Neutral Citation Number: [2021] EWHC 1029 (Comm)

Case No: CL 2020 000461

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 23/04/2021

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

(1) GOSHAWK AVIATION LIMITED
(2) PIONEER AIRCRAFT LEASING ONE LIMITED
(3) MYNA LEASING THREE LIMITED
(4) MYNA LEASING LIMITED
(5) ARCADIA LEASING 1 LIMITED
(6) ARCADIA LEASING 2 LIMITED
(7) JETAIR 14 LIMITED
(8) JETAIR 15 LIMITED
(9) KAPUAS AVIATION LEASING LIMITED

Claimants

- and -

(1) TERRA AVIATION NETWORK S.A.S.
(2) PT LION MENTARI TBK
(3) THAI LION MENTARI CO. LTD
(4) PT LANGIT ESA OKTAGON
(5) CIEL VOYAGE S.A.S.

Defendants

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Stephen Midwinter QC and Ben Woolgar (instructed by **Holman Fenwick Willan LLP**) for the **Claimants**
Akhil Shah QC and Giles Robertson (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing date: 19 March 2021
Draft Judgement circulated to the parties: 15 April 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 23 April 2021 at 10:30 am

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Second Defendant ("***Lion***") and the Third Defendant ("***Thai Lion***") apply, by notice dated 6 January 2021, for an order setting aside service of the Claim Form on them. They were purportedly served by email sent to their solicitors, Stephenson Harwood ("***SH***"), pursuant to an order of Moulder J dated 24 November 2020 ("***the Moulder Order***") permitting the Claimants to serve them by that alternative method. Lion and Thai Lion contend that the Claimants should not have been permitted to serve the Claim Form on them by an alternative method, and that the Claimants obtained the Moulder Order through material non-disclosure.

2. The Claimants seek an order varying the Moulder Order to include permission to serve out of the jurisdiction, for the reason indicated in § 32 below, and (if necessary) declaring the steps already taken pursuant to the Moulder Order to have constituted good service.

3. There is also before the court an issue about the costs of a previous application made by Lion and Thai Lion by notice dated 1 October 2020 ("***the First Application***"), by which they applied for an order setting aside service of the Claim Form on them. The grounds of that application were that service was purportedly effected on them under CPR rule 6.11 when the conditions set out in that rule were not satisfied, because the Claim Form included claims that Lion and Thai Lion had not agreed (i) to subject to the jurisdiction of the English courts or (ii) could be served on them by service on an agent in England.

(B) FACTS

4. The First Claimant ("***Goshawk***") is an aircraft leasing and financing company.

5. The Second to Ninth Claimants are special purpose vehicles that each own an aircraft which is the subject of this claim.

6. The Claimants claim for sums said to be due in respect of aircraft which are the subject of leases between one of the Claimants and one of the Defendants, either under the leases themselves, under guarantees and indemnities and/or notices of assignment and acknowledgment, or under a Side Letter dated 14 November 2019 ("***the Side Letter***"). The Claimants say the Defendants have had the use of their planes for more than a year without payment.

7. The first witness statement of the Claimants' solicitor, Mr Kavanagh, outlines the commercial connections between the parties and the claims as follows:

> "5. The First Claimant ("Goshawk") is an aircraft leasing and financing company and the remaining Claimants are special purpose aircraft owning companies which are either affiliated with Goshawk or managed by an affiliate of Goshawk. Each of the Second to Ninth Claimants owns an aircraft that is the subject of a lease.
>
> 6. The Second Defendant ("Lion") is an airline incorporated in Indonesia and the Third Defendant ("Thai Lion") is an airline incorporated in Thailand. Lion and Thai Lion form part of the 'Lion' group of companies. Thai Lion leases an aircraft from the Fourth Claimant. The First and Fifth Defendants (respectively, "TAN" and "Ciel") are special purpose vehicles incorporated in France which lease aircraft from the Claimants and then sub-lease them to airlines in the Lion group. The Fourth Defendant ("LEO") is a holding company in the Lion group which is incorporated in Indonesia. Lion and LEO provide security in respect of a number of the other Defendants' obligations under the relevant leases.
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> 7. By a written agreement dated 14 November 2019 to which Goshawk, Lion, Thai Lion and LEO were parties (the "Side Letter") …, it was agreed (among other things) that:
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> (a) The lessees under the various lease agreements between Goshawk group entities and Lion group entities would pay an additional deposit to the lessor under the relevant lease on or before 30 April 2020 such that the security deposit held by the lessor for each relevant aircraft should be equal to six months' Basic Rent (as defined in the relevant lease); and
>
> (b) Lion would procure that such additional deposits were paid."

8. Save for the Side Letter, all of the relevant contractual documents contain express provisions permitting service of claims on (variously) two process agents in England: Cogency Global (UK) Limited and SH Process Agents Limited.

9. On 26 June 2020 the Claimants obtained *saisies conservatoires* ("***saisies***") from the French court, freezing bank accounts belonging to the Fifth Defendant ("***Ciel***"). It was

a condition of the *saisies* that the Claimants must issue substantive proceedings within one month.

10. That condition was satisfied by the issue on 24 July 2020 of the Claim Form in the present proceedings and its service on Ciel in France on 28 July 2020.

11. On 5 August 2020, the *saisies* were set aside. In its judgment, the French court referred to the fact that the translations of the contract documents provided to the judge who issued the *saisies* had not made clear that Ciel had the benefit of parent guarantees from the Fourth Defendant("***LEO***") (which was said to undermine the case that there was a risk of the debts going unpaid if the *saisies* were not granted), the relevant passages having been redacted from the translations.

12. On 19 August 2020, the Claimants purported to serve the Claim Form on the two nominated process agents in England. The letters to the two agents were in similar form. After setting out the action heading and the names of the relevant Claimants, each letter stated:

> "We refer to the documents set out in Schedule 1 to this letter and your appointment as process agent in respect of claims under or in connection with those documents against the relevant parties identified in Schedule 1 (the "Relevant Parties").
>
> In accordance with your appointment as process agent as set out in Schedule 1, and pursuant to CPR r.6.11(1), on behalf of our above named clients please find enclosed, by way of service on the Relevant Parties, copies of the Claim Form in the above proceedings and accompanying Acknowledgement of Service form.
>
> Kindly confirm safe receipt."

13. Schedule 1 to each letter included a table listing contractual documents and, for each one, the name of the *"Relevant Party for whom you are appointed as process agent"*. The Schedule to the letter to Cogency Global (UK) Limited included (among other documents) two Notices of Assignment and Acknowledgment, and the Side Letter, in respect of which the process agent was said to have been appointed for Lion. The letter to SH Process Agents Limited was addressed 'care of' SH themselves. Its Schedule included two Deeds of Guarantee and Indemnity under which the process agent was said to have been appointed for Lion; and an Operating Lease Agreement, and the Side Letter, under which the process agent was said to have been appointed for Thai Lion.

14. On 20 August 2020 the Paris Commercial Court opened *conciliation* proceedings in respect of the First Defendant ("***TAN***") and Ciel.

15. On 4 September 2020, TAN, LEO and Ciel all acknowledged service, indicating an intention to defend. No claim is made against TAN, LEO or Ciel under the Side Letter. On the same date, Lion and Thai Lion acknowledged service, indicating an intention to contest the jurisdiction.

