Neutral Citation: [2021] EWHC 3175 (QB)

Case No: QB-2019-004037

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2021

Before :

MASTER DAGNALL

- -

Between :

JOE MACARI SERVICING LIMITED	**Claimant**
- and -	
CHEQUERED FLAG INTERNATIONAL INC	**Defendant**

- -
- -

Peter Webster (instructed by **Wilmott & Co**) for the **Claimant**
Nicholas Bard (instructed by **Goodman Derrick LLP**) for the **Defendant**

Hearing dates: 13 April 2021

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JUDGMENT

MASTER DAGNALL :

Introduction

1. This is my Judgment in relation to three related applications brought by the parties. The Defendant seeks to have the court declare that it does not have jurisdiction to hear the Claim on the basis that the Claim Form was not served in time. However, the Defendant itself requires and so applies for the court to grant it relief from sanctions in order for the Defendant's application to be made. Assuming that that relief from sanctions application is granted, the Claimant seeks an extension of the time for service of the Claim Form, such application having itself been made out of time. In the alternative, the Claimant applies for the court to exercise its discretion to treat certain steps taken by the Claimant to serve the Claim Form as amounting to good service even though they were taken after the ordinary time provided for in the Civil Procedure Rules ("the CPR").

2. The problems with service in this case have themselves been exacerbated by the effects of the COVID pandemic and resulting restrictions in both this country and the USA as well as a temporary closure of the Foreign Process Section ("the FPS") of the Queen's Bench Division of this High Court. Thus the facts of this case are likely to be unique although the legal questions which arise are, unfortunately, more common.

3. The underlying dispute between the parties is of limited relevance to what I have to decide. It relates to a motor-car which was sold on or about 15 November 2013 and where the Claimant, a company incorporated in this jurisdiction, asserts that it has claims against the Defendant, a corporate entity based in and

operating out of the State of California in the United States of America, but alleging using an agent based in this country, in contract and in misrepresentation. It is common-ground that the limitation period under sections 2 and 5 of the Limitation Act 1980 is, at least arguably, six years for such claims and which period would, again arguably, have expired in mid-November 2019. I have received no submissions as to the strengths or weaknesses of the claims themselves, and they do not seem material to the questions which I have to decide.

4. I heard oral submissions in this case on 13 April 2021 but then adjourned for further written submissions in relation to matters of Californian law and then further recently decided case-law. After having prepared a substantial element of this judgment, a further potentially important decision at High Court Judge level was published and the need to seek further submissions as to it and the Long Vacation then intervened. Unfortunately, owing to computer problems, I have had to rewrite that substantial element. This has all resulted in delays although I do not think that they have affected my recollection or reasoning process adversely in any way, and I have fully revisited the documents and my notes of submissions.

The Procedural History

5. The Claim Form was issued on 12 November 2019, being, or close to, the last day of the limitation period, although this seems to have followed some process of correspondence between the parties regarding the underlying claim. Under Civil Procedure Rule ("CPR 7.5") the relevant step for service of a Claim Form in this jurisdiction must be taken within four months of issue (CPR7.5(1)), or,

alternatively, the Claimant has six months from issue to serve out of this jurisdiction (where, here, the Claimant required judicial permission for such service out) (CPR7.5(2)).

6. The Claimant's solicitors wrote on 27 November 2019 to Californian lawyers who had been communicating on behalf of the Defendant enclosing a copy of the Claim Form. They asked whether the Defendant would agree to accept service either in this jurisdiction (by service on the previous agent or on nominated solicitors) or at any particular address in California, and threatened to seek permission to serve out in California if no agreement was reached as to method of service. Those lawyers did not reply.

7. The Claimant then issued an Application Notice on 4 February 2020 seeking permission to serve out of the jurisdiction at 4128 Lincoln Blvd, Marina del Ray, California 90292 USA ("the California Address") or elsewhere in the USA, and an order extending the six months' time period for such service. The draft Order attached to the Application Notice contained, within what was to be ordered, a paragraph reading: "[That the period in which the Claim Form and Particulars of Claim may be served shall be extended to [DATE TWO MONTHS AFTER THE DATE OF THE ORDER]]" On 7 February 2020 Master Eastman made such an order on paper and which was sealed on 10 February 2020 in precisely the form sought i.e. granting the permission to serve out and with the above paragraph as to the period for service, its square brackets and capitalised wording.

8. That wording could be read to provide that the time for service was truncated from the six months provided for by CPR7.5(2) i.e. until 12 May 2020, down to

2 months from the date of the Order being 7 (or perhaps 10) April 2020. However, the Defendant's counsel, Mr Bard, freely accepted (and indeed volunteered) that that effect could not have been intended by Master Eastman, it being contrary to the intention expressed in the Application Notice (being to give the Claimant more time rather than less) and lacking any rational justification. It seems to me that he was quite right to do so; and that this was a mere "accidental error" within the meaning of CPR40.12 and that I should and do correct it by adding the words "or what would otherwise be the period for service (whichever is the longer)"

9. The USA is a signatory to the Hague "Convention on the service abroad of Judicial and ExtraJudicial documents in Civil and Commercial matters" ("the Hague Convention") as is this country. Under Articles 2 and 3, a Central Authority of one State will arrange for service of documents within its jurisdiction of documents sent to it by the Central Authority of another State. I note that Article 10 does not prevent service by post or certain other means where the State where the documents are to be served does not object (presumably by its law or, perhaps, otherwise). Article 19 provides that the Hague Convention does not prevent service by other means providing that the law of the State in which the documents are to be served permits such.

10. This jurisdiction's Central Authority is the Senior Master of the Queen's Bench Division who operates through the FPS. Parties seeking to use the Hague Convention to serve abroad complete a Form N244 with some sections of an accompanying form referring to steps for compliance with the Hague Convention ("the Hague Convention Form"), and having sought to make any

necessary arrangements acceptable to the Central Authority of the receiving State (here the USA). The Claimant did make such arrangements ascertaining that the USA Central Authority nominated process servers (an entity called "ABC Legal" and whom I will term "ABC") who would effect service in the USA provided that a specific fee was paid, and on the basis that such service would be expedited if a higher level fee was paid ("the Higher Fee"). The system is that FPS should then post the documents to the process servers in the USA who would then effect service and then, having done so, complete further sections of the Hague Convention Form to explain how service had been effected, and post it back to FPS, and who would then pass it to the Claimant. Thus the system is, in effect, that communications with the USA Central Authority, and its process servers, as to the actual service itself, are carried out by FPS and not by the Claimant.

11. The Claimant's solicitors first sent a version of the requisite N244 Form and Hague Convention Form on about 18 February 2020 (this being following receipt of the Order of Master Eastman which they must have received a few days earlier) and stating that they were dealing with the payment of the US$95 Higher Fee which they then confirmed that they had paid (and which I find that they did around then). There was then a series of emails over the next three days regarding queries raised by FPS on precise wordings, including whether one word in the service address was to be spelt "Rey" or "Ray", and with the Claimant's solicitors stating that they were concerned as to delay where their reading of the order of Master Eastman was that they only had two months from its date in which to effect service; and they in fact completed the forms stating that that was in fact the position. By email of 25 February 2020 the Claimant's

solicitors requested that there be expedited service to take place within seven days.

12. On 4 March 2020 FPS raised various further queries as to the completion of the forms with which the Claimant's solicitors complied and so that they sent the corrected forms back to FPS on 5 March 2020. This was with a covering email in which the Claimant's solicitors again referred to Master Eastman's earlier order, and said (presumably on reading its actual words, and although I am now correcting them as set out above) that, in view of the fact that nearly one month had passed since that order had been made and it only provided for a two month period, they asked when they would be likely to be sent and whether that would result in service within the 2 month ordered period.

13. On 9 March 2020 there was an email exchange in which the Claimant's solicitors emailed FPS to confirm that the documents had been sent to FPS on 5 March 2020 and that they were thought to be in a satisfactory form (as they were) and stressed that there was to be "**Expedited Service**" and sought confirmation of this.

14. On 11 March 2020 the FPS sent an email to the Claimant's solicitors confirming that the relevant documents including the Claim Form (and Particulars of Claim) had been received and would be posted to the USA that day for service to be effected. There is no dispute and in any event I find (as is, and as FPS, stated below) that such posting did occur on 11 March 2020 on the basis that the service was to be expedited.

15. On 19 March 2020, the Claimant's solicitors emailed FPS asking for confirmation that service had been effected.

16. About this time, the effects of the COVID-19 pandemic had risen to such an extent that this country and the USA, although only on a state by state basis, both implemented "lockdowns" severely restricting activities including travel and working, extending to activities such as travelling to and then effecting service of documents. The FPS offices were closed, and its activities suspended, from about 23 March 2020.

17. On 24 March 2020 FPS emailed the Claimant to say that FPS "was closed until further notice and we are unable to send documents for service until we re-open." I note that FPS had already sent out the documents to the USA for service on 11 March 2020.

18. I note that at this point the extension in the February Order expired, if it were (which in my judgment, and see above, it is not, but which the Claimant's solicitors then seem to have believed) to stand and be construed as truncating the CPR7.5(3) service period to two months from the date of that Order.

19. On 16 April 2020 the Senior Master published a statement that the FPS office remained closed but pointed out that service might still be possible in compliance with the Hague Convention, and effectively referring to its Articles 10 and 19.

20. On 27 April 2020 the Claimant's solicitors emailed FPS to ask whether they were open and whether service had taken place. FPS emailed back to say that they were still closed, and the Claimant's solicitors replied to ask when FPS would reopen. FPS responded to say that there would be a meeting that Friday regarding a possible reopening and the Claimant's solicitors should ask for an update on the next Monday.

21. On 6 May 2020 the Claimant's solicitors emailed FPS for an update and FPS responded to say that there was none but that hopefully they would be able to update "after the next weekend."

22. I note that at this point the ordinary CPR7.5(3) period for service of the Claim Form would (apart from the February Order (providing for an earlier date) and which I am directing is not to have that effect, but which the Claimant's solicitors then seem to have thought it did) have expired.

23. On 27 May 2020, the Claimant's solicitors emailed FPS to ask for an update. FPS replied on 28 May 2020 and there was an exchange of emails with the Claimant's solicitors chasing for investigations to be made as to whether "service had been confirmed" and FPS saying that staff would be going into the office on 1 June 2020 but that there was a "mountain of post" for them to sift through and doing that "would take a good while".

24. On 8 June 2020, the Claimants' solicitors emailed FPS asking if they had made any progress. On 9 June 2020 FPS replied said that they would look into it the next day and if there was nothing received would send a chaser. On 10 June 2020 the Claimant's solicitors emailed FPS to ask if there was any news.

25. On 12 June 2020, the Claimant's solicitors spoke to an officer in FPS, and their attendance note (which I accept as being accurate) reads:

> "… I asked for an update on whether the claim had been served and you said that at the moment the system was showing that the documents were sent out to the bailiff in US to be served on 11 or 12 March. Nothing had been heard back yet, and it may be that there was an update in the post somewhere which you

hadn't yet managed to work through because there was quite a backlog as a result of the shutdown. With service in America you were not able to chase until the four month period had expired even if it was via the expedited 7-day service which we had asked for. We both noted that it would be another month till that four month period expired and you said that we should wait for that month and then get in touch and you would send a further chaser letter. There were other options to serve the documents under sections 10a and 10b but I pointed out that we would be out of time to do that and that we would have to make various applications for relief etc. You understood and confirmed that your name was Steven and I should get in touch again in a month."

26. On 12 June 2020, FPS wrote to the Claimant to confirm that the documents had been posted to the USA on 11 March 2020 and to say that FPS was writing to the Process Servers to ask for information "on service or non-service". On 23 June 2020, the Claimant's solicitors chased FPS for information. FPS replied on 24 June 2020 to say that they had sent a letter to the Process Servers on 12 June 2020 but had not yet received any reply.

27. I note that in fact (but then, and until October 2020, unknown to the Claimant) the Claim Form was then delivered to the California Address although the Defendant says that this was not valid service in accordance with local law and the Hague Convention (and see below) even had it been in time, albeit that it is also clear the Defendant chose to make no response at this point.

28. On 8 July 2020, the Claimant's solicitors chased FPS who replied on 8 July 2020 to say they had heard nothing. The Claimant asked FPS to chase the USA

and FPS replied on 9 July 2020 to say that they had written a further letter "requesting an update on the progression of services".

29. On 28 July 2020, the Claimant's solicitors chased FPS again, and who replied that day to say that FPS had not received any response from the USA Central Authority, and that the pandemic might be affecting the service of documents. Apparently, the Claimant consulted with counsel on that day although counsel's advice has remained undisclosed (being subject to legal professional privilege).

30. On 6 August 2020 the Claimant's solicitors wrote by email and recorded delivery to the Defendant in California to say that they had attempted to serve through FPS and the USA Central Authority, but were still awaiting notification of the outcome, and enclosing copies of the Claim Form and Particulars of Claim and other documents, and threatening to make further applications. The recorded delivery took place on 14 August 2020.

31. On 18 August 2020, the Claimant's solicitors made a further Application for an extension of time for service of the Claim Form and other documents. It was supported by a witness statement which gave the Claimant's version of the history and stated (paragraph 20) that authorisation under CPR6.15 of service by an alternative method would not be possible as such would not be permissible under local law and the Hague Convention, and that it was believed that the best available method would be for a process server to be instructed to serve in California thus mirroring the FPS process. In paragraph 21 it was stated that the application was made promptly "after having allowed the FPS sufficient time to affect (sic) service" and where the documents had recently been sent by post and where FPS had been closed due to the pandemic. In paragraph 22 it was

said that the granting of the Order sought would enable both the FPS method and the direct instruction by the Claimant of a process server. In paragraph 24 it was said contended that the CPR7.6(3) "all reasonable steps" and "promptly" requirements were satisfied. In paragraph 26 it was said that there was "good reason" to grant the extension due to the FPS situation and the Claimant acting promptly where the documents had already been brought to the Defendant's attention at least twice.

32. This Application was granted on 20 August 2020, by an Order "the August Order" sealed on 21 August 2020 and made by Master Eastman, this Order stating that "Time is extended to [DATE SIX MONTHS FROM DATE OF ORDER]". Service was again permitted at the California address or elsewhere in the USA.

