Neutral Citation Number: [2024] EWCA Civ 184

Case No: CA-2023-001851

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KB)
MR JUSTICE ROBIN KNOWLES
[2023] EWHC 2215 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/02/2024

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE UNDERHILL
and
LORD JUSTICE PHILLIPS

- -

Between :

PRIVINVEST SHIPBUILDING SAL (HOLDING) AND OTHERS	**Appellants**
- and -	
FILIPE JACINTO NYUSI	**Respondent**

- -
- -

Duncan Matthews KC and Frederick Wilmot-Smith (instructed by **Signature Litigation LLP**) for the **Appellants**
Rodney Dixon KC and Russell Hopkins (instructed by **Seladore Legal Limited**) for the **Respondent**

Hearing date : 7 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Julian Flaux C:

Introduction and background

1. The Appellants are some of the defendants in the main proceedings brought against them by the Republic of Mozambique claiming, inter alia, that three sovereign guarantees entered by the Republic were procured by fraud and bribery. The Appellants bring a Part 20 Claim against the Respondent, who is the President of Mozambique, as Fourth Party, for a contribution or indemnity and for damages in the tort of deceit. The claims against the Respondent are concerned with his alleged activity outside this jurisdiction, primarily before he became President and, in any event, not in his public capacity.

2. The Part 20 Claim Form was issued on 15 January 2021. By an Order dated 21 May 2021, Cockerill J granted the Appellants permission to serve the Part 20 Claim Form on the Respondent out of the jurisdiction. That Order gave permission to effect service either (a) by direct service in accordance with CPR 6.42(3)(a) at the Presidential Palace in Maputo or the Office of the President in Maputo or elsewhere in Mozambique or (b) by service through methods other than through diplomatic channels as permitted under Mozambique law and CPR 6.40(3)(c). Although that Order also refers to service under CPR 6.15, that is, service by an alternative method, it is accepted that that is a mistake and that no order for service by an alternative method has been made. Cockerill J said in terms on 21 May 2021 that she was not granting alternative service at that point.

3. On 19 October 2021, the Claim Form and other documents were left with police officers at the security checkpoint at the Presidential Palace who accepted them to give to the Respondent. Later the same day, another set of the documents was left with an official at the security desk at the Office of the President. The process server sought to serve the Respondent personally at both addresses but was not permitted access to him. The Appellants contend that this was good service in accordance with (a) of Cockerill J's Order. The Respondent did not acknowledge service at that time and did not claim state immunity.

4. The Appellants continued to seek to effect service through the Mozambique Courts which confirmed receipt of the documents in December 2021 and commenced proceedings to effect service in March 2022. There was a delay whilst an appointment in the Respondent's diary was sought to enable a Court official to serve the documents on him. An appointment was eventually obtained and the documents were served on the Respondent through the Mozambique court on 14 April 2023. On 5 May 2023 the Respondent acknowledged service indicating that he intended to contest the jurisdiction.

5. On 16 June 2023, the Respondent issued an Application Notice applying for an Order that the English Court has no jurisdiction to hear the Part 20 Claim against him because he has immunity and that he was not validly served with the Part 20 Claim Form in October 2021.

6. That application was heard by Robin Knowles J on 1 and 2 August 2023. By his Order dated 19 September 2023, the judge declared that the Respondent had not been validly served on 19 October 2021, that the Respondent has immunity from jurisdiction

pursuant to section 20 of the State Immunity Act 1978 and that the Court does not have jurisdiction to hear the Part 20 Claim against him.

7. Permission to appeal against that Order was granted by Elisabeth Laing LJ on 29 September 2023. On 4 October 2023, Popplewell LJ refused a request for the appeal to be expedited. In the meantime, before this appeal was heard, the judge heard the trial of the main claim in Michaelmas Term 2023 and judgment is awaited.

Provisions in relation to service and relevant legislation

8. CPR 6.40 contains general provisions about the method of service of a claim form on a party out of the jurisdiction. 6.40(3) and (4) are relevant and provide:

> "(3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served –
>
> (a) by any method provided for by –
>
> (i) Omitted
>
> (ii) rule 6.42 (service through foreign governments, judicial authorities and British Consular authorities); or
>
> (iii) rule 6.44 (service of claim form or other document on a State);
>
> (b) by any method permitted by a Civil Procedure Convention or Treaty; or
>
> (c) by any other method permitted by the law of the country in which it is to be served.
>
> (4) Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served."

9. CPR 6.42 is headed: "Service through foreign governments, judicial authorities and British Consular authorities". It provides:

> "(1) Where a party wishes to serve a claim form or any other document in any country which is a party to a Civil Procedure Convention or Treaty providing for service in that country, it may be served –
>
> (a) through the authority designated under the Hague Convention or any other Civil Procedure Convention or Treaty (where relevant) in respect of that country; or
>
> (b) if the law of that country permits –

> (i) through the judicial authorities of that country, or
>
> (ii) through a British Consular authority in that country (subject to any provisions of the applicable convention about the nationality of persons who may be served by such a method).
>
> (2) Where a party wishes to serve a claim form or any other document in any country with respect to which there is no Civil Procedure Convention or Treaty providing for service in that country, the claim form or other document may be served, if the law of that country so permits –
>
> (a) through the government of that country, where that government is willing to serve it; or
>
> (b) through a British Consular authority in that country.
>
> (3) Where a party wishes to serve the claim form or other document in –
>
> (a) any Commonwealth State which is not a party to the Hague Convention or is such a party but HM Government has not declared acceptance of its accession to the Convention;
>
> (b) the Isle of Man or the Channel Islands; or
>
> (c) any British overseas territory,
>
> the methods of service permitted by paragraphs (1)(b) and (2) are not available and the party or the party's agent must effect service direct, unless Practice Direction 6B provides otherwise."

