Neutral Citation Number: [2019] EWHC 89 (Ch)

Case No: HC-2017-001895

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 24/01/2019

Before:

CHIEF MASTER MARSH

- -

Between:

PUNJAB NATIONAL BANK (INTERNATIONAL) LIMITED	**Claimant**
- and -	
(1) RAVI SRINIVASAN	
(2) TRISHE RESOURCES INC (USA)	
(3) NARASIMHAN RAMKHUMAR	
(4) VATHSALA RANGANATHAN	
(5) PESCO BEAM ENVIRONMENTAL SOLUTIONS INC (USA)	
(6) PESCO BEAM ENVIRONMENTAL SOLUTIONS PRIVATE LIMITED	
(7) SHANKAR ANANTHARAMAN	
(8) LUKE STAENGL	
(9) ANANTHARAM SUBRAMAMIUM	**Defendants**

Jacqueline A. Perry QC and Lee Schama (instructed by **Cubism Law**) for the **Claimant**
Nicholas Vineall QC and Brian Dye (instructed by **Zaiwalla & Co**) for the **1st, 2nd and 4th to 9th Defendants**
Karishma Vora (instructed by **Marsans Solicitors and Advocates**) for the **3rd Defendant**

Hearing dates: 4, 5 and 25 October 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

CHIEF MASTER MARSH

Chief Master Marsh:

1. The claimant is a bank based in London. The claim concerns loans made by the claimant between 29 March 2011 and 1 December 2014 totalling $45 million for oil re-refining and wind energy generating projects in the USA. There were eight loans which fall into three broad categories:

   (1) **SEPL Loans**

   Southeastern Petroleum LLC ("SEPL") is based in South Carolina, USA. There were three loans to SEPL: $17 million was lent on 29 March 2011, $1.5 million on 14 October 2011 and $1.5 million on 25 June 2012. SEPL is not a party to this claim. The loan for $17 million was a syndicated loan advanced by Bank of Baroda which is described in the loan documentation as the Security Trustee.

   (2) **Pesco Loans**

   Pesco Beam Environmental Solutions Inc ("Pesco USA") is based in Virginia, USA. There were two loans to Pesco USA: $10 million was lent on 2 April 2012 and $2 million on 1 December 2014. Pesco USA is the 5th defendant.

   Trishe Loans

   (3) Trishe Wind Energy Inc ("Trishe Wind") is based in Delaware, USA. There were two loans to Trishe Wind: $6 million was lent on 29 June 2012 and $4 million on 13 February 2013. Trishe Wind is in liquidation and is not a party to this claim.

   Trishe Resources Inc ("Trishe Resources") is also based in Delaware, USA. There was one loan to Trishe Resources for $3 million on 21 July 2014. Trishe Resources is the 2nd defendant. Trishe Resources is said by the claimant to have adopted the liabilities of Trishe Wind although the basis for this assertion is not clear.

2. The loans are subject to various guarantees and alleged guarantees given by Pesco USA, Pesco Beam Environmental Solutions Pvt Limited ("Pesco India) (the 6th defendant) and the 3rd, 4th, 7th, 8th and 9th defendants. The guarantees are said to have been provided both in guarantee documents and documents described as letters of comfort. The 1st defendant is not sued as a borrower or a guarantor. He has been joined as a party on the basis that he was according to the claimant "a shadow controlling figure" behind the overall borrowing and liable in deceit for fraudulent misrepresentations that are alleged to have been made to the claimant.

3. I append as annex 1 to this judgment a helpful spreadsheet provided by Mr Vineall QC and his junior Mr Dye which sets out a summary of the loans and which parties are said by the claimant to be liable as a guarantor. The picture is a complex one.

4. The spreadsheet also sets out the domicile of each of the borrowers and the defendants. All the individual defendants are domiciled in and resident in India with the exception of the 8th defendant who is resident in and domiciled in the USA.

5. The relationship between the borrowers, the guarantors (I use this term to include those who accept they are guarantors and those who are alleged to be guarantors), the first defendant and other associated persons (corporate and real) is not easy to summarise. For the purposes of the hearing, Mr Vineall and his junior also provided a helpful diagrammatic summary of the principal parties showing how the individuals relate to each other and relate to the corporate entities. I append the summary as annex 2.

6. The claimant has issued proceedings in two other jurisdictions:

> (1) A claim was issued on 22 March 2017 in South Carolina against the 4th to 9th defendants ("the US Claim") three months before this claim was issued on 29 June 2017. In the US Claim Bank of Baroda and Punjab Bank (International) Limited are joint claimants.
>
> (2) A claim was issued on 28 November 2017 in the Debt Recovery Tribunal in Chennai against the 2nd, 3rd and 4th defendants ("the Chennai Claim") in relation to the Trishe loans. The Chennai Claim was commenced 5 months after this claim was issued but before the claim form was amended on 15 January 2018 to join the first defendant and to re-state the claim.

7. In annex 2 the persons and entities who have been sued in South Carolina are identified by the use of italics; underlining marks those who have been sued in Chennai.

8. It is common ground that none of the defendants have any connection with England. However, the contracts were executed in England and the loans were negotiated here. The loan accounts are all held and operated in London. The claimant relies on these facts and the willingness of the borrowers and their directors to travel to London for the purposes of arranging the loans as part of its case on forum conveniens.

The Claim in outline

9. In its original form, when it was issued on 29 June 2017, eight defendants were joined as parties. When the claim form was amended on 15 January 2018, and Mr Ravi Srinivasan was joined as 1st defendant, the existing defendants were re-ordered such that, for example, Trishe Resources which was the 8th defendant became the 2nd defendant, Mr Shankar Anantharaman ("Mr Shankar") who was the first defendant became the 7th defendant, and so on. The reasons that lie behind this reshuffling of the existing parties are obscure. It was certainly very unhelpful with regard to the future conduct of the claim.

10. The endorsement on the claim form issued in June 2017 provided the following brief details of the claim:

> "Fraudulent misrepresentation by the defendants in respect of a numerous loans, further and/or alternatively, against the guarantors of the loans for enforcement of several guarantees and loan agreements. [sic] The claim is also brought for breach of contract."

The amended claim form sealed on 15 January 2018, in addition to joining Mr Srinivasan as the first defendant, re-stated the brief details of claim as follows:

> "Between 2011 and 2014 the claimant made a series of loans for the purpose of financing to projects. The said loans were drawn down in their entirety, and have now fallen due and are owing. The principals alone total US $ 36 million. [sic]
>
> Each of the defendants named was one or more of (i) a borrower, (ii) owner of a borrower, (iii) controlling mind of a borrower and/or their owner, (iv) guarantor and/or provider of an indemnity, (v) controlling mind of a guarantor and/or provider of an indemnity, (vi) maker and/or procurer of a false and/or fraudulent misrepresentation that induced one or more of the said loans and/or (vii) constructive trustee of, unjustly enriched by and/or knowing receiver of the money lent under one or more of the said loans.
>
> The claimant accordingly brings causes of action against each and all of them in, inter-alia, (i) breach of contract, (ii) misrepresentation, and (iii) deceit."

11. It will be necessary to set out the chronology of the claim in some detail. At this stage it suffices to record that there are two orders that are relevant both made without notice to the defendants:

> (1) An order dated 13 September 2017 made by me under which the claimant was given permission to serve the claim form and the particulars of claim out of the jurisdiction and permission to serve the claim form by email.
>
> (2) An order dated 9th February 2018 made by Deputy Master Bartlett giving permission to serve the claim form and the particulars of claim on the newly joined first defendant (Mr Srinivasan) out of the jurisdiction by email. In addition, the order extended time for service of the claim form and particulars of claim until 12 February 2018. Both the claim form and the particulars of claim were amended between the dates of these two orders although the fact of amendment is not mentioned in the Deputy Master's order.

12. Both orders provided that the claim form and particulars of claim were to be deemed served on the second business day after the sending of the email pursuant to CPR rule 6.14 and 7.5 (1).

The Applications

13. There are two applications both dated 25 April 2018 seeking substantially similar relief. The defendants say that the orders dated 13 September 2017 and 9 February 2018 should be set aside both as to the grant of permission to serve out of jurisdiction and service by alternative means by email. In addition, the parties apply to set aside the order extending the validity of the writ pursuant to the order of Deputy Master Bartlett. If the defendants are successful on their applications, the claimant will be unable to pursue this claim against them.

14. The 1st and 2nd and 4th to 9th defendants are represented by Zaiwalla & Co ("the Zaiwalla defendants"). Their application is principally based on the following contentions:

Ground 1: The claimant has not made out an arguable case in deceit against the defendants.

Ground 2: The claimant is not able to show that England is the most appropriate forum.

Ground 3: If Grounds 1 and 2 are assumed in favour of the claimant, the orders giving permission to serve out of the jurisdiction should be set aside for material non-disclosure, namely the failure to inform the court of the US Claim at the hearing on 13 September 2017 and the failure to inform the court at the hearing on 9 February 2018 of both the US Claim and the Chennai Claim.

