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Case No: CL-2022-000230

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

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

Date: 06/02/2024

Before :

CHRISTOPHER HANCOCK KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

RANA AL-AGGAD	**Claimant**
- and -	
(1) TALAL AL-AGGAD	
(2) TAREK AL-AGGAD	
(3) LAMA AL-AGGAD	**Defendants**

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- -

Anthony Peto KC and Shane Sibbel (instructed by **PCB Byrne LLP**) for the **Claimant**
Stephen Houseman KC and Richard Hoyle (instructed by **Jones Day**) for the **First and Second Defendants**
Fionn Pilbrow KC and Vanshaj Jain (instructed by **Forsters LLP**) for the **Third Defendant**

Hearing dates: **17 – 18 and 26 October 2023**

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JUDGMENT

Christopher Hancock KC :

Introduction.

1. I have before me a number of applications, which are themselves preparatory for a potential *forum non conveniens* application currently listed for February 2024. Whether those applications do go ahead will depend on my decisions in this judgment, since the Defendants, for various reasons, do not accept that they have been validly served by the Claimant (C).

The background facts.

2. C is the sister of the three Defendants. D1 and D2 are her brothers, whilst D3 is her sister.

3. C is a Saudi national and refugee living in Canada [redacted] She was granted refugee status by the Canadian authorities on 12 July 2011.

4. It is necessary for me to set out in some detail the allegations made by C, although I emphasise that I make no final findings in this regard. I discuss the relevance of this material below.

(1) [redacted]

(a) [redacted]

(b) [redacted]

(2) [redacted]

(3) [redacted]

(4) [redacted]

(5) [redacted]

(6) [redacted]

[redacted]

(7) [redacted]

5. [redacted]

6. In summary, therefore, C submits that:

(1) [redacted]

(2) [redacted]

(3) it is necessary for C to refer to and rely upon that history for the purposes of these proceedings, both on the present applications and in the course of explaining, in particular, the relevant background to her claims and how (on C's case) the Defendants have taken advantage of her position to deprive her of the practical value of her shares in AICO (an investment holding company called Aggad Investment Company (also known as Omar Abdel-Fattah Al Aggad & Co), which was incorporated in Saudi Arabia by the parties' father, Mr Omar Al Aggad, in 1975). [redacted]

(4) [redacted]

(5) similar fears persuaded (i) the Canadian authorities to grant C refugee [redacted] and

(6) [redacted]

The current proceedings.

7. In these proceedings, C claims against all three Defendants for breach of contract and for an unlawful means conspiracy. For the purposes of this judgment, I do not need to go into the details of the underlying claims.

8. The current English proceedings were issued on 5 May 2022. On 15 July 2022, D3 was served with the proceedings personally whilst at Heathrow Airport. The family have a London apartment and a Surrey property.

9. On 22 July 2022, C applied *ex parte* for a domestic freezing order in respect of certain properties of the Defendants in England, permission to serve proceedings against D1 and D2 outside the jurisdiction, as necessary and proper parties to the proceedings against D3, permission to serve by alternative means (i.e. by email rather than via normal diplomatic channels) and for certain confidentiality orders.

10. On 11 August 2022, Butcher J refused the freezing order application but granted the remainder of the relief sought, including the confidentiality orders.

11. On 23 August 2022, the claim form was served on D1 and D2 by email.

12. Acknowledgments of service were filed as follows:

    (1) By D3, on 28 July 2022 with a statement that she intended to apply to challenge jurisdiction.

    (2) By D1 and D2, on 16 September 2022 with a statement that they intended to apply to challenge jurisdiction.

13. On 11 October 2022, D3 applied to stay the English proceedings on the grounds of *forum non conveniens*, and sought permission to rely on Saudi law evidence, given the contention that Saudi Arabia was a more appropriate forum.

14. On 14 October 2022, D1 and D2 applied to challenge the order for service by alternative means. They also sought to stay the English proceedings on *forum non conveniens* grounds. They sought to rely on D3's Saudi evidence, in support of their primary

contention that Saudi Arabia was the more appropriate forum and also sought permission to rely on evidence of Jordanian law on the basis that Jordan was the more appropriate forum, since D2 lives in Jordan.

15. On 28 November 2022, Part 11 applications were listed, to be heard on 17-18 October 2023 (i.e. the dates that I heard the applications with which I am now concerned).

16. On 17 March 2023, C's responsive expert evidence on Saudi law and Jordanian law evidence was filed, together with an application to rely on such. On 31 March 2023, Calver J by consent, amended the 11 August 2022 order to extend the confidentiality protections to relate to elements of C's responsive evidence. [redacted]

17. On 30 June 2023, following an extension of time order for service of the Defendants' reply evidence, evidence was served on behalf of D1 and D2, including reports from a new Saudi law expert (Dr Alsubaie) and a new Canadian law report (Dr Meighen) and further Jordanian law material from Dr Sharaiha.

18. On 28 July 2023, D3 filed further reply evidence in relation to Saudi law, with a report from Dr Alogla.

19. [redacted] C provided D1 and D2 with certain [redacted] by reference to which it was proposed that the [redacted] would be determined.

20. Between 1 and 6 September 2023, C provided the Defendants with drafts of her proposed rejoinder evidence in relation to the then mooted *forum non conveniens* applications.

21. On 7 September 2023, C filed the Rejoinder application, seeking leave to file rejoinder evidence in relation to the *forum non conveniens* applications then listed for October 2013.

22. On 13 September 2023, D1 and D2 wrote to propose that the jurisdiction applications be adjourned, and that the dates available be used for other purposes. That proposal was supported on 15 October 2023 by D3.

23. Following opposition in writing by C to the proposals set out above, the position was explained to the Court in September 2023, and a series of applications was made in that month.

24. On 5 October 2023, D3 filed an application for a declaration that there had been no valid personal service on her, because the claim form served did not contain the personal address of C. This was the first time that this contention had been put forward. The application stated that the lack of an order granting dispensation had not been appreciated until the process of preparing bundles for the *forum non conveniens* hearing was undertaken. This statement was made in the application notice, but no witness statement was served in relation to the point.

25. On 6 October 2023, there was a hearing before Foxton J, to determine whether the application by D1 and D2 that the jurisdiction applications be adjourned should be

granted. The adjournment application was allowed, but it was ordered that the original dates should be utilised to determine certain of the matters that had been raised by the Defendants, including in particular D3's challenge to the validity of service on her, and the challenge by D1 and D2 to the order for alternative service. It is these applications with which this judgment deals (although I also heard submissions on other matters during the course of the hearing, which in the event, took 3 days).

26. On 11 October 2023, an application was filed by C seeking dispensation of the inclusion of C's personal address on the claim form.

General introduction: the importance of open justice.

27. In my judgment, given the weight placed by the Defendants on the principle of open justice in support of their submissions in relation to service of the claim form, it is important to start with a consideration of this principle. D3 relied in this regard on the decision of Johnson J in *AEP v The Labour Party* [2021] EWHC 3821 (KB), in which the judge, having set out the general requirements for open justice, and the importance of this principle, stated as follows:

> "*These fundamental principles are reflected in the Civil Procedure Rules. Thus Civil Procedure Rule Practice Direction 16, paragraph 2.2 provides:*
>
> *"The claim form must include an address at which the claimant resides or carries on business."*
>
> *Paragraph 2.6 provides:*
>
> *"The claim form must be headed with the title of the proceedings, including the full name of each party. The full name means, in each case where it is known:*
>
> *(a) … his full unabbreviated name and title by which he is known …"*
>
> *Practice Direction 16.3.8(3) in conjunction with 16.2.6 directs that particulars of claim must include the full name of the claimant. Where there are multiple claimants these requirements apply to each of them: see section 6(c) of the Interpretation Act 1978. Once the claim form has been issued, it must be served on the defendant, and the defendant is entitled to production of documents from the court records pursuant to Rule 5.4B. Any member of the public is also entitled to obtain a copy of the claim form containing the names and addresses of the claimants from the court records: See CPR 5.4C(1):*
>
> *"The general rule is that a party who is not a party to proceedings may obtain from the court records a copy of (a) a statement of case but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it…"*
>
> *These rules are routinely observed, even in cases which raise matters which are "no doubt painful [or] humiliating". A claim form that does not contain*

the name and address of the claimant will be issued but the sealed copy will be retained by the court and will not be served until the claimant has supplied a full address: See Practice Direction 16, paragraph 2.5.

There are however circumstances where derogations from the public justice principle are exceptionally permitted. Thus, in Scott v Scott, Earl Loreburn said at 446:

"It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle …is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court."