10. Paragraph 5 of Practice Direction 6B is headed: "Service in a Commonwealth State or a British overseas territory". Para 5.1 provides:

> "5.1 The judicial authorities of certain Commonwealth States which are not a party to the Hague Convention require service to be in accordance with rule 6.42(1)(b)(i) and not 6.42(3). A list of such countries can be obtained from the Foreign Process Section (Room E02) at the Royal Courts of Justice."

11. Mozambique is a Commonwealth State, but it is not a signatory to the Hague Convention on service abroad of judicial and extra-judicial documents in civil and commercial matters signed on 15 November 1965. Accordingly CPR 6.42(3)(a) and PD6B para 5.1 would seem to be of immediate relevance.

12. On 31 July 2023, immediately prior to the hearing before the judge, the Respondent's solicitors had an email exchange with the Foreign Process Section ("FPS") from which it is clear that the only method of service available in Mozambique is "Agent to Agent" under which the FPS does not get involved. Instead, someone seeking to serve would have to get a solicitor or process server in Mozambique, then complete a Letter of

Request. The Letter of Request and documents for service should then be sent to the FPS with a covering letter and Form N224. The FPS will then get the Letter of Request signed by the Senior Master. The documents and signed Letter of Request (which is addressed to the Mozambique competent judicial authority) will then be returned by the FPS and all this documentation should be forwarded to the solicitor or process server in Mozambique for them to effect service through the Mozambique judicial authorities. It also appears from information obtained from the FPS and conveyed to the judge at the hearing below by counsel then acting for the Appellants that the FPS has no physical list of countries within PD6B para 5.1 as such.

13. Section 20 of the State Immunity Act 1978 is headed: "Heads of State" and provides:

> "(1)Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—
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> (a)a sovereign or other head of State;
>
> (b)members of his family forming part of his household; and
>
> (c)his private servants,
>
> as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.
>
> (2)The immunities and privileges conferred by virtue of subsection (1)(*a*) and (*b*) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.
>
> (3)Subject to any direction to the contrary by the Secretary of State, a person on whom immunities and privileges are conferred by virtue of subsection (1) above shall be entitled to the exemption conferred by section 8(3) of the Immigration Act 1971.
>
> (4)Except as respects value added tax and duties of customs or excise, this section does not affect any question whether a person is exempt from, or immune as respects proceedings relating to, taxation.
>
> (5)This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity."

14. The Diplomatic Privileges Act 1964 has the short title: "An Act to amend the law on diplomatic privileges and immunities by giving effect to the Vienna Convention on Diplomatic Relations; and for purposes connected therewith". Section 2(1) of the 1964 Act provides:

> "Application of Vienna Convention.
>
> Subject to section 3 of this Act, the Articles set out in Schedule 1 to this Act (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in the United Kingdom and shall for that purpose be construed in accordance with the following provisions of this section."

15. The Articles of the Vienna Convention set out in Schedule 1 to that Act which are of relevance for present purposes are Articles 31 and 39 which provide, so far as material:

> "Article 31
>
> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
>
> …
>
> Article 39
>
> 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

16. Other provisions of the State Immunity Act referred to by the parties provide as follows:

> "1 General immunity from jurisdiction.
>
> (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.
>
> 3 Commercial transactions and contracts to be performed in United Kingdom.
>
> (1) A State is not immune as respects proceedings relating to—
>
> (a) a commercial transaction entered into by the State; or
>
> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

The judgment below

17. Having set out the background, the judge dealt first with whether there had been good service on the Respondent in 2021. He referred to CPR 6.40(3)(c) and 6.42(3)(a) and quoted PD6B para 5.1, all of which I have set out above. He said at [9] of his judgment:

> "CPR 6.42(1)(b)(i) (taking the wording of sub-rule (i) alone, as proper construction of the rule requires in this case) refers to service "through the judicial authorities" of the country in which a party wishes to serve. Enquiries by the parties of the Foreign Process Section have not identified a physical "list" but have shown that, once given the name Mozambique, the Foreign Process Section is able to respond by detailing a process to cause the documents to reach the judicial authorities of Mozambique. The process involves the use of agents but includes a letter of request from the Senior Master of the King's Bench Division to the competent judicial authority overseas."

18. At [10] he noted that the method used by the Appellants in 2021 was not service through the judicial authorities of Mozambique. He noted that the order of Cockerill J had included provision for service direct and that the Appellants say that what was done amounted to service direct. The judge commented: "I respectfully consider that doubtful. However the decisive point is that it does not assist the [Appellants]."

19. At [11] he said:

> "CPR 6.40(3)(c), already cited, permits service by a method permitted by the law of the country in which it is to be served. CPR 6.40(4) provides that "nothing … in any court order authorises any person to do anything which is contrary to the law

> of the country where the claim form or other document is to be served". The burden of proof is on the [Appellants] to establish that the method used by them was not contrary to Mozambique Law. There is no evidence that the method that was used was a method permitted by, and not contrary to, that law. There is every indication, including from the response of the Foreign Process Section, that service through the Mozambique Court was required."

20. Although it is not clearly spelt out at this point in the judgment, the judge was evidently finding there that the service in 2021 was not good service because it was not through the Mozambique Court. Later in the judgment at [41], in his conclusion, the judge says in terms that the Respondent "was served on 14 April 2023 with these proceedings before this Court, and not earlier." Further, in the Form N460 refusing permission to appeal, the judge said:

> "On service I consider there is no real prospect at all. CPR 6.42(3) engages PD6B and that was not complied with. Service through judicial authorities was required (agents assist in this) and this was not achieved until 2023."

