Neutral Citation Number: [2021] EWHC 3482 (Comm)

Case No: CL-2021-000207

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21/12/2021

Before :

Peter MacDonald Eggers QC

(sitting as a Deputy Judge of the High Court)

- -

Between :

AELF MSN 242, LLC

(a Puerto Rico limited liability company)

- and -

DE SURINAAMSE LUCHTVAART MAATSCHAPPIJ N.V. D.B.A. SURINAM AIRWAYS

- -

- -

Hannah Brown QC (instructed by **W Legal Limited**) for the **Claimant**

Tom Stewart Coats (instructed by **Bird & Bird LLP**) for the **Defendant**

Hearing dates: 26th November 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

PETER MACDONALD EGGERS QC

SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 December 2021 at 14:00"

Peter MacDonald Eggers QC :

Introduction

1.
The Claimant ("AELF") is an aircraft leasing company and the Defendant ("SLM") is the national flag carrier of Surinam.

2.
In this action, AELF claims sums by reason of SLM's alleged breach of a Settlement Agreement and Termination Deed ("the Settlement Agreement") concluded between them on 26th June 2020, by which the parties agreed to settle AELF's claim for more than US$23 million against SLM arising under the terms of an aircraft lease agreement. By clause 3.1 of the Settlement Agreement, SLM agreed to pay the total sum of US$4,150,000 by way of monthly instalments of US$100,000 commencing on 1st December 2020. AELF asserts that SLM has failed to pay the sums when due and consequently AELF served a notice of acceleration dated 2nd April 2021 pursuant to clause 3.4 of the Settlement Agreement. The Settlement Agreement contains an exclusive English jurisdiction clause (clause 10.2).

3.
SLM has not yet served a Defence and instead has issued an application notice challenging the Court's jurisdiction pursuant to CPR Part 11. However, as is common ground, SLM did not file an acknowledgment of service by 25th June 2021, being the last day of the period allowed for the filing of the acknowledgment.

4.
The applications before the Court are SLM's application for an order for the extension of time in which to file an acknowledgment of service and an application challenging the Court's jurisdiction by reason of the alleged defective service of the Claim Form on SLM. However, only one aspect of the application challenging the Court's jurisdiction is to be determined, namely whether SLM has submitted to the jurisdiction.

Procedural background

5.
On 5th April 2021, AELF issued a Claim Form and Particulars of Claim.

6.
On 14th April 2021, Bryan, J made an order permitting the service of the Claim Form, the Particulars of Claim "and any other document in these proceedings" on SLM in Surinam and requiring the acknowledgment of service to be filed within 22 days after service.

7.
On 3rd June 2021, the Claim Form was said by AELF to have been served on SLM in Surinam by a bailiff leaving a copy with Mr John Vrede, SLM's Manager of Legal Affairs, pursuant to an appointment made with Mr Vrede.

8.
On Friday 25th June 2021, SLM attempted to file with the Court (in particular, the Commercial Court Listing Office) an acknowledgment of service by email.

9.

Later, on 25th June 2021, the Court informed SLM by email that “Pursuant to Practice Direction 51O, it is no longer acceptable to file documents via email. Documents should be filed through Ce-File …”.

10.
On Monday 28th June 2021, SLM e-filed its first acknowledgment of service (“the First Acknowledgment”). The First Acknowledgment was signed by SLM’s Chief Executive Officer and included a physical address and an email address for service on SLM in Surinam. However, it did not include a physical address for service within the United Kingdom. In addition, this acknowledgment of service stated that “The Defendant intends to defend all of this claim”. The box indicating the Defendant’s intention to contest jurisdiction was not ticked or checked.

11.
On the same day, 28th June 2021, AELF wrote to the Court (without a copy to SLM) requesting it to enter a default judgment against SLM stating that:

“We also attach an exchange of emails between the Defendant and the Court. It appears that no Acknowledgment of Service has been accepted by the Court.

In any event, the form of Acknowledgment of Service we have seen is defective in that it does not include a proper address for service in the jurisdiction.

Accordingly, please enter a default judgment.

If there is any doubt about whether a default judgment should be entered, we should be grateful if you could place this letter and attachments before a judge, with a request that the judge direct whether or not a default judgment should be granted.”

12.
AELF’s request for default judgment was initially rejected by the Court because the request used a form which asked for costs to be assessed.

13.
On 30th June 2021, AELF filed a revised request for default judgment.

14.
SLM then instructed English solicitors, Bird & Bird LLP (“Bird & Bird”). On 8th July 2021, Bird & Bird filed a notice of change of legal representative for AELF which provided Bird & Bird’s London address as an address for service within the jurisdiction.

15.
On 9th July 2021, SLM issued an application notice for an extension of time in which to file its Defence until 30th July 2021.

16.
On 21st July 2021, AELF’s solicitors, W Legal Ltd (“W Legal”), wrote to the Court stating that “It is now over 3 weeks since the request for judgment in default of Acknowledgment of Service was lodged. I should be grateful to hear whether judgment is being granted”. This was not copied to SLM or Bird & Bird.

17.

On 22nd July 2021, without the benefit of any submissions on behalf of SLM, Henshaw, J directed that no default judgment should be entered without giving the parties an opportunity to address the Court, stating that:

“Following Bryan J’s order of 14.4.21, the AoS was due within 22 days after service on 3.6.21, hence by 25.6.21. The file indicates that the AoS was emailed to court on 25.6.21 but CE filed only at 14:51 on 28.6.21. A Request for default judgment was purportedly filed at 09:33 on 28.6.21 but rejected and refiled on 30.6.21. It therefore appears that the AoS, if valid, would have been filed before the Request for CPR 12.3(1) purposes.

The AoS was defective as it did not contain, as an address for service, a business address for a solicitor (or other residential or business address) in the UK or other EEA state. It therefore did not comply with CPR 10.5(b), read with CPR 6.23(2), and as per note 10.5.5 should have been rejected as irregular. Other things being equal, the Claimant would be entitled to enter a default judgment on expiry of the deadline for filing of the AoS (25.6.21).

However, on 8.7.21 English solicitors, Bird & Bird, filed a notice of change indicating that they had been instructed to act on behalf of D, stating an address for service within the jurisdiction. Bird & Bird the following day filed an application for an extension of time for D to serve its Defence. In these circumstances it might be argued that the defect in the AoS, namely the [specification of] an address for service in the jurisdiction, has been superseded by the provision of such an address in the notice of change. Although I have some doubt about the strength of any such argument, in the circumstances which have arisen it appears to me that it would not be appropriate to enter judgment in default without first giving the parties an opportunity to address this matter. I therefore invite both parties to file and serve any submissions by 4pm on Monday 26.7.21, indicating also whether either of them seeks an oral hearing. Pending resolution of this issue, the application for an extension of time to serve a Defence should be adjourned and the court should not enter judgment in default of Defence.”

18.
On 23rd July 2021, SLM issued an application notice challenging the Court’s jurisdiction pursuant to CPR rule 11(1) and seeking an order that Bryan, J’s order dated 14th April 2021 be set aside to the extent that it permitted service on SLM otherwise than in accordance with section 12(1) of the State Immunity Act 1978 and a declaration that SLM had not been validly served with the Claim Form, Particulars of Claim or any other document purportedly served by AELF in accordance with the Court’s order dated 14th April 2021. In support of that application, SLM served a witness statement dated 23rd July 2021 by Mr John Vrede (SLM’s Manager of Legal Affairs). At paragraphs 7-8 of that statement, Mr Vrede said that:

“7. It is the Defendant’s position that these proceedings were required to be served on the Defendant in accordance with section 12(1) of the State Immunity Act 1978 which provides that “any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document in received at the Ministry”.

8. It is the Defendant’s position that, although it is a “separate entity” for the purposes of section 14 of the State Immunity Act, these proceedings relate to an act done by the Defendant in the exercise of the Republic of Suriname’s sovereign authority. As a result, these proceedings were required to be served under the procedure set out in section 12(1) of State Immunity Act. Since they were not, there has been no valid service on the Defendant.”

19.
On 26th July 2021, the parties filed written submissions in accordance with Henshaw, J's directions. In its submissions, AELF contended that SLM had submitted to the jurisdiction of the English Courts.

20.
On 26th July 2021, Bird & Bird on behalf of SLM filed a further acknowledgment of service ("the Second Acknowledgment"), in which Bird & Bird provided both a physical address and an email address for service within the United Kingdom. In addition, the Second Acknowledgment stated that SLM "intends to contest jurisdiction".

21.
After consideration of the parties' written submissions, on 27th July 2021, Henshaw, J directed as follows: "In all the circumstances I do not consider it appropriate for this matter to be dealt with on the papers. The default judgment issue and the jurisdiction challenge should be listed for hearing together, based on a time estimate to be provided by the parties. The parties should liaise with Commercial Court listing in order to fix the hearing".

22.
On 27th July 2021, SLM issued an application for relief from sanctions pursuant to CPR rule 3.9 and for an extension of time for filing of an acknowledgment of service to 26th July 2021.

23.
On 29th July 2021, AELF issued an application for summary judgment under CPR Part 24 against SLM on the grounds that SLM has no real prospect of defending the claim. This application was made without prejudice to AELF's contention that judgment in default of acknowledgment of service should be granted. However, under CPR rule 24.4(1), an application for summary judgment cannot be made against a defendant until an acknowledgment of service has been filed. In support of this application, and in response to SLM's application under CPR rule 11, AELF relied on the first witness statement of Ms Mónica Millán dated 29th July 2021, at paragraph 18 of which she said that "The Defendant issued an application for an extension of time on 9 July 2021 … This was not without prejudice to the jurisdiction of the Court and constituted an express submission to the jurisdiction of the Court in this matter". AELF also relied on the second witness statement of Mr Steven Loble dated 3rd August 2021, paragraphs 13 and 16 of which stated that there had been a submission to the jurisdiction by SLM by reason of the First Acknowledgment.

