best of the Claimants' knowledge, and this is not a case where there was any failure to make full and frank disclosure.

25. I have been reminded of the relevant authorities, notably *ST v BAI (SA) (t/a Brittany Ferries)* [2022] EWCA Civ 1037, especially at [62]-[63] per Carr LJ:

> "62. For ease of reference, I summarise the relevant general principles as follows:
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> i) The defendant has a right to be sued (if at all) by means of originating process issued within the statutory period of limitation and served within the period of its initial validity of service. It follows that a departure from this starting point needs to be justified;
>
> ii) The reason for the inability to serve within time is a highly material factor. The better the reason, the more likely it is that an extension will be granted. Incompetence or oversight by the claimant or waiting some other development (such as funding) may not amount to a good reason. Further, what may be a sufficient reason for an extension of time for service of particulars of claim is not necessarily a sufficient reason for an extension for service of the claim form;

> iii) Where there is no good reason for the need for an extension, the court still retains a discretion to grant an extension of time but is not likely to do so;
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> iv) Whether the limitation period has or may have expired since the commencement of proceedings is an important consideration. If a limitation defence will or may be prejudiced by the granting of an extension of time, the claimant should have to show at the very least that they have taken reasonable steps (but not all reasonable steps) to serve within time;
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> v) The discretionary power to extend time prospectively must be exercised in accordance with the overriding objective.
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> 63. Following up on the question of limitation, as noted in *Qatar* at [17(iv)] (and *Al-Zahra* at [52(3)]), it was stated in *Cecil* (at [55]) that a defendant's limitation defence should not be circumvented save in "exceptional circumstances". This is a phrase that needs to be approached with care; it is one about which the judge himself expressed reservations. At their outer limit, the words "exceptional circumstances" can be taken to mean "very rare" (or "very rare indeed"). In the present context, however, the phrase should not be taken to mean any more than its literal sense, namely "out of the ordinary". It means, as identified for example in *Hoddinnott* at [52], that the actual or potential expiry of a limitation defence is a factor of considerable importance. The factors in favour of an extension of time will have to be, either separately or cumulatively, out of the ordinary. Only in this way can the phrase "exceptional circumstances" be reconciled with the primary guidance in *Hashtroodi* (at [18]) and [22]) that the discretion under CPR 7.6(2) is to be exercised in accordance with the overriding objective and in a "calibrated" way, as emphasised in *Qatar* at [17(iii)]. It is neither helpful nor necessary to go further in terms of guidance, by reference to a need for "powerful good reason", as the judge suggested, or otherwise."

26. It was open to the Claimants to defer issuing proceedings until the last day before expiry of the limitation period. However, this left very little slack for the Claimants to play with thereafter.

27. Despite this, it was reasonable for the Claimants not to seek to effect service immediately, but to explore both whether the Defendant might appoint solicitors to accept service in England and whether it might be possible to resolve the claim amicably.

28. However, following the exchanges of 20 July 2022, the Claimants had no reason to believe that the Defendant might appoint solicitors in England. From that point onwards, therefore, the Claimants' state of mind must have been, and certainly should have been, that service would probably have to take place by service via the FPS, in Switzerland. When paragraph 7 of Ms Elliott's witness statement is read with the knowledge that there had been no fresh invitation regarding service in England from 20 July 2022 until after 10 January 2023 (when the Defendant had made it clear that service should be in Switzerland), her evidence that the Defendant "consistently" refused to nominate English solicitors confirms that this was, in fact, the Claimants' state of mind from 20 July 2022 onwards.

29. Given that Hill Dickinson LLP's message of 20 July 2022 implied that they would recommend to the Claimants to effect service after 2 August 2022, it is hard to understand why documents were not lodged with the FPS at about that time. I assume, in the Claimants' favour, that they were not aware of the significant backlog at the FPS until about the beginning of October 2022, and that it was a surprise when they were told by the FPS, at that time, that service would take about five months.

30. On this basis, an extension was obviously required. I agree with the Defendant that the application of 2 October 2022 ought to have brought more clearly to the Court's attention that the claim was now time-barred. This was a serious lapse, although it is fair to say that many Commercial Court judges would know, without having to be reminded, that maritime cargo claims are likely to be subject to a one-year limitation period; and that the reference to a pending timebar gave some clue that the timebar might by now have come into effect.

31. It is not necessary to dwell on this, however, because it is the Claimants' dilatoriness after the First Order that, in my judgment, is decisive. The Claimants knew that the claim form would have to be served in Switzerland, and the evidence is that they had been told by the FPS that service could take approximately five months. Having applied on 2 October 2022 for, and obtained, an extension that would just, but only barely, allow the claim form to be served before its expiry, I find it incomprehensible that they thereafter did nothing in respect of service until February 2023.

32. Even ignoring the time lost between 6 and 27 February 2023, which was not foreseeable and was not the Claimants' fault, it must already have been obvious to the Claimants, for weeks if not months, that they had no realistic chance of effecting service by 9 March 2023. The fact that without prejudice negotiations were still going on is relevant, but cannot be a sufficient explanation, especially in circumstances where the claim had been time-barred since 10 May 2022.

33. The Claimants' failure to serve the claim form within the initial period was arguably justified (although I have reservations about this). However, the failure to serve the claim form by 9 March 2023 was wholly unjustified. The Claimants had no good reason to delay lodging documents with the FPS, after the beginning of October 2022. On the contrary, they knew perfectly well that it was imperative to act speedily.

34. Furthermore, when applying for the Second Order, they should have highlighted that their failure to lodge documents prior to February 2023 had occurred despite knowing full well that there was a backlog at the FPS, in respect of a claim that had long been time-barred.

35. I therefore will set aside the Second Order.