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Neutral Citation Number: [2023] EWHC 1580 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

No. CL-2022-000378

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 9 June 2023

Before:

MR SIMON SALZEDO KC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

(1) THE EUROPEAN UNION
(REPRESENTED BY THE EUROPEAN INVESTMENT BANK)
(2) THE EUROPEAN INVESTMENT BANK — Claimants

- and -

THE SYRIAN ARAB REPUBLIC — Defendant

MR A BELTRAMI KC and MS H GLOVER (instructed by Allen & Overy LLP) appeared on behalf of the Claimants.

THE DEFENDANT did not appear and was not represented.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

MR SIMON SALZEDO KC:

INTRODUCTION

1 In these proceedings, the claimants are the European Union ("the EU") and the European Investment Bank ("the EIB"), and the defendant is the Syrian Arab republic ("Syria").

2 In advance of today's hearing, I have read the evidence filed in the applications before me and the detailed skeleton argument filed by leading and junior counsel for the EU and the EIB. I have today heard careful and helpful oral submissions from leading counsel for the claimants Mr Adrian Beltrami KC. Although Syria has been informed about these proceedings and today's hearing and the applications to be made against it, it has not been represented before me. In the circumstances, I have considered all of the submissions made to me on behalf of the claimants with particular care before deciding whether they accord with the evidence before the court and the requirements of the law.

3 The submissions I have heard have been in support of three applications made by the claimants by application notice dated 6 April 2023:

(1) An application for an order pursuant to CPR 6.27 validating service on Syria of the application notice, draft order, and supporting evidence;

(2) An application by the claimants for permission to apply for summary judgment against the defendant pursuant to CPR 24.4(1) in default of a filed acknowledgement of service or defence; and

(3) An application by the first claimant, the EU, for summary judgment on its claim pursuant to CPR 24.2.

PROCEEDING IN THE ABSENCE OF SYRIA

4 The first thing I need to decide today is whether it is appropriate to proceed to hear the applications and to determine them in the absence of the defendant, Syria. Butcher J considered the same question on 21 April 2023 in a judgment with the citation number [2023] EWHC 1116 (Comm). Like him, I apply to this question the principles which have been established by the cases of *R v Hayward Jones and Purvis* [2001] EWCA (Crim) 168 and *Certain Underwriters at Lloyd's v Syrian Arab Republic* [2018] EWHC 385 (Comm).

5 The fourth witness statement of Ms Garvey, a solicitor with Allen & Overy LLP, dated 26 May 2023 sets out the steps which have been taken to draw the date of this hearing to the attention of Syria. The claim was served on Syria at an email address of the Syrian Ministry of Foreign Affairs which is provided on its website. The email address is info@mofaex.gov.sy and that took place on 11 November 2022. Another email address has been used which is the email address of the Syrian Embassy to the European Union in Brussels which is ambsyrie@skynet.be.

6 On 6 April 2023, this application was served at both of the email addresses which I have mentioned, and on 12 April 2023, it was also delivered by courier to the Syrian Embassy at Avenue Franklin Roosevelt 3, 1050 Brussels, Belgium and the completion of that delivery is evidenced by material provided by the couriers DHL. The two emails sent on 6 April containing information about this application were both apparently delivered without any notification or bounce back message being received. Ms Garvey has therefore given evidence of her belief that those email addresses are still functioning.

7 In addition, on 6 April 2023, Allen & Overy made arrangements for all documents that had been served on the Syrian Embassy to the EU, as I have mentioned, also to be couriered by DHL to the various borrowers under the Loan Agreements, which I will describe shortly, and on 26 May 2023, Allen & Overy received confirmation from DHL that six of those deliveries had successfully reached the relevant Syrian government departments in Damascus and had been signed for, and I have seen evidence of that.

8 On 12 April 2023, Allan & Overy emailed Syria to inform it about a virtual, that is to say online, appointment with the court's listing office to arrange the listing of the present applications. On 14 April 2023, the listings office held a Teams meeting and listed the hearing for today, 9 June 2023, with a half-day estimate. No representative of Syria attended that meeting. Immediately after that, on 14 April 2023, the listing office sent emails to Syria at both of the email addresses which I have already described to inform it of the listing of this application for today.