In relation to the procedural requirements to provide on the claim form the names and addresses of the claimants, the court has power to disapply those rules so that a claim form can be issued by a claimant without it containing that person's full name or address. The court can also restrict the right of access to court records. It can direct that a hearing take place in private, and / or that the names of the parties or witnesses not be disclosed: See CPR 39.2(1) and (4); CPR 5.4C(4); and Practice Direction 16, paragraph 2.5." 'emphasis added'

28. In that case, after a full review of relevant authorities, the judge concluded that it was appropriate to grant an order anonymising the Claimants. However, it is clear both from that authority, and the further decision in the same case of Chamberlain J Taylor v Evans [2023] EWHC 935 (KB), that the principle of open justice is of the utmost importance. In that latter case, a helpful statement of the relevant principles is set out, at paragraph 9, as follows:

"*9. The principles to be applied were set out in JIH , at [21]:*

"(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.

(2) There is no general exception for cases where private matters are in issue.
(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.

(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such

restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(8) An anonymity order or any other order restraining publication made by a judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.

(10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one."

10. CPR 39.2(4) provides:

"The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness." 'emphasis added'

29. The Court also considered separately the question of whether a party's address should be held back, at paragraphs 31-33, as follows:

"*The claimants' addresses*

31. The application in respect of the claimants' addresses involves a lesser interference with the open justice principle. In general, and in this case, the public's understanding of the litigation is much less likely to be affected by the non-disclosure of addresses than of names. Nonetheless, a public interest reason must be shown to justify any departure from the usual rule that addresses are disclosed.

32. In my judgment, the appearance of material about this case on extremist websites provides such a reason. Although there is no specific evidence about the extent of any risk of attacks, the nature of some of the websites on which

material has appeared, taken together with the well-known fact that anti-semitic attacks have markedly increased in the UK in recent years, provides a sufficient basis to conclude that disclosure of the claimants' addresses would give rise to an appreciable risk to them and their families. Equally importantly, it would be bound to cause the claimants distress and worry, which they should not have to endure as a condition of bringing this claim.

33. The application for an order that the claimants' addresses need not be disclosed in publicly available documents is therefore granted."

30. C, for her part, submitted that it is well established that the principle of open justice is not absolute, but may require a balancing exercise between the public interest in open justice and the private interest in maintaining confidentiality for some reason. In this regard, C relied, *inter alia*, on the statement of general principle made by Lord Mance, in *Kennedy v Information Commissioner* [2015] AC 455, including the following observations as regards the nature of the open justice principle generally at §§113-114 (in the context of considering the extent to which such principles applied to Charity Commission inquiries):

"*The principle has never been absolute because it may be outweighed by countervailing factors. There is no standard formula for determining how strong the countervailing factor or factors must be. The court has to carry out a balancing exercise which will be fact specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests to others….*

…There may be many reasons why public access to certain information about the court proceedings should be denied, limited or postponed. The information may be confidential; it may relate to a person with a particular vulnerability; its disclosure might impede the judicial process; it may concern allegations against other persons which have not been explored and could be potentially damaging to them; it may be of such peripheral, if any, relevance to the judicial process that it would be disproportionate to require its disclosure; and these are only a few examples."

31. As to the specific CPR provisions under which the Confidentiality Regime was made, C submitted as follows:

(1) The general rule under CPR 39.2(1) is, reflecting the open justice principle, that hearings be in public. CPR 39.2(3) provides that the Court must derogate from that general rule, and hold all or part of a hearing in private, where the Court is satisfied (i) of one or more of the matters set out in CPR 39.2(3)(a)-(g) and (ii) that it is '*necessary to sit in private to secure the proper administration of justice*.' In that regard, the matters within CPR 39.2(3) C relied upon where (c) '*it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality*' and (g) '*the court for any other reason considers it necessary to secure the proper administration of justice*': see further the CPR notes at 39.2.3.1 and 39.2.7 on each of those factors. Such derogations must be ordered only when it is

necessary and proportionate to do so, with a view to protecting the rights which a claimant (and others) are entitled to have protected by such means: see the notes at CPR 39.2.2. The test is one of necessity and not discretion (*AMM v HXW* [2010] EWHC 2457 (QB)).

(2) The general rule under CPR 5.4C(1) is that a non-party may obtain statements of case and judgments or orders given or made in public, subject to the conditions in CPR 5.4C(3). CPR 5.4C(2) provides that a non-party may with the permission of the court obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person. CPR 5.4C(4) provides that the Court may make orders restricting such access to the Court records. These rules again engage the principle of open justice: see the CPR notes at 5.4C.10. An order made under CPR 5.4C(4) preventing a non-party from obtaining from court records copies of documents to which he would otherwise be entitled is a derogation from that principle and must be granted only when necessary and proportionate to do so, with a view to protecting the rights which applicants (and others) are entitled to have protected by such means: *G v Wikimedia Foundation Inc* [2010] EMLR 14.

(3) Under CPR 31.22(1) a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where the document has been read to or by the court, or referred to, at a hearing which has been held in public, or the court gives permission, or the party who disclosed the document agrees. Under CPR 31.22(2), the Court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court or referred to at a hearing which has been held in public. In exercising its discretion under CPR 31.22(2) to decide whether to restrict or prohibit use of a document which has been referred to in a public hearing, the open justice principle is engaged and central to the Court's evaluation: *Nab v Serco Ltd* [2014] EWHC 1225 (QB) §§28-38; CPR notes at 31.22.1. The Court will more generally take into account that CPR 31.22(2) is in wide terms, that the only pre-condition to the making of an order restricting or prohibiting the use of a document is that it has been disclosed, whether the order sought is proportionate, and whether the respondent would suffer any prejudice from the making of the order: *Rawlinson v Director of SFO* [2015] EWHC 937 (Comm) §§8-10.

32. As I have stated already, in paragraph 27, it necessary to consider the extent to which the present case calls for a limit or limits to be imposed on the principle of open justice. This has a bearing not only on the procedural regime to be adopted going forward (which, with the assistance of the parties, was finally dealt with by agreement at the hearing before me, and which has now been left to the judge who will hear the *forum non conveniens* application), but also on the questions which I have to determine.

33. In my judgment, in the light of the evidence put forward by C, [redacted] and which in my view is clearly credible, even though I do not need to make any final findings, this is clearly a case in which the principles of open justice fall to be modified. There is very real personal danger, on the basis of the evidence that I have seen, to C and her child, if there are no limitations on reporting, and, in particular, [redacted]

[redacted] I make no final findings as to the reality of such danger, but, on the basis of the evidence that I have seen, which in my view is clearly credible, I take the view (as did the Canadian Court) that consideration does indeed need to be given to steps to safeguard C.

34. As I have noted, the exact details of these steps will need to be considered by the judge who hears the *forum non conveniens* application.

35. I have started with this general introduction because, in my judgment, it informs the considerations which are relevant to the individual points which have been taken by the Defendants. Quite clearly, the principle of open justice is an extremely important one. I have attempted to bear this firmly in mind in considering the various applications before me.

The applications before me.

36. There are a series of applications before me, as follows:

(1) D3's application relating to the failure to include the Claimant's address on the Claim form. If the Claim form has not been validly served on D3, as D3 contends, then this Court has no jurisdiction over D3 and, since D3 is the anchor Defendant in relation to the claim against D1 and D2, this Court would have no jurisdiction over those Defendants either.

(2) The related application by C to dispense with inclusion of C's address on the Claim form.

(3) The application, made by D1 and D2, to set aside the order for alternative service. This is independent of those Defendants' reliance on the submissions made by D3.

The failure to include the Claimant's address on the Claim form and the application to dispense with the Claimant's address.

37. I start with the first two issues, which, for reasons which will become apparent, I regard as interrelated. The argument under this head was put forward principally by Mr Pilbrow KC, for D3, although short supporting submissions were made on behalf of the other two Defendants.

<u>The parties' submissions in outline.</u>

38. In outline, D3 made the following points.

(1) First, the consequence of the failure to state an address in the Claim form rendered that Claim form incapable of being validly served. In this connection D3 relied on the provisions of CPR 16.2(1)(e) with its mandatory language – the claim form <u>must</u> include an address – and the provisions of CPR PD 16 paragraph 2.3, along with the various authorities I refer to below.

(2) Secondly, CPR 3.10 could not be prayed in aid to correct the failure because the rules, in the form of PD 16 paragraph 2.3, specified a consequence for such failure and because the failing here was not in taking a step defectively but in

failing to take a step – i.e. applying for dispensation of inclusion of the address – at all. Further, the Court should exercise its discretion in order to declare service invalid.