16. On 30 September 2020, the Claimants' solicitors Holman Fenwick Willan ("***HFW***") wrote to SH:

> "We understand that you act for the following parties in the above proceedings:
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> (1) Terra Aviation Network S.A.S. (the First Defendant);
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> (2) PT Lion Mentari Tbk (the Second Defendant);
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> (3) Thai Lion Mentari Co. Ltd. (the Third Defendant);
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> (4) PT Langit Esa Oktagon (the Fourth Defendant); and
>
> (5) Ciel Voyage S.A.S. (the Fifth Defendant).
>
> We should be grateful for your confirmation that you are instructed by the above Defendants to accept service of the Claimants' Particulars of Claim and Initial Disclosure List.
>
> Subject to the above, and in light of the current public health situation, we should be grateful if you would also confirm that you will accept service by way of email on this occasion.
>
> Many thanks and we look forward to hearing from you by return."

17. SH replied on 1 October 2020:

> "We refer to your letter dated 30 September 2020.
>
> We confirm that we are instructed to accept service of the Claimants' Particulars of Claim and Initial Disclosure List on behalf of the First to Fifth Defendants in the abovementioned proceedings without prejudice to the Second and Third Defendants' application to contest jurisdiction and/or set aside service of the Claim Form, which has been filed at Court, and served on you, earlier today.
>
> We think that it is sensible, in light of the current public health situation, for all of the parties to agree to accept service by email.
> …"

The Particulars of Claim were served on SH on behalf of TAN, LEO and Ciel the following day.

18. Lion and Thai Lion applied on 1 October 2020 to set aside service on them. The essential basis of that application was that, although the majority of the claims against Lion and Thai Lion could be served under the service agent provisions, the claims under the Side Letter could not; and that CPR rule 6.11 permits a claim form to be served on a process agent only where *all* the claims in it are covered by the relevant agreement.

19. The Claimants accept (and say they have always accepted) that the claims under the Side Letter do not fall within the service agent provisions and that (if they chose to take the point) Lion and Thai Lion could therefore formally reject service of the Claim Form via that route for that reason. The Claimants accordingly conceded the First Application, which remains before the court only on the question of costs.

20. Judge Prentis made an order in the Insolvency and Companies Court, sealed on 12 October 2020, recognising the *conciliation* proceedings under the Cross-Border Insolvency Regulations 2006. As a result, I understand the claims against Ciel and TAN were stayed.

21. On 15 October 2020, HFW invited SH to confirm they were instructed to accept service on behalf of Lion and Thai Lion too, in order to avoid the waste of time and money involved in an application for permission to serve out. The relevant part of their letter stated:

> "We are prepared to agree, albeit that we do not accept as legally correct, that the claims made under the Side Letter do not fall within the service agent provisions contained in the associated leases and guarantees.
>
> Notwithstanding the above, in circumstances in which (a) all of the other claims in the Claim Form do fall within the service agent provisions and (b) we are plainly entitled to permission to serve the claims made under the Side Letter out of the jurisdiction, in particular by reference to CPR PD 6B paragraph 3.1(4A) and/or 3.1(6)(b), we invite you to agree to accept service of the Claim Form and Particulars of Claim on behalf of the Second and Third Defendants. Failing this, we intend to apply for permission to serve the Claim Form and Particulars of Claim outside the jurisdiction and/or by an alternative method, and will draw the Court's attention to your clients' unreasonable conduct in refusing to accept service, including in relation to the matter of costs.
>
> To assist your clients in considering the above, we attach a copy of the Particulars of Claim to assist the Second and Third Defendants to understand the basis on which the claims are advanced against them.
>
> We look forward to hearing from you by return."

22. That invitation was rejected, SH replying on 19 October 2020:

> "We refer to your letter dated 15 October 2020 in which you propose that we agree to accept service of the Claim Form and Particulars of Claim on behalf of the Second and Third Defendants in circumstances where, as you accept, the claims made under the Side Letter do not fall within the service agent provisions contained in the associated leases and guarantees, and therefore you and your clients have failed to follow the proper

> procedures to serve the Claim Form on the Second and Third Defendants.
>
> As you know, given the conditions faced by the aviation industry, our clients are seeking to agree revised lease terms with all their aircraft lessors, including your clients. In that context our clients view your clients' issuance of proceedings as unhelpful, and an attempt to gain a better position for themselves to the detriment to the body of lessors in general. Our clients are therefore not prepared to agree to your proposal.
>
> We reject your assertion that our client's conduct is unreasonable in any way, particularly in circumstances where there is no agreement to accept service in England and where your clients assert independent and separate claims against the different Defendants."

23. LEO served its Defence on 30 October 2020. LEO puts the Claimants to proof of the sums owed, and contends (in brief outline) that:

    i) on 25 September 2020, the Paris Commercial Court made an order in French conciliation proceedings in respect of TAN suspending the Claimants' various claims against TAN (the "***TAN Stay Order***");

    ii) the effect of the TAN Stay Order is to stay LEO's obligations to the Claimants as well;

    iii) alternatively, as a matter of construction, the effect of the TAN Stay Order is that the sums under the various guarantees and indemnities given by LEO are not due.

24. The relevant Claimants in their Reply to LEO's Defence, dated 20 November 2020, allege in outline that:

    i) in respect of one of the claims, LEO has not pleaded any defence at all;

    ii) as a matter of construction of the guarantees (which are governed by English law), LEO remains liable under the relevant guarantees, notwithstanding that the claims against TAN are stayed;

    iii) the TAN Stay Order was wrongly granted, and/or on its true construction, does not apply to claims where LEO is liable as a primary debtor and not merely as surety; and

    iv) if recognised in England, the TAN Stay Order's effect would not extend to the claims against LEO.

    In connection with (iii) above, the Reply indicates that the relevant Claimants intend to apply to set aside the TAN Stay Order, and reserve their right to amend the Reply upon the determination of that application. Such an application was made in the Paris Commercial Court and led to the 2 March 2021 rulings referred to in § 30 below.

25. In the meantime, the Claimants issued an application on 18 November 2020 for (i) permission to serve out on Lion and Thai Lion; alternatively (ii) permission to serve them by an alternative method, by email to SH, under CPR rule 6.15, and (iii) in either case, an extension of time for service of the Claim Form under CPR rule 7.6.

26. On 24 November 2020, Moulder J made an order granting permission to serve Lion and Thai Lion by email to SH pursuant to CPR rule 6.15, i.e. the Moulder Order. The order did not give permission to serve out of the jurisdiction or extend the time for service of the Claim Form. The order was initially issued on 23 November 2020, and the Claim Form was purportedly served pursuant to it the same day, but the order was reissued on 24 November 2020 to correct an accidental omission.

27. Also on 24 November 2020 (the last date of the 4-month period for serving the Claim Form in the jurisdiction), the Claimants emailed the Claim Form to SH again, by way of service on Lion and Thai Lion pursuant to the Moulder Order.

