[2021] EWHC 369 (Comm)
Claim No. CL-2020-000211

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
ADMIRALTY AND COMMERCIAL COURT

Before Deputy Master Kay QC

B E T W E E N:

(1) NJORD PARTNERS SMA-SEAL LP
(2) NPSSF DEBT CO S.À R.L.
(3) AIE III INVESTMENTS, L.P.

First to Third Claimants

(4) NORDIC TRUSTEE AS

Fourth Claimant/Judgment Creditor/Respondent

- and -

(1) ASTIR MARITIME LIMITED

First Defendant

(2) MUHAMMAD TAHIR LAKHANI

Second Defendant/Judgment Debtor/Applicant

(3) MUHAMMAD ALI LAKHANI

Third Defendant

Appearances: Ms Bushra Ahmed for the Second Defendant, Mr Lakhani instructed by KBH Bahrain

Mr Simon Salzedo QC and Mr Richard Blakeley for the Fourth Claimant, instructed by Milbank LLP

JUDGMENT

(Setting out the reasons with respect to the decision made at the hearing on the 16th February 2021)

Preamble

1. The Application was heard on the 16th February 2021. At that time, I ordered that Mr Lakhani's application should be dismissed with costs and that the hearing listed for the 22nd February 2021 should proceed and stated that I would provide a reasoned decision.

The Application

2. This matter has arisen as part of the proceedings between the Claimants and the Defendants named in the title above in the course of which the Fourth Claimant, Nordic Trust AS (the "Trustee"), obtained a judgment in default against the Second Defendant, Mr Muhammad Tahir Lakhani ("Mr Lakhani") who is resident in the UAE but holds joint Pakistan and UK nationality, and an Order made by Master Davison dated the 11th January 2021, for the examination of Mr Lakhani, with the production of specified documents, before the court by video link hearing on the 22nd February 2021, pursuant to CPR Part 71 (the "Part 71 Order").

3. The present application for consideration is dated the 3rd February 2021 and is made by Mr Lakhani who requests that the court set aside the Part 71 Order or makes an order delaying the hearing on the 22nd February 2021.

Evidence

4. The evidence filed includes the second witness statement of Mr Lakhani dated 3rd February 2021, made in support of his application of the same date, the ninth witness statement of Ms Vaswani of Milbank LLP ("Milbank), the solicitor for the Fourth Claimant and Respondent to the present application, dated 13th November 2020 (exhibited to Mr Lakhani's witness statement just referred to), the eleventh witness statement of Ms Vaswani dated 1st February 2021 (made in support of Milbank's application dated the 1st February 2021) and the twelfth witness statement of Ms Vaswani dated 10th February 2021 (made in response to Mr Lakhani's present application). The account of the background in this matter is derived from those witness statements and the documents exhibited to them.

Background

5. On the 14th July 2020 the Trustee was granted an order for summary judgment against Mr Lakhani by Foxton J, stating that he was liable to pay the Trustee US$47,297,812.73 by 31st July 2020 with interest running at 8% p.a. Aside from a sum of $71,496.70 set off in respect of costs, no payment has been received and the judgment debt remains at $47,226,316.03 with additional interest which continues to accrue. It is to be noted that the liability arises from a guarantee dated 28th March 2017 entered into between the Trustee and Mr Lakhani which provided, inter alia, for English law and jurisdiction and that the guarantor appointed a service agent in the United Kingdom to accept any process or other documents relating to proceedings connected with a dispute which included any application for a protective measure in connection with the guarantee.

6. On the 13th November 2020 the Trustee made an application for Mr Lakhani to attend the court pursuant to CPR Part 71. On the 26th November 2020 Master Davison directed that the application should be made on notice and made an order permitting service of the application and its associated evidence upon Mr Lakhani out of the jurisdiction. Under cover of a letter dated the 7th December 2020, the Part 71 Application, a draft order, an application for permission to serve the order out of the jurisdiction, a copy of the order of the 26th November 2020 and the supporting witness statement made by Ms Mona Vaswani (her 9th) were served by courier at Mr Lakhani's address in Dubai. Ms Vaswani has exhibited the witness statement of one Mr Zahed Bin Abdullah Jabri, dated the 28th January

2021, to her 12th witness statement which details the fact that the application documents were served on the 7th December 2021. Ms Vaswani also states that the documents were also served on Mr Lakhani's then solicitors Greenberg Traurig LLP ("Greenberg") by courier and by email (see the letter of the 8th December 2020 exhibited to Ms Vaswani's witness statement.).

