Neutral Citation Number: [2023] EWHC 3411 (Comm)

Claim No. LM-2022-000047

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 15 December 2023

Before:
JOHN KIMBELL KC
(Sitting as a Deputy High Court Judge)

B E T W E E N :

MARITIME DEVELOPMENTS LIMITED

Claimant

- and -

HINDUSTAN OIL EXPLORATION COMPANY LIMITED

Defendant

MS SARAH TULIP (instructed by Brodies LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not attend and was not represented.

(Via MS Teams)

J U D G M E N T

JUDGE KIMBELL:

1 I have before me two applications:

(1) The first is an application for default judgment under CPR 12.3, together with interest, made by way of an application notice dated 1 September 2023.

(2) The second is an application in the alternative for permission to serve a claim form on the defendant by alternative means and an application to extend time for service of that claim form. That application notice is dated 8 December 2023.

2 The first application is supported by the fifth witness statement of Jared Robert Oyston dated 15 September 2023. Mr Oyston is a solicitor in the firm Brodies LLP who represent the Claimant. The second application is supported by the sixth witness statement of Mr Oyston dated 8 December 2023. If the Claimant succeeds on the first application, the second application is not necessary and would not be pursued.

3 The Applicant is represented by Ms Sarah Tulip of counsel and the Defendant/Respondent is not represented, has not appeared and has not sent any communication to the court in respect of either application. I should say that I have seen certificates of service for both applications from a process server. In the case of the first application, the certificate of service is dated 16 November 2023, confirming service by a process server at the Defendant's registered address, and for the second application I have seen a certificate of service dated today showing service at 9.25 a.m. this morning local time in India.

Factual Background

4 The background to the applications is as follows which I take from the Particulars of Claim dated 8 March 2022 and the documents attached thereto. The Particulars of Claim has a statement of truth signed by Mr Oyston.

5 The Claimant ("**MDL**") is a private limited company providing consultancy services and equipment in the energy sector. Its registered office is in Aberdeenshire in the United Kingdom. The Defendant ("**HOEC**") is a public limited company incorporated in India and its registered office is at HOEC House, Tandalija Road, Off Old Padra Road, Vadodara, India.

6 By a service order dated 7 January 2021, HOEC placed an order with MDL to rent some equipment. This comprised two reels 9.2 m in diameter and a separate beam spreader. I will refer to the reels and the spreader collectively as "**the Equipment**". The rental period was an initial 90 days at a lump sum cost of £87,750 with extra charges falling due if the rental continued thereafter. This order was in response to, and an acceptance of, according to the particulars of claim at least, an earlier proposal by MDL to rent the Equipment to HOEC. That earlier proposal was dated 17 December 2020, and included within it certain clauses, including a clause 13 covering the event of total loss, and it is in the following terms,

> "If a total loss occurs in relation to the Equipment, then (13.1.1) the agreement shall immediately terminate and clause 14.3 shall apply".

Under clause 14.3, 14.3.2 says,

> "Without prejudice to any rights or remedies of a lessee, the lessee shall pay to MDL on demand: (14.3.2.1) all rental payments and other

> sums due but unpaid at the date of such demand together with any statutory interest accrued on late payment, if any; and secondly, (14.3.2.2) any costs and expenses incurred by MDL and indemnify them for the value of the Equipment that has been lost".

Clause 24 in MDL's proposal is applicable law and jurisdiction clause which provides that,

> "The agreement of non-contractual rights and obligations arising out of or in connection with the subject matter shall be governed and construed in accordance with English law and shall be subject to the exclusive jurisdiction of the English courts".

7 By an email dated 5 October 2021, sent by Mr Sivaraman Venkateswaran of HOEC to Graham Little of MDL, HOEC confirmed that installation work for which the Equipment had been rented had been completed in April 2021 but HOEC had been unable to transport the Equipment back to MDL because of a cyclone. It was said in that letter that the subsequent attempt to transport the Equipment back via Dubai had failed and that the Equipment had been lost "beyond traceability".

8 MDL then wrote on 19 October 2021 sending a letter of termination of the rental agreement pursuant to clause 13, to which I have just referred, and seeking payment of outstanding rent in the sum of £188,791 and claiming the replacement value of the Equipment lost in the sum of £592,820. Therefore, the total sum sought by MDL was £781,611.

9 No reply to this letter appears in the evidence and I have not seen any further correspondence, whether by email or letter, directly between MDL and HOEC before the claim form was issued in this court on 8 March 2022. The claim form accompanied by the Particulars of Claim, which I have referred to, is essentially the same as the claim which I have described, and the total sum is £781,611.