28. Lion and Thai Lion on 9 December 2020 acknowledged service a second time indicating an intention to contest the jurisdiction, and on 6 January 2021 issued and served the present application. As part of his second witness statement in support of the application, Mr Phillips of SH explained Lion and Thai Lion's approach to the question of service as follows:

> "8 … the COVID-19 pandemic has had an obvious, and very negative, effect on the aviation industry. Lockdowns and quarantines have destroyed schedules. Many passengers fear to travel; others want to fly but cannot lawfully or practically do so. Fleets of aircraft lie idle for want of work. Airlines do what they can to cut their costs. Employees are furloughed, and unnecessary expenditure eliminated. But some fixed costs, including rent under aircraft leases, cannot easily be shed. Across the industry, airlines are in real financial difficulty.
>
> 9 While it is in principle open to any creditor or lessor to sue for the amounts owing, the majority have recognised that if everybody sued, only the lawyers would win. (It is also relevant that airlines are, in general, harder than most other businesses to operate successfully within insolvency procedures.) Most lessors have pragmatically agreed deferrals or rent reductions. They consider that their return is likely to be maximised if the airlines are preserved in an operating condition, the sooner to get all the aircraft flying, and earning, again.
>
> 10 There is however an important limit to the lessors' flexibility. They are prepared to give something up to keep the airlines viable. But they are understandably not prepared to cross-subsidise their competitors. If they believe the Lion Air group of airlines (the "Lion Air Group") is giving other lessors (like the Claimants) a better deal than they are getting, they will seek that deal themselves. The situation is finely balanced, and the potential for it rapidly to unravel obvious. The Lion Group must accordingly do what it can to treat lessors equally.

> 11 Given that, while Lion and Thai Lion recognise the Claimants' right to pursue these proceedings, they are not prepared to facilitate or encourage them. For that reason, they have insisted on their strict rights, including in relation to service." (footnote omitted)

29. The Claimants on 20 January 2021 applied for an extension of time to serve the Claim Form by 21 days from the date of the judgment on Lion's and Thai Lion's present application.

30. The Paris Commercial Court gave judgment on 2 March 2021 on various applications in the proceedings which gave rise to the TAN Stay Order. The effect of those orders is, in summary, that:

    i) the TAN Stay Order remains in place, the Claimants' application to set it aside having failed;

    ii) the provisions of the TAN Stay Order stating that the measures therein would benefit co-obligors with TAN, or those who had granted a personal security in respect of TAN's obligations, were set aside; and

    iii) Lion and LEO's applications to intervene in those proceedings were refused.

31. However, on the same date, the Paris Commercial Court also granted an application for certain "*grace periods*" in respect of TAN's obligations, and declared that Lion and LEO are entitled to benefit from these grace periods.

32. On 15 March 2021, Lion and Thai Lion wrote to the Claimants, indicating that they intended to take an additional point to that raised in their evidence, viz that in light of the decision in *Marashen v Kenvett* [2018] 1 WLR 288 (David Foxton QC) §§ 17-23, the Moulder Order falls to be set aside on the further ground that alternative service on a party outside the jurisdiction under CPR rule 6.15 can be granted only where the court has also made an order that the claimant is entitled to serve out of the jurisdiction. It is common ground that that is the position as a matter of law. The Claimants sought permission to serve out from Moulder J in the alternative, and it is not disputed that they would be entitled to permission to serve out. However, the Moulder Order did not grant such permission, no doubt since the Claimants sought it only in the alternative to an order permitting alternative service on SH within the jurisdiction.

(C) SERVICE BY ALTERNATIVE MEANS

(1) Principles

33. CPR rule 6.15 provides that:

> "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."

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:
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> > "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."

35. Rix LJ added the following in relation to cases where the relevant overseas country was not party to a service Convention:

> "It may be that orders permitting alternative service are not unusual in the case of countries with which there are no bilateral treaties for service and where service can take very long periods, of up to a year (cf *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd* [2004] 1Lloyd's Rep 594, paras 44-45, per David Steel J). In the present case, that did not apply to any of the defendants, and I would prefer to leave such cases out of account. The rule, CPR r 6.15(1), expressly requires "good reason", and it may be that some flexibility should be shown in dealing with such cases, especially where litigation could be prejudiced by such lengthy periods. However, in *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 this court observed that mere desire for speed was unlikely to amount to good reason. As it is, the second defendant was a US company, the first and fourth defendants could be served in the USA, all in accordance with the Hague Convention, and the third defendant, a company incorporated in Afghanistan could, it seems, be served under Afghanistan law and therefore pursuant to CPR r 6.40 by registered post and courier to its registered business address. Therefore the claimants did not require more than about two months for service. In such a case, I agree that some special circumstance is needed to amount to good reason: after all, any case of service out earns the claimant an additional two months for service (the difference between the standard initial period of four months in a case of service within the jurisdiction and six months in the case of a claim form for service outside the jurisdiction)." (§ 113)

36. The position in relation to non-Convention states was later authoritatively stated by the Supreme Court in *Abela v Baadarani* [2013] 1 WLR 2043, in a passage which it is relevant to quote almost in full:

> "33. … Whether there was good reason is essentially a matter of fact. I do not think that it is appropriate to add a gloss to the test by saying that there will only be a good reason in exceptional circumstances. Under CPR r 6.16, the court can only dispense with service of the claim form "in exceptional circumstances". CPR r 6.15(1) and, by implication, also 6.15(2) require only a "good reason". It seems to me that in the future, under rule 6.15(2), in a case not involving the Hague Service Convention or a bilateral service Treaty, the court should simply ask whether,

in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service.

34. This is not a case in which the Hague Service Convention applies or in which there is any bilateral service convention or treaty between the United Kingdom and Lebanon. ... It follows that an alternative service order does not run the risk of subverting the provisions of any such convention or treaty: cf the reasoning of the Court of Appeal in *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 , paras 46–59 and *Cecil v Bayat* [2011] 1 WLR 3086, paras 65–68, 113. In particular, Rix LJ suggested at para 113 of the latter case that it may be that orders permitting alternative service are not unusual in the case of countries with which there are no bilateral treaties for service and where service can take very long periods of up to a year. I agree. I say nothing about the position where there is a relevant convention or treaty.

35. As stated above, in a case of this kind the court should simply ask itself whether, in all the circumstances of the particular case, there is a good reason to make the order sought. It should not be necessary for the court to spend undue time analysing decisions of judges in previous cases which have depended on their own facts.

36. The mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2). On the other hand, the wording of the rule shows that it is a critical factor. … rule 6.15(2) was designed to remedy what were thought to be defects as matters stood before 1 October 2008. The Court of Appeal had held in *Elmes v Hygrade Food Products plc* [2001] CP Rep 71 that the court had no jurisdiction to order retrospectively that an erroneous method of service already adopted should be allowed to stand as service by an alternative method permitted by the court. The editors of Civil Procedure, 2013 ed. add that the particular significance of rule 6.15(2) is that it may enable a claimant to escape the serious consequences that would normally ensue where there has been mis-service and, not only has the period for service of the claim form fixed by CPR r 7.5 run, but also the relevant limitation period has expired.

37. Service has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to the defendant. In *Olafsson v Gissurarson (No 2)* [2008] 1 WLR 2016 , para 55 I said, in a not dissimilar context, that

> "the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's

> case: see eg *Barclays Bank of Swaziland Ltd v Hahn* [1989] 1 WLR 506, 509, per Lord Brightman, and the definition of 'service' in the glossary to the CPR, which describes it as 'steps required to bring documents used in court proceedings to a person's attention' …"

I adhere to that view.