(3) Thirdly, there had been no waiver of the defect because:

(a) The parties could not waive the requirement because the requirement was imposed to ensure open justice, which was a principle that was not open to private waiver;

(b) There was not any conduct sufficient to constitute a waiver.

(4) Fourth, I should not grant the application for dispensation and, even if I did, this would not cure the invalidity of the service of the Claim form.

39. For its part, the Claimant contended that:

(1) On the proper construction of CPR PD 16.2.3, failure to comply with that provision does not invalidate service of the claim form.

(2) The Court has jurisdiction and should exercise that jurisdiction to correct any non-compliance.

(3) D3 has waived any right to challenge service of the claim form and to challenge jurisdiction.

(4) In addition, C applied for an order dispensing with the address in the claim form. That submission, was, as I understood the position, to permit the claim to continue with the claim in its current format, i.e. without an address.

40. I turn to consider the parties' more detailed submissions, before setting out my conclusions.

<u>Dispensation with the need for an address, validity of service and the cure of any defect.</u>

41. I start with C's application for dispensation from including the address of C on the Claim form. In this connection, I adopt the statements of principle that I have already set out, taken from the decisions of Johnson J and Chamberlain J. In the light of the evidence as to the potential for personal danger to C and her son were her address to become known [redacted], as might be the case if that address were included on a Claim form which was open for inspection by members of the public, I propose to allow that application. This leaves the further question of whether this affects the question of the validity of service of the Claim form, which I deal with below.

42. Moving on then to the argument that the service of the Claim form was invalidated by virtue of the lack of an address at the time of service, and that this defect cannot be cured under CPR 3.10, D3 contended as follows:

(1) The requirements of open justice require the name and address of the Claimant to appear on the claim form. I did not understand this to be disputed.

(2) The normal result of the failure to include the address is set out in PD 16.2.3, which states that "*If the claim form does not include a full address, including postcode, for all parties the claim form will be issued but retained by the court and not served until the claimant has supplied a full address, including postcode, or the court has dispensed with the requirement to do so. The court will notify the claimant*."

(3) It follows from the fact that the Court would not serve a claim form without an address unless dispensation had been given, that the Claimant could not validly serve such a claim form. Mr Pilbrow KC fairly accepted that there was no authority directly on point. However, he relied on a number of authorities which he contended supported his position, which I address below.

(4) The defect in service was not one which could be cured under CPR 3.10, since PD 16.2.3 was a more specific regime which was inconsistent with CPR 3.10, and a defect falling within PD 16.2.3 could only be cured in line with the requirements of that regime.

43. The first authority relied on by D3 was *Municipo de Mariana v BHP Group* [2022] EWHC 330, [2023] EWHC 2126 (TCC).

(1) This case involved litigation arising out of the Fundao dam disaster in Brazil.

(2) The first hearing was for directions in relation to the manner in which the litigation, which covered a very large number of Claimants, should be managed. The Claimants' proposal, which was accepted by the Court, was that an excel spreadsheet should be used to identify the Claimants who were suing in the action, by names and categories. It was submitted by the Defendants that a group register was necessary so that the Defendants would know who was suing them, who would be bound by determinations in the litigation and who is potentially liable for costs. In addition, there were certain "Missing Claimants" at the time of this hearing. The Defendants proposed that, by a set date, details of Claimants including names and addresses, should be provided so that those Claimants could be added to the group register. In the event, the Court concluded as follows:

> "*38. The starting point for case management of numerous claimants in such proceedings is to identify the claimants and the capacity in which they bring their claims; further, to establish a procedure for adding and discontinuing the claims, so that at any point in time the defendants may know by whom they are being sued.*
>
> *39. The existing claimants have all been identified in schedules attached to the claim forms. The individual claimants are listed in alphabetical order, with names, addresses and CPF (Cadastro de Pessoas Fisicas) taxpayer registration number, together with the identification of those whose claim is brought by a litigation friend. The names and addresses of the Krenak community claimants are listed, in alphabetical order but without any CPF number. The other entities are listed in separate schedules, with their addresses and CNPJ (Cadastro Nacional da Pessoa*

Juridica) registered business number. The new claimants will be named on a further claim form to be issued by 17 February 2023.

40. This was an appropriate method of identifying the claimants but, as the parties acknowledge, it is imperative that there should be one group register to provide clarity and transparency as to the claimants at any point in time for the purpose of managing the group litigation. I consider that this can be done by use of the Master Schedule excel spreadsheet, to be prepared by the claimants, served on the defendants by 17 February 2023 and thereafter managed and maintained by the claimants.

41. Mandatory minimum requirements for entry onto the Master Schedule are that:

i) the claimant or future claimant must be a named claimant identified in a claim form which has been issued and in respect of which the issue fee has been paid by 17 February 2023;

ii) the claim form on which the claimant or future claimant is named has been served on the defendants;

iii) the claimant or future claimant must state that they will rely on the AMPOC (in its current form or as amended); and

iv) the cut-off date for entry onto the group register has not passed.

42. The extract of the Master Schedule attached to the claimants' draft directions shows that it contains the following information, namely: (i) claimant ID number; (ii) claimant group or category (1) to (6); (iii) CPF number; (iv) relevant claim form on which the claimant was named; (v) whether the claimant has served an APOC; (vi) whether the claimant's details on the claim form are the subject of an amendment application; and (vii) if so, the original claimant name. The following additional information should be incorporated into the schedule by additional columns, namely:

i) where available, the row number in the original claim form schedule in which the relevant claimant's name appeared;

ii) the CNPJ number in respect of each claimant that is a legal entity and not a natural person;

iii) the date of birth (where available) in the case of claimants who are natural persons and were aged under 16 at the date of the collapse;

iv) in the case of claimants who are natural persons, whether their claim is brought through a litigation friend or other legal representative.

43. The court considers that it would be appropriate to order a cut-off date of 17 February 2023 for entry onto the Master Schedule of any further claimants unless the court gives permission. This will provide certainty for the parties as to the size of the claimant cohort and provide

a sound base from which further case management of the litigation can be conducted.

44. The claimants' proposal is that outstanding APOCs should be served by 16 June 2023, although they will use best endeavours to serve the APOCs in batches in advance of 16 June 2023 and, in any event, sample APOCs of the new claimants will be served in advance of the Hilary CMC. As regards the future claimants, that proposal is reasonable and sensible; it is understood that a very substantial exercise is likely to be required to obtain and verify the details of the new claimants.

45. However, the court considers that the deadline for service of any outstanding APOCs in respect of existing claimants should be 17 February 2023, when the Master Schedule is served. The claimants' application dated 5 May 2020 sought an extension of time for service of the APOCs in respect of 3,134 claimants, whose questionnaires had not been processed properly due to an error by the third party provider. Mr Goodhead sought an extension of time of 14 days from the date of the order. Although the application was stayed pending the defendants' strike out/stay application, that matter was determined by the Court of Appeal some months ago and there has been ample time to resolve the technical error that occurred. Further, the defendants are entitled to an early resolution of the Missing Claimants issue, which has been the subject of much correspondence over a long period of time.

46. Therefore, the court will order the claimants to serve any outstanding APOCs from existing claimants by 17 February 2023. If an APOC has not been served by a claimant by that date, they shall be struck through on the relevant claim form and the Master Schedule and the claimants will be required to apply to the court to discontinue such claims at the Hilary CMC if not by earlier consent order.

47. Both parties agree that there needs to be a resolution of any outstanding issues in respect of the claimants' application dated 7 May 2019 and/or BHP UK's application dated 24 July 2019, both stayed pending the outcome of the defendants' strike out/stay application. Accordingly, the court will order that by 3 March 2023, the claimants and the defendants should indicate to each other and to the court whether they seek to have listed to be heard at the Hilary CMC those applications.

48. Further, the parties are required to liaise with a view to agreeing (or identifying any dispute for determination by the court at the Hilary CMC regarding) group litigation directions, including:

i) the procedure by which the defendants may object to any claimant being entered on the Master Schedule and the process for resolution of any such dispute;

ii) the procedure by which claims which are discontinued are updated on the Master Schedule by Pogust Goodhead;

iii) the procedure for updating the Master Schedule on a periodic basis by Pogust Goodhead;

iv) proposals for costs sharing;

v) proposals for Schedules of Information to be provided by the claimants, setting out details of any claims and settlements in Brazil; and

vi) identification of common issues of fact and law.

