



Neutral Citation Number: [2013] EWHC 1019 (Comm)

Case No: 2012-1410

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 25/04/2013

Before:

MR JUSTICE HAMBLÉN

Between:

Arbuthnot Latham & Co Limited

- and -

(1) M3 Marine Limited

(2) Alan Lubin

Claimant

Defendants

Nevil Phillips (instructed by **Thomas Cooper**) for the **Claimant**
Sandra Healy (instructed by **Lewis & Co**) for the **Defendant**

Hearing dates: 22 April 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HAMBLÉN

Mr Justice Hamblen :

Introduction

1. On 26 October 2012 the Claimant issued proceedings before the English court making claims in debt and/or damages against the Defendants in the sum of €3,627,348.99 plus interest.
2. The claim against the First Defendant is for sums allegedly owed under (i) a loan facility agreement dated 20 March 2009 (“the Loan Agreement”) and (ii) an overdraft facility agreement dated 12 April 2011 (“the Overdraft Facility”), both of which financed the refitting and maintenance of the First Defendant’s luxury motor yacht, MIRABELLA III (“the Yacht”).
3. The claim against the Second Defendant is for sums allegedly owed under guarantees which he provided to secure the First Defendant’s obligations under the Loan Agreement and the Overdraft Facility, such guarantees being dated 20 March 2009 (“the First Guarantee”) and 13 April 2011 (“the Second Guarantee”).
4. The claim has been brought in England pursuant to the non-exclusive English jurisdiction agreements in the above contracts (“the Contracts”).
5. The Defendants contend that the English proceedings should be stayed pursuant to Articles 27 and/or 28 of the Judgments Regulation because the French court was the court first seised.
6. The issue between the parties is whether or not the French court was the court first seised. If it was, then it is accepted by the Claimant that there should be a stay under Article 27.

The French court proceedings

7. On 27 September 2012 the Claimant arrested the Yacht in Port Vendres in the South of France pursuant to the International Convention Relating to the Arrest of Sea-Going Ships of 10 May 1952 (“the Arrest Convention 1952”). The arrest of the Yacht was sought and obtained on the basis that the Claimant had a Maritime Claim within the scope of Article 1.1(q) of the Arrest Convention 1952, namely claims under the Loan Agreement and the Overdraft Facility which were secured by the Yacht Mortgages.
8. On 24 October 2012, whilst the Yacht was still under arrest, the Defendants’ French lawyers, Lewis & Co., issued a writ of summons before the French court claiming declarations of non-liability under the Contracts, damages for losses sustained as a result of the Claimant’s allegedly negligent and wrongful conduct in calling in the loan and in connection with the alleged loss of the Yacht’s papers, and an injunction preventing the sale of the Yacht (“the French Writ”). The Defendants contend that the French court has jurisdiction pursuant to Article 7.1(f) of the Arrest Convention 1952 which gives jurisdiction to the courts of the country where a vessel is arrested to decide on the merits of claims secured by mortgages over the arrested vessel. This is disputed by the Claimants.

9. The French bailiffs, SCP Haber-Luthier, F. Millet and M. Paillette (“SCP”) sent the French Writ by fax to the Foreign Process Section of the Royal Courts of Justice (“FPS”) on 24 October 2012 and the documents were received by fax the same day.
10. SCP also sent the French Writ to the FPS by post on 24 October 2012 and the documents were received by the FPS on 30 October 2012.
11. On 1 November 2012 the FPS issued an Acknowledgment of Receipt for the French Writ which stated that the date of receipt was 30 October 2012.
12. On 31 January 2013 the FPS issued a revised Acknowledgment of Receipt for the French Writ which stated that the date of receipt was 24 October 2012. The revised Acknowledgment of Receipt was stamped and initialled by the Senior Master, who, on the same date, also annotated the Acknowledgment of Receipt issued on 1 November 2012 as follows: “Permission to re-issue as the date of receipt was 24/10/12”.
13. The issue between the parties is whether the French court was seised on 24 October 2012 (when the FPS received the faxed French Writ) or 30 October 2012 (when the FPS received the posted French Writ). In short, the issue is whether it was necessary for the FPS to have received the French Writ by fax and post prior to those documents being deemed received for the purpose of Article 30(2) of the Brussels Regulation, or whether receipt by fax alone was sufficient.

The applicable provisions

14. Where proceedings involving the same or related causes of action are brought in the courts of different Member States, Articles 27 and 28 of the Judgments Regulation give primacy to the court first seised.
15. Article 30 of the Judgments Regulation determines when a court is seised for the purposes of Article 27 and 28. It provides:

“For the purposes of this Section, a court shall be deemed to be seised:

 1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
 2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.”
16. Article 30(1) applies to proceedings in England and Wales because they are instituted by the court issuing a claim form, which has subsequently to be served on the defendant (see Briggs & Rees, *Civil Jurisdiction and Judgments* (5th ed, 2009), para. 2.233; *Dicey, Morris & Collins* (15th ed) at para. 12-067). The English Court became seised of the present claim on 26 October 2012 when the Claim Form was issued.