7. In Ms Vaswani's 12th witness statement she has said that Mr Lakhani's evidence was due on the 22nd December 2020 and as none was forthcoming she wrote to Greenberg Traurig on the 24th December 2020 asking whether the application was opposed. On the 11th January 2021, Milbank wrote to the court and asked for the Part 71 Order to be made. That order, dated the 11th January 2021 and sealed on the 12th January 2021, set the hearing date for the 22nd February 2021 to be held by video-conference at the court address of 7 Rolls Buildings, Fetter Lane, London EC4A 1NL. The Order also required Mr Lakhani to produce a number of documents specified in the Annex to the Order.

8. Attempts were then made to serve the Order on Mr Lakhani at his residence in Dubai. These are set out in the third witness statement of Mr Zahed Jabri referred to above which indicated that his attempts to make personal service of the Order were unsuccessful, although it is clear that the relevant documents were delivered to associates of Mr Lakhani who was, according to Mr Jabri, apparently resident and working in Dubai at the time. Milbank also sought to bring Mr Lakhani's attention to the Part 71 Order by email on the 27th January 2021, by a WhatsApp message of the same date and, after receiving an email letter from Mr Lakhani dated the 28th January 2021 stating that documents should be sent to a London address and to a new email address, by sending the documents by courier and email to the named addresses.

9. By an Application Notice dated the 1st February 2021, Ms Vaswani applied to the court for an order for alternative service supported by her 11th witness statement of the same date in which she submitted that the evidence demonstrated that Mr Lakhani was deliberately seeking to avoid the attempts to serve the CPR Part 71 Order upon him personally. By an Order dated the 8th February 2021, the Court ordered that service of the CPR Part 71 Order could be effected in any one of the eight methods set out in paragraph 1 and, by paragraph 2: "*The permission granted in paragraph 1 of this Order applies to any such service as the Fourth Claimant may already have effected as at the date of this Order.*"

Consideration of the parties' submissions

10. The arguments supporting and opposing the application are to be found in Mr Lakhani's second witness statement, in the skeleton argument provided by his counsel, Ms Bushra Ahmed and the skeleton argument prepared on behalf of the Trustee by Mr Simon Salzedo QC and Mr Richard Blakeley. As appears hereafter, the case originally put forward by Mr Lakhani is not the same as the case presented by his counsel in writing and subsequently developed by Ms Ahmed at the hearing.

11. From his second witness statement it can be seen that Mr Lakhani's application to set aside the Part 71 Order is based upon two premises: (a) That the application for the Part 71 Order

was not served upon him personally in the UAE; and (b) That service of the Part 71 Application and/or the Part 71 Order upon Mr Lakhani in the UAE was not, as it should have been, made in accordance with the Treaty between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates on judicial assistance in civil and commercial matters dated the 7th December 2006 (the "Treaty"). Further, Mr Lakhani has based his application for a delay to the hearing on his need for further time stating: "*I am unable to comply with the Examination Date as I am unable to understand the documents which have already been provided and those that have not*".

12. Mr Lakhani further submitted that, if the court considers that he should have appealed the order rather than having applied to set it aside, he should be allowed an extension of time to file a notice of appeal. With respect to the issue of whether the challenge to the Order of the 11th January should have been made by way of an appeal rather than by the present application during the hearing, Mr Salzedo stated that, although he considered that an appeal would have been the proper course of action, he declined to take the point and his client was content that the court should deal with the matter by way of the present application. It follows that this is not a point of further concern.

13. Ms Ahmed provided a skeleton of some 22 pages. It was somewhat discursive and I am afraid that I found it difficult to follow the precise grounds upon which she argued that the Part 71 Order should be set aside except that she contended that the solicitor for the Trustee had failed to comply with the duty to provide full and frank disclosure of the existence and effect of the Treaty, that as a matter of construction there is a presumption against CPR Part 71 having extra-territorial effect, and that the proper means of taking evidence in Dubai was by virtue of Art. 12 of the Treaty which provided that the courts of the States which were parties to the Treaty would permit evidence to be taken by way of Letters of Request.