49. The court can see the potential benefits of the Master Schedule for categorising the claimants, their claims and identifying issues for test cases or sampling in due course. However, it would be premature for any order to be made in this regard before pleadings are closed and the entries of all claimants on the Master Schedule have been finalised."

(3) In that case, therefore, the original claim form (which covered a large number of Claimants) did not include all of the Claimants' addresses. A revised claim was then issued, and an extension of time was granted for inserting the relevant names and addresses and serving the claim form. The result of the hearing was that a further extension was granted. The judge dealt with the matter as follows:

"***Missing addresses from new claim form***

45. Turning then to the missing addresses from the new claim form, as both parties have recognised, this raises a slightly different issue in that the court has already granted an indulgence to the claimants in the order made following the CMC.

46. It is a requirement of a claim form that there should be an address for each claimant. Practice Direction 16 paragraph 2.1 provides :

"The claim form must include an address (including the postcode) at which the claimant lives or carries on business, even if the claimant's address for service is the business address of their solicitor."

47. The new claim form did not include the addresses of all the claimants named in the appendix to it. The court granted an extension of time by ordering that:

"The claimants may, if so advised, and by 4 pm on 16 June 2023, serve an amended new claim form which gives an address for all claimants named on the new claim form. Thereafter, any claimant named on the new claim form for whom no address has been provided shall be removed from the master schedule pending any successful application for permission to include them."

48. As recognised by the parties, that engages the test set out in Denton v TH White Ltd [2014] EWCA Civ 906 :

a. Identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order which engages CPR 3.9(1) .

b. Consider any explanation for the default.

c. Evaluate all the circumstances of the case, so as to enable the court to deal justly with the application, including CPR 3.9(1)(a) : the need for litigation to be conducted efficiently and at proportionate cost; and CPR 3.9(b) : to enforce compliance with rules, practice directions and orders.

49. The defendants' position is that the addresses were ordered to be provided for the new claim form by 16 June 2023. That was pursuant to the claimant seeking an indulgence of the court, having already failed to provide those addresses in the new claim form. The claimants have now failed to comply with the extended date.

50. It is also said by the defendants that there has been a failure to provide a full and proper explanation for the failure to comply with the order. The defendants do not know which claimants' addresses have been amended or included in the current schedules, because the amended schedules have not been marked up. It has been asserted by the claimants, in Mr Goodhead's witness statement, that about 138,000 addresses that were missing or incomplete would be contained on amended schedules served on 16 June 2023. It is unclear how many new claimants are still missing addresses. The claimants' number is 11,000, but the defendants have no means of checking that and, therefore, they submit that there has not been an adequate explanation to the court so as to justify the grant of a further indulgence.

51. First of all, I consider that the failure is significant and serious. The addresses should have been on the new claim form when it was issued in February 2023. Following the extension of time granted by this court, these addresses should have been provided by 16 June 2023.

52. As to whether or not there has been an adequate explanation, I consider that there has been. The claimants have provided full and detailed evidence explaining the difficulties that they have encountered in processing all of the new claimants, as referred to above. I accept that the claimants have satisfied the court that they have taken all the steps that they were able to take in order to comply with the court order.

53. I then consider whether or not, in all the circumstances, it would be appropriate to grant a further extension of time for the missing addresses to be supplied. Those circumstances include the difficulties incurred by the claimants in providing the addresses; the fact that, at least on the claimants' figures, it appears to be a relatively small number – this is all relative to the overall claimant cohort – that require a further short extension of time.

54. Against that, I consider that the defendants need to have an opportunity to check whether the claimants exist and to receive the addresses of the new claimants so that they can see for themselves that they are legitimate claimants who intend to pursue the claims; and to see where they fit into any pattern of claimants, which may affect the factors used to assess the merits of individual claims. However, the defendants do have a vast amount of information about most of the claimant cohort. Therefore, although I accept that the defendants will be adversely impacted by the late receipt of this information, it is not such a significant adverse impact so as to justify refusing the claimants a further opportunity to finalise this exercise.

55. Therefore, I will grant the extension of time sought. However, because the claimants have already had the indulgence of the court in an extension of time for this task, I will make it an unless order, so that it will read:

"Unless the claimants by 4 pm on 8 September 2023 serve an amended new claim which gives an address for all claimants named on the new claim form, any such claimant named on the new claim form for whom no address has been provided shall be removed from the master schedule and their names shall be struck through on the new claim form." 'emphasis added'

44. The next case that D3 relied on was Stunt v Associated Newspapers [2019] EWHC 511 (QB). That was an application under CPR 25.13(2)(e) for security for costs. D3 relies on certain statements in the judgment that emphasise the importance of the need for an address. In particular, my attention is drawn to the following passages in the judgment.

(1) In paragraph 17 of the judgment, the judge pointed out that, notwithstanding an argument to the contrary, it was undeniable that there had been a failure to include the address in the claim form, which involved a contravention of the Practice Direction.

(2) In paragraph 47 of his judgment, the judge rejected an argument that the requirement related to service only, stating that it might well be relevant to enforcement considerations.

45. D3 then relied on the decision in *Pitalia v NHS* [2023] EWCA Civ 657. That was a case in which the claim form was served out of time. The Defendants applied to strike out the claim, but they did not contend that the Court had no jurisdiction (on the basis that the Claim form had not been served within the period of its validity). The decision of the Court of Appeal was that failure to contest jurisdiction could be cured under CPR 3.10, and that the claim should be struck out as out of time.

46. I think it helpful to set out the discussion of the Court of Appeal *in extenso*. The Court said this:

"*32. The following principles emerge from the authorities in this area:*

(i) Barton v Wright Hassall LLP makes clear the particular importance attached by the Supreme Court to the timely and lawful service of originating

process. Failure to comply with the Rules about such service is to be treated with greater strictness than other procedural errors. In the present case, if the Respondent's solicitors had made their application of 24 January 2020 expressly seeking a declaration under CPR 11(1) that the court has no jurisdiction to try the claim, there would have been very little that the Appellants could have said in response.

(ii) On the other hand, the principle established in Vinos and followed in cases such as Ideal Shopping is that CPR 3.10 cannot be used to override an express prohibition in another Rule. An example of such an express prohibition is in CPR 7.6(3) . If a claimant applies retrospectively for an order to extend the time for service of a claim form the court may make such an order only if the remaining conditions laid down by the rule have been fulfilled. If they have not been fulfilled then Rule 3.10 is simply not available. But the Vinos principle must not be expanded into saying that CPR 3.10 cannot be used to rectify any breach of the CPR . Otherwise the Rule would be deprived of its utility. When CPR 3.10 is invoked it presupposes that some error of procedure has been made. Without it civil litigation would be even more beset by technicalities than it is already.

(iii) There is a valid distinction between making an application which contains an error, and failing to make a necessary application at all. Steele v Mooney [2005] 1 WLR 2819 is a useful illustration. In that case the claimants sought the defendants' consent to a draft order extending time for service of the Particulars of Claim. That consent was forthcoming, but the extension of time was useless since the claimants had omitted to refer to the claim form. This court, distinguishing Vinos , held that the application for an extension of time was clearly intended to be for service of the claim form as well as the particulars. The subsequent application for relief was not in substance an application to extend time for service of the claim form, but an application to correct the application for an extension of time which had been made within the time specified for service and which by mistake did not refer to the claim form.

33. Hoddinott lays down that if a Defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise its jurisdiction) to try the case, this is taken to be an acceptance of jurisdiction. Whatever one might think of Hoddinott , the decision is binding on us, and like the judge I do not consider that it has been impliedly overruled by Barton . The judge was also right to reject the argument, based on the use of the word "expired" in Barton , that there is an analogy between the expiry of a claim form and the death of a living creature. Plainly in some circumstances an expired claim form can be revived: see CPR 7.6(3) .

34. I agree with the judge that the failure of the Defendant's solicitors, when completing the acknowledgment of service form, to tick the box indicating an intention to contest jurisdiction is not fatal to their application for relief. Even if the box had been ticked an application would still have been required to be made within 14 days. CPR 11(1) does not say that a box on a form must be ticked: it says that an application must be made. As the judge put it, a tick

in the box is neither necessary nor sufficient as a basis for challenging jurisdiction.

35. The critical question, therefore, is whether the Defendant's application of 24 January 2020 can, by the use of CPR 3.10 , be treated as having been made under CPR 11(1) . I do not accept Mr Trotman's argument that such rectification would offend against the Vinos principle. CPR 11(1) does not contain clear mandatory wording equivalent to that laid down by CPR 7.6 (3) that a retrospective extension of time may be granted "only if" certain conditions are fulfilled.