21. He then went on in his judgment to deal with the issue of immunity of the Respondent as Head of State. He said at [13] that the issue which arises is that framed by Briggs LJ (as he then was) in *Apex Global Management Ltd v Fi Call Ltd and Others* [2013] EWCA Civ 642; [2014] 1 WLR 493:

> "The internationalisation of commercial activity, and the propensity for disputes about commercial activity to be justiciable in the United Kingdom without any of the relevant activities having taken place here, makes it important to know whether, thus far, Parliament has legislated so as to confer upon foreign heads of state a personal immunity from suit in the United Kingdom in respect of their personal (i.e. non-official) commercial activities worldwide, or merely commercial activities undertaken by them in the United Kingdom…"

22. The judge noted at [14] that in *Apex* before Vos J (as he then was) at first instance ([2013] EWHC 587 (Ch)) and in the Court of Appeal, the issue did not require resolution, in other words what was said was obiter. The issue was fully argued before Vos J but less fully in the Court of Appeal. Briggs LJ, like Vos J, recognised the importance of the issue and was not persuaded by Vos J's analysis. In the circumstances, Briggs LJ considered that he should: "set out my brief reasons for reaching the opposite conclusion, although acknowledging that a binding decision on this important question must await a case where it really matters."

23. The judge then cited section 20 of the State Immunity Act, section 2(1) of the Diplomatic Privileges Act 1964 and Articles 31 and 39 of the Vienna Convention, all set out above. He also cited other sections of the State Immunity Act including section 3, concerning commercial transactions. At [18] he referred to the decision of the House

of Lords in *Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147 ("*Pinochet (No. 3*)") cited in both Courts in *Apex*. The judge noted that Vos J had emphasised that *Pinochet No. 3* did not involve commercial activity, but had quoted at [84] of his judgment what Lord Phillips had said about the restriction on personal immunity excluding commercial transactions, which the judge in the present case then set out:

> "An acting head of state enjoyed by reason of his status absolute immunity from all legal process. This had its origin in the times when the head of state truly personified the state. It mirrored the absolute immunity from civil process in respect of civil proceedings and reflected the fact that an action against a head of state in respect of his public acts was, in effect, an action against the state itself. There were, however, other reasons for the immunity. It would have been contrary to the dignity of a head of state that he should be subjected to judicial process and this would have been likely to interfere with the exercise of his duties as a head of state. Accordingly the immunity applied to both criminal and civil proceedings and, in so far as civil proceedings were concerned, to transactions entered into by the head of state in his private as well as his public capacity. When the immunity of the state in respect of civil proceedings was restricted to exclude commercial transactions, the immunity of the head of state in respect of transactions entered into on behalf of the state in his public capacity was similarly restricted, although the remainder of his immunity remained: see sections 14(1)(a) and 20(5) of the Act of 1978".

24. The judge noted at [19] that Vos J had first to decide whether two Saudi princes were entitled to immunity under section 20(1)(b) as members of King Abdullah's family forming part of his household. He then asked whether, if they did have immunity, it excluded actions relating to commercial activities outside the UK. On that second question, he concluded that, if they did have immunity, it did not extend to any commercial activity outside their official function anywhere in the world. At [20] the judge set out the rival arguments before Vos J on that question:

> "Vos J summarised the argument on one side as that, "when the court applied article 31.1 to the circumstances described in section 20(1) of the SIA, a "necessary modification" should be made so as to read article 31.1(c), when applied to sovereigns and families of sovereigns as opposed to diplomatic agents, as if the restrictive territorial words were excluded." (see [58]). The (two alternative) arguments on the other side he summarised as that the "proposed modification could not be said to be necessary, and would run counter to customary international law as it applied to sovereigns and, furthermore, if any "*necessary modification*" were required it would be to read article 31.1(c) as if it did not apply any commercial exception at all to sovereigns, their families, and private servants" (see [58])."

25. The judge then set out [136] and [139] to [142] of Vos J's judgment. At [22] he set out what he described as Briggs LJ's "very fair summary" of Vos J's view at [48] of his judgment:

> "48. The judge's view, persuasively set out in paragraphs 135-141 of his judgment, may be summarised as follows. The restriction of the commercial exception to non-official commercial activities of the diplomat in the receiving state by Article 31 of the Vienna Convention was the natural corollary of the fact that his personal immunity was entirely confined to the period of his own presence in the receiving state, it being the judge's view that "diplomatic agents in post are unlikely to be sued whilst they are in post in the UK in respect of foreign commercial activity". By contrast, the primary effect of the section 20 personal immunity for heads of state and their households will apply while they are not in the UK, so that to limit the effect of the commercial exception to a tiny part of the ambit of their personal immunity would be anomalous. Further, the conferral upon heads of state of a personal immunity which extended to the vast bulk of their non-official commercial activity would run directly counter to the unambiguous introduction in section 3 of the SIA of an exception from state immunity (and head of state immunity *ratione materiae*) in respect of commercial activity worldwide, shortly after the recognition by the English court of a similar exception as a matter of customary international law in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 52."

26. The judge then set out [49] to [58] of Briggs LJ's judgment, culminating in Briggs LJ's conclusion at [58] that he would have decided that the princes were not excluded from personal immunity in relation to alleged commercial activity outside the UK, whilst recognising that this was *obiter*, so a binding decision on the point should await an occasion when it was necessary to decide the point. To the extent necessary, I cite that passage from the judgment of Briggs LJ in the Discussion section below.

27. The judge noted at [27] that in legislating section 20 of the State Immunity Act:

> "Parliament gave "statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts": Lord Hope in *Pinochet (No 3)* at 240H; it was "enacting customary international law and the Vienna Convention on Diplomatic Relations (1961)": Lord Millett in *Pinochet (No 3)* at 268H-269A. There was material focus on Article 39(2) of the Vienna Convention in the circumstances of that case."

