

**IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) [REDACTED]

BETWEEN:

APPLICANT X

Applicant

and

RESPONDENT Y

Respondent

Appearances:

Mr. David Welford, with him Mr. Tom Frazer and Mr. Romauld Johnson, for the Applicant

2022: July 12.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** This judgment concerns an application relating to service under the Convention of 1st November 1965 on the Service Abroad of Judicial Extrajudicial Documents in Civil and Commercial Matters ('Hague Service Convention' or 'Convention'). The application seeks an order directing that the Registrar of the Supreme Court of the Virgin Islands ('Registrar') may send documents for service pursuant to the Hague Service Convention directly to the Central Authority of the receiving state for each Defendant in these proceedings. The heading in this Judgment has been anonymized; in the underlying matter there are a considerable number of intended Defendants, many of whom reside in states which are signatories to the Hague Service Convention.

- [2] The application was brought on an urgent *ex parte* basis and heard on 12th July 2022. I granted the application and gave oral reasons. This written judgment records how the Court has interpreted the relevant legal provisions. To preserve anonymity, this written decision only addresses the legal aspects which are likely to be of general interest.

INTRODUCTION

- [3] This application was for an order directing that the Registrar may send documents for service under the Hague Service Convention to the Central Authority of the receiving state for each Defendant. The application was made in proceedings where permission was granted for service out of the jurisdiction on certain Defendants. Some of the Defendants are resident in jurisdictions in which lawful service must be effected in accordance with the Hague Service Convention. Such service, even if successful, generally takes many months. Particularly where there are multiple Defendants, waiting for service to be effected (or not, as is unfortunately often the case) can hold up the timeous pursuit of viable claims. That is, of course, undesirable.
- [4] In the course of effecting service of these proceedings, the Applicant had been advised of the availability of a route under the Hague Service Convention which, in the circumstances, would appear to be somewhat shorter to that currently practiced in the Territory of the Virgin Islands ('BVI'). The present practice entails the transmission of the documents to be served to the Senior Master of the Royal Courts of Justice, London, United Kingdom, addressed for the attention of the Foreign Process Section ('FPS'). The FPS then transmits the documents to be served to the receiving state, through consular/diplomatic channels to the receiving state's Central Authority. The Claimant has been advised by the FPS that, in addition to this usual route, the Registrar in the BVI may forward documents directly to the receiving state's Central Authority, without needing to involve the FPS in London and the said consular/diplomatic channels.
- [5] The Applicant sought an order from the Court providing directions as to the availability of this additional method in these proceedings.

THE RELEVANT PROVISIONS OF THE HAGUE SERVICE CONVENTION

- [6] The Hague Service Convention creates a method of service through the Central Authority in the receiving state under Article 5. Article 2 requires each Contracting State to designate a Central

Authority which will undertake to receive requests for service from other Contracting States and to perform the relevant functions required by the Convention. Although the Convention preserves alternative methods of service such as through consular channels and postal channels, such methods may be subject to the express objections of receiving states. The application presently before the Court concerns service through the Central Authority in the receiving state under Article 5.

- [7] Documents to be served under the Hague Service Convention are sent by the 'competent' 'authority' or 'judicial officer' in the requesting state to the Central Authority in the receiving state. Article 3 of the Convention provides:

"The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality. The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate."

- [8] Upon receipt of the documents, the Central Authority in the receiving state will then serve the documents on the party to be served pursuant to Article 5 of the Convention. Each Contracting State under the Hague Service Convention is empowered to designate authorities other than the Central Authority which are capable of receiving and transmitting documents under Article 3 and 5 of the Convention. Article 18 provides:

"Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority."

- [9] The United Kingdom as the Contracting State has extended the Hague Service Convention to a number of British Overseas Territories and Crown Dependencies, including the BVI. The Registrar of the Supreme Court of the Virgin Islands has been designated as the authority competent to **receive** documents pursuant to Article 18 of the Convention.