36. The failure to make express reference to CPR 11(1) in the letter of 21 January 2020 or the application of 24 January 2020 was in my view an error capable of rectification under CPR 3.10 . The three documents - the acknowledgment of service, the covering letter and the application to strike out supported by witness statements – together made the Defendant's intentions clear. This was in substance an application to stop the case on the grounds that the Claimants had failed to serve the claim form in time. The case is much closer to Steele v Mooney than to Vinos or Hoddinott.

37. I am not impressed by the argument on behalf of the Appellants that if their failure to comply with the rules is to be treated so strictly despite the serious consequences, the same procedural rigour should be applied to the Respondent. That argument is contrary to the decision of the Supreme Court in Barton. Errors in issuing and serving originating process are in a class of their own."

47. D3 relied on the dicta in paragraphs 32(i) and 37 as to errors in issuing and serving proceedings as being in a class of their own.

48. Finally, D3 relied on *Barton v Wright Hassall* [2018] UKSC 12, paragraph 16, where the Court said:

"*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."

49. The second limb of D3's argument under this head was that a failure to include an address in a claim form is not a defect capable of being remedied under CPR 3.9 or 3.10. It is convenient to start with the wording of these Rules, which provide as follows:

"Relief from sanctions

3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

General power of the court to rectify matters where there has been an error of procedure

***3.10** Where there has been an error of procedure such as a failure to comply with a rule or practice direction –*

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error."

50. D3 argues that the Claimant cannot rely on CPR 3.10 to remedy any breach in relation to the service of a claim form without an address for three reasons, because:

(1) CPR 3.10 is a provision of general application which cannot be used to override specific provisions that address the consequences of non-compliance with a rule;

(2) CPR 3.10 is only relevant where a party has taken a relevant step defectively and not where it has failed to take that step at all;

(3) The Court should exercise its discretion to declare service invalid.

51. D3's first contention is that CPR 3.10 cannot be used to overcome specific provisions of the Rules. This is said to follow from the decisions of the Court of Appeal in Ideal *Shopping v Mastercard* [2022] EWCA Civ 14 at paragraphs 145-146, where the Court said this:

"*145. The second ground of appeal concerns the scope of rule 3.10 and whether it is available in principle in this case. It is important to analyse*

correctly what is the error of procedure which the appellants are asking the Court to remedy. They are in substance asking the Court to treat the service of unsealed amended claim forms as good service and to dispense with the requirement for any further service. Those are matters to which rules 6.15 and 6.16 are applicable and yet the appellants' applications under those provisions were refused. It is also important to note that none of the appellants' applications included an application for an extension of time under rule 7.6(3) for service of the sealed amended claim forms. Yet, in seeking to remedy the defect in service, the appellants are, in a very real sense, seeking to achieve the same result as would a successful application under rule 7.6(3) .

146. It follows that the appellants are asking the Court to do the very thing which Vinos and the line of authority which follows it does not permit. The general provision in rule 3.10 cannot be used to override a specific provision, here rule 6.15 or rule 6.16. The appellants could not satisfy the "good reason" or "exceptional circumstances" criteria under those two rules and they are not permitted to use rule 3.10 to bypass the requirements of those specific provisions. Likewise, since the appellants could not have satisfied condition (b) of rule 7.6(3) , as they could not have shown that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to do so, they cannot be permitted to use rule 3.10 to bypass the requirements of rule 7.6(3) ."

52. That was a case in which unsealed claim forms had been served in time, but no sealed claim forms had been served until out of time. The point being made by the Chancellor of the High Court was that in order to validate service, an application under CPR 6.15 or 6.16 would have had to have been made, and was not, or an application under CPR 7.6(3) would have had to have been made but was not. In essence, the Claimants had made the wrong application, there being more specific ways of achieving the desired ends *with superadded requirements*. The need to comply with the superadded requirements could not be avoided by reliance on CPR 3.10.

53. D3 also relied on the decision in *Vinos v Marks and Spencer PLC* [2001] 3 All ER 784, at [20] in which the Court of Appeal said this:

"*20. The meaning of rule 7.6(3) is plain. The court has power to extend the time for serving the claim form after the period for its service has run out "only if" the stipulated conditions are fulfilled. That means that the court does not have power to do so otherwise. The discretionary power in the rules to extend time periods rule 3.1(2)(a) - does not apply because of the introductory words. The general words of Rule 3.10 cannot extend to enable the court to do what rule 7.6(3) specifically forbids, nor to extend time when the specific provision of the rules which enables extensions of time specifically does not extend to making this extension of time. What Mr Vinos in substance needs is an extension of time calling it correcting an error does not change its substance. Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored. It would be erroneous to say that, because Mr Vinos' case is a deserving case, the rules must be interpreted to accommodate his particular case. The first*

question for this court is, not whether Mr Vinos should have a discretionary extension of time, but whether there is power under the Civil Procedure Rules to extend the period for service of a claim form if the application is made after the period has run out and the conditions of rule 7.6(3) do not apply. The merits of Mr Vinos' particular case are not relevant to that question. Rule 3.10 concerns correcting errors which the parties have made, but it does not by itself contribute to the interpretation of other explicit rules. If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the Civil Procedure Rules and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition. Criticism of Mr Vinos' solicitors in this case may be muted and limited to one error capable of being represented as small; but there are statutory limitation periods for bringing proceedings. It is unsatisfactory with a personal injury claim to allow almost three years to elapse and to start proceedings at the very last moment. If you do, it is in my judgment generally in accordance with the overriding objective that you should be required to progress the proceedings speedily and within time limits. Four months is in most cases more than adequate for serving a claim form. There is nothing unjust in a system which says that, if you leave issuing proceedings to the last moment and then do not comply with this particular time requirement and do not satisfy the conditions in rule 7.6(3), your claim is lost and a new claim will be statute barred. You have had three years and four months to get things in order. Sensible negotiations are to be encouraged, but protracted negotiations generally are not. In the present case, there may have been an acknowledged position between the parties that the defendants' insurers would pay compensation; but it is not suggested that they acted in any way which disabled the defendants in law or equity from relying on the statutory limitation provisions and on the Civil Procedure Rules as properly interpreted."

54. D3 argued that this case again showed that a more specific provision of the Rules trumped the general provisions of CPR 3.10, particularly because the provision of CPR 7.6(3) specifically stated that a retrospective extension could be granted "only if" the further provisions of that rule were satisfied.

55. D3 argued that on their true construction, the provisions of CPR 16.2(1)(e) read together with PD 16.2.1, is that the claim form is not to be served. Where the period for service has expired, then an application for an extension can be made, which is what happened in the *Municipio de Mariana* case.

56. CPR 3.10 could not be read so as to "paper over" the Claimant's breach. In this regard, reliance was placed on the decision of Foxton J in Serbian Orthodox Church v Kesar & Co [2021] EWHC 1205 (QB), at 51, where the judge said:

> "*51. I must confess to having some difficulty with the suggestion that CPR 3.10 could be relied upon to validate a defect in service where, for example, service had been effected by email without permission to serve at that email address, in any case in which relief could not have been obtained under CPR 6.15 . A particular difficulty with CPR 3.10 is that, if it is applicable to service errors, CPR 3.10(a) would appear automatically to validate service unless the Court ordered otherwise. That, with respect, is a surprising*

proposition, and an approach which requires the party seeking to validate service to seek and obtain an order from the court seems inherently more appropriate.

52. Further, the reasoning which commended itself to Nicklen J and Morgan J – that CPR 3.10 as a provision of general application must yield to the more specific provisions on service in, for example, CPR 6.15 , 6.27 and CPR 7.6(3) – also commends itself to me, for conventional legal reasons and because it has strong support from the majority of the Supreme Court in Barton , [8] when addressing a similar argument as the interrelationship of CPR 3.9 and CPR 6.15 . In these circumstances, I have concluded that if the Appellant is to validate the service of the notice of commencement, it must persuade the court to make an order under CPR 6.27 ."

57. Finally, D3 argued that if CPR 3.10 could be relied on to cure service of a defective claim form in breach of the practice direction, this would render the need to apply for a dispensation, an important principle of open justice, a nullity.