Ground 4: The order dated 13 September 2017 only gave permission to serve the claim form and particulars of claim in the form that was provided to the court on that occasion. Permission to serve the amended claim form and the amended particulars of claim was not given.

Ground 5: Permission to serve by alternative means should not have been given on the authorities and, the court was materially misled as to the need for such an order.

Ground 6: The court should not have made an order extending the validity of the claim form.

Ground 7: Service was not, in any event, effected pursuant to the orders within the period of validity of the claim form.

Ground 8: So far as the SEPL loans are concerned, the claimant is not entitled to bring a claim either at all or without Bank of Baroda being a joint claimant. Further, the claimant has not made out a good arguable case against the defendants said to be liable as guarantors of the SEPL loans.

Ground 9: The claimant has not made out a good arguable case against Pesco USA and Pesco India.

Ground 10: A good arguable case has not been made out in respect of the additional causes of action that are relied on by the claimant.

15. There is considerable overlap between the way in which the Zaiwalla defendants' application is pursued and the 3rd defendant's application. However, the 3rd defendant, who is separately represented, also contends that:

(1) Service by email is not permitted under the Hague Convention, as it affects service of process in India, and this is an additional ground for setting aside service.

(2) The claimant has not shown that the 3rd defendant provided a guarantee and, therefore, that it has not shown a claim with a reasonable prospect of success.

The US claim

16. On 22 March 2017, the claimants and Bank of Baroda as joint plaintiffs issued a claim in the Court of Common Pleas of the County of Chester in the State of South Carolina. It is described as a "Verified Complaint (Non-Jury) Deficiency Demanded". The 5th to 9th defendants in this claim are all defendants to the US Claim. SEPL, Vrone Energy Private Limited (an Indian corporation), Trishe Energy Inc (a Delaware corporation) and Shriram Auto Finance (an Indian business) ("Shriram") are also defendants. Chester County is a defendant because SEPL was said to have outstanding tax liabilities owing.

17. The claim comprises a number of causes of action including foreclosure of the mortgage that secured the loan to SEPL. Relevantly, it also includes a claim against the 5th to 9th Defendants under their guarantees of lending to SEPL for a sum totalling slightly in excess of $20 million.

19. The claim makes positive assertions that the 4th, 7th, 8th and 9th defendants have addresses in India and provides addresses for them in India. The claim was subsequently served on the defendants with addresses in India pursuant to requests made under the Hague Convention for service to be effected in accordance with Article 5, namely by a method that is prescribed by Indian law. None of the defendants responded to the US Claim.

The Chennai Claim

20. The Chennai Claim was issued before the Debt Recovery Tribunal in Chennai ("the DRT") by the claimant on 28 November 2017. The 2nd, 3rd and 4th defendants in this claim are defendants to the Chennai Claim. The claim documents set out the addresses in India of the 3rd and 4th defendants who are individuals and it includes an address in Chennai for the 1st defendant in his capacity as a director of a corporate defendant. The cause of action is said to have arisen in Chennai on various dates between 25 May 2012 and 23 May 2016. Claims are made against the 2nd, 3rd and 4th defendants under their guarantees totalling approximately $15.4 million. The claimant incorrectly certified that there are no claims pending "… before any court of law or any other authority …". Plainly the claimant was aware that it is a party to the US Claim.

21. The truth of the contents of the claim are verified by an Assistant General Manager of the claimant both in the claim form and an affidavit.

22. Subsequently, Trishe USA and Trishe Wind applied to the DRT for the proceedings to be rejected on the basis that the claimant had "… submitted in the courts of England that the Jurisdiction will be only United Kingdom and not any other place." The applicants went on to assert that claims under the two loan facilities ought to be tried in England. At the time of the hearing on 4 and 5 October 2018, the DRT had not ruled on the application. Shortly afterwards, on 10 October 2018, the DRT dismissed the application having determined that the claimant bank was entitled to bring a claim against Trishe USA and Trishe Wind in England and in Chennai. The claimant applied for permission to rely on the decision of the DRT, albeit the decision came after the hearing of the applications in these proceedings. In the event, the application was not opposed at a hearing held on 25 October 2018. At the same hearing the claimant applied to introduce further evidence about whether service of claims by email is permitted in India. I declined to admit the evidence on the basis that (a) no good reason was provided for the failure to serve the evidence before the hearing of the defendants'

applications, the Zaiwalla defendants having produced evidence on the subject in July 2018, and (b) I was not satisfied that the evidence was of sufficient weight to be material to the issue to which it was directed.

Witness statements

23. Sixteen witness statements were filed and three expert's reports were filed by the parties for the purposes of the two applications. It is unnecessary, however, to refer to the evidence in detail save as to discrete points concerning some of the subsidiary issues.

Chronology of the claim

24. In August 2016, about a year before the claim was issued, Cubism Law acting on behalf of the claimant, made contact with the individual defendants by email. On 7 October 2016 they sent letters of claim. In the case of the 7th defendant the letter was sent to him is his capacity as a director of the relevant companies. All the letters were sent by email but it is notable that the letters addressed to the 3rd, 4th and 9th defendants included their residential address in India. The letter to the 8th defendant, Mr Staengl, appears to include a business address for Pesco USA, the 5th defendant. The letters all include a section under the equivocal heading: "Potential Dishonest Conduct". An example of the paragraph that follows is taken from the letter to the 9th defendant:

> "A large amount of lending has been advanced to you and your family members. The ownership and control of the above three companies [there are in fact four named] is with members of your family. Large amounts of our client's lending have been diverted towards [SEPL].
>
> We are of the view that you have participated and assisted in acquiring large amounts of loans from our client with a dishonest intent. Furthermore, we are of the view that you have participated in and assisted others in diverting the loan monies for purposes which were unconnected with the terms of the lending."

25. This passage is followed by an invitation to the addressee to set out his or her version of events and to make contact with the aim of agreeing a repayment plan. The letter to the first defendant makes the assertion that he was the controlling mind of SEPL and the Trishe companies. The letter to the 4th defendant refers to a letter of comfort and a guarantee from Shriram Auto Finance and Vrone Energy Pvt Limited signed by her and asserts that when she signed the documents she knew or ought reasonably to have known that they were unable to meet their commitments if called upon by the claimant to do so.

26. I observe that the letters of claim come nowhere near what is required to particularise a serious allegation, let alone an allegation of dishonesty. For the solicitors merely to say "we are of the view that …", without following it up with a basis for the view they have reached is completely inadequate. No indication is given about the "diversion" of the loans or what is said to have been the dishonest intent.

27. The 3rd defendant strongly denied liability in his response dated 12 October 2016. He and the other recipients of the letters were asked if they were content to receive communications by email. Mr Nasir Khan of Cubism Law asked the 3rd defendant

whether he could send documents "for your perusal" by email. The 3rd defendant agreed with this suggestion and the other defendants mostly agreed to similar requests. In the case of the 8th defendant, his attorney in Virginia, USA made contact with Cubism Law although the initial contact was not followed up by either party.

28. On 29 June 2017, more than 8 months after the initial contact, the claim was issued in London. That date is more than 6 years after the date of the first loan to SEPL and a number of the guarantees that are relied on. The next loan was made in October 2011 and so it was clearly desirable for the claimant to proceed with service of the claim with expedition. A good start was made, because on 30 June 2017 an application was issued by the claimant seeking permission to serve out of the jurisdiction. The same application sought an order giving permission to serve the claim by alternative means, either by email or by fax. The application notice asserts in section 10 that the defendants (without distinguishing between corporations and individuals) "…are refusing to engage in settlement discussions and have simply walked away from this debt. It is very likely that they will evade service. Letters of claim have been served upon the Defendants". The short witness statement made by Mr Khan on 30 June 2017 said nothing further to support the assertion that the defendants were likely to evade service and did not say that Cubism Law had been in contact with some of the defendants in 2016 but no further steps were taken by English solicitors for 8 months.

