



Neutral Citation Number: [2021] EWHC 541 (Comm)

Case No: CL-2019-000440

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT QBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 23rd February 2021

Before:

MS. PATRICIA ROBERTSON, QC
(Sitting as a Deputy Judge of the High Court)

Between:

ICTSI MIDDLE EAST DMCC

Claimant

- and -

**THE GOVERNMENT OF THE REPUBLIC OF
SUDAN**

Defendant

MR. RAJESH PILLAI, QC (instructed by **HFW LLP**) for the **Claimant**
MR. JONATHON DAWID (instructed by **Peter Dovey & Co Solicitors**) for the **Defendant**

Approved Judgment

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

DEPUTY JUDGE ROBERTSON :

1. I am giving my ruling in relation to the adjournment application. In this matter Sudan appear by Mr. Dawid, who was instructed only last night, and applies at the 11th hour and indeed some way considerably beyond the 11th hour to adjourn this hearing of ICTSI's summary judgment application, that application having been issued on 31st July 2020, and served in accordance with the order of Jacobs J made on 3rd July 2020, which is to say it was served on the Ministry of Finance of Sudan, on the Sudanese Embassy in London and it was also copied to a firm of solicitors who, at that time, purported to be instructed for Sudan, although there is an issue over that that I do not think I need go into further for present purposes.
2. I am not going to go in detail through the extensive efforts that have been made by the claimant in these proceedings to ensure that both the proceedings themselves and all relevant documentation, including this application, have been brought to the defendant's attention. Those are detailed in the claimant's skeleton argument and I have been taken back through the material this morning having also read it for myself in preparation for the hearing. I am satisfied that all appropriate efforts were made on the claimant's side and, indeed, there is no reason to suppose that the requirements of the Sovereign Immunity Act themselves have not been complied with.
3. There is an outstanding point taken by the defendant about not having received back yet the hard copies of the relevant Apostilled documents but I am told, and I have no reason to doubt, that a scan of those documents has been received and the only reason the hard copies have not been provided back is that the diplomatic bag is currently suspended due to Covid.
4. On the face of it, there has been appropriate service in accordance with the requirements of that Act as well as appropriate service in accordance with the requirements of an order, which allowed permission to Sudan to apply to set aside that order, permission they have never sought until now to avail themselves of, nor until now have they indicated any intention to challenge the jurisdiction.
5. However, the defendant has appeared today seeking an adjournment and reserving their position on all of those points making clear that they are not by appearing today submitting to the jurisdiction, that they want to take stock across the whole piece, in other words, whether there is jurisdiction, whether there is any basis to set aside the order of Jacobs J in relation to service and, indeed, the merits of the claim itself.
6. Sudan has undergone a military coup since the agreements that are in issue in these proceedings and more recently, earlier this month, there has been a cabinet reshuffle which has replaced the Head of the Finance Ministry, the Finance Ministry being the ministry on which service has been effected in addition to being effected on the Sudanese Embassy. Be that as it may, it is in evidence before me that part payments have been made since the date of the regime change, expressly with reference to the principal amount due under the Refund Bond, which is one of the two liabilities in issue on this summary judgment application.
7. The other element of the claim relates to a sum of 3.5m euros per month which the claimant alleges to be due by way of an indemnity for its funding costs, and that is an ongoing liability which accrues at a rate of 3.5m euros a month.

8. Whatever the political turmoil in Sudan it does not seem to me to be an adequate explanation for the failure of that government to engage until now with these proceedings against that factual backdrop. I, therefore, approach this adjournment application on the footing that I am justified in concluding that there has simply been a change of stance on the part of Sudan which now wishes to engage having previously failed to do so.
9. Nevertheless, now that the defendant has indicated that it wishes to do so it does seem to me that justice requires there should be an adjournment but on terms that the claimant will be no worse off by reason of that adjournment than if the matter had been heard today. That is, therefore, the basis on which I am approaching the terms of the adjournment.
10. I have determined that this matter should be adjourned to the first available two-day date in May of this year and I should add that is not necessarily a date after 23rd May. The defendant indicated it wanted three months. It may or may not get that depending on when it proves possible to list. The costs thrown away by this adjournment are to be paid by the defendant on an indemnity basis and in default of agreement no doubt those will have to be assessed.¹ I will hear from the parties as to what date should be specified for payment but, in principle, payment should be made at an early stage before the rest of the directions I am about to deal with.
11. By way of further condition attached to the adjournment, the defendant should pay into court the sum of 7m euros. That amounts to two monthly payments of 3.5m euros each. Now, that is a significant sum but it is a veritable drop in the ocean by comparison with the balance of the principal sum, the principal sum due in respect of the Refund Bond in respect of which it is difficult as matters stand to see what points will be available to Sudan in defence.
12. Again, I am not going to go through that in detail now save to say that those points are set out in Mr. Pillai's skeleton on behalf of ICTSI. I have been through the documentation and was taken through it again this morning. In short, that sum is due under what on its face is an agreement governed by English law, subject to an exclusive jurisdiction clause in favour of the English courts, and there have been a number of acknowledgements on behalf of Sudan of its liability in the form of part-payments, the most recent of which was in December 2019 and, therefore, after the date of the relevant regime change. So, all of that represents something of a mountain to climb in respect of submissions that may or may not ultimately come to be made at a further hearing on a summary judgment application.
13. Striking a balance, on the one hand, I have seen documents, which, if unanswered, show ICTSI undoubtedly is owed the unpaid balance of the 410m euros. On the other hand, I have not yet heard the summary judgment application and it is the purpose of the adjournment to give Sudan an opportunity to be heard. I recognise that as regards the separate liability of 3.5m euros per month, and there may indeed be rather more scope for debate and more to say, I am not prejudging that at this stage, but what is clear is that the fact that a further two months, at least, of that liability will accrue before this matter can come back to be heard is another aspect of the prejudice to the claimant from this adjournment.

¹ The Deputy Judge clarified after the hearing that this was intended to be a reference to summary assessment, consistent with the order being for payment of a specified sum in 14 days.

14. Therefore, it may be somewhat rough-and-ready justice to alight upon that as the appropriate figure to be paid into court but it does seem to me appropriate that something should be paid into court conditionally in respect of what appear to be the weaknesses on the face of the claim, a very late adjournment and the need, it seems to me, to ensure that there is proper engagement from Sudan going forward so that this matter does come to a conclusion at the next summary judgment application in May, be that either that summary judgment is appropriate and is given or the matter is then made the subject of directions which will take it to trial and certainly either way there should not be renewed lack of engagement with the process.
15. The other element in that is that there should be a timeline set, which requires any application to set aside the jurisdiction or to set aside the order of Jacobs J to be made in short order such that it is clear whether or not those are live issues or whether it is simply a matter of summary judgment being heard in May. It was suggested by Mr. Pillai in submissions that a two-week timescale would be appropriate for that. I am inclined to give somewhat longer because I recognise there may be difficulties in getting instructions from Sudan in the very short timescale, but it does seem to me that within a month from now it should be possible for Sudan to set out its position on both of those matters.
16. I will hear from counsel as to what date should then be specified for evidence in response and any skeleton argument from Sudan, both of which it may be appropriate to set by reference to numbers of weeks ahead of the eventual hearing date, once that has been listed.
17. I should before closing mention that, and again without going to the details because this is extempore, I was taken to *Abbot Investments (North Africa) Limited v Nestoil Limited [2017] EWHC 119 (Comm)* as an authority in relation to the imposition of conditions and what I derived from that was that one has to tailor the condition to the purpose for which the condition is imposed. In these circumstances, that purpose is to protect the claimant from the prejudice involved in this matter coming on later by reason of the adjournment, and also to secure what appears to be a weak defence on the part of Sudan. However, tailored - the level at which I have tailored it is to allow for the fact that I have not yet heard from them in detail so I am judging it to be weak provisionally, if you like, on the basis of having heard ICTSI's side of the story and having looked at the documents on which they rely. It is for that reason that I pitched it at the level I have and also tailoring that to the element of prejudice involved in delay, because of the way in which the monthly liability accrues.

.....

This judgment has been approved by the Judge.