[2019] EWHC 1806 (Ch)

Case No: HC-2017-000156

IN THE HIGH COURT OF JUSTICE
BUSINESS PROPERTY COURTS OF
ENGLAND AND WALES
BUSINESS LIST

7 Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 31 May 2019

BEFORE:

CHIEF MASTER MARSH

BETWEEN:

MICHAEL ASHLEY AND ANOTHER

Claimants

- and -

TONY MICHAEL JIMENEZ

Defendant

MR R LISSACK QC AND MR J FARMER (instructed by Lawrence Stephens Solicitors) appeared on behalf of the Claimants
NO REPRESENTATION on behalf of the Defendant

JUDGMENT

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(Official Shorthand Writers to the Court)

1. THE CHIEF MASTER: This is my judgment on the hearing today of an application made by the claimants by which they seek an order that the court should grant a judgment on the merits of this claim in the circumstances that have pertained.

2. The application was issued on 25 March 2019 supported by a comprehensive and helpful witness statement, Mr Johns' eighth witness statement. It is necessary first of all to put the application in its relevant context. This claim was issued as long ago as 19 January 2017. The claim concerns a payment made by Mr Ashley personally to a company called South Horizon Trading Limited, which was the second defendant to the claim. There is no doubt that South Horizon was a trading entity acting as a manifestation of the first defendant, Mr Jimenez. The payment of £3 million, or more specifically the euro equivalent of that amount, was made by Mr Ashley by transfer on 13 May 2008. At the relevant time, Mr Ashley and Mr Jimenez were both friends and business associates. Both such relationships seemingly were relatively short-lived.

3. Mr Jimenez became a director and vice-president of Newcastle United Football Club in January 2008 and remained a director until the latter part of 2008. The claim as drafted comprises some seven different causes of action, but at its heart it concerns the "payment representations" that are said to be made by Mr Jimenez before the payment was made and the basis upon which the payment was received by South Horizon and ultimately received by Mr Jimenez.

4. The claim was met by a dispute as to jurisdiction and that dispute was a long time in the gestation. Ultimately it did not come on for hearing until 2 and 3 October 2018. Judgment was handed down following that hearing on 16 January 2019 and a consequentials hearing was held on 6 February 2019.

5. The orders made on that occasion were to dismiss Mr Jimenez's challenge to jurisdiction. South Horizon was successful in its application and from that point on ceased to play any part in the claim. Directions were given permitting the claimants to amend their claim and also, importantly, at paragraph 13 of the order the first defendant, Mr Jimenez, was given permission to file a further acknowledgment of service by 4 pm on 20 February 2019, and at paragraph 14 it was directed that if he

chose to do so he was required to serve any defence by 4 pm on 20 March 2019. Consequential directions were also provided in that order.

6. Mr Jimenez was ordered to pay the costs of the jurisdiction challenge and ordered to make a payment on account of £200,000 by 20 February 2019. He has not made that payment. Furthermore, and more significantly, he has not filed an acknowledgment of service pursuant to the permission given to him.

7. Herbert Smith Freehills, who acted for Mr Jimenez from the outset of the claim, have rightly said in correspondence that the effect of the order made on 6 February 2019 pursuant to CPR 11(7)(a) is that the acknowledgment of service filed by Mr Jimenez dealing with jurisdiction ceases to have effect. The consequences that arise from that rule concerning issues of service are matters I will come to shortly.

8. The hearing dealing with jurisdiction involved a comprehensive review of a substantial body of witness evidence. There were some 30 witness statements before the court. The judgment provides a review of that evidence, and in order to keep this judgment as brief as possible, I will treat paragraphs 9 to 50 of that judgment as incorporated within this judgment.

9. The issues I have to deal with today are the following. First, should the court as a matter of discretion accede to the claimants' request to give a judgment on the claim on the merits? That issue involves a consideration of the merits of the claim and matters relevant to the exercise of the court's discretion. Secondly, the court must be satisfied that the application that is before the court today has been properly served on Mr Jimenez. Thirdly, the court is asked to make provision for future service of proceedings on Mr Jimenez. Fourthly, there is the question of the terms of the orders that the court is asked to make.