9 In addition to these matters, Allen & Overy arranged for an earlier order of Butcher J, which I will describe shortly, to be sent by DHL to the Syrian Embassy in Brussels on 25 April 2023. Allen & Overy was informed by DHL that staff at the Embassy refused to accept the envelope on 26 April 2023 and the envelope was returned to Allen & Overy's offices.

10 On the basis of all of these matters, Ms Garvey states that she believes that the fact of this application and this hearing today has come to the notice of Syria and on the basis of the last matter that I mentioned, she points out that there is evidence to suggest that Syria may be taking steps to avoid service of further documents in these proceedings. I have considered all of this evidence and I am satisfied that, indeed, reasonable steps have been taken to give the defendant sufficient notice of this hearing, as well as of the proceedings which underlie the hearing, and that Syria has been given every opportunity to attend court today. The fact of today's hearing has, in my judgment, come to the attention of Syria, and in the same way as Butcher J found in his judgment at [2], to the extent it has not come to Syria's attention, that is a matter of deliberate choice on the part of Syria itself.

11 I am also satisfied that there is no reason to believe that an adjournment would be likely to result in Syria attending a hearing at a later date and, indeed, there is no reason to believe that Syria wishes to be represented before the court in this matter, just as there had been no indication that it wished to be represented when Butcher J heard the last application on 21 April 2023. Similarly, as at today's date, there has been no such indication and, indeed, every indication to the contrary. I therefore conclude, as did Butcher J on 21 April, that it is just and appropriate to proceed to hear the claimants' applications today and to decide them even though the defendant has not been represented at the hearing.

THE SERVICE APPLICATION

12 The hearing I have already mentioned before Butcher J on 21 April was to decide the claimants' application for permission to serve documents by the alternative methods of service of sending emails to the two email addresses that I have mentioned and by posting to the Syrian Embassy to the European Union in Brussels. That application was granted by Butcher J on 21 April 2023. However, as I have already set out in the above history of the matter, the documents in this application were served by those methods prior to 21 April 2023. The claimants therefore apply today for an order validating that service.

13 CPR 6.27 provides, by reference to CPR 6.15, that the court may authorise service of a document other than a claim form by an alternative method, or in an alternative place, and may validate such service retrospectively when there is "good reason" to do so. As to the meaning of "good reason", the applicable principles were set out in *R (On the Application of)*

The Good Law Project v The Secretary of State for Health And Social Care) [2022] 1 WLR 2339 at [54]-[56]. It is well established that those powers may be exercised in relation to service out of the jurisdiction: see, for example, *Abela & Ors v Baadarani* [2013] UKSC 44 and the notes in the **White Book** at 6.40.4.

14 In my judgment, there is good reason in the present case retrospectively to authorise the claimants' service of the documents in relation to today's applications by the methods that have been used, which are also the methods that have been authorised going forward by Butcher J. My reasons can be shortly summarised and they are in accordance with the submissions made to me on behalf of the claimants:

(1) As I have already set out, the evidence is clear that the application and its listing have, in fact, been brought to Syria's attention;

(2) Syria has failed to provide any address for service within this jurisdiction despite the rules of court requiring it to do so and service by the means that would be adopted under CPR 6.40(3) would be unlikely to give effective notice prior to the hearing of the application. There are specific reasons for that in this case, including the fact that Syria is not party to any relevant convention relating to service of proceedings and there is currently no British consular authority in Syria; and

(3) As I have already explained, there are indications in the evidence that suggest that Syria, in particular, through its employees at its Embassy in Brussels, may be attempting to avoid service of documents in these proceedings. Butcher J reached that view at [13] and [46] of the judgment I have mentioned and I have reviewed the evidence that led him to it, which I accept, as well as the more recent evidence that I have already mentioned from Ms Garvey's most recent witness statement.

