Neutral Citation Number: [2024] EWHC 169 (KB)

Case No: QB-2021-000470

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31.01.24

Before :

MASTER THORNETT

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Between :

STUART LUNN	**Claimant**
- and -	
ANTARCTIC LOGISTICS CENTRE INTERNATIONAL (PTY) LTD	**Defendant**

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- -

Mr Christopher Loxton (instructed by Fieldfisher LLP) for the Claimant

Miss Sarah Crowther KC (instructed by Hunters Law LLP) for the Defendant

Hearing date: 11 January 2024

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JUDGMENT No.2

Master Thornett:

1. This is the second reserved judgment in the Defendant's14 February 2023 Application that contests jurisdiction and other procedural points. I decided several of the latter in my reserved judgment dated 10 January 2024. This decision concerns a specific issue within the Application I directed to be heard on 11 January 2024: whether the court should have extended time for service of the Claim Form by its Order sealed 3 August 2021. The question focuses upon the more common exercise of discretion on an extension application and is separate to the continuing challenge whether the claim falls within the jurisdiction of England and Wales. The Defendant reviews the grant of the extension as of right because the Order was made without notice to the Defendant.

2. The Claim Form was issued on 10 February 2021 and concerned a claim for service out of the jurisdiction. For the reasons set out in my judgment dated 10 January 2024, the Claim Form needed to be served by 10 August 2021.

3. The Claimant applied on 15 July 2021 to extend time for service pursuant to CPR 6.36. The N244 sought a decision without a hearing and without notice to the Defendant.

   The Application was supported by a forty-three paragraph Witness Statement sworn on 14 July 2021 by the Claimant's legal representative, Mr Keith Barrett. The statement confirmed it was an application to extend under CPR r.6.36 and provided a factual summary of the Claimant's accident on 12 February 2018. The statement sought to explain and justify the Claimant's contention that the claim fell within this jurisdiction, having regard to the criteria at CPR 6.37. These particular submissions are subject to argument in the remaining part of the Defendant's Application as still to be listed.

4. In terms of the explanation and justification for the extension, Mr Barrett at Paragraph 42 explained that the Claim Form had to be served by 10 August 2021 and that:

   "I have been in correspondence with the Defendant's Attorneys for some time now. I have asked them to a) appoint a solicitor to accept service of court proceedings in England and b) to confirm they are instructed to accept service of proceedings. At the time of making this statement the Attorneys continue to await instructions. Unfortunately, I cannot wait any longer and I am now instructed to serve out of the jurisdiction. Given the current conditions the RCJ Foreign Process section are working under (their e-mail dated 14.07.2021 [attached at Exhibit KB1] suggests a minimum period of 12 months for service to be effected in South Africa) and the fact that we are in the middle of a Pandemic, I seek a further 18 months to ensure the court proceedings are served on the Defendant".

   The annexed e-mail from the RCJ Foreign Process section is also dated 14 July 2021 and appears to "cut and paste" the RCJ Section's standard service information about service of documents in South Africa. That stated indeed that "Length of time for service" is a "Minimum of 1 year".

5. On 29 July 2021, I granted an extension to 29 January 2023; the Order was sealed on 3 August 2021. The Defendant was served by the Sheriff of the Western Cape on 24 August 2022 and therefore, with the benefit of hindsight, it is clear that an extension of time had been required.

6. Extrapolating now irrelevant points to the extension challenge because they have already been decided, at the hearing on 11 January 2024 Miss Crowther KC relied upon the submission that the July 2021 Application had seen material non-disclosure to the court. Relevant material and facts material had not been but should have been presented. I was referred to *Re OJSC Yugraneft v Sibir Energy PLC* [2008] EQHC 2614 (Ch). Although a case concerning an application to dismiss the appointment of a liquidator, the Defendant submitted that the general review of authorities from

Paragraph 67 onwards are relevant. In particular, the duty of full and fair disclosure, such that all facts which reasonably could or would be taken into account by the judge in deciding to grant the application are disclosed. Further, at Paragraph 102, principles going to the consequences of "culpable non disclosure". In summary, that the general rule that once "culpable non disclosure" is established, the court on review should discharge the without notice Order; any jurisdiction to continue or re-grant should be exercised sparingly.

7. The non-disclosure relied upon by the Defendant is said to comprise:

   7.1 Failing to disclose the limitation period applicable to the claim and that the application for extension of time was, if granted, to have the effect of extending statutory limitation;

   7.2 Failing to address the delay in making the application. The Claimant was aware that he needed to serve out and had threatened application for permission to serve out but did not do so until 15 July 2021, just over 5 months after issue even if (as I have now held) this was still a month before expiration of the Claim Form;

   7.3 There had been extensive correspondence with the Defendant's South African attorneys which raised material issues, none of which were referred to in the Application. In particular, the Claimant had not mentioned the fact that he had previously indicated that his intention was to bring its proceedings against the Defendant before the South African courts and that there had been extensive consideration of the possible application of Russian law by the parties.