THE CURRENT PRACTICE IN THE BVI

[10] Counsel for the Applicant contended that the current practice adopted in the BVI (the 'Current Route') to service outside the jurisdiction pursuant to the Hague Service Convention is as follows. Counsel for the Applicant credits the Honourable Mr Justice Jack (Ag) for this summary.¹ The process is summarised as followed:

- "The Authority of the [British Overseas Territory/ Crown Dependence] BOT/CD will transmit the documents to be served the Foreign Process Section in London.
- On receipt in London, the documents will be processed and sent to the British Embassy in the country where the documents are to be served.
- When the British Embassy receives the documents, they will be passed to the receiving country's Ministry of Foreign Affairs (MFA) or other competent authority (CA) who will arrange for service locally.
- Once the MFA/CA return the documents and certificate of service/non-service, they will be returned to the FPS via the overseas post or to FCDO in London and the Authority of the requesting BOT/CD."

[11] The Applicant informed the Court that the Registrar has confirmed that the Current Route, as summarised thus, is followed in practice in the BVI. The application presently before the Court does not challenge the legality or availability of the Current Route. Rather, the Applicant seeks clarification from this Court as to the availability of an alternative, more direct, route (the 'Direct Route') that the Applicant considers to be more expedient in proceedings such as the present.

THE AVAILABILITY OF THE DIRECT ROUTE

[12] The Applicant contends that an alternative route to effective service pursuant to the Hague Service Convention is available to the Registrar. The Applicant contends that the Registrar is entitled to send documents directly to the Central/other designated Authority in the receiving state under Article 3, without needing to transmit the documents through the FPS. The advantages to the Applicant and claimants generally of the Direct Route are plain. In removing the need to transmit

¹ In an informal information note produced by Jack J (Ag.) in 2021 entitled 'British Overseas Territories Hague Service Convention'.

documents through the FPS in London and the British Embassy in the receiving state, service is capable of being effected in a more timely fashion and at lower cost. This is particularly the case in circumstances where there are administrative burdens on the various institutions involved in the Current Route, which can create additional significant delays.

[13] The Applicant has made inquiries into whether the Direct Route is permissible under the Hague Convention, evidence of which has been adduced before the Court. The result of these inquiries is as follows:

- (1) The FPS has confirmed that the Direct Route is available.
- (2) The Direct Route is the current practice in a number of other Territories to which the United Kingdom has extended the Hague Service Convention, including the Grand Court of Cayman Islands, the Royal Court in Guernsey and the Registrar of the Supreme Court of Gibraltar. Notably, this Court is informed by the Applicant that the Registrar in Gibraltar also sends documents *via* London in respect of service in Spain, due to a political sensitivity, demonstrating the concurrent nature of the availability of both the Current Route and the Direct Route. Additionally, contends the Applicant, the Registrar of the Supreme Court in Montserrat has confirmed that the Direct Route is considered appropriate in that jurisdiction.
- (3) The route to be adopted is not a question for the receiving state but rather the requesting state. The Court has been referred to an extract from the Practical Handbook on the Operation of the Service Convention (4th edn., HCCH 2016) which is officially produced by the Hague Conference on Private International Law. Paragraph 121 of the Practical Handbook says:

"Under Article 3, a request for service may only be forwarded to the Central Authority of the requested State by an "authority or judicial officer competent under the law of the State in which the documents originate" [Emphasis added].

In other words, the Convention sets the minimal requirement that the request be forwarded by an 'authority' or a 'judicial officer' but leaves it to the requesting State to determine who qualifies as competent authority or judicial officer in the sense of Article 3.

- (4) The Applicant added that as such, it is discouraged that a receiving state applies any processes to determine whether it considers the forwarding authority to be competent or not. Indeed, the extract from the Practical Handbook adds:

"Also, the requested State cannot apply its own domestic rules to verify the competence of the forwarding authority. Similarly, a State Party to the Service Convention cannot impose requirements on Hague requests that it sets outside the conventional framework (e.g., on Letters Rogatory received from States which are not Parties to the Service Convention)."