24.
On 15th October 2021, W Legal on behalf of AELF wrote to Henshaw, J stating that SLM had made a series of applications which "are doomed to fail" and that SLM "has not indicated that it has any defence on the merits and it is clearly seeking to capitalise on the fact that a default judgment, which should have been entered, was not. The Defendant's applications have been listed for hearing on 22 June 2022. The Claimant's application for summary judgment issued on 29 July 2021 has not been listed. The applications should not be allowed to delay a default judgment or an application for summary judgment by a year".

25.
On 3rd November 2021, Henshaw, J made the following direction:

"I agree that it would be unfortunate if these issues, including the claimed entitlement to judgment in default, were all to have to wait a year to be determined. My provisional view is that the following course of action should be taken.

The Claimant's application for judgment, the Defendant's application for an extension of time for its Defence, the Defendant's application for relief from sanctions, and the Defendant's application disputing jurisdiction/service, should be listed for hearing on a date later on this term with a time estimate of half a day.

However, so far as concerns the jurisdiction/service application, the hearing this term will address only the question of whether the Defendant is precluded from disput[ing] jurisdiction or challenging service by reason of having submitted to the jurisdiction as alleged by the Claimant.

The balance of Defendant's jurisdiction application, in the event that it remains extant, will have to be addressed at a later date (formally by way of adjournment of the hearing this term), bearing in mind that (a) that application may require service of substantive evidence and (b) in any event, it seems unlikely that it could be dealt with (along with the other applications mentioned above) at a half day hearing, that being the longest fixture the court could accommodate this term. The parties may retain the current listing for 22 June 2022 to cater for that eventuality, subject to any further direction made by the judge hearing the applications this term.

The hearing this term will, if necessary, be listed regardless of the availability of particular counsel …"

26.
The following applications were heard by me on 26th November 2021:

(1)
AELF's request for entry of judgment in default.

(2)
SLM's application to challenge jurisdiction based on invalidity of service but limited to the issue whether SLM has submitted to the jurisdiction.

(3)
SLM's application for an extension of time for filing its acknowledgment of service and for relief from sanctions.

(4)
SLM's application for an extension of time for its Defence.

27.
At the hearing, AELF accepted that it could not request that judgment be entered in default because at the time when judgment would have been entered, an acknowledgment of service had been filed (CPR rule 12.3(1)).

28.
Depending on the outcome of SLM's application for an extension of time for filing its acknowledgment of service and relief from sanctions and AELF's contention that SLM has submitted to the Court's jurisdiction, the parties have agreed that SLM be permitted either 14 or 21 days within which to serve its Defence.

29.
Therefore, there are only two issues which currently require determination by the Court, namely:

(1)

SLM’s application for an extension of time for filing its acknowledgment of service and relief from sanctions.

(2)
AELF’s contention that SLM is precluded from disputing the Court’s jurisdiction or challenging service by reason of its submission to the Court’s jurisdiction.

The relevant provisions of the Civil Procedure Rules

30.
The starting point for the consideration of SLM’s application is that no acknowledgment of service was filed within the time period specified in Bryan, J’s order dated 14th April 2021 (which accords with the period of time specified by CPR rule 6.35(5) and CPR Practice Direction 6B).

31.
CPR rule 10.3(2)(a) specifies the period within which an acknowledgment of service must be filed where the claim form has been served out of the jurisdiction.

32.
CPR rule 10.5(b) provides that an acknowledgment of service must include the defendant’s address for service and then refers in parentheses to CPR rule 6.23, which makes provision for the defendant’s address for service.

33.
CPR rule 6.23 provides that:

“(1) A party to proceedings must give an address at which that party may be served with documents relating to those proceedings. The address must include a full postcode unless the court orders otherwise …

(2) Except where any other rule or practice direction makes different provision, a party’s address for service must be –

(a) the business address within the United Kingdom of a solicitor acting for the party to be served; or

…

(c) where there is no solicitor acting for the party –

(i) an address within the United Kingdom at which the party resides or carries on business …

(3) Where none of sub-paragraphs (2)(a) or (c) applies, the party must give an address for service within the United Kingdom

…

(5) Where, in accordance with Practice Direction 6A, a party indicates or is deemed to have indicated that they will accept service by fax, the fax number given by that party must be at the address for service.

(6) Where a party indicates in accordance with Practice Direction 6A that they will accept service by electronic means other than fax, the e-mail address or electronic identification given by that party will be deemed to be at the address for service

…

(8) This rule does not apply where an order made by the court under rule 6.27 (service by an alternative method or at an alternative place) specifies where a document may be served

(For service out of the jurisdiction see rules 6.40 to 6.47.) …”

34.
The editors of the White Book state, after referring to CPR rule 6.23(5)-(6), at para. 6.23.3, that:

“Neither of these provisions alters the requirement that the party, where a solicitor’s address is not given, must if he has one, give an address within the United Kingdom at which the party resides or carries on business, that is, a physical address. To comply with the rule a party may not give just a fax number or email address for example as the actual address for service although the party may be willing to be served by those means. Where the party has indicated that it will accept service by transmission of a fax, the rule requires that the fax number given must be at the address for service. In a case in which the party has indicated a willingness to be served by electronic means other than fax, the email address or electronic identification given by that party will be deemed to be at the address for service.”

35.
CPR Practice Direction 6A, paragraph 4.1 provides that:

“Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –

(1) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –

(a) that the party to be served or the solicitor is willing to accept service by fax or other electronic means; and

(b) the fax number, e-mail address or other electronic identification to which it must be sent; and

(2) the following are to be taken as sufficient written indications for the purposes of paragraph 4.1(1) –

(a) a fax number set out on the writing paper of the solicitor acting for the party to be served;

(b) an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service; or

(c) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court.”

36.
The requirement that an acknowledgment of service be filed in accordance with the requirements set out in CPR Part 10 is not one non-compliance with which ordinarily results in the imposition of a sanction under the Civil Procedure Rules, save that a claimant may request the entry of a default judgment where no acknowledgment of service has been filed at the date of judgment (CPR rule 12.3(1)). No such default judgment can be entered unless no acknowledgment of service has been filed and the time for doing so has expired. However, if an acknowledgment of service is filed before

the entry of default judgment, even if it is filed late, no default judgment can then be entered pursuant to CPR rule 12.3(1).

37.
Before default judgment is entered therefore an application for an extension of time for the filing of the acknowledgment of service does not require an order for relief from sanctions pursuant to CPR rule 3.9. If of course default judgment is entered before the acknowledgment of service is filed, the defendant will then have to apply to set aside the default judgment pursuant to CPR Part 13.

38.
When the defendant wishes to dispute the Court's jurisdiction, the application is to be made in accordance with CPR rule 11.

39.
CPR rule 11 provides that:

"(1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction …"

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim …"

40.
Accordingly, CPR rule 11(2) provides that a defendant cannot apply to dispute the Court's jurisdiction unless the defendant has first filed an acknowledgment of service in accordance with CPR Part 10.

41.
One question which is considered below is whether an application for an extension of time for the filing of the acknowledgment of service in order to permit the defendant to apply to dispute the Court's jurisdiction requires the Court's order relieving the defendant from sanctions in accordance with CPR rule 3.9.

42.
CPR rule 3.9(1) provides that:

“On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders …”

Application for extension of time and relief from sanctions

The parties’ submissions

43.
Mr Tom Stewart Coats on behalf of SLM submitted that:

(1)
SLM’s First Acknowledgment was filed, or at least attempted to be filed, within time and in conformity with CPR Part 10.

(2)
CPR rule 10.5(b) provides that an acknowledgment of service must include the defendant’s address for service. A note to that rule refers to CPR rule 6.23 which makes provision for addresses for service after proceedings have been started.

(3)
The First Acknowledgment did not include a physical address for service within the United Kingdom, but where the defendant provides an email address for service, in accordance with CPR rule 6.23(6) and CPR Practice Direction 6A, paragraph 4.1, that email address constitutes a sufficient address for service for the purposes of CPR rule 10.5(b). Although this argument was presented in writing, it was not repeated during oral argument, at least not with emphasis.

(4)
On 14th April 2021, Bryan, J had ordered that the Claim Form, the Particulars of Claim “and any other document in these proceedings” could be served on SLM in Surinam. Accordingly, any requirement that an address for service in the United Kingdom be stated in the acknowledgement of service form was overridden by this order, having regard to CPR rule 6.23(8). This argument was presented by Mr Stewart Coats orally, but not in writing.

(5)
The case for an extension of time is overwhelming in circumstances where:

(a)
SLM attempted, as an unrepresented litigant, to file its First Acknowledgment in time and was only unable to do so because it emailed rather than e-filed the acknowledgment of service. Indeed, whilst SLM accepts that CPR PD 51O required the acknowledgment of service to be e-filed, the notes for a defendant in the response pack provided to SLM stated that the acknowledgment of service must be completed and sent to “Admiralty and Commercial Registry, The Rolls Building, 7 Rolls Building, Fetter Lane, London, EC2A 1NL”.

(b)

If there was a defect in the First Acknowledgment, it was a technical and unintentional defect and SLM clearly intended to provide physical and electronic addresses for service.

(c)
SLM and its solicitors only became aware that the First Acknowledgment was potentially defective as a result of an email from the Court dated 22nd July 2021.

(6)
To the extent SLM requires relief from sanctions, or the principles relevant to relief from sanctions apply by analogy, SLM's application should succeed by reference to the three-stage test in Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 WLR 3296.

(a)
Whether the non-compliance was serious or significant: in this case, the non-compliance was not significant since SLM successfully filed its First Acknowledgment the next working day after the deadline for filing and it filed its Second Acknowledgment promptly after notification by the Court that there was doubt as to the validity of the First Acknowledgment.