33. On 3 October 2020, the FPS received (although they only notified the Claimant's solicitors of this by letter of 20 October 2020 received on 22 October 2020) from ABC Legal, a letter and completed Hague Convention Form stating that service on the Defendant had taken place in accordance with Article 5 of the Hague Convention by personal service on 30 June 2020. There was a declaration that a Brian Fecher, as an authorised process server, had effected service in accordance with the laws of California. It was said that this had taken place by service on an "Alex Mitrovich, MANAGER, PERSON AUTHORIZED TO ACCEPT" Service" and who had received the documents in accordance with social distancing requirements. There is a dispute with regard to the position and authority of Mr Mitrovich but it is common-ground

that he, shortly after receipt on 30 June 2020, passed the Claim Form and other documents to a senior officer of the Claimant, Mr Neil Jaffe.

34. Meanwhile the Claimant's solicitors had instructed USA lawyers, being Lewis Brisbord Bisgaard & Smith ("LBBS") to also effect service. They sent the Claim Form and other documents, including the August 2020 Order, to the Defendant at the California address by letter of and posted in the USA on 27 October 2020 saying that this was pursuant to Article 10a of the Hague Convention. This arrived with a senior officer of the Defendant on 29 October 2020. Also on 3 November 2020, LBBS had a process server serve the Claim Form and other documents including the August 2020 Order upon the Defendant in California. I note that at one point it was said that they and other US process servers would have required a stamped document from FPS before they would do this but that contention was subsequently withdrawn.

35. By an Application Notice ("the Defendant's November 2020 Application") dated and issued on 12 November 2020, the Defendant applied to set aside the August 2020 Order and "in consequence to set aside the service of the Claim Form upon the Defendant."

36. On 17 November 2020, the Defendant filed an Acknowledgment of Service stating that it intended to contest jurisdiction on the basis that it was applying to set aside the August 2020 Order.

37. On 3 December 2020, the Claimant's solicitors sent an email to the Defendant's solicitors stating that the Defendant had failed to issue an application to request the court to decline jurisdiction within the time period provided for by CPR11 and therefore that the Defendant was deemed to have accepted that the court

had jurisdiction and could not mount any challenge based on late service of the Claim Form – and relying on the decision in Hoddinott v Persimmon 2007 EWCA Civ 1203 (and to which I refer below). The Defendant responded by issuing an Application Notice dated and issued on 4 December 2020 ("the Defendant's December 2020 Application" seeking for the court to extend the CPR11 time-limit, to grant relief from sanctions, and to declare that the court would decline jurisdiction.

38. On 11 December 2020, the Claimant's solicitors issued a protective Application Notice ("the Claimant's December 2020 Application") seeking an order that the Court treat one or more of the various 2020 deliveries (on 30 June and in late October and early November), but not the earlier 2019 delivery, of the Claim Form to the Defendant as being good service under CPR6.15.

Limitation

39. It is important to, and I do, bear in mind fully that the law of limitation is not to be regarded merely as procedural means of preventing claimants from having what may well be valid claims (and to which there may be not even a shadow of a defence – although I have no reason to consider that to be case here) heard and adjudicated upon by a court. Rather, limitation is a statutory right and defence available to defendants and of which they can (and usually, although not always, do) take advantage. The CPR, when combined with Limitation Act 1980, in fact grant claimants what can be seen as an indulgence in allowing a claim to be issued within a limitation period but only served (and which is the full initiation of the claim) some months outside it. The CPR's provisions regarding extension of time for service beyond the initial prescribed periods are

a carefully crafted scheme providing a balance between injustice to claimants who are unable to effect service and injustice to defendants who find the limitation period for full initiation of a claim against them to be effectively extended. It follows that there is no injustice, as such, in a defendant doing nothing, failing to co-operate and/or allowing a claimant to fall into a trap of having failed to serve in time which is of the claimant's own making (as long as the defendant does not cross an equitable line), or relying on the strict wording of the relevant CPR – see e.g. Bethell v Deloitte 2011 EWCA Civ 1231 and Barton v Wright Hassall 2018 UKSC 12).

Time for Service of the Claim Form, Extensions of Time and the CPR

40. As I set out above, CPR7.5 lays down a time period for service within the jurisdiction of taking the relevant step within 4 months of the issue of the Claim Form and a time period of six months from issue for service out of the jurisdiction.

41. The CPR's scheme for allowing an extension of time for service of a Claim Form is as set out in CPR7.6; and which reads as follows:

"7.6

(1) The claimant may apply for an order extending the period for compliance with rule 7.5.

(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5; or

(b) where an order has been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

(4) An application for an order extending the time for compliance with rule 7.5

(a) must be supported by evidence; and

(b) may be made without notice."

42. In this division of the High Court generally, and specifically in relation to these proceedings (as was clear from Master Eastman's order of February 2020), it was for the Claimant and not the court to serve the Claim Form. Thus where the CPR7.5 period has already expired, the court is only able (and where it still has to consider whether or not to exercise the relevant discretion) to extend time for service where the claimant has demonstrated (the burden being on the claimant) that the claimant has both:

i) Taken all reasonable steps to serve within the CPR7.5 period and

ii) Acted promptly in making the application.

43. Counsel took me to various authorities in this area as follows. Mr Bard first referred me to DDM v Al-Zabra 2018 EWHC 346 where service was to be effected through FPS in the United Arab Emirates and at paragraph 24 it was recorded that service in that jurisdiction might take 6-12 months and so that there were told an extension of time of 12 months should be requested. It seems to me that this is simply different from the position in relation to the United States of America where all the indications were that (absent COVID) (Expedited) service would take place very quickly.

44. In Vinos v Marks & Spencer 2001 3 AER 784 at paragraph 20 (and also paragraph 27), it was made clear that the jurisdictional requirements of CPR7.6(3) were strict, and that the general waiver power contained in CPR3.10 could not be used to circumvent them. It was pointed out that the CPR7.5 periods usually allowed good time for service and that a party put itself at risk in waiting (even if as a result of negotiations taking place) to the end of a limitation period before issuing their proceedings.

45. In Intelsat v JSC – judgment 12 September 2019, Deputy Master Bartlett in the Chancery Division considered an application under CPR7.6(3) where there had been difficulties in effecting service in Kazakhstan. At paragraphs 28 and 29 it was held:

"28 In considering what amounts the taking of all reasonable steps for the purposes the rule Mr Waistell emphasises that the requirement is one of reasonableness, not that the claimant must have taken all possible or practical steps. What those steps are as a highly fact sensitive issue to be decided on the

circumstances of each particular case. Those points plainly correct (see Warwick University v De Graaf [1975] 1 WLR 1126).

29. I find considerable assistance in applying the rule a passage in the judgement of Smith LJ (with which Dyson LJ agreed) in Carnegie v Drury 2007 EWCA Civ 497 at para 40:

"Also, this court has warned litigants against the dangers of leaving until the last minute taking of a procedural step governed by a time limit… a litigant is entitled to make use of every day allowed by the rules for the service of a claim form. But it is well known that hitches can be encountered when trying to effect service. A litigant who leaves his efforts at service to the last moment and then fails due to an unexpected problem is very unlikely to persuade the court that he has taken all reasonable steps to serve the claim in time. Without such a finding the court will be unable to extend time for it is only if both subparagraphs (b) and (c) of Part 7.63 are satisfied that the court has any discretion to grant relief. A litigant who delays until the last minute does so at his peril."

I would add that these points may apply with particular force in the case where service is to be out of the jurisdiction. In such cases a claimant may well be reliant on persons or bodies abroad over whom he has only limited or no control to effect service. Delays and difficulties in affecting service in many foreign jurisdictions are well known. While the court must of course not require a higher standard than the rule specifies in such cases a reasonable claimant will in my view has such potential problems in mind and deciding what steps to take and went to take them."

46. In paragraph 30 the Deputy Master went on to say that, with Kazakhstan being known as a particularly difficult country for service, a reasonable claimant should bear that in mind when deciding what steps to take and when to take them.

47. In later paragraphs the Deputy Master said that a party is acting reasonably to select a reasonable method of service, even if others might be available but must then take all reasonable steps to effect service in time (paragraph 38), although that only has to be to do so in time and so can permit initial inactivity if it is still reasonably clear that service should be capable of being effected in time absent unexpected problems (paragraph 39). In that case, there was a continued inactivity which was such that the service could not have occurred in time whether or not the eventual unexpected problem had arisen (paragraphs 42-44). I have though also reminded myself of paragraph 40 of the judgment in Drury (cited above) which suggests that a period of initial inactivity which results in an unexpected problem becoming more serious than would otherwise have been the case may well lead to the conclusion that "all reasonable steps" had not been taken.

48. I was also taken to Drury v Carnegie 2007 EWCA Civ 497 but only as to paragraph 36 where it was made clear that the "all reasonable steps" test relates only to the period provided for by CPR7.5 (or any existing order" and that per Smith LJ "Attempts made after that time are irrelevant. In my view, the judge erred in taking the later efforts into account."

49. The question as to what is meant by "promptly" in the CPR has been considered in various cases in various different contexts (as set out in, for example, the

White Book at 13.3.3). In Khan v Edgbaston 2007 EWHC 2444 HH Judge Coulson QC (as he then was) described the test of "promptly" as asking whether the applicant had acted "with all reasonable celerity in the circumstances" and referred with approval to a dictum of Simon Brown LJ in Regency Rolls v Carnall 23 June 2000 (unreported) "Having regard to the long and generally unsatisfactory history of the proceedings to that point, the application plainly could, and in my judgement reasonably should, have been issued well before it was."

50. In Intelstat v JSC at paragraph 32, Deputy Master Bartlett said:

"On the issue of promptness I agree with the view expressed by Ward LJ in Mullock v Price 2009 EWCA Civ 1222 at para 2 that "promptly" is an ordinary English word which needs little further exposition. He pointed out that it has been said to require the claimant to act with "alacrity" or "reasonable celerity". It does not require the application to be made as soon as would have been possible but it does require "a substantial degree of urgency" (Chare v Fairclough 2003 EWHC 180 (QB) per Treacy J at para 31)."

I note that in Chare the delay was 2.5 months and which was not prompt and especially where FPS had sent a communication which implied that an acknowledgement of service would be expected within a specific period but no acknowledgement of service had been received (giving rise to an inference of non-service).

51. At paragraphs 33 and 34 he discussed whether the relevant circumstances were only those which existed when (and following when) the existing period for the service of the claim form had expired (which he thought was probably

"theoretically correct") or could extend to a situation where a claimant ought to have foreseen before the date of expiry that there would be a problem and so that an application ought to have been made in advance. However, the latter was not that case and the Deputy Master "did not find it necessary to express any firm view on the position in those circumstances" whilst doubting "whether such a claimant would satisfy the requirement of promptness". I have some difficulty with the internal consistency of those statements but in any event the Deputy Master did not come to any specific conclusion as to those matters.

52. The Deputy Master considered (obiter as the application had already failed on the basis that "all reasonable steps" had not been taken) promptness in paragraph 46 and held that the lapse there of four weeks between expiry of the time for service and the making of the application was "close to the borderline" but within it.

53. In Drury, an application had been drafted with reasonable expedition but the applicant had waited 10 weeks from when the applicant knew that service had not been effected before issuing it. At paragraph 47 the Court of Appeal held that that length of delay would require fully explained exceptional circumstances (which did not exist in that case) to have satisfied the "promptly" requirement.

54. The mere fact that the jurisdictional requirements are satisfied does not mean that the discretion to extend time should necessarily be exercised. The general rule (especially where the effect is effectively to extend a limitation period) is that the Claim Form should be served within the CPR7.5 prescribed period and there is a substantial (indeed heavy) burden on the claimant to justify there being

any extension. However, this point tends to be more material in CPR7.5(2)(a) "without time application" cases as if the Claimant has taken all reasonable steps (and which will have failed) and acted promptly, it may be difficult to see why they should lose their claim to limitation, but it all depends on the circumstances.

55. I also bear in mind, as is common-ground, that under CPR23.10, where, as here, the court has made an order (here the August 2020 Order) without service of an application notice having taken place, a person, here the Defendant, can apply to have the order set aside or varied. That is what the Defendant has done by the Defendant's November 2020 Application in relation to the August 2020 Order. In DDM v Zebra at paragraph 62, it was made clear that the Court would approach such an application as a re-hearing. I raised, and have had cited to me, R (Kuznetsov) v Camden 2019 EWHC 3910 where Mostyn J recorded at paragraph 22 that there was no authority as to how a court should approach such a re-hearing and said at paragraph 24 that:

"… I would formulate the test as follows that the court should give due weight to the decision of the judge who dealt with the matter without a hearing and should be able to identify a good reason for disagreeing with his or her decision…"

That statement is binding upon me but, in the circumstances of this case where the Defendant's relevant application is founded on CPR 7.6(3) and whether or not its jurisdictional requirements are satisfied on what are mainly agreed facts, I do not think that it makes much difference.

56. I was also taken to Cecil v Bayat 2011 EWCA Civ 135, but I do not think that that decision adds much to the above, although at paragraphs 39-40 it was made clear that lack of finance (which is not asserted here) is of limited (if any) relevance to these jurisdictional requirements of CPR7.6(3).

57. After the oral submissions, I drew attention to the very recent decision in Boxwood v Gleeson 2021 EWHC 847 and the parties supplied written submissions regarding it. There the period of time for service of a Claim Form was extended to 10 September 2020, the Claim Form was served on 11 September 2020 and an application was made by the claimant effectively to validate the late service.

58. At paragraphs 46 and 47 Mrs Justice O'Farrell said:

"46 Drawing together the principles that are relevant for determining the application before the court, they can be summarised as follows:

i) If a claimant applies for an extension of time for service of the claim form and such application is made after the period for service specified in CPR 7.5(1), or after any alternative period for service ordered under CPR 7.6, the court's power to grant such extension is circumscribed by the conditions set out in CPR 7.6(3): *Barton v Wright Hassall* at [8] & [21]; *Vinos v Marks & Spencer* at [20] & [27].

ii) The court has a wide, general power under CPR 3.10 to correct an error of procedure so that such error does not invalidate any step taken in the proceedings: *Phillips v Nussberger* at [30]-[32]*; Steele v Mooney* [19]-[20].

iii) In the cases cited where the power under CPR 3.10 was exercised, there was a relevant, defective step that could be corrected: *Steele v Mooney* (defective

wording of application for an extension of time); *Phillips v Nussberger*, *Bank of Baroda*, *Dory* (ineffective steps taken to serve the claim form on the defendants); *Integral* (defective service of particulars of claim). Doubts have been expressed as to whether CPR 3.10 could or would be used where no relevant procedural step was taken: *Integral* at [29]; *Bank of Baroda* at [17]; *Dory* at [76].

iv) The court also has a wide, general power under CPR 3.9 to grant relief from any sanction imposed for a failure to comply with any rule, practice direction or court order: *Denton v White* [2014] 1 WLR 3926 at [23] – [36].

v) A claimant is not entitled to rely on the wide, general powers under CPR 3.10 or CPR 3.9 to circumvent the specific conditions set out in CPR 7.6(3) for extending the period for service of a claim form: *Vinos v Marks & Spencer plc* at [20] & [27]; *Kaur v CTP* at [19]; *Elmes v Hygrade* at [13]; *Godwin v Swindon BC* at [50]; *Steele v Mooney* at [19] & [28]; *Piepenbrock* at [81] & [82]; *Ideal v Visa* at [92].

Application of CPR 7.6(3)

47. The court does not have power to grant any extension of time for service of the claim form under CPR 7.6(3). Firstly, Boxwood has made no application for an extension of time under CPR 7.6. Secondly, as must be recognised by Boxwood, if any such application were made, the conditions in CPR 7.6(3) would not be met. CPR 7.6(3) provides that *"the court may make such an order only if … (b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so"*. The unfortunate mistake by Boxwood's solicitors resulted in no steps being taken to serve the claim form by 10 September 2020.

Therefore, Boxwood could not establish that it took all reasonable steps to serve the claim form within the extended time period ordered by the court. Finally, the words used in CPR 7.6(3) are clear. The court does not have power to extend the time for service of the claim form where the specified conditions have not been met."

59. At paragraphs 48 to 50, the Judge rejected any attempt by that claimant to rely upon the court's general power to waive errors of procedure under CPR3.10 on the bases that (1) that would be inconsistent with the mandatory provisions of CPR7.6(3), (2) the requirement for service of originating process are subject to a "bright line rule" and (3) there was no justification for inflicting the prejudice of the deprivation of a limitation defence upon that defendant.

60. The Judge also went on to engage protectively in the Denton v White 2014 EWCA Civ 906 three stage analysis relevant to applications for relief from sanctions (i.e. considering whether the applicant had discharged the (heavy) burden of justifying the grant of relief in the light of (a) whether the breach was serious or substantial (b) whether there was good reason shown for the breach to have occurred and (c) all the circumstances and justice of the case including the heavy weight to be given to the CPR3.9 factors of the importance of compliance with rules, practice directions and orders and for litigation to be conducted efficiently and at proportionate cost). She said:

"55. As to the first stage, the breach of CPR 7.5 and the order dated 7 April 2020 was serious and significant. In the absence of service of a valid claim form, Gleeson were not subject to the court's jurisdiction. The delay was a matter of days, rather than minutes.

56. As to the second stage, the reason for the breach was a genuine mistake made by the claimant's solicitors and/or a diary error. A full account has been given by Ms Traill as to the circumstances in which the mistake was made. I accept that working away from the office during the pandemic would reduce the oversight of more junior practitioners that would be normally present and could allow mistakes to slip through the net. However, having issued proceedings in circumstances where limitation was a live issue and where Gleeson had objected to the requested extensions of time for service of those proceedings, it was incumbent on the solicitors to ensure that the extended dates ordered by the court were met.

57. As to the third stage, when considering all the circumstances, the same factors as set out above in respect of CPR 3.10 would arise. In particular, it would not be appropriate in this case to deprive Gleeson of any accrued limitation defence by extending time for service of the claim form.

58. The court's other general case management powers and the overriding objective would not lead to any different conclusion."

It seems to me that I should bear in mind what that Judge said as I have set out above but that it has little direct relevance to the main issues before me although it does emphasise the general heavy burden on a claimant who applies for an "out of time" extension of time for service under CPR7.6(3).

Method of challenging service of a Claim Form out of time and Civil Procedure Rules Part 11

61. However, the CPR scheme also provides for its own method as to how a defendant who wishes to assert that a Claim Form has been served out of time should seek to prevent the court proceeding with the Claim, being under CPR11 which reads:

" **Procedure for disputing the court's jurisdiction**

11

(1) A defendant who wishes to –

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

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

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

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

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

(4) An application under this rule must –

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

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

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

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

(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

(a) setting aside the claim form;

(b) setting aside service of the claim form;

(c) discharging any order made before the claim was commenced or before the claim form was served; and

(d) staying the proceedings.

(7) If on an application under this rule the court does not make a declaration –

(a) the acknowledgment of service shall cease to have effect;

(b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.

(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence."

62. The question as to what is the consequence of this in relation to an attempt to challenge an order granting an extension of time for service of a Claim Form was considered in Hoddinott where an order had been made extending time for service and an application had been made for that order to be set aside and the claim to be struck out for consequent non-service within time, but no application had been made for the court to decline jurisdiction within the 14 days from the filing of the Acknowledgement of Service (and which in that case, unlike in this one, had ticked the box of intent to defend and not the box of intent to apply for the court to decline jurisdiction).

63. At paragraphs 21 to 24, the Court of Appeal held that in these circumstances CPR11 was engaged, and that the reality in law was that the defendant was seeking to have the court decline jurisdiction on the basis of non-compliance with CPR7.5. The Court of Appeal went on in paragraphs 25 onwards to hold that if such an application was not made within the 14 days, and notwithstanding that the defendant had applied to set aside the extension of time order (and to

strike out) then the defendant was deemed to have accepted that the court had jurisdiction and so that even if the extension of time order were set aside the strike-out would fail and the claim would proceed. They said that:

"Did the application to set aside the order extending time for service render an application under CPR 11(1) unnecessary?

25 Mr Exall seeks to uphold the reasoning of the district judge. The question is whether, in a case where an application to set aside the order extending time for service has already been made, a defendant is to be treated as having accepted that the court should exercise its jurisdiction to try the claim, unless he also makes an application under CPR 11(1) within 14 days after filing an acknowledgment of service. There is force in the observation made by the district judge that "it is not the intention of the Civil Procedure Rules to insist upon a succession of applications to be made seeking the same relief…the issue is the same and the Court should not be burdened with duplicitous or repetitious applications whose purpose is identical".

26 We doubt whether the Rule Committee addressed the problem that has arisen in this case. But in our view, the interpretation adopted by the district judge was not open to him. Subject to the point discussed at para 28 below, the language of CPR 11 is clear. Paragraph (1) permits a defendant to apply to the court for an order declaring that the court has no jurisdiction to try the claim or that the jurisdiction should not be exercised. Paragraph (2) provides that a defendant who wishes to make such an application "must *first* file an acknowledgment of service in accordance with Part 10" (emphasis added). Paragraph (4) provides that an application under CPR 11 must be made

"within 14 days *after* filing an acknowledgement of service" (again, emphasis added). Paragraph (5) provides that if the defendant files an acknowledgement of service and does not make an application within the period specified in paragraph (4), "he is to be treated as having accepted that the court has jurisdiction".

27 In our judgment, the meaning of paragraph (5) is clear and unqualified. If the conditions stated in subparagraphs (a) and (b) are satisfied, then the defendant is treated as having accepted that "the court has jurisdiction to try the claim". The conditions include that the defendant does not make an application for an order pursuant to CPR 11(1) within 14 days after filing an acknowledgment of service. An application to set aside an order extending the time for service made before the filing of an acknowledgement of service is not an application under CPR 11(1) nor is it an application made within 14 days after the filing of the acknowledgment of service. The district judge (rightly) did not hold that the application to set aside the order extending time for service *was* an application under CPR 11(1). Rather, he said that the earlier application to set aside the order rendered it unnecessary to make an application under CPR 11(1). But in our judgment, there is no warrant for holding that, if an application is made before the filing of an acknowledgment of service to set aside an order extending the time for service, this has the effect of disapplying the requirement for an application under CPR 11(1). There is no such express disapplication, nor does one arise by necessary implication.

28 In our view, a defendant is fixed with the consequences stated in paragraph (5) if the two stated conditions are satisfied. At first sight, there is an apparent difficulty with the application of this approach to a case (such as the present) where the defendant wishes to argue that the court should not exercise its jurisdiction to try the claim, rather than to dispute the court's jurisdiction to try the claim. The distinction between the two categories of case seems to have been well understood by the draftsman. It is clearly drawn in paragraphs (1) and (6). But paragraph (3) provides that a defendant who files an acknowledgement of service does not, by doing so, lose any right he may have "to dispute the court's jurisdiction"; and paragraph (5) provides that if the two conditions in (a) and (b) are satisfied, the defendant is treated as having accepted that the court "has jurisdiction to try the claim". It may, therefore, be argued (although it was not argued before us) that paragraphs (3) and (5) refer to paragraph (1)(a) but not paragraph (1)(b). We would reject such an argument. CPR 11 must be read as a whole. It is clear that both paragraphs (2) and (4) are referring to applications made under paragraph (1)(a) and (1)(b). Further, paragraph (5) provides that if the defendant does not make "such an application" (ie an application under paragraph (1)(a) or (b)), then the consequences will be as stated. Paragraph (5) cannot mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court has jurisdiction to try the claim. It must mean that, if a defendant does not make an application under paragraph (1)(b), he will be treated as having accepted that the court should exercise its jurisdiction to try the claim. In our judgment, the reference to disputing the court's jurisdiction in paragraph (3)

and accepting that the court has jurisdiction in paragraph (5) encompasses both limbs of paragraph (1). The reference to the court's jurisdiction is shorthand for both the court's jurisdiction to try the claim and the court's exercise of its jurisdiction to try the claim.

29 It follows that, since both of the conditions stated in paragraph (5) were satisfied in this case, the defendant is treated as having accepted that the court should exercise its jurisdiction to try the claim, notwithstanding the late service of the claim form. The effect of paragraph (5) was that he was to be treated as having abandoned its application to set aside the order extending the time for service. This conclusion is reinforced by the fact that in this case the defendant indicated on the acknowledgement of service that it did not intend to contest jurisdiction and did intend to defend the claim.

30 For these reasons, we disagree with the decision of the district judge on the second issue and would, therefore, allow the claimants' appeal...”

64. It is common-ground, correctly in my judgment, that that reasoning applies to this case where no application for the court to decline jurisdiction was made under CPR11 within 14 days of the filing of the Acknowledgment of Service.

65. The Defendant, however, has applied for an extension of time (under CPR3.1(2)(a)) of the period to make an application prescribed by CPR11(4) and for relief from the (accepted by both parties to be a) sanction (in the form of a deemed acceptance) imposed by CPR11(5).

66. I have had my attention drawn to the decision in Caine v Advertiser 2019 EWHC 39 where a claim form was served late, an acknowledgement of service

was filed but without the box stating an intent to contest jurisdiction being ticked, it being noted that the notes on the form referred to the 14 day period, but only an application to strike-out was made and that was only done after the 14 day period. The defendant in that case then applied for a protective extension of time and relief from sanctions but also contended that a strike-out application under CPR3.4 was an alternative to an application under CPR11 in this context.

67. Master Yoxall held that a strike-out application was a permissible alternative, but, on appeal, Dingemans LJ held that that was wrong saying:

"30. In these circumstances in my judgment the decision in *Hoddinott v Persimmon*, followed in this respect by *Atkas v Adepta*, is clear authority, binding on both Master Yoxall and me, that an application that the court should not exercise its jurisdiction to try a claim must be made by CPR Part 11. Master Yoxall was right to note that in the analysis in *Atkas* and *Burns-Anderson* the courts appeared to have overlooked a provision of CPR Part 2.3(1) relating to whether a claim form was also a statement of case, but this does not meet the point that *Hoddinott v Persimmon* was binding. As has been noted in later cases, and in particular in the judgment of the Privy Council in *Texan Management* at paragraphs 63 to 66, CPR Part 11 has been "inelegantly and inconsistently drafted". In such circumstances different interpretations of the rules may appeal to different judges. However the rules of precedent exist to provide that in courts bound by the precedent like cases are decided alike, thereby providing reasonable certainty to litigants. In my judgment Master Yoxall was wrong to find that the application to set aside service of the claim form could be made pursuant to CPR Part 3.4."

68. However, Master Yoxall also held that he could and would grant a retrospective extension of time and relief from sanctions. Dingemans J (as well as holding that Master Yoxall had properly considered that such an application was actually being made) dealt with this aspect as follows:

"31 It is clear that, notwithstanding the wording of CPR Part 11(4) and 11(5) there is jurisdiction to grant an extension of time for making the application to dispute jurisdiction. This appears from the judgment in *Texan Management* and the judgment in *Le Guevel-Mouly v AIG Europe Limited* [2016] EWHC 1794 (QB) at paragraph 34. The provisions of CPR 3.9 and the guidance given in *Denton v White* apply…

34 As to the exercise of the discretion to extend time for making the application it might be noted that the issue of service had been raised immediately on receipt of the claim form and particulars of claim by the Advertiser and Times company and Mr Curry. The point had been pursued by an application (albeit by making the wrong application) on behalf of the defendants. Mr Caine was not misled into thinking that this point was not being pursued, and as soon as he raised the issue about the need to make the application pursuant to CPR Part 11, the issue about CPR Part 11 was addressed. Master Yoxall permitted Mr Caine to raise the issue about CPR Part 11 after the first hearing, and Master Yoxall was entitled to permit an extension of time to challenge service by CPR Part 11 in circumstances where the point about service had been taken from the outset. Mr Caine did in his submissions refer to various waiver cases and contended that the Defendants had submitted to the jurisdiction of the Court. The cases relied on by Mr Caine were cases involving a dispute about whether the Court had

territorial jurisdiction and parties acting inconsistently with a dispute about that territorial jurisdiction. Here there was no doubt that the Court had territorial jurisdiction over the dispute, and what was in issue was the exercise of that jurisdiction. Even where the acknowledgment of service ticked only that the claim was being defended, it was accompanied by a letter identifying a point about service. In these circumstances there was no waiver of the right to dispute jurisdiction on the basis that the claim form and particulars of claim were not served in time. In my judgment Mr Caine was unable to point out anything to suggest that Master Yoxall's exercise of his discretion to grant an extension of time to the defendants for making the Part 11 challenge was wrong. Therefore Master Yoxall was entitled to extend time for the Part 11 application, and to impose a permanent stay on proceedings."

69. While I bear in mind both that Master Yoxall's decision was on the facts of that particular case and that Dingemans J was only deciding that Master Yoxall's decision was one which was open to him to reach (and Dingemans J did not say that he would have reached the same decision as Master Yoxall or that Master Yoxall could only have properly reached the decision that he did (and not have properly refused the extension or relief from sanctions), I do, nevertheless, bear in mind that Dingemans J did not seem to regard there as being a real "waiver of the right to dispute jurisdiction on the basis that the claim form and particulars of claim were not served in time" where the documents at the point of time of the acknowledgment of service made it clear (as here) that that was not the defendant's intention.

Service by Alternative Means

70. CPR6.15 provides that the Court may choose to authorise service by alternative means in circumstances where the ordinary methods of service under the CPR have not been adopted or succeeded. It reads as follows:

> **"Service of the claim form by an alternative method or at an alternative place**
>
> **6.15**
>
> (1) 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.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.
>
> (3) An application for an order under this rule –
>
> (a) must be supported by evidence; and
>
> (b) may be made without notice.
>
> (4) An order under this rule must specify –
>
> (a) the method or place of service;
>
> (b) the date on which the claim form is deemed served; and
>
> (c) the period for –
>
> (i) filing an acknowledgment of service;
>
> (ii) filing an admission; or
>
> (iii) filing a defence."

71. At the oral hearing both parties drew my attention to various decisions on the interpretation of this Rule, which grants the Court a discretion to authorise an

alternative means (to those in CPR Part 6) of service where there is "good reason", and the interaction between it and CPR7.5 and 7.6 and the Hague Convention.

72. However, Mr Bard also submitted that CPR6.15 could only authorise a service which was not "otherwise permitted by this Part [i.e. Part 6]" and drew my attention to CPR6.40(3) which provides that service abroad may take place through a Hague Convention process (CPR60.4(3)(a)(ii) and CPR6.42(a)) or by any other method permitted by the local law (CPR6.40(3)(c)), such provisions not permitting the local law to be contravened (CPR6.40(3)). He therefore submitted that CPR6.15 could not be used to authorise a method of alternative service which method would actually be good service (albeit out of time) under CPR6.40(3).

73. CPR6.15 was considered in Kaki v National Private Air [2015] EWCA Civ 731 where (i) the court had granted permission to serve out of the jurisdiction and extended time for service (ii) the claimant had initiated the FPS process but also sent a copy of the claim form to the defendant abroad (and which was not good service in itself) (iii) the court had then made directions for alternative service and extended time again; but those directions were only complied with just after the extended time for service and (iv) a CPR Part 11 application was made for the court to decline jurisdiction.

74. The court analysed CPR6.15 and held:

"31 The effect of the wording of these three paragraphs is, to my mind, that a claimant can apply either before or after the time during which a claim form is valid for service, within or without the jurisdiction, for an order permitting

service by an alternative method. If the claimant seeks an order that steps already taken to bring the claim for to the attention of the defendant by an alternative method is to be, "good service", then there must be, "a good reason" for ordering that the steps identified by the claimant as the ones that were made to bring the claim form to the attention of the defendant will constitute good service of the claim form on him. That is clear in terms of paragraph 23 of the judgment of Lord Clarke in Abela where he said:

"Orders under rule 6.15(1) and, by implication, also rule 6.15(2) can be made only if there is a 'good reason' to do so. The question, therefore, is whether there was a good reason to order that the steps taken [in that case] constituted good service of the claim form on him."”

75. In Paragraph 32, the court said that “good reason” did not require “exceptional circumstances”, and the judgment then proceeds as follows:

“33 The judge who has to decide whether to make an order under Part 6.15 will, of course, have to consider all factors that are relevant to the circumstances of the particular case in front of him. It is not sensible to try and identify all those factors in case that list is treated by others as a gloss on the wordings of Part 6.15(1) and (2). However, I readily accept that, as Lord Clarke stated at [48] of Abela, there will inevitably be a focus on the reason why the claim form cannot or could not be served within the period of its validity. Therefore, the conduct of the claimant and his advisors in this regard and the timing of the application are likely to be relevant factors for the judge to consider. So, too, will the conduct of the defendant and his advisors. I would also accept that when the court is considering all the relevant circumstances of a particular case, it has to

adopt a "rigorous approach", because that is the court's job. It has to examine all relevant factors carefully and reject irrelevant ones. To that extent it must be "rigorous". Indeed, it is only if the approach is "rigorous" that the court will be able to conclude that there is a "good reason" to make an order under Part 6.15(1) or (2).

34 I cannot, however, accept that the approach has to be any more rigorous if the application is made after the time for permission to serve out has expired rather than before the expiry of that time limit. If the application is made after the time for service out has expired, then that is just another factor that the court will have to consider. It will examine all relevant factors rigorously."

76. The Court then considered the appeal against the decision of the judge below who had held that there was good reason to authorise the initial sending of the claim form to the defendant as being good service in the particular circumstances, and notwithstanding the incompetence of that claimant's solicitors in failing to comply with the later alternative service order; and notwithstanding that the judge had held that the claimant had not taken "all reasonable steps to serve" and so could not succeed on a CPR7.6(3) extension application.

77. They held:

"36 In considering this argument, I have to keep in the forefront of my mind the words of Lord Clarke at [23] of Abela. The judge had to make the valued judgment on whether there is, "a good reason" to regard what was done to bring the claim form to the attention of NAS as constituting, "good service". At

paragraph 28 of his judgment in this case, the judge identified the steps on which the Sheik relied. These are:

"(i) The letter to PO Box 18118 Jeddah of 21st February 2012; (ii) the email of Mr Sohanpal of 21st February 2012 and the email to Dr Ayman Al Juwayer on 22nd February 2012; (iii) the further letter to the same address on 13th September 2012; and (iv) the further email to Dr Ayman Al Juwayer on 13th September 2012."

37 The judge gave four reasons why he valued those steps provided, "a good reason", and why they should constitute good service. The judge considered the points that were made, doubtless forcefully, by Mr Milner.

38 In this court Mr Milner has concentrated on three particular matters which he submits the judge did not take account of either at all or sufficiently. The first, he submits, is that the judge did not focus on why the claim form was not served in accordance with the order of 20 May 2013 (as amended) within the period of validity, i.e. before 14 August 2013. Mr Milner submits that the sole reason for this failure was the incompetence of Clyde & Co and its agents in Saudi Arabia and he submits that this therefore cannot amount to "good reason" for making an order under Part 6.15(2).

39 The judge fully set out the chronology of the events for the time of 20 May 2013 order until the fulfilment of its terms by 19 August 2013, although he did so in the context of the application of the Sheikh to extend the period of time in which to serve the claim form under Part 7.6(3). The judge examined the arguments that were made by Mr Milner in respect of that aspect of the case,

as is clear from paragraph 23 of his judgment. The judge concluded that, "Not all reasonable steps" had been taken: see paragraph 25.

40 In my view, the judge had all those factors in mind when he stated at paragraph 25 of his judgment that although, "not all reasonable steps" had been taken for Part 7.6(3) purposes, overall the claimant had made, "significant efforts" to bring the claim form to the attention of the defendants and had done so. That is a valued judgment on that factor and I, for my part, find nothing wrong with it.

41 Secondly, Mr Milner submits that the judge did not take account of the fact that the application was made after the validity of the claim form for service out of the jurisdiction had expired. I disagree. In my view, the judge had this point in mind in making the comments that he did at paragraph 37 of his judgment.

43 Thirdly, Mr Milner emphasises that the judge did not take into account the effect of his judgment on the summary judgment of March 2014. Mr Milner submits that the effect of the order was that it would retrospectively turn the summary judgment order into a regular one which could then only be set aside if merits were shown. Without the judge's order, that summary judgment order would have been irregular and could have been set aside as of right. This is a point which Mr Milner fairly accepts had not been specifically pressed before the judge.

44 Whether or not that is the case, in my view, there is nothing in the point. If there is "a good reason" for the order of the judge that the steps taken to bring the claim form to the attention of the defendant constitute good service, then it must follow that the judge is entitled, indeed obliged, under Part 6.15(3) to

specify a date when the claim form is deemed served. As Flaux J correctly pointed out in paragraph 9 of his judgment in Dubai Financial Group Plc v National Private Air Transport Services Co (National Air Services Limited) [2014] EWHC 4482(Com) a case similar to the present one, (and, I believe, with the same defendant), it must follow from that order that proper service in this case took place on 17 September 2012. Therefore the summary judgment of March 2014 was a regular judgment. In other words, in my view, a validation order made under Part 6.15(2) must have retroactive effect not just for the purposes of identifying the date on which the claim form was deemed served but for all subsequent events. There is no qualification of the rule itself and there is no basis on which I can see that the order should have effect for one purpose but not another.

45 I accept that rule 6.15(3) gives the court the power to state the date on which the claim form is deemed to be served and that in an appropriate case, it might not be the same date as that when the claim form was brought to the attention of the defendant. No later date was however argued for by Mr Milne, at least not before us.

46 Looking at the matter overall, Mr Milner has not been able to convince me that there are other factors that the judge should have considered or that he considered factors that were not relevant. The precise weight that the judge gave to the factors considered is a matter for him because he is the judge at first instance. It is not a matter for this court to review, unless we were to conclude that the weight attached to a particular factor or the conclusion of the judge overall was just, "Wrong".”

78. This was thus a case on its own facts, where it was only held that the relevant conclusion was open to a first instance judge, but it does hold that CPR6.15 can apply even where the relevant claimant has failed to take "all reasonable steps" and failed to satisfy CPR7.6(3) (or to apply in time under CPR7.6(2)) and that CPR6.15 can be used to authorise a non-rules compliant method of service (where, as here, a copy of the issued Claim Form had actually been sent to the defendant at an early stage).

79. Mr Webster, for the Claimant, took me to OOO v Econwall 2017 FSR 1 where it was sought to authorise alternative service by means of the sending of a photocopy of an unsigned copy claim form, with the sealed Claim Form only being served out of time (due to a reasonable misapprehension as to whether or not there had been an agreed extension of time). At paragraph 47 it was said:

"To the extent that it was suggested, I do not agree that the requirements of rule 7.6(3) are to be imported into rule 6.15 where the facts concern a failure to serve a claim form in time. The Court of Appeal made no mention of rule 7.6(3) in *Bethell*. I think this was because the Court believed, without any need to say so, that it had no bearing. The Court by inference held that where the claimant had failed to serve the claim form in time solely because there was a minor departure from a permitted method of service or an ineffective attempt to serve by a permitted method within the time limit, good service can be deemed pursuant to rule 6.15 without the additional burden of the conditions associated with rule 7.6(3), see paragraph 24 in which the Chancellor quoted the judge at first instance and his reference to *Kuenyehia v International Hospitals Group Ltd* [2006] EWCA Civ 21, apparently with approval."

And then at paragraph 53 "Taking into account all circumstances of this case I have come to the view that collectively they qualify as a good reason to authorise service retrospectively and I will order that good service is deemed to have been achieved by delivery to the defendants of the copy unsigned claim form on 6 July 2015."

80. Mr Webster then took me to two decisions regarding CPR6.15 where the relevant service country was a party to the Hague Convention. The first in time was Flota Petroleum v Petroleos 2017 2 CLC 759 where at paragraphs 20-23 there was a discussion of various previous decisions which might have suggested that exceptional circumstances were required for a use of CPR6.15 to be justified in such a case. In paragraph 21 of the judgment the proposition that exceptional circumstances would be required was rejected. I note that in paragraphs 22 and 23 it was held that a reason to justify the use of CPR6.15 rather than the ordinary service route was the fact that there was a policy that arbitration proceedings (being that case) should be progressed expeditiously.

81. The second was Mv N 2021 EWHC 360. Under the hearing "Relevant Principles" Foxton J said:

"8. The question of when is appropriate to make an order for alternative service on a defendant who would otherwise have to be served abroad under the HSC or another service convention is well-trodden ground, and I do not propose to tread it again in this judgment. In brief, and I hope uncontroversial, terms, the

effect of those authorities is broadly as follows (the references to the HSC being intended to encompass other service conventions as well):

i) 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."

ii) The fact that the Court is being asked to make an order for alternative service on a defendant domiciled in a HSC country is a relevant factor in considering whether a good reason has been made out: see for example *Deutsche Bank AG v Sebastian Holdings Inc [2014] EWHC 112 (Comm), [19]* ("a critically important distinction", Cooke J).

iii) In proceedings in which the HSC is engaged, there are a number of cases which have held that merely avoiding delay or inconvenience will not be sufficient to constitute "good reason" (*Deutsche Bank AG v Sebastian Holdings Inc* , [28]), Société Générale v *Goldas Kuyumculuk Sanayi [2017] EWHC 667 (Comm), [49* (9)(a)]).

iv) In those cases where the country in question has stated its objection under Article 10 of the HSC to service otherwise than through its designated authority, it has been held that relief under Rule 6.15 will only be granted in "exceptional circumstances" (Société Générale , [49(9)(b)], approved at *[2018] EWCA Civ 1093, [33-35]* ; *Marashen Limited v Kenvett Limited [2017] EWHC 1706 (Ch), [57]* ; *Punjab National Bank (International) Ltd v Srinivasan [2019] EWHC 89*

(Ch)) or in "special circumstances" (if that is different): *Russian Commercial Bank (Cyprus) Ltd v FedorKhoroshilov [2020] EWHC 1164 (Comm), [96-97]* .

v) There has been some debate as to what the requirement of "exceptional" or "special circumstances" means, but it has generally been interpreted as requiring some factor sufficient to constitute good reason, notwithstanding the significance which is to be attached to the Article 10 HSC reservation (see for example *Koza Ltd v Akcil [2018] EWHC 384 (Ch), [45-49]* , Richard Spearman QC).

vi) However, it is clear that there are circumstances in which an order for alternative service will be appropriate in HSC cases (or to put matters another way, in which good reason for making such an order can be established notwithstanding the HSC factor).

9. It is this last question which is the principal issue in this application. Before turning to the facts of the case, it is helpful to consider the types of factors which have been held sufficient to justify an order for alternative service in an HSC case. They include:

i) Cases in which an attempt is being made to join a new party to existing proceedings, where the effect of delay in effecting service on the new party under the HSC will be either substantially to interfere with directions for the existing trial, or require claims which there is good reason to hear together to be heard separately: see for example *Avonwick Holding Limited v Azitio Holdings Limited and others [2019] EWHC 1254 (Comm)* and *Evison Holdings Limited v International Company Finvision Holdings LLC [2020] EWHC 239 (Comm)*

.

ii) Cases where the proceedings have been begun with a without notice injunction application, which is to be served immediately or in short order on the respondent. As Calver J noted in *Griffin Underwriting Limited v Varouxakis [2021] EWHC 226 (Comm), [57]* :

"In my judgment, in a case such as this where a party seeks a freezing injunction, because the court is making a number of coercive orders with the risk of committal for contempt, as well as the claimant giving an undertaking in damages, it is important that the proceedings be constituted formally as soon as possible which, in my judgment, fully justifies an order for alternative service, despite this being a Hague Convention case."

See also the same judge in *AXIS Corporate Capital UK II Limited v ABSA Group Limited [2021] EWHC 225 (Comm), [104]* and Bryan J in *Abu Dhabi Commercial Bank PJSC v Shetty [2020] EWHC 3423 (Comm), [113-115]* .

iii) Cases where an expedited trial is appropriate, and the order for alternative service is necessary to achieve the required expedition (as in *Daiichi Chuo Kaisha v Chubb Seguros Brasil SA [2020] EWHC 1223 (Comm), [47]*).

iv) It has also been suggested that an order for alternative service might be appropriate when the order sought arises out of a hearing which has already taken place, and delay in service under the HSC might lead to the issues being determined a prolonged period after the fact-finding has been undertaken (Marashen, [67]), or in cases in which the financial consequences of requiring service under the HSC might make pursuit of a low value claim financially unviable (Marashen , [73]).

10. In addition, orders for alternative service are routinely made in the Commercial Court, even in HSC cases, in claims for relief under the Arbitration Act 1996 …

12. Those considerations have been held sufficient to outweigh the HSC factor in alternative service cases: *Cruz City 1 Mauritius Holdings v Unitech [2013] EWHC 1323 (Comm)* , Field J at [18-19] and *Flota Petrolera Ecuatoriana v Petroleos de Venezuela SA [2017] EWHC 3630 (Comm)* , Leggatt J at [22]. The approach of the Commercial Court has been approved in the Court of Appeal: *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas [2012] EWCA Civ 644, [75]* ."

82. Following the hearing, I drew attention to the very recent decision in Goshawk v Terra 2021 EWHC 1029. The questions of the approach to Hague Convention countries was dealt with (but obiter as the case did not concern a Hague Convention country and without citing the more recent decisions referred to above) by citing from Cecil v Bayat as follows:

"34 In *Cecil v Bayat* [2011] EWCA Civ 135, a case where the relevant overseas country was a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), Stanley Burnton LJ (with whom the other members of the court agreed) said:

"67 Quite apart from authority, I would consider that in general the desire of a claimant to avoid the delay inherent in service by the methods permitted by CPR r 6.40, or that delay, cannot of itself justify an order for service by alternative means. Nor can reliance on the overriding objective. If they could, particularly in commercial cases, service in accordance with CPR r 6.40 would be optional;

indeed, service by alternative means would become normal. In fact this view is supported by authority: see the judgment of the court in *Knauf UK GmbH v British Gypsum Ltd* [2002] 1WLR 907, para 47:

"It was argued by [the second defendant] before the judge that the Hague Convention and the Bilateral Convention were a 'mandatory and exhaustive code of the proper means of service on German domiciled defendants', which therefore excluded alternative service in England. The judge did not accept that submission, pointing out that those Conventions were simply not concerned with service within the English jurisdiction. [The second defendant] did not repeat that submission on its appeal. Nevertheless, it follows in our judgment that to use CPR r 6.8 as a means for turning the flank of those Conventions, when it is common ground that they do not permit service by a direct and speedy method such as post, is to subvert the Conventions which govern the service rule as between claimants in England and defendants in Germany. It may be necessary to make exceptional orders for service by an alternative method where there is 'good reason': but a consideration of what is common ground as to the primary method for service of English process in Germany suggests that a mere desire for speed is unlikely to amount to good reason, for else, since claimants nearly always desire speed, the alternative method would become the primary way."

68 Service by alternative means may be justified by facts specific to the defendant, as where there are grounds for believing that he has or will seek to avoid personal service where that is the only method permitted by the foreign law, or by facts relating to the proceedings, as where an injunction has been

obtained without notice, or where an urgent application on notice for injunctive relief is required to be made after the issue of proceedings. In the present case, the only reason for urgency in serving the defendants arose from the claimants' delay in seeking and obtaining their permission to serve out of the jurisdiction: a delay resulting in part from their decision not to proceed with their claim until they had obtained funding for the entire proceedings. Furthermore, their application for permission to serve out was not particularly complicated.

69 This does not mean that a claimant cannot bring proceedings to the attention of a defendant by e-mail, fax or other more speedy means than service pursuant to CPR r 6.40. The claimants could have done so in the present case. But, as I have indicated, service is more than this. In my view, the judge confused this possibility with service itself."

83. The judgment then considered the principles regarding CPR6.15 generally as follows:

"37 Finally, Popplewell J reviewed all the authorities and summarised the relevant principles in *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S. & Ors* [2017] EWHC 667 (Comm) § 49, stating (so far as relevant to the present case):

"(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. …

(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." (§ 49)

38 The Court of Appeal, on appeal from Popplewell J's decision, differed as to the last proposition stated in quoted subparagraph (5) above: the court explained that in the context of alternative service, as opposed to extension of the validity of a claim form, negligence or incompetence by a claimant's lawyers will not always be a bad reason for ordering alternative service: it must depend on the facts of the case (*Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S. & Ors* [2018] EWCA Civ 1093 §§ 20-23). *Kaki v National Private Air Transport Co* [2015] 1 CLC 948 was an example of a case where the Court of Appeal upheld a decision by a judge who had not regarded such negligence or incompetence as a bar to relief. The Court of Appeal in *Société Générale* noted that *Kaki* was a case where no limitation issue arose (*Société Générale* §§ 20 and 23)."

84. However, Mr Bard has also sought to rely upon a summary in Boxwood Leisure at its paragraph 42 of elements of Barton v Wright Hassall 2018 1 WLR 119 and its consideration of CPR6.15 (in the different circumstances of a litigant in person claimant failing to serve in a manner permitted by the rules although

actually sending the claim form to the defendant's solicitors). Paragraph 42 of Mrs Justice O'Farrell's judgment reads as follows:

"42 The principles to be applied to applications for relief from mistakes in service of a claim form were considered by the Supreme Court in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119. The case concerned a litigant in person who purported to serve a claim form on the defendant's solicitors by email, without obtaining any prior consent. It was common ground that this was not good service and the claim form expired unserved on the following day. The court dismissed the appeal, declining to exercise its power retrospectively to permit service of the claim form by an alternative method under CPR 6.15 for the reasons explained by Lord Sumption:

"[8] The Civil Procedure Rules contain a number of provisions empowering the court to waive compliance with procedural conditions or the ordinary consequences of non-compliance. The most significant is to be found in CPR 3.9, which confers a power to relieve a litigant from any "sanctions" imposed for failure to comply with a rule, practice direction or court order. These powers are conferred in wholly general terms, although there is a substantial body of case law on the manner in which they should be exercised … CPR rule 6.15 is rather different. It is directed specifically to the rules governing service of a claim form. They give rise to special considerations which do not necessarily apply to other formal documents or to other rules or orders of the court. The main difference is that the disciplinary factor is less important. The rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty.

They are simply conditions on which the court will take cognisance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction.…

[9] What constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority…

[10] … In the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances.…

[16] The first point to be made is that it cannot be enough that Mr Barton's mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke pointed out in *Abela v Baadarani*, this is likely to be a necessary condition for an order under CPR rule 6.15, but it is not a sufficient one. Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making

him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension. An order under CPR rule 6.15 necessarily has the effect of further extending it. For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process.…

[21] … I agree with the general point that it is not necessarily a condition of success in an application for retrospective validation that the claimant should have left no stone unturned. It is enough that he has taken such steps as are reasonable in the circumstances to serve the claim form within its period of validity. But in the present case there was no problem about service. The problem was that Mr Barton made no attempt to serve in accordance with the rules. All that he did was employ a mode of service which he should have appreciated was not in accordance with the rules. I note in passing that if Mr Barton had made no attempt whatever to serve the claim form, but simply allowed it to expire, an application to extend its life under CPR rule 7.6(3) would have failed because it could not have been said that he had "taken all reasonable

steps to comply with rule 7.5 but has been unable to do so." It is not easy to see why the result should be any different when he made no attempt to serve it by any method permitted by the rules."

85. Mr Bard relies on what was said to be the "main relevant factors". Although the final above sentences of Barton could be said to be inconsistent with Kaki on the question whether CPR6.15 can apply where "all reasonable steps" have not been taken, Barton does not differ from Kaki, this case is not a situation where the Claimant did not try to serve under the appropriate FPS process.

86. I have also now noted the decision in YA II v Frontera 2021 EWHC 1380 (judgment 26/05/2021) but have not canvassed this with the parties due to a need to bring the process of preparing this judgment to an end. In any event, it appears to be consistent with the above authorities in:

(1) Citations from Popplewell J in Societe General (and see above) (paragraph 48)

(2) Stating that it will be a matter of significance if the alternative method of service is one not permitted by a relevant Convention applicable to that country and particularly so if the country has registered an objection e.g. under Article 10 of the Hague Convention but which has not happened in relation to the USA (paragraph 49)

(3) Stating that authorising a flawed attempt at a method of service which was permitted by the Hague Convention does not involve a test of "special" or "exceptional circumstances (paragraph 51).

COVID Cases

87. There are various decisions which relate to the COVID pandemic, the consequent government regulations and advice limiting activities in this country, and their effects in relation to Court procedure. I also note that at the relevant time in Spring and Summer 2020, Practice Direction 51Z was in force providing that the Court would take the pandemic into account regarding directions etc. (but without any specific reference to CPR7.6 or service).

88. Mr Bard took me to Municipio v BHP 2020 EWHC 928 where an extension had been sought to a timetable for evidence on the basis of difficulties due to the pandemic. At paragraph 32 it was held that:

"32 In my judgment the approach to applications for the extension of time in the context of the Covid-19 pandemic is to be determined by having regard to the overriding objective; paragraph 4 of PD51ZA; and the protocols and guidance which have been referred to above. In addition regard is to be had to the approach to the adjournment of trials set out above. In the light of that the Defendants' application is to be assessed against the following principles.

i) The objective if it is achievable must be to be keep to existing deadlines and where that is not realistically possible to permit the minimum extension of time which is realistically practicable. The prompt administration of justice and compliance with court orders remain of great importance even in circumstances of a pandemic.

ii) The court can expect legal professionals to make appropriate use of modern technology. Just as the courts are accepting that hearings can properly be heard

remotely in circumstances where this would have been dismissed out of hand only a few weeks ago so the court can expect legal professionals to use methods of remote working and of remote contact with witnesses and others.

iii) While recognising the real difficulties caused by the pandemic and by the restrictions imposed to meet it the court can expect legal professionals to seek to rise to that challenge. Lawyers can be expected to go further than they might otherwise be expected to go in normal circumstances and particularly is this so where there is a deadline to be met (and even more so when failing to meet the deadline will jeopardise a trial date). So the court can expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology. As I have already noted metaphors may not be particularly helpful but the court can expect those involved to roll up their sleeves or to go the extra mile to address the problems encountered in the current circumstances. It is not enough for those involved simply to throw up their hands and to say that because there are difficulties deadlines cannot be kept.

iv) The approach which is required of lawyers can also be expected from those expert witnesses who are themselves professionals. However, rather different considerations are likely to apply where the persons who will need to take particular measures are private individuals falling outside those categories.

v) The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.

vi) However, the court must also take account of the realities of the position and while requiring lawyers and other professionals to press forward care must be taken to avoid requiring compliance with deadlines which are not achievable even with proper effort.

vii) It is in the light of that preceding factor that the court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods. In the context of the present case the Defendants said that meetings conducted remotely took twice as long and achieved less than those conducted face to face. The Claimants challenged the precise calculation but accepted that such meetings would be likely to take longer and that is readily understandable particularly in a case such as the present involving large quantities of documents and requiring at least to some extent the use of interpreters.

viii) In the same way the court must have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to address the pandemic. In current circumstances the remote dealings are not between teams located in two or more sets of well-equipped offices with fast internet connexions and with teams of IT support staff at hand. Instead they are being conducted from a number of different locations with varying amounts of space; varying qualities of internet connexion; and with such IT support as is available being provided remotely. In addition those working from home will be working from homes where in many cases they will

be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.

ix) Those factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily than an extension of time which does not have that effect. That remains the position in the current circumstances and before acceding to an application for an extension of time which would cause the loss of a trial date the court must be confident that there is no alternative which is compatible with dealing fairly with the case."

89. I have borne those various matters in mind, although they do relate to a specific requirement to produce evidence within a limited time period.

90. The parties also took me to Stanley v LB of Tower Hamlets 2020 EWHC 1622 where a local authority sought to justify its application to set aside judgment in default of an acknowledgement of service in part on the basis of COVID related staffing-of-office difficulties. It was held at paragraph 34 that the claimant should have been aware of these and dealt with service accordingly. At paragraphs 35 and 36 it was held:

"35 I turn to the three stage *Mitchell/Denton* test. As I have said, Mr Cohen accepted that there had been a serious and significant default by the Council in its failure to serve an Acknowledgement of Service and a Defence. I agree. However, I accept that the circumstances which led to the default were unique and that overall I should grant relief from sanctions having regard to the second and third stages of the test and the criteria in CPR r 3.9. Here, I am bound

to have regard to CPR PD 51ZA (Extension of time limits and clarification of Practice Direction 51Y – coronavirus), which provides at [4]:

"4. In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions."

36 I find that the reason for the Council's default was the COVID-19 crisis, and that, but for the Council's offices being shut, it would have responded in time to the Claimant's claim. Whilst, as I have said, the Council had shown something of a cavalier attitude prior to the issuing of proceedings, I am satisfied it would have acted in accordance with the rules once proceedings had actually been issued. Another relevant circumstance is that Mr McConville was at fault for not checking whether service by post was still possible and feasible. That was an obvious step which he should have taken. The Council moved promptly to instruct Ms McDougall once it became cognisant of the Claimant's claim and this application to set aside default judgment was made promptly thereafter. I fully recognise the need to enforce compliance with the rules and the need to conduct litigation at proportionate cost. However, overall, I am satisfied that the interests of justice require judgment in default to be set aside. It would be unconscionable in my view for the Claimant to benefit from the unprecedented health emergency which prevailed at the end of March (and which is still subsisting today)."

91. I note that there PD 51ZA was treated as being applicable generally to a case of seeking relief for the consequences of a default in compliance with the Rules.

While it might be said that CPR13.3 is something of a self-contained code, earlier in the judgment the Judge had held (paragraphs 26 and 27, following the Court of Appeal in Dexia v Regione Piemonte) that the relevant discretion had to be exercised in accordance with Denton principles. Thus, the decision is some authority for a contention that an application to disapply a Rule which relates to a sanction (which is also the case in relation to a CPR7.6(3) application) should have COVID and resultant difficulties taken into account as part of the relevant analysis and consideration.

92. Following the hearing, I drew the parties' attention to the even more recent decision of Qatar v Phoenix 2021 EWHC 2243. This was a decision under CPR7.6(2) where that claimant had tried to engage FPS for the purposes of service in Switzerland (under the Hague Convention) in May 2020 after FPS had shut due to COVID. Master Gidden considered that that claimant had not done sufficient because they had issued the claim form in January 2020 but done nothing to investigate the position until May 2020 (when only two months were left for ordinary service outside the jurisdiction).

93. The Judge on appeal found that the Master's decision was justifiable and that the reasoning given was sufficient. The most material paragraphs (although dealing with the less restrictive (to CPR7.6(3)) CPR7.6(2) jurisdiction) are as follows:

"41 The proposition that the decision of Master Gidden fell outside the generous width of his discretion is based essentially on three factors: his failure to make any or any proper allowance for the fact that service out of the jurisdiction via the FPS was severely affected from 16 March 2020 and was

suspended altogether by 16 April 2020 thus rendering service out of the jurisdiction impossible in any event from that date; his illogical reasoning in relation to the effects of the pandemic, i.e. suggesting that the Claimants should have anticipated the effects before they were generally recognised; his failure to mention at all the evidence that the FPS in May 2020 had advised a colleague of Mr Tapper that applications should be made for lengthy extensions to the time for service and that on 30 June 2020 the FPS had advised Mr Tapper to await the outcome of the application for an extension of time before submitting documents for service.

42 The difficulties with the FPS did not begin until the middle of March 2020 and the service was not suspended until the middle of April 2020. The Claimants had issued the claim form days before the expiry of the limitation period. Therefore, it was incumbent on them to act promptly. It is quite correct for Mr Stewart to say that the Claimants had 6 months in which to serve the claim form out of the jurisdiction. It is necessary to emphasise that the rule permits 6 months to serve out of the jurisdiction, not the better part of 6 months before taking any steps to discover what needs to be done to serve out of the jurisdiction. Reasonable steps in the context of this case would have involved the Claimants at an early stage informing themselves of the processes by which service out of the jurisdiction would be effected. Had they done so, the problems with the FPS, about which they knew nothing at all until late June 2020, could have been overcome. It also is correct that the Claimants had 4 months to serve within the jurisdiction. However, as the Master observed, the Claimants took an optimistic view of the attitude of the Defendant company's solicitors to accepting service which was wholly unwarranted given the history of the case in the period

preceding the issue of the claim form. Reasonable steps would have been for the Claimants to establish as soon as the claim form had been issued whether the solicitors would accept service since, if they would not, service out of the jurisdiction would be required. It has been argued that this would not have been appropriate given that negotiations were continuing. The only evidence before the Master on this was hearsay evidence, i.e. what had been said by Mr Latamie. This evidence was vague in the extreme and of little (if any) weight. Master Gidden made it very clear in his judgment that the Claimants' lack of activity between issue and early May 2020 (in relation to which he had no proper evidence) was a critical factor in his reasoning. Master Gidden gave proper weight to the issues with the FPS. In reality, those issues were not of the significance argued for by the Claimants.

43 The paragraph of the judgment dealing with the effects of the pandemic is not the easiest part of the judgment to understand. However, the Master was entitled to observe that the pandemic did not come wholly out of the blue. It was something in the general public consciousness by early March 2020. As I have indicated, a critical factor in the Master's reasoning was the total lack of activity between 22 January 2020 and 5 May 2020. It was not illogical for him to refer to the need to leave nothing to chance given what was unfolding from early March. In fact, by doing nothing for another 2 months, the Claimants did take a risk.

44 It is correct to observe that the Master did not refer specifically to the evidence of the information provided by the FPS to a colleague of Mr Tapper about which Mr Tapper learnt towards the end of June 2020. Nor did he mention

that the FPS had advised Mr Tapper to await the outcome of the application to extend before submitting documents. This evidence could not have affected the decision of the Master given the basis on which he made it. There was no need for him to refer to it. The lack of such reference does not begin to vitiate the decision."

Service in California

94. There is a dispute between the parties as to whether or not what happened on and shortly after 30 June 2021 was proper service according to the laws of California. At the oral hearing there were already a witness statement from Mr Mitrovich and expert affidavits from Robert Ross (Claimant) and Martin Buchanan (Defendant). The Defendant sought to adduce further expert evidence regarding that and I directed that the expert evidence sought to be relied upon should be filed and served so that (i) the Claimant could object (if the Claimant so wished) on an informed basis and (ii) it could be considered. A further supplemental expert affidavit of Mr Ross was then filed and served, and then one of Mr Buchanan in response. Although disputes have arisen as to whether or not I should allow these further reports to be adduced it seems to me that no real prejudice has been caused to either side by allowing this process and so I grant any necessary permissions.

95. Mr Mitrovich has provided a "to whom it may concern" statement, signed but without a Statement of Truth, stating that he declined to accept the documents when the process server attended, did not sign anything, did not give his own name, and was only a salesman, but accepted that he did pass the documents

(whatever they were) to the senior officer "Neil" (being one Neil Jaffe ("Mr Jaffe")) in the next few days.

96. Mr Ross' first affidavit of 5 February 2021 stated that in Californian law (i) only service on the "registered agent for service of process" for the Claimant, and who was Mr Jaffe, could be proper service on the Claimant (ii) although Californian law permits "substituted service" at least "reasonable diligence" must take place and which is usually three attempts to serve and there has to be an Affidavit of Diligence confirming such (iii) the Claimant had in no way clothed Mr Mitrovich with authority to accept service and therefore (iv) service had not occurred under Californian law. The fact that Mr Jaffe eventually obtained the documents from Mr Mitrovich was not mentioned.

97. Mr Buchanan's first affidavit is dated 22 March 2021. He says (i) a proof of service document (as completed by Mr Fecher) creates a rebuttable presumption of valid service (ii) service can take place on a "general manager" who is anyone who has "sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made" and that can well be a sales representative or agent (such as Mr Mitrovich) (iii) the Californian courts take a liberal approach and consider service effected if the documents actually reach a person of sufficient seniority (as occurred with Mr Jaffe) (iv) substituted service on a company (as opposed to on an individual) is achieved by leaving the documents at the relevant premises, at least with a person apparently in charge (such as Mr Mitrovich), and then sending them by post (as occurred in August).

98. Mr Ross's second affidavit is dated 8 April 2021. He agreed with much of what Mr Buchanan said but stated that (i) the service was invalid as out of time as far as the time limit in the February Order was concerned (ii) Mr Mitrovich did not have the status of a "general manager" (iii) the cases relied upon by Mr Buchanan for "substituted service" applied to non-Californian corporations only due to the existence of the "registered agent" provision regarding Californian corporations.

99. Mr Ross' third affidavit is dated 6 May 2021. He says (i) that a Californian court would not treat as valid service, a "summons the time for service of which had expired" and that Article 5 of the Hague Convention should be construed likewise (ii) this is the case even if time is subsequently extended as the event of service was still then invalid (iii) there was insufficient material for the Defendant to have held out Mr Mitrovich as a relevant agent (i.e. one upon whom service could take place) and Mr Mitrovich could not clothe himself with such authority (iv) the burden of proof of showing valid service is on the person asserting that to be the case (v) the papers actually reaching a relevant person is insufficient for service; the liberal approach only applied to minor technical defects (vi) there was no sufficient Proof of Service allowing reliance on the subsequent posting to be substituted service.

100. Mr Buchanan's second expert affidavit is dated 18 May 2021. He says (i) if the law of California regarding periods of time for service of Californian summonses applied, then time for service would have been extended due to the existence of difficulties in service due to COVID (ii) while Californian law may be strict in terms of time for service of Californian summonses, it would (a)

apply a "flexible due diligence standard" in relation to service and time for service under the Hague Convention and consider what efforts the claimant had made as balanced against any prejudice to the defendant from what had occurred, and relied on case-law regarding service of USA process in Germany or (b) treat any time limit as being suspended once the documents had reached ABC Legal (i.e. the USA Central Authority) in March 2020 (iii) that he maintained that serving on someone who is not authorised who transmits to someone who is authorised to accept service is sufficient as being "substantial compliance" as long as (a) there had been some degree of compliance (b) the circumstances made it "highly probable" that an equivalent to full compliance had occurred and (c) there had been sufficient notice imparted to put the defendant on his "defense", and that was the case here (iv) there was no need for three attempts of service upon a corporate defendant.

101. I have considerable doubts as to whether the disputes as to Californian law actually matter that much to the real decisions which I have to take as it is common-ground that:

i) what occurred at the end of June (and thereafter) was outside the time for service permitted by CPR7.5(3) and/or the February Order

ii) what occurred in October and the start of November was outside the time for service permitted by CPR7.5(3) and/or the February Order but inside the time for service permitted by the August Order and, if the August Order stands, effective service (by service on Mr Jaffe) in Californian law.

102. However, I do express my conclusions on Californian law, and which are a matter of technical "fact" for me, and what occurred shortly:

i) I do not conclude that what happened in June was necessarily ineffective because it was outside the time for service permitted by CPR7.5(3) and/or the February Order. The expert affidavits seem to be concerned with the question of the status of an unserved Californian summons once its time for service has expired and conclude one or both of (i) the summons ceases to have validity (and becomes a nullity, although capable of subsequent revival) at that point and (ii) service cannot then occur (at least without an order having been made). However:

a) They do not deal with the status of an unserved England & Wales Claim Form

b) In the law of England & Wales, an unserved Claim Form remains valid, albeit that the Court may decline jurisdiction if a CPR Part 11 application is made, but before then it can still be served which is precisely what both CPR Part 11 and Hoddinott provide. I do not see why a Californian court would disregard that and say that service was impossible

c) Article 5 of the Hague Convention provides that one Central Authority will serve documents provided to it by another Central Authority. It says nothing about any implied limitation dependent on the providing jurisdiction's rules regarding period of time for service. It could be highly restrictive and contrary to the purpose of the Convention (which is all and only about

service) if a request to serve ceased to have effect because of a limit to time for service in the providing Authority's law

ii) I do conclude that the mere delivery of the documents to Mr Mitrovich at the Californian Address was not sufficient to amount to good service. He was not the "registered agent for service" and I see no reason to conclude that he was clothed with any more authority than "minding the shop" and in particular no reason to conclude that he was being clothed with the authority of a "general agent" or someone who had authority to accept service

iii) I do conclude that (although this would not be sufficient in England & Wales law) the delivery to Mr Mitrovich, the person at the relevant address, by ABC Legal and with the documents being passed on (as is accepted by the Defendant) to Mr Jaffe would be good service under Californian law. That accords with the concept of "substantial compliance" as explained in Ramos v Homeward 223 Cal.App 4th 1434 at Section III of the judgment of the California Court of Appeal considering previous authorities (in particular Dill v Berquist) and which is the most recent authority on the point cited by the experts

iv) I also consider that the doctrine of substituted service would apply once the posting had been effected (following the delivery to Mr Mitrovich at the Californian Address). If a Proof of Service form was required then that is only a minor technical defect and which the Californian courts, with their liberal approach, would have been prepared to waive.

CPR Part 11 and Hoddinott and the Defendant's Application for Relief from Sanctions

103. Technically, the first application for me to consider is that of the Defendant to extend the time to apply under CPR Part 11 and relief from the sanction (which it is common-ground and I find to exist) under CPR11(5) of the Defendant having been deemed to have accepted that the court has jurisdiction to try the Claim. If this application fails, then the other applications become irrelevant.

104. I therefore turn to the Denton v White three stage analysis.

105. The relevant occurrence is, in my view, serious and substantial. The Rule provides for a clear consequence, detrimental to the defendant, which is triggered by non-compliance with Rule 11(4). It is thus at least equivalent to a sanction, and all the more so as the Rule is designed to provide certainty as to whether or not there is going to be a challenge to the court's jurisdiction. The facts that (i) the actual period of time before an application was made was very short and (ii) there was already subsisting an application (incorrectly) designed to achieve the same purpose does not, in my judgment, and contrary to Mr Bard's submissions, affect this. In relation to the first point: the Rule is clear and intended to be certain; no suggestion was made in Hoddinott other than that the Rule and its provisions were conclusive, rather the Hoddinott decision stressed their importance; and the shortness of the period of time prior to an application was only due to the Claimant drawing the point to the Defendant's attention; and, in any event, it is the sanction rather than the period of time after when it is imposed which is the most relevant consideration here (and see also Dirije v Bejay 2020 EWCA Civ 1400 at paragraph 56).

106. There was no good reason for the non-compliance. Even if the wording of the Rule could be described as technical and potentially unclear, the Hoddinott decision (and also the later Caine decision) had made quite clear how the Rule was to be construed. Whilst it is clear that the error was "innocent" (there being no suggestion of the Defendant seeking to gain an advantage by not applying under CPR11 which would both have been in its interest and, if known, the obvious course to have taken), there is no good reason for it.

107. The third stage, however, is to consider all the circumstances of the case. As to these:

i) The burden is on the Defendant, as applicant, to satisfy me as to why relief should be granted, notwithstanding the deeming provision of CPR11(5), and this should not be done too readily

ii) I bear in mind my conclusions on the first two stages, neither of which is helpful to the Defendant

iii) I also bear in mind that CPR11(5) is designed to enable and ensure certainty, and therefore that there is a strong policy in favour of enforcing it. That ties in with CPR3.9(b) (as well as CPR1.1(2)(f)) as to the importance of enforcing compliance with Rules, and which matter is to have a "top seat at the table" of consideration of whether or not to grant relief but which is not conclusive of itself

iv) CPR11(5) is also designed to assist the orderly progress and process of the litigation as time-limiting when points can be taken as to jurisdiction, and where the importance of, and the effect of the relevant contravention

on, such progress and process is made another "top seat at the table" matter by CPR3.9(a) but again which is not conclusive of itself

v) I note that in Caine, a case with similarities to the present but where the "intend to contest jurisdiction" box on the Acknowledgement of Service had not been ticked (thus rendering the case weaker as that was a further potentially important non-compliance with the Rules), Master Yoxall was prepared to grant relief and it was held that doing so was within his discretion. However, that case is only an example of what a Master might do, the Judge did not hold that the Master had no choice but to do it

vi) I do, however, further note that in Caine the Judge held that, in circumstances of the existing (there as here) application to set aside the order granting an extension of time for service, there was clearly no intention to actually waive an ability to contest jurisdiction and thus that the CPR11(5) is being used (as a deeming provision) to operate in a very technical way (although that is, of course, precisely what it does) and thus the claimant's reliance upon it is to some extent (although understandably) opportunistic

vii) I bear in mind that the application was made very speedily, albeit only once the Claimant (who could have delayed) had notified the Defendant of its problem with CPR11(5) and Hoddinott

viii) I also bear in mind that the Claimant would contend that the Defendant is seeking to take a very technical approach, and advantage of COVID problems, against the Claimant in relation to the timing of service of the

Claim Form and that it might be said that the Defendant should therefore be held itself to technicalities (here the operation of CPR11(5)). That is, on the surface, an attractive argument, but, I think, ignores the strength of the statutory policies of limitation in general and time for service of claim forms being limited in particular. These are not mere matters of technicality but specific rights given to persons in the position of the Defendant (and whether or not they are actually wrongdoers in law)

ix) The Claimant has also criticised the Defendant for apparently conceding and then taking particular points in relation to the other applications. Even were that right, I do not see that such matters particularly impact upon this question

x) I have also borne in mind that in Hoddinott this "simple" solution of seeking and obtaining relief from sanctions was not even suggested by the Court of Appeal as being a possibility. However, I do not know why that was (and the relevant extension in time order would have survived in that case in any event, so the matter was somewhat otiose) and in Caine it was held to be an appropriate course.

108. Although I have borne in mind all the points above and the various points made by Mr Webster, it seems to me that I should grant the extension of time and relief from sanctions sought by the Defendant. The situation here is that it was absolutely obvious from the Defendant's initial application, and the Defendant's Acknowledgement of Service, and the Claimant could have been in no doubt, as to what the Defendant was seeking to do i.e. set aside the August Order and use that to say that service had not taken place in time and that the litigation

should therefore be terminated. The point was properly taken but is extremely technical and all that its taking has done has been to result in the need for a further application which has been combined into the applications before me with no disruption to the court's timetable or the proceedings apart from the need to deal with it as a matter of law. There has been no real disruption to the progress or the process of the litigation, and Caine makes clear that it can be perfectly proper for relief to be granted in this particular type of situation. While I think that I can bear this in mind in favour of the Claimant with regard to other discretionary (but not jurisdictional) matters, albeit only to a distinctly limited extent, and it will be relevant as to costs in any event, I do regard the Defendant as having discharged the relevant burden, and that the justice of the case in the all the circumstances requires me to, and I will, extend the time for making a CPR11(4) application and grant relief from sanctions.

CPR7.6(3) and the Defendant's Application to set aside the August Order

109. The next matter is as to whether I should accede to the Defendant's Application to set aside the August Order as, if I do not, service will have been properly effected within time both by the events of (i) in June to August 2020 (a) Mr Mitrovich passing the documents to Mr Jaffe and (b) the documents being delivered to Mr Mitrovich at the California Address and then being posted to that address And also separately (ii) by the delivery by process server and post in October/early November 2020.

110. As I have said above, there are two jurisdictional requirements before any discretion arises, namely that the claimant "has taken all reasonable steps to comply with [CPR7.5]" and that the application for the August Order was made

promptly. Although Mr Webster contended that the Claimant appeared only to be going to challenge the second requirement, Mr Bard chose to challenge both.

The first requirement "all reasonable steps"

111. The first requirement is that "the claimant has taken all reasonable steps to comply with [CPR7.5] but has been unable to do so."

112. Mr Bard for the Defendants submits that this requirement is not satisfied, and in particular (although I have borne all his submissions in mind) that:

i) The wording is all reasonable steps

ii) It should have been clear to the Claimant that COVID could well be giving rise to problems in serving in California within the relevant time period; and that the potential for this could have been somewhat clarified by an internet search as to relevant lock-downs and restrictions

iii) The Claimant could (and should) have instructed its own USA process servers separate from ABC Legal. Even if such an instruction had been ineffective to effect service, it would still have been a "reasonable step" and the taking of which is a jurisdictional requirement

iv) The Municipio decision makes clear that lawyers should have been adjusting their practices during COVID to seek to continue to comply with the CPR

v) There is a good reason to depart from the August Order sufficient to satisfy the approach taken in R(Kuznetsov).

113. Mr Webster submitted that I should find that "all reasonable steps" had been taken, and that:

i) It is "all reasonable steps to comply with [CPR7.5 and the February Order]" not "all reasonable steps" generally

ii) Any delay over the Christmas 2019 period could be explained by the guiding mind (Mr Macari) of the Claimant having been seriously unwell at that point as stated in unchallenged evidence

iii) The Claimant reasonably expected that the requested and paid for "Expedited Service" would have taken place within 7 business days from when FPS posted the documents on 11 March 2020 and the Claimant did all it possibly could to ascertain what had happened

iv) It would have been unreasonable and pointless to try to instruct alternative US process servers as (a) they would have been affected by USA lock-downs (b) there would have been no reason to suppose that they would have done any better than ABC especially where the Californian Address would have been expected to have been closed and (c) there was no reason to suppose that ABC had failed to effect service.

114. In considering these submissions, and this aspect of the matter generally, I have borne in mind that, from the authorities (in particular Drury and Intelsat) which I have set out above:

i) The test is one of "all reasonable steps" and while it is "all" it is also only "reasonable steps" and not all those steps which might have been possible or practical

ii) The relevant period of time during which to take such steps is the CPR7.5(3) 6 months period as it may have been extended (or truncated) by order (here the February Order)

iii) A Claimant does not have to proceed with particular expedition but if a Claimant does not do so and puts "all their eggs in one basket", and in particular if they do that at a late point and where they are seeking to serve abroad in a country known for its difficulties with service, but also where they risk the arising of an "unexpected problem" which then does arise they may find that they have not taken all reasonable steps

iv) It can well be reasonable to select a particular method by which to attempt service, and then to seek to implement it, but in various circumstances (see the preceding paragraph) that may not be sufficient to satisfy the "all reasonable steps" requirement. I agree with the Deputy Master's judgment in Intelsat with regard to this. I do not see that the "all reasonable steps" requirement can require a claimant (at least where there is no reason to believe that a particular method will be ineffective) to start off by seeking to serve in every way which might be reasonably possible but the claimant should leave sufficient time for it to be (ordinarily) seen whether the chosen reasonable method will have failed and for another (but only if such is available) reasonable method to be sought to be implemented.

115. The circumstances of this case are somewhat unique (due to COVID and the terms of the February Order) but I conclude that the claimant has demonstrated satisfaction with the requirement, and in particular as:

i) I do not think that any real complaint should be made of the time taken before the obtaining of the February Order, the obtaining of which was a necessary stage of seeking to serve this defendant. I think that because of each and all of (a) it being reasonable to ask the defendant (which unhelpfully did not respond) whether a method of service could be agreed (b) the Christmas and New Year period (together with the unchallenged evidence of the illness of the guiding mind of the claimant albeit that I accept that the illness was not specified and the evidence did not deal whether or not others could have instructed the legal team) and, more importantly (c) the time required to prepare the Application for the February Order and (d) the February Order itself (the grant of which has not been challenged) being designed to obtain an extended period (the problem with it being that the court omitted to adjust its wording to comply with everyone's, including Master Eastman's, intention). Also Intelsat makes clear that initial inactivity does not itself prevent a finding of all reasonable steps having been taken

ii) Utilising the Hague Convention was essential in the absence of any contractually agreed method of service. It seems to me to have been perfectly reasonable, and indeed the obviously most appropriate course, to use the Central Authority, and thus the FPS and ABC Legal, method under the Hague Convention and including as (a) that is the primary method identified in the Convention itself (b) not to use it would be to risk falling foul of relevant provisions of US Federal or State law which might prevent the use of Article 10 and (c) it would be highly undesirable if this Court was to conclude that parties should not ordinarily be able to

rely upon this method but, in order to act reasonably, should (also) be taking other steps to serve

iii) There is no evidence to suggest that there is ordinarily any particular difficulty or delay in serving documents in the USA; and quite unlike, for example, Kazakhstan (as in Intelsat) or various other jurisdictions

iv) It therefore does seem to me that the Claimant chose an apparently reasonable method of service (in fact the method was the most obvious and appropriate namely Hague Convention service through the two Central Authorities) and at a time when the Claimant (notwithstanding the growing public aware of COVID) reasonably did not think that COVID was going to cause any problem with Expedited Service resulting effective service in the very near future

v) The Claimant, by and as demonstrated by its solicitors' various actions as set out above, (a) did all it could as expeditiously as possible to procure "Expedited Service" as soon as was possible, resolving a number of minor technical queries on the way but still leaving a situation where it appeared that service would actually be effected a fair time (10+ days) before the period allowed for service by the February Order, even were that only to be 2 months from that Order, would expire

vi) There then supervened COVID and COVID restrictions in the USA and UK. However, I do not think that the Claimant acting reasonably (and it has not been suggested or demonstrated on the evidence to the contrary) could have either supposed or ascertained that service had not been effected until after August 2020. The relevant point of contact was

between ABC Legal (and the USA Central Authority) and FPS. The Claimant's solicitors sought information prior to the initial COVID lock-downs (in either country), being on 19 March 2020, as to the expected i.e. due to the advertised Expedited Service expected 7 day period from the initial FPS posting on 11 March 2020, occurrence of service having been effected by then. It seems to me that that expectation was fully reasonable in the light of the "Expedited Service" aspect and what they had been told (by the relevant authorities) was the usual expectation. The Claimant then did absolutely everything that could be expected in terms of repeatedly chasing FPS (which had made it clear that it was for FPS to chase ABC Legal, with no suggestion being made that the Claimant could do so), both while it was closed and then once it had reopened, for information as to what had happened (and there would have been no point in inquiring of the defendant which had not chosen to respond to the initial supply to its Californian lawyers of the claim form at the end of November 2019). It seems to me to be perfectly reasonable for the Claimant's side to have supposed that service had been validly effected within time, and as expected, but that they were having to wait for a full confirmation

vii) It is correct that COVID lock-downs and restrictions also occurred in the USA and that the fact of such (although not necessarily their details and ramifications even with the ability to conduct internet searches) was common knowledge. However, there is nothing before me to suggest that the Claimant should have known of some method of service which would have been lawful and practicable but in circumstances where

ABC Legal would not have been complying with their duty to serve. At first sight, if (itself a hypothesis) ABC Legal could or would not serve, presumably due to COVID, then the same problem would affect other USA/Californian process servers. I do not have evidence before me to gainsay that as at the relevant period (March 2020 onwards) but I also do not consider that in COVID circumstances, where the FPS process had been implemented prior to any lock-down, it would have been part of reasonableness for the Claimant to engage in an investigations of such USA legal (which would include both the availability of Article 10 methods in California and Californian/USA COVID rules) and practical matters or to then guess, or have to guess, that ABC Legal had failed and would continue to fail but that some other process server was sufficiently likely to succeed to make it sufficiently worthwhile to locate and instruct them

viii) I also bear in mind that the February Order itself on its wording (although I am correcting it – see above – and so that it actually does not have that effect) appeared to require service to take place by the first part of April 2020. That was an unfortunate matter, and which was due to the Claimant's drafting but which I do not think can be blamed on the Claimant where the drafting and accompanying evidence made clear what was intended, but had the effect that the Claimant could (and actually did) reasonably (albeit wrongly) conclude that the Claimant only had a short (but still an apparently sufficient) time in which to effect service, and that service outside that period might itself be ineffective. This is a relatively minor point, and I can see that another person might

reasonably conclude that the February Order had a different effect, but, while I would come to same conclusion without it, I give it some limited weight

ix) In all those circumstances, I do not think that the Claimant could be said to have been taking a risk, whether by delay or otherwise, but rather I do think that the Claimant simply took all reasonable steps to comply with CPR7.5(3) as affected by the February Order

x) I have also borne in mind the Qatar v Phoenix decision but it seems to me that it is thoroughly distinguishable as: (i) there the claimants had failed to progress matters at an early stage but had substantially delayed before seeking to initiate a service process, and which is not the case here where the Claimant's side had both informed themselves of and initiated the service process with proper expedition (ii) there the claimants had only sought to engage with FPS well after the initial COVID lock-down and the closure of FPS while here the Claimant had procured FPS to send the documents to the USA for service before any lock-down (and a sufficient period before then for Expedited Service to have been capable of being effected) (iii) there the claimants had waited before trying to get the defendant to accept service by agreement, but here the Claimant had immediately following issue sought such agreement but with the defendant not supplying any response (iv) there the claimants had not explained their inactivity, but here the Claimant has done so fully and where the activity was very considerable, reasonable and explicable (v) although, as stated in Qatar, the pandemic

was present in the general public consciousness by early March 2020, the Claimant was doing all it could to have service effected before any relevant lock-downs were announced and could reasonably conclude that it was likely to have succeeded

xi) I add that I have borne in mind: (a) the Municipio decision, but which seems both more directed to compliance with the rules regarding work to be done by solicitors under the usual case management processes and somewhat balanced against by the Stanley decision (b) the R(Kuznetsov) decision which requires me to pay proper respect to the fact of the August Order itself, and the decision of the Master to make that decision on the papers, but where I would have come to the same decision in any event without carrying out that operation.