29. The application notice does not specify the ground or grounds upon which the claimant was seeking permission to serve out of the jurisdiction. Mr Khan's witness statement merely refers to CPR PD 6B 3.1 without saying which of the grounds within paragraph 3.1 were relied on. The material parts of the witness statement are:

> "*Loan Agreements*
>
> 6. I now refer to a true copy of a table of all of the contractual documents at Exhibit NK2 (loan agreement, guarantees and share pledges) which have been executed between the parties. All of the loan agreements are governed by English law with England also being the preferred jurisdiction.
>
> *Guarantees*
>
> 7. The guarantees signed by D4[1] and D5[2] are also governed by English law with England also being the preferred jurisdiction.
>
> 8. The guarantees signed by D1[3], D2[4], D3[5] and D6[6] are governed by Indian law, but the jurisdiction is non-exclusive. This allows the Claimant to decide the venue of the case.
>
> *Fraudulent misrepresentation*

[1] D4 is Luke Staengl. He is D8 in the amended claim
[2] D5 is Vathsala Ranganathan. She is D4 in the amended claim
[3] D1 is Anantharam Shankar. He is D7 in the amended claim
[4] D2 is Pesco India. It is D6 in the amended claim
[5] D3 is Anantharam Subramanian. He is D9 in the amended claim
[6] D6 is Narasimham Ramkhumar. He is D3 in the amended claim

> 9. The main part of this case is fraudulent misrepresentation upon the Claimant bank. The Defendants fraudulently mislead [sic] the bank in advancing tens of millions of dollars. The fraud was on a UK bank and the misrepresentations were made in London. The Claimant alleges that all of the Defendants fraudulently misled it into advancing the money.
>
> *England the proper forum*
>
> 10. The Claimant lent money from this jurisdiction. All of the money was sent from London. The Defendants have defaulted on their commitments to repay the Claimant and, for that reason, breach has occurred within this jurisdiction and the Claimant's losses will be suffered within this jurisdiction."

30. The witness statement is not accurate where it deals with Mrs Vathsala Ranganathan. The claim against her is made under six guarantees. Three are subject to Indian law and contain no jurisdiction clause. Two are subject to Indian law and contain a non-exclusive Chennai jurisdiction clause. Only one is subject to English law and subject to a qualified English jurisdiction clause.

31. A month later, on 1 August 2017, Mr Khan of Cubism Law made telephone calls to the 1st, 7th and 8th defendants. They are recorded in a telephone attendance note, the contents of which are in part disputed by the defendants. For the purposes of the applications it is unnecessary to reach any view about who has the better of the argument on the evidence.

> (1) The note records that he rang the 7th defendant (Mr Shankar) at 11.42 and then again in the afternoon and that Mr Shankar hung up. At 16.14 that day Mr Khan sent Mr Shankar an email saying he was trying to contact him and asking for the best number to reach him. He said a claim had been issued and asked whether Mr Shankar would be willing to receive court documents by email and asks for his residential address. Mr Shankar accepts that he received the email and did not reply to it. He denies he hung up to avoid speaking to Mr Khan.
>
> (2) Mr Khan spoke to Mr Srinivasan, who later became the 1st defendant. Mr Khan describes him in a witness statement as "the mastermind behind this fraudulent enterprise". Mr Khan's note records him as saying that he was happy to receive documents by email and he would forward documents to his sister who is now the 4th defendant.
>
> (3) Mr Khan spoke to the 8th defendant (Mr Staengl) and he records Mr Staengl as saying that he would receive court documents by email.

32. The application came before a Deputy Master on 2 August 2017. Mr Khan made a further witness statement dated 2 August 2017. It deals in relatively brief terms with the merits of the claim. It says: "The claimant had been cheated out of approx. £37m. Our evidence shows that this entire enterprise was fraudulent from the beginning." Such evidence is not shared with the court and in light of the claimant's subsequent struggle to articulate a claim in deceit, there must be real doubt about whether it was true. The witness statement goes on to say:

> "4. In 2011 and then I subsequent years, the Claimant granted lending for project finance to:
>
> (a) [SEPL]
>
> (b) [Pesco India]
>
> (c) [Pesco USA]
>
> (d) [Trishe Resources]
>
> 5. The contracts were all covered by English law and most of the guarantees were also covered by English law (some were covered by the law of India, though the jurisdiction was non-exclusive).
>
> …"

33. This was not an entirely accurate summary of the position. It conflates what the lenders described in paragraph 4 with the narrative in paragraph 5. SEPL was a substantial borrower but is not a party to the claim. Pesco India is a party but is not a borrower. Trishe Resources borrowed only $3 million. It is not right that most of the guarantees were subject to English law.

34. The witness statement places much emphasis on the review by the Cubism Law of thousands of emails passing between the parties and makes the point that the email addresses of the defendants are known to be current. In the section that follows, the suggestion is made that the defendants addresses are not likely to be reliable. Mr Khan says he has not been able to verify the addresses and does not know whether the addresses are "old or still live". He goes on to the express the view that at least some of the addresses may no longer be current and then says that because the scheme was fraudulent from the outset "… the best explanation for the inability to verify these addresses is that they were bogus from the outset." However, Mr Khan does not say what, if any, attempts to verify the addresses had been made. It seems likely nothing had been done and the defendants say that had the addresses been checked it would quickly have emerged that all the individual defendants had settled addresses. By contrast with the claimant's approach in this case, the claimant's attorneys in South Carolina do not appear to have had any concerns about the defendants' addresses. I would add that Mr Khan makes no attempt to distinguish between individuals and corporate defendants. Furthermore, Mr Khan goes on to refer to the telephone calls he made on 1 August 2017. It could not be said in light of his conversations with the defendants to whom he spoke that they were exhibiting signs of seeking to evade service and it is notable that contact with some of the defendants was made just the day before the further hearing.

35. Mr Schama, who appeared as junior counsel on the hearing of the defendants' applications, appeared before a Deputy Master on 2 August 2017. The application was adjourned and came before me on 4 September 2017. Mr Khan made a third witness statement dated 31 August 2017 to bolster the case for obtaining permission to serve out the jurisdiction. Mr Khan summarised all the lending including lending to SEPL which is not party. He says on several occasions that a particular defendant signed the loan agreement without explaining the significance of such signature. In fact, these

signatures were made by the individuals as officers of the company and there is no clearly pleaded claim against them in that capacity. In the concluding paragraph, he submitted that London is the most appropriate and convenient venue for the claim and says, perhaps presciently: "Otherwise, it would create an extraordinary mess in the conduct of this litigation if different parts of this case were being debated in different countries." No mention was made by him of the US Claim.

36. Mr Schama appeared again for the claimant. My note of the hearing as recorded on the court file reads:

> "See skeleton. The poc have been finalised. Copy handed up. C may wish to amend them. If they do the order giving permission will need to be amended. Submissions on the application. Claim in contract is straight forward. Claim for fraudulent misrep is less so.
>
> There are no adverse points counsel wishes to raise.
>
> Service by email is essential as current addresses for the individual defendants cannot be located. For the companies it is belt and braces.
>
> Draft order will be filed. I will read the poc. If satisfied I will make the order and give written reasons separately."

37. Particulars of claim dated 1 September 2017 were filed with the court and provided to the court at the hearing. They are verified with a statement of truth. At paragraph 60 (out of 83) in just one sentence it is said that a claim had been brought in the USA by the claimant and the Bank of Baroda against SEPL. The court was not told either in Mr Khan's witness statements, Mr Schama's skeleton arguments or at the hearings that the US Claim had been brought against some of the defendants to this claim. As my note records, Mr Schama left the court with the impression that service by email was the only practical option for the claimant. Additionally, the court was told that all the contracts upon which the claimant relied were subject to English law and exclusive English jurisdiction clauses, neither of which was correct. During the course of the hearing, Mr Schama was asked by the court whether there were any matters he should draw to the court's attention in view of the hearing taking place in the absence of the defendants. He was therefore given an express opportunity to enable the claimant to fulfil its duty of full and frank disclosure to the court.

38. The revised version of the particulars of claim which was handed up to the court on 4 September 2017 was considered subsequently and the order dated 13 September 2017 was sealed on that date. At that stage the claim was pleaded in a relatively succinct manner.

39. The claimant took no steps to serve the claim immediately. Three months later, on 13 December 2017, Mr Khan sent an email to the court to say that counsel had re-worked the particulars of claim since the hearing on 4 September 2017. The court was asked whether I would be able to review the amended pleading before the Christmas break if it were to be sent by email by 15 or 18 December 2017. The email concludes:

> "The Order to serve out of jurisdiction has already been made. The purpose for the Chief Master to consider the amended PoC would be to satisfy himself that there is sufficient merit in the case to warrant service out of jurisdiction." [sic]

40. A message was sent to Mr Khan to say that the amended pleading could be reviewed before the holiday period. However, revised draft amended particulars of claim were not filed. Instead, the claimant issued an application notice on 21 December 2017 seeking permission to serve Mr Srinivasan out of the jurisdiction, to serve him by email and for an extension of time for service of the claim form and particulars of claim until 19 January 2018. The application was a curious one because at the time it was made Mr Srinivasan was not a party to the claim. He was not joined until the claim form was amended on 15 January 2018. In any event the application was listed for hearing on 18 January 2018.

41. The application notice refers to hearing on 4 September 2017 and to the discussion with Mr Schama about the possibility of amending the particulars of claim. The application notice says: "Chief Master Marsh stated that he would like to see any amended particulars of claim before they were served out "under his order"." It is clear from the transcript of the hearing on 4 September 2017 that this mis-states the position. What Mr Schama was told was that the particulars of claim could be amended without permission and the order giving permission to serve out could be amended. Clearly the amendment to the order would involve the court satisfying itself afresh that the basis upon which the original order had been made held good.