- [14] The Applicant's legal representatives have exhibited correspondence between them and the FPS (represented by one Mr. Steven Oates), in which the following position was stated, to which the FPS representative appears at least to have concurred:

"...the Registrar has two options for forwarding the documents under the Convention:

a. The first option relies on the Crown Dependency relationship between the BVI and the UK. In this procedure, the documents may be sent from the BVI Supreme Court Registry to the Foreign Process Section in London. Following the processing of the request for service, the Foreign Process Section will forward the documents to the Foreign Commonwealth Development Office in London to deliver the documents to the Central Authority in the receiving foreign country through the consular/diplomatic channels.

b. The second option involves the BVI Supreme Court Registry forwarding the documents to be served directly to the Central Authority in the receiving foreign country without the need to first send it to the Foreign Process Section in London. This is because, as listed on the official Hague Convention website at HCCH | Authority, the Registrar of the Supreme Court of the Virgin Islands is a designated and competent authority (under Article 18 of the Hague Convention) to effect service in this manner under Article 5 of the Hague Convention."

- [15] Article 5 materially provides:

"The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either – a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed."

- [16] At first sight, an apparent difficulty with the FPS's explanation in (b) is that the designation of the BVI Registrar as an 'other Authority' pursuant to Article 18 designates the Registrar as the territorial competent authority to receive requests for service under the Hague Convention, and not, by virtue

of this designation, to **send** requests for service. The Applicant's learned Counsel fairly disclosed this as part of their duty of full and frank disclosure and fair presentation at this *ex parte* hearing.

[17] That said, and as the Applicant's Counsel submitted, the Practical Handbook notes that the power in a **judicial officer** to send documents under Article 3 is intended to be broadly construed.

[18] This is apparent first from paragraph 121 of the Practical Handbook, which explains that 'the Convention lays down a minimum requirement that the request be forwarded by an 'authority' or a 'judicial officer'. At paragraph 122, it is observed that there is an important limitation to this power, in terms that 'it is important to note that private persons are not entitled to send directly a request for service to the Central Authority'. Then, at paragraph 124, the Practical Handbook points out that '[t]he diversity of authorities or judicial officers competent to issue requests for service to a Central Authority is very great'. At paragraph 126, it is stated that '[i]n practice, Contracting States have not experienced any difficulties in determining whether a forwarding authority has competence to forward a request for service.' At paragraph 129, it was reiterated that '[a]s indicated above (see para. 121), the Convention imposes the basic requirement that the request is forwarded by an 'authority' or a 'judicial officer'. At paragraph 130, it was noted that '[a]s to English solicitors, the authors of the Convention had accepted that they should indeed be regarded as a competent authority or judicial officer'.

[19] As a matter of BVI law, the Registrar of the Supreme Court is an officer of the Court, pursuant to sections 59 and 60 (in particular) of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance.² Moreover, by section 19(1)(a) of the Legal Profession Act,³ read together with section 95(4)(d) of the Virgin Islands Constitution Order 2007⁴, a Registrar of the Supreme Court is a 'law officer'. There is no discernible difference, other than as a matter of semantics, between such a 'law officer' and an 'officer of the Supreme Court', which section 13(1)(c) of the Legal Profession Act stipulates a legal practitioner to be. A legal practitioner, within the meaning used by the Legal Profession Act, includes persons who had previously been enrolled as solicitors, Barristers and attorneys-at-law.⁵ It would be startling indeed if legal practitioners (including those

² Cap 80.

³ No. 13 of 2015 as amended.

⁴ No. 1678 of 2007.