The second requirement "promptly"

116. The second requirement is as to whether the Claimant has shown that the application for the August Order was made "promptly".

117. Mr Bard for the Defendants submits that this requirement is not satisfied, and in particular (although I have borne all his submissions in mind) that:

i) The Application for the August Order was made on 18 August 2020 being some 15 weeks after time had expired under CPR7.5(3) even assuming that the February Order had not truncated that 6 month time period, and which was over 3 months after the six months from the issue of the Claim Form

ii) The Claimant was wrong to just sit and wait and should have made a protective application in case ABC Legal had not effected service

iii) The Defendant was thus left technically (there is no suggestion that it gave any actual consideration as to this) in limbo in terms of not knowing (or being able to know) whether or not time had been extended

iv) The Claimant could have inferred from the absence of an Acknowledgment of Service that the Claim Form had not been served, at least after about 3 weeks from expiry of the 6 month time period (and as was suggested in Chare).

118. Mr Webster submitted in response in particular that:

i) Promptness needs to be considered in all the circumstances

ii) The Claimant did not know, and was doing its very best to find out from the Court, whether or not service had occurred within time

iii) While a protective application might have been technically possible, the Court (and the overriding objective) does not encourage potential waste of resource on what might be futile and unnecessary exercises.

119. In considering these submissions, and this aspect of the matter generally, I have borne in mind that, from the authorities (in particular Chare, Drury and Intelsat) which I have set out above:

i) The test is one of "promptly" and which has a very real meaning of "alacrity" or "reasonable celerity" or "substantial degree of urgency"

which suggests a need for speed of some sort, but which also has to be considered in the light of the particular individual circumstances

ii) It seems to me (and was not really suggested otherwise by Mr Bard) that the key period is that following the 6 months from issue of the Claim Form as "promptly" must be following the expiry of the CPR7.5(3) period. On the other hand, as "promptly" is conditioned by the relevant circumstances, those will include the circumstances which have gone before.

120. I have found this question more difficult than the previous one, but in the somewhat unique circumstances of this case, and notwithstanding that the period of time was lengthy, I conclude that the claimant has demonstrated satisfaction with the requirement, and in particular as:

i) It is the circumstances of the particular case which have to be considered in order to see whether the "promptly" requirement has been met

ii) An application can only be made under CPR7.6(3) where the claimant has been unable to serve and hence where the claimant has not served the claim form within the CPR7.5(3) period – see the concluding words of CPR7.6(3) "but has been unable to do so". Under CPR7.5(4)(a) the application must be supported by evidence, and thus, on the strict wording of the rule, the evidence must demonstrate (and contain a statement of truth of the belief of the claimant to the effect) that service has not taken place

iii) Thus while it is common-ground that a protective "in case of non-service" application can be made under CPR7.6(3) that, even if legitimate, is not very consistent with the words of the rule. It is also at first sight contrary to the overriding objective as it involves a potential waste of both cost and of court resource (cf. CPR1.1(2)(e)). At first sight, when service may well actually have taken place within time, it would seem desirable to act urgently to seek to clarify that position as part of the circumstances against which "promptly" in terms of eventually making the application has to be viewed

iv) I have borne in mind Mr Bard's submission that it should be inferred that counsel advised the making of the Application on 28 July 2020, and he then points to the lapse of time before 18 August 2020 and the actual making of the Application. However, the inference is a dangerous one to draw (counsel may well have advised a further chaser to FPS and the posting to the USA as a first stage), but, in any event, the Application and supporting evidence required some real drafting in what were COVID lock-down times and I do not see the intervening period of being of any substantial length in context (and it is nothing like the 10 weeks in Drury, and Deputy Master Bartlett was (obiter) prepared to hold that 4 weeks (although there from the expiry of the six months) was prompt in Intelsat)

v) In the particular circumstances of this case, in my view, and in the light of my consideration of the previous requirement above: (a) the Claimant was in a position where the Claimant could reasonably consider that

service probably had been effected in time (b) the Claimant was reasonably doing everything which the Claimant could to seeking to clarify the position with and through FPS (including both by asking FPS to search through its post and by asking FPS to send chasers to ABC Legal to ask what was the position), and where FPS was not seeking to dissuade the Claimant but rather repeatedly holding out hope to the Claimant that the position would be clarified in the relatively short future, and the answer might, for example, be sitting in the pile of unopened post

vi) Unlike in Chare: (a) FPS had not mentioned to the Claimant any suggestion of drawing an inference of non-service from the absence of an Acknowledgment of Service (b) there were at least two reasonable possible explanations for the absence of an Acknowledgment of Service being (i) that the Defendant had been served and not sent one to the court due to the effects of COVID and COVID lockdowns in the USA and (b) an Acknowledgment of Service had been sent but was also in the FPS pile of unopened post. Thus I do not think that that argument and matter has particular weight

vii) It is correct that the Claim was issued at the end of the limitation period. However, this appears to have been following at least some correspondence, and possibly negotiations, and I cannot determine whether the Claimant can really be said to have delayed. In any event, "promptly" has to be considered primarily with regard to the period

following expiry of the CPR7.6(3) time, and least with regard to the period prior to the issue of the Claim Form

viii) Again I have borne Qatar v Phoenix in mind but it seems to me to be generally distinguishable for the reasons given above, and including that: (a) there was no similar initial delay as in that case (b) the Claimant had initiated, and reasonably thought it had implemented, Expedited Service prior to any lock-down (c) the pandemic (in terms of US regulations) supervened after the documents had been sent to the USA (d) the Claimant reacted appropriately to the ensuing absence of communication by continually chasing FPS and being (in its legal team's own mind, thinking reasonably) encouraged by FPS's responses both as to there being a pile of unopened post and continued chasers of ABC Legal

ix) It is correct that the Defendant was, as a result, in a state of theoretical uncertainty as to what was happening and as to whether the Claim Form could no longer be properly served. However, that is more relevant to discretion than this jurisdictional requirement, and in the unique COVID situation, and where FPS had been closed and had not worked through its paperwork, it has little practical reality as to how the Defendant could have sensibly reached a final conclusion and which there is no evidence that the Defendant sought to investigate or reach

x) FPS at no point prior to the making of the Application for the August Order said that service by ABC Legal had not taken place. In the light of that and the matters above, it seems to me both understandable and reasonable for the Claimant to have waited as long as it did, or at least

to a time not long prior to the making of that Application, before concluding that it was appropriate to make a protective application, albeit that there is a fair argument that it would have been reasonable to continue to wait for something clear or determinative from FPS.

xi) In those circumstances, it seems to me that the Claimant did act with (at least) alacrity or reasonable celerity once it seemed to be becoming more (although only more) clear that the provision of a determinative response as to what had (or had not) happened was simply speculative as to when (and if) it would occur. This situation was unique but it seems to me that the Claimant did act (at least) promptly in all the circumstances

xii) I add again that I have borne in mind: (a) the Municipio decision, but which seems both more directed to compliance with the rules regarding work to be done by solicitors under the usual case management processes and somewhat balanced against by the Stanley decision (b) the R(Kuznetsov) decision which requires me to pay proper respect to the fact of the August Order itself, and the decision of the Master to make that decision on the papers, but where I would have come to the same decision in any event without carrying out that operation.

121. I therefore consider that both jurisdictional requirements of CPR7.6(3) are satisfied. However, the matter still (now) becomes one of discretion as to whether the extension should be granted.

Discretion

122. Mr Bard has submitted that the discretion should not be exercised in particular because of:

i) The various matters which I have recorded that he has submitted above

ii) The fact that paragraph 2.7 of CPR 23 provides that "Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it" and he submits that this was the case (as least as far as desirability was concerned) at the expiry of the initial six months (12 May 2020) but if not then at least by and at the conference with counsel on 28 July 2020

iii) There being a heavy burden to justify what is, in essence, a further extension of the limitation period; and which burden is reflected in the case-law in relation to "in time" CPR7.6(2) applications.

123. Nevertheless, I am of the view that the discretion should be exercised and so as to preserve the August Order and its extension; and for all the reasons given above but in particular and also as:

i) The fact that (in context) all reasonable steps were taken and that the application was made promptly would tend to suggest (and which is supported to a limited degree by Qatar) that justice (including Article 6 rights to have claims determined) would favour the grant of the extension. This is notwithstanding that I agree with Mr Bard that the effect and relevance of the law of limitation is that the regime is supposed to be strict and that there is a substantial burden on the

Claimant to justify the grant of extension notwithstanding that the Rule 7.6(3) itself does contemplate that extensions will be granted in appropriate circumstances

ii) The Claimant did seek to have the Defendant agree a method of service but received no response (and no reasons for such have been provided). The Claimant thereafter sought to take the, in my judgment, appropriate and prescribed course of obtaining the relevant permission and an appropriate extension and implementing the Hague Convention process on an Expedited Service basis

iii) The unique circumstances of COVID and its consequential effects on ABC Legal and FPS and their activities, and their ability to learn of and communicate what had happened, were a truly supervening and unpredictable set of events which, in my judgment, were the cause of the problem here where the Claimant was left in a position, through no fault of its own, of "guessing" as to what might (or might not) be the appropriate course

iv) The making of protective applications is an unusual course, and not one which the court would necessarily wish to encourage as they are potentially inconsistent with the overriding objective (and, in this case, the actual wording of CPR7.6(3) itself) for the reasons given above. That is not to say that they are inappropriate, or would be refused, but I do not find it unreasonable for the Claimant in these circumstances not to have made one

v) Paragraph 2.7 of CPR23 is itself guidance and does not lay down any absolute rule. However, the application would only have been "desirable" as a protective application, as to which see my preceding paragraph, and I do not think that the desirability for the making of a protective application was so apparent as to see the Claimant has having significantly delayed. This is particularly true in relation to the period from 12 May 2020 when it was highly unclear as to whether service had not been effected, and the Claimant could reasonably take the view that it probably had been (with a resultant communication simply lying in FPS's pile of unopened post), but also true in relation to the, in my judgment, short period from 28 July 2020

vi) I again take the view that the Claimant had no real reason to suppose (and I do not find) that instructing its own US attorneys direct would produce (or have produced) any better outcome than waiting for ABC Legal to have done its best

vii) I also bear in mind, but give limited weight to (a) the R(Kuznetsov) decision which requires me to pay proper respect to the fact of the August Order itself, and the decision of the Master to make that decision on the papers, and (b) the fact that I have granted relief from sanctions to the Defendant to make its application to contest jurisdiction; but where I would have come to the same decision in any event without either matter being the case.

124. For all these reasons I am going to dismiss the Defendant's Application to set aside the August Order. Although I have also found that service occurred in the

June-August 2020 period, as it is common-ground that service was properly effected on any basis in November 2020, this means that service was effected within time and so I am going to dismiss the Defendant's Application to contest jurisdiction.

The Claimant's protective application under CPR6.15

125. However, I have asked myself as to whether, in case I am wrong as to the above, I should express an opinion as to whether I would (if I had set aside the August Order) have granted the Claimant's protective Application for an authorisation of service by alternative means under CPR6.15. I have decided that it would not be appropriate to do so, for the following reasons.

126. First, the Claimant's Application Notice states that the alternative means sought to be authorised so as to effect service are the June-August 2020 (and if not then the November 2020) events, and Mr Webster maintained this position in submissions relying on Kaki to submit that the Court could authorise service under CPR6.15 notwithstanding that the relevant events were outside the time permitted by CPR7.5.

127. However, on re-reading Kaki:

i) I am not satisfied that Kaki is authority for that proposition. It seems to me that the Court of Appeal were there dealing with the question as to whether the CPR6.15 application could be made after (as well as before) the CPR7.5 time-limit expired, and not whether the means of service which were sought to be authorised could occur after the CPR7.5 time-limit had expired. I note both that (i) the means of service which were

authorised in Kaki were the initial in-time sending of the claim form to the relevant defendant and (ii) it would seem very odd if CPR6.15 could be used to override CPR7.5 in the way in which Mr Webster seeks to have occur

ii) However, Kaki might well enable (in theory) the Claimant to seek to have authorised as service by alternative means, the sending of the Claim Form to the Defendant's US lawyers in November 2019, with the question of whether or not there was good reason to authorise that being influenced by what happened thereafter. At first sight such contentions would seem (at least) reasonably arguable

iii) But that is not the basis on which the Application was made or has been argued. I do not think that it would be fair to seek to resolve this hypothetical question without proper and full argument (and which would have to extend to whether the Claimant could even advance the point bearing in mind the contents of the Application Notice). However, to seek and have such argument would have caused waste of cost, time and resource, as, on my above conclusions, it is purely hypothetical.

128. Further:

i) The various case-law make it clear that the question of "good reason" is one which involves a full evaluation of all the relevant circumstances. I have carried out such an evaluation in coming to my conclusions in relation to the August Order. If it turns out that on an appeal that evaluation is upset, then there is a real risk that any conclusion which I came to on "good reason" would be potentially tainted by the reasoning

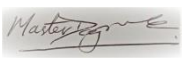
of the appellate judge. Thus it would be likely to be a waste and distraction for me to express a view, even though the test of "good reason" is in some ways less than that of "all reasonable steps" (see Goshawk)

ii) The case-law on the application of CPR6.15 to circumstances where the Hague Convention applies is, at least in a non-arbitration context, not entirely clear, and all the more so where there are, as here, disputes as to whether authorising service in this manner would be inconsistent with US law. There is also now the YA II decision and where again to have provided it to the parties with a request for further submissions would simply result in waste of time, cost and resource.

129. I am therefore not going to express any view on the CPR6.15 application which, in the light of my other conclusions, does not require determination.

Handing-Down and Consequential Matters

130. As stated in my circulated draft judgment and accompanying and subsequent emails, I am handing-down this Judgment without attendance from the parties but with an adjournment of the hearing and of (with general extensions of time until further order) all questions of permission to appeal and time to appeal, form of orders and costs to 10.30am on 22 December 2021. The parties are to liaise and have until 4.30pm on 17 December 2021 to submit their proposed orders (including any statements of costs) and any applications (including for permission to appeal and time to appeal).

FINAL JUDGMENT  25.11.2021