42. The application notice refers to previous contacts with Mr Srinivasan and says he was contacted with a view to him accepting service on behalf of others. It was proposed that Mr Srinivasan would be contacted to ask him whether he would agree to accept service on himself by email and that a further witness statement would be filed. To my mind it is curious that Cubism Law were forecasting what they proposed to do rather than reporting on what they had done. Mr Srinivasan could have been asked about service of the claim in the preceding 3 months.

43. Mr Khan made two witness statements that were before Deputy Master Bartlett on 18 January 2018, his fourth and fifth statements dated respectively 16 and 18 January 2018. As on previous occasions, the statements were made immediately before the hearing.

44. The basis upon which permission to serve out of the jurisdiction was sought against Mr Srinivasan (by the time of the hearing having been joined as the first defendant) is said to the same as the other defendants. A bare summary of that case is set out in paragraph 6 of the statement with references to claims under the loans and the guarantees and the statement that: "This is essentially a case brought under fraudulent misrepresentation and deceit …". Clearly it cannot be right that the court's approach to service out would be the same against Mr Srinivasan as the other defendants because he was not a party to any loan or guarantee agreement. The only claims against him under the 18 January 2018 version of the claim was in deceit or for negligent misrepresentation.

45. Mr Khan records that he spoke to Mr Srinivasan and told him that he will be joined as a defendant. Mr Srinivasan is said by Mr Khan to have refused to provide his residential and postal address beyond the first two lines of the address (which are not

recorded in the attendance note). Mr Khan says he refused to provide the balance of it saying he could not recall it.

46. The fifth statement was produced on the day of the hearing before the Deputy Master. There is no obvious reason why it could not have been produced earlier. It provides the claimant's explanation for the application to extend time for service of the claim form. Nothing in it suggests that the claim could not have been served earlier in its original form. The explanation given was that:

> (1) New evidence had been discovered that enabled the claimant to join Mr Srinivasan as a defendant on the basis that he was the, or a, controlling mind of the borrowers and the "fraudulent enterprise".
>
> (2) On 28 November 2017, the assistant general manager of the claimant had met some of the defendants, including Mr Srinivasan, in Chennai when assurances about the money being repaid were provided.
>
> (3) Mr Srinivasan had been brokering a deal between the 2nd defendant and a third party for the sale of a wind turbine plant for $17 million with the approval of the claimant. The sale had taken place but no payment to the claimant had been made. I note that Mr Khan's fourth witness statement, made two days previously, said the claimant was intending to apply for a freezing injunction against all the defendants "as soon as their assets can be traced".

47. There are three particular features of note concerning the hearing on 18 January 2018 before the Deputy Master:

> (1) The court was provided on the day of the hearing with a revised version of the particulars of claim with a signed statement of truth dated 18 January 2018. They were not amended in a form that showed the original version and appear to have been substantially re-drafted to take account of the joinder of Mr Srinivasan. In that iteration of the claim, Mr Srinivasan is shown as the 9th defendant albeit that in the claim form sealed a few days before Mr Srinivasan is the first defendant with the other defendants shuffled to appear in a new order. The claim before the DRT in Chennai is not mentioned at all in the claim. The US Claim is referred to in paragraph 35 where it is said that:
>
> > "SEPL is the subject of court proceedings in the USA at the suit of the Claimant and the Bank of Baroda, in respect of contracts of guarantee guaranteeing the SEPL loans." [sic]
>
> Paragraph 36 goes on to refer to SEPL having had its assets seized by Chester County for non-payment of taxes. No mention is made the fact that the 4th to 9th defendants in this claim are parties to the proceedings.
>
> (2) Mr Schama did not refer to the US Claim or the Chennai Claim in his skeleton argument or at the hearing.
>
> (3) Mr Schama asked the Deputy Master for additional time to re-draft the particulars of claim again. The claimant was given 14 days in which to undertake that exercise.

48. On 1 February 2018 Mr Schama sent an email to the court with a request that it was forwarded to the Deputy Master. The email attached revised but unsigned particulars of claim in a substantially different form to any of the earlier versions. It was said that the draft had not been approved by the claimant and a request was made for the Deputy Master to specify for the purposes of the order that had been approved in principle a date for service of the claim form and a date two weeks later for service of the particulars of claim. The Deputy Master replied the same day saying that the date for service of claim form and the particulars of claim had to be the same date. He said he was willing to extend time for service until "the end of next week [9 February 2018] but not longer without an explanation of why longer is really needed."

49. On 8 February 2018 Cubism Law sent to the court by email the revised particulars of claim. They observed that there had been a "substantial re-shaping of the case". They also said that the revised statement of case had the benefit of several appendices which incorporated "the various contractual terms and representations which the Claimant alleges should not have been breached." They offered to send these appendices to the court if the Deputy Master wished to see them. Appendix 14, which runs to 70 pages, contains particulars of the fraudulent representations that are alleged to have been made to the claimant by the defendants.

50. On 9 February 2018 Cubism Law sent a draft order to the court for the Deputy Master to approve. Importantly they said:

> "The Claimant is ready to serve the pleadings upon the defendants, subject to the Master's approval. We can serve by 4pm on Monday, 12 February 2018."

51. The order was approved and sealed the same day. The order gave the claimant permission to serve the claim form and the particulars of claim out of the jurisdiction by email on the first defendant, Mr Srinivasan, pursuant to ground 9(a) of Paragraph 3.1 of Practice Direction 6B "on the basis that there is a good arguable case and a claim in tort where the damage was sustained, or will be sustained, within the jurisdiction". Under paragraph 3 of the order time for service of the "claim form" (not the amended claim form) and the particulars of claim was extended until 12 February 2018. Paragraph 5 provided that service was deemed to take place on the second business day after the sending of the email pursuant to CPR Rules 6.14 and 7.5(1).

52. On 9 February 2018 at 15.43 Cubism Law sent an email to all the defendants with the claim form and the particulars of claim and the two orders giving permission to serve out. They said they would serve the appendices to the particulars of claim in a separate email. That subsequent email was sent on 12 February 2018 at 12.38.

53. The defendants say that in accordance with the deeming provisions in the order made by Deputy Master Bartlett the claim was served on 13 February 2018 which was after the extended deadline for service specified in the order.

54. The procedural history up to the point of service is not a happy one. Mr Vineall QC who appeared for the Zaiwalla Defendants made a series of headline submissions which have considerable force:

(1) Steps that needed to be taken by the claimant invariably were left to the last moment and progress with the finalisation of the particulars of claim was both laboured and slow.

(2) The Claimant has been granted a series of indulgences from the court that include the review of versions of the particulars of claim after the hearing of the applications, a willingness to review yet another draft in the period immediately before the Christmas holiday and the very prompt way in which Deputy Master Bartlett dealt with the final version of the particulars of claim and the order sealed on 9 February 2018.

(3) The claimant did not mention the US Claim at the hearing on 4 September 2017.

(4) The claimant did not return to the court after the Chennai Claim was issued.

(5) The claimant did not come back to the court after the claim and particulars of claim were amended.

(6) No mention was made to Deputy Master Bartlett of either the US Claim or the Chennai Claim.

(7) The proceedings were served beyond the period permitted by Deputy Master Bartlett's order because the appendices had not been finalised.

The Particulars of Claim

55. The version of the particulars of claim placed before the Deputy Master on 18 January 2018 ran to 34 pages. The version sent to the defendants on 9 and 12 February 2018 comprises 52 pages plus over 200 pages of appendices. As I have observed, appendix 14 alone which purports to provide particulars of the representations made to the claimant is 70 pages long.

56. The US Claim is not mentioned at all in the final version of the particulars of claim. There is an indirect reference to the claim at paragraph 19 where it is said that the claimant believes SEPL has had its assets seized. There is no reference to the Chennai Claim. Neither of those claims include allegations of deceit. They are both based on a contractual liability to pay under the loans and guarantees.