10. Taking those issues in turn, should the court grant a judgment on the merits? Having regard to the background considerations, it seems to me there are seven points which can usefully be adumbrated. First, the defendant's position in this claim is that he has chosen not to file an acknowledgment of service, and although I will come to this in more detail later in this judgment, Herbert Smith Freehills have indicated that they are

no longer acting for him and they have declined to deal with further correspondence on his behalf. That is notwithstanding the fact that they remain on the record as his solicitors. Thus it is possible to forecast that the claimant will be in some practical difficulty in dealing with this claim were it to go forward.

11. Secondly, it is helpful to refer to the overriding objective, without setting out its provisions in any detail. The circumstances here are such that the court should have an eye to the proper use of court resources and to doing justice between the parties, bearing in mind the cost of requiring this case to go forward to a full trial with evidence to be called contrasted with dealing with the application as I am requested to do today.

12. Mr Lissack QC, who has appeared for Mr Ashley, has described the defendant as an "artful user and abuser of the legal system". He relies on that description of Mr Jimenez as a factor the court should take into account in having regard to the overriding objective and providing reasons for dealing with the claimants' application. The factual basis that lies behind that assertion is a matter to which I will come shortly.

13. Thirdly, there is no doubt that the court has jurisdiction in this claim. The issue of jurisdiction has been reviewed comprehensively. Permission to serve out was given. The challenge to jurisdiction on behalf of Mr Jimenez was rejected, and the fact that Mr Jimenez has chosen not to submit to the jurisdiction of the court is not a good reason for the court declining to deal with this application.

14. Fourthly, the court has had an unusually full opportunity to review the evidence brought forward by both parties. Mr Jimenez took the opportunity to provide several batches of evidence at different times, and the period of time between the issue of his application and its hearing clearly shows that he had a more than adequate opportunity to provide all the evidence that he wished.

15. Fifthly, it is undoubtedly the case that the court has power to deal with the matter as the claimant has requested. I have been referred to a number of authorities. It is unnecessary to cite them but I have in mind in particular the decision of Flaux J as he then was in *Concept Oil Services Limited v En-Gin Group LLP and Others* [2013] EWHC 1897 (Comm).

16. Sixthly, there is plainly concern on the part of the claimant, and rightly so, about future issues of enforcement, and it is appropriate that the court has in mind that a judgment that deals with the merits of the claim may be easier to enforce than a judgment given under CPR Part 24 or a judgment under the provisions permitting judgment in default.

17. Seventhly, Mr Ashley has helpfully limited the causes of action upon which he wishes the court to give a judgment on the merits to two of the seven causes of action that are pleaded. First, the claim in deceit, and secondly, the claim alleging that the funds paid by Mr Ashley were held subject to a Quistclose trust.

18. It seems to me that all those considerations indicate very clearly that this is a suitable case for the court to deal with the claim on the merits at this stage. I now turn to the merits themselves and provide a brief evaluation of the causes of action and the evidence that lies behind them. I do so repeating what I have said already, that my earlier judgment provides a full review of the relevant facts.

19. There is no real difficulty with the principles that lie behind a claim in deceit. Mr Ashley relies on representations made orally by Mr Jimenez which are set out in paragraph 6 of the Amended Particulars of Claim. His case is that those representations were false and that Mr Jimenez made them either knowing them to be false or being reckless as to the truth, further that they were made intending that Mr Ashley would rely on them and that he in fact did so. The loss of course is the £3 million that Mr Ashley paid over.

20. The claim that a Quistclose trust came into being was a matter discussed in my earlier judgment. In substance it is a claim which is the mirror image of the claim in deceit. Mr Ashley's case is that he paid over the euro equivalent of £3 million on the clear basis that the recipient, in the first instance South Horizon but ultimately Mr Jimenez, was not entitled to use those monies for any other purpose than to provide an investment in the scheme which is referred to as Les Bordes. The purpose was to obtain for Mr Ashley a shareholding in Les Bordes (Cyprus) Limited. Put another way, the payment was not made on the basis that it was money which South Horizon or Mr Jimenez were entitled to freely dispose of at their will when it was impressed with a trust, and it is said that Mr Jimenez was at least one of the trustees of those funds.

