EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 59 OF 2018

Between:

VTB BANK (PUBLIC JOINT STOCK COMPANY)

Claimant/Applicant

And

DMITRY VALENTINOVICH KOSTYGIN

Defendant/Respondent

Appearances:

Mr Nicholas Burkill of Ogier for the Claimant/Applicant
Ms Tameka Davis (by telephone) and Allana-J Joseph (in person) of Conyers for the Defendant/ Respondent

---

2019: June 19
July 30

Default Judgment –CPR 12.4 Conditions to be satisfied—Failure to file Acknowledgement of Service-Function of Court Office-Function of Court-Applicability of the Hague Convention

JUDGMENT

[1] **Adderley, J** Ag. This is an application filed 18 January 2019 to enter Judgment in Default of the Defendant failing to file an acknowledgement of service within the time limited by the Rules.

THE STATUTORY REGIME

[2] Judgment in default of acknowledge of service is set out in CPR 12.4 in the following terms:

> "**Conditions to be satisfied- judgment for failure to file acknowledgment of service**
>
> …12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if-
>
> (a) the claimant proves service of the claim form and statement of claim,
>
> (b) the defendant has not filed-
>
> (i) an acknowledgment of service; or
>
> (ii) a defence to the claim or any part of it;
>
> (c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;
>
> (d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;
>
> (e) the period for filing an acknowledgment of service under rule 9.3 has expired; and
>
> (f) (if necessary) the claimant has the permission of the court to enter judgment.

[3] Ms Davis drew the court's attention to Practice Direction 112 (No 1 of 2012) which was issued to clarify CPR 12.4 and 12.5 but on its face it is stated to apply in circumstances where the claimant has not made a request for entry of default judgment. That is not the case here.

[4] For the application to proceed the Applicant must prove service as required by CPR 12.4(a). The rule provides that CPR 5.5 (personal service), 5.11(postal service), 5.12 (by electronic means), and 5.15 (by specific method) set out how service is proved. CPR 5.15 provides "*Service is proved by an affidavit made by the person who served the document showing that the terms of the order have been carried out*."

[5] Therefore in a case where there was an order for service out of the jurisdiction, as is this case, the starting point for the court staff or the court, as the case may be, must be to review the order made by the judge, to determine whether the order for service was carried out. In so doing, since this is not a review of the judge's decision it seems to me that they can assume that in making the service order the judge complied with CPR 7.8 (2). That prohibits the making of an order which authorizes a person to do any act which is against the law of the country where the document is to be served. CPR 7.8(2) reads as follows:

> **"Nothing in this Part or in any court order may authorize or require any person to do anything in the country where the claim form is to be served which is against the law of the country"**

THE JUDGE'S SERVICE ORDER

[6] The Judge made the following Order on 11 October 2018:

> "1. The Applicant has permission to serve the Claim Form dated 10 April 2018, the statement of claim dated 10 April 2018, the Notice of Application dated 10 April 2018, the Order in this court dated 13 April 2018 and any other document in these proceedings on DMITRY VALENTINOVICH KOSTYGIN out of the jurisdiction, by way of alternative service, in accordance with CPR 7.8A, including service personally by the Applicant or its agent.
>
> (a) by post by the Senior Investigation Committee in ST Petersburgh, Russia, A.A. Zadachin (the Senior Investigator") to Mr Kostygin's residential address in Russia; and or
>
> (b) by post pursuant to the order of the Senior Investigator dated 22 June 2018 to Mr Kostygin's residential address in Russia
>
> 2. Service of the following documents in these proceedings by post upon Mr Kostygin pursuant to the order of the Senior Investigator dated 22 June 2018 shall be deemed to be good service."

The documents were listed in the Order and included the Claim Form and Statement of Claim amoung other documents.

[7] It is noted that CPR 7.8 (1)(c) provides for personal service. Mr Kostygin was personally served with the documents on 23 April 2019. While acknowledging receipt of the documents, on the face of his affidavit dated 30 April 2019, he does not accept it as proper service because he refers to it in paragraph 9 and elsewhere as "purported service".

IS PERSONAL SERVICE OF COURT DOCUMENTS ALLOWED IN RUSSIA?