57. The compendious and unfocused style of the pleading can be seen from its summary of the claim. After listing claims for the sums due under the loan agreements and the guarantees as the first and second heads of claim, the particulars of claim go on:

> "6. Thirdly, each of the loans was induced by fraudulent misrepresentations and/or deceit including but not limited to the guarantees, indemnities and "letters of comfort" proffered or procured by the Defendants and each of them. The said guarantees, indemnities and "letters of comfort" were fraudulent in and of themselves in that none of the obligors was willing and able to honour them yet, in reliance on them, the Claimant was thereby induced and deceived into making each of the eight loan facilities available to the Borrowers, and into continuing to

> do so. The fraudulent misrepresentations were continuing, confirmed and repeated.
>
> 7. Finally, it is averred that the Defendants and each of them in breach of contract have failed to apply the funds, or all of them, towards their authorised purposes and/or to manage the Projects in accordance with the Agreements and have instead withdrawn, transferred, converted, re-deployed and/or misappropriated the borrowed funds, and have continued to expend them notwithstanding the occurrence or subsistence of events of Default and/or Material Adverse Changes to the operations, performance and prospects of the Projects and/or the Defendants' ability to perform and any all of their obligations. [sic] Further or alternatively, the Defendants and each of them have caused or procured the same to be done on their behalf.
>
> 8. To the extent that, following disclosure, this is found to be so and that the Defendants or any of them are holding onto the Claimant's money, or property that represents it, the Claimant avers that they and each of them do so on constructive trust and/or as knowing recipients and/or have been unjustly enriched thereby, and the Claimant reserves the right to pray for the appropriate equitable relief in due course.
>
> 9. In summary, therefore, the Defendants and each of them were, in relation to the said eight loans:
>
> 9.1 Borrowers and/or their beneficial owners, directors, shadow directors and/or controlling minds;
>
> 9.2 Guarantors and/or the providers of indemnities, and/or their beneficial owners, directors, shadow directors and/or controlling minds;
>
> 9.3 The makers and/or procurers of fraudulent misrepresentations that induced and/or deceived the Claimant into making the loan facilities available; and/or
>
> 9.4 Knowing recipients and/or constructive trustees of the missing monies, and/or thereby unjustly enriched."

58. Particular attention at the hearing was focussed on the claim in deceit. However, its status in the hierarchy of claims is uncertain. The prayers for relief pursue remedies in the following order: (i) payment under the loan documents, alternatively rescission; (ii) damages; (iii) damages for fraudulent misrepresentation or under section 2 of the Misrepresentation Act 1967. It is not clear how the loan documents and guarantees could be rescinded other than on the basis of misrepresentations or, indeed, why the claimant would want to rescind those contracts and thus lose the right to pursue the borrowers and the guarantors.

59. The claim in deceit is pleaded in the broadest terms conceivable. Each of the defendants, including the corporate defendants, are said to be liable in deceit for making, procuring and/or causing the fraudulent misrepresentations that are said to have induced all 8 of the loans (paragraphs 10 to 18 of the particulars of claim). The loans were made over a period from 29 March 2011 to 1 December 2014. The notion that each defendant is liable for each representation over the entire period regardless

of which company was the borrower or defendant's connection with it is not easy to follow. It is as if the claimant has tried to shoehorn a claim in conspiracy within a claim in deceit; or the draftsman has simply lost sight of the claim that is to be pursued.

60. Paragraph 77 of the particulars of claim pleads:

> "77. During pre-contractual negotiations, from late 2010 until at least mid-2014, in order to induce and deceive the Claimant into making and/or continuing to make the said Loan Facilities available to the respective Borrowers, the Defendants and each of them made, procured and/or caused to be made on their behalf, each of the following representations:".

61. Seventeen representations follow. At paragraph 78, it is said:

> "These representations were made orally and repeated in telephone conversations and meetings and confirmed, evidenced and repeated in writing in emails sent to the Claimant, and by conduct, by the Defendants and each of them and/or procured by them, and were deemed to be repeated per the terms of all of the Loan Agreements:
>
> 78.1 at each utilisation and/or drawdown request;
>
> 78.2 on each date of each utilisation or drawdown; and/or
>
> 78.3 on the last day of each interest period."

62. The pleading goes on to say that full particulars of the written representations relied on by the Claimant are set out in Appendix 14. That appendix runs to 70 pages and adumbrates written representations over a period from 17 November 2010 to 18 November 2014. At the risk of stating the obvious, representations made after individual loans were made cannot have induced the claimant to make such loans.

63. Limited particulars are given of oral representations made in telephone conversations and meetings (or otherwise). Furthermore, there is no link made in the pleading between the representations (or one or some of them) and the loans (or one or some of them); and no link between the representations and individual defendants. There is a further layer missing because the representations are all said to have been made by the corporate defendants and the individual defendants. In the case of the corporate defendants, the representations must have been made by a person, but no details are provided in respect of any of the long list of representations.

64. What is required in relation to each allegation of misrepresentation is a pleading which identifies the defendant said to be responsible for making a particular statement of fact, to whom it was made and when, why it was false and what was the state of mind of the maker of the statement when it was made. In addition, the bank was required to make out a case on reliance to say what was relied upon, what was done and when. All these core components of a claim in deceit are absent; or if they are present, they are provided as such a high level of abstraction as to be totally inadequate.

The Zaiwalla Defendants' Application

65. I will take the submissions made by the Zaiwalla defendants in the order set out at paragraph 14 above.

66. A claimant seeking permission to serve out of the jurisdiction must satisfy the court of three things that are derived from CPR 6.37:

> (1) That there is a serious issue to be tried in relation to each cause of action in respect of each cause of action in relation to which permission is sought. Where extremely serious allegations are made, the proof to establish that there is a serious issue to be tried must be commensurate to the seriousness of the allegation.
>
> (2) That the claimant has the better of the argument that the case falls within one of the gateways specified in paragraph 3.1 of Practice Direction 6B.
>
> (3) That the courts of England and Wales are clearly the appropriate forum for the determination of the dispute and the court ought to exercise its discretion to permit service out of the jurisdiction; the court will not give permission unless it is satisfied that England and Wales is the proper place in which to bring the claim.

Ground 1

67. Particulars of claim must contain a concise statement of the facts on which the claimant relies (CPR 16.4(1)(a)) and the claim must set out any allegation of fraud (Practice Direction 16 para. 8.2(1)). There are numerous judicial statements concerning the importance of pleading allegations of fraud with care. A recent summary of the principles can be found in the judgment of Stuart-Smith J in *Portland Stone Firms and others v Barclays Bank plc* [2018] EWHC 2341 (QB) at [25] to [31]. He observes by reference to the Queen's Bench Guide that a statement of case exceeding 25 pages is regarded as exceptional and the observation that:

> "Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the court has to decide."

68. I would add a defendant must be able to understand with relative ease the case that has to be met. The function of particulars of claim are, rather obviously, to communicate to the defendant and the court what case is being made in a concise way. In my judgment, it is literally impossible for any of the defendants to this claim to know what case in deceit they have to meet due to the all-embracing manner in which the claims in deceit and misrepresentation are made out. It is not that the claimant has failed to plead sufficient facts to constitute the causes of action, or that they are not comprehensive, but rather that they are too comprehensive and not sufficiently particular. The particulars of claim fail to meet the minimum requirements that are essential. They are beyond being prolix and they are wholly unspecific in relation to each defendant.

69. I would make two additional points. First, to repeat, the letters of claim were completely inadequate. There must be real doubt about whether, when they were sent, the serious allegations that were made had been substantiated. In any event, the letters do not do so. Secondly, it is of note that in relation to the SEPL lending, the Bank of Baroda has not made similar allegations. It has pursued a straightforward claim against the defendants to the US Claim.

70. In his skeleton argument, and during the course of the hearing, Mr Vineall gave a number of specific examples of inadequacies concerning the claim in deceit. I accept the force of his observations, but I do not consider it is necessary to set them out in this judgment.

71. It follows that the claims in deceit and misrepresentation do not demonstrate a serious issue to be tried in relation to the relevant cause or causes of action. Indeed, they are vulnerable to an order striking out that part of the claim.

72. It is not alleged the first defendant has contractual liability to the claimant. The claim against him lies only in deceit or for negligent misrepresentation. It follows that the application must succeed so far as it relates to him.

Ground 2

73. The Zaiwalla Defendants submit that England is not the appropriate forum for these claims. None of the defendants have a connection with this jurisdiction. It is first necessary to summarise the lending and then to consider the jurisdiction clauses in the loan agreements and guarantees and the relevant principles of law that are applicable. Mr Vineall has helpfully identified five different types of choice of law and jurisdiction clauses amongst the many agreements:

(1) **Type 1**

The loan agreement between the Bank of Baroda and the claimant as lenders and SEPL as borrower is subject to a guarantee by Pesco USA. There is a subsidiary point concerning this loan namely whether the claimant alone has jurisdiction to sue. It is notable that the US Claim is brought in the name of both lenders and the loan agreement describes them together as the "Original Lenders" and the lenders make the facility available to SEPL albeit that their commitment sums are described separately.

Clause 38.7 provides that the governing law is English law.

Clause 38.8 provides that:

> "38.8.1 The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement … (a Dispute).
>
> 38.8.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no party will argue to the contrary.
>
> 38.8.3 This Clause 38.1 is for the benefit of the [lenders] only. As a result, no [lender] shall be prevented from taking proceedings relating to a Dispute in any

other courts with jurisdiction. To the extent allowed by law, the [lenders] may take concurrent proceedings in any number of jurisdictions."

(2) **Type 2**

The guarantee signed by the 8th defendant (Mr Staengl) dated 14 March 2012 has an English choice of law clause and provides that the 8th defendant submits to the non-exclusive jurisdiction of the High Court "but this guarantee may be enforced in any court of competent jurisdiction."