21. The court has in mind that a degree of caution is needed for two particular reasons. First, the events which give rise to this claim now date back over more than 11 years. Inevitably the recollections of individuals will have dimmed somewhat, particularly where it is said that a claim arises at least in part as a result of oral discussions. The second reason for caution is that despite Mr Jimenez having had a full opportunity to provide his case for the purposes of the jurisdiction hearing, none of the evidence has been fully tested. I have both those considerations in mind, but for the reasons I will give I am entirely satisfied that this is a proper case in which the court can safely grant judgment on the merits in favour of Mr Ashley.

22. Amongst other considerations that I have in mind is the fact that there are a considerable number of contemporaneous documents which largely comprise exchanges of emails between two witnesses. They are Mr Christopher Mort who is a partner with Freshfields Bruckhaus Deringer LLP, who was working on secondment to St James Holdings at the time, and Mr Graham Muir, who was the managing partner of the Dubai office of Norton Rose until September 2007. Their exchanges of emails taken with the undisputed fact of payment by Mr Ashley of £3 million provide the bedrock of the claim. Those emails were reviewed comprehensively in my earlier judgment, and it is unnecessary to repeat them or summarise them here.

23. Mr Ashley has provided a number of witness statements, and in substance taken together, it is possible to derive from his evidence clear and unequivocal support for his case that representations were made to him orally by Mr Jimenez in terms set out in paragraph 6 of the Amended Particulars of Claim. Support for those representations, in the sense that Mr Ashley's assertions have real credibility, can be found in particular from emails passing between Mr Muir and Mr Mort on 31 March 2008 and 12 May 2008 (those emails preceded the payment) and furthermore, from a document dated 3 September 2008, that is after the payment, which asserts in terms on behalf of Mr Jimenez and South Horizon that the investment had been made on behalf of Mr Ashley. Those emails bookend the payment and provide adequate evidence that enable the court to find on the balance of probabilities that the representations were made.

24. There is in the circumstances here no difficulty in concluding that Mr Ashley relied on those representations. He is an experienced businessman, and it is plainly entirely understandable that he would wish to obtain assurances about, put simply, what he was getting for his money.

25. A long period of time passed between the payment being made by Mr Ashley and the institution of these proceedings. Mr Ashley was notified of what he described as the "true position" by the outcome of a claim brought by Mr Dennis Wise, a former professional footballer, against Mr Jimenez in which Mr Wise obtained a judgment based on a similar cause of action and relating to the golf course project at Les Bordes in France. Enquiries were made by Mr Ashley's solicitors subsequently concerning the shareholding, the response to which on 26 February 2015 was that neither Mr Ashley, St James's Holdings Limited nor South Horizon is a registered shareholder or ever has been in Les Bordes (Cyprus) Limited.

26. In *Wise v Jimenez*, the deputy High Court judge, having heard evidence in full from the parties declined to accept Mr Jimenez's evidence and made a number of remarks about his credibility that were less than complimentary to him. More recently in a case called *Khakshouri v Jimenez* [2017] EWHC 3392 (QB), Green J also having heard Mr Jimenez give evidence concluded that he was an entirely unreliable witness.

27. It seems to me that the evidence that the court has before it in its totality is more than sufficient for the court to conclude on the balance of probabilities that the representations made by Mr Jimenez were false, and more significantly that when they were made Mr Jimenez knew they were false.

28. It seems inconceivable, based on the evidence, that Mr Jimenez could have believed that he was dealing with Mr Ashley in a straightforward fashion soliciting a genuine investment from him to form part of the Les Bordes project. I am satisfied on the balance of probabilities that Mr Jimenez knew that the representations were false. It also follows in case limitation were to be an issue that Mr Jimenez deliberately concealed his fraud from Mr Ashley and St James's Holdings Limited.

29. Turning to the Quistclose trust claim, it seems to me it is entirely clear for the reasons already given that the payment made by Mr Ashley was made on the basis that it was not a payment to be freely disposable by Mr Jimenez. It was paid for the specific purpose of providing the investment which I have indicated. It is not disputed in the claim that although the payment was made by Mr Ashley to South Horizon that the money was obtained by Mr Jimenez personally through the medium of South Horizon.

30. South Horizon was a company that was Mr Jimenez's alter ego. It was his property investment company. In light of Mr Jimenez having received the payment personally and, in light of the nature of South Horizon, I can conclude without difficulty that Mr Jimenez received the money as a trustee and subject to the Quistclose trust.

