

Neutral Citation Number: [2018] EWHC 1478 (Comm)

Case No: CL-2015-000606

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AN WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 8th June 2018

Before :

Mr Justice Teare

Between :

Fiona Havlish et al.	<u>Claimant</u>
- and -	
Islamic Republic of Iran et al.	<u>Defendant</u>

Vernon Flynn QC (instructed by Boies Schiller Flexner (UK) LLP)

Hearing date: 8th June 2018

APPROVED RULING

MR JUSTICE TEARE
(11.11 am)

Friday, 8th June 2018

Ruling by MR JUSTICE TEARE

1. This is an application without notice by the claimants, Fiona Havlish and others, for an order pursuant to CPR 6.16(1) that the court dispenses with service of the claim form in this matter.
2. The court's power to dispense with the service of a claim form may only be exercised in exceptional circumstances. The application must be supported by evidence and may be made without notice. Sometimes that power is exercised retrospectively, but in this case an order is sought that service is dispensed with prospectively. The notes to the CPR at 6.16(2) indicate that that is a permissible use of the power.
3. These proceedings concern efforts by the claimants, who are all representatives or relatives of individuals who were victims of the September 11th 2001 terrorist attacks in New York, to recover amounts due to them from the defendants, who are the Islamic Republic of Iran and other emanations of that State, which amounts are due to them from the defendants pursuant to a judgment from the United States District Court for the Southern District of New York.
4. As I understand the matter, the claimants seek to register that judgment as a judgment of this court and seek to enforce it on assets of the defendants within this jurisdiction. It is apparent from the evidence before the court that similar efforts are being made in other countries. The reason why this application is made and the circumstances which are said to be exceptional concern the inability of the Foreign & Commonwealth Office to serve the appropriate documents on the defendants in Iran in the normal way.
5. There are two particular letters from the Foreign Office to which I should refer. The first is a letter dated 13 August 2016 from the deputy head of mission at the British Embassy in Tehran to the Foreign & Commonwealth Office. The letter concerns this case and attempts made to serve the documents in this case on the Iranian authorities.

6. Mr Fender sets out in that letter the reasons why he does not believe that there is any realistic prospect of successful service and why there should be no further attempt to effect service. He states that he has been asked to serve legal papers on the Iranian authorities on a number of occasions and has not succeeded at any time. He states at paragraph 4:
7. "The practice of the Iranian Government is not to allow foreign embassies to have contact with government departments or authorities in Iran, except as arranged by the Ministry of Foreign Affairs (MFA). My belief, based on my experiences, is that the MFA has a policy of resisting service in cases which it believes to be against the interests of the Islamic Republic of Iran."
8. He then refers to one particular case in which an attempt at service was made, but failed. He then says this at paragraph 9:
9. "On several occasions I then discussed the delivery of the papers with Mr Mohammed Sahebi, the deputy director for Western Europe in the MFA. He told me that MFA staff were not generally permitted to receive legal documents and that the only person authorised to do so was a Mr Esfahani-Nejad, the head of the MFA's Legal Affairs Department. Mr Sahebi advised that I should seek a meeting with him. He also made clear that I should not attempt to oblige the MFA to accept documents through any subterfuge and that damage to UK-Iran relations would result."
10. Mr Fender then requested a meeting with Mr Esfahani-Nejad, but he declined to see Mr Fender. Mr Fender goes on at paragraph 11 to say:
11. "In the course of these exchanges, Iranian officials indicated that they believe some legal cases against the Iranian authorities are politically motivated, and that it would harm UK-Iran relations for the Embassy to be associated with them. The clear implication was that they would not co-operate with them."
12. He concluded at paragraph 13:
13. "Based on my experiences, my belief is that the MFA has a deliberate policy of not accepting papers relating to some cases involving the Iranian authorities and is determined to obstruct the

service of papers. I believe that this would also be true of the papers in the case of Fiona Havlish & Others. In view of the MFA's assertion that some of these cases are politically motivated, I also believe that damage would result to UK-Iran relations if we were to make further attempts to serve papers."

14. The other letter to which I should refer is dated 6 April 2018. This is a letter from Mr Batchelor of the Premium Service Legalisation Office of the Foreign & Commonwealth Office. He refers to an earlier decision of this court -- as it happens, one given by me -- which concerned service of documents in Syria. He stated:
15. "However, several previous attempts at service of legal claims on the Government of Iran under the State Immunity Act, via the Ministry of Foreign Affairs (MFA) in Iran have been unsuccessful, despite the best efforts of the British Embassy in Tehran. We have detailed those attempts in a letter, which was sent by email to Melissa Kelley on 14 September 2016. As set out in that letter, repeated attempts to effect service caused the Iranian Ministry of Foreign Affairs to inform the British Embassy that further attempts, or attempts by other means, to serve the documents would not only be refused, but would also be detrimental to bilateral relations. That position has not changed, and senior colleagues at the British Embassy continue to hold the view that any further attempts at Service on the Government of Iran under the State Immunity Act would be unsuccessful and counterproductive."
16. Those are the circumstances in which the claimants in this case find themselves. It is submitted on their behalf that those circumstances are exceptional, and I accept that submission. The question then arises whether the court should exercise its discretion to dispense with service.
17. It is helpful at this stage to refer to a decision of Mr Andrew Henshaw Queen's Counsel, sitting as a judge of the High Court, in the case of *Certain Underwriters at Lloyd's v The Syrian Arab Republic* [2018] EWHC 385 (Comm). In that case the judge concluded that the documents in question had been transmitted through the Foreign & Commonwealth Office to the appropriate

ministry, but he went on to consider an alternative submission in that case, which was for an order dispensing with service.