(3) **Type 3**

The guarantee provided by Pesco India, and the 7th and 9th defendants dated 24 March 2012 has an Indian choice of law clause and provides for the non-exclusive jurisdiction of the court of Chennai. The guarantee signed by the 3rd and 4th defendants dated 7 April 2012 has a similar law and jurisdiction clause.

(4) **Type 4**

The guarantee provided by the 4th defendant dated 1 March 2012 has an Indian choice of law clause and no jurisdiction clause.

(5) **Type 5**

The agreement made in March 2011 under which Trishe Energy Inc guaranteed the liabilities of SEPL has a New York choice of law clause and provides that the guarantor irrevocably submits to the jurisdiction of the courts of the State of New York and Federal Courts sitting in New York.

74. The contractual position in relation to the SEPL loans, the Trishe loans and the Pesco loans is not at all easy to summarise due to the tangle of contractual documents. I would make a prefatory remark about the letters of comfort that were signed. The claimant says they created a freestanding liability on the part of the signatory. This assertion was not the subject of submissions at the hearing. It appears to me, however, that the language used in such letters is not clearly that of an obligor. I do not consider the claimant has made out a case in respect of the letters of comfort that has a real prospect of success.

SEPL Loan

(1) The SEPL comprised three facilities which were restated twice. They are syndicated loans and Bank of Baroda is the Security Trustee. The claimant relies on guarantees given by Trishe Wind and Pesco USA. Both guarantees were in fact provided to Bank of Baroda, not the claimant and, in the case of the former, the guarantor was Trishe Energy in relation to which there is no case alleged for the second defendant having assumed its liabilities. The claimant has not made out a case that it has a real prospect of success against any other defendant.

(2) If the claimant were to be able to make out a case with reasonable prospects of success under the letters of comfort, they are not subject to the jurisdiction clause in the loan agreement and all on their face were made in India.

Trishe loans

(3) The first two Trishe loans were made to Trishe Wind Energy, Inc which is in liquidation. The claimant alleges that the 2nd defendant (Trishe Resources) took over the liabilities of Trishe Wind when the claimant provided an additional facility to the 2nd defendant on 21 July 2014. That facility contains a Type 1 jurisdiction clause which cannot accurately be described as an exclusive jurisdiction clause. The evidence relating to the second defendant taking over Trishe Wind's liabilities is thin. The facility agreement dated 21 July 2014 between the claimant and the second defendant contains a recital headed: "Background and assumption of debt". The recital states that the claimant agreed to provide a short term facility of US$3 million to the second defendant "… subject to [Trishe Resources] assuming debt of Trishe Wind Energy, Inc, in the amount of USD 11,029,361.50 as of 21 July 2014 (Assumed Debt)."

(4) The particulars of claim assert that the second defendant assumed all of Trishe Wind's liabilities, debts and obligations on 21 July 2014 without explaining the legal mechanism by which it is said to have come about. It seems to me at best the claimant has a reasonable case in respect of the sum referred to in the recital on the basis that the recital expresses a condition upon which the further loan was made. I do not consider the claimant has a reasonable prospect in respect of wider liability, particularly liability under guarantees entered into by Trishe Wind.

(5) The claimant is proceeding against the second defendant in the Chennai Claim in respect of the same liabilities as in this claim.

(6) The claimant is proceeding against the 4th defendant under three guarantees relating to the Trishe loans but only one guarantee relates to Trishe Resources. The other two relate to Trishe Wind. The jurisdiction clauses are Types 3 and 4.

Pesco loans

(7) Two loans were made to Pesco USA (the 5th defendant) for US$10 million and US$2 million respectively. They are subject to Type 1 jurisdiction clauses.

(8) Two guarantees of these facilities were provided. One was given by the 6th, 7th and 9th defendant and the other by the 8th defendant. The former is subject to a Type 3 jurisdiction clause. All the guarantors are domiciled in India and the guarantee was made in Chennai. The latter has a Type 1 jurisdiction clause and permits enforcement to be pursued in any court of competent jurisdiction.

75. A non-exclusive foreign jurisdiction clause raises a strong presumption that such jurisdiction is the forum conveniens and strong grounds are needed to justify the court in not accepting jurisdiction. A factor which will be relevant is whether the or a party with the benefit of the clause has chosen to apply it or to issue proceedings in another jurisdiction: see *Bas Capital Funding Corp v Medfinco Ltd* [2004] 1 Lloyds LR 652 at [192] and [193] per Lawrence Collins J.

76. In *BP plc v Aon Ltd* [2006] 1 Lloyds Rep 549 at [23] Colman J observed:

> "23. There can be no doubt that it is implicit in a non-exclusive jurisdiction clause that both parties accept when they agree to it that it will be appropriate for that court in the interests of justice, as distinct from obligatory to exercise jurisdiction over all disputes which may be reasonably envisaged as arising in relation to their agreement. That, however, does not go so far as saying that it is agreed in all circumstances that may in future arise the designated court will necessarily be the court where the court may most suitably be tried for the interests of all parties and the end so of justice. If that were so, the effect of such a clause would be indistinguishable from that of an exclusive jurisdiction clause. The *forum non conveniens* test would be deployed not as a flexible comparative exercise but so as to impose an inflexible constraint analogous to that imposed by contract."

77. Concurrent proceedings in separate jurisdictions are a significant factor in relation to whether the claimant can show that England is clearly the most appropriate forum. Furthermore, there is a related issue about whether maintaining separate proceedings is vexatious or oppressive. The court has power to stay claims if it considers it appropriate to do so in the interests of justice.

78. A further factor in this case is that the claimant has entered into a series of broadly related contracts with inconsistent provisions in them as the applicable law and jurisdiction. Where this is so and the claimant chooses to bring a claim joining a series of parties that are subject to different provisions, the effect of the English non-exclusive clause is diminished albeit that it remains an important factor.

79. The claimant has sought to minimise the effect of the US Claim and the Chennai Claim in its evidence. In the case of the US Claim, it says that Bank of Baroda brought the claim and the claimant was required to join in. Furthermore, the claim was intended only to secure assets following SEPL's default on paying local taxes. In the case of the Chennai Claim it is said that the claim was brought to obtain possession of a property held as security.

80. The claimant also points to two further matters. First, that the defendants did not respond to the US Claim. Nevertheless, jurisdiction in South Carolina has been taken and the US Claim continues. Inaction by the defendants, to their disadvantage, is not a ground for ignoring the US Claim when it was always open to the claimant and Bank of Baroda to discontinue the claim, a step they have declined to take. Secondly, the defendants applied in Chennai to prevent that claim from proceeding arguing that England was the place in which the claim should be pursued. They were unsuccessful and the claim continues. Again, it was open to the claimant to have acceded to the application, but it has not done so and has maintained the jurisdiction of the DRT in Chennai. It can fairly be said that the defendants have not readily submitted to the jurisdiction of the court in any of the three jurisdictions where there are proceedings.

81. There are significant factors that point towards England as an appropriate forum. The claimant is a bank based in London and the majority of the negotiations, apart from initial negotiations in the USA, took place in London. The credit committee signing off the lending is based in London and the loans were made from London and are repayable here. Against that, the defendant are all resident and domiciled either in the USA or India and the loans were for projects in the USA.

82. However, I consider that the existence of the US Claim and the Chennai Claim trumps all other countervailing factors. The claimant is not able to demonstrate that this court is clearly the most appropriate forum for these claims. There is in my judgment no good reason why those defendants should be sued in this jurisdiction as well as in the USA or India. All the more so in light of the weakness of the claim in deceit and for misrepresentation. The claimant has made its choice of the place to bring claims and I am unimpressed with its efforts to diminish the import of those claims. Whether the position is looked at from the perspective of forum conveniens or the effect on the defendants of maintaining these proceedings in addition to the foreign claims, the same answer is reached.

83. Strictly, it is unnecessary to go further. However, the application was fully argued on all the grounds put forward by the Zaiwalla Defendants and it is right that I deal with the majority of them.

Ground 3

84. On an application that is heard without notice to the other parties, the applicant is under a duty to make full and frank disclosure. The applicant must be candid and draw to the attention of the court all relevant matters regardless of whether they help or hinder the application. The duty is well-established and can be described in a number of ways including that the applicant must bring to the attention of the court "any matter which the other party, if represented, would wish the court to be made aware of" and "any features which might reasonably be thought to weigh against the order sought". There are four features which bear emphasis in this case.

    (1) It does not suffice to merely include a material point within an exhibit or to mention it within a dense statement of case: see *ABCI Bank v Banque Franco Tunisienne* [1996] 1 Lloyds Rep 485 at 491 per Waller J.

    (2) It is the knowledge of the applicant itself that is important. The duty of frankness is placed on the applicant although it is to be expected that the applicant's lawyers will take all proper steps to ensure that they are apprised of material facts. It is not an answer to a breach of the duty that the applicant's lawyers were unaware of those facts.