PERMISSION TO APPLY FOR SUMMARY JUDGMENT

15 The usual rule in CPR 24.4 is that a claimant who wishes to apply for summary judgment has to wait until the defendant has filed an acknowledgement of service or a defence. However, that rule is subject to the power of the court to order otherwise. In general, if a defendant fails to file an acknowledgement of service or a defence, then the court has power to grant judgment in default of those steps. However, that type of judgment would be granted on procedural grounds rather than upon the substantive merits of the claim. In some cases, of which this is one, the claimant prefers to ask the court to adjudicate on the merits of the claim for the proper and legitimate reason that such a judgment may be more valuable to the claimant than one based on procedural grounds alone. In the present case, the position is unusual because Syria appears to have sent to the claimants an acknowledgement of service dated 5 September 2022 indicating an intention to defend the claim, and a defence dated September 2022, but has failed to file these documents with the court despite being reminded by the claimants' solicitors of the requirement to do so. In formal procedural terms, these documents are of no effect because they have not been filed. However, I will take into account their contents on any point where they might indicate that Syria has a valid defence to the claims.

16 The evidence before me, which I have already outlined, strongly suggests that Syria has now decided not to participate in these proceedings, whatever view it might have taken at an earlier date when the documents that I have mentioned, the acknowledgement of service and defence, appear to have been produced on Syria's behalf. There is no possible injustice to Syria in permitting the claimants to make their application for summary judgment today, of which Syria has been given proper notice and in circumstances where it seems likely, if not

inevitable, that further time would not be used to regularise the procedural position. I will therefore grant the claimants' permission to make their application for summary judgment.

SUMMARY JUDGMENT APPLICATION

17 This claim is brought by the EU and the EIB to recover substantial sums owed by Syria under five development loans entered into between 1 November 2004 and 8 December 2008 under which the EIB agreed to make available to Syria up to €700 million for specified infrastructure and development projects ("the Loan Agreements"). The EU is the guarantor of Syria's repayment obligations under the Loan Agreements pursuant to a series of guarantees ("the Guarantees"). Since 19 December 2011, Syria has defaulted on its repayments under the Loan Agreements. The EIB has made calls on the EU under the Guarantees and the EU has accordingly indemnified the EIB for the payments which Syria has failed to make.

18 On 29 June 2018, the EU obtained summary judgment for approximately €190 million on its subrogated claim against Syria for amounts that had fallen due under the Loan Agreements as at that date, together with one prior loan agreement in respect of which no claim is made in these proceedings because no further repayment instalments have fallen due under it since that time. The earlier summary judgment order was made by Bryan J for reasons that he gave on 29 June 2018 with neutral citation number [2018] EWHC 1712 (Comm). Syria did not lodge any appeal or other challenge against that order. To date, I am told, no part of the debt owing under that summary judgment has been paid by Syria. I will refer further to Bryan J's judgment later in this judgment.

19 Syria has continued to default on its repayment obligations under the Loan Agreements since the date of that judgment and the EU has continued to make calls on the Guarantees. The EU now brings this second claim to recover from Syria the further amounts to which the EU is entitled in its right of subrogation as a result of Syria's ongoing default.

20 The basis upon which the EU claims to be so entitled is, it seems, materially identical to the claim which was brought to before Bryan J in 2018. As I have mentioned, one minor difference is that the loan agreement which Bryan J described as the first loan agreement is not in issue in the application before me, but to the extent necessary I will retain the same numbering as used by Bryan J to avoid confusion. I can take the background and material terms of the Loan Agreements from the summary given in the judgment of Bryan J as follows:

> "4. From at least 23 July 1996, being the date on which the Council of the European Union adopted Regulation No. 1488/96 the EU has adopted a policy of providing financial assistance to countries in the Mediterranean region to support their economic, social and administrative reform. In furtherance of that policy the Bank entered into six Loan Agreements with Syria (collectively the 'Loan Agreements') in the period 10 September 2003 to 8 September 2008:
>
> (1) By an agreement with number 22193, dated 10 November 2003 and varied on subsequent dates, namely 2 September 2005, 27 February 2007, 16 October 2007, and by an agreement dated 2 July 2008, the Bank agreed to make €40 million available to Syria for the purpose of co-financing agreed capital investment projects to be carried out by small and medium sized enterprises in Syria ('the First Loan Agreement').