17. It was common ground that Article 30(2) applies to proceedings in France because the writ has to be served before being lodged with the court. Thus, in the present case, the French court was seised at the time when the French Writ was received by “the authority responsible for service”, namely the FPS.
18. In determining when the French Writ was “received” by the FPS, regard should be had to the meaning of that concept in the Service Regulation.
19. In *Tavoulaareas v Tsavliris* [2006] 2 CLC 1034 at [8], Longmore LJ said (in the context of the earlier Service Regulation, which Regulation 1393/2007 has since replaced):

“The concept of ‘service’ in Article 30 of the Judgments Regulation must be consonant with the concept of ‘service’ in the Service Regulation and the word ‘service’ in Article 34(2) of the Judgments Regulation must likewise have the same meaning as in Article 20 of the Service Regulation. Otherwise there would be a serious mismatch between the respective provisions for seizure and judgment recognition. Given the primacy of the court first seised, it is, par excellence, the judgment of that court to which recognition must be extended.”
20. Service under the Service Regulation is effected by an established network of transmitting and receiving agencies in Member States tasked with arranging service.
21. The Service Regulation includes the following recitals and articles relevant to the method by which documents are to be transmitted:
 - i) Recital (2) provides that:

“The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil and commercial matters for service between the Member States”
 - ii) Recital (6) provides that:

“Efficiency and speed in judicial procedures in civil matters require that judicial and extrajudicial documents be transmitted directly and by rapid means...”
 - iii) Recital (7) provides as follows in relation to the range of means of transmission of documents:

“Speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed...”
 - iv) Recital (19) provides for the basis for a manual to be drawn up containing information relevant to the application of the Service Regulation:

“The Commission should draw up a manual containing information relevant for the proper application of this Regulation...”

- v) Article 2(4) requires Member States to provide the Commission with certain information relating to its receiving agencies. In particular sub-paragraph 2.4(c) requires the following information to be provided:

“the means of receipt of documents available to them;”

- vi) Article 4(2) sets out the means by which documents are to be transmitted between transmitting agencies and receiving agencies under the EU Service Regulation. It provides as follows:

“The transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible.”

- vii) Article 6(1) provides for a standard form receipt to be sent by the receiving agency to the transmitting agency upon receipt of a document:

“On receipt of a document, a receiving agency shall, as soon as possible and in any event within seven days of receipt, send a receipt to the transmitting agency by the swiftest possible means of transmission using the standard form set out in Annex I.”

22. In the furtherance of the objectives of the Service Regulation, a Manual Containing the Information Relating to the Receiving Agencies (“the Manual”) is published on the European Commission internet site.

23. The following sections of the Manual are relevant to the United Kingdom:

- i) At p.4 the Contents of the Manual insofar as they relate to the United Kingdom are listed as follows:

“United Kingdom

- | | |
|---|-----------|
| I. names and addresses of receiving agencies | p. 1 UKI |
| II. geographical areas in which they have jurisdiction | p. 20 UKI |
| III. means of receipt of documents available to the agencies | p. 22 UKI |
| IV. languages that may be used for completion of the standard | p. 23 UKI |

form”.

- ii) At p.22 of the UK section of the Manual, in section III concerning the “means of receipt of documents available to the agencies” the manual states:

“Documents will be transmitted by fax and post.”

24. The critical issue in this case is whether this means that in order for a document to be deemed received by the FPS it must be received by both fax and post (as the Claimant contended) or by either fax or post (as the Defendants contended).

The parties' contentions

25. Both parties addressed submissions on this issue under the following general headings:

- (1) The wording;
- (2) The context;
- (3) FPS practice;
- (4) Law and practice in France.

(1) The wording

26. The Defendants submitted that the natural reading of Section III is that it sets out the various means available for transmission of documents to the FPS. There is nothing in the language suggestive of a mandatory requirement that each of the means specified must be used before a document will be deemed received by the FPS. "Will be" is a simple future tense. It does not convey an imperative or an obligation. "And" is being used as a conjunction to link the two different means available. They are alternative rather than cumulative requirements.
27. The Claimant submitted that the natural and ordinary meaning of the words used is that it imposes a dual requirement. The language is mandatory: the documents "will be" transmitted by the means specified in the Manual, and the use of the word "and" between "fax and post" means that both methods must be used in order to transmit the documents to the FPS for service. If the intention had been for the requirements to be alternative then the means would have been expressed in permissive terms ("can" or "may") and described as alternatives ("or").