(b)
Reasons for non-compliance: SLM's non-compliance was innocent, understandable, and promptly remedied. As to the First Acknowledgment, SLM attempted to file a valid acknowledgment of service in time and was only prevented from doing so by a misunderstanding of how the document was to be filed and (if it is correct that the First Acknowledgment was defective) an innocent failure to provide a physical address for service within the United Kingdom. As to the Second Acknowledgment, SLM filed this shortly after it was notified by the Court (and not by AELF) that the First Acknowledgment might not be valid.

(c)
All the circumstances of the case: SLM should not be precluded from running a jurisdictional objection which has important consequences not just in this case but also more generally merely because it was slightly delayed in filing an acknowledgment of service despite its efforts to do so.

44.
Ms Hannah Brown QC submitted on behalf of AELF that:

(1)
SLM has not satisfied the conditions precedent under CPR Part 11 for challenging service. SLM has not satisfied the requirement in CPR rule 11.2 to "first file an acknowledgment of service in accordance with Part 10". As at the date it issued the application notice, SLM had not filed a regular acknowledgment of service. Further, the acknowledgment of service which it did eventually file was not filed within the relevant time fixed by CPR rule 10.3 (Taylor v Giovani Developers Ltd[2015] EWHC 328 (Comm), para. 14-16; Cunico Resources FZE v Daskalakis[2018] EWHC 3382 (Comm) paragraph 34, 94; White Book, para. 11.1.5).

(2)
SLM can, therefore, only pursue its application to challenge the Court's jurisdiction if it is able to persuade the Court to extend time for filing its acknowledgment of service and for relief from sanctions, both in relation to the fact that it did not first file an acknowledgment of service before issuing its application and in relation to the late filing of the acknowledgment of service. Any such relief should be refused.

(3)
The Court must exercise its discretion in accordance with the overriding objective, taking into account all the circumstances of the case, so as to deal justly with the application and including the specific matters identified in CPR rule 3.9(1), namely the need (a) for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules. It is established that the Court will apply the principles in Denton v TH White Ltd[2014] EWCA Civ 906; [2014] 1 WLR 3296.

(4)
The acknowledgment of service (the Second Acknowledgment) was filed 32 days late against the permitted time of 22 days - more than double the time permitted - and it was filed after the issue of the application to challenge the Court's jurisdiction. This is a serious and significant default. See Taylor v Giovani Developers Ltd[2015] EWHC 328 (Comm), where a delay of 64 days compared to 21 days was serious and significant (para. 20); and Cunico Resources FZE v Daskalakis [2018] EWHC 3382 (Comm) where a delay of 28 days compared to 21 days was held to be substantial (para. 116(i)). The significance of the delay is the greater given that AELF had, prior to service of the acknowledgment of service, applied for and should have been granted judgment in default.

(5)
Moreover, both breaches are unexplained. Ms Simona Peter of Bird & Bird gives no proper explanation for the lengthy delay in filing a regular acknowledgment of service. In particular, she gives no explanation as to (i) why SLM failed to file a regular acknowledgment of service within time; and (ii) why it took from 8th July until 27th July 2021 for Bird & Bird, having come on the record, to file a regular acknowledgment of service and issue the application for an extension of time and relief from sanctions.

(6)
As to (i), the only explanation given is that SLM did not have an address in England and had not instructed solicitors in England. That is no explanation at all. Ms Peter does not explain why SLM had not instructed solicitors in England sooner, or why it apparently took until 8th July 2021 for them to do so. SLM knew it had been served with proceedings taking place in England as is evident from an email exchange on 2nd June 2021 (the jurisdiction having been chosen by the parties in the Settlement Agreement signed only the previous year) and must have appreciated the need to act expeditiously. Yet there is no explanation as to why SLM apparently did nothing about the proceedings at all until its first failed attempt to file an acknowledgment of service on the last permitted date, 25th June 2021, and why it failed to instruct English solicitors until 8th July 2021.

(7)
As to (ii), the application appears to have been prompted by the Court's email dated 22nd July 2021 and notice of AELF's application for default judgment. There is no explanation why the defect in the acknowledgment of service was not appreciated sooner given that it is plain on the face of the document and it would have been known that SLM had no address in the jurisdiction and had not already instructed solicitors. Further, even having apparently appreciated on 22nd July 2021 that no regular acknowledgment of service had been filed, SLM chose to issue and serve its application challenging jurisdiction before, several days later, filing the Second Acknowledgment. For this, there is no explanation at all.

(8)
There is, therefore, no good explanation for the default.

(9)

There is no explanation for the change from the First Acknowledgment which stated that SLM intended to defend the claim (and did not state that SLM intended to contest jurisdiction) to the Second Acknowledgment which stated that SLM intended to contest jurisdiction (as noted in paragraph 12 of the second witness statement dated 3rd August 2021 of Mr Steven Loble on behalf of AELF).

(10)
Further, the purpose of the application for an extension of time is to enable SLM to challenge the Court's jurisdiction based on an argument that service was not effected in accordance with section 12(1) of the State Immunity Act 1978. That application is, however, bound to fail. Section 12(1) applies only to "States" as defined in section 14 of the 1978 Act. SLM is not a State; it is a separate entity within the meaning of section 14. Indeed, SLM's own evidence expressly states as much (paragraph 8 of the witness statement dated 23rd July 2021 of Mr John Vrede). It is a very short point and SLM's contention is obviously unsustainable. It is permissible for the Court to take into account the merits of the jurisdiction challenge in deciding whether to accede to the application for an extension of time, where the merits or lack of merits are so plain as to warrant summary judgment (HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd[2014] UKSC 64; [2014] 1 WLR 4495, para. 29-31; R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633; [2015] 1 WLR 2472, para. 46-48).

(11)
In addition, SLM agreed that service should be effected upon it by the Bailiff and Mr Vrede (SLM's Manager of Legal Affairs) made the appointment to accept service by email dated 2nd June 2021. Accordingly, even if SLM were a State (which it plainly is not), service would have been effective under section 12(6) of the State Immunity Act 1978.

(12)
It is manifest (not least given the position adopted by SLM in the Surinam Court) that the application disputing jurisdiction is no more than a delaying tactic in the absence of any grounds for a defence.

(13)
It is contrary to the need for litigation to be conducted efficiently and at proportionate cost to extend time and relieve SLM from sanctions in order to enable it to bring an abusive application which is doomed to fail and which, if permitted to proceed, will cause and is intended to cause significant further delay to the proceedings. That is particularly so where, as here, the debt has been publicly acknowledged by SLM, there is no suggestion of any arguable defence and AELF should already have been granted judgment in default.

(14)
The Court should therefore dismiss the application for an extension of time and relief from sanctions.

Discussion

45.
CPR rule 11(2) provides that a defendant who wishes to dispute jurisdiction must have filed an acknowledgment of service in accordance with CPR Part 10; in other words, a defendant cannot apply to dispute the Court's jurisdiction unless the defendant has first filed an acknowledgment of service in accordance with CPR Part 10. An acknowledgment of service which is not served within the time specified in CPR rule 10.3(2)(a) (and CPR rule 6.35) and/or which does not contain an address for

service within the United Kingdom as required by CPR rule 10.5(b) therefore is not one which has been filed in accordance with CPR Part 10 as required by CPR rule 11(2).

46.
In these circumstances, the failure of the defendant to comply with CPR Part 10 has the effect of depriving the defendant of the right to apply to challenge the Court's jurisdiction. Accordingly, in my judgment, an extension of time for the filing of the acknowledgment of service in order to permit the defendant to apply to dispute the Court's jurisdiction requires the Court to make an order relieving the defendant from sanctions in accordance with CPR rule 3.9.

47.
This conclusion is that drawn by Andrew Baker, J in Cunico Resources FZE v Daskalakis [2018] EWHC 3382 (Comm); [2019] 1 WLR 2881, at para. 94-95 and 115:

"94. I have already said I agree with, and so I am happy to follow, Taylor's case in deciding that under CPR r 11(2) it is a procedural requirement of an application under CPR r 11(1) to challenge jurisdiction that the defendant first file a timely acknowledgment of service. That means filing either within the time period set under CPR Pt 10 or within an extended period fixed by the court on a successful application (prospective or retrospective) for an extension.

95. Therefore, Mr Daskalakis is not entitled to challenge jurisdiction in the 2018 claim unless he is granted either a retrospective extension of 28 days for filing acknowledgment of service, to cover his lateness in doing so, or relief from sanctions by a waiver of CPR r 11(2) …

115. Mr Choo-Choy accepted that pursuant to the "implied sanction" doctrine, an out-of-time application for an extension of time for filing acknowledgment of service is to be determined by reference to relief from sanctions principles under CPR r 3.9 and Denton v TH White Ltd [2014] 1 WLR 3926 …"

48.
In considering an application for relief from sanctions, the Court undertakes a three-stage inquiry laid down by the Court of Appeal in Denton v TH White Ltd[2014] EWCA Civ 906; [2014] 1 WLR 3296:

(1)
First, the Court must identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order". If the failure is not serious or significant, the Court should generally grant the relief from sanctions, although it should still consider all of the circumstances of the case in the exercise of its discretion.

(2)
Second, the Court must consider why the default occurred and the explanation for the default provided.

(3)
Third, the Court must evaluate all the circumstances of the case, so as to enable the Court to deal justly with the application including the objectives referred to in CPR rule 3.9(1)(a) and (b).

49.
The first question is whether SLM's failure to comply with CPR Part 10 in filing its First Acknowledgment and/or Second Acknowledgment was serious or significant failure. In my judgment, it was neither a serious nor a significant failure, because:

(1)
SLM sought to file its acknowledgment of service with the Admiralty and Commercial Registry within the time specified by Bryan, J's order, albeit on the final day of this period.

