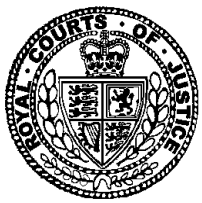

Neutral Citation Number: [2022] EWHC 501 (Comm)

Case No: CL-2018-000422

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11/03/2022

Before :

The Hon Mr Justice Butcher

Between :

GENERAL DYNAMICS UNITED KINGDOM LIMITED **Cla**

- and –

THE STATE OF LIBYA **Defe**

- -

- -

Daniel Toledano QC and James Ruddell (instructed by **Reed Smith LLP**) for the **Claimant**

Lucas Bastin and Freddie Popplewell (instructed by **Curtis, Mallet-Prevost, Colt & Mosle**) for the **Defendant**

Hearing date: 24 February 2022

- -

Approved Judgment

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

1.
I have to determine an application by the Defendant ('Libya') to set aside an ex parte order made by Teare J on 20 July 2018 ('the Teare J Order'). The basis on which Libya contends that the order should be set aside is that the Claimant ('General Dynamics') did not comply with its duty of full and frank disclosure when applying for and obtaining that order.

2.

The Teare J Order had two aspects. In the first place it granted General Dynamics permission to enforce an arbitral award which it had obtained against Libya in January 2016 ('the Award') and entered judgment in terms of the Award pursuant to s. 101(2) and (3) of the Arbitration Act 1996 ('the Arbitration Act'). Secondly, it dispensed with service of the Claim Form and of the Teare J Order pursuant to CPR 6.16 / 6.28.

3.
The second aspect of the Teare J Order has already been the subject of judicial consideration, up to the Supreme Court, and has been set aside. The present application concerns the first aspect of the Teare J Order.

Background

4.
The Award arose out of a dispute between the parties relating to a contract made in 2008 for the supply by General Dynamics to Libya of communications systems for use in military vehicles and related services. General Dynamics filed a Request for Arbitration with the ICC in January 2013. The ICC Court submitted the Arbitration to a three-member tribunal ('the Tribunal'). General Dynamics appointed its arbitrator. Libya did not nominate a co-arbitrator, and therefore the ICC directly nominated a co-arbitrator. The ICC Court then appointed a President of the Tribunal. The Tribunal was fully constituted on 7 November 2013.

5.
Thereafter the Arbitration proceeded. Libya took part, being represented by Dr Abdurrazek Ballow and Mr Kamal Sefrioui of Sefrioui Law Firm, based in France. Claims were made against each other by both parties. On 5 January 2016 the Tribunal published a unanimous award under the 2012 ICC Rules. The Tribunal found for General Dynamics in relation to some issues and for Libya in relation to others. The overall result was that Libya was ordered to pay General Dynamics £16,114,120.62 plus interest and the costs of the Arbitration, Libya's counterclaim was dismissed, and all other claims and requests for relief were rejected.

6.
The seat of the Arbitration had been Geneva, and accordingly the Award was a New York Convention Award. On 21 June 2018 General Dynamics made an application by arbitration Claim Form for (i) permission to enforce the Award and for judgment in its terms, and (ii) for service of the Claim Form, any order of the court, and associated documents to be dispensed with. That application was supported by the first Witness Statement of Nicholas Brocklesby, a partner of Reed Smith LLP ('Brocklesby 1').

7.
Brocklesby 1 referred in paragraph 6 to Libya as being a sovereign State. Thereafter, it described the contract, the Arbitration and the Award, testified that the Award had not been paid whether in whole or in part, exhibited a duly certified copy of the Award and an original copy of the arbitration agreement, and sought that General Dynamics should have permission to enforce the Award in the same manner as a judgment or order of the Court to the same effect and for judgment to be entered in terms of the Award.

8.
Then Brocklesby 1 turned to the issue of service, and sought permission to dispense with service of the Claim Form, any Order made by the Court 'and any associated documents'. Brocklesby 1, at para.