> 38. It is plain from his judgment … that the judge took account of a series of factors. He said that, most importantly, it was clear that the respondent, through his advisers was fully apprised of the nature of the claim being brought. That was because, as the judge had made clear at para 60, the respondent must have been fully aware of the contents of the claim form as a result of it and the other documents having been delivered to his lawyers on 22 October in Beirut and communicated to his London solicitors and to him. As Lewison J said at para 4 of his judgment (quoted above, para 25):
>
> > "The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations."
>
> I agree.
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> 39. In addition the judge had regard to the fact that service through diplomatic channels in Lebanon had proved impractical and that any attempt to pursue it further would lead to unacceptable delay and expense. Furthermore, the judge noted that the respondent was unwilling to co-operate with service of the proceedings by disclosing his address in the Lebanon. While I accept the submission made on behalf of the respondent that he was not under a duty to disclose his address, his refusal to co-operate does seem to me to be a highly relevant factor in deciding whether there was a good reason for treating as good service the delivery of the documents in Beirut within the six months' validity of the claim form in circumstances in which the documents came to his knowledge."

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).

(2) Application

39. In the present case, Lion would be served in Indonesia and Thai Lion in Thailand. Neither is a party to the 1965 Hague Convention or to any bilateral service treaty with the UK.

40. No limitation issue arises.

41. The Claimants submit that there was good reason for Moulder J to have made an order for alternative service vis-à-vis both Lion and Thai Lion for these reasons:

i) The claim has plainly come to the attention of both companies. They have served acknowledgments of service, and instruct the same solicitors as the other defendants.

ii) The claim has come to their attention via an attempt at formal service, viz the purported service via process agents.

iii) Lion and Thai Lion did consent to service via process agents for the purposes of the main contractual documents to which they are parties, and the claims under the Side Letter are closely related to those contracts.

iv) There is no dispute that the Claimants would be entitled to permission to serve Lion and Thai Lion out of the jurisdiction, so they would not be prejudiced by loss of the protections normally afforded by the requirements for permission to serve out.

v) In relation to Lion, the evidence of Mr Kavanagh is that:

> "… based on the advice of their Indonesian local counsel, service of the Claim Form on Lion in Indonesia would require the following procedural steps:
>
> (a) The Applicants must arrange delivery, via the UK Embassy in Indonesia, of the Claim Form to the Directorate General of Law and Social Culture at the Indonesian Ministry of Foreign Affairs.
>
> (b) Indonesian Ministry of Foreign Affairs will then deliver the Claim Form to the Clerk of the Indonesian Supreme Court.
>
> (c) The Clerk of the Supreme Court will then send the Claim Form to the District Court whose jurisdiction covers Lion's address.
>
> (d) The bailiff of the relevant District Court will then serve the Claim Form on Lion. On service, both the bailiff and Lion must sign a form called an "Acknowledgment Receipt of Judicial Documents from Foreign Court" (the "Acknowledgment") (this form will then be fed back through the channels described above).
>
> Even assuming that there are no complications in obtaining the signed Acknowledgment, this process will take 2-4 months. Factoring in the process set out at CPR r. 6.43 for obtaining service by the UK Foreign and Commonwealth Office (via the Senior Master at the Foreign Process Section at the Royal Courts of Justice), and the general impact of COVID-19 on processing times, it is likely that the full service process will take 6 months or longer. That timeframe has been confirmed by the Foreign Process Section."

vi) In relation to Thai Lion, the Foreign Process Section has stated that service through diplomatic channels in accordance with CPR 6.42(2) will take 12 months or longer. The Claimants believe that service by international courier, which would take only a few days, would be permissible, but it is not clear that such service would not be open to challenge as Thai law contains no express provisions governing the service of foreign proceedings. The correspondence and evidence to which I refer in §§ 45-51 below gives good reason to fear that courier service might give rise to a further debate about service.

vii) As noted earlier, LEO's Defence is founded essentially on the effect of the orders made in the *conciliation* proceedings in France. The evidence served on behalf of Lion indicates that *"Lion is in a functionally equivalent position to LEO: if required to file a Defence it would rely on the same points."*. No defence has so far been intimated on behalf of Thai Lion. The Claimants intend to apply for summary judgment, on the basis that the grace periods ordered in France do not affect the liability of LEO, Lion or Thai Lion as a matter of English law, which governs the debts (cf *National Bank of Greece and Athens v Metliss* [1958] A.C. 509). It is plainly desirable that the court should determine simultaneously the cases against Lion and LEO (and also Thai Lion, were it to raise any similar defence). The cases raise the same issues, and if the Claimants were to obtain judgment against LEO before Lion had been served with the proceedings, then either (a) Lion would have to admit the claims, in which case there is no reason for the court to allow it to string out the time for that to happen, or (b) Lion would attempt to relitigate the same points, which would be a waste of court time and resources.

viii) There are no countervailing reasons: Lion's and Thai Lion's own evidence, quoted in § 28 above, indicates that they are simply trying to delay the litigation. Whilst the Covid pandemic has had an adverse effect on airlines such as the Defendants, it can be assumed to have had an equally adverse effect on companies such as the Claimants who lease planes.

42. Lion and Thai Lion take issue with several of these points. As to (ii) above, they say it cannot be a factor in favour of alternative service that the claim has come to their attention via an attempt at formal service which the Claimants must have known was invalid: that would amount to giving an incentive for non-compliance. HFW's letter of 19 August 2020 asserted that the Claimants were entitled to serve on the process agents a claim including claims under the Side Letter, when that was clearly not the case. I agree with Lion and Thai Lion that the purported service was thus clearly flawed. On the other hand it was an attempt at service clearly intended to bring the claim to the Defendants' attention as being formal service of the proceedings, unlike the examples cited by Popplewell J in *Société Générale* § 49(3) of instances where a claim comes to a person's attention in circumstances that would not lead the recipient to believe that the would-be claimant was attempting to serve him with the proceedings.

43. As to (iii) above, Thai Lion was party to an aircraft Operating Lease with the Fourth Claimant, Myna Leasing Limited, which at § 25.4(b) included a process agent clause in the following terms:

> "The Lessee irrevocably appoints Stephenson Harwood, London Office, at Finsbury Circus, London, EC2M 7SH, England as its

> agent to receive and accept on its behalf any process or other document relating to any proceedings in the English courts which are connected with this Agreement."

The Fourth Claimant might accordingly have argued (though in fact it refrained from arguing) that its own claim against Thai Lion under the Side Letter was a claim 'connected with' the Operating Lease within the above clause. On the other hand, the same cannot be said of the claim which the First Claimant (Goshawk) brings against Thai Lion under the Side Letter, nor of any of the claims made against Lion under the Side Letter. Goshawk, which makes claims under the Side Letter against both Lion and Thai Lion, is not party to any other relevant agreement with either of those companies. Indeed, none of the claimants who advance claims against Lion under the Side Letter advance any other claims against it. I also accept Lion/Thai Lion's point that it cannot be enough, to justify alternative service, that a party has agreed to process agent service in relation to other claims, since that would subvert the parties' freedom of contract.

44. As to (v) above, Lion submits that a delay of "*six months or longer*", to effect service in Indonesia by diplomatic means, would be within the range where allowing alternative service would wrongly supplant the 'norm' of service overseas. It notes that delays of up to a year were stated to be sufficient to justify alternative service in *Cecil* (per Rix LJ) and *Abela* § 34, whereas delays of up to 50 days are already contemplated by the Table in PD6B (for service to the New Zealand Island Territories). In my view, however, a delay of "*six months or longer*" might in itself be a factor in favour of alternative service. In any event, that period should be considered in conjunction with the impact on the litigation as a whole, including the live proceedings against LEO i.e. factor (vii) in the list set out above.

45. As to (vi), relating to the service on Thai Lion, the evidence of Mr Kavanagh in his witness statement before Moulder J was:

> "… we understand from our Thai lawyers that whilst Thai law contains no express provisions governing the service of foreign proceedings in Thailand, (a) service by courier is an acceptable method under Thai law for service of domestic proceedings, and (b) Thai law allows Thai proceedings to be served out of the jurisdiction by courier .... The Applicants therefore consider that service on Thai Lion in Thailand by international courier is permitted under Thai law in accordance with CPR r. 6.40(3)(c). This route is clearly preferable to service through diplomatic channels in accordance with CPR r. 6.42(2), which the Foreign Process Section has confirmed will take 12 months or longer"

46. The Thai advice referred to in this passage was a letter from a Thai law firm which stated:

> "1. Since the proceeding is governed by English law, we are not able to confirm a legal position as to whether the service of summons to a legal entity in Thailand will be successful and valid.

> 2. Under the Civil Procedure Code of Thailand B.E. 2477 (the "CPC"), there is no provision expressly dealing with foreign proceedings. Also, under the CPC, the procedures for a service of summons will be ordered by the court.
>
> 3. Further, we have liaised with a court official at the Department of International Legal and International Cooperation, Court of Justice, and were informed that service of summons in relation to foreign proceedings can be made by diplomatic channels (via the Ministry of Foreign Affairs) or international courier.
>
> 4. It may be helpful to point out the proceedings that the Thai court will carry out to serve a summons to a defendant. We note that the court may order service of summons be made by registered post or domestic special express mail service. Such service by registered post or domestic special express mail service will be considered as if it was service carried out by a court official. We cite Section 73 Bis - *For the pleading or document to be served by the court official, whether it shall be the duty of the court to serve or the party has the duty to procure service thereof, the court may order service by registered post with acknowledgment upon receipt or by domestic special express mail service; and the party who has the duty to procure service shall pay the postage fee. In this case, it shall be deemed that the pleading or document to be served by the postal officer has the same effect as if that of the Court official ...*
>
> …"

47. Subsequently, the witness statement of Mr Phillips of SH in support of Lion and Thai Lion's present application stated *inter alia* that there was no substantive argument about delay in serving Thai Lion:

> "… because Mr Kavanagh's statement indicates that the Claimants would if necessary serve Thai Lion directly by courier (paragraph 23), which is unlikely to take more than about two days at most. It seems the application in relation to Thai Lion ultimately turned purely on matters of administrative convenience."

48. HFW wrote to SH on 13 January 2021 referring to that statement and saying:

> "Your assertion is obviously intended to give the impression that any delay in service on Thai Lion out of the jurisdiction would therefore necessarily not be substantial and that such service would be "unlikely to take longer than two days at most".
>
> Please would you therefore, for the avoidance of any doubt, confirm by no later than Monday 18 January 2021 that the Third Defendant will not object to service of the Claim Form on it in

> Thailand by international courier in accordance with CPR r. 6.40(3)(c) if permission is granted to serve out of the jurisdiction."

49. SH replied on 15 January 2021:

> "Paragraph 17.1 of the Second Witness Statement of Paul Phillips dated 6 January 2021 simply repeats what Giles Kavanagh said in paragraph 23 of his Witness Statement dated 18 November 2020 based on the advice he received from your Thai local counsel on the same day as exhibited in Exhibit GK1/62 of Mr Kavanagh's Witness Statement. Contrary to your suggestion, the root of the assertion that service on the Third Defendant out of the jurisdiction can be effected without substantial delay by international courier is therefore Mr Kavanagh, and not us or Mr Phillips.
>
> As to your request in the penultimate paragraph of your letter, we do not propose to rehearse our submissions in correspondence, but we note that it is by no means clear from the advice given from your Thai local counsel to Mr Kavanagh whether service by international courier of English proceedings in Thailand is permitted under Thai law, and therefore permitted under CPR r. 6.40(3)(c) if permission is granted to serve out of the jurisdiction.
>
> Given your Thai local counsel's opinion exhibited in Exhibit GK1/62 to Mr Kavanagh's Witness Statement is not entirely clear on this point, we will have to instruct Thai counsel to advise us and our client, and therefore we anticipate we will need longer than Monday 18 January 2021 before we are able to provide an informed response."

50. Having taken such advice, SH stated on 22 January 2021:

> "Having taken advice from Thai counsel, we now understand that:
>
> 1 Service by international courier of English proceedings to be made within or to Thailand is not expressly prohibited by Thai law. The Thai Civil Procedure Code is silent on the issue of service of foreign proceedings made in Thailand.
>
> 2 Section 70 of the Thai Civil Procedure Code requires Plaints to be served by an officer of the Thai court (i.e. an employee of the Thai court, or a person expressly appointed as such by the Thai court). Claim Forms would fall within the definition of "Plaints" in Section 1(3) of the Thai Civil Procedure Code, which includes, among other things, a charge submitted by a plaintiff to a Thai court in writing at the time of the institution of the case, which would ordinarily contain the name of the court in which

> the case is to be entered, the names of the parties to the case, nature and details of the claim, amount claimed, and the relief sought."

51. Mr Phillips of SH repeated the above response, without elaboration or comment, in § 6 of his third witness statement dated 28 January 2021 in support of the present application.

52. Finally, a footnote to Lion and Thai Lion's skeleton argument in support of their present application states:

> "In light of what is said at Phillips 3 §6, Thai Lion accepts that service by international courier in Thailand would conform to r. 6.40(3)(c)."

53. CPR 6.40(3) and (4) provide:

> "(3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served—
>
> (a) by any method provided for by—
>
> (i) [Omitted]
>
> (ii) rule 6.42 (service through foreign governments, judicial authorities and British Consular authorities); or
>
> (iii) rule 6.44 (service of claim form or other document on a State);
>
> (b) by any method permitted by a Civil Procedure Convention or Treaty; or
>
> (c) by any other method permitted by the law of the country in which it is to be served.
>
> (4) Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served."

54. Comments of the Supreme Court in *Abela* suggest that 'permitted' in this context may not simply mean the same as 'not prohibited':

> "It is important to note that rule 6.15 applies to authorise service "by a method or at a place not otherwise permitted" by CPR Pt 6. The starting point is thus that the defendant has not been served by a method or at such a place otherwise so permitted. It therefore applies in cases (and only in cases) where none of the methods provided in rule 6.40(3), including "any other method permitted by the law of the country in which it is to be served"

> (see rule 6.40(3)(c)), has been successfully adopted. The only bar to the exercise of the discretion under rule 6.15(1) or (2), if otherwise appropriate, is that, by rule 6.40(4) , nothing in a court order must authorise any person to do anything which is contrary to the law of the country where the claim form is to be served. So an order could not be made under rule 6.15(2) in this case if its effect would be contrary to the law of Lebanon. Although it was held that delivery of the claim form was not permitted service under Lebanese law, it was not suggested or held that delivery of the documents was contrary to Lebanese law or that an order of an English court that such delivery was good service under English law was itself contrary to Lebanese law." (§ 24, my emphasis)

If the mere fact that delivery of the Claim Form was not contrary to Lebanese law meant that it was a permitted method for CPR 6.40(3) purposes, then there would presumably have been no need to consider an order for alternative service.

