



Neutral Citation Number: [2023] EWHC 1891 (KB)

Case No: QB-2019-001682

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2023

Before:

HIS HONOUR JUDGE BIRD (SITTING AS A JUDGE OF THIS COURT)

Between:

LOUIS EMOVBIRA WILLIAMS

Claimant

- and -

**(1) THE FEDERAL GOVERNMENT OF
NIGERIA**

Defendant

**(2) ATTORNEY GENERAL OF THE
FEDERATION OF NIGERIA**

Mr Oluwole A Ogunbiyi (direct access counsel) for the **Claimant**
Mr A. Aderemi (instructed by **Setfords**) for the **Defendants**

Hearing dates: 5 July 2023

Approved Judgment

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HIS HONOUR JUDGE BIRD (SITTING AS A JUDGE OF THIS COURT)

His Honour Judge Bird:

Introduction

1. Dr Williams says that in or about 1986 he was the victim of a state sponsored fraud as a result of which he lost the sum of US \$6,520,190. Thereafter he says he was unlawfully detained by the first Defendant and was unlawfully deprived of a further US \$5,880,611. He says these wrongs have been formally acknowledged by the first Defendant and that on 29 September 1993 a decree was issued by the then President of Nigeria requiring that these sums, together with punitive interest, be repaid to him. On 8 May 2019 he issued proceedings seeking to recover these sums. By then the claim amounted to more than US \$80m.
2. A dispute has arisen as to the jurisdiction of this court to deal with the claim. The Claimant asserts that the Court has jurisdiction because the proceedings have been properly served on each Defendant by delivery to the High Commissioner of the first Defendant in London on 9 May 2019 or in the alternative because the Defendants have each submitted to the jurisdiction. The Defendants deny that there has been good service and assert that they have not submitted to the jurisdiction.
3. Whilst the issue concerns both Defendants it was acknowledged in the course of the hearing that the second Defendant has been joined simply as a matter of form and that no relief is sought against him.

Service

The Law

4. Service on a foreign state (and therefore on the first Defendant) is governed by section 12 of the State Immunity Act 1978. In *General Dynamics v Libya* [2021] UKSC 22, the Supreme Court held by a majority that the Act sets out “*for proceedings within its scope, the exclusive and mandatory method for service on a foreign state*”. The version of that provision in force on 9 May 2019 provided as follows:

“12. Service of process and judgments in default of appearance.

(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and Service shall be deemed to have been effected when the writ or document is received at the Ministry.

....

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

....

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.”

5. The parties agree that service was not affected on the first Defendant in accordance with section 12(1). The remaining options for good service are therefore that the first Defendant has “*appeared in proceedings*” and so submitted to the jurisdiction of the Court or that service was affected in a manner agreed by the first Defendant.
6. Section 12 does not apply to the second Defendant. He must therefore be served in the normal way. It is accepted that although the relevant claim documents were posted to the Attorney General’s office in Nigeria there was never permission to serve out of the jurisdiction. The Attorney General would not be entitled to contest jurisdiction if he had submitted to the jurisdiction.

Submission to the jurisdiction

7. During the course of argument I suggested to the parties that the test set out in the following passage from Dicey, Morris & Collins on the Conflict of Laws accurately summarised the law. Neither side made any contrary submissions and I do not regard these propositions as in any way controversial:

“In order to establish that the defendant has, by its conduct in the proceedings, submitted or waived its objection to the jurisdiction, it must be shown that it has taken some step which is only necessary or only useful if the objection has been waived or never been entertained at all. In *Deutsche Bank AG v Petromena ASA*¹⁹¹ the Court of Appeal held that there are two types of waiver which might give rise to a submission to the jurisdiction. First, there is “common law waiver”, which is the performance of an act which is inconsistent with maintaining a challenge to the jurisdiction. Such an act must clearly convey to the claimant and the court that the defendant is unequivocally renouncing its right to challenge the jurisdiction. In judging this, it is useful to consider whether a disinterested bystander with knowledge of the case would regard the acts of the defendant (or the defendant’s solicitor) as inconsistent with making and maintaining a challenge to the jurisdiction. Secondly, there can be a statutory form of submission to the jurisdiction, as in CPR, r.11(5) and (8), for example by filing an acknowledgment of service of proceedings, but then failing to make any application to dispute the court’s jurisdiction or failing in that application. In that situation the “disinterested bystander test” has no application; the sole issue is whether the conditions of those paragraphs have been met.”