31(iii), set out the terms of s. 12(1) State Immunity Act 1978 ('SIA'). It proceeded to contend that there were exceptional circumstances which justified a departure from the requirement of service through the Foreign and Commonwealth Office (now the Foreign, Commonwealth & Development Office or 'FCDO'). These were said to include 'the practical and political challenges in effecting service in Libya'. In that connexion, Mr Brocklesby said, at paras. 43-44:

'[43] There is, however, ongoing confusion about the status and identity of the Minister of Foreign Affairs [of Libya] and, correspondingly, the status of the Ministry. …

[44] At present, due to the ongoing civil conflict in Libya, several government institutions, in essence, split into two branches, in or around 2014. Those institutions include the Ministry of Foreign Affairs. I understand that there are currently two competing governments in the country, namely:

(i) Tripoli based institutions controlled by the Government of National Accord ("the GNA"), which is recognised internationally and, in particular, by the United Nations; and

(ii) a parallel government based in Tobruk, with branches in Beida that form part of the House of Representatives (the "HoR")."

9.
Brocklesby 1 proceeded to say that 'the political environment [was] … ever changing'; further that 'there is the question of whether, in practice, service made in accordance with Section 12 of the State Immunity Act would then be brought to the attention of the Defendant'; and in any event that, even if possible seeking to effect service in accordance with s. 12 SIA would take 'considerable time'.

10.
General Dynamics sought a short oral hearing of its application. In the Skeleton Argument which was put in on that occasion by Ms Tolaney QC on behalf of General Dynamics, it was said that, while an application to enforce an arbitration award would ordinarily be made on the papers, an oral hearing had been requested 'in light of the fact that [General Dynamics] seeks permission, in the exceptional circumstances of this case, to dispense with service of the claim form, any Order made by the Court and other associated documents'. The Skeleton Argument referred (at para. 17) to the first part of the application, ie the application to enforce the Award and for judgment in the terms of the Award, as 'a straightforward application pursuant to s. 101 AA 1996'. The Skeleton Argument concentrated, rather, on the issue of service on States, and argued that service pursuant to s. 12 SIA could and should be dispensed with.

11.
At the short hearing in front of Teare J on 20 July 2018 Ms Tolaney QC reiterated that the first limb of the application was 'straightforward' (p. 2), and then turned to the issue of service. After submissions on that point, Teare J gave a short ruling granting the order dispensing with service.

12.
The Teare J Order was accordingly made. The Teare J Order:

(1)
Granted General Dynamics permission to enforce the Award and gave judgment in terms of the Award (paragraphs 1-3);

(2)

Dispensed with service, on terms that the relevant documents be couriered to three addresses associated with Libya (paragraphs 4-5);

(3)
Permitted Libya a period of two months to apply to set aside the Teare J Order (paragraph 6);

(4)
Directed that the Award should not be enforced until after: (a) the period of two months had expired, or (b) if any application was made to set aside the Teare J Order, until that application had been finally disposed of (paragraph 6); and

(5)
Awarded General Dynamics its costs (paragraph 7).

13.
On 19 September 2018 Libya applied to set aside paragraphs 4-5 of the Teare J Order, and to vary paragraphs 6-7, on the basis that under CPR 6.44 and s. 12(1) SIA service on Libya had to be effected through diplomatic channels, or alternatively that the necessary 'exceptional circumstances' to dispense with service did not exist. This application, which may be called 'the First Set Aside Application', was not made on the basis that there had been a failure to give full and frank disclosure in General Dynamic's ex parte application for the Teare J Order.

14.
The First Set Aside Application was heard by Males J on 18 December 2018, and on 18 January 2019 Males LJ granted Libya's application, holding that diplomatic service was mandatory in this case. Paragraphs 4 and 5 of the Teare J Order were set aside, and paragraph 6 was varied to provide that Libya would be entitled to apply to set aside the remainder of the Teare J Order within a period of two months and 14 days from the date of diplomatic service, during which time the Award could not be enforced. General Dynamics appealed to the Court of Appeal, with permission of Males LJ.

15.
On 22 February 2019, in light of Males LJ's order, General Dynamics filed a request for diplomatic service of the relevant documents.

16.
On 13 June 2019, the Court of Appeal heard General Dynamics' appeal. Judgment was handed down on 3 July 2019. The Court of Appeal unanimously allowed General Dynamics' appeal and restored paragraphs 4 and 5 of the Teare J Order.