31. In failing to restore the money to Mr Ashley, and in using it for a purpose other than the purpose for which it was intended, Mr Jimenez committed a fraudulent breach of the Quistclose trust. That breach entitles Mr Ashley to equitable compensation in the amount of the money he paid over to Mr Jimenez.

32. I have not thus far said anything about the defences Mr Jimenez wished to bring forward. There are two planks to his defence. The first is that on his evidence on 19 May 2008, that is shortly after the payment was made, a conversation between him and Mr Ashley took place. It is summarised at paragraph 34 of my earlier judgment. In short, Mr Jimenez says that he reached an agreement with Mr Ashley that the payment had missed the deadline for the Les Bordes investment and that it should be held on account of future payments Mr Jimenez expected to receive relating to the sale of Newcastle United Football Club. Mr Jimenez says that he agreed with Mr Ashley that this arrangement would remain private between them and that they would not tell either Mr Mort or Mr Muir about the arrangement.

33. The evidence supporting this part of Mr Jimenez's case is no more than bare assertion by him. It is entirely unsupported by any of the documents. The exchanges of emails between Mr Mort and Mr Muir continued. Mr Mort dropped out of the picture subsequently. Mr Jimenez's explanation for Mr Ashley agreeing to this arrangement was that Mr Ashley was said to be intending to sack Mr Mort. However, that runs

totally contrary to the unimpeachable evidence of Mr Mort that in fact he had already told Mr Ashley and a number of others that he was proposing to resign his position.

34. I think it is fair to describe Mr Jimenez's case in this respect as a complete fantasy. I am satisfied that such a conversation never took place. It is, to be candid, absurd to think that experienced businessmen would agree to keep such an arrangement secret from their legal advisers such that even a year later Mr Muir was apparently unaware of it. I am satisfied that this conversation did not take place.

35. The second plank of Mr Jimenez's defence is based on an agreement said to have been concluded on 17 September 2008 following an incident at the Bahri Bar in Dubai. The veracity of this agreement is a matter considered extensively in my earlier judgment, and in particular there are six points set out at paragraph 74 of that judgment which cast very considerable doubt on the 17 September 2008 document. There is very strong handwriting evidence from Mr Radley, which he describes as being conclusive, to the effect that Mr Ashley did not sign that agreement. There are numerous other concerns about it, not just to do with its late production but the fact that the agreement on its face is inconsistent with a position previously adopted by Mr Jimenez. It is also inherently improbable that Mr Ashley should have been so grateful to Mr Jimenez for the services he claims to have provided that he was willing to give him £10 million for such services. Last but not least, the evidence about the timing of the services said to have been provided by Mr Jimenez does not fit with the unimpeachable evidence of Mr Sturman QC and Mr Cadman of Russell-Cooke, which is summarised at paragraph 74(6) of my judgment.

36. I am satisfied on the balance of probabilities that the 17 September 2008 agreement is a forgery prepared by Mr Jimenez for the purposes of bolstering his defence in the claim. It is a false document. Mr Jimenez provided a number of witness statements from individuals supporting his claim. One batch of witness statements sought to persuade the court that the initial dealings between Mr Ashley and Mr Jimenez took place in September 2007 rather than the early part of 2008, and that the conversation took place in New York rather than London. That itself is no longer an issue that is of great significance, however, I can say I am unable to accept the evidence of Mr Bonacci, Mr Papadopoulos and Ms Christo relating to that issue. Inconveniently perhaps for them,

despite assertions that they were employed by South Horizon during the period from September to the end of 2007, South Horizon was not in fact formed until 31 December 2007. Ms Christo, for example, gives evidence of writing a letter sent on 14 December 2007 on behalf of South Horizon to Mr Ashley saying:

> "As recently agreed with Mr Tony Jimenez, would you please send the £6 million investment funds for the above projects as soon as possible? Do not hesitate to contact us if you need further information."

The notion that such a letter would be sent by post from Cyprus to Mr Ashley by a junior employee concerning an investment of £6 million is plainly absurd. Such a letter I am satisfied was not sent, not least because the company on whose behalf it was purported to be sent did not exist at the material time.