[8] In **JSC MCC Eurochem v Livingston Properties Equities Inc** BVIHC(COM)2015/97 (**"Eurochem"**) it was held that service of court documents from the BVI can **only** [emphasis added] be by way of The Convention on the Service Abroad for Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "**Hague Convention**"). Paragraph 34 read as follows:

> "Judicial documents originating in the BVI may be served within the territory off Russia only in accordance with the provisions of the Hague Convention…"

[9] Although the rest of the judgment remains unchallenged, in my judgment, the Court of Appeal in **Stichting Adminsitratiekantoor Nems v Anna Radchenko** BVIHCMAP 2019/0003 ("**Stichting**") has now put that aspect of the judgment to rest. Although not dealing with an appeal from **Eurochem** on the issue of service, the Court of Appeal has made it clear that a number of alternative modes of service are possible in Russia other than under the Hague Service Convention, so long as the mode is not in breach of CPR 7.8(2).

[10] In **Stichting** the court had to decide whether in attempting service of court documents in Russia by courier from the BVI whether that could constitute good service of court documents in Russia. In considering this issue it concluded:

"[16] We agree that the learned judge erred in concluding that service could only be in accordance with the Hague Convention...".

[11] This opens up all of the modes of service under CPR 5 as well as CPR 7 in Russia provided that the process is not against the law of Russia.

MEANS OTHER THAN PERSONAL SERVICE

[12] The modes of service objected to by Russia were set out in **Eurochem** at [31]

"[31] … Russia has expressly objected to the use of alternative methods of service listed in Hague Convention Article 10 by making a declaration under Hague Convention Article 21:

VI. Service of documents by methods listed in Article 10 of the Convention is not permitted in the Russian Federation.

[32] Accordingly, the following methods listed in the Hague Convention Article 10 cannot be used in Russia to serve documents [court documents] originating in the BVI by personal service on persons or judicial officers in Russia:

(a) The freedom to send judicial documents, by postal channels, directly to persons abroad (emphasis added) "

[13] In **Stitchting** the EC Court of Appeal reviewed in detail the issue of service outside the jurisdiction. In the case being considered the Judge had ordered that the document could be served outside the jurisdiction in Russia in any manner not contrary to the law of Russia. In that case, the documents had been served on the defendant by courier. In light of its clarity I will quote extensively from that judgment. Pereira CJ with whom the rest of the panel agreed said this in relation to service:

"[16] We agree that the learned judge erred in concluding that service could only be in accordance with the Hague Convention and then concluding that service was not proper service, in the absence of any expert evidence on Russian Law before him.

It appears that the learned Judge failed to appreciate that the modes of service out of a claim, as setout under CPR 7.8, are disjunctive and therefore allows the utilization of various options. CPR 7.8 is in the following terms:

"7.8(1) subject to the following paragraphs of this rule, and Rule 7.8A **if a claim form is to be served out of the jurisdiction** (emphasized) it may be served-

(a) By a method provided for by-

(i) rule 7.9 (service through their foreign governments, etc.): or

(ii) rule 7.11 (service on a State)

(b) in accordance with the law of the country in which it is to be served:

Or

(c) personally by the claimant or the claimant's agent.

(2) Nothing in this part or in any court order may authorize or require any person to do anything in the country where the claim form is to be served which is against the law of that country."

"[17] CPR 7.9 encapsulates service under the Hague Convention. But it bears note the 7.9(2) expressly states that:

"the methods of service permitted by this Rule [that is 7.9] are in addition to any method of service under rule 7.8(1)(b) or (c)"

[14] This makes clear that service out by the method provided under the Hague Convention is simply one of the methods of service permitted for service out under CPR 7.8. CPR 7.8(1)(b) and CPR 7.14(4) expressly permit service out of a claim, application or notice in proceedings in respect of that claim, "in accordance with the law of the country in which it is to be served" as a separate or other option by which service out may be effected.

[15] Therefore in **Stitchting** where the judge had ordered that service be effected " *in a manner that is not contrary to the laws of the Russian Federation*", and the judge hearing the matter on the return date had concluded that it had not been properly served because it had not been served in accordance with the Hague Convention the Court of Appeal sent it back for a rehearing. The Court of Appeal observed at [14] of **Stitchting** that the question of whether service was contrary to Russian law could only be answered by reference to evidence of Russian law on the point. In

Stitchting no expert evidence had been led on Russian Law and so the Court of Appeal remitted it back to the judge who had heard the matter on the return date for consideration on its merits as to whether the method of service employed in Russia had passed the test that it was not against the law of the Russian Federation.

[16] In **Stitchting**, the judge accepted service as being good because of expert evidence on Russia Law that sending by courier was not by postal means.