58. For her part, C made a number of points under this head.

(1) First, the wording of PD 16.2.3 is, on its proper construction, addressed at the default situation under CPR 6.4, where it is the Court which serves the claim form, unless (per CPR 6.4(1)(b)) C notifies the Court that C wishes to serve it. What PD 16.2.3 makes clear is that, in the default scenario, the Court has a discretion not to serve the claim form unless and until there is '*a full address*' for '*all parties*'. The Court '*will notify*' the claimant one way or the other upon its exercise of that discretion. That provision is most obviously directed at scenarios where there is no address specified for the defendant to be served, and/or where there is no service address for C, such that service may be impossible or lead to subsequent practical difficulty for the defendant. The provision is not engaged where it is C that will be doing the serving. In that scenario the claim form is not '*retained*' but released to C for her to serve. That is what happened here.

(2) Second, whilst C acknowledges that it is a technical error for the claim form to provide an address for service but not an address (in addition) for C (see PD 16.2.1), that error does not, without more, invalidate service. There are no words in CPR PD 16 which provide for such an outcome, nor is there any reason in principle for service to be invalidated (with all the nuclear consequences which may flow from that in proceedings) simply because the claimant's personal address is not included on the claim form. It has caused D3 absolutely no prejudice (in particular where an address for service was given) and would be the ultimate triumph of form over substance.

(3) Third, C's construction is supported by the fact that under CPR 3.10 'where there has been an error of procedure such as a failure to comply with a rule or practice direction – (a) the error does not invalidate any step taken in the

proceedings unless the court so orders; and (b) the court may make an order to remedy the error': see the useful summary of authorities involving claim forms in Boxwood Leisure Limited v Gleeson [2021] EWHC 947 (TCC). In that case, the judge said as follows:

> *"Whilst that power cannot be used to circumvent more specific provisions dealing with the retrospective validation of service (where engaged) (Ideal Shopping Direct Ltd v Mastercard Inc [2022] 1 WLR 1541), CPR 3.10 reflects and encapsulates a more general principle that technical errors should not be construed or applied in a manner which allows form to triumph over substance, in particular where they cause no prejudice to the other side."*

(4) Fourth, D3's construction of PD 16. 2.3 cannot be right, having regard to CPR 25.13(2)(e):

a) That provision sets out, as one gateway condition for the purposes of security for costs, that 'the claimant failed to give his address in the claim form, or gave an incorrect address in the claim form.'

b) This presupposes that a claim form can be issued and validly served without such an address. Otherwise the proceedings would never reach the stage at which security for costs became relevant.

c) The CPR notes at 25.13.13 make clear that even where this condition is satisfied 'the court's power to order security is discretionary; it must be satisfied, having regard to all the circumstances of the case, that it is just to make such an order.' In *Beriwala v Woodstone Properties (Birmingham) Limited* [2021] EWHC 6 (Ch) the Court refused to order security where the Claimant had deliberately omitted their apartment number from their address on the claim form due to concerns for her safety and security (see §§32-49). The Court referred to the breach as 'technical' and 'minor' (§48) and held that it would not be just in all the circumstances to order security. There was absolutely no suggestion that the failure to provide a full address in some way invalidated service.

59. Turning to the related question of the applicability of CPR 3.10, C relied on the very general wording of CPR 3.10, which I have set out above. The defect here was the failure to include C's address. The Rule is clear in stating that no failure to comply with a practice direction or rule would invalidate a step taken in the action. D3's contention was flatly counter to that proposition, since it involved the proposition that the failure to comply with the provisions of Part 16 and PD16 did indeed invalidate a step taken in the action, namely the action of service.

60. The Claimant relied on the summary of the relevant principles in *Boxwood Leisure v Gleeson* [2021] EWHC 947 (TCC), at paragraph 43, which, following a review of the relevant case law, states as follows:

> "*43. In Dory Acquisitions Designated Activity Company v Ioannis Frangos [2020] EWHC 240 (Comm) the claimant sought a declaration that proceedings were validly served on the defendant in circumstances where the claim form served did not have a court seal or claim number on its face. Bryan J rectified the irregularity in the claim form by applying CPR 3.10:*
>
> *[76] The guidance of the House of Lords in Phillips v Nussberger and subsequent cases can be summarised as follows:*
>
> *(1) The guidance in Phillips v Nussberger is authoritative obiter dicta.*
>
> *(2) CPR rule 3.10 is a beneficial provision to be given a very wide effect. It can be used beneficially where a defect has no prejudicial effect to the other party and to prevent the triumph of style over substance. (See Bank of Baroda at [17].) CPR rule 3.10 can apply even where the defect constitutes a failure to serve sufficient claim forms on defendants or a failure to deliver the correct claim form to the correct defendants or even where a defendant received no claim form at all, only an acknowledgement of service form in the context of service of claim forms on multiple defendants (see the Goldean Mariner [1990] 2 Lloyd's Reports 215 discussed in Phillips v Nussberger, Integral Petroleum and the Bank of Baroda). This interpretation of CPR rule 3.10 applies to originating processes as much as it does to other procedural steps (see Bank of Baroda at [19]).*
>
> *(3) In view of this broad guidance, the most important question in determining whether CPR rule 3.10 applies is whether there has been an error of procedure which might otherwise invalidate a procedural step. This would be more difficult where there has been, for example, a complete failure of service Bank of Baroda at [17]).*
>
> *(4) Another important factor to consider is whether the defendant has suffered any prejudice as a result of the procedural error. The court has in the past used its powers under CPR rule 3.10 to remedy service of an unsealed claim form without a claim number where the service of that claim did not deprive the defendant of any knowledge of the fact that the proceedings had been or were about to be started or the nature of the claim against it (see Heron Bros Limited v Central Bedfordshire Council [2015] EWHC 604 (TCC), at [16]and below).*
>
> *(5) Whether the defect was the fault of the applicant is considered, but it is a subsidiary factor."*
>
> *44. In Piepenbrock v Associated Newspapers Ltd & others [2020] EWHC 1708 (QB) , the claimant's wife purported to serve the claim form by email on solicitors for the defendants, without obtaining confirmation that they were instructed to accept service or that service could be effected by email. The purported service was invalid and the four month period for service of*

the claim form expired. Nicklin J refused the claimant's application under CPR 7.6(3) for a retrospective extension of time to serve the claim form, also rejecting the alternative grounds under CPR 6.15 and 6.16 , CPR 3.9 and CPR 3.10 , relying on the decisions in Integral and Bank of Baroda (above). Having considered those cases, Nicklin J stated:

"[81] These two cases were decided before the Supreme Court decision in Barton. The comments as to whether CPR 3.10 can validate an error in serving a Claim form are strictly obiter and there is a consistent line of authority that suggests that CPR 3.10 cannot be used to rescue a claimant who, having failed to serve the Claim form by a permitted method, cannot bring him/herself within CPR 7.6 , 6.15 or 6.16 : see Vinos ; Kaur …

[82] My conclusion is that CPR 3.10 cannot assist the Claimant in this case:

i) I consider that Barton is a clear statement of the underlying principles as to the importance of serving the Claim form in accordance with the CPR .

ii) CPR 3.10 was not referred to in Barton yet, if the argument as to the width of the rule were correct, it would appear to have been an obvious solution to Mr Barton's predicament. In my view, the analysis of Lord Sumption as to why CPR 3.9 is inapt would apply equally to CPR 3.10 .

iii) If CPR 3.10 is given an interpretation that permits the Court, retrospectively, to validate service not in accordance with the CPR on the basis that there has been a " failure to comply with a rule ", then that would make CPR 6.15(2)redundant. That would be a surprising result as the terms of CPR 6.15(2) are of specific operation whereas CPR 3.10 is of general application. Further, as noted in Godwin the effect would be " tantamount to giving the court a discretionary power to dispense with statutory limitation periods ". This would be contrary to the clear policy statement in Barton .

iv) Steele -v- Mooney [18]-[19] appears to contain the clearest pre- Barton statement that CPR 3.10 cannot be used in this way.

a) CPR 3.10 gives the court a discretion. This must be exercised in accordance with the overriding objective of dealing with cases justly. If remedying one party's error will cause injustice to the other party, then the court is unlikely to grant relief under the rule. This gives the court the necessary control to ensure that the apparently wide scope of rule 3.10 does not cause unfairness.

b) The general language of rule 3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by Vinos…

45. Following the oral hearing of the application in this case, judgment was handed down on another case in which this issue was considered, namely, Ideal Shopping Direct Ltd & Others v Visa Europe Ltd & Others [2020] EWHC 3399 (Ch) . I am grateful to the parties for their diligence and co-operation in drawing to the Court's attention this further authority. The

claimants served unsealed claim forms by the agreed extended date for service but the sealed claim forms were served after expiry of that date. Morgan J refused to grant relief under CPR 6.15 , providing for alternative means of service, or 6.16 by dispensing with service. Having considered the authorities on CPR 3.10 , he stated at [92]:

"Having considered the authorities, I conclude that I should follow the approach in Piepenbrock and hold that rule 3.10does not enable me to find (under rule 3.10(a)) that there has, after all, been valid service on the Defendants or that I should make an order (under rule 3.10(b)) remedying the Claimants' error as to service. If it is not possible to distinguish Integral Petroleum or Bank of Baroda as to the scope of rule 3.10 , then I would have to choose between those two decisions and the decision in Piepenbrock. I find the reasoning in Piepenbrock to be more persuasive and I would follow it. It may be that it is my duty to follow Piepenbrock unless I considered that it was wrong: see Colchester Estates v Carlton plc [1986] Ch 80 . As to that, I do not think Piepenbrock is wrong."