17.
On 15 December 2020, the Supreme Court heard Libya's appeal from the order of the Court of Appeal. Judgment was handed down on 25 June 2021. The Supreme Court allowed Libya's appeal, restoring the Males LJ Order, and thus again setting aside paragraphs 4 and 5 of the Teare J Order.

18.
Meanwhile, on 31 May 2021, after the hearing in the Supreme Court but before judgment was handed down, diplomatic service was in fact effected on Libya by the FCDO. As a result, Libya had 2 months and 14 days from 31 May 2021 to apply to set aside the remainder of the Teare J Order, only after which period (and assuming that no set aside application was made) could General Dynamics seek to enforce the Award.

19.
It is in those circumstances that, on 16 August 2021, which was the last date of the period available to it, Libya made the application which is presently before me.

20.
One further matter requires mention at this juncture. On 11 February 2022, the Supreme Court made a costs order in respect of the First Set Aside Application. Libya was awarded its costs before the Supreme Court and below, to be assessed if not agreed. Enforcement was, however, stayed until the determination of any application to set aside the remaining paragraphs of the Teare J Order (ie the present application); and if that application was unsuccessful the costs order could only be enforced by way of set off against the sums owed to General Dynamics under the Award.

The Present Application

21.
The present application was originally advanced on the basis that General Dynamics had failed to give full and frank disclosure in the ex parte application leading to the Teare J Order in relation to three matters, as follows:

(1)
First, that General Dynamics had failed to inform the Court that there was only one recognised government in Libya;

(2)
Secondly, that General Dynamics had failed to inform the Court that diplomatic service would be effected by the FCDO and not by General Dynamics; and

(3)
Thirdly, that General Dynamics had failed to inform the Court that Libya had adjudicative and enforcement immunity under the SIA, subject to the exceptions thereto.

22.
The second of these grounds was not pursued before me. The third ground was that on which Libya's submissions primarily focused, but the first ground was also relied upon. I will consider them in turn. First, however, it is appropriate to consider the legal principles applicable to the obligation on a party to make full and frank disclosure.

The Duty of Full and Fair Disclosure

23.
There is no doubt that the obligation on a party seeking relief ex parte to make full, frank and fair disclosure is of the greatest importance. It is necessary to allow the Court to fulfil its obligations under Article 6 of the European Convention on Human Rights, and is the corollary of the Court's being prepared to depart from the ordinary position that it should hear both sides before making a decision. As it was put by Popplewell J in Fundo Soberano de Angola v Dos Santos [2018] EWHC 2199, at [51], 'It is a duty owed to the court which exists in order to ensure the integrity of the court's process'.

24.
The essential principles were stated in Brink's Mat Ltd v Elcombe [1998] 1 WLR 1350 by Ralph Gibson LJ at 1356-1357 as follows:

‘In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(1) The duty of the applicant is to make “a full and fair disclosure of all the material facts:” see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an Anton Piller order in Columbia Picture Industries Inc. v. Robinson [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 92—93.

(5) If material non-disclosure is established the court will be “astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:” see per Donaldson L.J. in Bank Mellat v. Nikpour, at p. 91, citing Warrington L.J. in the Kensington Income Tax Commissioners’ case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it “is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:” per Lord Denning M.R. in Bank Mellat v. Nikpour [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.’

25.
In Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269, at para. 180, Lawrence Collins J gave the following summary:

‘On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, ie those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries … But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present’.

26.
Furthermore, if the duty has been breached, the court retains a discretion to continue or re-grant the order if it is just to do so. In Millhouse Capital UK Ltd v Sibir Energy plc [2008] EWHC 2614 (Ch), Christopher Clarke J said, at [105]-[106]:

‘[105] As to the future, the Court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the Court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.

[106] As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose.’

Non-Disclosure of State Immunity

The Parties’ Positions

27.
In relation to what, in Libya’s application, is called the third ground of non-disclosure, ie a failure to refer to Libya’s adjudicative and enforcement immunity, Mr Bastin advanced the following arguments.

(1)
He contended that state immunity was a matter of great significance. It needed to be considered by a curial court to ensure that it was not in breach of international norms respecting the sovereign equality of States and their sovereign immunity.