(2)
The acknowledgment of service was rejected by the Court on Friday 25th June 2021 because it was purportedly filed by email and not e-filed. This lapse occurred against a background of SLM not having yet retained English solicitors and the Response Pack required the acknowledgment of service to be returned to the Admiralty and Commercial Registry. The failure to instruct solicitors earlier is a ground of criticism by AELF, but there is no obligation on a defendant to instruct solicitors and in circumstances where it lacks the benefit of legal advice within the forum, it is reasonable - even if possibly misguided - for a defendant to comply with the instructions included in the Response Pack.

(3)
Immediately after receiving notification of the rejection, SLM e-filed the First Acknowledgment on Monday 28th June 2021, the next business day.

(4)
The First Acknowledgment did not include a physical address within the United Kingdom but did include a physical address in Surinam as well as an email address. Contrary to SLM's submissions, I consider that this did not comply with CPR rule 6.23, because rule 6.23(2)-(3) requires an address to be specified which is within the United Kingdom; rule 6.23(5)-(6) do not alter this requirement in that rule 6.23(5) requires the fax number to be located at the physical address within the United Kingdom and rule 6.23(6) deems the email address to be at the physical address for service. Indeed, the acknowledgment of service form states that "the business address of your solicitor … or your own residential or business address within the UK …" should be included (although I note that the form does not allow for the third possibility contemplated by CPR rule 6.23(3)). Further, I do not consider that Bryan, J's order permitting service of the Claim Form, the Particulars of Claim "and any other document in these proceedings" on SLM in Surinam is concerned with the provision of an address for service under CPR rule 6.23, but with the service of originating process (and associated documents), and not with any document in the proceedings, such as all application notices. In addition, this order was not an order for service by an alternative method as contemplated by CPR rule 6.23(8).

(5)
Even though the physical and email addresses included in the First Acknowledgment did not comply with CPR rule 6.23, they still provided an effective means by which documents and applications could be served on and communicated to SLM. Indeed, CPR rule 6.23(6) and CPR Practice Direction 6A, paragraph 4.1 contemplate that service at an email address is a permitted method of service on a party to the proceedings.

(6)
SLM was not aware of the defect in the First Acknowledgment in not including a physical address within the United Kingdom until 22nd July 2021 (see Part C of SLM's application for an extension of time to file an acknowledgment of service and relief from sanctions). SLM then issued its Second Acknowledgment, curing this defect, on 26th July 2021.

(7)
There is no delay comparable to the delays of 64 days and 28 days, which were regarded as serious or significant, respectively in Taylor v Giovani Developers Ltd [2015] EWHC 328 (Comm), para. 20 and Cunico Resources FZE v Daskalakis[2018] EWHC 3382 (Comm); [2019] 1 WLR 2881, para. 116(i). The

First Acknowledgment was filed on the first business day after the expiry of the 22 day period allowed for filing of the acknowledgment of service and the Second Acknowledgment was filed four days after SLM became aware of the defect in the First Acknowledgment.

50.
I cannot regard the steps taken by SLM as a substantial, serious or significant failure on the part of SLM to comply with the Civil Procedure Rules. At all stages, SLM sought to comply with the requirements of the Civil Procedure Rules, but was defeated either by the lack of advice from English solicitors or forgivable errors which did not have a substantial impact.

51.
Ms Brown QC submitted that I should take into account the fact that the grounds of SLM's jurisdiction challenge (based on section 12 of the State Immunity Act 1978) are without merit in disposing of the application for an extension of time and relief from sanctions. In the circumstances of this case, I do not consider that I should accede to this invitation. This is for two related reasons. First, SLM did not attend the hearing with a view to arguing the application of section 12 of the 1978 Act. Second, Henshaw, J directed that only one aspect of the jurisdiction challenge be determined at this hearing, namely whether SLM has submitted to the jurisdiction. This meant that section 12 would not be the subject of argument at this hearing. In these circumstances, I think it would be unfair to take into account the merits of the argument based on section 12 in connection with the extension and relief from sanctions application. I should add even if AELF is correct that the argument based on section 12 is likely to be or is without merit, I would still have acceded to the application for an extension of time and relief from sanctions, given that SLM's failure to comply with the relevant rule was both insignificant and forgivable.

52.
Having regard to all of the circumstances of the case including the factors referred to in CPR rule 3.9(1), and the circumstances by which SLM found itself in its current predicament, I have no hesitation in granting SLM's application for an extension of time for the filing of its acknowledgment of service to 26th July 2021 and relief from sanctions.

53.
I should comment that one issue which was not addressed by the parties, nor raised by me during oral argument, was the application of section 12(2) of the State Immunity Act 1978 which extends the time for the entry of an appearance (or the filing of an acknowledgment of service) by two months insofar as the defendant is entitled to the privilege set out in section 12(1). Given that SLM contends it is so entitled to the benefit of section 12(1) of the 1978 Act, this is a potentially applicable provision. However, given my conclusion above, this issue does not arise for consideration.

Is SLM precluded from disputing jurisdiction by reason of a submission to jurisdiction?

SLM's application to dispute the Court's jurisdiction

54.
SLM has filed an application pursuant to CPR rule 11 contesting the Court's jurisdiction on the basis that the Court's order dated 14th April 2021 permitting service out of the jurisdiction on SLM in Surinam was otherwise than in accordance with section 12(1) of the State Immunity Act 1978, which requires a claim form to be served on a State by transmitting it through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State in question. As is evident from the witness statement dated 23rd July 2021 of Mr John Vrede served in support of SLM's application,

SLM contends that the Claim Form should have been served in accordance with section 12(1), even though it is a “separate entity” within the meaning of section 14(1) of the 1978 Act.

55.
Where the application contesting jurisdiction is based on arguments concerning the validity of service, it is properly made, as here, under CPR rule 11 (IMS SA v Capital Oil & Gas Industries Ltd[2016] EWHC 1956 (Comm); [2016] 4 WLR 163, para. 26-37).

56.
Although Ms Brown QC addressed the merits of the grounds of SLM’s application disputing jurisdiction, Mr Stewart Coats did not address this issue, relying on Henshaw, J’s direction that the only issue to be determined at this hearing was not the application of section 12(1) of the 1978 Act, but the single question whether SLM has submitted to the jurisdiction.

The parties’ submissions

57.
Ms Hannah Brown QC submitted on behalf of AELF that SLM has submitted to the jurisdiction so that the application contesting jurisdiction should be dismissed:

(1)
The defective First Acknowledgment filed on 28th June 2021 ticked the box indicating an intention to defend the claim (not to challenge the service of the court) and, on 9th July 2021, SLM issued an application for an extension of time to serve its Defence. The evidence in support of the application (Part C of the application notice) acknowledged that the proceedings had been served on SLM on 3rd June 2021 and that SLM had filed an acknowledgment of service noting its intention to defend the claim. The evidence also stated that SLM had instructed Bird & Bird to prepare a Defence but that SLM was not in a position to serve its Defence by the deadline of 9th July 2021 because Bird & Bird had only been instructed on 8th July 2021. Bird & Bird had written to W Legal requesting an extension of time but W Legal had been unable to take instructions in the short time available. Accordingly, SLM applied for an extension of 21 days to file its Defence.

(2)
The Defendant thereby acted, objectively, inconsistently with an intention to challenge service and submitted to the jurisdiction. See White Book, para. 11.1.10 and Global Multimedia International Ltd v ARA Media Services [2006] EWHC 3612 (Ch), para. 27-31.

(3)
Further, in order to obtain a discharge of a freezing injunction obtained by AELF in Surinam, SLM expressly relied upon the fact that the English Court has exclusive jurisdiction to determine the claims and that these proceedings are pending before the English Court by reason of service of the Claim Form on SLM in Surinam (see paragraphs 2-5 of the second witness statement of Mónica Millán dated 18th November 2021 and the exhibited translation of SLM’s submission to the Surinam Court dated 28th September 2021, where it was said on behalf of SLM, in reliance on the exclusive English jurisdiction agreement, that “On 3 June 2021 the SLM was summoned to appear before the English court. As is evident from the documents of the case, in order for its claim to be allowed before the English court, AELF explicitly invoked the aforesaid irrevocable and exclusive choice of forum”).

58.
Mr Tom Stewart Coats on behalf of SLM submitted that:

(1)
In IMS SA v Capital Oil & Gas Industries Ltd[2016] EWHC 1956 (Comm), it was explained that any challenge to jurisdiction (including those based on non-service or defective service) should proceed by way of the CPR Part 11 procedure.

(2)
In Deutsche Bank AG London Branch v Petromena ASA[2015] EWCA Civ 226, the Court of Appeal explained that that there are two different ways in which a defendant might submit to the jurisdiction: (a) the first, categorised as "common law waiver", requires the doing of an act inconsistent with maintaining a challenge to the jurisdiction; such a waiver must clearly convey an unequivocal renunciation by the defendant of its right to challenge the jurisdiction; (b) the second, categorised as a "statutory form of submission", is where the national procedural rules provide that a particular act shall be treated as a submission.

(3)
The present case is concerned only here with "common law waiver" since SLM's challenge to the jurisdiction was made: (i) within 28 days after filing its First Acknowledgment; and (ii) shortly prior to its Second Acknowledgment. It therefore cannot be said that SLM is deemed to have submitted to the jurisdiction pursuant to CPR rule 11(5).

(4)
As to common law waiver, in SMAY Investments Ltd v Sachdev[2003] EWHC 474 (Ch), it was stated that notification of intention to defend in an acknowledgment of service can only become an unequivocal submission to jurisdiction if the defendant fails to issue an application challenging jurisdiction within the time limit prescribed by CPR rule 11(4) or indicates to the Court in clear and express terms that it has abandoned his intention to contest jurisdiction.

(5)
The Court of Appeal also summarised the relevant test in Deutsche Bank AG London Branch v Petromena ASA[2015] EWCA Civ 226, where Floyd LJ said at para. 32 that a common law waiver "must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction, and the application of a bystander test is plainly apt".