8. Whilst the point was not argued, I note that in *AELEF MSN 242 LLC v Surinaamse Luchtvaart Maatschappij NV DBA Surinam Airways* [2021] EWHC 3482 (Comm) it was decided that a common law waiver was sufficient to satisfy the requirements of section 12(3) of the State Immunity Act (see paragraph 100). I note in that case that

the Defendant was held to have submitted to the jurisdiction of the Court because it had applied to extend time for serving its defence (see paragraph 73).

The acts said to amount to common law submission

9. After purported service of the proceedings in May 2019 very little happened for some time.
10. On 21 September 2020, the Claimant made an application to amend the Particulars of Claim. No order has yet been made on that application.
11. On 23 October 2020, the Defendants' solicitor sent a part 18 request to the Claimant's solicitor seeking a response within 21 days. It was made clear that in default of response the Defendants would seek a court order. It was clear from the request that it was made on behalf of both Defendants. In a preamble to the requests, the Defendants said: "*the Defendants [intend] to defend this claim. In order to prepare the defence, the Defendants need further and better particulars of the claims.*" The request stretches over 8 pages and has 33 numbered requests many of which are sub-divided. Requests 2 to 7 and 9 raise questions about service. The Defendants accept that this was the first time (some 17 months or so after the proceedings came to their attention) that the issue had been raised. Many of the requests are for the production of documents referred to in the Particulars of Claim.
12. No response was supplied and on 10 December 2020, the Defendants issued a part 23 application seeking an order that the Claimant be required to provide responses. The evidence in support of the application was set out within the application and included an explanation of why the responses were needed. Echoing the request itself the Defendants said: "*the request is necessary so that the Defendant[s] can put together a Defence to this matter. Hence, we seek this court order*".
13. The application was listed to be heard on 25 February 2022. On 24 February (so the order records) the parties emailed the court asking for the hearing to be vacated because they had "*agreed to deal with the requests and other tangential issues as part of efforts to deal with the matter holistically*". An order reflecting the agreement and making no order as to costs was made on 25 February by Master Thornett.
14. On 14 March 2022, the Claimant requested judgment in default of Defence in the sum of £83,763,496.00. On 16 March 2022, the Defendants responded with an application seeking an order that the claim be dismissed "for want of jurisdiction". In their evidence in support, the Defendants asserted that the application was not to be treated as a submission to the jurisdiction. They also, quite apart from contesting jurisdiction, set out their case for resisting the entry of judgment (see in particular paragraphs 3(iii), (iv), (vi), 26 to 29). At paragraph 29 Defendant ask that the claim be "*dismissed or otherwise struck out*". The evidence also responded to the "*purported application*" to amend the claim.
15. On 4 April 2022, the Claimant issued an application seeking an order that the Defendants be debarred from defending the claim.

The effect of these actions

16. The Defendants used the request for further information and the subsequent application to the court, to make it clear that it intended to defend the claim and that it needed the information it had requested to do so. The Defendants plainly wanted to progress the case to trial and asked the Court to compel such progress in circumstances where its own requests of the Claimant had failed to achieve any progress. In my judgment it is plain that a disinterested bystander with knowledge of the case would regard the application for a court order as inconsistent with an assertion that the Court lacked jurisdiction. By asking the court to make a case progression order, the Defendants were invoking the Court's jurisdiction not denying it. Further, the position is put beyond all doubt in the present case because the Defendants (in concert with the Claimant) invited the court to make an order which would allow the parties to deal with the request "and other tangential matters" at their own pace. The effect of the order was the case had made some progress towards a resolution. In my judgment it is plain that the application to court and the submission to a court order are acts which are wholly inconsistent with maintaining a challenge to the jurisdiction. Such acts clearly convey to the claimant and to the court that the Defendant was content that the Court had jurisdiction. At the time that application was made there was no suggestion that jurisdiction was to be challenged.
17. I therefore find that the Defendant's application to the Court on 20 December 2020 clearly amounts to a submission to the jurisdiction. Even if that were to be incorrect, the evidence in support of the jurisdictional application engages with the merits of the claim and itself in my view amounts to a submission to the jurisdiction. The request at paragraph 29 that the Court deal with the claim by striking it out and the engagement with the application to amend are together inconsistent with an assertion that the Court has no jurisdiction over the claim. In my judgment, the mere assertion within the evidence that the Defendant does not submit to the jurisdiction is insufficient to save the Defendants from the conclusion that even in their own application they are acting inconsistently with an assertion of want of jurisdiction.
18. During the course of argument my attention was drawn to *Kurz v Stella Musical Veranstaltungen GmbH* [1992] Ch, 196 a decision of Hoffmann J (as he then was). In that case the Court had concluded that a request for "discovery" and for an extension of time to serve the defence were not acts sufficient to amount to a submission to the jurisdiction.
19. The decision must be seen in context. In my judgment it has no application to the facts of the present case. It was made under the former Rules of the Supreme Court. Under those rules (see page 201F to 202G of the report) an Acknowledgement of Service would not be treated as a submission to the jurisdiction if, before the Defence was due, an application contesting jurisdiction was issued. It followed that a request for an extension of time was consistent with a wish to contest jurisdiction. The point is also discussed in the *AELEF MSN* case at paragraph 63(5). The finding that a request for documents was consistent with contesting jurisdiction was a fact sensitive point. The issue of jurisdiction might in that case "*depend entirely on the terms of such documents, such as the place of performance fixed by a pleaded contract*".
20. In the present case whilst there are requests for documents it cannot be said that those documents (or at least the vast majority of them) would unlock or shed any light at all on the jurisdiction issue. It is not the fact that a request for information was made in