(2) By an agreement with number 22751, dated 1 November 2004 and varied on 7 May 2008 and 22 February 2009, the Bank agreed to make €200 million available to Syria for the purposes of co-financing the construction of the Deir Ali power plant located south of Damascus (‘the Second Loan Agreement’).

(3) By an agreement with number 23334, dated 16 December 2005 and varied on 21 September 2008, the Bank agreed to make €100 million available to Syria for the purpose of co-financing a telecommunications project extending the fixed line telephone network to rural areas in Syria (‘the Third Loan Agreement’).

(4) By an agreement with number 23496, dated 31 May 2006 and varied on 5 November 2009, the Bank agreed to make €45 million available to Syria for the purpose of co-financing the development of a new water and waste water infrastructure in municipalities south of Damascus (‘the Fourth Loan Agreement’).

(5) By an agreement with number 24252, dated 6 December 2007 and varied by agreements dated 18 March 2010 and 25 November 2010, the Bank agreed to make an additional €80 million available to Syria for the purpose of co-financing projects to be carried out by private sector entities in Syria (‘the Fifth Loan Agreement’).

(6) By an agreement with number 24725, dated 8 December 2008, the Bank agreed to make €275 million available to Syria for the purpose of co-financing the construction of an extension to the Deir Ali power plant (‘the Sixth Loan Agreement’).

5. Save in certain identified respects, each the Loan Agreements contained the following terms:

(1) By Articles 1.01, 1.02 and 1.04 the Bank makes the specified sums available to Syria to be disbursed in tranches upon request and upon the satisfaction of specified conditions. A disbursement request is to specify whether the requested tranche is to bear a fixed or floating rate of interest, such rates being set pursuant to Article 3.01, save that the Fourth Loan Agreement makes no provision for floating rate interest;

(2) By Article 2.01 the loan comprises the aggregate of the amounts disbursed by the Bank under the Loan Agreement;

(3) By Article 3.01: (a) interest is payable on the outstanding balance of each fixed rate tranche at the rate specified in the applicable disbursement notice issued by the Bank; and (b) in all the Loan Agreements other than the Fourth Loan Agreement, interest is payable on the outstanding balance of

each floating rate tranche at a floating interest rate determined by the Bank;

(4) By Article 3.02, interest shall accrue on any overdue sum from the due date to the date of payment at the higher (for any given relevant period) of: (i) a rate equal to EURIBOR, plus 2 per cent; or (ii) the fixed rate payable under Article 3.01, plus 0.25 per cent. Under the Third Loan Agreement the latter rate is applicable only to overdue fixed rate tranches;

(5) By Article 4.01 Syria is to repay the loan in instalments in accordance with amortisation tables provided by the bank;

(6) By Articles 8.01 and 8.02 Syria is to pay all taxes, duties, fees and professional costs arising out of the execution or implement of the Loan Agreement or any related document;

(7) By Article 10.01 the Loan Agreement shall be governed by English law, and by Article 10.02 all disputes concerning it shall be submitted to the Courts of England. The Bank and Syria waive any immunity from or right to object to the English Court's jurisdiction and a decision of the Court shall be conclusive and binding on both parties without restriction or reservation."

21 I also mention that Syria's obligation to make payments of sums due (including principal and interest) is set out at Article 5.03 of each of the Loan Agreements. The evidence before the court today demonstrates that up until the present date, the EIB has dispersed €337,385,821.75 under the Loan Agreements. The EU guaranteed Syria's repayment obligations under the Loan Agreements pursuant to a series of guarantees entered into between 2000 and 2011, as I have mentioned. I do not think I need to set out here the background to the making of those guarantees but it may be found in Bryan J's judgment at [8]. However, it is important to note, as Bryan J did at [9], that:

> "It was an express term of each of the Guarantees that, to the extent that the EU made any payment under the Guarantees, the EU would be subrogated to the rights that the Bank held against the relevant guaranteed party."