18. At paragraph 24 he referred to CPR 6.16(1), which is the power which I am asked to exercise on this occasion. The judge at paragraph 25 considered whether dispensing with service would be inconsistent with the mandatory nature of section 12 of the 1978 State Immunity Act. However, he concluded that he did not consider there to be an inconsistency. He said at paragraph 25:

19. "Section 12 applies to '*Any writ or other document required to be served for instituting proceedings against a State*'. If, exceptionally, the court has made an order dispensing with service of the claim form instituting the proceedings, then it is not a '*document required to be served*' within section 12."

20. At paragraph 28 he referred to CPR 6.16 and concluded that one factor relevant to the exercise of the CPR 6.16 power to dispense with service is whether the proceedings are likely to have been brought to the attention of the defendants.

21. In considering the exercise of the court's discretion in the present case, I am on the one hand concerned that, notwithstanding the reasons given by Mr Henshaw Queen's Counsel for concluding that there is no inconsistency between making an order dispensing with service and section 12 of the State Immunity Act, in proceedings to be commenced in circumstances where service has not been effected on the defendant. But on the other hand there must be put in the balance the matters which are set out in the skeleton argument of counsel in the present case, namely that a refusal to grant the relief sought by the claimants would deprive the claimants of any recourse in the proceedings and allow the defendants to avoid the proceedings without any substantive basis for doing so. It is said that this would "effectively grant the defendants absolute immunity from suit". In similar vein, it is said that refusing the claimants the relief sought may deprive the claimants of any recourse before the English courts in respect of the US

judgment on limitation grounds, given that the limitation period for English actions on the basis of the defendants' failure to pay the US judgment would expire in September 2018.

22. A further matter to be considered is whether there is reason to believe that the defendants are aware of the US judgment and of the efforts being taken by the claimants to recover amounts due under that judgment. There are reasons to believe that the defendants are aware of the US judgment. They are set out in the third witness statement of Fiona Huntriss, a solicitor and partner in the law firm which acts for the claimants.
23. In summary, those matters are these. First, press reports indicate that an Iranian Foreign Ministry spokesman has publicly commented on the judgment of the United States District Judge George B Daniels, calling it "clumsy scenario-making" by the United States.
24. Secondly, the 1st through to 12th defendants have made formal appearances on 3 March 2016 and 26 June 2017 in proceedings before the Luxembourg courts in which the claimants are seeking to enforce the United States judgment.
25. Third, Bank Markazi, the central bank of Iran, and a judgment debtor of the United States judgment, though not a defendant to these proceedings, has been served with proceedings before the Italian courts in which the claimants are also seeking to enforce the United States judgment. Service of these proceedings was accomplished in three different ways: first, service on the Iranian Embassy in Rome, which returned the papers to the claimants' Italian solicitors; second, service through diplomatic channels by the Italian Ministry of Foreign Affairs, who delivered the documents to the Iranian Embassy Rome under a note verbale dated 4 February 2018, with service acknowledged by a reply note verbale dated 5 March 2018 disputing various points; and third, pursuant to a court order by courier on Bank Markazi, which is the central bank of Iran.
26. Those matters certainly show that the defendants are likely to know, first, of the American judgment; and second, that the judgment claimants are seeking to enforce that judgment in countries where they believe they may find assets of the defendants. Those matters do not

suggest that the defendants are aware of the particular proceedings instituted in this court by which attempts are being made to enforce the judgment from the United States.

27. Bearing that in mind, the claimants are willing to give an undertaking to take certain steps to ensure that these proceedings before this court are brought to the attention of the defendants. They propose to do that in three ways: first, by emailing the claim form and any other necessary documents to the Iranian Ministry of Foreign Affairs in Iran at the email address publicly available on the ministry's website; second, by instructing a courier to deliver the necessary documents to the Iranian Ministry of Foreign Affairs at its stated address on its website in Tehran; and thirdly, by personal service and transmission by email to the Luxembourg lawyers representing the 1st to 12th defendants in the Luxembourg proceedings.
28. In those circumstances, it seems to me appropriate to exercise the power granted by CPR 6.16 to dispense with service of this claim form and related documents. There are exceptional circumstances, as I have described, and there are good reasons why in those circumstances the power should be exercised. I will therefore make the order which has been sought, subject to one or two corrections which have been discussed with counsel in the course of argument.