28. At [28] to [36], the judge set out detailed reasons for the immunity of a Head of State. Rather than setting out that passage *in extenso* here, I have summarised his reasons in addressing the submissions of Mr Dixon KC below. The judge then concluded at [38]-[39]:

> "38. With these considerations in mind, I conclude that the modification proposed by Vos J where it alters the territorial extent of the commercial activities exception is, with respect, not necessary. Necessity was the threshold that Parliament had set for modifications. I accept the submission of Mr Rodney Dixon KC and Russell Hopkins, appearing for [the Respondent], that to remove what is a clear territorial restriction to what are narrow exceptions for diplomatic immunity in a receiving State in Art. 31(1)(c) does not fall within the category of "necessary modifications".
>
> 39. Thus section 20 of the Sovereign Immunity Act 1978 recognises and does not exclude the immunity from the jurisdiction of this Court for which [the Respondent] contends, in relation to the claims against him in these proceedings, whilst he is Head of State."

The grounds of appeal and Respondent's Notice

29. The Appellants pursue three grounds of appeal which, in summary, are as follows:

(1) The judge erred in concluding at [11] that the service on 19 October 2021 by leaving the documents with security at the Presidential Palace and the Office of the President was not effective service because it was contrary to Mozambique law within CPR 6.40(4). He had wrongly conflated the test under CPR 6.40(3)(c) with that under CPR 6.40(4). The Appellants' case was that they had served under 6.42(3)(a) (and 6.40(3)(a)(ii)) not 6.40(3)(c) so the latter was irrelevant. The correct test under 6.40(4) is whether the method of service proposed is unlawful in the sense of being positively prohibited by local law. The judge applied the wrong test. If the service on 19 October 2021 was valid, the Respondent was out of time to make his application, which should have been dismissed.

(2) Although the judgment did not say on its face that Mozambique was a country in respect of which "Practice Direction 6B provides otherwise", so that service under CPR 6.42(3) is inapplicable, it appears from Form N460 completed by the judge refusing permission to appeal that he did so consider. He was wrong to do so. The fact that the FPS did not hold a "list" within PD6B para 5.1 meant that he was wrong as a matter of construction to hold that CPR 6.42(3) could be excluded by PD6B. Further, the material before the judge did not justify the conclusion that the judicial authorities of Mozambique required service only to be effected via that method. The judge was wrong to hold (in so far as he did) that service under CPR 6.42(3) was not an available method of service in Mozambique.

(3) The judge was wrong in law to conclude that no "necessary modification" should be made to Article 31(1)(c) of the Vienna Convention as applied to Heads of State by section 20 of the State Immunity Act by deleting the words "in the receiving state." The application of that section to heads of state and their families, subject to an exception in respect of acts of professional or commercial activity only in the UK, rather than anywhere in the world, is incoherent and illogical and cannot have been intended by Parliament.

30. The Respondent served a Respondent's Notice seeking to uphold the judge's order for additional reasons. I only set out those reasons which were relied upon in argument and which are of any relevance in the light of the conclusions I have reached:

    (1) Reason 1: "Service direct" under CPR 6.42(3) is not permitted in Mozambique because PD6B applies.

    (2) Reason 3: Absent an order for alternative service, neither CPR 6.40(3)(c) nor 6.40(4) transpose methods of service permitted for service in the jurisdiction onto methods of service out of the jurisdiction.

    (3) Reason 5: Service direct was not effected on 19 October 2021 in any event. The Appellants did not establish that service had been effected by leaving the claim form at a place specified in rules 6.7, 6.8. 6.9 or 6.10.

    (4) Reason 7: The English Court is required by section 1(2) of the State Immunity Act to give effect to state immunity and procedural rules must be construed by reference to that statutory requirement.

Submissions of the parties

31. On behalf of the Appellants, the starting point of Mr Duncan Matthews KC was CPR 6.40(3)(ii), which permits a claim form to be served out of the jurisdiction by any method provided by CPR 6.42. The relevant provision in 6.42 was (3)(a) since Mozambique is a Commonwealth state which is not a signatory to the Hague Convention and accordingly, the methods of service in (1)(b) and (2) (service through judicial authorities, government or consular authorities) are not available and there must be "service direct". He accepted that there was no guidance in the CPR or the notes to the White Book as to what "service direct" meant, but this had been considered by Jacobs J (albeit on an application where the defendant was not represented) in *FBN Bank (UK) Ltd v Mansell (Ghana) Ltd* [2019] EWHC 2833 (Comm), a case concerning service in Ghana, another Commonwealth state which was not a signatory to the Hague Convention and to which, therefore, CPR 6.42(3)(a) applied. Jacobs J accepted that "service direct" was to be understood by reference to other provisions of CPR Part 6 dealing with service. At [11]-[12] he said:

> "11. One of the provisions which is relevant in that context is CPR 6.5, which describes how certain documents can be served personally. I should say that the claim form is not a document which is required to be served personally, but of course it can be served personally…
>
> 12. In addition, CPR 6.9 provides a set of rules which are applicable where the personal service rules do not apply and the claimant does not wish to effect personal service under r.6.52. The position here is that the claim form must be served on the defendant at a place shown in the table set out in 6.9(2). In the case of a foreign company, that means "any place within the jurisdiction where the corporation carries on its activities or any place of business of the company within the jurisdiction". CPR 6.9, as I have described, identifies the place at which service is

> to be effected. It does not describe the manner in which service is to be effected, applying English principles. Those are to be found CPR 6.3, which sets out various ways in which a claim form can be served. These include personal service, first class post and leaving it at a place specified in r.6.7, 6.8, 6.9 and 6.10."