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]; Piepenbrockat [81] & [82]; Ideal v Visa at [92]."

61. The summary of principles in the last paragraph cited above was referred to with approval by Foxton J in the case of *Serbian Orthodox Church*, to which I have made reference above, and I gratefully adopt it.

> 1. Here, C contended, here are no words in PD 16 which specifically say that a failure to include an address invalidates service;
>
> 2. There are no alternative bases which seek validation of such a claim form on grounds which are exhaustive;
>
> 3. The wording of CPR 3.10 is entirely general, and the authorities construing that provision militate in favour of a generous interpretation;
>
> 4. Any discretion should be exercised in favour of the Claimant, given the absence of prejudice to D3.

Discussion and conclusions.

62. First, I can say that I do not regard the fact that I have granted the application to dispense with the address of C in the claim form as really relevant to this question as to the validity of service. If the claim form has not been validly served, then this Court would have had no jurisdiction; the claim form would have expired before now; and there would thus be no valid form which a dispensation could be given by reference to. Put another way, the two issues (i.e. dispensation from inclusion of the address going forward and invalidity of service) raise different considerations. The first has to do with considerations of confidentiality, open justice and, in this case, continuing personal safety. The second has to do with the question of whether service of the claim form was validly effected when served (which was within the period of its validity), or whether it is right that a claim form without an address is incapable of being served.

63. I have concluded that, in this latter regard, C's contentions are to be preferred. I reach this conclusion for the following reasons.

(1) First, and perhaps most importantly, I do not accept that PD 16 provides for an express sanction for non-compliance with the requirement to provide an address where, as here, the Court stamps the claim form and then leaves it to C to effect service, which is the normal regime in the Commercial Court.

(2) Nor do I accept that a sealed claim form without an address can be equated with an unsealed claim form. In the latter case, the document is not an official Court document at all. It is, as Mr Peto KC put it, simply a piece of paper. In the former, it is an official Court document, but contains a defect.

(3) In my judgment, such a defect is capable of cure by reference to CPR 3.10. I do not accept the submission that PD 16 is a more specific regime than CPR 3.10 in the same way as CPR 7.6(3) has been held to be. The Practice Direction has no specific wording akin to that in CPR 7.6(3); it contains no superadded requirements such as those laid down in provisions such as 7.6(3). Nor are any

of the cases cited and summarised in the *Boxwood Leisure* case, which I have set out above, similar to the current case.

(4) In my view, as Mr Pilbrow KC fairly accepted, there is no authority directly on point. As the Court of Appeal put it in the *Pitalia case*, cited above, civil litigation is beset with technicalities as it is. Absent clear wording in the Rules, which I have concluded does not exist in this case, further technicalities should not be encouraged.

(5) I have borne in mind throughout the importance of the principles of open justice. However, in a case such as the present, it is quite clear to me that, had an application been made at the outset, a dispensation from the requirement to include the address would have been granted, I do not think that the requirements of open justice lead to the conclusion that service of a claim form without an address is invalid. As I have indicated, that is not to say that my decision to allow dispensation answers the question of service – it does not. However, equally, the principle of open justice does not lead to the automatic conclusion that a claim form which does not comply with the requirements of CPR in relation to the inclusion of an address cannot be validly served. Instead, I have concluded that the failure to include an address does not invalidate service and can be remedied under CPR 3.10.

(6) Finally, I make clear that I reject the submission that I should not exercise my discretion under CPR 3.10 to remedy the defect.

64. It follows that I conclude that service was validly effected on D3 notwithstanding the lack of an address on the claim form.

Waiver.

Waiver pursuant to the provisions of CPR 11.

65. I turn then to the question of waiver. Two questions were argued under this head. In this regard, I was referred to Dicey, Morris and Collins on the Conflict of Laws, at 11-067 to 11-068, in which it is stated that:

> *11-067. In order to establish that the defendant has, by its conduct in the proceedings, submitted or waived its objection to the jurisdiction, it must be shown that it has taken some step which is only necessary or only useful if the objection has been waived or never been entertained at all. In Deutsche Bank AG v Petromena ASA the Court of Appeal held that there are two types of waiver which might give rise to a submission to the jurisdiction. First, there is "common law waiver", which is the performance of an act which is inconsistent with maintaining a challenge to the jurisdiction. Such an act must clearly convey to the claimant and the court that the defendant is unequivocally renouncing its right to challenge the jurisdiction. In judging this, it is useful to consider whether a disinterested bystander with knowledge of the case would regard the acts of the defendant (or the defendant's solicitor) as inconsistent with making and maintaining a challenge to the jurisdiction. Secondly, there can be a statutory form of submission to the jurisdiction, as in CPR, r.11(5) and (8), for example by filing an*

acknowledgment of service of proceedings, but then failing to make any application to dispute the court's jurisdiction or failing in that application. In that situation the "disinterested bystander test" has no application; the sole issue is whether the conditions of those paragraphs have been met. In Jameel v Dow Jones & Co Inc it was held that, even if the defendant had submitted to the jurisdiction, it could apply for proceedings to be struck out as an abuse of the process on the ground that there had been no real and substantial tort within the jurisdiction.

11-068 Submission, in the form of common law waiver has been inferred when the defendant applied to strike out part of the claim. It has also been inferred when the defendant filed affidavits and appeared through counsel to argue the merits on the claimant's application for an injunction; when the defendant consented inter partes to the continuance of a freezing injunction without reserving its right to contest the jurisdiction; when the defendant sought to set aside a committal order and gave an undertaking and submitted evidence; when the defendant moved to set aside a default judgment and at the same time applied for an order that the claimant deliver a statement of claim; and when a defendant applied for an order for security for costs. When a defendant had unsuccessfully challenged the jurisdiction and had filed a second acknowledgment of service and then sought permission to appeal it was to be treated as submitting to the jurisdiction of the court. This is waiver of the second type. The clear trend of the modern authorities is that the defendant will not be regarded as having submitted by making an application in the proceedings, provided that the defendant has specifically reserved its objection to the jurisdiction.

66. As regards the first type of situation, CPR Part 11 provides as follows:

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.

67. In relation to this argument, D3 argued that there had been an acknowledgment of service; that this indicated an intention to dispute jurisdiction; that an application had then been made within the time period provided by the Rule; and thus the provisions of CPR 11(5) were not engaged. I was also referred to CPR 58.7(2). That Rule states that,

in the Commercial Court, the period for serving an application under CPR Part 11 was 28 days. The effect of CPR 58.7(2) is to extend the time for making an application from 14 days to 28 days. This time limit was complied with.

68. C argued that, because the original application was not made on the basis of inadequate service, there had been no application within the 28 day time limit provided for in CPR 58.7(2). In such circumstances, C contended, a retrospective extension of time for the application would be needed, and no application for such had been made.

69. I reject C's contention. In my judgment, clearly here there was an application under CPR 11, in which D3 contested the Court's jurisdiction. It is quite true that that application was made on the ground of *forum non conveniens*. However, in my judgment, this was sufficient to comply with the requirements of CPR 11. I have not overlooked, in this connection, the decision in *IMS SA v Capital Oil and Gas Industries Limited* [2016] EWHC 1956 (Comm), in which it was said that normally challenges to the jurisdiction of the Court (based, for example, on invalid service) and challenges to the exercise of that jurisdiction (based, for example, on *forum non conveniens* grounds) should be made in one application. However, although this is the normal practice, I do not think it follows that, prior to the hearing of the jurisdiction challenge, a party may not raise a further jurisdictional challenge.

70. I turn to consideration of common law waiver.

Common law waiver: The Claimant's contentions.