22 Following Syria's default, the EIB has made calls on the EU under the Guarantees as amounts have fallen due under the Loan Agreements but remain unpaid by Syria. The EU has paid each call made on it under the Guarantees. The details of each of those calls since the previous order dated 29 June 2018 and the amounts that are accordingly claimed in these proceedings are set out in Appendix 1 to the particulars of claim. Pursuant to Article 10.04 of the Loan Agreements, Appendix 1 is *prima facie* evidence of amounts owed by Syria. Syria's outstanding liability under the Loan Agreements as at the issue of the claim form was €130,820,233.97 (in addition to the amounts that are the subject of the earlier judgment). A full breakdown of that sum has been provided in Appendix 1 to the particulars of claim. Between the date when that appendix was prepared, which was 30 June 2022, and the date of the hearing of this application on 9 June 2023, the evidence shows that further default interest has accrued so that the total amount now claimed in addition to the previous judgment is €135,401,476.28. An updated of version of Appendix 1 evidencing the figures up to today's date was served on Syria on 6 June 2023.

23 As I have mentioned, each of the Loan Agreements contained an express English law governing law clause and an express exclusive jurisdiction clause in favour of the English court. Although Syria is a sovereign state, I am satisfied that it is not able to claim sovereign immunity from these claims. The State Immunity Act 1978 provides as follows at s.1:

> "(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

At s.2:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission."

At s.3:

> "(1) A State is not immune as respects proceedings relating to—
>
> (a) a commercial transaction entered into by the State
>
> ...
>
> (3) In this section 'commercial transaction' means—
>
> ...
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation..."

24 Any assertion of sovereign immunity by Syria, were it to be made, would fail for two reasons. The first is because Syria has contractually submitted to this jurisdiction, as I have already mentioned, by Article 10.02 of each of the Loan Agreements under which the parties have expressed waived any immunity from or right to object to the jurisdiction of this court. Secondly, these proceedings relate to commercial transactions within the meaning of s.3(1)(a) of the State Immunity Act 1978 to which no immunity attaches. I note that Bryan J reached the same conclusion in his 2018 judgment at [23]-[31] and I also adopt his reasons for reaching the same view.

25 These proceedings were validly served on Syria on 11 November 2022. That fact has been declared by the order of Butcher J dated 21 April 2023. Under that order, the time for entering and appearance began to run two months after 11 November 2022. The time for Syria to file an acknowledgement of service or a defence in these proceedings accordingly expired on 3 February 2023. The claimants argue that the result of Bryan J's 2018 judgment is that Syria is estopped in these proceedings from disputing, at least:

(1) The validity of the Loan Agreements; and

(2) The EU's right of subrogation to the rights of the EIB under the Loan Agreements arising from its payments under the Guarantees.

26 I accept that such an estoppel arises but also that on the evidence before this court, those matters are established in any event to the standard required for summary judgment to be granted.

27 There does not appear to be any issue between the parties as to the validity of the Loan Agreements nor that Syria has failed to make all the repayments that are, on the face of it, do under them. Syria has, on several occasions, acknowledged the debt under the Loan Agreements. For example:

(1) By letter to the EIB dated 17 August 2020, Syria stated that it:

> "...has not denied for one day the agreements with EU or EIB, neither we denied your financial rights which we hope to find a proper mechanism to repay."

(2) In the same letter, Syria expressed confidence that:

> "...an agreement can be reached through negotiations on how we can repay your outstanding amounts through a certain schedule."

(3) In the defence that has been served but not filed in these proceedings, Syria expresses its desire for a negotiated solution that should "include banking channels and a payment mechanism" and refers to a previous request for a negotiated solution to include "rescheduling due loans and instalments".