(6)
There has been no unequivocal renunciation of SLM's right to challenge the validity of the service on it in this case for the following reasons:

(a)
The mere fact that an unrepresented litigant ticks the box on an acknowledgment of service indicating that it intends to defend the claim should not, at least while the period for a challenge to jurisdiction is extant, amount to an unequivocal renunciation of the litigant's right to challenge jurisdiction.

(b)
If (as AELF maintains), the First Acknowledgment is invalid, it cannot then be used by AELF as a basis for saying that SLM has submitted to the jurisdiction.

(c)
SLM's application for an extension of time for its Defence was made very shortly after its solicitors, Bird & Bird, came on the record and in circumstances where: (i) AELF's solicitors, W Legal, had failed to inform Bird & Bird that a request for default judgment had been made; (ii) W Legal had failed to

inform Bird & Bird that AELF challenged the validity of the First Acknowledgment; and (iii) W Legal had failed to properly engage with Bird & Bird's informal request for an extension. The application for an extension was clearly intended to be a protective measure to avoid a default judgment being entered whilst Bird & Bird were reading into the case and it was not a clear expression of SLM's intention to abandon any challenge to jurisdiction.

(d)
Once SLM's solicitors had had a proper opportunity to consider the position, an application to challenge the validity of service was made promptly.

The authorities

59.
In Global Multimedia International Ltd v ARA Media Services [2006] EWHC 3612 (Ch); [2007] 1 All ER (Comm) 1160, para. 27-31, the Chancellor identified and applied the test for determining whether there has been a submission to the jurisdiction as follows:

"27. The test to be applied in determining whether any particular conduct amounts to a submission to the jurisdiction was considered by Colman J. in Spargos Mining NL v Atlantic Capital Corporation [1995] reported only in "The Times" for 11th December, but quoted in full by Patten J. in SMAY Investments Ltd. v Sachdev [2003] 1WLR 1973 at p.1976. I reproduce the whole of the quote as set out in that paragraph 41 from the Judgment of Patten J:

"In approaching the question of submission, I have in mind the following authorities. In Astro Exito Navagacion S.A. v. W.T. Hsu, otherwise know, more pronounceably, as The 'Messiniaki Tolmi', [1984] 1 Lloyds Reports, 266, Lord Justice Goff (as he then was) at page 270, said this:

'Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend upon the circumstances of the particular case.'

In Sage v. Double A Hydraulics Ltd, [1992] Times Law Reports, 165, Lord Justice Farquharson said (and this is a report of the judgment which is not reported in oratio recta):

'A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the Defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.'

In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.

If the well-informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning."

28. Thus the test to be applied is an objective one and what must be determined is whether the only possible explanation for the conduct relied on is an intention on the part of the defendant to have the case tried in England …

30. I can express my conclusion quite shortly. I will assume for the purposes of the argument that both orders for service had been improperly made so that Mr. Aljadail did have grounds for challenging the jurisdiction of the court. I also recognise that solicitors instructed to advise and represent the client in relation to a claim such as this have little time to determine whether to contest the jurisdiction. Consequently, in cases of doubt the solicitor would be well advised to tick box 3 on the acknowledgement of service and obtain an extension of time under Rule 11(4) without delay. If he genuinely wishes to preserve his client's ability to contest the jurisdiction of the court he will refrain from entering on the merits of the claim or at least only do so on a clear and express without prejudice basis.

31. The solicitor for Mr. Aljadail adopted none of these courses. To any objective outside observer his conduct, and accordingly that of Mr. Aljadail from the giving and receipt of instructions on 3rd April to the letter of 10th May - a period of over five weeks - was only consistent with an acceptance of the jurisdiction of the court to determine the claims of AMS on their merits. A defendant who intends to challenge the jurisdiction of the court does not seek an extension of time for his defence, he does not advance a defence on the merits in the form of the settlement agreements, nor does he threaten to strike-out the claim if the claimant refuses to discontinue it … In my judgment Mr. Aljadail had submitted to the jurisdiction before his solicitor's letter of 10th May was sent, and before his application for an extension of time was issued on 23rd May 2006 …"

60.
In SMAY Investments Ltd v Sachdev[2003] EWHC 474 (Ch); [2003] 1 WLR 1973, which was cited in Global Multimedia International Ltd v ARA Media Services, Patten, J said at para. 40-43:

"40. One would have thought that, with the advent of the CPR, we could finally have adopted an all embracing and exhaustive code for dealing with challenges to jurisdiction and assigned to history arguments about implied waiver and submissions to jurisdiction, which seem to me to be an affront to any mature legal system. As it is, it still appears to be open to argument, and it has been argued in this case, that by placing a tick in the wrong box and by obtaining, necessarily or unnecessarily, an extension of time for a defence, the first defendant has waived his right to apply for a stay.

41. It seems to me that when a defendant has complied with CPR Pt 11 with a view to challenging the jurisdiction of the court, and the time for making his application under CPR r 11(4) has not yet expired, then any conduct on his part said to amount to a submission to jurisdiction, and therefore a waiver of that right of challenge, must be wholly unequivocal …"

61.
Patten, J then quoted the decision of Colman, J in Spargos Mining NL v Atlantic Capital Corporation (also referred to above) and then said:

“42. That was a case in which the defendants applied unsuccessfully to set aside service of the writ outside the jurisdiction. After judgment was handed down the parties asked the court to give directions for the service of pleadings and for discovery. The directions were given. The defendants did not make any application for leave to appeal the refusal to set service aside, nor was there any reservation of their position on jurisdiction. When they subsequently applied for leave to appeal, Colman J held that, by seeking and obtaining directions in the manner I have described, there had been a submission to the jurisdiction. Such conduct was only explicable on the basis that they intended to have the case tried in England. The same conclusion, in similar circumstances, was reached in In re A Company (No 002015 of 1996) [1997] 2 BCLC 1.

43. In the present case, however, the first defendant’s conduct was anything but unequivocal. He indicated in the affidavit sworn on 5 December and served prior to the hearing on 6 December that he intended to contest jurisdiction. Mr Deacon indicated to Peter Smith J that the full inter partes hearing would involve a contest on jurisdiction, and the undertakings offered were only until that effective hearing. Therefore the only order sought and obtained by the first defendant from the judge on 6 December which was in any way inconsistent with the challenge to jurisdiction being maintained was the extension of time for service of the defence. That was strictly unnecessary, see CPR r 11(9), but it can only operate as an unequivocal submission to the jurisdiction if the only possible explanation for it is an intention on the part of the first defendant to have the case tried in England. In making that assessment the court cannot ignore the background circumstances as they were on 6 December. The acknowledgment of service had not yet been filed and the position was therefore as set out in the affidavit of 5 December and in counsel’s skeleton argument. It is true that when the first and third defendants did later file acknowledgments of service on 16 December, these had the “intention to defend” box ticked, but they also indicated that these defendants intended to contest jurisdiction, and the notification of an intention to defend was therefore at best equivocal. Given the assertions by the first defendant in his affidavit about a challenge to the jurisdiction and the subsequent affirmation of that position in the acknowledgment of service, the position, in my judgment, could only have become unequivocal either by his failure to issue an application challenging jurisdiction within the time limit prescribed by CPR r 11(4) or by his indicating to the court in clear and express terms that he had abandoned his intention to contest jurisdiction. Neither of these events occurred. In so far as the extension of time for a defence was sought and obtained, that is not inconsistent with a continuing intention to challenge jurisdiction. On the contrary, it seems to me equally consistent with a desire to postpone any obligation to serve a defence until after the issue of jurisdiction had been determined.”

62.
In Deutsche Bank AG London Branch v Petromena ASA[2015] EWCA Civ 226; [2015] 1 WLR 4225, the Court of Appeal referred to the decision in Sage v Double A Hydraulics Ltd (cited in Global Multimedia International Ltd v ARA Media Services above), where the defendant had applied to set aside service of a claim form pursuant to the predecessor to CPR rule 11 (RSC Order 12, rule 8), but did not attend the hearing of the application due to an oversight and so the application was dismissed. Thereafter, the statement of claim was served and before the defendant issued a further application to set aside service, the defendant applied for an extension of time in which to serve a defence. At para. 27-28 and 32 in Deutsche Bank v Petromena, Floyd, LJ summarised the findings in Sage v Double A Hydraulics as follows:

“27. Farquharson LJ delivered the judgment of the court, which also included Lord Donaldson MR and Stocker LJ. In a passage dealing with the law applicable to both appeals, he said:

“The danger inherent in the defendant doing anything further after [the defendant] has issued a summons to set aside, lies in the risk that he may be taken to have waived his right to challenge the writ or the court’s jurisdiction. It is necessary in each case to determine whether any step taken, looked at objectively, falls into this category. A useful test is whether a disinterested bystander with knowledge of the case, would regard the acts of the defendant (or his solicitor) as inconsistent with the making and maintaining of a challenge to the validity of the writ or to the jurisdiction.”

28. Applying this disinterested bystander test to the facts of the Sage case, the court regarded the issue of a summons seeking an extension of time, in the period when there was no extant challenge to the jurisdiction, as an act inconsistent with the maintenance of such a challenge. The challenge to the validity of the writ therefore failed …

32. … The Sage case was a case of what one might call common law waiver, the doing of an act inconsistent with maintaining a challenge to the jurisdiction. Such a waiver must clearly convey to the claimant and the court that the defendant is unequivocally renouncing his right to challenge the jurisdiction, and the application of a bystander test is plainly apt …”

63.
As explained by the Court of Appeal in Deutsche Bank AG London Branch v Petromena ASA, there are two forms of submission to the jurisdiction: a statutory form of submission to the jurisdiction (pursuant to CPR rule 11(5) and (8)) and a common law submission to the jurisdiction or a common law waiver. On the basis of the authorities referred to above, the law concerning “common law waiver” or a common law submission to the jurisdiction (in the sense used in Deutsche Bank AG London Branch v Petromena ASA, para. 32, 46) may be summarised as follows:

(1)
A defendant will be precluded from disputing the Court’s jurisdiction if the defendant voluntarily recognises or has voluntarily recognised that the Court has jurisdiction to hear and determine the claim, that is if the defendant voluntarily submits to the Court’s jurisdiction.