    (3) "The existence of overlapping proceedings in a foreign jurisdiction between the same or related parties (whether pending or prospective) is likely to be a particularly relevant matter which in normal circumstances must be disclosed, and the nondisclosure of which may well lead to the order for permission being set aside": per Lawrence Collins J in *Opthalmic Innovations International (UK) Ltd v Opthalmic Innovations International Inc* [2004] 1 Lloyds Rep 2948 at [45].

    (4) A failure to disclose a limitation defence where the court is asked to extend the period of validity of the claim form which would deprive a defendant of limitation defence will normally lead to the order being set aside: per Rix J in *The Hai Hing* [2000] 1 Lloyds Rep 300 at 308.

85. If the court considers that the duty has been breached, the court must decide whether the order should be set aside. That will involve a consideration of the circumstances in

which the breach occurred. Even a deliberate breach of the duty does not inevitably lead to the order being set aside.

86. Compliance with the duty of frankness is important and the work of the court when dealing with applications without notice is dependant upon compliance with it. As I have indicated, it is not significant whether the reason for the breach of duty lies with the claimant or the claimant's lawyers. However, the court will have regard to the circumstances in which the breach occurred and to whether it was caused by an oversight or was deliberate when deciding what outcome should result

87. The US Claim was issued some months before this claim was initiated. Mr Khan says:

> "I was aware of the case which was initiated by the Bank as well as the Bank of Baroda in relation to SEPL in South Carolina, USA. The existence of this case is mentioned in the particulars of claim. In fact, the existence of this case was also mentioned in previous PoCs (which were not served). We were open about the existence of this case."

88. I am unable to accept this attempt to justify the claimant's position. The duty of frankness requires just that. The US Claim was mentioned in the claim but its significance was concealed. If Mr Khan was aware of the claim he must have been aware that the claim included relief sought against the 4th to 9th defendants. There was plainly a duty not just to bring the existence of a claim against SEPL to the attention of the court but also its scope and how it interrelated with this claim. The passing references to the claim come nowhere near to fulfilling the claimant's duty to draw it to the attention of the court at the hearing on 4 September 2017. The failure to inform the court fully and fairly about the US Claim was a material breach of the claimant's duty of frankness.

89. The Chennai Claim cannot fairly and accurately be described as "enforcement proceedings only" and as being not being duplicative of this claim. Mr Kahn says he was aware that the claimant was considering bringing a claim in Chennai but did not know that it had been commenced. However, he should have taken steps to find out whether a claim had been issued before returning to the court. In any event, the claimant should have ensured that Mr Khan was told of the issue of the claim. The existence of the Chennai claim should have been drawn to the attention of the court at the hearing on 18 January 2018 and the failure to do so was a material breach of the claimant's duty of frankness. I note that this claim was also not drawn to the attention of the DRT in Chennai.

90. The claimant applied on 21 December 2017 to extend the period of validity of the claim from 28 December 2017 for an additional 6 months. The order made by the Deputy Master granted a much shorter extension. Undoubtedly limitation issues were engaged by that date because the contractual claim is based in part on loans dated 29 March and 14 October 2011 and the claim in deceit relies on representations made prior to those loans being made. The claimant was under a duty to draw these matters to the attention of the court fairly and squarely and it failed to do so.

91. I also have concerns about the way in which Mr Khan's evidence deals with the need for service by alternative means. First, the court should have been told that the US Claim had been served without apparent difficulty on the relevant defendants under

the Hague Convention. Secondly, it was misleading to suggest to the court that the defendants were likely to evade service. Obviously, that could not be said about the corporate defendants. As to the individual defendants, such an assertion is not supported by the facts. Reluctant to engage with liability the defendants may have been, but there was no evidence of substance to support a risk, let alone a likelihood, that service would be evaded. Indeed, the first iteration of the particulars of claim dated 1 September 2017 provided addresses for each individual defendant saying that the address provided is the current residence to the best of the claimant's knowledge. As I have observed earlier, the case put forward by the claimant about service by alternative means appears to be one that, instead of being based on evidence obtained in India about the degree of connection with the residential addresses, was self-justifying; 'there is a fraud and therefore the defendants will evade service'.

92. The failure to draw to the attention of the court the existence of the foreign claims was a serious breach of the claimant's duty to the court. The proceedings were highly material to the exercise of the court's jurisdiction to give permission to serve out of the jurisdiction. The failure taints both the order dated 4 September 2017 and the order dated 18 January 2018. Even without the additional matters to which I have referred, the failures are such that the court should set those orders aside. I do not consider they are failures which can be overlooked.

Ground 4

93. The order dated 13 September 2017 gave the claimant permission to serve "the claim form and the particulars of claim" out of the jurisdiction. Plainly the permission related to the statements of case in the form considered by the court prior to that date. Subsequently, the claimant extensively amended the claim form and the particulars of claim before they were served. The amendment goes much further than providing additional particulars of the existing claim. The claim in deceit was expanded to add additional claims.

94. There is no authority that is directly on point. The Zaiwalla Defendants rely on the pre-CPR decision of the Court of Appeal in *Trafalgar Tours Ltd v Henry* [1990] 2 Lloyds Rep 298 in support of the proposition that an order for permission to serve out only applies to the claim in the form it is when the order is granted and *ED&F Man Sugar Ltd v Lendoudis* [2008] 1 All ER 952 where Christopher Clarke J, having considered the pre-CPR authorities, concluded that they still had application, albeit in relation to facts that are not on all fours with the present case. It seems to me, however, that this aspect of the application can be decided by reference to the terms of the order the court made. Had the claimant chosen to make amendments which could properly be characterised as 'tidying up' the claim, the defendants would have been served with what was in substance the claim the court has considered and approved. The court would have satisfied itself that the claim had reasonable prospects of success and a good arguable case that one of the jurisdictional grounds was satisfied based on the witness evidence placed before it and the statement of case. Where, however, extensive amendments are made, particularly where new claims are added, the defendants are served with a claim that has not been reviewed by the court. Such a step is outside the terms of the order which authorises service of the claim form and particulars of claim in substantially the form considered by the court.

95. Whether it is necessary to refer the application back to the court depends upon the scope of the amendment. However, if the claimant does not refer the application back to the court the order is vulnerable to being set aside if the amendments are more than minor changes. In this case, in light of the observations I have made about the re-drafted particulars of claim, the failure to seek the court's approval was foolish indeed. I consider that in this case, the service of the claim form and particulars of claim on the 2nd to 9th defendants without obtaining approval from the court, was a failure to comply with the order dated 13 September 2017. This is not a triumph of formalism over substance. It is the result of the claimant acting outside the scope of the permission granted by the court in light of the extent of the amendment.

Ground 5

96. The Zaiwalla Defendants submit that the court should not have granted permission to serve them by alternative means. Both the USA and India are members of the Hague Convention Organisation and have acceded to the Service Convention. India, but not the USA, has registered objections under Article 10 to service otherwise than through its Designated Authority. It is notable that the US Claim was served under the Hague Convention without apparent difficulty or undue delay.

97. The claimant sought to rely on evidence which suggests that service in India is commonly effected by email. However, this evidence was provided after the hearing had concluded and I declined to admit it. In any event, it is doubtful whether evidence of this type is of assistance where the normal method of service is under the Hague Convention.

98. When the court gives permission to serve out of the jurisdiction it may give directions under CPR 6.37(5)(b)(i). It is this provision that provides the court with power to permit service by email, rather than CPR 6.14. There are a number of recent cases which have considered the threshold test for granting an order for service by alternative means where the claim is to be served out of the jurisdiction. In all three cases the Hague Convention was applicable. In *Flota Petrolera Ecuatoriana v Petroleos de Venezuala SA* [2017] EWHC 3630 (Comm) Leggatt J rejected the notion that being a country being a signatory to the Hague Convention meant that permission to serve by alternative means could only be ordered in exceptional circumstances. Richard Spearman QC, sitting as a Deputy Judge of the High Court, in *Koza v Akcil* [2018] EWHC 284 (Ch) reached a similar conclusion albeit that he considered in a Hague Convention case there needed to be a "good reason" for the making of such an order. David Foxton QC sitting as a Deputy Judge of the High Court in *Marashen Ltd v Kenvett Ltd* [2017] EWHC 1706 (Ch) held that permission to permit service by alternative means in a Hague Convention case should only be permitted if exceptional circumstances existed. In reaching that conclusion, after a full review of the authorities, Mr Foxton followed the two first instance decisions to which he refers in paragraph [57] of his judgment.

99. The difference between there being a good reason and a good reason based upon exceptional circumstances will lead to a different result in some cases. It seems to me that the conclusion reached by Mr Foxton is to be preferred for two reasons. First, the court should be careful to avoid watering down a treaty obligation by the application of domestic service rules. Secondly, I consider that a threshold test of "good reasons" sets the bar much too low. The application of such a test risks losing sight of the

exceptional nature of service by alternative means regardless of whether service is to be effected abroad.