37. Mr Jimenez also provided a batch of witness statements seeking to explain the late discovery of the 17 September 2008 agreement. Such evidence, however, is entirely implausible. Yet again Ms Christo is said to have written a letter to Mr Ashley sent by post from Cyprus referring to this agreement. Plainly that letter was convenient. However, the evidence about late discovery of the 17 September 2008 agreement is internally inconsistent. The date on which Mr Michael claims to have come across the document does not fit with the objective facts that are available, and importantly the handwriting examiner used by Mr Jimenez, Mr Bah, provides evidence which I am satisfied shows that enquiries were made about obtaining a report on the 17 September 2008 agreement some months before it was said to have been discovered.

38. None of this evidence comes anywhere near to helping Mr Jimenez, and I am satisfied that it can safely be discounted. I am, therefore, content to hold that Mr Ashley has made out his case both in respect of the claim in deceit and the claim that there was a breach of the Quistclose trust under which Mr Jimenez became the trustee of the euro equivalent of £3 million.

39. Mr Ashley invites the court to award interest on a compound basis. The calculation of interest that I have been provided with in fact shows that there is not a very substantial

difference between compound and simple interest. Be that as it may, I am satisfied in this case not only that the court has power to award compound interest but that it is just to do so in light of the fraudulent conduct I have found on the part of Mr Jimenez.

40. As to costs, it is plainly right that an order for costs in respect of the claim should be made against Mr Jimenez and I will so order, such costs to be the subject of a detailed assessment on the standard basis.

41. I now turn to deal with the service issue. As will be apparent from what has gone before, I am satisfied that the claimant's application has been properly served. It is, however, necessary to explain that conclusion in some detail. Furthermore, I am requested and I consider it appropriate to make an alternative order in case I am wrong on the primary ground and also to make provision for future service.

42. The starting point is, as I indicated earlier, that pursuant to CPR 11.7(a) the acknowledgment of service filed by Herbert Smith Freehills ceased to have effect on the making of the order on 6 February 2019. Herbert Smith Freehills have expressed the view that this has the consequence that they are no longer required to receive documents on behalf of Mr Jimenez, and that they have ceased to be his address for service. I consider that the conclusion they have reached is incorrect.

43. The two provisions in particular that are relevant are CPR 6.23 and in passing 6.24 and CPR 42. CPR 6.23 requires a party to proceedings to give an address for service. The remaining provisions of that rule make provision about where that address should be. It is to my mind quite clear that Mr Jimenez remains a party to these proceedings. He is required to provide an address for service. CPR 6.24 provides that where the address for service of a party changes, that party must give notice in writing of the change as soon as it has taken place to the court and to every other party. The court has not received notification from Mr Jimenez or from Herbert Smith Freehills that his address for service has changed.

44. That provision can helpfully be considered in light of CPR 42. This is an important rule, because where a solicitor has, to use the usual expression "gone on the court record" the other party to the claim knows that it may, whilst the solicitor remains on

the record, always have a means by which documents can be served throughout the course of the proceedings. This enables litigation to be conducted efficiently and it minimises disputes about service of documents, be they formal steps under the CPR or routine correspondence.

45. Under CPR 42.2, a solicitor is under a duty to give notice of change. I do not read into this judgment the provisions in detail, but it is I think notable that it mirrors CPR 6.24, and it is I think of significance that there is a duty on the solicitor to give such notice. The core provision is contained in CPR 42.1, which provides that:

> "Where the address for service of a party is the business address of that party's solicitor, the solicitor will be considered to be acting for that party until the provisions of this Part have been complied with."

That is a reference to both CPR 42.2 and CPR 42.3. Under the latter, "A solicitor may apply to the court for an order declaring that he has ceased to be the solicitor acting for the party." That will usually be based on the termination of the retainer for one reason or another with the solicitor's client. No such application has been made by Herbert Smith Freehills in this case.

46. I am satisfied that there is no reason to construe the rules to which I have referred as leading to the conclusion that upon the effect described in CPR 11(7) taking place the solicitor automatically ceases to be the address for service of documents of their client. An acknowledgment of service is a formal step in the claim which involves much more than merely providing an address for service, although that is an important consideration as is explained in paragraph 3 of Practice Direction 10. It is not, however, the only matter that is dealt with in the acknowledgment of service. It seems to me that properly construed the position is that if a solicitor becomes the address for service of its client for the purposes of disputing jurisdiction, the solicitor must do more than merely notify the other party that they are no longer acting. If they are to cease to be the address for service of their client, they must apply to the court for an order declaring that they have ceased to act, or notice of change must be given. Unless and until one of those two steps occurs, the solicitor remains on the record and the proper address for service of the defendant.