8. Mr Loxton submits that this case satisfies the principles for extending time for service of a Claim Form as summarised in *ST v BAI (SA) (t/a Brittany Ferries)* [2022] EWCA Civ 1037 at [62] Carr LJ (as she then was). In particular, the following observation as to the different tests under CPR 7.5(2) and 7.5(3) (at [59]):

   > *'It can be seen immediately that there is clear water between the test to be applied on an application for an extension of time to serve a claim form i) before and ii) after the expiry of time for service under CPR 7.5. Specifically, unlike on a retrospective application, a court can allow an application to extend time prospectively without being satisfied that the claimant has taken "all reasonable steps" to comply with CPR 7.5. There is, as it was put in the leading case of Hashtroodi v Hancock [2004] EWCA Civ 652, [2004] 1 WLR 3206 at [17] ("Hashtroodi"), a "striking" "contrast" between the two regimes.'*

   Mr Loxton points out that in *ST v BAI* the court had been satisfied that it was reasonable for that claimant to opt to make an extension application rather than to pay a "disproportionate and potentially irrecoverable fee" to a French agent. Hence, the court emphasised that, in an application before expiration of the Claim Form, a claimant is not obliged to take "all" reasonable steps to serve within time.

9. The Claimant contends that Mr Barrett's First Witness Statement of 14 July 2021 had both clearly and sufficiently accounted for the inability of the Claimant to serve within 6 months of issue for the following reasons. First, the Defendant's representatives had been unwilling to arrange for service to be accepted by a solicitor in England; their position instead seemed to be to engineer an extended period of delay whilst they were awaiting instructions. In a Third Witness Statement dated 18 October 2023 and so with the benefit of hindsight[1], Mr Barrett confirmed that the Defendant did not instruct an English firm until February 2023. Secondly, the minimum period of 12 months confirmed by the RCJ Foreign Process section for the Claim Form (and materials) to be processed for foreign service was both correct and a central justification for an extension. Thirdly, delay generally had to be factored because this was at a time of a global pandemic.

10. Discussion and conclusion

10.1 The respective duties of full and transparent disclosure in any Application without notice and duty to show reasonable steps have been taken before requesting an extension of time under CPR r.7.5 are complimentary but by no means contiguous. A party, for example, may have taken reasonable steps but still fail to draw relevant material to the attention of the court. Conversely, the duty of disclosure must be reasonably limited to the context of CPR r.7.5 and have as its central object the purpose of appraising the court of all factors relevant to the proposed extension, rather than featuring general arguments and counter-arguments in the proposed litigation.

10.2 I have therefore carefully considered the Defendant's submissions in the context an Application following the issue of the Claim From and disregarded what are more abstract criticisms about various litigation strategies at times proposed by the Claimant in correspondence.

10.3 Here I find relevant the following further statements of principle drawn at [102] in the *OJSC* case as relied upon by the Defendant:

> (5) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
> (5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.
> (6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
> (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

[1] Miss Crowther confirmed at the hearing no point was taken on this statement providing a retrospective view

(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

11. *Failure to explicitly state that the limitation period was effectively being extended*

I accept that it would have been good practice to make this expressly clear in such an Application but do not accept the failure to do so constitutes a material non-disclosure. As a personal injury claim, the subject matter of the cause of action can easily be distinguished from a conceptually complex cause of action where, for example, because of questions of concealment or deferred damage the need to clarify respective arguments on limitation is central. It was apparent to the court, and I am satisfied would be to any judge so considering the Application, that this personal injury claim had been issued close to expiration of its limitation period and therefore the extension period sought would have the effect of extending limitation.

12. *General delay in making the Application and failure to put relevant correspondence before the court*

12.1 As canvassed during the hearing, I am satisfied that a careful distinction has to be made between delay in the conduct of litigation that can have no justification and, in contrast, a period within which some litigators may have acted sooner or differently to others. Those not acting as soon as others in this second category cannot be said to have been acting in a culpably tardy way, merely differently. The distinction between culpable delay and subjective conduct of litigation is plainly a fact sensitive approach as relevant to the type of "without notice" Application being made. Following *ST v BAI*, taking reasonable, but not "all reasonable", steps to serve within time includes taking reasonable, but not "all reasonable", steps to issue the extension Application itself.

12.2 Given I have already found that the Claim Form still had an unexpired month for service, I do not accept that the issue date itself of the Application was markedly later than it might have been. I am not satisfied that anything occurred between issue of the Claim Form and issue of the Application as establishes culpable delay in issue. In the absence of such evidence, the delay relied upon by the Defendant is of no real application given the information provided by the RCJ Foreign Service Department establishes that an extension application of some kind would always have had to have been made.