32. Jacobs J went on to find that there had been personal service under CPR 6.3 by leaving the documents at a place specified in 6.9, namely a place in Ghana where the defendant corporation carried on its activities and that this was "service direct". Mr Matthews KC submitted that the analysis by Jacobs J in those paragraphs was a sensible and legitimate analysis of the requirement of "service direct" in CPR 6.42(3). He submitted that it cannot simply mean service as permitted by local law, since that is covered by CPR 6.40(3)(c) which would otherwise be otiose and methods permitted by local law might not properly be referred to as "direct". Accordingly, he submitted that "service direct" meant service in accordance with the earlier provisions of the CPR from 6.3 to 6.9, always provided that the method of service was not contrary to the local law under CPR 6.40(4). In this case, service by leaving the documents at the Presidential Palace was good service direct under the table at CPR 6.9 because the documents had been served at the Respondent's usual residence.

33. Mr Matthews KC submitted that, to the extent that the judge had decided the point at all, he had been wrong to conclude that service at the Palace was not good service direct because PD6B "provides otherwise" within the proviso to CPR 6.42(3). He submitted that all that the correspondence with the FPS demonstrated was that service via the Mozambique Court was a permitted method of service in Mozambique. The judge wrongly conflated that with CPR 6.40(4) in concluding that any other method of service was contrary to the law of Mozambique.

34. In this context, Mr Matthews KC relied upon the fourth witness statement of Mr Snelling, his instructing solicitor, dated 25 February 2021 served in support of the Appellants' application for permission to serve the claim form out of the jurisdiction in Mozambique on various third parties and on the Respondent as fourth party. The witness statement refers to an intention to effect "direct service" on the Respondent under CPR 6.42(3)(a) at the Presidential Palace or at the Office of the President. It also sets out in detail, on the basis of information from Mozambique counsel, a method of service via the Mozambique courts which corresponds with the method described by the FPS. Mr Matthews KC sought to rely on this witness statement in support of his submission that service could be effected in Mozambique either through the courts or by service direct.

35. Mr Matthews KC submitted that, because there was no list of countries as contemplated by para 5.1 of PD6B, the Appellants could not be precluded by the Practice Direction from serving within CPR 6.42(3) as they had done. The provision could not be interpreted as requiring service in Mozambique to be via the judicial authorities and by no other method. The argument on PD6B conflated two distinct questions, as Phillips LJ said during the course of argument. The first question was whether Mozambique was a Commonwealth state where the judicial authorities require service to be in accordance with CPR 6.42(1)(b)(i). The second question was whether, if there was no list within the second sentence of para 5.1, a precondition for the English Court to give effect to that requirement was not satisfied. Mr Matthews KC's submission was that the

list was a precondition to the application of the paragraph and that in the absence of a list there was no evidence that the first sentence of the paragraph was satisfied.

36. Underhill LJ put to him in argument that the correspondence with the FPS should be sufficient evidence that Mozambique was a Commonwealth state where the judicial authorities require service to be in accordance with CPR 6.42(1)(b)(ii). Mr Matthews KC disputed that, saying there should be expert evidence of Mozambique law to establish whether or not that first sentence of para 5.1 applied to Mozambique. When I put to him, that if there was a list and Mozambique was on it, that would be the beginning and end of it and there would be no need for expert evidence, he could see the force of that construction of para 5.1, but submitted that that was not the situation here, because there was no list.

37. Mr Matthews KC submitted in relation to Ground 3 that the approach of Vos J in *Apex* was to be preferred to that of Briggs LJ. The question was how one applies across the provisions of the Diplomatic Privileges Act to a head of state under section 20 of the State Immunity Act. He pointed out that the fundamental point about a diplomat was that his protection was related to his time in the receiving state and the exception related to professional or commercial activity in the receiving state outside his official functions. Mr Matthews KC submitted that, when applied to a head of state, there was no logic to a distinction between the acts of the head of state in the UK and the acts done outside the UK. The exception from immunity should apply to all professional or commercial activities of a head of state outside his official functions, wherever carried out. He submitted that the removal of the temporal limit in the exception was a "necessary modification" since for a head of state there is no "receiving state" and, indeed, the head of state may never come to this country or have any involvement with it.

38. Mr Matthews KC said that the main thrust of the Respondent's case seems to be that there was a pre-existing all-encompassing immunity for heads of state in customary international law. He submitted that this argument was flawed at a number of levels. As Vos J pointed out in *Apex*, there was no such customary established position in respect of all activity in the civil context. He also noted that, under section 3 of the State Immunity Act, the state does not have immunity in relation to commercial transactions it has entered into, but on the Respondent's case it is suggested that the head of state, who is after all an emanation of the state, has immunity in respect of his commercial activities going beyond what the state enjoys. He submitted that that was a very odd and unlikely outcome. The reality is that, if Parliament had intended the head of state to have complete immunity, it could simply have said so and not applied the immunity of diplomats which is not an absolute privilege.

39. Mr Matthews KC referred to the decision of a Divisional Court of the Family Division (Sir Andrew McFarlane P and Chamberlain J) in *Al M (Immunities)* [2021] EWHC 660 (Fam) which distinguished the arrest warrant case in the International Court of Justice. At [47]-[48] of the judgment, the Court said:

> "…It is not enough for the father to establish that he is entitled to some immunity from civil jurisdiction. He would have to go further and establish the scope of that immunity and, in particular, that it extends to immunity from jurisdiction in civil claims in respect of non-official acts and that it applies even

> when not visiting the country. The ICJ did not need or purport to resolve those issues.
>
> 48. Nor does the comparison drawn by the ICJ with diplomatic and consular agents provide the answer. As Mr Otty pointed out, the scope of their immunity is obviously different from that of a Head of State, Head of Government or Minister of Foreign Affairs in at least one key respect: save when in transit to or from a posting, it applies in only one foreign State - the receiving State. The immunity of diplomats from the civil jurisdiction of that State protects them, among other things, from "the risk of trumped up or baseless allegations and unsatisfactory tribunals": *Reyes v Al Malki* [2019] AC 735, [12(3)]. The fact that a diplomat, who is posted to the receiving State, requires protection from these risks does not entail that the same is true of a Head of Government, who in most cases is likely to be based in his own State. There can be no automatic assumption that a Head of Government is entitled in every foreign State to immunities of precisely the same scope as are accorded by the receiving State to the head of a diplomatic mission while posted in that State."