[17] With respect to expert evidence on Russian law, in **Renova Industries Ltd et al v Emmerson International Corporation et al** BVIHC (COM) 2013/0160 delivered 21 February 2019 I ruled, for example, that service on a company at its registered office in Moscow was good service. That was service in accordance with service set out under CPR 5.7(Service on limited company) and not contrary to CPR 7.8(2). This decision was based on Russian Law expert evidence that

> "1. that service of the court documents in question did not constitute an illegal act, including an administrative offense or criminal offence, in accordance with laws of the Russian Federation,
>
> 2. that the service of court documents in question was proper and effective in accordance with the laws of the Russian Federation, and
>
> 3. the service of court documents in question complied with the "letter" and the "spirit" of the Hague Convention."

SERVICE IN THIS CASE

[18] On 23 April 2019 personal service permitted by the learned Judge's Order dated 11 October 2018 (the **"Order"**) was carried out by an agent of the applicant and the person who carried out the service swore the affidavit. It seems to me that the method of personal service complied with the requirements of CPR 5.3 "by handing it to or leaving it with the person to be served", and the method of proof of service mandated by CPR 5.5 (1-5) appears to have been satisfied by the first Affidavit of Kseniya dated 29 April 2019. The affidavit included the identification of Mr Kostygin by photograph as provided for in CPR 5.5(3) and how it was personally served by being handed to him and explained to him.

[19] The service process therefore complied with CPR 7.8(1)(b) and the order of the learned Judge, and does not appear to be one of the methods of service contrary to Article 10 of the Hague Convention. Therefore on the face of it the service is not against the law of Russia, and does not offend CPR 7.8(2).

[20] I therefore find that it was valid personal service on Mr Kostygin on 23 April, 2019 at about 7:29 pm at the arrivals area of Terminal B of the Moscoa Sheremetyevo Airport in Moscow. It is within the express terms of the Order and does not offend CPR 7.8(2). However, that service obviously took place after 18 January 2019 when the request to enter default judgment was made. It also consisted only of the service letter and the freezing order with penal notice.

[21] Service by post by the Senior Investigator to Mr Kostygin's residential address in Russia, this did not happen.

[22] The alternative method of service by sending the documents by post **pursuant to the order** of the Senior Investigator dated 22 June 2018 to Mr Kostygin's residential address in Russia was undertaken. In the Fifth Affidavit of Alexander Muksinov dated 18 January 2019, he sworn to the Claim Form and Statement of Claim issued 10 April 2018 ("the Claim") against Mr Kostygin having been posted to Mr Kostygin's residential address at Shpalernaya Street 60, apartment 170-171, Saint Petersburg 191015, Russian Federation. These claimed enforcement of a judgment issued by the Dzerzhinsky District Court of Saint Petersberg in favour of VTB Bank for RUB 652,984,721.13. Mr. Muksinov exhibited the documents in support of the service and receipt of postage with translations.

[23] By Mr. Muksinov's said affidavit the letter was apparently sent from the BVI ("**November Dispatch**"). On the face of it this appears to be contrary to Article 10 of the Hague Service Convention to which Russia objected, however no issue was raised by the respondent in respect of it and there was no expert evidence on the point. Furthermore it was done pursuant to an Order dated 27 June 2018 by an order of the authorities in St Petersburg (the Chief Investigation officer) in the following terms:

" …pursuant to Art. 38, 107, 122, 159 of the Criminal Procedure of the Russian Federation (CCP), IT IS HEREBY ORDERED 2. to allow VTB Bank PJSC to send D.V. Kostygin the documents listed in the petition by mail to : 60 Shpalernaya Str., apt 170-171, St Petersberg" in these circumstances it does not appear to be contrary to Russian Law.

[24] Because of objections by Ms Davis, Mr Burkill conceded that he would not rely on the Fourth Affidavit of Sergey Levichev dated 11 June 2019 including the expert report which was exhibited thereto except for the delivery and tracking record relating to the November Dispatch of the documents. That affidavit had given detailed evidence of service and an expert opinion on Russian Law on whether the service by post was good notification.

[25] Absent that affidavit the Applicant relied on the following as proof of service as evidenced by the delivery tracking record:

(1) The covering letter which was sent by registered post enclosing documents is addressed to Mr Kostygin at 60 Shpalernaya ATR., Apt 170-171, St Petersburg", which is the address given by Mr Kostygin as his home address.

(2) The tracking record in English includes the following reports:

26 Nov 2018	Arrived at the post office	Moscow 125167
03 Dec 2018	Available for pickup at The Post office	
03 Jan 2018	Return to sender	19105 St Petersburg
15 Feb 2019	Forwarded to the courier	190[9]00 St Petersburg

[26] It relied on the covering letter to prove the contents of the package which was sent and the list of enclosures by the Russian post office which listed 14 items among which were acknowledgement of order + translation, claim form + translation, ex parte notice of application + translation, and statement of claim + translation.