10 On 28 March 2022 HHJ Pelling KC gave permission to serve the claim form and the Particulars of Claim out of the jurisdiction. Those claim documents were served by a process server on the Defendant's registered address. No acknowledgment of service was received and the claimant applied for default judgment, which was granted by HHJ Pelling on 29 April 2022. This default judgment itself was then served on the defendant by process servers on 10 May 2022.

11 However, MDL were subsequently advised by Indian counsel that service of the claim form may not have been valid as a matter of Indian law because service had not been effected via the Indian Central Authority in accordance with the Hague Service Convention. MDL therefore applied itself to set aside the default judgment which it had obtained and to extend time for service of the claim form with a view to re-serving the claim forms via the Indian Central Authority in accordance with the procedure provided for by Article 5 of the Hague Service Convention. This application was granted by HHJ Pelling, who extended time for service of the claim form to 8 December 2022.

12 MDL then took steps to serve the claim form via the Indian Central Authority in accordance with Article 5 of the Hague Service Convention, starting with submitting the relevant forms to the form process section of the High Court, which was acknowledged and confirmed by the High Court in that notice was sent to MDL's solicitors on 22 August 2022. On 12 September 2022 a local lawyer engaged by MDL - Mr Gopal Machiraju of Lakshmikumaran & Sridharan, attorneys in Mumbai (which I will refer to as "**L&S**") - confirmed to MDL's solicitors that the Department of Legal Affairs in India had processed the documents to

provide to the Indian Civil Court for issuing, and the Department of Legal Affairs in India is the Central Authority for the purposes of the Hague Service Convention.

13 There followed thereafter a series of communications between Brodies and L&S describing what had then happened to the documents that had been received in India. By 15 December 2022, L&S were able to confirm that the registry of the local district court had informed them that the documents had been received locally and that the principal district judge in the relevant local court had addressed a letter to DOLA informing DOLA that service had in fact been effected. L&S proceeded to try and obtain the certificate required under the Hague Service Convention certifying that service had indeed been effected.

14 L&S made repeated attempts to obtain the certificate. The details are set out in the witness statement of Mr Oyston that I have referred to, but, in summary, at least once a month, if not more often, L&S provided an update as to their attempts to obtain the certificate, but the long and short of it is that no certificate was obtained. By July 2023 L&S confirmed that they were still unable to obtain the certificate, despite personally following up with emails and calls and, indeed, attending at the office of DOLA in person. MDL also attempted to obtain some assistance from the Department of Trade and Business in Delhi but they confirmed that they could not assist either.

The present application

15 In those circumstances, MDL makes its application under CPR 12.3, which provides as follows:

> "The claimant may obtain a judgment in default of an acknowledgment of service only if at the date on which judgment is entered –
>
> (a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and
>
> (b) the relevant time for doing so has expired".

16 Ms Tulip accepts, as she must do, that because the time for filing a defence or an acknowledgment of service runs from the date of effective service, default judgment can only be entered if the claim form and particulars of claim were properly served.

17 Both India and the UK are parties to the Hague Service Convention, and she referred me in particular to Articles 10 and 15 of that Convention. Article 10 provides as follows:

> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

18 In relation to Article 10, India has "filed a notice of reservation", objecting to the use of alternative means of service – that is those set out in (a), (b) and (c). India requires that instead the Central Authority be used.

19 Article 15 is of particular relevance to this application. It provides at 15(1) as follows:

> "Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –
>
> (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
>
> (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,
>
> And that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend."

20 Then at 15(2):

> "Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –
>
> (a) the document was transmitted by one of the methods provided for in this Convention,
>
> (b) the period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
>
> (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed."

The United Kingdom has made a declaration under Article 15(2).

21 Ms Tulip very helpfully drew my attention to thelimited case law guidance on the interpretation and application of Article 15(2). She drew my attention in particular to three cases: first of all, *Marashen Limited v Kenvett Limited* [2017] EWHC 1706, a decision of

Mr David Foxton QC (as he then was). In that decision it was said at paragraph 71, albeit obiter:

> "...the effect of Article 15 of the Hague Service Convention is that if Marashen had sought to effect service under the Hague Service Convention ... it would be open to it to apply to the court for judgment once a period of six months had elapsed from transmission."

22 The second case is *Punjab National Bank (International) Limited v Vishal Cruises (Private) Limited & Ors* [2020] EWHC 1962 (Comm), a decision of Cockerill J, where she said in paragraph 106, also obiter, that Article 15 of the Hague Convention:

> "... offers protection when there is actually no certificate [of service]; so there is assumed service on the basis of transmission and the lapse of time under Article 15."

23 The third case is *Punjab National Bank (International) v Boris Shipping Limited & Ors* [2019] EWHC 1280 (QB), a decision of Mr Christopher Hancock QC, sitting as a Deputy High Court Judge, in which he held that the conditions in Article 15(2)(a) and (b) were satisfied where a period of 12 months had elapsed since the document had been transmitted to the foreign process servers department in the High Court, and in those circumstances he held that he was entitled to enter default judgment.

24 Finally, in relation to the case law on Article 15(2) my attention was drawn to the comments in the *Punjab National Bank v Boris Shipping* case, that although in that case it was held that the provision was satisfied, no explanation was given or attempt to describe what might be required to satisfy the test of "every reasonable effort". However, Ms Tulip drew my attention to the HCCH Handbook on the operation of the Service Convention (2016) which refers to a US District Court saying that, perhaps unsurprisingly, the placing of a single phone call to a Central Authority was insufficient to meet the test of "every reasonable effort".

25 I have no doubt that the comments that I have been referred to in the cases of *Marashen* and *Punjab v Vishal Cruises* about the purpose and function of Article 15(2) are a correct interpretation of Article 15(2). I am satisfied that I should follow them even though they were obiter dicta.

26 Ms Tulip's submission is that, on the evidence before me, I should be satisfied that the requirements of Article 15(2) are satisfied in this case and judgment by default should be entered, for three reasons:

(1) I can be satisfied that the claim form was transmitted by one of the methods provided by the Hague Service Convention;

(2) I can be satisfied a period of not less than six months has elapsed since the date of transmission, which I could consider to be adequate; and

(3) No certificate has been received, even though every reasonable effort has been made to obtain it through the competent authority in India.

27 I accept those submissions, for the following reasons.

28 As to the first submission, I am satisfied that the claim form was indeed submitted to the foreign process section of the High Court on 12 August 2022, and I have been referred to the notice of the certification of that by the foreign process servers on 22 August sent to MDL's instructing solicitors, and I accept that it is correct, as Ms Tulip submitted, that it is implicit in *Punjab National Bank v Boris Shipping* that the transmission referred to is the transmission to the sending authority, which is sufficient for the purposes of Article 15 of the Hague Service Convention. It is implicit in that decision because the 12 months referred to in the judgment start from the date of submission to the transmitting authority and, in any event, I am satisfied that that is the correct way to interpret Article 15, not least because that is consistent, as Ms Tulip submitted, with the entire scheme of Article 15.

29 In these circumstances, it is not necessary for me to be persuaded that it has gone any further than that. I am satisfied that there has been a transmission to the relevant authority in the country of origin and it is not necessary for me to go on and consider the evidence, albeit that it does actually exist in this case, to show that it actually arrived not only at the Indian Central Authority but seems to have gone beyond that, and there is certainly plausible evidence that it arrived at the local district court, but, for some reason or other, no certificate was entered. So, as I say, for the purposes of Article 15, and this application, it is not necessary for me to go through the further evidence in great detail as to where the documents went to after they left the High Court here.

30 As to the second submission, I am satisfied that an adequate period has elapsed, which is more than six months. In this case, a period of just over 15 months has elapsed since the date of transmission to the process service and a period of over 12 months since the transmission to DOLA. This exceeds the minimum period of six months and is consistent with a period of 12 months being considered sufficient in *Punjab Bank v Boris* and, therefore, I find as a matter of fact that 15 months is a sufficiently long period for the purposes of Article 15(2).

31 Thirdly, and finally, it is clear from the evidence of Mr Oyston that not only has no certificate been received but that every conceivable effort has been made. As I have already said, at least every month, if not more frequently than that, constant attempts were made to try and obtain the certificate and to find an explanation as to why it has not been provided. This has involved not only emails and letters and phone calls but even personal visits on five occasions to DOLA's offices to seek an explanation. I have no doubt whatsoever that this easily meets and exceeds the test of "every reasonable effort".

32 In anticipation, correctly, as it turned out, of HOEC not appearing on this application, Ms Tulip quite rightly drew my attention to points that might be taken against her. Very properly, in writing, in paragraph 35 of her skeleton argument, she dealt with four points that might be made against her.

33 The first point, she says, is that the defendant, had it appeared, might have argued that MDL were required to serve the application in accordance with the Hague Service Convention. However, CPR r.12.12(5)(a) provides that an application for default judgment can be made without notice in certain circumstances, which include where, as in this case, a claims is made under a contract which provides that the courts of England and Wales have jurisdiction. I will return to this point below.

34 Secondly, she has pointed out to me that the HCCH handbook to which I have already referred says in relation to Article 15(2) that:

> "It was intended by the drafters only to be applied rarely, in cases where the defendant evades service in bad faith."

35 Although it was absolutely right that she drew my attention to this suggestion, the difficulty I have with that part of the handbook is that it seems to me to be absolutely impossible to glean from the language that has been used in Article 15(2) that it should only be used, or was only intended to be used, in cases where a defendant evades service in bad faith. If that was really intended to be the test, then the language of Article 15(2) would, in my judgment, in very much more precise and different to that which was in fact used. I therefore accept Ms Tulip's submission that what is said in the HCCH handbook about the intention of the drafters, does not reflect the legal test as a matter of English law. There no authority, and it has never been argued it seems, and certainly not accepted - that bad faith is a necessary part of the test for Article 15(2). I find, on the natural language of Article 15(2) that there is no bad faith requirement, nor any requirement for the claimant to show that the defendant has evaded service.

36 The third point that she said might be taken is that just because the conditions of Article 15 are satisfied does not imply that service is valid. This is what appears to be suggested in the HCCH handbook. I am not entirely certain I completely follow the suggestion but it seems to me that, as a matter of English law at least, if the conditions set out in Article 15(2) are satisfied, then as Cockerill J put it, there is assumed service on the basis of transmission and lapse of time. As a matter of natural language Cockerill J's approach to Article 15(2) is correct and is the one I ought to apply.

37 Finally, it is said that the defendant's position on the substance of the claim is presently unknown. That is of course right, but I think she is right to point out that if there is a defence to the claim which has not yet been put, then the remedy there is for the Defendant to come to court and apply to set aside default judgment, which it can do under CPR Rule 13.3 once it has had notice of the order which reflects this judgment.

38 So for all of those reasons, I am persuaded this is an appropriate case to enter judgment in default in the sum of £781,611.

CPR 12.12(5)

39 I said that I would return to CPR 12.12(5)(a) and I do so now. It provides that an application for default judgment can be made without notice if three conditions are satisfied. I have already referred to the first of the three conditions which is that there is a claim made in respect of a contract which provides exclusive jurisdiction of the English courts. The second is that the defendant has indeed failed to file an acknowledgement of service (which I have also held is satisfied. Finally, the third requirement, is there is no provision of a CPR which requires notice to be given, which I accept is also the case. It follows therefore that CPR Rule 12.12(5)(a) is satisfied in this case.

Interest

40 In addition to the judgment, the principal sum sought, MDL seeks interest. In the claim form MDL do say that they claim interest, and then in the particulars of claim what is claimed is interest under the Late Payment of Commercial Debts (Interest) Act 1998. However, Ms Tulip accepted in her skeleton argument that this point is not pursued and instead she seeks interest under section 35A of the Senior Courts Act 1981.

41 What MDL seeks is interest actually at the judgment rate at 8 per cent from 16 November 2021 until today. Ms Tulip made various submissions as to why it should be at that level, including the time that the defendant has had to deal with this claim, the various delays, and the fact that it was the Defendant who admits it lost the Equipment and so forth, but, in my judgment, those are not really relevant considerations. The principle underlying the award of interest under section 35A is to compensate the claimant for being out of the money which it ought to have had by now. The relevant principles have been summarised by the Court of Appeal in *Carrasco v Johnson* [2018] EWCA Civ 87, where the Court of Appeal went through all of the earlier case law on interest and concluded:

> "(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profits they may have made from the use of the money.
>
> (2) This is a question to be approached broadly. The court will consider the position of the persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.
>
> (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
>
> [Paragraph 4 does not apply as it is in relation to personal injury claimants]
>
> (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

42 In particular, in one case, before the *Carrasco* decision, in *Reinhard*, an award of 3 per cent over base rate was made to a claimant who was not a large entity and was the rate at which it was thought that a concern of that size would be able to borrow.

43 The decision that I have come to, having looked at this, MDL is certainly not a large commercial entity - it seems to be a small to medium sized consultancy in Aberdeen - and, in my judgment, applying the approach in *Carrasco* the appropriate rate to order is that it be 3 per cent above the Bank of England base rate from the time that the debt became due until today and thereafter at the judgment rate of 8 per cent.

Costs

44 That deals with interest. In relation to costs, although a schedule of costs has been submitted, I have been asked to adjourn the question of costs in order to give the claimant a chance to put in a further costs schedule. I have agreed to deal with that application for costs on paper as long as submissions and any updated schedule is put before me by 4.00 p.m. on Monday and then I will rule on the question of costs on a summary basis.

Disposal

45 In those circumstances, the claimant succeeds entirely in relation to the first application and the second application does not need to be pursued, and that concludes my judgment.

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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