(2)
The defendant makes such a voluntary submission to the jurisdiction if the defendant takes a step in the proceedings which in all the circumstances amounts to a recognition of the Court’s jurisdiction.

(3)
There will be a submission to the jurisdiction where the defendant’s conduct cannot be explained, except on the basis that the defendant accepts that the Court has jurisdiction. That is, the defendant’s conduct must be unequivocal in submitting to the jurisdiction in order to deprive the defendant of its right to apply to dispute the Court’s jurisdiction. This is especially the case where, at the time of the relevant conduct alleged to amount to a submission to jurisdiction, the defendant has issued an application to contest jurisdiction within time or the time for filing such an application has not yet expired. Of course, if the defendant has not applied to contest jurisdiction within the requisite time, it will be treated as having accepted that the Court has jurisdiction pursuant to CPR rule 11(5) (this is a statutory submission to the jurisdiction, as opposed to a common law waiver: Deutsche Bank AG London Branch v Petromena ASA, para. 36).

(4)
If the defendant’s conduct is both consistent with the acceptance of jurisdiction but also can be explained because it was necessary or useful for some purpose other than the acceptance of the jurisdiction, there will be no submission to the jurisdiction.

(5)
Examples of conduct which might amount to a submission to the jurisdiction include the defendant applying for an extension of time in which to serve a defence or advancing a defence on the merits or threatening to strike out the claim (other than on the grounds of the Court's lack of jurisdiction). It is worth noting that under the now repealed Rules of the Supreme Court and an earlier version of CPR rule 11, the time within which an application to dispute jurisdiction had to be made was defined by reference to the period within which a defence had to be served. Now under CPR rule 11(4) the application to dispute jurisdiction must be within 14 days after filing of an acknowledgment of service, although in the Commercial Court the period is 28 days after filing of an acknowledgment of service (CPR rule 58.7(2)). Therefore, whereas an application for an extension of time in which to serve a defence may have been equivocal at least under the Rules of the Supreme Court, given that the effect of the application was to extend time in which to apply to dispute jurisdiction, this consideration no longer applies under the current version of CPR rule 11 (The Burns-Anderson Independent Network plc v Wheeler [2005] EWHC 575 (QB); [2005] 1 Lloyd's Rep 580, para. 30-34). However, where the relevant conduct is accompanied by a clear statement that it is without prejudice to the defendant's challenge to, or right to challenge, the Court's jurisdiction, that is likely - although not necessarily, as it depends on the facts - forestall a submission to the jurisdiction (SMAY Investments Ltd v Sachdev; Winkler v Shamoon[2016] EWHC 217 (Ch)). Similarly, where the defendant has indicated an intention to dispute jurisdiction in its acknowledgment of service, that will often - but again it depends on the facts - be sufficient to prevent a defendant from being treated as having submitted to the jurisdiction.

(6)
The mere indication of an intention to defend the claim, as opposed to an indication of an intention to contest the Court's jurisdiction, in ticking or checking the relevant box in the acknowledgment of service form is of itself not sufficient to amount to a submission to jurisdiction, without additional conduct which demonstrates an unequivocal intention to submit to the jurisdiction, such as failing to apply to dispute the Court's jurisdiction within the requisite time period imposed by the Civil Procedure Rules or a statement or conduct which is fundamentally inconsistent with such an intention to dispute jurisdiction. This is made plain by CPR rule 11(3) which provides that "A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction".

(7)
The timing of the conduct alleged to constitute a submission to the Court's jurisdiction is important. If the conduct took place before an application contesting the Court's jurisdiction was intimated or issued, then it is more likely to be an unequivocal submission to the jurisdiction; if the relevant conduct occurred whilst there was a pending application to contest the Court's jurisdiction or a reservation of the right to do so, then it is unlikely, perhaps very unlikely, to constitute a submission to the jurisdiction (see e.g. Zumax Nigeria Ltd v First City Monument plc[2016] EWCA Civ 567; [2016] 1 CLC 953, para. 44-51). In each case, however, it is dependent on an examination of all of the facts.

(8)
The assessment of the defendant's conduct must be undertaken objectively, sometimes said to be from the perspective of the disinterested bystander.

64.
I confess that I share similar concerns to those of Patten, J in SMAY Investments Ltd v Sachdev about the ease with which a defendant might be treated as having submitted to the jurisdiction and thereby lose the right to contest jurisdiction, especially where the time for making an application to dispute

jurisdiction has not yet expired. Nevertheless, the law in this respect as described above is well settled.

Discussion

65.
AELF relied on three separate instances of SLM's conduct in support of its contention that SLM had submitted to the Court's jurisdiction and had therefore lost the right to dispute jurisdiction under CPR rule 11, namely:

(1)
The fact that in its First Acknowledgment SLM indicated its intention to defend the claim and did not indicate its intention to dispute jurisdiction. However, AELF accepts that it could not rely on this conduct alone in support of SLM's submission to jurisdiction, but it could rely on this conduct together with additional conduct by SLM.

(2)
The fact that on 8th July 2021 SLM applied for an extension of time in which to serve its Defence (a day before the expiry of the time period for the service of the Defence set by Bryan, J's order dated 14th April 2021).

(3)
The fact that SLM had represented to the Surinam Court, in September 2021, that the English Court had been seised of jurisdiction by reason of the exclusive English jurisdiction agreement in the Settlement Agreement between the parties and the service of process on SLM on 3rd June 2021.

66.
I can deal with the third instance of SLM's conduct relied on by AELF immediately. I do not consider that this amounts to a submission of jurisdiction in circumstances where the representation to the Court was not to my mind unequivocal and more importantly was made after SLM had applied to contest jurisdiction on 23rd July 2021 and SLM had indicated its intention to contest jurisdiction in its Second Acknowledgment on 26th July 2021.

67.
The first two instances of SLM's conduct - the indication of an intention to defend the claim in the First Acknowledgment and the application to extend time for the service of the Defence - both took place before any intimation of an intention to contest jurisdiction on 23rd July 2021.

68.
On 8th July 2021, SLM applied for an order extending time in which to serve its Defence until 30th July 2021. On 14th June 2021, Bryan, J had ordered that SLM's Defence be served 36 days after the service of the Particulars of Claim on 3rd June 2021. Accordingly, the Defence had to be served by 9th July 2021, unless an application was made to contest jurisdiction, in which case SLM would have been excused from the requirement to file a defence before the hearing of the application (CPR rule 11(9)).

69.
In support of its application for an extension of time, SLM relied on the evidence set out in Part C of the application notice, namely that:

"On 3 June 2021, the Claimant served on the Defendant the Claim Form, Particulars of Claim and order of Mr Justice Bryan (dated 14 April 2021) (the "Directions Order") out of the jurisdiction. The

Directions Order provided that the Defendant would have 36 days from the date of service of the Claim Form (together with the Particulars of Claim) within which to serve a Defence.

The Defendant, at the time unrepresented, filed an Acknowledgment of Service noting its intention to defend the claim on 25 June 2021. Bird & Bird LLP came on the record on 8 July 2021 and filed a Notice of Change at 18:16 on 8 July. A copy of the Notice of Change was served on the Claimant's legal representative, W Legal Ltd, immediately thereafter.

Pursuant to CPR Part 15.5(1), the Defendant's solicitors, Bird & Bird LLP requested a 21 day extension for filing of the Defence (i.e. until 30 July 2021) in its letter to W Legal Ltd sent on 8 July 2021 at 15:28. Bird & Bird LLP has only come on the record and been instructed to prepare a defence on 8 July 2021. Given that this firm was only instructed the day before the current deadline for filing of the Defence, the Defendant is not in a position to comply with this deadline.

At the time of making this application, the Claimant has not responded substantively to the Defendant's request for an extension of time. W Legal Ltd responded to Bird & Bird's letter of 8 July stating that it would be "able to communicate further" once Bird & Bird has come on the record. Since service of the Notice of Change on W Legal Ltd, Bird & Bird LLP requested a response to the extension request by email on 8 July 2021 at 18:21 and again on 9 July 2021 at 8:49. Mrs Simona Peter of Bird & Bird LLP also left a voice message for Mr Loeb at W Legal Ltd at 10:18 on 9 July. At 11:20 on 9 July 2021 Mr Loeb of W Legal informed Mrs Peter that the Claimant is based in a different time zone and that he had no instructions on the extension request and that he is unlikely to receive these until the afternoon of 9 July. Given the imminent expiry of the deadline for filing the defence, the Defendant is making the application pending substantive response from the Claimant in this regard.

As a timetable for the proceedings is yet to be fixed, the Defendant does not consider that the Claimant would suffer any prejudice if the extension of time is granted (particularly as this application is being made before the expiry of the present deadline for filing the Defence). The extension sought therefore has no impact on any trial given that none has been fixed."

70.
In this account, SLM made the following express assertions by way of evidence in support of its application for an extension of time to serve its Defence:

(1)
The Claim Form, the Particulars of Claim and Bryan, J's order were all served on SLM out of the jurisdiction.

(2)
SLM - before instructing solicitors - had filed its First Acknowledgment stating its intention to defend the claim.

(3)
SLM had instructed Bird & Bird as its solicitors in these proceedings by 8th July 2021.

(4)
SLM was unable to serve its Defence by 9th July 2021, as directed by Bryan, J.

(5)
SLM therefore required further time in which to serve its Defence.

(6)

Bird & Bird on behalf of SLM requested AELF to agree to an extension of time for the service of its Defence.

(7)
SLM made the application for an extension pending a response from AELF to SLM's request for an extension.

(8)
The granting of an extension would impose no prejudice on AELF and had no impact on any trial as no trial had yet been fixed.