(2) The context

28. The Defendants stressed that the Service Regulation is concerned with the need to "improve and expedite" the transmission of judicial and extrajudicial documents (Recital (2)); that it recognises that "efficiency and speed...require that judicial and extrajudicial documents be transmitted...by rapid means" (Recital (6)); and that "speed in transmission warrants the use of all appropriate means" (Recital (7)). The Service Regulation therefore encourages the adoption of rapid and speedy means of transmission and the requirements should be interpreted consistently with that general aim. Fax is a far more rapid means of transmission than post and if transmission by fax is an available interpretation of the words used then it should be preferred.
29. The Claimant emphasised that the available means had to be "appropriate". This involved satisfying conditions of "legibility and reliability" (Recital (7)) and of "true and faithful" communication of content (Article 4.2). Insisting on receipt of a hard copy by post in addition to a faxed copy ensures certainty, legibility and reliability, all three of which are identified as key considerations in Recital (7). A faxed document

might well not be fully legible or reliable: faxed documents not infrequently make it difficult to distinguish between certain letters and numbers; interference on the telephone line in question can lead to distortion of the document; parts or pages of the document can be missing upon receipt, despite apparently successful transmission; and receipt is dependent upon the status of the receiving machine, regardless of successful transmission.

(3) FPS Practice

30. The Defendants relied on the revised Acknowledgment of Receipt issued by the FPS on 31 January 2013, stamped and initialled by the Senior Master, and the version of the original Acknowledgment of Receipt containing the Senior Master's annotation dated 31 January 2013.

31. They also relied on the email of Ms Pat Moore of the FPS dated 19 February 2013 in which she stated:

“This email is to confirm that the acknowledgement of receipt showing that we Received the documents on 30th October 2012 was incorrect.

We have issued a new acknowledgement of service [sic], showing that we received the documents by fax on 24th October 2012, which is correct.

Permission for this re-issue was given by The Senior Master.”

32. They submitted that this showed that the Senior Master's considered view was that receipt occurred when the documents were received by fax and not at the later date when they were received by post. As the judicial officer with responsibility for the FPS this can reasonably be regarded as reflecting the FPS's view and practice. That provides important supporting evidence for the Defendants' interpretation. The United Kingdom information in the Manual was provided for use by the FPS.

33. The Claimant submitted that notwithstanding the revised Acknowledgment of Receipt, the evidence shows that the practice of the FPS is not to treat the documents as being received until they have been received by post. It contended that this was borne out by the fact that: (i) The initial acknowledgment of receipt was not issued until 1 November 2012, after receipt by post; (ii) The FPS - being under an obligation, pursuant to Article 6.1 of the Service Regulation, “within seven days of receipt” to “send a receipt to the transmitting agency” – did so 2 days after the hard copy was received on 30 October 2012, but 8 days after the fax copy was received so that, if it was complying with its obligations under the Service Regulation, the FPS must have been acknowledging the hard, postal copy; (iii) The FPS only sent the French writ to the County Court for service after the postal copy had been received; and (iv) Information received from “Mark” at the FPS was to the effect that the FPS only processes and acts on hard copy documents. It accordingly submitted that on the evidence the practice of the FPS is consistent with its interpretation.

(4) Law and practice in France

34. Both parties submitted that the conduct of the bailiffs in France was consistent with their interpretation of the Manual requirements. Both parties also put forward French law advice which supported their case.

Discussion and conclusion

35. Having carefully considered the party's written and oral submissions, for the reasons outlined below, and those given by the Defendants, I find and hold that receipt by fax or post suffices. In particular:
- (i) I consider that either parties' interpretation is an available interpretation as a matter of language. If, however, the intention was to impose a double requirement of transmission by both fax and post one would expect that to be clearly set out. It needs to be clear to the transmitting and receiving agencies what the minimum requirements are. Transmission by post alone would reasonably be expected to be a sufficient requirement and if more than that was intended to be required then that should have been spelt out, such as by saying that documents "must" be transmitted by "both" fax and post.
 - (ii) There is no good reason for requiring transmission by both fax and post. It was suggested that a fax would provide advance notice of the posted transmission. That may be an administrative convenience but it is difficult to see why it should be a mandatory, additional requirement of receipt, particularly as the regime applies to extrajudicial as well as judicial documents. It is to be noted that no other country imposes a double requirement for receipt, still less a requirement additional to receipt by post.
 - (iii) A double receipt requirement may in fact undermine certainty as it means there is a greater possibility for something to go wrong in the process.
 - (iv) Faxes are generally both reliable and legible and have the advantage of providing a timed receipt. Many countries allow receipt by fax, as set out in the Manual. In this country service of a claim form by fax is permitted – CPR 6.3.
 - (v) Speed and efficiency are important aims of the Service Regulation. Allowing receipt by fax promotes those aims.
 - (vi) In so far as it is relevant to the issue of interpretation, I have no doubt that the best evidence of the view and practice of the FPS is that reflected in the revised Acknowledgment of Receipt and the Senior Master's comments on the original. Although the Claimant submitted that there was no evidence of how and why the revised Receipt was issued and of the information available to the Senior Master, the context was clearly whether receipt by fax alone is sufficient. The Senior Master's opinion is that it is. The FPS would follow his lead.
 - (vii) Evidence of the understanding of the French bailiffs is of no assistance and in any event was equivocal. Evidence of the understanding of French lawyers is equally of no real assistance and in any event was disputed. It was common ground that when a document is "received" for the purpose of Article 30(2) is an autonomous matter of interpretation.
36. For all these reasons I accordingly conclude that the French Court was the court first seised and that a stay should be granted.