40. Mr Matthews KC submitted that that case demonstrated that there was not in effect a universal principle of total immunity for heads of state in relation to all matters civil and criminal. It all depends on the context and it has been provided under the State Immunity Act that the head of state gets no more immunity than a diplomat does under the Diplomatic Privileges Act and to carry that across, there have to be some modifications to the language to make the whole thing make sense.

41. Mr Matthews KC then dealt with Reason 7 in the Respondent's Notice, reliance on section 1(2) of the State Immunity Act. He submitted that the Respondent seemed to be arguing that, even if the Appellants were correct that there was good service in October 2021, the Court was still required to give effect to the immunity even if it was not raised at the time. He submitted that the complete answer to any such argument was to be found in the decision of this Court in *Zhongshan Fucheng Investment v Federal Republic of Nigeria* [2023] EWCA Civ 867. That was an application by Nigeria to re-open under CPR 52.30 a refusal of permission to appeal against a judgment of Cockerill J which was dealt with at an oral hearing by Underhill LJ and myself. The detail does not matter, but the relevant point is an argument by Nigeria that the Court was obliged by section 1(2) to raise state immunity of its own motion even though Nigeria had failed to comply with the procedural timetable laid down by the judge. We dismissed that argument. At [33] to [35] of my judgment I said:

> "33. The suggestion that it was somehow open to Nigeria to fail to comply with or disregard that timetable, but that the Court would still have to make a determination as to state immunity, is as startling as it is misconceived. Although, if state immunity is established, the Court has no jurisdiction over the state in respect of the substantive dispute, in relation to the prior determination of whether state immunity arises at all, the Court does have jurisdiction…

> 34. That jurisdiction must encompass the imposition of whatever procedural rules are appropriate for that determination. This is clear from what Kerr LJ said in *JH Rayner* where he spoke of the issue of state immunity being determined "in whatever form and by whatever procedure the court may consider appropriate". In the present case, Nigeria was given two months and fourteen days under the CPR to make an application to set aside the enforcement order and raise state immunity if so advised. If Nigeria needed more time to make an application, it was incumbent upon it to make an application in time under CPR 3.1(2)(a) for an extension of time. If such an application was not made in time (as in the present case) then Nigeria would need to seek relief from sanctions as the notes in the White Book make clear and, if it could not satisfy the *Denton* criteria (as the judge found here), then the sanction of not obtaining an extension of time would follow, so that Nigeria could not raise state immunity because it was too late. There is nothing in the CPR or the authorities which suggests that these normal procedural consequences do not follow merely because the defendant is a state.
>
> 35…The proposition that, even in a case where the state did not make any application to set aside the enforcement order, the Court would need to make some form of further determination that state immunity did not apply on the balance of probabilities is pointless and absurd. Nothing in the authorities points to some such formalistic requirement…"

42. Mr Matthews KC submitted that if service was effective in October 2021, and the Respondent had not claimed state immunity at the time, he could have applied for relief from sanctions. He did not do so and what he cannot do is come along more than two years later and complain that the Court has not cast aside its procedural rules and applied section 1(2). The Court emphasised the need to comply with the procedural rules at [37] of my judgment in *Zhongshan*:

> "In the present case, as I have said, the determination in making the enforcement order in the first place was a determination by the judge that state immunity did not apply (subject to Nigeria having the opportunity to apply to set aside the order). Nigeria failed to comply with the generous time limit of two months and fourteen days to make such an application and, indeed, did not raise state immunity until 29 November, three months after the time limit expired. In those circumstances, Nigeria needed relief from sanctions in order to obtain an extension of time to which the judge held Nigeria was not entitled. Nigeria had every opportunity to make an application in time to set aside the order but did not do so even though it was well aware of the time limit."

43. In relation to the service issue, Mr Rodney Dixon KC for the Respondent submitted that the nub of the issue was PD6B which the judge got entirely right in finding that

service through the judicial authorities in Mozambique was the only means of valid service, unless of course alternative service under CPR 6.15 were ordered. He submitted that CPR 6.42(3) made absolutely clear that in a Commonwealth state which is not a party to the Hague Convention, there could be direct service, but not if required otherwise under PD6B. The judge clearly had the Practice Direction in mind at [9] of the judgment, where he refers to the absence of a list but to the fact that the FPS was able to respond by detailing the process to cause documents to reach judicial authorities in Mozambique. He submitted that that was the consistent answer one would get from the FPS whether it was taken from a list or a computer system or however it was stored.

44. Mr Dixon KC pointed out that the Appellants had the information that service in Mozambique would have to be by the procedure described in para 5.1 of PD6B, namely service via judicial channels, in February 2021 before they made their application for permission to serve out. He referred to the fourth witness statement of Mr Snelling, to which I referred in [34] above. He said that the Appellants had in fact gone down two routes for service in parallel. They did in fact commence the judicial authorities route in 2021 and that is what eventually led to service through those authorities in April 2023. However, in parallel, they went down the route of leaving the documents with security at the Presidential Palace and the Office of the President, which was not a valid route. He submitted that engagement with the FPS would have made that absolutely clear, given the subsequent correspondence between the FPS and the Respondent's solicitors in July 2023.