71.
In support of its application to contest the Court's jurisdiction, SLM relied on the witness statement of Mr John Vrede dated 23rd July 2021, in which Mr Vrede said at paragraph 14:

"The application to extend time for service of the Defence was made shortly after the Defendant had instructed Bird & Bird to act for it in relation to these proceedings and was a protective measure to safeguard the Defendant's position. For the avoidance of doubt, the Defendant did not thereby intend to submit to the jurisdiction of the Court or waive any right to challenge the validity of the purported service on it."

72.
Of course, for this purpose, I must consider SLM's conduct objectively. It seems to me that any subjective intention entertained by SLM is not relevant to this exercise. Even if it was, it is but one factor to be considered.

73.
In my judgment, SLM has submitted to the jurisdiction by reason of (a) its application (and request) on 8th July 2021 for an extension of time for the service of its Defence until 30th July 2021, (b) its earlier indication in the First Acknowledgment that SLM intended to defend the claim (rather than to contest jurisdiction), and (c) there had been no indication by SLM that it intended to contest jurisdiction prior to 23rd July 2021 and no indication of a reservation of rights to do. I should also make clear that I would have come to the same conclusion even if I ignored the indication in the First Acknowledgment; I mention this as it might well be legitimate to ignore it, because it was not an acknowledgment of service compliant with CPR Part 10. My reasons for this decision are as follows.

74.
First, the Court has traditionally considered an application for an extension of time in which to serve a defence to be inconsistent with an intention to contest jurisdiction, as in Global Multimedia International Ltd v ARA Media Services, para. 30-31. The position in SMAY Investments Ltd v Sachdev was different; in that case, the indication of an intention to defend the claim in the acknowledgment of service and the application and obtaining of an extension of time in which to serve a defence were held to be equivocal conduct, in circumstances where both steps were preceded by a statement made in an affidavit and during a hearing before the Court that the defendant intended to contest the Court's jurisdiction.

75.
Second, it is apparent from the scheme adopted by CPR rule 11 that, where an application is made to contest jurisdiction, there is no requirement to serve a defence before the hearing of the application (CPR rule 11(9)) and, moreover, if the application is unsuccessful, the defendant must file a further

acknowledgment of service and the Court shall make directions for the filing and service of a defence (CPR rule 11(7)). The service of a defence is an answer to the claim made against the defendant on the merits. It follows that an application to extend time in which to serve a defence is a step in the proceedings whose object is to determine the merits of a claim. In this case, SLM sought an extension of time for the service of its Defence until 30th July 2021. Such an application indicated that SLM would serve its Defence on the merits within the space of some three weeks; there was no indication that the extension of time was intended to postpone the service of the Defence until the Court's disposal of any application to contest jurisdiction. Thus, in SMAY Investments Ltd v Sachdev, the facts were materially different in that Patten, J said that "In so far as the extension of time for a defence was sought and obtained, that is not inconsistent with a continuing intention to challenge jurisdiction. On the contrary, it seems to me equally consistent with a desire to postpone any obligation to serve a defence until after the issue of jurisdiction had been determined". In the present case, there was no suggestion that the Defence was to be deferred until after the issue of jurisdiction was determined by the Court.

76.
Third, on the evidence, I cannot think of an explanation which underlies SLM's application for an extension of time in which to serve its Defence to 30th July 2021 which is consistent with an intention to contest jurisdiction. The only explanation offered by SLM in its evidence was that it was "a protective measure to safeguard the Defendant's position" (paragraph 14 of Mr Vrede's witness statement). During the hearing, Mr Stewart Coats on behalf of SLM relied on the facts that (a) W Legal had failed to inform Bird & Bird that a request for default judgment had been made by AELF; (b) W Legal had failed to inform Bird & Bird that AELF challenged the validity of the First Acknowledgment; (c) W Legal had failed properly to engage with Bird & Bird's informal request for an extension of time; and (d) the application for an extension of time was clearly intended to be a protective measure to avoid a default judgment whilst Bird & Bird were reading into the case and it was not a clear expression of SLM's intention to abandon any right to challenge to jurisdiction.

77.
I do not think that these considerations ameliorate the inconsistency between the application to extend time for the service of the Defence on the one hand and any intention to contest jurisdiction on the other hand. Indeed, it seems to me that any conduct motivated to forestall the entry of default judgment does not indicate an intention to contest jurisdiction. Indeed, if an application to contest jurisdiction had been made, there would have been no need to serve a defence (CPR rule 11(9)). There may be circumstances where steps taken to prevent a default judgment being entered is consistent with an intention to contest jurisdiction (cf.Winkler v Shamoon[2016] EWHC 217 (Ch), para. 48, where the defendant applied to set aside a default judgment). However, in the present case, no reference was made by SLM in Part C of its application notice for an extension of time for the service of the Defence and, as far as SLM was aware, there was no reason why a default judgment could be entered when it had filed its First Acknowledgment the previous week and was not aware of any defect in the First Acknowledgment until 22nd July 2021.

78.
Fourth, there was no hint of an attempt by SLM to reserve its rights, or to make the application without prejudice to, any intention to contest jurisdiction. I appreciate that SLM instructed solicitors in England only shortly before the application was made and that Bird & Bird were in a difficult position (as observed by the Court in Global Multimedia International Ltd v ARA Media Services, para. 30) where they had been only recently instructed and had a looming deadline for the service of the

Defence, but this is not sufficient to explain why the application to extend time (together with the indication made in the First Acknowledgment to defend the claim) could be said to be consistent with an intention to contest jurisdiction.

79.
In these circumstances, and subject to the issue which I consider below, in my judgment, SLM's application to dispute the Court's jurisdiction should be dismissed by reason of SLM having submitted to the Court's jurisdiction by way of a "common law waiver".

Section 12(3) of the State Immunity Act 1978

80.
There is one final issue I should address in connection with SLM's application to dispute jurisdiction, namely whether submission to the jurisdiction of the Court amounts to an appearance in proceedings within the meaning of section 12(3) of the State Immunity Act 1978.

81.
This issue was not addressed during oral argument. However, I invited the parties' written submissions on this point after the hearing.

82.
The issue arises in that SLM contests jurisdiction by reason of the invalid service of the Claim Form on it because it contends that it was entitled to be served the Claim Form in accordance with section 12(1) and service was in fact effected contrary to the requirements of that statutory provision. AELF takes issue with SLM's entitlement to rely on section 12(1) because it argues that SLM is not a State within the meaning of that section and because, in any event, SLM agreed to the service of the Claim Form in the manner it was in fact served and therefore service was valid in accordance with section 12(6).

83.
It is worth noting the terms of sections 12(1)-(6) of the 1978 Act:

"(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner."

84.
Section 22(2) of the 1978 Act provides that "In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures".

85.
For the purposes of this application, I shall assume that SLM was entitled to rely on section 12(1). I repeat that the issue about the entitlement of SLM to rely on section 12(1) does not currently arise for determination. I am concerned only with the question whether SLM submitted to the jurisdiction.

86.
Section 12(3) provides that "A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings". The question arises whether SLM's submission to jurisdiction by reason of a common law waiver, rather than a statutory form of submission to jurisdiction, can constitute an appearance within the meaning of section 12(3). If not, it could be said that SLM cannot be deprived of the right to object to service not undertaken in accordance with section 12(1) unless it has filed an acknowledgment of service in which it is indicated that SLM intends to defend the claim, and it is not indicated that it intends to dispute jurisdiction, and the time for making an application to contest jurisdiction has passed.

87.
Mr Stewart Coats submitted on behalf of SLM that:

(1)
The phrase "appears in proceedings" in section 12(3) meant that, under the Civil Procedure Rules, a defendant must have acknowledged service and must not have applied to challenge jurisdiction within the requisite time period. See L v Y Regional Government of X[2015] EWHC 68 (Comm), para. 56-60.

(2)
It follows that the filing of the First Acknowledgment on 28th June 2021 was not an appearance within the meaning of section 12(3).

(3)
As SLM filed an application to contest jurisdiction within the requisite time period, it cannot be taken to have appeared in the proceedings within the meaning of section 12(3).

(4)
A State cannot appear in proceedings within the meaning of section 12(3) by reason of a common law waiver, because that would be contrary to the statutory purpose of section 12(3), which should be construed narrowly, in contrast to the broad construction to be given to section 12(1) (General Dynamics United Kingdom Ltd v State of Libya[2021] UKSC 22, para. 43, 58).

(5)
By contrast, sections 2(1)-(3) of the 1978 Act refer to a submission to jurisdiction, which is wide enough to embrace a common law waiver. If the intention of the parliamentary draftsperson had been to use the same concept in section 12(3), the same language would have been used.

88.

Ms Brown QC on behalf of AELF submitted that an “appearance” or an “entry of appearance” can take place when the defendant submits to the jurisdiction by means of a common law waiver by taking a step in the proceedings even if there has been no statutory submission to the jurisdiction within the meaning of CPR rule 11(5) (Deutsche Bank AG London Branch v Petromena ASA [2015] EWCA Civ 226, para. 15, 37-40). Ms Brown QC also made clear that AELF does not contend that the filing of the First Acknowledgment constituted an appearance within the meaning of section 12(3) because it was defective.

89.
In L v Y Regional Government of X[2015] EWHC 68 (Comm); [2015] 1 WLR 3948, the defendant acknowledged service of an arbitration claim form which had been served on the defendant’s solicitors by way of alternative service and indicated its intention to contest jurisdiction in the acknowledgment of service form. Hamblen, J held that the filing of an acknowledgment of service in which the defendant indicated that it intended to contest jurisdiction was not an appearance within the meaning of section 12(3) and said at para. 59-63 that:

“59. Under the CPR the functional equivalent of entering an (unconditional) appearance under the RSC 1978 is therefore filing an acknowledgment of service and failing to make an application disputing the court’s jurisdiction within the requisite period.