(2)
A State has, subject to exceptions, both an adjudicative and an enforcement immunity. Section 1(1) of SIA provides that a State is immune from the jurisdiction of the UK courts, except as provided in Part I of the SIA; and a court is to give effect to the immunity conferred by s. 1 even though the State does not appear. There are exceptions in relation to the immunity from adjudicative jurisdiction in ss. 2-11 of the SIA. Even if there is no immunity in respect of the adjudicative jurisdiction by reason of the applicability of one of those exceptions, there will still, under s. 13 SIA, be immunities in respect of enforcement by execution. There has never been any suggestion that Libya has waived the s. 13 immunities from such enforcement.

(3)
The failure to refer to Libya's immunity under s. 1 SIA was of particular significance here because, if the orders sought were granted, General Dynamics would have been able, without a further hearing before the court, and without any further meaningful judicial intervention, to have proceeded to execute the Award or the judgment entered in its terms, thus potentially infringing Libya's enforcement immunity.

(4)
The particular type of enforcement by execution to which General Dynamics could have proceeded without any further hearing or need to refer to Libya's enforcement immunity was by way of a Writ of Control. This would have only required a request for issue under CPR r. 83.9(3)-(5). No permission from the Court would have been required, as none of the circumstances listed in r. 83.2(3) was applicable. The Writ of Control would have been sealed by a court officer of the appropriate court, here the Admiralty and Commercial Court Registry.

(5)
There was no evidence that General Dynamics had not intended to proceed directly to such execution. On the contrary, Brocklesby 1 had said that General Dynamics had identified an asset against which it intended to attempt enforcement.

(6)
The seriousness of the failure to refer to Libya's immunity under the SIA was compounded in the present case by General Dynamic's application that service of the Claim Form and associated documents pursuant to s. 12 SIA should be dispensed with. This led to the possibility that, without serving any document on Libya, General Dynamics could have proceeded to enforce against one of its assets.

28.
Mr Bastin contended that the order giving permission under s. 101(2) and entry of a judgment in terms of the Award under s. 101(3) Arbitration Act should be set aside 'without renewal'. While he did not exclude that there might be other adverse consequences of this for General Dynamics, he made it clear that Libya's primary and immediate objective in seeking to set aside those parts of the Teare J Order was that, if this should happen, then the costs ordered by the Supreme Court would be payable to Libya, and would not be subject to the set-off against the Award which would apply if they were not set aside.

29.
For General Dynamics, Mr Toledano QC submitted that Libya's case was without merit.

(1)
The obligation of full and frank disclosure only applied to defences which had been raised by Libya or which were arguable defences which might affect the order the Court was being asked to make.

(2)
The relevant orders which the Court was being asked to make were the orders under s. 101 Arbitration Act. There was, however, no arguable defence to those orders on the basis of State immunity. This is because an exception to the immunity in s. 1 SIA is that in s. 9 SIA. That section provides:

‘Where a State has agreed in writing to submit a dispute which has arisen, or which may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.’

(3)
That provision extends to proceedings in England for permission to enforce an award and for judgment in terms of the award, under s. 101 Arbitration Act. This is clear from Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No. 2) [2007] QB 886 at [117].

(4)
Libya had never suggested that it was (or is) entitled to state immunity in respect of the arbitral process or the Award, or in relation to orders under s. 101 Arbitration Act. It could not do so, because of the existence of the arbitration agreement, and of the arbitration in which it fully participated. Accordingly though, as Mr Toledano QC put it, it would undoubtedly have been preferable for there to be a reference before Teare J to the immunity in s. 1 SIA, it was not a matter of any great significance. Had it been mentioned, it would simply have been followed by a sentence saying that the case fell within the s. 9 exception, and to that there was and is no possible answer. The failure to make reference to the s. 1 SIA immunity was not deliberate, but was the result of the focus of those advising General Dynamics on the question of whether there were any grounds under s. 103 Arbitration Act on which Libya could resist recognition of the Award.

(5)
The application for orders under s. 101 Arbitration Act was not the point at which to raise issues as to an immunity against execution. That point would come only when particular assets or at least a particular method or methods of enforcement had been identified as relevant, and then, if the relevant order was being sought ex parte there would undoubtedly be an obligation to make disclosure of Libya’s enforcement immunity. Libya appeared to accept that this would be the case in relation to a Third Party Debt Order or a Charging Order.