45. He submitted that there did not have to be some form of list or other mechanism at the FPS to ensure that the only form of valid service, other than alternative service, was through the Mozambique courts. The requirement was what the FPS conveyed to the Respondent's solicitors, what they would have conveyed previously and would convey now. He asked rhetorically why would they say this was the only way of serving if there had been another way of validly serving.

46. He submitted that, since service through the judicial authorities was the only valid method of service, it was not necessary to define what is meant by "service direct" or to decide whether *FBN Bank* was correctly decided. There was nothing in the Appellants' suggestion that the Respondent should have brought more evidence of the requirement. The email from the FPS was clear and the judge was entitled to make the findings he did at [9] to [11] of his judgment.

47. In relation to the issue of state immunity, Mr Dixon KC submitted that, as a sitting head of state, the Respondent was in a particular position where international law recognised that immunity was absolute for all acts, whether public or private, while he was in office and whether they took place before he was in office or while he was in office. That immunity subsists while he is in office but not after that.

48. Mr Dixon KC submitted that the judge had outlined a number of reasons why the Respondent was entitled to immunity. First was the passage in [27] of his judgment quoted at [27] above, that in the State Immunity Act, Parliament had given statutory force to that customary international law as to the immunity from proceedings in foreign courts enjoyed by heads of state.

49. Second was that the rationale behind the immunity set out by the judge at [28] was that it is functional, that is, as Lawrence Collins LJ put it in *Aziz v Aziz* [2007] EWCA Civ

712; [2008] 2 All ER 501 at [61]: it has a clear "function in international relations to protect the ability of the head of state to carry out his functions and to promote international co-operation."

50. Third was the point discussed by the judge at [29]-[30] that, originally, section 20(1)(a) of the State Immunity Act was only to apply to a head of state who was in the UK, but that the provision had been amended to cover heads of state, like heads of diplomatic missions, irrespective of presence in the UK, as Lord Browne-Wilkinson and Lord Goff explained in *Pinochet (No 3)* in the passages which the judge quoted.

51. Fourth was what the judge said in [33] that the immunity only persists while the head of state is in office and in any event does not give immunity in their own state.

52. The judge had then dealt at [34] with the decision of the Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 52 and the commercial exception in section 3 of the State Immunity Act. As Mr Dixon KC put it, commercial activities of states are now fair game in jurisdictions around the world, but they have to be purely commercial, not governmental. However, section 3 does not erode head of state immunities which are in a different Part of the Act.

53. Mr Dixon KC emphasised the point made by the judge at [38], quoted at [28] above, that the test for whether there should be any modification to the application of the Diplomatic Privileges Act and the Vienna Convention to heads of state as compared with diplomats is one of necessity, not whether it would be a good thing. The judge had been right to conclude that there was no necessity for any modification, certainly no necessity for any removal of the words "in the receiving state" in Article 31.1(c) when applied to heads of state. The analysis of Briggs LJ was to be preferred to that of Vos J.

Discussion

54. In my judgment, the provisions in CPR 6.42 and PD6B have to be read together. When they are, it is clear that service in a Commonwealth state which is not a signatory to the Hague Convention must be by "service direct" unless PD6B provides, in relation to that country, that another method of service is required. The first sentence of para 5.1 of the Practice Direction then confirms that the judicial authorities of certain such Commonwealth countries require service to be in accordance with CPR 6,42(1)(b)(i), that is via those judicial authorities. The word used in that sentence is "require" which is not permissive, but points to service only being permitted and valid via those judicial authorities. That this is the position in Mozambique is borne out by the email from the FPS which is in categorical terms: "The only service method available in Mozambique is "Agent to Agent"", which the rest of the email exchange makes clear means service through judicial channels. The email from the FPS contains a detailed explanation as to how to go about such service. There is no suggestion in the email exchange that some other method of service is permissible in parallel. This email exchange is ample evidence that Mozambique is a Commonwealth state within the first sentence of para 5.1 where the judicial authorities require service via them and that that is the only permissible means of service in Mozambique. Although Mr Matthews KC sought to maintain that service could be either through the Mozambique courts or by service direct and relied on Mr Snelling's fourth witness statement, that statement does not address the terms of PD6B para 5.1 and its mandatory terms, which indicate that the

only permitted method of service is through the Mozambique courts. In my judgment, the material in the witness statement is not a reliable basis for any contention that both methods of service are permissible.

55. The fact that there is no formal "list" at the FPS does not detract from the conclusion that, in Mozambique, service is required to be through the courts. Nothing in the second sentence of para 5.1 even begins to suggest that the existence of a list is somehow a precondition to the operation of the first sentence. The second sentence is merely intended to indicate the existence of a list as a source of information as to which countries fall within the first sentence. Even if there were a list, it would be unlikely to tell someone contacting the FPS more than that Mozambique was on the list. If one wanted more information as to how to go about serving in Mozambique it would surely be extremely unlikely to be set out in such a list. One would have to ask the FPS for more detailed information, which is exactly what was done by the email exchange on 31 July 2023.

56. Thus, on the basis of the evidence before the Court, service through the Mozambique courts is the only permitted method of serving English proceedings in Mozambique. In those circumstances, the Appellants gain no assistance from CPR6.40(3)(c), since there is no other method permitted by Mozambique law.

57. On the basis that the only permissible method of service in Mozambique is via the courts under para 5.1 of PD6B, it must follow that good effective service did not take place until April 2023 when the respondent was served via the Mozambique courts. The purported service in October 2021 by leaving the documents with security personnel at the Presidential Palace and the Office of the President was not good service. Given that the Appellants did not seek an order for alternative service under CPR 6.15 by leaving the documents with the security personnel it is not necessary to decide if that alternative method of service would have been precluded as contrary to the law of Mozambique under CPR 6.40(4).

