Case No: 2011 FOLIO 721

Neutral Citation Number: [2012] EWHC 1023 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings,
Fetter lane, London EC4A 1NL

Date: 20/04/2012

Before :

MR. JUSTICE TEARE

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Between :

BNP PARIBAS SA	**Claimant**
- and -	
(1) OJSC “RUSSIAN MACHINES” **(2) JSC MANAGEMENT COMPANY “INGOSSTRAKH-INVESTMENTS”** **and others**	**Defendants**

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Stephen Houseman (instructed by **Clifford Chance LLP**) for the **Claimant**
Vasanti Selvaratnam QC and Henry Ellis (instructed by **Bryan Cave**) for the **Second Defendant**

Hearing date: 18 April 2012

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Judgment

Mr. Justice Teare :

1. This is an application which was issued on 28 February 2012 by the Claimant for an order pursuant to CPR 6.15(2) that the proceedings in this action have been validly served on the Second Defendant. The application is opposed by the Second Defendant who has appeared by counsel but expressly without prejudice to its pending jurisdiction and anti-suit appeals in the Court of Appeal.

2. The jurisdiction appeal is from a decision of this court on 24 November 2011 in which Blair J. dismissed challenges to the jurisdiction by the First and Second Defendants and declared that the claim form had been validly served on the Second Defendant by way of service on lawyers acting for the Second Defendant in Russia. There is now no dispute, following the decision of the Court of Appeal in *Abela v Baadarani* [2011] EWCA Civ 1571 given on 15 December 2011, that service on the lawyers in Russia was not good service. It is in those circumstances that the present application was issued and a hearing sought on an expedited basis.

3. The jurisdiction appeal is due to be heard on Tuesday of next week. In view of the limited time to prepare my judgment so that it is available to the parties this week this judgment will be shorter than it would otherwise have been. It does however set out the essence of my reasoning.

4. CPR 6.15(2) provides:

> "On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

5. An order pursuant to CPR 6.15(2) has been described as a retrospective declaration of service. CPR 6.15(1) enables the court to make a prospective order for an alternative method of service "where it appears to the court that there is a good reason" to do so. It is common ground that when an application is made for a declaration of retrospective service pursuant to CPR 6.15(2) the applicant must show not only that there have been steps taken to bring the claim to the attention of the defendant but also that there is good reason to make the declaration.

6. The nature of the good reason required by CPR 6.15 has been discussed by the Court of Appeal in *Cecil v Bayat* [2011] 1 WLR 3086. I summarised the guidance given in that case in *JSC BTA Bank v Ablyazov and Khazhaev* [2011] EWHC 2988 (Comm) at paragraph 34 as follows:

> "Although the observations of both Stanley Burnton LJ and Rix LJ in *Cecil v Bayat* as to how this jurisdiction should be exercised are strictly *obiter dicta* they were made after hearing full argument and therefore are of very persuasive authority. It is necessary to note the following observations in particular. Stanley Burnton LJ said, at paragraph 66, that whilst the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention is a relevant consideration,

it is in general not a sufficient reason for an order for service by an alternative method. He further said, at paragraph 67, that in general the desire of a claimant to avoid the delay inherent in service under the Hague Convention cannot of itself justify an order for service by alternative means. Service by alternative means may be justified by facts specific to the defendant, "as where there are grounds for believing that he has or will seek to avoid personal service where that is the only method permitted by the foreign law" or by facts relating to the proceedings, "as where an injunction has been obtained without notice"; see paragraph 68. Rix LJ agreed that the mere desire for speed was unlikely to amount to good reason. However, he left out of account those cases where service can take very long periods and observed that "it may be that some flexibility should be shown in dealing with such cases, especially where litigation could be prejudiced by such lengthy periods"; see paragraph 113."