⁵ See section 9 of the Legal Profession Act.

persons formerly known in this jurisdiction as a solicitors, being the equivalent of English solicitors) should be treated as being competent 'judicial officers' for the purposes of sending out service requests, but not that category of 'law officer' public servants which include the Registrar of the Supreme Court. This is all the more so, because, unlike legal practitioners in private practice, by section 60(7) the Registrar of the Supreme Court has custody of all records, documents and papers of the High Court and Court of Appeal, as well as custody of their seals. Custody of Court papers must entail the authority to release them, or send them out, as may be appropriate. Custody of the High Court and Court of Appeal seals also entails the ability appropriately to use them. If Article 3 is broad enough to include a solicitor, who is not a public servant, but is an officer of the Court in an attenuated (although real and important) sense, it would be startling indeed if a statutorily defined, officer of the Court, charged with the full-time performance of the due conduct and discharge of the business of the High Court and Court of Appeal,⁶ namely the Registrar, should lack the inherent authority to send out requests for service. This is so, particularly where it is the Registrar who, under the Current Route, as part of conduct of the business of the Court, sends out papers on the first step of their journey for service overseas. It is difficult to avoid the conclusion that the office of Registrar of the Supreme Court falls within the 'very great' range of meaning to be ascribed to the term 'judicial officer' mentioned in Article 3.

[20] The Applicant observed that this breadth of interpretation has also been applied in the USA, where the power to send documents has been extended to any non-private person entitled to serve documents under US law.

[21] In this Court's judgment, the need for a service request to be sent by an 'authority or judicial officer' pursuant to Article 3 must be read together with the designation of an authority, apart from the United Kingdom's Competent Authority, to receive incoming requests pursuant to Article 18, for two reasons:

(1) The first is that Article 18 itself expressly maintains in its second paragraph that:

"The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority."

The 'however' refers to the first paragraph, which provides:

⁶ Cf. section 60(3).

“Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.”

In other words, the meaning of these two paragraphs is that notwithstanding the designation under Article 18 of another authority, and notwithstanding limitations expressed upon the extent of such other authority’s competence (e.g. only to receive service requests), Article 18 preserves the right of an applicant to have a judicial officer send out a service request directly to the Central Authority of a receiving state pursuant to Article 3.

- (2) The second is that both sending and receiving service requests come down to dealing with service requests. Read together, and I apprehend that this is also the FPS’s interpretation, the Registrar of the Supreme Court is simply the office holder who is competent to deal with both outgoing as well as incoming requests for service. In practice this also reflects the practical mechanics of the current practice. It need not be so of course – sending and receiving authorities could be different - but in a relatively small jurisdiction where both receiving and sending service requests is business ancillary to the work of the High Court, it makes sense that the same officer holder – the Registrar – should be treated as the competent authority for both aspects. The Court thus finds that the Registrar of the Supreme Court is a ‘judicial officer’ competent to send requests for service pursuant to Article 3 of the Hague Service Convention.

[22] I am grateful for the Applicant’s submissions as to the interpretation of the provisions of the Hague Service Convention, the practice adopted in other British Overseas Territories, and the indication provided by the FPS in London. On the basis of these submissions and the evidence before the Court, this Court recognises the lawfulness and availability of applying the Direct Route in the BVI.

[23] Delay in effecting service is one of the major difficulties faced by litigants. This Court is frequently confronted with this problem, given that one of the objectives of service is to allow the Court to take jurisdiction over a defendant who resides abroad. It is an oft repeated truism that justice delayed is justice denied. It is regrettably a fact that service under the Convention can take what appears an inordinate length of time, in the context of often grave injustice which reasonably requires vindicating rapidly, and in this current age of instant communication. Any shortening of the process, by obviating unnecessary steps, is in principle to be welcomed.

- [24] The effect of this decision is to outline that the Direct Route is lawfully available. As above, it does not supersede the availability of the Current Route. Further, it does not in any way interfere with or override the discretion of the Registrar as to the method the Registrar adopts in carrying out the Registrar's duties. It is possible that the Registrar may have reasons to be reluctant to adopt the Direct Route, both generally or in any particular instance. The Registrar may well prefer to involve the institutions in London. That said, it is apparent that the Direct Route is both available and may well offer greater expediency in procedurally complex proceedings.

CONCLUSION

- [25] For these reasons, this Court concluded that the Direct Route is available and considered it was appropriate to grant the Applicant the relief that was sought.
- [26] The Court takes this opportunity to thank learned Counsel for the Applicant for their assistance during this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar