Neutral Citation Number: [2019] EWHC 1254 (Comm)

Case No: CL-2016-000494

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/05/2019

Before:

THE HONOURABLE MRS JUSTICE MOULDER

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Between:

(1) AVONWICK HOLDING LIMITED

Claimant

- and –

(1) AZITIO HOLDINGS LIMITED
(2) DARGAMO HOLDINGS LIMITED
(3) OLEG MKRTCHAN
(4) SERGIY TARUTA

Defendants

AND BETWEEN:

(1) DARGAMO HOLDINGS LIMITED
(2) SERGIY TARUTA

Additional Claimants

-and-

(1) AZITIO HOLDINGS LIMITED
(2) AVONWICK HOLDING LIMITED
(3) OLEG MKRTCHAN

Additional Defendants

-and-

(1) VITALI GAIDUK
(2) ROSELINK LIMITED
(3) PRANDICLE LIMITED

(4) OLENA GAIDUK
(5) GASTLY HOLDINGS LIMITED
(6) EDUARD MKRTCHAN
(7)CHRYSTALLA ARGYRIDOU
(8)ASTRELLA HOLDINGS LIMITED
(9)ETMOR INVESTMENTS LIMITED
(10) EMINENCE EQUITY S.A.
(11) MD NOMINEES LTD
(12) MELGRED LIMITED
(13) SARGIS ISRAELYAN
(14) OLGA SHCHYGOLYEVA
(15) SERGEI UDOVENKO
(16) LESHI LIMITED
(17) NEUTRAL POINT HOLDING LIMITED
(18) LANACOMO LIMITED
(19) LEADPOINT LIMITED
(20) TROTIO HOLDINGS LIMITED

Third Party Defendants

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Ms S Tolaney QC & Ms L Newton (instructed by **Reed Smith LLP**) for the **Applicants**
Mr N Pillow QC & Mr S Dhar (instructed by **Hogan Lovells International LLP**) for the **2nd & 4th Defendants**
Mr B Woolgar (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant, 1st, 3rd & 4th Third Parties**

Hearing date: 10 May 2019

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is the judgment on an application dated 14 February 2019 (the "Set Aside Application") made by the 14th and 15th defendants, Ms Shchygolyeva and Mr Udovenko, to set aside the order for alternative service made by Cockerill J on 3 January 2019 following an ex parte hearing in December 2018 (the "December Hearing").

2. There is also before the court an application (the "Validation Application") by the additional claimants, Dargamo Holdings Limited ("Dargamo") and Sergiy Taruta (the "Taruta parties") dated 13 March 2019 for an order under CPR 6.15 (2) that service of the relevant documents on Reed Smith LLP at their London offices (by sending them via email and post on 12 March 2019) amounted to good service.

Evidence

3. In support of the Set Aside Application the court has a witness statement of Benjamin Summerfield dated 14 February 2019, a solicitor in Reed Smith LLP and subsequently a witness statement in opposition to the Validation Application dated 3 April 2019.

4. In opposition to the Set Aside Application for the Taruta parties the court has a witness statement of Michael Roberts, a partner at Hogan Lovells International LLP ("Hogan Lovells"), solicitors instructed by the Taruta parties, dated 13 March 2019.

5. The claimant, Avonwick Holdings limited ("Avonwick") and the first, third and fourth Third Parties (the "Gaiduk parties") were represented at the hearing but made no substantive submissions on the applications.

Background

6. In August 2016 Avonwick brought a claim (the "Avonwick Claim") in misrepresentation, deceit and conspiracy to injure against Messrs Taruta and Mkrtchan and their corporate vehicles, Azitio Holdings Ltd ("Azitio") and Dargamo. The allegations related to the purchase price paid to the claimant for its interest in Industrial Union of Donbass ("IUD"), the sum claimed being over $1bn.

7. The Taruta parties then brought additional claims (the "Original Claims") alleging that the sale of the interest in IUD was part of a larger transaction which included the transfer by Mr Gaiduk and/or his wife and/or his companies of its interest in OJSC Ukrainian Mining and Mettalurgical Company ("UGMK") which are alleged to have been transferred to companies owned and controlled by Mr Mkrtchan or to other parties.

8. In June 2018 the Taruta parties sought to bring further claims against Oleg Mkrtchan and Azitio (the "Mkrtchan parties"), in trust and under s423 Insolvency Act 1986 (the "New Claims Applications").

9. At a hearing in September 2018 (the "September Hearing") Cockerill J granted the New Claims Applications against Oleg Mkrtchan and the 6-13th Third Parties.

10. Evidence given by Mr Braithwaite, a solicitor acting on behalf of the Mkrtchan parties (Tenth witness statement of 23 July 2018) suggested that the applicants (through corporate entities, Melgred Limited, Lanacomo Limited, Leadpoint Limited and Trotio Holdings Limited) and not Mr Mkrtchan held an interest in UGMK. In October 2018 there was therefore a further application (the "Further Application") which was to join the 14th to 20th third party defendants (i.e. including the applicants) as third parties to both the Original Claims and the New Claims as well as an application for permission to serve out of the jurisdiction and in respect of the applicants, for alternative service. The applicants are domiciled in Ukraine and therefore would have to be served in accordance with the Hague Convention unless an order was made permitting alternative service under CPR6.15.

11. Following the hearing in December 2018 (the "December Hearing") by order of 3 January 2019 Cockerill J granted the Further Application, including permission to serve out of the jurisdiction and to effect service by email to Azito and/or post to Covington and Burling LLP ("Covington").

12. A trial of the Original Claims is due to take place in October 2019 (an application to adjourn that trial having been refused). In the order of 21 December 2018 Cockerill J ordered that the future management of the claims so introduced against the 14th-20th third parties, including which aspects of those claims would be heard at the October 2019 trial, was to be addressed at a CMC.

13. Following the order of 3 January 2019, the documents were served in accordance with that order on Covington on 7 February 2019.

The Set Aside Application

14. The Set Aside Application is stated to be made pursuant to CPR 23.10 and/or under the court's general case management powers under CPR 3.1. The grounds on which the applicants seek to set aside the order are stated to be that:

    i) the application was made without notice;

    ii) the applicants have not had sight of the order nor the evidence before the court which led to the order being made; and

    iii) the authorities make clear that service on a defendant resident in a Hague Convention country should be effected in accordance with the Hague Convention.

15. The Taruta parties submitted that the Set Aside Application should in fact have been made under CPR 11 but were prepared to treat the Set Aside Application as having been made under CPR 11 provided that the applicants accepted that this was the only jurisdictional challenge that they could bring. Counsel for the applicants told the court that the applicants did not intend to bring any further jurisdictional challenge. It seems to me therefore that it is not necessary for me to rule on the issue. However, it seems clear from the Court of Appeal in *Hoddinott v Persimmon* [2008] 1 WLR 806 that this application does fall within CPR 11.

Relevant law

16. CPR 6.15 (1) provides:

> "Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

17. The test in the circumstances of this case where the Hague Convention applies is largely common ground: *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S.* [2018] EWCA Civ 1093 at [33] where Longmore LJ said:

> Since Lord Clarke was at pains in Abela to say (paras 33-34 and 45) nothing about the position where the Hague Convention applied and expressly referred to paras 65-68 of Cecil v Bayat [2011] 1 WLR 3086 on which the judge relied, without expressing any disapproval of them, I cannot accept Soc. Gen's submission. In para 65-66 Stanley Burnton LJ said:-
>
> "65. In modern times, outside the context of the European Union, the most important source of the consent of states to service of foreign process within their territory is to be found in the Hague Convention (in relation to the state parties to it) and in bilateral conventions on this matter. Because service out of the jurisdiction without the consent of the state in which service is to be effected is an interference with the sovereignty of that state, service on a party to the Hague Convention by an alternative method under CPR r 6.15 should be regarded as exceptional, to be permitted in special circumstances only.
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> 66. It follows, in my judgment, that while the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention is a relevant consideration when deciding whether to make an order under CPR r 6.15 , it is general not a sufficient reason for an order for service by an alternative method."
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> The phrase "interference with the sovereignty" might now be re-phrased in the light of Lord Sumption's judgment in Abela but the essential reasoning of Stanley Burnton LJ (with whom Wilson LJ and Rix LJ agreed) remains binding on this court so that service by an alternative method is to be permitted "in special circumstances only." [emphasis added]

18. It is essentially a matter of fact: *Abela v Baadarani* [2013] 1 WLR 2043 at [33].

19. The principles were summarised by Popplewell J at first instance in *Société Générale 2017 EWHC 667 (Comm*) at [49]:

49. I would endeavour to summarise the relevant principles as follows:

(1) As the wording of Rule 6.16 makes clear, the Court will only dispense with service in exceptional circumstances.

(2) In deciding whether to authorise service by an alternative method under CPR Rule 6.15, whether prospectively or retrospectively, the Court should simply ask itself whether there is "a good reason": Abela at [35]. This is the same test as whether there is good reason (without the indefinite article): Barton at [19(i)]. The Court must consider all the relevant circumstances in determining whether there is a good reason for granting the relief; it is not enough to identify a single circumstance which taken in isolation would be a good reason for granting relief (e.g. allowing the claimant to pursue a meritorious claim) if it is outweighed by other circumstances which are reasons not to grant the relief. I do not read Aikens LJ as saying anything different in Kaki at [28] when emphasising the existence of the indefinite article "a good reason"; he did so in order to make the point that although all the relevant factors for and against granting relief inform the conclusion as to whether there is a good reason (see his paragraph [33]), no subsequent and separate discretion falls to be exercised if there is a good reason for granting relief.

(3) A critical factor is whether the defendant has learned of the existence and content of the claim form: Abela at [36], Barton at [19(ii) and (iii)]. If one party or the other is playing technical games, this will count against him: Abela at [38]; Barton at [19(vii)]. This is because the most important function of service is to ensure that the content of the document served is brought to the attention of the defendant: Abela at [37]). The strength of this factor will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an attempt at formal service. It may be weaker or even non-existent where the contents of the claim form become known through other means. It is well known that sometimes issued claim forms are sent to a defendant "for information only" because the claimant does not want for the time being to trigger the next steps. Sometimes a claim form may be sent in circumstances which although less explicit do not suggest that the sending is intended to amount to service. The defendant may happen to learn of the claim form and its contents from a third party, or a search, in circumstances which might not suggest an intention by the claimant to serve it or to pursue the proceedings, or might positively suggest the reverse.

(4) However, the mere fact that a defendant learned of the existence and content of the claim form cannot of itself

constitute a good reason; something more is required: Abela at [36], Barton at [19(ii)];

(5) There will be a focus on whether the claimant could have effected proper service within the period of its validity, and if so why he did not, although this is by no means the only area of inquiry: Abela at [48], Kaki at [33], Barton at [19(iv)]; generally it is not necessary for the claimant to show that he has taken all the steps he could reasonably have taken to effect service by the proper method: Barton at [19(v)]; however negligence or incompetence on the part of the claimant's legal advisers is not a good reason; on the contrary, it is a bad reason, a reason for declining relief: Hashtroodi at [20], Aktas at [71].

(6) Delay may be an important consideration. It is relevant whether the application for relief has been made promptly and, if not, the reasons for the delay and any prejudicial effect: Anderton at [59]. It is relevant if the delay is such as to preclude any application for extension of the validity of the claim form because the conditions laid down in 7.6(3)(b) and/or (c) cannot be fulfilled, i.e. if the claimant has not taken reasonable steps to serve within the period of validity of the claim form and/or has not made the application promptly: Godwin at [50], Aktas at [91]. The culpability of the claimant for any delay may be an important factor. Particular considerations arise where the delay is abusive (see (7) below) or may have given rise to a limitation defence (see (8) below).

(7) Abuse:

(a) It is relevant whether any conduct of the claimant has been an abuse of process of the proceedings.

(b) At one extreme, there will rarely if ever be "good reason" where the claimant has engaged in abusive delay or abusive conduct of the proceedings which would justify striking them out if effective service had been made when attempted under the principles established in Grovit v Doctor [1997] 1 WLR 640 and Habib Bank v Jaffer [2000] CPLR 438 .

(c) However even where the abuse is not of that character, any abuse of process will weigh against the grant of relief.

(8) Limitation:

(a) Where relief under Rule 6.15 would, or might, deprive the defendant of an accrued limitation defence, the test remains whether there is a good reason to grant relief: Abela .

(b) However, save in exceptional circumstances the good reason must impact on the expiry of the limitation period, for

instance where the claimant can show that he is not culpable for the delay leading to it or was unaware of the claim until close to its expiry: Cecil at [108] and see Godwin at [50].

(c) It is not ordinarily a good reason if the claimant is simply desirous of holding up proceedings while litigation is pursued elsewhere or to await some future development; the convenience for a claimant of having collateral proceedings determined first is not a good reason for impinging on the right of a defendant to be served within the limitation period plus the period of validity of the writ: Battersby per Lord Goddard at p.32; Dagnell per Lord Browne-Wilkinson at p. 393C. Cecil at [99]-[106].

(d) Absent some good reason for the delay which has led to expiry of the limitation period, it is only in exceptional cases that relief should be granted under Rule 6.15 or 6.16 ; there is a distinction between cases in which there has been no attempt at service and those in which defective service has brought the claim form to the defendant's attention (Anderton at [56]-[58], Abela [36]), with relief being less readily granted in the former case, but even in the latter case exceptional circumstances are required: Kuenyehia at [26];

(e) Absent some good reason for the delay which has led to expiry of the limitation period, it is never a good reason that the claimant will be deprived of the opportunity to pursue its claim if relief is not granted; that is a barren factor which is outweighed by the deprivation of the defendant's accrued limitation defence if relief is granted; that is so however meritorious the claim: the stronger the claim, the greater the weight to be attached to not depriving the defendant of his limitation defence: Cecil at [55], Aktas at [91].

(9) Cases involving service abroad under the Hague Convention or a bilateral treaty:

(a) Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost: Knauf at [47], Cecil at [66], [113].

(b) It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this

> country, comity requires the English Court to take account of and give weight to those objections: see Shiblaq at [57]. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in Cecil at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in Knauf at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of Abela was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of Abela , there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Conventions case: Bank St Petersburg at [26].
>
> (10) The mere fact that a party is a litigant in person cannot on its own amount to a good reason, although it may have some relevance at the margins: Barton at [19(vi)]." [emphasis added]

Submissions

20. It was submitted for the applicants that:

i) The sanctity of the Hague Convention should be upheld and the court should not allow convenience to circumvent the Hague Convention. The court should have regard to the fact that Ukraine has derogated from Article 10 and the need for a "bright line": Popplewell J at first instance in *Société Générale* at [49(9)(b)]

ii) The reasons advanced by the Taruta parties did not warrant an order- delay was not enough: *Marashen Limited v Kenvett Limited* [2017] EWHC 1706 (Ch) at [72]:

> "72. In the circumstances of this case, and even without taking account of the Article 15 point, I do not think the level of delay inherent in service in the Russian Federation under the HSC rises beyond the level of mere delay, and the position is a fortiori once Article 15 is brought into consideration. There was no suggestion of the delay causing prejudice or potentially prejudicing the fair determination of the s.51 Application, merely of an understandable desire on Marashen's part to "get on with it". I would note that it has taken 7 months between the Master's rejection of the set aside application and the determination of this appeal, which may put the time it would take to serve the proceedings under the HSC into context.

iii) It was submitted that at the September Hearing the evidence was that service would take 3-8 months and at the December Hearing the delay was at least a year. However, something more was required such as "litigation prejudice" as stated in *Marashen* at [57]:

> "In my judgment, the current state of the law is as set out in the decisions of Mr Justice Cooke in Deutsche Bank AG v. Sebastian Holdings Inc. and Mr Justice Popplewell in Société Générale v. Goldas Kuyumculuk Sanayi and others [2017] EWHC 667 (Comm) , and that in HSC cases, or cases in which there is a bilateral service treaty which is exclusive in its application:
>
> i) "exceptional circumstances", rather than merely good reason, must be shown before an order for alternative service other than in accordance with the terms of the treaty can be used; and
>
> ii) mere delay or expense in serving in accordance with the treaty cannot, without more, constitute such "exceptional circumstances". I say "without more" because delay might be the cause of some other form of litigation prejudice, or be of such exceptional length as to be incompatible with the due administration of justice." [emphasis added]

It was submitted that at the December Hearing Cockerill J did not have in mind the judgment in *Marashen* when she made the order and in particular when she concluded (page 98 of the transcript) that this was "not simply a case of delay" but a case of "very considerable delay".

iv) The involvement of the applicants as custodians for the purposes of disclosure did not mean that Covington had an obligation to keep them apprised of the wider proceedings. It was not appropriate to make an order for alternative service on Covington who were not acting for the applicants, merely because that firm was already acting in the proceedings and it would be more convenient to effect service on them than to go through the proper channels

v) The court will look at conduct: *Societe Generale* at [49(6)]. It was submitted that the Taruta parties could have effected service through the Hague Convention once it knew that the applicants were to be joined as a party: they could have made the application at the September Hearing or on paper immediately after that hearing. Alternatively, if the Taruta parties had started the process for service under the Hague Convention in December 2018 they would be six months into the period.

vi) It was submitted that the applicants are not impacted by the first trial and thus no "catch up" is required on the part of the applicants. It would be unfair and contrary to the overriding objective for the applicants now to be bounced into participating in a trial in October 2019. The second trial has not yet been fixed.

21. For the Taruta parties it was submitted:

i) A critical factor is whether the parties had learnt of the existence of the proceedings. In this case the documents had been served on Covington on 7 February 2019 and thus the content of the documents had been brought to their attention "through what the defendant knows to be an attempt at formal service". A letter dated 22 February 2019 from Covington to Hogan Lovells refers to Covington being informed of certain matters by Ms Shchygolyeva. This would suggest that Covington are able to communicate with her directly. Further Reed Smith were acting for corporate entities for which the applicants are alleged to be beneficial owners and which are party to the same proprietary and personal claims in respect of UGMK. It was submitted that it would be highly artificial to ignore this and assume that the applicants were not fully aware of the nature and content of the claims being made against them and their corporate vehicles. Further the applicants had been involved in without prejudice negotiations as referred to in the evidence of Roberts at paragraphs 44 and 45.

ii) This is not a case of "mere delay": the evidence of Roberts at paragraphs 50 and 51 is that the level of potential delay is itself significant.

iii) The delay or potential delay is significant in the context of the ongoing proceedings leading up to the first trial in October 2019 at which proprietary claims requiring the Mkrtchan parties to account for and return the shares in UGMK will be determined. Live issues for the trial include who holds the relevant interests in UGMK and the applicants should be bound by any order or findings made at that trial.

Discussion

22. Since this is an application to set aside the order of Cockerill J and not an appeal, this court considers the Set Aside Application in the light of the submissions and evidence before this court. However insofar as it was submitted for the applicants that Cockerill J's decision at the December Hearing was inconsistent with her earlier decision at the September Hearing, I do not accept that submission. At the December Hearing Cockerill J clearly had in mind the relevant law and on each application the court had to apply the law to the particular circumstances of the different applications before it and the judge considered all the relevant factors in reaching her conclusion.

23. In relation to delay it was submitted that at the December Hearing Cockerill J did not have in mind the decision in *Marashen*. However, the judge referred expressly to *Marashen*.

24. There were different factors in play at the two hearings: at the September Hearing where the court refused an application for alternative service against Eduard Mkrtchen, the delay was said to be 8 months and the context was that there was no other factors to outweigh service by the Hague Convention leading the judge to conclude that in that case the test was not met.

25. Turning to the factors in this case, they are as follows:

i) Involvement/knowledge

ii) Overlap

iii) Delay

26. Involvement/Knowledge: It was submitted that in her judgment Cockerill J overstated the involvement of the applicants in the proceedings. Whether or not this was the case, the evidence before this court is that the documents were served on Covington which is clearly in contact with Ms Shchygolyeva. In addition, Reed Smith are acting for the other corporate third parties (13th, 16th-20th third party defendants). One of the grounds relied on in the Set Aside Application is that the applicants have not had sight of the order nor the evidence before the court which led to the order being made, and the evidence of Mr Summerfield is that neither he nor the applicants have been provided with a copy of the order of 3 January nor any other documents sent to Covington. However, it is difficult to conclude from the evidence that the applicants do not have knowledge of the documents. Firstly, Mr Summerfield acknowledges in his first witness statement (paragraph 22) that one of his colleagues spoke with Covington on 8 February 2019 and were informed that Covington had received a copy of the 3 January order and other documents by email. The position therefore before this court is that the applicants have learned of the existence of the documents even though they do not appear to have asked for a copy from Covington. Secondly, although Mr Summerfield's evidence is that Mr Udovenko is not actively involved in the litigation, Reed Smith are acting for him in this litigation and presumably have procedures in place to carry out that representation on his behalf. As to Ms Shchygolyeva, there is no statement that Reed Smith are not in contact with her.

27. It is in my view irrelevant that Covington are not instructed to accept service on behalf of the applicants. The order of 3 January 2019 permitted alternative service by first class post on Covington. Covington are instructed on behalf of the Mkrtchan parties. The evidence of Mr Summerfield is that Covington were in contact with Reed Smith and thus service of the documents did come to the attention of Reed Smith, acting for the applicants, whether or not Reed Smith chose to relay this to their clients. Further Mr Summerfield in his second witness statement refers somewhat obliquely (paragraph 19(c)) to a copy of his first witness statement and exhibit being sent to "those instructing me in Kiev" and then states that neither applicant "has reviewed or had sight of" the January order. In the light of the fact that Reed Smith are acting for the applicants, this does not in my view support a conclusion that the applicants do not have knowledge of the claim, even if they have so arranged matters such that they themselves have not personally had sight of the documents.

28. Further it is in my view relevant to the issue of knowledge on the part of the applicants, that Reed Smith are instructed by the other third party defendants, including Melgred (the 12th third party defendant), Lanacomo (the 18th party defendant) and, Leadpoint (the 19th party defendant). It is the evidence of Mr Summerfield (paragraph 24 of his first witness statement) that the applicants own Melgred in equal shares, that Ms Shchygolyeva is the ultimate beneficial owner of Lanacomo and Mr Udovenko is the ultimate beneficial owner of Leadpoint. Service has been effected on those parties and acknowledgements of service have been filed by amongst others, Lanacomo and Leadpoint. In these circumstances it is in my view reasonable to infer that the applicants are aware of the claims.

29. Even if it were to be said that the claims against the applicants personally have not come to their knowledge through service on the corporate entities, the evidence of Mr Roberts (paragraph 45 and 46 of his witness statement) is that the Taruta parties have been in discussions with the applicants (through a Ms Strilko) regarding the settlement of the existing and new claims made against them and their companies. Mr Summerfield in response (paragraph 23 of his second witness statement) suggests that the reference to these without prejudice discussions is "wholly inappropriate" and he rejects the assertions regarding his own and his team's detailed knowledge of the proceedings. I note however that he does not reject the evidence that these discussions have taken place on behalf of the applicants with a view to settling the proceedings and thus it would appear unlikely these discussions could have taken place on behalf of the applicants, without the applicants being aware of the claims against them.

30. I accept that the mere fact that a defendant learned of the existence and content of the claim form cannot of itself constitute a good reason for ordering alternative service. The next factor therefore to consider is whether the Taruta parties could have effected proper service within the period of its validity. In this regard it is relevant to consider the fact that a trial is listed for October 2019 and the overlap which the Taruta parties say exists, thereby, they submitted, giving rise to a need for alternative service.

31. It was submitted for the applicants that once the Taruta parties had the evidence in July 2018 that the applicants were purportedly the beneficial owners of shareholding interests leading to the application for permission to add the applicants and the corporate entities which were contended to be their corporate vehicles (as set out in the 13th witness statement of Mr Roberts dated 17 October 2018 at paragraph 12), the Taruta parties could have made the application for alternative service. I do not accept this submission**.** In the circumstances it seems to me wholly inappropriate and unrealistic to suggest that the application for alternative service could have been dealt with separately on paper prior to the December Hearing.

32. As to the overlap, it is clear from the order of Cockerill J of 21 December 2018 that, although it was ordered that the trial of the new claims would take place after the trial of the existing claims (paragraph 8 of that order) it was expressly envisaged, at paragraph 7(1) of that order, that certain issues involving the applicants might well be dealt with as part of the trial in October 2019 (subject to the precise determination at a case management conference). In addition, in the ruling Cockerill J (page 88 of the transcript) said:

> "So the claims are in essence the same claims as the existing proprietary and personal claims advanced against the Mkrtchan parties in relation to UGMK. And as I have indicated in the judgment, it was argued and I accepted that the joinder of these parties effectively needed to be done. <u>It is important, not least in relation to the proprietary claims where it is the Taruta parties desire to bind the proposed defendants to any judgment which reflects the position of the judgment that insofar as they held their shares in UGMK they do so for and on behalf of Mr Mkrtchan and need to ensure that those individuals and entities are heard in relation to the issues which arise in relation to that and are bound by any judgment recognising the proprietary interest.</u>" <u>[emphasis added]</u>

33. Although no such case management conference has yet been held, in order for this part of the order to be effective and for it to be possible for aspects of the new claims to be addressed at the trial in October 2019 and for the applicants to be bound as Cockerill J envisaged, the applicants needed to be served without delay, which in the event happened through service on Covington. Had the applicants then responded and filed a defence, the applicants would have been further advanced in the process. In any event it is to be inferred from the fact that the corporate third parties have filed acknowledgements of service that the applicants will have been considering their response to the claims. I do not therefore accept that there is prejudice to the applicants as alleged, rather it seems to me that were the court now to require service through the Hague Convention this would inevitably result in these matters not being capable of being dealt with at all in the trial in October 2019. In my view this falls within the concept of "litigation prejudice" identified at [57] in *Marashen* (and quoted above).

34. Turning then to the time which would be taken to effect service through the Hague Convention in Ukraine. The evidence before Cockerill J at the September Hearing was that the process would take around eight months to complete (paragraph 198 of the eighth witness statement of Mr Roberts dated 12 June 2018). At the December Hearing the evidence was that service could in fact take longer than previously thought and according to the Foreign Process Section could take a year or more (paragraph 143 of the 13th witness statement of Mr Roberts dated 17 October 2018). In *Marashen* the evidence was that service was likely to take 8 to 10 months with a further two months for translation. Accordingly, the evidence here is that service can take a year or more and more significantly, that in this case the consequence of such a delay could cause prejudice to the progress of the litigation. As Cockerill J observed (page 97 of the transcript) one must look at the question of delay in a fact sensitive way and look at the significance of delay in the context of the proceedings. I reject the submission for the applicants therefore that it was the "change" in the estimate of the time required to effect service through the Hague Convention which was a separate reason for the decision to order alternative service. Further in terms of the actual period of delay I note the observation of Cockerill J that a number of cases where delay has been dealt with, have been looking not at a case of joinder to existing proceedings so there was no question of "falling behind". I agree with the observation of Cockerill J (page 98 of the transcript) that:

> "it is a different matter if you are looking at a self standing claim to if you are looking to slot in a service out into existing set of proceedings".

35. Given the time estimate provided by the Foreign Process Section and the fact of a trial being listed in October 2019, I do not accept that it would have been possible to effect service through the Hague Convention by commencing the process in December 2018 and thereby avoid the litigation prejudice which has been identified in this case.

36. Finally, I should add that I reject the submission that an order to permit alternative service in the circumstances of this case sets a "very dangerous and unwelcome precedent". As has been stated above, each case turns on its facts and involves balancing the various factors to determine whether, in a Hague Convention case, the test of exceptional circumstances has been made out.

Conclusion

37. In reaching a conclusion as to whether or not alternative service should be ordered, the court takes into account all the relevant circumstances. In this case those circumstances include weighing the time that would be taken to effect service under the Hague Convention against the "litigation prejudice" which would be caused to the efficient progress of the litigation where, as discussed above, a trial has been fixed for October 2019. In addition, the court takes into account the knowledge of the applicants and the reality that on the evidence they are fully aware of the claims against them and thus in my view no prejudice to them arises if the order for alternative service is upheld. For the reasons discussed, in my view there can be no criticism of the steps taken by the Taruta parties. Finally having regard to the potential delay in this case, it would not in the circumstances have been feasible for service to have been effected through the Hague Convention without disrupting the progress of the litigation.

38. Accordingly, for these reasons, in the circumstances I find that the test for alternative service has been met and the Set Aside Application is dismissed. In the circumstances it is not necessary for me to consider the Validation Application.