7. In *Abela v Baadarani* [2011] EWCA Civ 1571 the Court of Appeal has confirmed the guidance given in *Cecil v Bayat*. Longmore LJ said at paragraph 22 as follows:

> "Nevertheless the exercise of this power is liable to make what is already an exorbitant power still more exorbitant and I am persuaded by Mr Greatorex that it must indeed be exercised cautiously and, as Stanley Burnton LJ said in paragraph 65 of Cecil v Bayat, should be regarded as exceptional."

8. Mr. Houseman has submitted on behalf of the Claimant that steps have already been taken to bring the claim to the attention of the Second Defendant. Those steps are the following:

   i) By 27 June 2011 Bryan Cave had been instructed to act on behalf of the Second Defendant for the purpose of challenging the jurisdiction of this court. Before that date, on 20 June 2011, the claim form had been served on Bryan Cave. Accordingly, as from 27 June 2011 it it likely that the claim form had been brought to the attention of the Second Defendant.

   ii) In November 2011 the Second Defendant had been represented by leading counsel before Blair J.

   iii) On 14 December 2011 the Re-Amended Claim Form was served on Bryan Cave pursuant to permission granted by Blair J. on 1 March 2012.

   iv) On 2 March 2012 the Re-Amended Claim was served on Bryan Cave pursuant to permission granted by Burton J. on 1 March 2011.

9. Miss Selvaratnam QC, counsel for the Second Defendant, submitted that the "service" of the claim form on 20 June 2011 was irrelevant because Bryan Cave had not been instructed until after that date. She also submitted that the "service" of the Re-Amended Claim Form on 14 December 2011 could not be relied upon because Blair J., in giving permission to serve the Re-Amended Claim Form on the Second

Defendant on 13 December 2011, *ex parte* on very short notice to the Second Defendant, had said, in circumstances where the Second Defendant intended to seek permission to appeal against the court's judgment of 24 November 2011, that his order "in no way prejudices [the Second Defendant's] position." Although no similar statement was made by Burton J. when permitting service of the Re-Amended Claim Form on the Second Defendant on 1 March 2012 his order should be regarded in the same way as the order of Blair J.

10. My conclusion on these matters is as follows. I accept that Bryan Cave were not instructed on 20 June 2011 when the claim form was provided to Bryan Cave so that it cannot be said that the claim form was brought to the attention of the Second Defendant on that day. However, once Bryan Cave had been instructed on or before 27 June 2011 for the purposes of challenging the jurisdiction of the court in this matter there can be no doubt that the claim form was brought to the attention of the Second Defendant. In circumstances where leading counsel was instructed to challenge the jurisdiction that is the only realistic conclusion.

11. After some hesitation I have concluded that the Claimants cannot rely on the service of the Amended and Re-Amended Claim Forms on Bryan Cave on 14 December 2011 and 2 March 2012 as further evidence of the claim form being brought to the attention of the Second Defendant. Blair J.'s order that the Amended Claim Form could be served on Bryan Cave was expressed "to follow the existing orders as made on 24 November 2011". By that he meant that since the court had declared that service of the claim form on the Second Defendant's Russian lawyers was good service it was appropriate to permit service of the Amended Claim Form on Bryan Cave who were the solicitors on the record. However, he recognised that there was an intention to seek permission to appeal from the declaration that service on the Russian lawyers was good service and, by making an order which "followed" that order, he was, expressly, not intending to prejudice that appeal. It was said that Blair J. cannot have had in mind an application under CPR 6.15(2). However, there was such an application before him. It was unnecessary for him to deal with it though he indicated that he would not have acceded to it; see paragraph 143 of the judgment. It is true that the Second Defendant's arguments on its appeal against the court's decision on jurisdiction and service on the Second Defendant's Russian lawyers remain what they were and are not prejudiced by this court taking into account the fact that on 14 December 2011 and 2 March 2012 the claim form was brought to the attention of the Second Defendant. But a retrospective order pursuant to CPR 6.15(2) will mean that the Second Defendant's anticipated successful appeal with regard to the service on Russian lawyers will be rendered nugatory. In that way the appeal will be prejudiced. In those circumstances I consider that if this court were now to take into account the service of the Amended Claim Form on 14 December 2011 this court would be acting contrary to Blair J's express statement that his order should not prejudice the Second Defendant's position. I consider that the same applies to the service of the Re-Amended Claim Form on Bryan Cave on 2 March 2012. Nevertheless, the position remains that the claim form in this matter was clearly brought to the attention of the Second Defendant before 14 December 2012.