58. In the circumstances, it is also not necessary to decide whether, if leaving the documents with the security personnel had been capable of being good service, it would have constituted "service direct" within the meaning of CPR 6.42(3). As Underhill LJ said in the course of argument, in the context of CPR 6.42 as a whole, the contrast seems to be between service "through" judicial, governmental or consular authorities provided for in (1) and (2) and service "direct". I can see the force of the approach of Jacobs J in *FBN Bank*. However, as I say, it is not necessary to decide the point and it is best left for a case where it is critical to the decision.

59. In my judgment, the third ground of appeal concerned with the immunity of the Respondent as a sitting head of state can be dealt with relatively briefly. Applying the Diplomatic Privileges Act and Vienna Convention scheduled to it to a head of state as required by section 20(1) of the State Immunity Act, the exception in respect of professional or commercial activity will not apply because none of the Respondent's alleged such activity took place in the UK as the receiving state. The only way round this would be if the words: "in the receiving state" are deleted from their application to heads of state, which, as the judge recognised, would only be possible if that was a "necessary modification" within the opening words of section 20(1) of the State Immunity Act.

60. I find the reasoning of Briggs LJ in *Apex* as to why the deletion of those words was not a "necessary modification" compelling. I will only quote the core of that reasoning as to why the argument fails the necessity test at [52] to [55] of Briggs LJ's judgment:

> "52. I now consider the position of a head of state. The effect of the excision of the phrase "in the receiving state" from the Article 31.1(c) exception to immunity would be, in exactly the same way, to expose a visiting head of state to being served with originating process while in the UK in respect of his private commercial activity undertaken anywhere in the world, including in his home state, during the relevant limitation period prior to the service of proceedings. Those with disputes which they wished to litigate against him, including his own subjects, might see his temporary presence in the UK as a heaven-sent opportunity to engage in such litigation, with obviously adverse consequences for the dignity of the head of state during his visit, and for the effective performance of his official functions while in the UK.
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> 53. It is in my judgment no answer to that difficulty to say that, for most of his time as head of state, he will be outside the UK. The purpose of section 20 (before the amendment of the bill) was specifically to provide for personal immunity for foreign heads of state while visiting the UK, equivalent to that of their ambassadors, and that purpose was not itself removed by the amendment which extended the immunity so as to protect the head of state at all times during his holding of that office.
>
> 54. It would, of course, have been possible for Parliament to deal with this difficulty by providing for a full personal immunity subject only to commercial activity in the UK, while a head of state was visiting the UK, and a restricted immunity subject to a full commercial activity exception at all other times. But it does not follow from the fact that Parliament did not engage with these difficulties that it must be assumed to have intended to resolve them by a solution apposite to an immunity to be given to heads of state while absent from the UK, at the expense of creating, for the first time, a derogation from such immunity for visiting foreign heads of state, by comparison with that enjoyed by their ambassadors. It is furthermore not unreasonable for Parliament to have thought that, if the starting point for head of state personal immunity was to be by analogy with that afforded to ambassadors, then an exception by reference to commercial activity in the UK was at least as, if not more, appropriate for heads of state than for ambassadors, having regard to the dignity to be afforded to the office of a head of state when visiting the UK, and the potential for disruption of good relations between states which would be afforded by creating an opportunity for persons aggrieved by a head of state's private business activity

> abroad, to have them adjudicated upon as a result of service of process during a head of state's visit.
>
> 55. Balancing these considerations leaves me with no sufficiently clear view that Parliament must have intended one rather than the other of the two solutions contended for in these proceedings. The result is that, in my judgment, the supposed modification constituted by the excision of the words "in the receiving state" from Article 31.1(c) in its cross-application to heads of state fails the necessity test."

61. Like the judge, I prefer the reasoning of Briggs LJ on this point to that of Vos J at first instance. Given that the suggested modification fails the necessity test and thus the argument against the Respondent having immunity under section 20 fails at the first hurdle, it is not necessary to address the various other arguments advanced on behalf of the Respondent, which, in any event, Mr Dixon KC did not develop in his oral submissions.

Conclusion

62. For the reasons set out above I have concluded:

(1) That the Respondent was not effectively served with these proceedings in October 2021.

(2) That effective service only took place in April 2023 so that the application made by the Respondent for a declaration that the English Courts had no jurisdiction on grounds of state immunity was made in time.

(3) That the Respondent has immunity from the jurisdiction of the English Courts whilst he is the head of state of Mozambique.

63. It follows that this appeal must be dismissed.

Lord Justice Underhill

64. I agree with the Chancellor's reasoning and conclusion and, like him, would dismiss the appeal. I wish to add one observation about the words "service direct" which appear at the end of CPR 6.42 (3). Mr Matthews treated those words, sometimes reversed by him as "direct service", as if they were intended positively to prescribe a particular (though unspecified) means of service. That is not how I read it. In my view the word "direct" is simply used to connote the contrast with service in the various situations provided for by paragraphs (1) and (2), which is described in each case as service "through" the entity specified – in other words, directly as opposed to through any of those intermediaries. (That appears also to have been the view of Jacobs J in *FBN Bank*: see para. 10 of his judgment.) I do not read the rule as intended to go further and prescribe what form such "direct" service could or should take. That being so, the question may arise in cases falling under paragraph (3), as it did in *FBN Bank*, of what forms of service are in fact permitted; but, since in this case PD 6B applies, we do not have to address that question and I prefer not to do so.

Lord Justice Phillips

65. I agree with both judgments. I would add that, although it is not necessary to decide the point, I see much force in the approach of Jacobs J in *FBN Bank* as to what constitutes "service direct" for the purposes of CPR 6.42(3).