the present case that amounts to an inconsistency, it is the application to the court with a clear view to progressing the case towards trial.

21. Under the present rules, an application to extend time for service of a Defence has been held to be a submission to the jurisdiction (see for example the AELEF MSN 242 LLC case cited above).

Statutory submission to the jurisdiction

22. CPR 10.1(3)(b) and CPR 11(2) require that a Defendant file an acknowledgment of service (indicating that jurisdiction is disputed) if they wish to dispute the court's jurisdiction. Once the Acknowledgment is filed the Defendant has 14 days to make the application. If the Defendant fails to make the application in time the Defendant will be treated as having accepted that the Court has jurisdiction (see CPR 11(4) and (5)).
23. Here, subject to the points dealt with below, the Defendant has failed to comply with CPR 10.1(3)(b) and CPR 11(2). The effect of that is to prevent the Defendant from making any application to contest the jurisdiction. In a case that follows a usual timetable the sequence of events provided for in the rules has a clear and obvious purpose. The Acknowledgment acts as a brake on proceedings, so that the only proper procedural step that can be taken is to issue an in-time application contesting jurisdiction. This ensures that jurisdictional issues are dealt with as early as possible.
24. The Defendants have suggested that time did not begin to run for the filing of an Acknowledgment of Service because they were not served. They submit therefore that they cannot be in breach of CPR 10.1(3)(b). There was very little argument on the point and its resolution is not necessary to determine the application. However, in my judgment an apparent inability to comply with CPR 10.3 does not mean that CPR 10.1(3)(b) and CPR 11(2) are disapplied.
25. I am satisfied that in the present case the Defendants ought to have filed an Acknowledgement of Service before making this application. The fact that they have not done so means that there has been a technical submission to the jurisdiction.

Contrary arguments

26. The Defendants have raised a number of counter arguments.
27. My attention has been drawn to CPR 15.11 which provides that "where at least" 6 months have expired since the time for filing a Defence and no other step has been taken, the claim is stayed. In my view this does not assist the Defendants. The purpose of the stay is to require any party who wants to progress the claim to apply to court and to explain itself. It is a policing mechanism which allows the court to keep an eye on proceedings. It is often overlooked and has been overlooked in this case. Where both parties invite the court to make an order (as they did in February 2022) if a CPR 15.11 stay is in place it seems to me that the making of an order amounts to an implied lifting of that stay.
28. The Defendant submits that the Claimant failed to serve all the documents required by CPR 7.8(1)(a) to (c). There is nothing in this point. I have found that the Defendants

have submitted to the jurisdiction. The potential absence of a response pack does not alter that fact. Any failure to serve all documents is in any event contested. If there was a breach it can be easily remedied. The Defendants are the most sophisticated of all parties who come before the Court: a State and a Law Officer of that State. If it were necessary (and I do not find it is) I would absolve the Claimants of any breach of the CPR as I am permitted to do by CPR 3.10.

29. The Defendant also suggested that the Claim Form has expired. In my view again there is nothing in the point. By finding that the Defendants have each submitted to the jurisdiction I have found that they have waived any right to complain about service as it was carried out (no matter how inadequately). The Defendants' position is that by the time the matter was heard or by the time the application was made the Claim Form had expired assumes that the Claim Form had not been served. The effect of my finding is that it should be treated as having been served.
30. It was also suggested that an Acknowledgement of Service could not be filed because there had been no service. Again in my judgment there is nothing in that point. CPR 10 and CPR 11 lay down a procedural code which allows jurisdictional issues (often involving disputes about service) to be dealt with. The Defendant was obliged to act quickly, once the claim papers came to their attention. This point (which in my judgment is a bad point) in any event only arises in respect of the statutory submission.
31. My attention was drawn to a number of passages in *General Dynamics United Kingdom Limited v State of Libya* [2021] UKSC 22. I do not find any of those passages of assistance. The claim concerned the application of section 12(1) of the State Immunity Act 1978 and in particular its application to arbitration enforcement. The decision does not deal with section 12(3) and, save for making it plain that in that case there was no "agreement" makes no reference to section 12(6).