60. The obviously sensible construction of section 12(3) given the changes in civil procedure since 1978 is to hold that a state “appears” in proceedings when it files an acknowledgment of service and does not issue an application to dispute the court’s jurisdiction within the requisite period.

61. The word “appears” is sufficiently broad to be construed in this manner.

62. If necessary, the same conclusion can be reached by giving section 12(3) an updated construction …

63. As the NML Capital case [NML Capital Ltd v Argentina [2011] UKSC 31; [2011] 2 AC 495] makes clear, the SIA is not one of those rare acts which is meant to be of unchanging effect. So far as necessary, it should be given an updated meaning to allow for procedural changes since it was enacted. In the present case that means construing “appears” in section 12(3) in the manner set out above.”

90.
However, the Court in that case was not considering the wider question whether forms of submission to jurisdiction (i.e. common law waiver) other than a statutory submission to jurisdiction pursuant to CPR rule 11(5) also constituted an appearance within the meaning of section 12(3).

91.
Mr Stewart Coats however submitted that Hamblen, J indicated the statutory purpose of section 12(3) was to provide certainty that a State could lose its right to insist on service in accordance with section 12(1) only by means of an appearance under section 12(3) or an agreement for alternative service under section 12(6). This statutory purpose, it was submitted, requires a “clear and narrowly construed definition of “appears in proceedings”". In this respect, Mr Stewart Coats relied on para. 69 of Hamblen, J’s judgment:

“In my judgment the claimant’s “Catch 22” construction of section 12(3) cannot be correct. It should be construed in the manner set out above. That is consistent with the statutory purpose of section 12, namely, to confer an important procedural right on state entities, which can be foregone either: (i) by

doing the functional equivalent of entering an unconditional appearance under the old rules of procedure, or (ii) by an agreement to an alternative method of service. It is also in accordance with the fundamental feature of the scheme of CPR Pt 11, namely, that a "defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction": CPR r 11(3)."

92.
I quite accept that section 12 of the 1978 Act is intended to provide a special regime for States and that section 12 should be construed accordingly. However, bearing in mind that a common law waiver is concerned only with unequivocal conduct on the part of defendant to submit to the Court's jurisdiction, I do not regard such a common law waiver as being contrary to the statutory purpose referred to by Hamblen, J. Indeed, it seems to me that a common law waiver submission to jurisdiction is the "functional equivalent" of entering an unconditional appearance.

93.
I am conscious of the fact that sections 2(1)-(3) of the 1978 Act use the language of "submission to jurisdiction", and section 12(3) does not. Sections 2(1), (2) and (3) provide that:

"(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

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

(3) A State is deemed to have submitted—

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings."

94.
I see the force of Mr Stewart Coats' argument that the submission to the jurisdiction referred to in section 2 is broader in scope than an appearance in proceedings referred to in section 12. However, sections 2 and 12 of the 1978 Act are addressing two separate matters. Section 2 is concerned with an exception to State immunity which is provided for under section 1. Section 12 is concerned with "Procedure", meaning court procedure. Therefore, I think the different language in sections 2 and 12 is explicable by the fact that the exception to State immunity in section 2 is not only concerned with court procedures but extends to conduct outside court proceedings, whereas section 12 is concerned only with service and an appearance in proceedings in accordance with court procedures. That said, if section 12(3) had adopted the language of a submission to jurisdiction, rather than an appearance, the current issue would not have arisen.

95.
Under section 2, the submission to jurisdiction to forestall a State from relying on a right of general immunity under section 1 of the 1978 Act is intended to extend to conduct independent of court procedures or court proceedings which have been instituted. An appearance in proceedings referred to in section 12 is intended to deal only with conduct relating to those court proceedings and to deal with a State participating in court proceedings without any objection to jurisdiction. Such an appearance may be effected by the filing of an acknowledgment of service indicating an intention to defend together with the lapse of the period required to make an application disputing jurisdiction

(see L v Y Regional Government of X). That appearance equally may also be effected by other means, such as taking a stance on the merits of a claim in the proceedings or taking a step in the proceedings with a view to the resolution of the claim on the merits, for example by applying for an extension of time for service of the defence or in fact serving a defence. In both of these examples, the State is appearing in the proceedings in the sense of participating in the proceedings with a view to disputing the merits, not the Court's jurisdiction.

96.
If therefore a defendant can be taken to have submitted to the jurisdiction, by means of a common law waiver, for the purposes of determining the right of a defendant to apply to challenge jurisdiction under CPR Part 11, that submission to jurisdiction seems to me to represent an appearance within the meaning of section 12(3). I do not read any anything in the judgments in General Dynamics United Kingdom Ltd v State of Libya[2021] UKSC 22; [2021] 3 WLR 231 which contradict this approach.

97.
This conclusion is consistent with the interpretation which has been given to article 26 of the Brussels Regulation Recast (Regulation (EU) No. 1215/2012) which provides that "a court of a Member State before which a defendant enters an appearance shall have jurisdiction". In Winkler v Shamoon[2016] EWHC 217 (Ch), at para. 27-34 and 41-45, in reliance on the judgment of the Court of Appeal in Deutsche Bank AG London Branch v Petromena ASA[2015] EWCA Civ 226; [2015] 1 WLR 4225, Henry Carr, J considered the equivalent provision in the predecessor to the Brussels Regulation Recast (article 24 of the Brussels Regulation) and held that there could be an entry of appearance by the defendant if there has been a submission to the jurisdiction in accordance with the local law, which would include a common law waiver. In that case, however, the Court held that there had been no appearance or submission to the jurisdiction, because at all relevant times the defendant had indicated its intention to challenge the Court's jurisdiction (para. 39-50). I am of course aware of the different legislative context of each of the Brussels Regulation Recast and the State Immunity Act 1978, but the purpose of delineating a submission to the jurisdiction must be the same in both contexts.

98.
There is however an argument which might militate against my conclusion, namely that the words "appears in proceedings" should take their meaning from other sub-sections of section 12, in particular section 12(2) which refers to the time for entering an appearance under the relevant rules and sections 12(4) and (5) which refer to a judgment being entered in default of such appearance. It could be argued that an appearance under section 12(3) must refer only to a statutory submission to the jurisdiction by means of choosing not to make an application to dispute jurisdiction within the requisite time period, having regard to the Rules of the Supreme Court which were in force when the 1978 Act commenced in November 1978 (see L v Y Regional Government of X).

99.
Nevertheless, I hold to the conclusion that an appearance must refer to any act of waiver, whether of the common law or statutory type, which disables the defendant from disputing jurisdiction. This is supported by the reference to section 22(2) which states that references to the entering of an appearance include "references to any corresponding procedures". In General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22; [2021] 3 WLR 231, the Supreme Court held that section 12 of the 1978 Act applied to an arbitration claim form. Lord Lloyd-Jones said at para. 35:

“The terms employed by section 12 SIA include those associated with the Rules of the Supreme Court as they existed at the time of the enactment of the statute in 1978. Subsection (1) refers to a writ and the following subsections also refer to entering an appearance and judgment in default of appearance, matters which have long been superseded in civil procedure in this jurisdiction. The interpretation section of the SIA provides in section 22(2) that references to entry of appearance and judgments in default of appearance include references to any corresponding procedures. The precise application of section 12 to more modern procedures has on occasion given rise to difficulty. (See Norsk Hydro, AIC Ltd v Federal Government of Nigeria (2003) 129 ILR 571, Fox and Webb, The Law of State Immunity, pp 234-235.) However, it was clearly not the legislative intention to limit the procedure for service under section 12(1) to cases involving the entry of appearance and possible judgments in default, or to corresponding procedures, as is demonstrated by the reference in section 12(1) to an “other document required to be served for instituting proceedings against a state”.”

100.
This was said in a different context, but indicates some flexibility in the meaning of the terms used in section 12(1) and, in my judgment, section 12(3). Indeed, Hamblen, J also recognised the malleability of section 12 to adapt to updated procedures in L v Y Regional Government of X (para. 62-63; cf. para. 65). Bearing in mind that a submission to jurisdiction by a common law waiver or by a statutory submission to the jurisdiction are to the same effect, and are both procedural means of depriving a defendant of its right to contest jurisdiction (including the right to dispute the validity of service of originating process), I do not see that an appearance under section 12(3) must be limited to a statutory submission to the jurisdiction. It should therefore be treated as extending to a common law waiver.

101.
For these reasons, in my judgment, SLM’s application to contest jurisdiction by disputing the validity of the service of the Claim Form under section 12(1) of the 1978 Act should be dismissed.

102.
Mr Stewart Coats submitted that the application of section 12(3) of the 1978 Act could not be determined separately from the question of SLM’s entitlement to rely on section 12(1) and that therefore the Court should defer a decision on SLM’s application contesting jurisdiction. I do not accept this submission. I can assume that SLM is otherwise entitled to rely on section 12(1) in determining whether section 12(3) applies and indeed that is what I have done. On that assumption (as to which no decision is made), in my judgment, SLM has appeared in the proceedings within the meaning of section 12(3) of the State Immunity Act 1978 and so cannot rely on any privilege to which it was or may have been entitled under section 12(1).

Conclusion

103.
For the reasons explained above, I allow SLM’s application for an extension of time in which to file its acknowledgment of service until 26th July 2021 which therefore permitted SLM to present its application to dispute jurisdiction.

104.
However, I dismiss SLM’s application challenging the Court’s jurisdiction on the ground that it has submitted to the Court’s jurisdiction and, if applicable, on the ground that it has appeared in the proceedings within the meaning of section 12(3) of the State Immunity Act 1978.

105.
The result of the dismissal of SLM’s application to contest jurisdiction is that SLM’s acknowledgment of service ceases to have effect and it may file a further acknowledgment of service in accordance with CPR rule 11(7).

106.
I am very grateful to both counsel for their very helpful submissions.