12. Mr. Houseman submitted that there was good reason to make a retrospective declaration of good service. His principal reasons were these:

i) The proceedings involve an arbitration claim form and injunctive, anti-suit, relief. Such proceedings were the "paradigm" case in which the court should deal with matters "robustly" and make an order under CPR 6.15(2). In such a case the court would be expect to determine the arbitration claim swiftly and so it was appropriate to make such an order so as to avoid delay in bringing the Second Defendant before the court.

ii) The Foreign Process Section had transmitted the documents for service under the Hague Convention to Russia on 26 July 2011 but there has as yet been no response. Almost 9 months has elapsed. On 13 February 2012 the FPS advised that service might take one year or more. Such a long period of delay was inappropriate when disclosure was to take place in August 2012 with an exchange of witness statements thereafter leading up to an expected trial involving the other defendants in December 2012. Delay in serving the Second Defendant would prejudice that trial.

iii) Article 15 of the Hague Convention envisages that a court may give judgment if six months from transmission of the papers for service elapses without service. That period has already elapsed.

13. Miss Selvaratnam submitted there was no good reason to make an order pursuant to CPR 6.15(2). Her principal arguments were as follows:

i) In *Abela v Baadarani* [2011] EWHC Civ 1571 Longmore LJ said, in paragraph 22, that "it would..….usually be inappropriate to validate retrospectively a form of service which was not authorised by an order of an English judge when it was effected and was not good service by local law". Longmore LJ applied that reasoning when dealing, not only with alternative service on foreign lawyers abroad, but also when dealing with alternative service on English solicitors; see paragraphs 10 and 33. In the present case the provision of the claim form to Bryan Cave in June 2011 had not been authorised by an order of an English judge and such service was not recognised as good service in Russia.

ii) Such an approach was consistent with comity.

iii) There was ample time for the Claimant to seek an order for alternative service pursuant to CPR 6.15(1) if the Court of Appeal upholds the decision of Blair J. as to jurisdiction. The projected trial in December 2012 will not be prejudiced.

iv) Article 15 of the Hague Convention was not concerned with service.

14. I am not persuaded that Miss Selvaratnam's submission concerning the effect of *Abela v Baadarani* is correct. The Court of Appeal held that the service on a foreign lawyer in the Lebanon in that case ought not to have been retrospectively validated because such service was not recognised in Lebanese law and there was no good reason to validate it pursuant to CPR6.15(2). The only reason was to avoid a stale claim becoming time barred; see paragraph 29 of the judgment. The Court of Appeal also held that a further order extending time for service and permitting service on the defendant's English solicitors should be set aside. Longmore LJ said in paragraph 33 that reliance on such orders was "misplaced for the reasons which are very similar to

the reasons I have just given for saying that it was inappropriate for the judge to have granted retrospective validity to the earlier invalid service." He then explained in paragraph 34 why there was no good reason to extend time for service. It seems to me that Longmore LJ, when referring back to his earlier reasons, was referring back to those given in the second half of paragraph 29, namely that avoiding a claim form being time barred was not a good reason for extending time. Thus I do not consider that Longmore LJ was saying that when permission was sought for alternative service on a lawyer in England no such order should be made if such service was not recognised by the law of the country where the defendant was to be found.

15. However, I do accept that the court should proceed cautiously when being asked to validate retrospectively a form of service which was not authorised by an order of the court when it was effected. I also accept that the court should always be alert to the requirements of comity.

16. In this case the court is being asked to validate retrospectively as good service the provision of the claim form to Bryan Cave in June 2011 which brought the claim form to the attention of the Second Defendant and caused it to challenge the jurisdiction of this court. The mere fact that the claim form has been brought to the attention of the Second Defendant in this way cannot amount to good reason for making an order under CPR 6.15(2). Otherwise the requirement for service in accordance with the Hague Convention would be side-stepped. There has to be a good reason for doing so since such an order may only be made exceptionally.

17. In the present case the nature of the relief sought against the defendants is an anti-suit injunction designed to protect an arbitration taking place in London between the Claimant and the First Defendant. In such a case there is a particular need for the trial to be heard promptly. If service can only take place via the Hague Convention there is a risk, on the evidence now before the court, that it may not take place in sufficient time to enable the trial against all defendants to take place in December 2012. Disclosure has been agreed, subject to questions of jurisdiction and service, to take place in August 2012. That is just over one year from the date when the papers were transmitted by the FPS to Russia. Service may not take place until some time thereafter and so the projected early trial may be put at risk.

18. In principle I consider that such considerations are capable of amounting to "good reason" to make a retrospective declaration of good service. I do not consider that such an approach is inconsistent with the guidance of the Court of Appeal in *Cecil v Bayat.* The considerations to which I have referred are "facts relating to the proceedings" of a type recognised by Stanley Burnton LJ in paragraph 68 of his judgment as justifying an order under CPR 6.15. They are also considerations resulting from a long period of delay in service which Rix LJ recognised might require flexibility where litigation could be prejudiced.

19. I have placed no reliance on Article 15 of the Hague Convention. I have not been shown any provision of English law which declares that the court may give judgment if a claim form has been transmitted but service has not been effected within 6 months thereof.

20. I am mindful of the need to respect comity. There is expert evidence that service in Russia is only recognised if it is pursuant to the Hague Convention. However, the

court is not being asked to validate steps taken or to be taken in Russia but steps which have been taken in this jurisdiction. I do not consider that validation of steps taken in this jurisdiction can be said to offend the principle of comity.

21. Whilst it would be possible for the Claimant to make an application for prospective alternative service after the Court of Appeal's decision on jurisdiction is known, I do not regard that as a reason for not making the order which has been sought. If there are good reasons for making the order sought under CPR 6.15(2) now such order should be made. Making an application under CPR 6.15(1) after the decision of the Court of Appeal is known will lead to further delay which is undesirable in circumstances where disclosure is to take place in August 2012.

22. I am conscious that Blair J. would not have made this order when he considered it in November 2011. However, at that time only 4 months had elapsed since the FPS had transmitted the documents to Russia. I am told that the evidence before him was that service would take 3-6 months. The position now is that almost 9 months have elapsed and there has been no acknowledgment of receipt by the Russian authorities. The FPS has now said that service may take a year or more with the result that the projected trial may be prejudiced.

23. For these reasons which I have only been able to express in short form in view of the hearing before the Court of Appeal next week I consider that, although the court must exercise its power under CPR 6.15(2) cautiously, good reason has been shown for an order under CPR 6.15(2) and it is appropriate to make such an order.

Cross-application for an extension of time to challenge the alternative service orders made on 13 December 2011 and 1 March 2012.

24. Although the time for challenging these ex parte orders has expired an extension of time for doing so has been sought because Mr. Robert Dougans of Bryan Cave believed, in the light of Blair J.'s comments that his order was not intended to prejudice the jurisdiction appeal, that it would only be necessary to apply to set aside the orders in the event that the Second Defendant lost its jurisdiction appeal. I agree with Mr. Houseman that Mr. Dougans was taking a risk in delaying any application to set aside the orders but in the unusual circumstances of this case, bearing in mind what was said by Blair J., I consider that it is just to extend the time for seeking to set aside the orders of Blair J and Burton J.

Permission to appeal

25. I have been asked to deal with permission to appeal in view of the proximity of the appeal next week. Since the application of CPR 6.15 to the facts of this case is a matter of legitimate debate in the light of *Cecil v Bayat* I cannot say that there is no real prospect of success on appeal. I therefore consider that permission to appeal should be given, particularly in circumstances where this case is before the Court of Appeal next week.