(6)
The argument that there would be no need or opportunity for there to be a subsequent disclosure of the enforcement immunity if what was being sought was a Writ of Control was incorrect. The Commercial Court Guide (11th ed) makes it clear that matters of execution are referred automatically to a Queen’s Bench Master. Paragraphs 22.98 to 22.100 of the Queen’s Bench Guide (8th ed) provide that (i) before any Writ of Control will be issued against a State, a Master must be informed in writing and their direction sought, (ii) the Master will then notify the FCDO and allow time for the FCDO to furnish further information relevant to the decision, and (iii) the Master would then decide whether to issue the Writ. Further and in any event, it would be the professional duty of the applicant to raise the issue of immunity with the court when applying for a Writ of Control.

(7)
The fact that General Dynamics also sought to dispense with service added nothing relevant. It was not, in fact, the case that the order sought would have meant that no one at Libya knew about the order, because Teare J had ordered that it had to be couriered to three addresses. In any event, the position remained that it was not necessary at the stage of seeking the orders under s. 101 Arbitration Act to refer to possible immunity in respect of methods of enforcement. That would still have arisen only when specific methods of enforcement had been identified.

Discussion

30.
I agree with Mr Toledano QC that it would have been preferable if there had been an express mention of the immunity accorded to Libya under s. 1 SIA, coupled with an explanation as to why it was said that it was inapplicable. I consider that that is desirable in any case in which it is sought to obtain relief against a State ex parte.

31.
I do not, however, consider that the failure to refer to the immunity under s. 1 SIA to have been, in the present case, of significant importance. The orders which were being sought were (i) under s. 101 Arbitration Act, and (ii) dispensing with service. In relation to (ii) there was detailed reference to s. 12 SIA. That part of the resulting Teare J Order has been set aside. In relation to (i), the relevant immunity (if applicable) would be Libya's adjudicative immunity, not its immunities from enforcement by execution under s. 13 SIA. Libya had, however, no adjudicative immunity which meant that orders under s. 101 Arbitration Act could not be made against it, because s. 9 SIA was applicable.

32.
Thus, in Svenska Petroleum Exploration v Lithuania (No. 2), Moore-Bick LJ, giving the judgment of the court, said at [117]:

'The judge held that there was no basis for construing section 9 of the State Immunity Act (particularly when viewed in the context of the provisions of section 13 dealing with execution) as excluding proceedings relating to the enforcement of a foreign arbitration award. We think that is right. Arbitration is a consensual procedure and the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective. Mr Shackleton accepted that proceedings in support of the arbitral process itself as well as proceedings challenging the award fall within section 9(1), but submitted that proceedings to enforce the award do not. We are unable to accept that distinction. The Act itself draws a distinction between proceedings which relate to the arbitration (section 9) and process in respect of property for the enforcement of the award (section 13). In our view an application under section 101(2) of the Arbitration Act 1996 for leave to enforce an award as a judgment is, as subsection (1) recognises, one aspect of its recognition and as such is the final stage in rendering the arbitral procedure effective. **Enforcement by execution on property belonging to the state is another matter, as section 13 makes clear**.' (emphasis added)

33.
I accept that the failure to refer to the immunity in s. 1 SIA was not deliberate. I consider that, rather, it came about precisely because it was not considered as a reason why the orders sought should not be granted. This was not a case in which there had ever been a dispute as to the applicability of the arbitration clause. Libya had participated, and counterclaimed, in the arbitration. It had done nothing to suggest that it would contend that, notwithstanding the arbitration agreement, it could claim sovereign immunity in respect of the recognition of the Award. Up to the present, it has still not suggested that there is any argument to that effect. Had there been grounds for General Dynamics to believe that state immunity would be asserted as reasons why orders should not be made under s. 101 Arbitration Act, then it would undoubtedly have been very important for these to be set out in the application, but there were not; and, as I have said, it was doubtless largely for that very reason that nothing was said about it.

34.