[27] Ms Davis did not agree that that proved service. She argued that there were three tracking reports which were contradictory and unclear. The court, she says, is being asked to accept the one most favourable to prove service by the Claimant.

[28] She made the following observations. The court office did not have that delivery tracking record before them when the application was made in January and probably accounts for why they referred the matter to the court.

[29] Firstly, she stated that there was no explanation why the tracking report extracted at 12 December ("December Extracts") 2018 is at odds with the tracking reports generated on the website of the Russian Post on 4 June 2019 ("June Extracts"). In the December Extract on 3 December 2018 at 11:02 it was recorded that the package was "pending receipt at the delivery location", while in the June Extracts the package was recorded as "available for pick-up".

[30] Second, in the June Extracts on 4 June 2019 at 23:34 pm on the 18 January and 15 February 2019 the post code and place is recorded as "1900000, St Petersburg, while in the June extracts the number generated is"190900" with the remainder of the text in Russian.

[31] Thirdly she submitted that in both versions of the extracts the addressee is incorrect.

[32] In those circumstances Ms Davis submitted that it cannot be said with any degree of confidence that it is more likely than not that Mr Kostygin was served.

[33] The burden of proving service is on the Claimant, and the standard must be the usual civil standard, namely, on a balance of probability.

[34] In my judgment the so-called discrepancy in the wording in the December Extracts and the June Extracts are not material; there is no material difference between "pending receipt at the delivery location" and "available for pick-up."

[35] There are indeed 3 tracking reports all said to be generated on the website of the Russian Postal Service. However, all have the correspondence arriving 26 November 2018 and have tracking report #12516727009424.

[36] The first tracking report which also purports to be generated by the official website of the Russian Post on December 12, 2018 does not show delivery to the addressee; the last entry is on 3 December 2018 at 11:02 "**Pending receipt at delivery location**" at location 191015 St Petersburg. Both reports generated 4 June show an entry on the same time and date as "**Available for pickup at the Post Office**" at location191015, St Petersburg. Therefore all three of the tracking reports show that the package with the correct address was available for pick-up on December 3. On 3 January 2019 the reports generated on 4 June record that the package was returned to the sender.

[37] The evidence therefore shows that the documents were available for pick-up between 3 December and 2 January 2019. They were not picked up and so Mr Kostygin is deemed to have been notified by 2 January, 2019. Thirty five days for filing an acknowledgment of service from 2 January in accordance with Wallbank J's Order expired on 4 February 2019. VTB's request for default judgment was filed 18 January 2019. Under CPR 9.3(4) the defendant may file an acknowledge of service at any time **before** a request for default judgment is received at the court office out of which the claim form was issued. This is consistent with the judgment of Philips J in **Almond v Medgolf Properties Ltd** [2015] EWHC 3280 where he stated at para 12 ". *In my judgment, the question of whether or not a defendant has filed an acknowledgment of service must be judged at the point of which the application is made*…". I take that to refer to the point at which a **valid** application is made. Since the application was made prematurely it is not a valid application. The respondent has now filed an acknowledgement of service as ordered by the court. It follows that the request for the entry of default judgment was premature.

[38] For the above reasons I decline the request to enter judgment in default of acknowledgement of service and dismiss that application.

[39] Nevertheless, in his first affidavit dated 30 April 2019 Mr Kostygin now acknowledges that he has been served with the Claim as well, through his lawyers, Conyers, who he engaged on 25 April after discovering about this hearing "…from a public court list…" He expressed the wish to defend the Claim, and foreshadowed that he will mount a jurisdictional challenge. He also applied for an extension of time in which to file a defence. However, at a hearing on 30 April scheduled for the

hearing of the default judgment, because of the late receipt of Mr Kostygin's evidence the court granted an adjournment of the application and ordered Mr Kostygin to file and serve evidence by 4 pm on 24 May 2019 to include details of his defence or grounds for contesting the jurisdiction of this court. Mr Kostygin has failed to do so.

[40] In a second affidavit Mr Kostygin acknowledges the application for contempt proceedings against him and purports to comply with the disclosure order contained in the freezing order that was personally served on him on 23 April 2019.

[41] An application was made by Ms. Davis for an extension of time to file a defence. This was dismissed and the hearing of the extant contempt application was adjourned to a date to be fixed. The application for the adjournment of this hearing was dismissed after hearing argumentation from both sides. In these circumstances the Claimant can weigh its options.

[42] Having regard to all the circumstances costs are reserved.

K. Neville Adderley
Commercial Court Judge

By the Court

Registrar