28 The EU's right to be subrogated to the rights of the EIB under the Loan Agreements raises a preliminary question as to the governing law of those rights. The governing law analysis was the subject of detailed findings by Bryan J in his 2018 judgment. It seems to me that it is not necessary for me to repeat the analysis which he set out there at [66]-[67] but it suffices for me to state that the conclusion is that the EU's right of subrogation is governed by Belgian law, which provides that the EU is, indeed, subrogated to all the rights which the EIB has in relation to the debtor. I have considered the same matter afresh and reached the same conclusions as Bryan J did on that issue. The EU has accordingly been subrogated to the rights of the EIB under the Loan Agreements as a matter of Belgian law upon payment of the relevant sums under the Guarantees.

29 On the face of the facts, therefore, subject to any defence that might be raised, the claimants are entitled to judgment because the EU has a valid claim against Syria for reimbursement of the sums it has paid to the EIB under the Guarantees. The fact that Syria has declined to participate in these proceedings is one indication that it has no realistic defences to the claim. However, there may be other reasons for non-participation and, as I have mentioned, certain matters have been raised, apparently on the Syria's behalf, in the defence which appears to have been served on its behalf in September 2022. As indicated already, I will consider all the matters raised in that document to ascertain whether any of them indicate that a different conclusion should be reached on the claimants' application for judgment.

30 I will continue refer to the document as the defence even though it has no formal status in these proceedings because it has not been filed with the court. I make no finding as to whether it was, in fact, served on behalf of Syria, though it certainly appears that that was the case on

the documents before the court today. First, the defence requests that an amicable negotiated solution should be reached. That is not a matter that is in the hands of the court. If the parties had been able to reach an amicable solution, then this application would not have been made. A creditor is not obliged to reach an accommodation with its debtor and if no negotiated solution is arrived at, then the court will ultimately enforce the parties' contractual obligations.

31 Secondly, the defence argues that the claims in respect of each of the five relevant Loan Agreements should not be combined in a single lawsuit. This defence states that the issue is one that "we leave it to the court's justice to decide". In English law, there is no objection to a single lawsuit being brought in respect of several loan agreements between the same parties. This is not a point of any substance.

32 Thirdly, there is a suggestion in the defence that "the Syrian state and its affiliates (loan beneficiary) have not realised the interest on the loans as planned in the Loan Agreements" and that "the completion of funding was interrupted". The defence does not give details of the alleged interruption but I have been shown a letter of 4 October 2011 in which the mission of the Syrian Arab Republic to the EU complained that two disbursements under the sixth loan agreement had not been made. The explanation for this, according to the evidence of Ms Garvey, was contained in earlier letters from the EIB to the Syrian Ministry of Finance dated 1 July 2011 in which the EIB explained that certain preconditions of disbursements, including the provision of audited accounts and quarterly updates on the relevant projects, had not been complied with. On the evidence before the court, I accept that this is correct. In any event, as Bryan J held at [88] of his 2018 judgment, if there had been a breach by the EIB, the remedy for that would be a claim in damages which has not, in fact, been brought, and as Mr Beltrami KC submitted, such a claim would, by now, be time-barred. On any view, it is hard to see how a court of justice could find that a failure to disperse a later instalment of a loan could excuse the debtor from repaying the earlier instalments which it had received.

33 The EU imposed sanctions against Syria on 9 May 2011 which would have made the payment of any further instalments after that date unlawful in any event and that leads me on to consider the fourth potential defence. Fourthly, the defence says that Syria should not be obliged to make redress for damage that has been caused by the claimants' own fault. The defence sets out in detail the fact that the EU imposed sanctions on Syria, freezing its funds and making it impossible for Syria to pay, or the claimants to receive, payments from Syria. As the claimants recognised, this is the only defence raised that has any possible substance and I have considered very carefully whether the court can be satisfied to the requisite standard that this defence has no real prospect of succeeding.

34 As I have mentioned, the EU imposed sanctions against Syria on 9 May 2011. They were later consolidated into Council Regulation (EU) 36/2012. These provided, among other things, at Art.14.1:

> "All funds and economic resources belonging to, owned, held or controlled by the natural or legal persons, entities and bodies listed in Annex II and IIa shall be frozen."