At least in the usual case, including here, it will not be necessary for an applicant for orders under s. 101 Arbitration Act in respect of an award against a State to raise the issue of the immunities which the State may have pursuant to s. 13 SIA in respect of enforcement by execution. The issues which may arise in relation to execution will, at least ordinarily, arise at a subsequent stage, and it will generally be premature to deal with them at the stage of recognition of the award, and entry of a judgment in its terms. Any issues as to immunity from execution will need to be considered in relation to what assets it will be sought to execute against. There are clear reasons why that exercise should not be undertaken at the stage of recognition of the award against the State. These include those identified in the recent decision of the High Court of New Zealand in Sodexo Pass International SAS v Hungary [2021] NZHC 371. At [58] Cooke J said this:

'But there are two interrelated reasons why the identification of assets that may be the subject of execution steps would not be appropriate at this stage:

(a) Requiring a party in the position of Sodexo to identify the assets it wishes to proceed against could potentially prejudice its ability to do so. Steps could be taken in an attempt to avoid such execution. So a requirement to set out how execution is intended to proceed would likely prejudice the efficacy of the enforcement regime contemplated by the [ICSID] Convention. …

(b) Recognising the award should be a straightforward step. A more extensive exercise which involves an identification of the assets that may be in the jurisdiction, and arguments over whether those assets could be the subject of state immunity, should not arise at the recognition stage. Any such arguments can properly take place later under domestic law with respect to particular execution steps and particular assets. To require more would again undermine the efficacy of the enforcement steps contemplated by the Convention.'

35.
Libya's argument as to the possibility of a claimant proceeding, having obtained orders under s. 101 Arbitration Act ex parte, to execution by way of a Writ of Control, without the need to bring the State's immunities under s.13 SIA to the attention of the Court, appeared to me to be an ingenious but unrealistic one. In the first place, the possibility would only arise if the State did not apply, within the time allotted, to set aside the orders pursuant to s. 101 Arbitration Act.

36.
Moreover, the argument rests on the contention that, because the Claim Form was issued in the Commercial Court, a Writ of Control would be issued without any judicial intervention. Libya accepted, as I understood it, that the procedure in the Queen's Bench Division, other than in the Admiralty and Commercial Courts, would be that in paragraphs 22.98 to 22.100 of the Queen's Bench Guide (8th ed). It also recognised that the Commercial Court Guide, (11th ed.), provides, in Part K.3, that proceedings for the enforcement of judgments or orders for the payment of money given in the Commercial Court will be referred automatically to a Master of the Queen's Bench Division or a District Judge (K3.1(a)), and that applications in connection with the enforcement of a judgment or order for the payment of money will be allocated by the Admiralty and Commercial Court Registry to the Admiralty Registrar or to another of the Queen's Bench Masters (K3.1(b)). It argued, however, that the Queen's Bench Guide would be irrelevant, because A1.6 of the Commercial Court Guide states that other Court Guides do not apply to proceedings in the Commercial Court; and that the provisions of K3.1 of the Commercial Court Guide would not result in any judicial involvement. This was because, Libya said, even though there would be automatic assignment of enforcement proceedings to a Queen's Bench Master or District Judge in accordance with K3.1(a), the process of

obtaining a Writ of Control set out in CPR 83.9, taken with Schedule 12 to the Tribunals, Courts and Enforcement Act 2007, would not involve an 'application' to the Court.

37.
I accept that, had a party in the position of General Dynamics conceived a strategy to make an ex parte application for orders under s. 101 Arbitration Act in respect of an award against a State and then, in the absence of an application by the State to set those orders aside, to proceed to request the issue of a Writ of Control without bringing before the court the potential applicability of the State's immunities from execution, that should be disclosed at the ex parte hearing. In the present case, however, there is no evidence that General Dynamics had conceived of such a strategy, and indeed I suspect that it is one which had not been thought of until it was thought of by those representing Libya on this application.

38.
Moreover, my understanding is that, in fact, if a request for the issue of a Writ of Control against a State is made to the Admiralty and Commercial Court Registry, it will, if identified as such, be referred to a Queen's Bench Master or to the Foreign Process Section and be dealt with in accordance with the procedure in paragraphs 22.98 to 22.100 of the Queen's Bench Guide. It may be that consideration should be given to its being spelled out that this is the appropriate procedure when a further edition of the Commercial Court Guide is produced; or that a Writ of Control against the property of a State should be one of the Writs or warrants in respect of which permission for issue is required under CPR 83.2.