14. It also appeared that Ms Ahmed's skeleton submissions with respect to extra-territorial effect and the propriety of serving a CPR Part 71 order in Dubai were directed towards whether service could properly be effected. However, during the course of her oral submissions Ms Ahmed, helpfully, developed and clarified the case for Mr Lakhani. She stated that there was no challenge to the service of the Order as had been indicated by Mr Lakhani's witness statement. In my view, this concession was sensible. CPR Part 71.3 provides that the Order must be served personally "*unless the court otherwise orders*". In fact, by the Order of the 8th February 2021, Master Davison ordered that alternative service would be effective in this case, including the previous delivery of the documents to Mr Lakhani's residence and to his previous solicitors. On the evidence before the Court it was quite clear that Mr Lakhani had been given abundant notice of the CPR Part 71 hearing and the consequences of non-attendance in good time.

15. During her oral submissions, Ms Ahmed further argued that, when making the CPR Part 71 Order, the Court had failed to give any or sufficient consideration to the extra-territorial effect of the Order and that making it might be contrary to the domestic law of the UAE. She submitted, by reference to a dictum of Sir Jeremy Cook, sitting as a judge of the DIFC in *Pearl Petroleum Company Ltd v The Kurdistan Regional Government of Iraq* [2017] DIFC ARB 003, that in the UAE, treaties, once ratified, have the force of law to which, by

Art.238 of the UAE Law of Civil Procedure, the UAE courts must give effect and that as the Treaty between the UK and the UAE provided, by Art 4(2)(b), for the obtaining of evidence within the UAE by means of Letters of Request, that was the lawful means to obtain evidence (which included questioning and the provision of documents under CPR Part 71) under UAE law. She also relied upon a number of decisions including those made in *Masri v Consolidated Contractors International Company SAL* [2010] 1 AC 90 and *R(on the application of KBR Inc) v. Director of Serious Fraud Office* [2021] UKSC 2 to support her case which I consider can best be summarised as making the following propositions:

a. That it is incumbent upon the English Court to consider whether, in making, a CPR Part 71 Order, this might impinge upon the sovereignty of another country, in this case the UAE;
b. That Ms Vaswani had failed to bring the fact and the operation of the Treaty to Master Davison's attention when she applied for the Part 71 Order to allow him to consider this properly;
c. That treaties ratified by the UAE are part of the domestic law of the UAE;
d. Art 4(2)(b) of the Treaty limits the extent of the English Court's powers with respect to taking evidence in the UAE to seeking judicial assistance in the UAE by means of Letters of Request or upon commission.
e. It follows, from c and d, that a Part 71 Order which requires a resident of the UAE to give oral evidence by video link to an English Court is unlawful under UAE law.

16. In these circumstances Ms Ahmed submitted that the CPR Part 71 Order should not have been made and that the existing Order should be set aside. If these submissions did not find favour with the Court Ms Ahmed submitted that there should be an adjournment of the hearing on the 22nd February for four weeks to allow Mr Lakhani more time to prepare and provide the documents set out in the Annex to the Part 71 Order. In support of this she relied upon the reasons set out in Mr Lakhani's witness statement.

17. In his submissions Mr Salzedo QC first considered the non-disclosure point. He submitted that it did not arise where the application was one made on notice to Mr Lakhani, as opposed to being made without notice. In such cases there is no obligation of full and frank disclosure upon an applicant. He also submitted that, in any event, in her ninth witness statement Ms Vaswani, did draw the court's attention to the existence of the Treaty and stated her belief that under UAE law it was possible for a process server to effect personal service of documents upon a judgment creditor giving the basis of her belief. He also noted Mr Lakhani's reliance upon Art. 4(2)(b) of the Treaty (the Letter of Request provision) and pointed out that, following the decision of David Foxton QC, now Foxton J, in *Marashen Ltd v Kenvett Ltd* [2018] 1 WLR 288 the Treaty made with the UAE is not exclusive in its application as service may, by Art.7 of the Treaty, be effected by any method required by the requesting party which is not incompatible with domestic law. Mr Salzedo further submitted that Art. 4(2)(b) of the Treaty does not apply because the Part 71 Order is not a request for judicial assistance under the Treaty, nor is it a request for the taking of evidence by means of Letters of Request. Those points were made in his skeleton which unsurprisingly was designed to deal with the grounds for the application set out in Mr Lakhani's witness statement.