55. Notwithstanding the concession in Thai Lion's skeleton argument quoted above, based on the evidence and correspondence quoted above there remains in my view an element of doubt as to whether service of English proceedings by international courier has been shown to be permitted under Thai law. Accordingly I consider there to be a residual risk that proper service in Thailand could not be effected in less than 12 months.

56. As to factor (vii) set out in § 41 above (impact of delay in service on the litigation as a whole), Lion and Thai Lion suggest that there are three possibilities:

i) The Commercial Court's previous approach when these issues of French law have arisen was to await the French courts' decisions: see *Lehman Bros Bankhaus v CMA CGM* [2013] EWHC 171 (Comm). It is not yet clear how the Claimants will respond to the latest developments in France.

ii) The Claimants might attempt to argue that LEO's Defence cannot succeed in law, and they apparently intend to apply for summary judgment against LEO. If so, any judgment given would be binding (unless, exceptionally, a subsequent judge thought it obviously wrong) and so would resolve the same issues against Lion. By way of elaboration, in oral submissions Lion/Thai Lion appeared to accept that a summary judgment against Lion would not bind them if they had not yet been served with the proceedings, but said that in practice they and their legal team could not properly contest the matter, unless the decision against Lion was arguably wrong, in which case an appeal would be likely in any event.

iii) Alternatively, the Claimants could accept that the case should go to trial (in which case some procedural progress could be made while Lion is served).

57. Lion and Thai Lion suggest that in none of these scenarios is the delay to serving Lion a bar to the claims proceeding in a sensible way. It is, therefore, not a 'good reason' for service under r. 6.15.

58. I do not find that submission persuasive. The Claimants have clearly stated, in evidence as well as in submissions, an intention to apply for summary judgment against LEO,

without the need to await further steps in the proceedings in France. Whilst the court might decide to stay its proceedings, as occurred in *Lehman*, it might well decide in the present case that the Claimants (not all of whom are in any event parties to the French proceedings) should be permitted to seek summary judgment. That application might well be heard, in the ordinary course, before Lion or Thai Lion could be served by diplomatic means; and even if they had been served, it is likely that either (a) summary judgment applications against them would come on for hearing later than the application against LEO, or (b) the summary judgment against LEO would have to be delayed. It is clear that the same issues as arise vis-à-vis LEO will also arise at least in relation to Lion. It is by no means a foregone conclusion that a decision against LEO would in practice bind Lion too, if Lion were only subsequently served with the proceedings, or (arguably) were not involved in the summary judgment application against LEO. To take one example, Lion might identify arguments or facts that were not advanced in the application against LEO. The issue would then have to be litigated a second time as between the Claimants and Lion. In reality, it is in my view clear that having additional parties (Lion and Thai Lion) join the proceedings at a later stage is liable to cause substantial additional procedural complexity, cost and court time, to the detriment of both the parties and other court users.

59. As to factor (viii), Lion and Thai Lion argue that there are other countervailing factors why Moulder J's order for alternative service should be set aside and not re-granted, arising from delay and non-disclosure and delay by the Claimants.

60. As to delay, Lion and Thai Lion object to Moulder J's order on the basis that it gave the Claimants the benefit of an extension of time to serve the Claim Form which (i) Moulder J herself did not give, despite being asked, and (ii) they were not entitled to. But for the Moulder Order, the Claimants would have had to serve out of the jurisdiction, and even with the extra two months afforded by CPR rule 7.5(2) they would have needed an extension of time. Lion and Thai Lion highlight the comments in *Société Générale* § 49(6) about the relevance of delay.

61. I do not accept the premise of this argument. On the basis that service on Lion in Indonesia would take *"six months or longer"*, that being the evidence before Moulder J and before the court now, an extension would in practice have been required even if the Claimants could reasonably have been expected to set the wheels in motion on the day the Claim Form was issued. Moreover, it would have been reasonable for the Claimants first to have taken sensible steps to ascertain whether, in the light of the process agent provisions in the main contracts, the Defendants' solicitors could obtain instructions to accept service of proceedings in respect of all the claims. Further, on the footing that service on Thai Lion in Thailand would take a year or more, an extension would again have been necessary in any event. Nonetheless, I go on below to consider Lion's and Thai Lion's delay argument in any event.

62. The principles governing extensions of time to serve claim forms were explained by the Court of Appeal in *Hashtroodi v Hancock* [2014] 1 WLR 3206 as follows:

    i) There is no express or implied requirement in CPR rule 7.6(2) that the claimant show a 'good reason' for failing to serve within the period of validity (§§ 16-17).

ii) However, in practice, the court will have to inquire into the claimant's reasons for not serving within the period of validity ("*it will always be relevant for the court to determine and evaluate the reason why the claimant did not serve the claim form within the specified period*"), because it will not be possible to deal with the case in accordance with the overriding objective without knowing why the application is being made, and "*an applicant who has merely left service too late is not entitled to as much consideration*" (§ 18).

iii) This leads to a "*more calibrated approach*" than applied under the previous law (where good reason had to be shown). If the claimant has taken all reasonable steps to serve within that period but been unable to do so, then the Court will readily grant an extension (§ 19); conversely, "*the weaker the reason, the more likely the court will be to refuse to grant the extension*" (§ 19); for example, if the claimant has simply overlooked the need for service, then that would be a strong reason for refusing to grant the extension (§ 20).

iv) Beyond that, the Court of Appeal was unwilling to grant any more detailed guidance, except that the application should be approached on the basis of the overriding objective and that the reason for not having served will be material (§ 22).

63. Lion and Thai Lion say that it is tolerably clear that the Claim Form was issued when it was (at least in part) in order to allow some of the Claimants to continue the *saisies* they had obtained in France. It was thus issued on 24 July 2020 for the purpose of supporting *saisies* that the French court subsequently found had been obtained through non-disclosure. Specifically, the French court found that it was not told (and should have been told) that Lion was guaranteeing Ciel:

> "it is obvious, as verified at the hearing in the presence of the parties, that the free French translation presented to the motions judge did not mention Lion Air's status as guarantor (Exhibit 9, email dated April 26, 2020), as the words "The Lion Guarantee" had not been translated into French; that the statement according to which the free translation is indicated as "partial" is not sufficient to justify that an essential element giving credit to the solvency of Ciel was left out in favour of an overall economic situation, which was admittedly very difficult, but of which, on the contrary, no evidence was brought to the attention of the judge who ordered the attachment, so that the latter received information which was deliberately truncated, apart from the fact that the information available to him was therefore not sufficient to enable him to grant the requested protective attachment measure"

and no adequate explanation has been given as to why this occurred.

64. The French court applied the sanction of setting aside the *saisies*. The question, however, is what bearing that has on the present proceedings, which concern the Claimants' substantive claims against the Defendants. The fact that the Claim Form was issued on a particular date in order to seek relief which the French court found to have been improperly obtained, though (absent any explanation) it reflects badly on the

Claimants, has little direct bearing on the issues before this court now. There is no reason to believe that the Claim Form would have been issued on any different date if the *saisies* had been properly sought. Nor is there any reason to believe that the setting aside of the *saisies*, which occurred on 5 August 2020 i.e. shortly after the Claim Form was issued, has resulted in delay in serving the present proceedings. The period between the issue of the Claim Form on 24 July 2020 and the first attempt at service on 19 August 2020 was not in reality attributable to the wrongful obtaining of the *saisies* in France. Rather, it seems more likely to have been attributable at least in part to the 'without prejudice' discussions which it is common ground took place during that period. I accept Lion/Thai Lion's point that such discussions are not a good reason for delay under the CPR, but nor should a relatively short delay of that kind in a period when such discussions are taking place carry a great deal of weight against the Claimants.

65. Lion and Thai Lion say the next period, from 19 August to 15 October 2020, was taken up with an attempt at service that did not comply with the rules and which, when queried, could not be defended. It is true that such an attempt at service was made, on 19 August 2020. However, it was followed by a period of six weeks, until 1 October 2020, during which Lion and Thai Lion made no substantive response save to acknowledge service on 4 September 2020 indicating an intention to contest the jurisdiction.

66. That was followed by HFW's letter of 15 October 2020 inviting SH to accept service on behalf of Lion, which was refused on 19 October 2020. There was then a brief exchange of correspondence on 4 and 6 November 2020 in which HFW corrected an error in their letter of 15 October and SH maintained the position set out in their letter of 19 October. The Claimants' application was then issued on 18 November. It might be argued that the period from 19 October 2020 to 18 November 2020 was a largely unexplained delay, but on the other hand the Claim Form still had at this stage over two months' remaining validity for service out of the jurisdiction, and as noted earlier an extension was always likely to be needed anyway for service out of the jurisdiction. There was also (just) enough time to seek an order for alternative service within the jurisdiction, and to serve pursuant to such an order, as in fact purportedly occurred.

67. In these circumstances, I do not accept Lion and Thai Lion's submission that delay on the part of the Claimants is or was a reason why an order for alternative service should not have been made, nor a reason why any necessary extension of time to serve the Claim Form should not have been made. Nor do I accept the suggestion that Moulder J should in substance be regarded as having "refused" an application to extend the time for serving the Claim Form: given her order for alternative service, an extension was not necessary.

68. It is further submitted that Lion (at least) has been prejudiced by the Claimants thereby avoiding the need for an extension that they would not have received. Proceedings under the Claim Form (issued on 24 July 2020) benefit under Article 67 of the UK/EU Withdrawal Agreement from the provisions of the Brussels I (Recast) Regulation, pursuant to section 3 of the European Union (Withdrawal) Act 2018. Proceedings issued now would not do so. It follows that if the Claimants can proceed with this claim, they can require a judgment made here to be recognised in France; if they start a new claim, that will not be the case. As noted above, there is live litigation in France, in which Lion has an interest. Lion is therefore prejudiced if the Claimants are able to

keep alive this claim, rather than starting a new one. For example, a judgment against Lion in England might be enforceable in France. The position is said to be analogous, to a degree, with cases where an extension to the validity of a claim form would deprive the defendant of a limitation defence.

69. However, as the Claimants point out:

i) All Part 7 claims issued in England and Wales prior to 31 December 2020 benefitted in the same way. It cannot be the case that no orders for alternative service should have been made prior to 31 December 2020 where service through diplomatic channels would have occurred only after that date.

ii) No-one really knew how the Brexit negotiations would play out. It would have been impossible to be sure whether arrangements would continue as they were after 31 December 2020, or, if they would change, what the change would be.

iii) Whereas TAN and Ciel are French-domiciled, Lion and Thai Lion are not. They do not share any shareholders with TAN and Ciel, and the Claimants are not aware of any assets they have in France (and Lion and Thai Lion have not suggested otherwise). The jurisdictions in which the Claimants are likely to wish to enforce a judgment against them are Thailand and Indonesia, where the process for enforcement is unaffected by Brexit.

70. As to non-disclosure, the Claimants' application to Moulder J was *ex parte*, so the Claimants were under a duty to make full and frank disclosure. Lion and Thai Lion complain that Moulder J was not told about:

i) the litigation in France relating to the TAN Stay Order; or

ii) the previous litigation about the *saisies* that had prompted the issuing of the Claim Form.

71. Mr Kavanagh's first witness statement, which was before Moulder J, explained that the proceedings against TAN and Ciel had been stayed pursuant to recognition orders made pursuant to the Cross-Border Insolvency Regulations 2006; but that permitting service on Lion and Thai Lion within the jurisdiction would save time and costs, by simplifying the management of the proceedings and enabling all active claims (which were intrinsically linked) to be managed and tried together. Lion and Thai Lion say that, in circumstances where the application was made substantially on the basis of delay, the witness statement should also have explained that (as set out in the Claimants' Reply served two days later) the stay arose because of an order of the French court which the Claimants alleged was wrongly granted and intended to challenge. That was material to the validity of the Claimants' argument about the active proceedings advancing in tandem, because it would have highlighted a doubt about how or when the French proceedings would advance.

72. I agree that it would have been preferable for the evidence before Moulder J to have referred more explicitly to the French proceedings, and to the Claimants' intention to challenge the TAN Stay Order. However, the explanation would no doubt have gone on to say that the Claimants' position was that the TAN Stay Order was in any event no bar to proceeding in England against LEO, Lion and Thai Lion and that the

Claimants were proposing to seek summary judgment. In these circumstances, I do not consider that it would have been appropriate to set aside the Moulder Order on the grounds of material non-disclosure. In circumstances where, as noted below, the Moulder Order must be set aside in any event on other grounds, the real question is whether there was material non-disclosure justifying a refusal to re-granted relief in similar form should that otherwise be appropriate. In my view there was not.

73. Lion and Thai Lion also say that the *saisies*, and the way they prompted issuance of the Claim Form, are an inherent part of the analysis of why the Claimants ended up applying very shortly before the expiry of the validity of the Claim Form, that being something which "*will always be relevant*" (*Hashtroodi* §18). The fact that the story is discreditable only underlines the need for it to be disclosed.

74. I do not accept that submission. For the reasons given earlier, I do not consider the manner in which the *saisies* were obtained, and shortly afterwards set aside, to have a significant bearing on the timing of the Claim Form or the issues before Moulder J.

(3) Conclusion on alternative service

75. In my view, there was at the time of the Moulder Order, and is now, good reason to permit alternative service. Lion and Thai Lion are fully aware of the claims against them and have a legal team available to them who are fully up to speed with the litigation as a whole. There is no dispute that the Claimants would be entitled to permission to serve the claims on Lion and Thai Lion out of the jurisdiction. There are connections in commercial terms between the claims and parties involved in the litigation as a whole, and similar issues arise as between the Claimants and Lion (at least) as arise vis-à-vis LEO. It is desirable in the interests of justice for all the claims to advance together, so far as possible, and not to be unduly delayed. There is a significant risk that absent an order for alternative service, significant delays would be experienced in serving Lion and Thai Lion, which would lead to fragmentation and/or delay.

(4) Validity of the Moulder Order

76. The question arises as to whether my conclusion on alternative service means that the Moulder Order can simply stand, or whether the absence of permission to serve out means that Moulder J lacked the power to make an order for alternative service.

77. In *Marashen*, David Foxton QC accepted a submission that where a defendant is outside the jurisdiction, the power to make an order for substituted service arises from CPR rule 6.37(5)(b)(i), which provides that *"[w]here the court gives permission to serve a claim form out of the jurisdiction … (b) it may …(ii) give directions about the method of service"* (§§14–22). It follows, he held, that it is a necessary precondition to making a substituted service order in such a case that the court has also given permission to serve out:

> "On this issue, I am satisfied that Mr Salzedo's submissions are correct, and that an order for service by an alternative method within the jurisdiction against a defendant who is resident outside of the jurisdiction can only be made if the court has

> satisfied itself that the case is a proper one for service out of the jurisdiction, and has made an order to that effect." (§17)

As a result, the order for alternative service was set aside (§ 23).

78. Lion and Thai Lion say it does not matter that the Claimants sought permission to serve out from Moulder J, or that there is no dispute it should be given. Those factors were both the case in *Marashen* (see §§20, 21–2) and the order was still set aside. As they put it, the Claimants in the present case asked for permission to serve out in the alternative to alternative service, and Moulder J gave them their (defective) first choice.

79. I accept that submission. In my view the wording of CPR rule 6.37(5)(b)(i), referred to in § 77 above, indicates that the power to give directions about service arises only where the court has given permission to serve out. Moulder J therefore did not have power to make the alternative service order.

80. Further, it appears to me that the court cannot confer such jurisdiction retrospectively by granting permission to serve out now. A grant of permission to serve out now will not alter the fact that when the Moulder Order was made, no such permission had been granted.

81. However, the court can (a) grant permission to serve out now and (b) make an alternative service order to the effect that the steps taken to effect service in the light of the Moulder Order shall constitute good service, subject to appropriate further provision about the impact on the timing of further procedural steps in the litigation. It is clear from *Abela* §§ 20- 21 that CPR rule 6.37(5)(b)(i) is to be construed as conferring the power, via rule 6.15(2), retrospectively to validate alternative service in such a case, or such a power is to be implied generally into the rules governing service abroad.

82. I shall hear any further submissions the parties may wish to make as to the appropriate relief to be granted in the light of my conclusions in this judgment. My provisional view is that the appropriate course is (a) to grant permission to serve out, (b) to order that the steps already taken following the Moulder Order shall constitute good service and (c) to state in the order the matters required by CPR rules 6.15(4)/6.37(5).

(D) EXTENSION OF VALIDITY OF CLAIM FORM

83. Given the matters set out above, and subject to any further submission from the parties as to the appropriate form of relief, it appears to me unnecessary to make any order extending the time for service of the Claim Form. However, I have in substance considered in §§ 62 to 69 above the applicable principles and the considerations that would have arisen had such an extension been necessary. In the light of those matters, I would have been willing to grant an extension of the time to serve the Claim Form had one been necessary or appropriate (and remain prepared to do so if persuaded that it is in fact necessary or appropriate in order to give effect to the conclusions reached in this judgment).

(E) COSTS OF THE FIRST APPLICATION

84. Lion and Thai Lion contend that, since Goshawk does not suggest that the original service on the process agents on 19 August 2020 was valid service under the CPR, they

were right to bring the application to set that service aside and should recover their costs of that application.

85. The Claimants submit that:

i) they never contested the suggestion that they were not entitled to serve on Lion and Thai Lion pursuant to CPR rule 6.11, and there was no need for an application at all: if SH had written to say that Lion and Thai Lion were taking that point, the Claimants would not have contested it (as they did not, when the point was taken);

ii) the costs of the application were thus unnecessarily incurred because SH did not simply write beforehand to raise the point in correspondence;

iii) it was perfectly sensible to serve the Claim Form on Lion and Thai Lion via the process agents and to see whether they would take a technical point on service. When they did take that point, the Claimants invited them to agree that SH could accept service, pointing out that there was no basis on which permission to serve out could sensibly be contested. They refused. That necessitated the application to Moulder J. All of that could have been avoided if Thai Lion and Lion had chosen not to object to the initial service on them; and

iv) a person may choose to take technical points, but if by doing so they cause others (and the court) to spend time and money taking procedural steps for the sake of it, it is not unreasonable to suggest that they should bear the costs that result.

86. Lion and Thai Lion make the points that:

i) since the Side Letter contains no agent for service provision, it was clearly wrong for HFW to assert the contrary when purporting to serve the proceedings on 19 August 2020;

ii) consequently, it was also clear from the outset that the Claim Form could not be served at all via the process agent route as it was not 'solely in respect' of contracts containing agent for process agent provisions;

iii) Lion and Thai Lion were thus entitled to challenge service on them and should not be penalised in costs for having done so;

iv) imposing such a cost sanction on the basis that Lion and Thai Lion should have agreed to be served would amount to imposing a duty on defendants to cooperate on service, when no such duty exists: see, e.g., *Al-Zahra v DDM* [2019] EWCA Civ 1103 ("*unless and until proceedings are validly served on the foreign Defendant, that party is under no obligation to respond at all*" (§ 93)) and *Collier v Williams* [2006] EWCA Civ 20 ("*the defendant's solicitors were under no obligation to the claimants to reveal the defendant's address for service*" (§ 99));

v) after Lion and Thai Lion had challenged the jurisdiction, it took the Claimants 14 days to write (until HFW's letter of 15 October 2020): given the tight timetable that applies when challenging the jurisdiction, there is no reason to

believe that a prompt response from SH following the purported service on 19 August 2020 would have avoided the need for Lion and Thai Lion to spend money serving an acknowledgement of service and preparing a jurisdiction challenge; and

vi) the root cause of the problem (and the costs) was that the Claimants sought to serve Lion and Thai Lion in a manner not permitted by the rules. The usual costs consequences should follow.

87. In my view there was fault on both sides. It was inappropriate for the Claimants simply to purport to serve the Claim Form based on a clearly incorrect assertion that all the claims were covered by agent for service provisions. A more appropriate course would have been to invite SH to seek instructions to accept service on the basis that, whilst some claims fell outside those provisions, the claims and parties had a degree of connection and it would save unnecessary costs for SH to accept service on behalf of all. On the other hand, SH would, given the evidence submitted on behalf of Lion/Thai Lion as to their strategy, no doubt have refused the invitation. Moreover, following the approach HFW in fact took, it appears to me that (contrary to the submission noted above), a prompt response from SH refusing to accept service and inviting HFW to concede the point within, say, 7 days would have avoided the need for a challenge to the jurisdiction to be prepared and issued. At most, Lion and Thai Lion might have incurred the very modest cost of filing an acknowledgement of service. Taking a broad view, the just outcome in my judgment is for each side to bear its own costs of Lion's and Thai Lion's first application. I shall hear argument in due course as to the costs of the present applications.

(F) CONCLUSIONS

88. The Moulder Order for alternative service must be set aside, on the basis that the court lacked jurisdiction to make such an order without having granted permission to serve the proceedings out of the jurisdiction.

89. However, it was and remains appropriate to make an order for alternative service and (if necessary) to extend the time for serving the Claim Form. I shall hear from the parties as to the appropriate relief, my provisional view being that I should grant permission to serve out and order that the steps already taken with a view to effect service following the Moulder Order shall constitute good service.