35 At Art.20:

> "By way of derogation from Article 14 and provided that a payment by a person, entity or body listed in Annex II or IIa is due under a contract or agreement that was concluded by, or an obligation that arose for the person, entity or body concerned before, the date on which that person, entity or body had been designated, the competent

> authorities of the Member States, as indicated on the websites listed in Annex III, may authorise, under such conditions as they deem appropriate, the release of certain frozen funds or economic resources, provided that the payment is not directly or indirectly received by a person or entity referred to in Article 14."

36 Article 23 provided:

> "The European Investment Bank (EIB) shall:
>
> (a) be prohibited from making any disbursement or payment under or in connection with any existing loan agreements entered into between the State of Syria or any public authority thereof and the EIB;..."

37 The Central Bank of Syria was included in the list of entities whose accounts were frozen under Art.14. The defence states that the Central Bank of Syria attempted to make payments to the EIB and I have seen evidence that this was indeed the case in the documents. In short, the Central Bank of Syria gave instruction to certain banks to make payment under the Loan Agreements which those banks refused to make. As far as the evidence before me goes, it appears likely that the refusal was on the basis that such a payment might be in breach of the sanctions.

38 My attention has also been drawn to a letter by which the Central Bank of Syria sought the help of the EIB to resolve the situation. That was a letter dated 28 April 2015 which requested "your cooperation and tracking the above-mentioned payments". The EIB's response to that request, I have been told, is contained in or exemplified by the letter dated 15 January 2014 in which the EIB explained that the obligation of Syria to repay the EIB's loans remained solely with the Syrian Arab Republic until the funds were actually received by the EIB and:

> "...as such, we strongly recommend that you continue to explore the possible alternative means of repayment."

39 A similar issue to this one was considered by Bryan J who dealt with the matter in his 2018 judgment at [82]-[85]. At [82], he recited the existence of the sanctions. At [83], Bryan J referred to the request by the Central Bank of Syria for assistance. At [84], Bryan J noted that Art.20 of the sanctions regulation provided for a derogation whereby Member States and competent authorities could authorise the release of frozen funds where a payment was due under a contract or agreement concluded before the date upon which the paying party became subject to sanctions.

40 Bryan J's conclusion at [85] was:

> "It seems to me, in such circumstances, that even if Syria were to identify any point in relation to sanctions impinging upon its ability to make payment, it could seek derogation in relation to that matter. I am satisfied that there is nothing in relation to the potential impact of sanctions which gives rise to any defence which has any real prospect of success in relation to the claims that are brought by the European Union before me today."

41 Since that judgment was given, the law in relation to this matter has been considered in more detail by Cockerill J in the case of *Banco San Juan Internacional Inc v Petroleos De Venezuela SA* [2020] EWHC 2937 (Comm). I note that in that case, the defendant was represented by leading and junior counsel. So Cockerill J had the benefit of full argument.

That was a case in which the defendant argued that it was unable to make payment of sums due under certain credit agreements owing to sanctions which had been imposed in relation to Venezuela. The sanctions in that case were imposed by the government of the United States of America. The defendant argued that in English law, an obligation ceases to be enforceable if it is one which cannot be performed without illegality in the place where performance is required and the defendant argued that it was unable to make payment into the relevant account in that case without breach of US law. Cockerill J acknowledged that the rule which derives from the case of *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287:

> "...provides that an English law governed contract is unenforceable if performance is prohibited by the law of the place of performance..."

42 Cockerill J considered the authorities in this field and reached the following conclusions:

> "84. This brings the argument to BSJI's main point, which seems to me to be well founded. As noted above, this line of authority makes clear that it is only illegality at the place of performance which is apt to provide an excuse under the *Ralli Bros* doctrine; it also makes clear that the party relying on the doctrine will in general not be excused if he could have done something to bring about valid performance and failed to do so.
>
> 85. It is common ground that all the relevant Executive Orders contain a dispensation provision which allow disapplication if a licence is obtained. It is common ground that this can be done by applying to OFAC. It is also common ground that OFAC has in fact issued specific and general licences excepting some of the effects of the US Sanctions - and that it has done so in relation to bonds issued by PDVSA..."