18. With respect to Ms Ahmed's oral submissions, as to the effect of Art.4(2)(b) and whether the court should be concerned as to whether making a Part 71 Order might amount to a possible infringement of the UAE's domestic law and therefore transgress its sovereignty referred to above, Mr Salzedo submitted that the Court should only be concerned with such matters if there was evidence to the effect that it was unlawful under UAE law for Mr Lakhani to give oral evidence pursuant to the CPR Part 71 Order or that it could be inferred that the wording of the Treaty itself gave rise to such a conclusion. He pointed out that there was no such evidence before the Court, that no argument had been advanced which supported a suggestion that, from the wording of the Treaty, it could be inferred that the Part 71 Order would be unlawful and that, as the provisions of Art. 4(2)(b) of the Treaty were permissive they could not possibly be construed as excluding other means of obtaining evidence other than by way of a request for judicial assistance by the use of Letters of Request. Further, Mr Salzedo referred me to Dicey, Morris and Collins Conflict of Laws (15th Ed) section 3 dealing with 'Obtaining Evidence Abroad' which draws the distinction between situations where it is desired to obtain evidence from third party witnesses resident abroad and the examination of an actual party to the proceedings properly commenced before the English Court. He submitted that Art 4 of the Treaty is the result of an agreement between two states to co-operate with regard to the provision of evidence from third party witnesses whereas Dicey indicates that different considerations apply where the person to be examined is a party to the proceedings. In this respect he referred to the decision of Gloster J, as she then was, in *Masri v Consolidated Contractors International UK Ltd (No.2)* [2008] 1 All ER (Comm) 305 at paras 134-135 where she held that the EU Evidence Regulation (Council Regulation (EC) No 1206/2001) did not apply with regard to an Order under CPR Part 71. Mr Salzedo submitted that the same considerations apply in the present case to the Treaty made between the UK and the UAE. He further submitted that, in any event if the Court did consider that the effect of the Part 71 Order was to require Mr Lakhani to do something unlawful in the UAE that would not be a bar to the making of a Part 71 Order but be a factor to be taken into account by the Court when exercising its discretion whether to make a Part 71 Order. In this respect Mr Salzedo submitted that Ms Ahmed had made no submissions on this aspect and there was no evidence that compliance with the CPR Part 71 Order would open Mr Lakhani to some sanction in the UAE or put him at risk in any way. Mr Salzedo also drew attention to paragraph 8-071 of Dicey, Morris and Collins which states that the Court has a discretion in cases of '*real risk*' but will '*not generally excuse a party from compliance with its obligations to the court on the ground that to do so would infringe foreign law or expose him to penal sanctions in a foreign country'*.

19. Finally, Mr Salzedo opposed the adjournment of the hearing on the 22nd February 2021. He submitted that Mr Lakhani had not given any real reason for such an adjournment. Mr Salzedo has submitted that Mr Lakhani has had ample time to understand the request for documents and to respond to it. At the very least Mr Lakhani has, as he himself accepted, had notice since 4th January 2021, but it is very probable that he had notice of the application earlier. Although Mr Lakhani has, in his second witness statement, asserted that the application for a CPR Part 71 Order was not brought to his attention until 4th January 2021 Mr Salzedo submitted there must be considerable doubt about the veracity of that assertion because his own solicitors, Greenberg, had been directly involved in ascertaining an appropriate hearing date during December and it is extremely unlikely that they would

have been so involved without discussing an appropriate date with their client. It is also to be noted that Greenberg were still acting for Mr Lakhani at that time, as they did not come off the record until 11th January 2021, so that he had the benefit of their advice.

Consideration

20. The application for a CPR Part 71 was, at the direction of Master Davison, brought on notice to Mr Lakhani who had notice of it before it was made and made no objection. In these circumstances the duty to give full and frank information in her supporting witness statement did not apply to Ms Vaswani. However, even if it did, Ms Vaswani did draw the attention of the Court to the existence of the Treaty and made reference to its possible effect with regard to service within the UAE. Although Ms Ahmed sought to argue that there was an additional duty to draw attention to the possibility that making a CPR Part 71 Order might amount to an infringement of UAE domestic law and therefore the Court was deprived of the opportunity to consider that aspect there is no merit in such a submission. That is particularly true where Ms Ahmed could point to no evidence that this was, in fact, the case and could put forward no sensible argument that this was somehow to be inferred from the wording of the Treaty.