39.
In any event, I would agree with Mr Toledano that it would be a professional obligation on the part of litigants where a State had not sought to set aside orders under s. 101 Arbitration Act, and the issue of a Writ of Control was to be sought in respect of property of the State, specifically to bring to the court's attention at that stage the fact that execution was being sought against a State, and that there were potentially applicable immunities from enforcement.

40.
For these reasons I do not consider that the possibility of the subsequent issue of a Writ of Control against Libya's property was a matter which enhanced the need for Teare J to be informed about the immunity in s. 1 SIA.

41.
The other strand of Mr Bastin's argument in relation to this ground was to the effect that non-disclosure of Libya's immunity under s. 1 SIA was the more significant because General Dynamics had also been seeking orders dispensing with service of the Claim Form and related documents, leading to a greater possibility of the State being unaware of the proceedings, and of its s. 13 SIA immunities not being considered or given effect to. I do not consider that this point adds any significant force to those already considered. It is correct, as the Supreme Court has determined, that it was not permissible to dispense with service pursuant to s. 12 SIA; and that has led to the setting aside of those parts of the Teare J Order which dealt with service. But even if dispensing with s. 12 SIA service might have impaired Libya's ability to assert any adjudicative immunity it had, the fact is that, given that no question as to the applicability of s. 9 SIA had (or has) been suggested, there was no such immunity which could be asserted. Equally, the suggestion that there nevertheless needed to be disclosure of that immunity at the stage of seeking ex parte orders under s. 101 Arbitration Act because of the possibility of General Dynamics' proceeding to obtain a Writ of Control without further meaningful

court involvement is unfounded, for the reasons I have already given. The fact that orders were sought dispensing with service under s. 12 SIA does not alter that.

Non-Disclosure in relation to two 'Governments'

42.
The other matter which Libya contends was not disclosed was that there was only one recognised government in Libya. It argued that only the GNA was the government of Libya: the GNA was recognised by Her Majesty's Government; and, in accordance with the 'one voice' principle, had to be accepted as such by the courts. Accordingly, so Libya said, it was a breach of the duty of full and frank disclosure and fair presentation not to explain that there was only one Libyan government.

43.
This point was dealt with shortly at the hearing, and in my view, it has no force. The issue as to there being two 'governments' was only potentially relevant to the question of how service should be effected. It was not relevant to the issue of whether General Dynamics was entitled to substantive relief under s. 101 Arbitration Act against Libya. The parts of the Teare J Order which dealt with service have been set aside. I do not consider that, in the present case, it would be appropriate for the non-disclosure of a matter going only to service to affect the parts of the Teare J Order which consists of orders under s. 101 Arbitration Act.

44.
Further, the nature and effect of the alleged non-disclosure has to be borne in mind. Teare J was informed that the GNA was internationally recognised including by the United Nations, although it is true that he was not told that the GNA was recognised by Her Majesty's Government. An argument was made that the existence of two 'governments' made it difficult to know how service in accordance with s. 12 SIA could be effected. That was wrong, but it was not in fact the basis for Teare J's decision to dispense with service, as recognised by Males LJ in his judgment of 18 January 2019 [2019] EWHC 64 (Comm) at [3]. These points indicate both that the alleged non-disclosure was a narrow one, and that it obtained no significant advantage for General Dynamics, even before the parts of the Teare J Order relating to service were set aside.

Conclusion

45.
As I have set out, I agree that it would have been preferable for General Dynamics to have set out the s. 1 SIA immunity, and have referred to the s. 9 SIA exception. Because of the clarity of the applicability of s. 9 SIA, however, I do not consider that this non-disclosure was of great significance, and it has not obtained any benefit for General Dynamics which it ought not to have had. It would in my judgment be inappropriate to set aside the orders under s. 101 Arbitration Act because of it. The Court can appropriately mark the importance that it attaches to any non-disclosure by depriving General Dynamics of its costs of the application before Teare J.

46.
I do not consider that the argument that there was a material non-disclosure in relation to the 'two governments' point has any force, and would not set aside or vary the Teare J Order on that ground.

47.
Accordingly, I will set aside the Teare J Order insofar as it relates to costs. Subject to that, the application to set it aside is refused.