43 Cockerill J went on to find that:

> "89. It follows that, whatever the meaning of the Sanctions orders, lawful performance under US law is therefore possible. This too seems to be common ground. The real issue between the parties is whose responsibility it was to gain such a licence, with PDVSA contending that it would be worse than useless for them to make such an application.
>
> 90. BSJI directed my attention to a number of authorities where licences have been in issue. On their face these appear to show that (absent contrary agreement) where a supervening prohibition may be lawfully circumvented by obtaining a licence, a party is not excused from performance of a contractual obligation affected by that prohibition unless and until they make reasonable efforts to apply for and are refused a licence, or prove that, even had such efforts been made, a licence would actually have been refused..."

44 Other authorities are cited which support the proposition summarised there by Cockerill J. In particular, at [96], she referred to *Libyan Investment Authority v Maud* [2016] EWCA Civ 788, which clearly stated that the burden of proof in relation to the possibility of obtaining a license was on the defendant who had failed to pay. At [98], Cockerill J said:

> "98. Accordingly, it would appear by analogy that in the absence of any provision to the contrary in the Credit Agreements the burden is as a matter of law on PDVSA, as debtor and the party bound to perform, to obtain the necessary licence..."

45 While in the *Banco San Juan* case there was specific evidence that licenses could have been obtained and, indeed, an express provision in the relevant agreements that the debtor was obliged to apply for such licenses, nevertheless, Cockerill J was very clear in [100]-[101] that even had those matters not been present, the answer would have been the same on the basis of the burden of proof on a debtor to establish that payment would truly be illegal under the relevant foreign law on the basis that it would not have been able to obtain a license.

46 I am satisfied that Cockerill J's statements properly represent the law of England and, on that basis, at any trial there would be a clear burden of proof on Syria to establish that the express derogation contained in Art.20 would not have assisted it had it sought to obtain a license. No suggestion has been made to that effect in the defence and there is no evidence before this court that would indicate either that Syria intends to try to discharge that burden, or that if it did make such an attempt, that there would be any basis upon which it could succeed.

47 I suggested to counsel that another way of legally analysing the point about sanctions might be to propose an implied term that the creditor would not make payment by the debtor impossible, but as Mr Beltrami KC submitted in response to the question, even if such a term could be implied, that would only take one back to the question whether payment was, indeed, truly impossible which would again require Syria to show that it could not have obtained a derogation.

48 For all these reasons, I am satisfied that no defence which the court can reasonably anticipate might be made would have any real prospect of success. I am also satisfied that there is no other reason why it would be appropriate for these claims to be decided at trial rather than in the present summary judgment application. Accordingly, I will grant the application and the judgment for which the claimants have applied.

L A T E R

49 I accept all of those submissions. As Mr Beltrami KC has submitted, there is a lot of money at stake and, in addition, there is a great deal of complexity and difficulty caused by the fact that the defendant State has chosen not to participate other than by sending certain documents and by, of course, the difficulty of the lack of diplomatic representation between relevant States and, in particular, of the UK in Syria. I therefore understand entirely why the time spent and costs incurred are as they are.

50 So I will summarily assess the service application costs as per the schedule subject to them being recalculated to mark down the solicitors' rates to the top guideline rate.

L A T E R

51 So the schedule includes not just the costs of the summary judgment but also the costs of the action, as that is now, effectively, determined by the summary judgment. Again, it is a complex matter with a great deal of history and the need to seek to anticipate points that may be made in the circumstances is one which increases the costs necessarily and certainly reasonably incurred by the claimants in bringing it forward.

52 So, again, I will summarily assess the costs in the amounts that have actually been incurred, subject only to the solicitors' rates being reduced to the guideline rates.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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