47. It is I think unnecessary for me to go through the correspondence that has taken place in this case. I have summarised the position adopted by Herbert Smith Freehills, and for the reasons I have given I am satisfied that they are not correct and that they remain the solicitors on the record. It follows that the provision of documents to them by Lawrence Stephens Solicitors, in particular the application I am now dealing with, provided proper service in accordance with the CPR.

48. There is, however, a secondary application, and I am asked to make an order to the effect that, and this is in addition to the first order, leaving documents at the defendant's address, Grosvenor House Apartments in Dubai, constitutes good service of documents on Mr Jimenez and that such documents are deemed served on Mr Jimenez on 28 April 2019. There can be no doubt that this is the appropriate address for Mr Jimenez. There are two reasons for reaching that conclusion. First, Herbert Smith Freehills in an email dated 26 March 2019 stated that was his address and requested that documents should be served on him there. Secondly, Lawrence Stephens have undertaken through local agents careful enquiries, and these are summarised in Mr Johns' ninth statement. It is possible to be satisfied based on that evidence that the address is the current address for Mr Jimenez and that documents that are left at reception in that block will reach him.

49. I am, therefore, asked to make an order applying the power in CPR 6.15, which gives the court a power if it appears there was a good reason to do so to permit service by an alternative method. Care is needed when making such orders for service of documents in another jurisdiction. There is an applicable service treaty as between Dubai and the United Kingdom, and caution is required to avoid the treaty obligations being run roughshod over by use of CPR 6.15 in an appropriate case. The evidence here is that if documents are served via the treaty route it would take some six months for the documents to reach Mr Jimenez.

50. In the case of service of a claim, in general it will be inappropriate to direct service by alternative means merely because there will be a delay. However, it seems to me that the position here is somewhat different. The court is seized of this claim. Permission to serve out on Mr Jimenez was given in 2017, and the claim has proceeded for the last two years with solicitors on the record in London. It would be in my judgment quite

wrong, and would defeat the interests of justice in this jurisdiction, if the court were to place the treaty obligation above that of the interests of justice by requiring service by the treaty.

51. There is authority, if it is required, indicating that in other circumstances judges have adopted a similar course of action. *Bill Kenwright Limited v Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB) is but one example of such a decision. I would add that according to Davidsons, who are the local solicitors Mr Ashley has retained in the UAE, the method of service involving leaving documents for a party at an address is not unknown in the United Arab Emirates and is not a method of service which would be regarded as being unlawful.

52. It is appropriate to make this order as an alternative rather than an addition to the first order relating to service at Herbert Smith Freehills's address. I will, therefore, grant declarations confirming that service has been properly effected of this application and of the application for a charging order by both of the methods that are set out in paragraphs 1 and 2 of the draft order.

53. Furthermore, it is plainly right that the court should look at the matter prospectively, and I am satisfied that it is appropriate to make an order permitting the claimants to serve Mr Jimenez out of the jurisdiction with any documents that relate to this claim by leaving them at his address in Dubai or by posting them to him at that address. The two orders that I am making today should also be served on Mr Jimenez in accordance with that provision.

54. As an addendum, I am satisfied as to two matters. First, it is appropriate that Mr Jimenez should pay the costs of the service application. The application became necessary because of what I have found to be a bad point taken by Herbert Smith Freehills on behalf of Mr Jimenez, and it was in any event appropriate for Mr Ashley to seek to have certainty about service of the application.

55. The second point concerns the basis of the order for costs. The court has power to award costs on the indemnity basis where the circumstances are out of the norm. It seems to me that the circumstances here can certainly be regarded as falling within that

class. Mr Jimenez having enthusiastically participated in these proceedings so far as jurisdiction is concerned has chosen not to participate subsequently and, furthermore, he has gone out of his way to create difficulty for Mr Ashley in relation to service. That, allied with the bad point taken by Herbert Smith Freehills, takes the case out of the norm and I consider in the exercise of my discretion it is appropriate to award costs of the service application on the indemnity basis.