The alternative service argument

32. In order to dispose of the application I do not need to deal with the existence of an agreement to serve on the High Commissioner. The evidence in respect of this is neither complete nor clear. On the one hand I have evidence from the former High Commissioner and a former judge of the Supreme Court of Nigeria asserting that some agreement was in place and on the other evidence from a Nigerian law officer saying that no such agreement was in place and that the High Commissioner's evidence is wrong.
33. The claimant's evidence on service is set out in a number of statements: first, in a witness statement of 25 July 2020 (long before the issue of service had been raised by the Defendants) he says the then High Commissioner for Nigeria in London, His Excellency Ambassador George Adesola Oguntade, agreed to accept service of the claim. He points to a letter from the High Commission dated 7 June 2019 which acknowledges receipt of the claim and assures the claimant's solicitors that the "*papers have been forwarded to the appropriate office for necessary action*".
34. Secondly, in a witness statement of 4 April 2022 (wrongly dated 4 April 2020) in a witness statement prepared in opposition to the Defendants' application to strike out for want of jurisdiction, the claimant says that the proceedings were served "*by prior*

agreement on the Defendants through the Nigerian High Commissioner...”. He describes how, following an earlier action he had been in discussions with the Defendants’ “officials and representatives” and that “to expedite matters it was agreed by the parties that this claim should be served on the Nigerian High Commissioner in London”. Mr Oludotun Sowemimo, the claimant’s Nigerian based lawyer, has prepared a witness statement which confirms that he has represented the claimant in these discussions with the Defendants. He says that an understanding was reached with incumbent Solicitors General of Nigeria that “in the event the matter could not be resolved by negotiations Dr Williams could issue his claims in the UK courts and any such claims could be served on the Nigeria High Commissioner in London who was fully empowered to accept claim papers on behalf of the Nigerian Government”.

35. Thirdly, the claimant relies on a witness statement from the former High Commissioner dated 20 January 2023. He explains that before being appointed to the position of High Commissioner he had been a Judge of the Supreme Court of Nigeria for 6 years and notes that “in accordance with the procedures I agreed service on the High Commission, and I was empowered to exercise all the relevant powers of the Government of Nigeria relevant to the United Kingdom when I was High Commissioner”.
36. The Defendant relies on witness evidence from Abubakar Malami, the immediate past Attorney General of Nigeria and its former Minister of Justice. I take the following from his evidence: The Minister of Foreign Affairs is responsible for accepting service of claims made against the State (paragraph 10) and all foreign claims against the State must be dealt with by the Ministry of Foreign Affairs (paragraph 13). The High Commission in London is the responsibility of the Minister of Foreign Affairs (paragraphs 8, 19 and 24). The proper and only person on whom a claim made against the Attorney General can be served is the Attorney General (paragraph 12). The former Attorney General’s evidence is unequivocal that he has at no time authorised the High Commissioner to accept service and he points out (paragraph 24) that under Nigerian Law the role of the High Commissioner’s role does not include accepting court process.
37. The evidence leaves no clear picture. It is not possible, and in my view, even if possible, not sensible, to attempt to make findings about the presence or absence of agreements on evidence of this type. In my judgment a denial by a Sovereign State that there is an agreement for service by some alternative method is a factor of very real weight. Further in my judgment, an agreement by the State to an alternative means of service might be expected to attract a degree of formality. If the High Commissioner was expressly authorised by the State (authorisation by the Foreign Affairs ministry may not be enough) it might be expected that that fact would be recorded and noted.
38. On balance therefore, I am not prepared on the evidence before me, to conclude that there was any agreement to serve by alternative means.

Conclusion

39. For the reasons I have set out, I have come to the clear conclusion that the Defendants have each submitted to the jurisdiction of the court. The first Defendant is prevented

from raising any objection about noncompliance with section 12(1) of the 1978 by operation of section 12(3) and the second Defendant is prevented from raising any argument about the absence of permission to serve out of the jurisdiction.

40. I am grateful to both counsel for their helpful written and oral arguments.