100. I consider, however, on the facts of this case the difference between the two tests is immaterial. As I have already indicated, the evidence relied upon by the claimant in support of its application for service by alternative means was slight, even assuming the dispute of fact between the parties about Mr Khan's conversations in favour of the claimant. When looked at objectively there were no reasons, let alone good ones, to suppose that the defendants would evade service. The claimant did not consider this was a risk when either the US Claim or the Chennai Claim was to be served and service was effected in both cases without difficulty. Furthermore, the application was not founded on adequate research. No enquiries were made in India about the relevant defendants' links with their addresses. Had this been done, it is likely it would have established that the defendants had strong connections with the addresses which the claimant positively asserted as being their addresses supported by a statement of truth.

101. I would add that Mr Khan's evidence on this subject is not entirely satisfactory. I have concerns about an English solicitor telephoning unrepresented parties and discussing with them their preferences for communications and service of a claim. In any event, I do not think a concession made by such a party without full advice about the effect of making such a concession should be readily relied on.

102. Furthermore, in the case of Mr Staengl, he gave Mr Khan details of his lawyer in the USA and contact was made with the lawyer by email. In his case there was no basis whatever for suggesting that he would evade service. In the case of the other individual defendants the application did not provide good reasons for the order being made let alone good reasons based upon exceptional circumstances.

103. Mr Khan's evidence is that Mr Srinivasan gave only the first two lines of his address and refused to provide the balance. However, Mr Srinivasan had had dealings with the claimant in the latter part of 2017 when attempts were made to reach an accommodation. He attended at least one meeting with the claimant in Chennai and terms of a deal were agreed. This is hardly the conduct of a person who is evading service.

Ground 6

104. The Zaiwalla Defendants submit that the order granting an extension of time for service should not have been granted. The jurisprudence in relation to an application to extend the period for service under CPR 7.6 is well established following the decisions of the Court of Appeal in *Hashtroodi v Hancock* [2004] 3 All ER 530, *Collier v Williams* [2006] 1 WLR 1945 and *Hoddinott v Persimmon Homes* [2007] EWCA Civ 1203. A convenient summary of the principles can be found in the judgment of Tugendhat J in *Hallam Estates Ltd v Baker* [2012] EWHC 1046 (QB) at [12]. The principle that is of immediate application is that the court should normally only exercise its power to extend the period of service where the extension is needed due to issues relating to service. Where, for example, the claimant has taken timely steps to serve the claim but has been thwarted by events beyond its control the court will normally grant an extension. Delays in the process of effecting service under the Hague Convention are a common, and usually a good, reason for granting an extension.

105. In this case, the claimant took no steps to serve the 2nd to 9th defendants until after obtaining permission to serve the 1st defendant. There was nothing to inhibit service on the 2nd to 9th defendants from grant of the order on 13 September 2017. It was the claimant's choice to join Mr Srinivasan to this claim, rather than issue a fresh claim against him, and its choice to undertake an extensive amendment to the claim. I would add that the process of completing the claim took a surprisingly long time in light of Cubism Law's unequivocal assertions about the claim in the letters of claim sent in 2016.

106. It seems to me that the claimant and its advisers lost sight of the need to take steps to serve the claim promptly. Their reliance upon CPR 7.6 was ill-founded.

Ground 7

107. The order made by the Deputy Master granted an extension of time for service of the claim form and particulars of claim until 12 February 2018. I do not consider there is any doubt that the order relates to both documents in their amended form. The difficulty for the claimant is that the order, as drafted by the claimant, contains a deemed service provision in the following terms:

> "5. The claim form and particulars of claim shall be deemed served on the second business day after the sending of the email, pursuant to CPR Rules 6.14 and 7.5(1)."

108. The regime for service of claims within the jurisdiction was changed in 2008 and 2011. However, the rule change does not affect service of a claim form out of the jurisdiction. The hearing before Deputy Master Bartlett gave permission to serve the first defendant out of the jurisdiction and a limited extension of time for service of the claim up to 12 February 2018. The claimant wished to make some final adjustments to the claim and the Deputy Master wished to see the version of the particulars of claim that was to be served. In fact, even at this very late stage the claimant undertook what was described by Cubism Law as a substantial re-shaping of the claim. It was sent to the court on 8 February 2018, some three weeks after the hearing, and the following day a draft order was supplied. They were reviewed promptly by the Deputy Master and the order was sealed the same day. Cubism Law sent the claim form and the particulars of claim to the defendants by email that afternoon. However, they did not send the appendixes which were not sent until the following Monday 12 February 2018. The appendixes were an essential element of the claim and service was not effected until they were supplied. By virtue of the deeming provision in the order, service was deemed to be effected the following day, 13 February 2018 and thus outside the extended period.

109. The Zaiwalla Defendants rely on the decision of the Court of Appeal in *Anderton v Clwyd CC (No2)* [2002] 1 WLR 3174 where the court held that a deemed service provision created a non-rebuttable presumption that service took place on the deemed date. That decision remains good authority in relation to the CPR as it relates to service out of the jurisdiction and is binding on me.

110. Ms Perry QC who appeared for the claimant made an oral application for relief from sanctions in the course of her submissions. She submitted that the point had only been taken by the defendants in September 2018 and the court should take the view that

such a technical failure to comply with the order should be relieved. As it turned out service was doomed to fail from 9 February 2018 in light of the terms of the order. She submitted that had the court been asked at the time for a short additional extension of time, it would have been granted.

111. I do not accept that this is a suitable case in which to relieve the claimant from the effect of the order it sought. Although a formal application may not be required in every case, it seems to me in this case such an application was required to give the court an opportunity to consider the claimant's case on the application of the well-known *Mitchell* and *Denton* principles. But in any event, such an application is without merit in light of the catalogue of procedural failings on the part of the claimant.

Third Defendant

112. All the points relied upon by the Zaiwalla Defendants apply with equal force to the 3rd defendant. I will however, deal briefly with the two supplementary grounds that Ms Vora who appeared for him put forward.

113. India is a signatory to the Hague Convention subject to carve outs that were stipulated at the time of signature. Under Article 2 of the Convention, each signatory state is required to designate a Central Authority to receive requests for service from other contracting states. Under Article 5 the Central Authority itself is required to serve the document or arrange for it to be served in accordance with its internal law or by a method prescribed by the applicant, unless such a method is incompatible with the law of the state receiving the request for service. Article 10 makes for provision for service of documents by particular means "provided the State of Destination does not object".

114. India stipulated four special conditions when signing the Convention:

(1) Documents cannot be served by email.

(2) All modes of service under Article 10 were objected to. So, for example, documents cannot be served by post or through judicial officers "or other competent persons".

(3) Documents must be served via the proper authority and not through private channels.

(4) Documents cannot be served through the requesting state's diplomatic channels.

115. The stipulations made by India in relation to service do not have the effect of preventing an English court from making an order for service by alternative means, but they are factors that must be carefully considered before such an order is made. India has chosen to adopt a restricted approach to service under the Convention and this should be respected unless it provides a bar to a legitimate claim in this jurisdiction from being pursued. Whether the good reasons test or the higher test of exceptional circumstances is applied, it is plain that in the case of India a strong case

for service by alternative means will need to be made out. As I have already concluded, no such case is made out here.

116. The 3rd defendant also says that the claimant has not made out a good arguable case that he signed a guarantee. At paragraph 12 of the particulars of claim, the third defendant is described as a director and controlling mind of Trishe Resources. Unlike in the case of other individual defendants, it is not said there that he provided a guarantee. The only claim made against him is in deceit. The claimant has produced a facility letter addressed to Trishe Wind Energy Inc dated 31 January 2012 which is signed by the 3rd defendant on behalf of the borrower. He is listed as one of three persons who are to provide a guarantee. He is also named as a guarantor in the loan agreement dated 29 June 2012. The claimant is, however, unable to point to a guarantee signed by the 3rd defendant or to a link between the facility letter dated 31 January 2012 and the later loan agreement. He is not a signatory to that agreement. I consider that the 3rd defendant has the better of the argument on this point and the claimant is unable to show that it has a reasonable prospect of succeeding on a contractual claim against him.

Conclusions

117. These proceedings have had an unfortunate history. Although the applications succeed on multiple grounds, I would not wish the order in which I have dealt with them, which follows the order of precedence relied on by the Zaiwalla Defendants, to mask the importance of the duty of frankness. It is disturbing that the US Claim was not brought to the attention of the court in a plain and direct manner from the outset. It is equally disturbing that the claimant's intention to bring proceedings in Chennai was not investigated and details of the claim was not revealed to the court. I would have been willing to grant the relief that is sought in relation to service out of the jurisdiction and service by alternative means on this ground alone.

118. I will make an order setting aside the orders dated 13 September 2017 and 9 February 2018 as to service out of the jurisdiction, service by alternative means and extending the period of service of the claim form.

ANNEX 1

[Annex referred to in paragraph 3 of the judgment]

ANNEX 2

[Annex referred to in paragraph 5 of the judgment]