21. Although Ms Ahmed relied upon the decision of Sir Jeremy Cook, in *Pearl Petroleum Company Ltd*, that does no more than establish that a Treaty made by the UAE is to be regarded as being part of UAE domestic law. It did not establish that an Order made under CPR Part 71 requiring a resident of the UAE (who also happens to be a UK citizen) to attend a Part 71 hearing and provide documents where that person is a party to the English proceedings is unlawful in the UAE, either by reason of the wording of the Treaty itself or for any other reason.

22. Furthermore, although Ms Ahmed submitted that the matters under consideration were novel and were not subject to authority, I think that she is wrong. The starting point is that rule 23(1) in Dicey, Morris and Collins makes it clear that the obligations of parties to a case pending before the court in respect of disclosure and evidence are governed by the *lex fori* and that issues of extra-territoriality have little application with respect to Orders made under CPR Part 71 when directed to a party to English proceedings. Mr Salzedo then drew attention to the decision of Gloster J in *Masri (No.2)*, referred to above, which makes it clear, at least by analogy, that the application of CPR Part 71 will not be affected by other regulations arising by way of a treaty. That decision is persuasive but, in my view, the matter is put beyond doubt by the decision in *Masri v Consolidated Contractors International UK Ltd (No.4)* [2010] 1 AC 90 which, being a decision of the House of Lords, is binding upon me. In his speech at paragraph 17 Lord Mance said:

> *"In these circumstances, the conjunction in CPR 71 of provision for oral examination of a personal judgment debtor (against whom an order may be obtained although he or she is out of the jurisdiction) with provision for oral examination of officers of a corporate judgment debtor is not persuasive support for a proposition that an order may be made against the latter when he or she is out of the jurisdiction. There are basic*

differences between the two situations, and the presumption against extra-territoriality has a potential application to the latter which it does not have to the former." (emphasis added)

23. Thus, the principle of whether an individual person residing abroad who is a party to the English proceedings may be subject to a Part 71 Order has been decided. In consequence I do not consider that there is any basis for concluding that the English Court should refuse to make a CPR Part 71 Order in respect of Mr Lakhani, particularly where Ms Ahmed has produced no evidence to support her case and it is not possible nor sensible to read the Treaty as prohibiting such an Order being made or complied with.

24. Further as Mr Salzedo has submitted, even if Ms Ahmed had provided a basis for establishing that it would be unlawful under UAE law for Mr Lakhani to take part in a CPR Part 71 Order hearing (which she has not), it would still be a matter upon which the Court should exercise its discretion and, as stated at paragraph 8-070 of Dicey, Morris and Collins the court will not generally exercise its discretion to excuse a party from compliance with its obligations on the ground that it would infringe foreign law. Even if that were the case, Mr Salzedo has submitted that there is nothing before the Court to cause it to exercise its discretion in favour of Mr Lakhani. I agree with him.

25. With respect to the application for an adjournment this is a case where the Judgment has been outstanding for some considerable time and has not been satisfied at all. Ms Ahmed has referred to Mr Lakhani's witness statement as providing reasons for adjourning the hearing. I disagree. There is nothing in Mr Lakhani's witness statement which can be considered as a valid reason for adjourning the hearing.

Conclusion

26. I am grateful to all counsel for the manner in which the case has been presented and conducted and, having considered the evidence provided, the arguments put forward on behalf of the parties and despite Ms Ahmed's valiant efforts to persuade me to the contrary, I have come to the conclusion that I must agree with Mr Salzedo's submission that Mr Lakhani's case is hopeless.

27. In these circumstances I therefore consider that the proper Order is:
    a. That Mr Lakhani's application to set aside the Part 71 Order of Master Davison should be dismissed;
    b. That the CPR Part 71 examination on the 22nd February 2021 should proceed as listed;
    c. That Mr Lakhani should pay the Trustee's costs of Mr Lakhani's application and the hearing which took place on the 16th February 2021.

Dated the 18th day of February 2021