12.3 I have carefully read the inter-party correspondence as dated between 9 December 2019 and the 15 July 2021 Application. A continuing theme is a dispute about whether this jurisdiction is applicable. During the Claim Form pre-issue period the Claimant had indicated he would be issuing proceedings in the High Court "in London" and, for example on 6 July 2020, "arrange for Court proceedings to be served upon you via our South African agents".

12.4 The more relevant correspondence in the extension Application is that from the 10 February 2021, when the Claim Form was issued. The following are the central issues featured within a variety of other comments:

> 21.01.21 : The Claimant was proposing to obtain an order permitting service out of the jurisdiction but continued to suggest that the Defendant appoint English agents to accept service;
> 23.02.21 : A month later, the Defendant says it was taking instructions and considering all of the evidence whether it could be liable;
> 28.03.21 : Following continued exchanges about jurisdiction, the Claimant states that a detailed response has been provided and so awaits hearing from the Defendant;
> 20.05.21 : The Claimant confirms that, given the impasse, it would be applying in the High Court in London and arranging for service in South Africa;
> 24.05.21 : The Claimant checks whether the proceedings should be served on the Defendant directly and not their legal representatives;
> 28.06.21 : The Claimant repeats his request for confirmation whether to serve the Defendant directly or on appointed representatives;
> 01.07.21 : The Defendant replies to state it has no instructions;
> 05.07.21 : The Claimant refers to its Application and again requests whether the Defendant might appoint solicitors in this jurisdiction to accept service or, subject to permission from the court, serve directly by e-mail. The letter remarks about the desire to avoid costs of service if possible.

12.5 I am satisfied that that the above summary of the correspondence is entirely consistent with Paragraph 42 of Mr Barrett's 14 July 2021 statement in which he had simply stated – in justifying a need for the extension – that correspondence with the Defendant's South African Attorney's had failed to agree either that they appoint solicitors in this jurisdiction to accept service or alternatively confirm that they were so instructed to accept service in South Africa. In terms of its relevance to the Application, I am unable to accept that paragraph 42 in some way failed fairly or properly to present a different and more correct summary of the parties' positions.

12.6 A point that the Defendant raised for the first time during the hearing was whether the Claimant's solicitors were right to contemplate in their correspondence that the Claim Form and papers, once received by the official recipient in South Africa from the RCJ Foreign Process, could then be served by an agent in South Africa appointed by the Claimant. Because the Defendant said that this proposition was simply wrong and so the illustrative of not only delay but mistake as to the process, I asked if either party could clarify the point following the hearing.

12.7 The Claimant has returned to confirm that they do not think there is a definitive answer on the point, South Africa not being a member of the Hague Convention neither a party to any Civil Procedure Convention or Treaty within the meaning

of CPR Part 6. The Defendant's research suggests that in the absence of the Claimant having applied to a local court in South Africa for an agent to be appointed and the usual method of service by the Sheriff of the High Court displaced, then there was no basis for asserting that process would be effected by an agent appointed by the Claimant.

12.8 I am grateful to the parties for their further contribution, although (for the avoidance of any doubt, given a concern expressed by the Claimant about the potential introduction of expert evidence without permission) do not treat the Defendant's response as necessarily definitive for the purposes of this judgment.

12.9 Ultimately, I find nothing hinges on the point. There is no nexus between the anticipated procedural method for service referred to in the Claimant's correspondence and the reasoning expressed by Mr Barrett in his 14 July 2021 Application. The Defendant's submission that because the steps the Claimant had contemplated in correspondence would not have been valid does not support an argument that the Claimant failed to take reasonable steps before requesting an extension. Whether ultimate service of the Claim Form once received in South Africa was to be by the South African Sheriff or a substituted agent as permitted by a local court, (i) the RCJ Foreign Service Department had confirmed that a period of 12 months had to be allowed for the documents to be provided to the South African High Court and (ii) these interim events were to be taken during a global pandemic.

12.10 A further submission on delay by the Defendant was the feature of the e-mail from the RCJ Foreign Process Department being dated only just before the Application. This, it was said, evidenced a somewhat last minute approach to investigation and presentation. I am unable to accept this proposition. First, in commencing its reply "Thank you for your e-mail", it provides no evidence that the Claimant's request for the information itself had been late. Secondly, the feature of Mr Barrett choosing to provide evidence to the court of the current approximate time Foreign Service were advising it would take for transmission to the relevant South African recipient by no means establishes that the Claimant's representatives had been personally unaware of that approximate period until seeking such confirmation. Third, and perhaps most importantly, whether the Application had been made upon issue of the Claim Form or later, the period that Foreign Service would have advised would always have necessitated an extension Application of some kind.

13. *Conclusion*

There was no material non-disclosure and the Claimant had taken reasonable steps before requesting an extension of time. I dismiss that part of the Defendant's 14 February 2023 Application as seeks to set aside the Order dated 3 August 2021 extending time to serve proceedings. The Defendant's Application now proceeds on the

sole remaining issue whether England and Wales is the proper place to bring the claim against the Defendant.

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