71. First, as I have explained above, the Claim form was served on D3 at Heathrow on 15 July 2022.

72. On 28 July 2022, D3 filed an acknowledgement of service. In that acknowledgement D3 indicated her intention to contest jurisdiction.

73. On 11 October 2022, D3 made an application to challenge jurisdiction. That application was made on the basis that the Court should not exercise jurisdiction on *forum non conveniens* grounds.

74. In the witness statement supporting that challenge, D3's solicitors stated that she "does not dispute that she has been served within the jurisdiction for the purposes of CPR 6.5. Her jurisdiction challenge is on the grounds of *forum non conveniens*."

75. C drew attention to the important distinction between an allegation that the Court has no jurisdiction to exercise and an allegation that the Court should not exercise the jurisdiction that it does have: see the *IMS* case, referred to above, in which the judge said this:

> *Procedural points*
>
> *26. Mr Kenny put his argument on abuse of process on the grounds that the present application was a second application for the same or substantially the same relief, relying on The Laemthong Glory [2015] 1 Lloyd's Rep 100 and Rawlinson v ITG [2015] EWHC 1664 (Ch) for the proposition that the court will treat such a second bite at the cherry as an abuse where the*

material relied on in the second application was available at the time of the first application and there has been no material change of circumstance.

27. However this is not an application for the same or substantially the same relief as the first jurisdiction challenge. It is well known that in the context of challenges to jurisdiction, reference to the Court's jurisdiction can be a shorthand for two different concepts: one is the court's jurisdiction to try the claim on its merits; the other is the court's exercise of its jurisdiction to try the claim (see, for example Hoddinott v Persimmon Homes (Wessex) Ltd [2007] EWCA Civ 1203, [2008] 1 WLR 806at [28]). Leaving aside cases covered by the Lugano Convention and recast Brussels 1 Regulation, service of process is the foundation of the court's jurisdiction to entertain a claim in personam, and accordingly the court has such jurisdiction only where the defendant is served, in England or abroad, in the circumstances authorised by, and in the manner prescribed by, statute or statutory order (typically the CPR): see Dicey Morris and Collins The Conflict of Laws 15th edn. Rule 29 . Where there has been no such service, the court does not have jurisdiction. Where such jurisdiction has been established by service of process, the Court may nevertheless decline to exercise its jurisdiction, for example on grounds of forum non conveniens or lis alibi pendens.

28. The two types of challenge are logically and juridically separate and distinct. Moreover they typically involve different forms of relief. Where there has been no valid service necessary to found in personam jurisdiction, the court will set aside service and set aside the claim form. On the other hand where the challenge is to the exercise of jurisdiction on grounds of forum non conveniens, the appropriate relief is usually a stay of proceedings, which is capable of being lifted, if appropriate, in the light of subsequent events.

29. As Mr Cutress correctly emphasised, Capital's first jurisdiction challenge was concerned only with service and was a challenge to the existence of the court's jurisdiction; whereas this application, as now pursued solely on forum non conveniens grounds, is a challenge to whether the court should exercise its jurisdiction."

76. In those circumstances, C submitted that D3 has clearly and unequivocally waived her right to contest service. In this context, C relied on Dicey and Morris at 11-067 to 11-068, and on *Williams & Glyns Bank v Astro Dynamico* [1984] 1 WLR 438, at 444. D3 knew the relevant facts, having received the claim form without an address. D3 had clearly represented in her witness statement that she accepted she had been validly served. There was detrimental reliance in that the parties had been preparing for a year for a *forum non conveniens* application, with no indication that there was any intention to contend that there had been no valid service. In those circumstances, D3 had elected not to rely on a right to challenge service, or was estopped from doing so.

77. In relation to this separate question of whether, by her conduct, D3 had waived the right to challenge jurisdiction, Mr Pilbrow KC, for D3, argued firstly, that because the need for an address on the claim form attracted a public interest, the parties could not waive the requirement. I can deal with this argument briefly, since I do not accept it. The question of whether the claim form should have contained an address (which is the

question which relates to open justice) and the question of whether D3 has waived the right to rely on this to challenge jurisdiction are two entirely separate questions in my view. In essence, D3 is seeking to rely on the failure to include the address in relation to her entirely private rights to assert a want of jurisdiction in the English Courts. The public interest in having an address on the Claim form is an entirely separate one.

78. Secondly, he argued that the requirements for a waiver were not satisfied on the facts, because D3 and her legal representatives had not made the necessary unequivocal representation and because they did not have the requisite knowledge of the facts to justify a waiver. In relation to this latter point, he relied on the decision of the House of Lords in *Kammins Ballrooms v Zenith Investments* [1971] AC 850. That was a case in which an application had been made for a new tenancy under the Landlord and Tenant Act 1954.

79. The headnote of the case reads as follows:

> "*On August 2, 1968, the tenants of business premises made a request for a new tenancy under section 26 of the Landlord and Tenant Act 1954 . The landlords served a counter-notice indicating that they would oppose an application to the court under section 24 . On September 4, 1968, the tenants filed an application for a grant of a new tenancy to which the landlords filed an answer, taking no objection to the application being premature. On December 5, 1968, the landlords' solicitors wrote to the tenants informing them that they would make a preliminary objection at the hearing of the application, that the tenants' application was invalid since it had been made less than two months after the request for a new tenancy, contrary to section 29 (3) of the Act, and accordingly the application could not be entertained by the court. The county court judge refused the application, holding that section 29 (3) went to the jurisdiction of the court and could not be the subject of estoppel or waiver. The Court of Appeal, by a majority, affirmed that decision.*
>
> *The tenants appealed:-*
>
> *Held:*
>
> *(1) (Viscount Dilhorne dissenting), that, the requirements of section 29 (3) of the Landlord and Tenant Act, 1954 , were only procedural, and consequently the landlords had a right to ignore or object to the tenants' premature application but could not waive that right.*
>
> *(2) (Lord Reid and Lord Pearson dissenting), that, in the circumstances, the landlords had not waived their right to object that the application was bad, and that, accordingly the appeal must be dismissed.*"

80. In particular, reliance was placed on the following passage from the speech of Lord Morris:

> "*It is not suggested that by that date (October 17) the point as to the date of the initiation of the proceedings had occurred to anyone. So the letter was written in good faith and there was no misunderstanding between the*

solicitors. I see no basis for a contention that by writing the letter of October 17, the landlords waived the taking of any point that might later occur to anyone. Whether any point could be taken would depend upon whether there was any procedural bar.

I do not think that because of knowledge of fibs and dates (a knowledge shared by both parties) some deemed understanding or appreciation of the time point is to be imputed to them but even if it were so the letters do not suggest or promise any limitation of the arguments which either party would decide to advance at the hearing either in support of or in opposition to the claim of entitlement to a new lease."

81. In this case, what is said by D3 is that:

(1) Whilst she and her legal representatives knew that the claim form had no address when it was served, it was only appreciated that this involved a failure to make an application for a dispensation when the bundle for this hearing was produced;

(2) The statement relied on by the Claimant was therefore made in ignorance of the full facts and/or legal rights;

(3) In these circumstances there was no waiver by election or estoppel.

Discussion and conclusions.

82. In my judgment, it is clear from the well known decision of the House of Lords in ***The Kanchenjunga*** [1990] 1 Lloyd's Rep. 391, that the term waiver is used to connote two distinct concepts, namely election, in the sense of a choice between inconsistent legal rights, or estoppel, in the sense of a representation that binds the representor. As Lord Goff put it in that case:

"*Election is to be contrasted with equitable estoppel, a principle associated with the leading case of Hughes v. Metropolitan Railway Co., (1877) 2 App.Cas. 439. Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so.*

There is an important similarity between the two principles, election and equitable estoppel, in that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights. But there are important differences as well. In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right. His election once made is final; it is not dependent upon reliance on it by the other party. On the other hand, equitable estoppel

requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation. No question arises of any particular knowledge on the part of the representor, and the estoppel may be suspensory only. Furthermore, the representation itself is different in character in the two cases. The party making his election is communicating his choice whether or not to exercise a right which has become available to him. The party to an equitable estoppel is representing that he will not in future enforce his legal rights. His representation is therefore in the nature of a promise which, though unsupported by consideration, can have legal consequences; hence it is sometimes referred to as promissory estoppel."

83. Looking at each of these doctrines in turn, I am satisfied that D3 has elected not to challenge service, and that D3 is estopped from doing so. I reach this conclusion for the following reasons.

(1) In relation to election, it is necessary to show that D3 had knowledge of the relevant facts; knowledge of the legal right in question; and elected not to rely on that legal right. Here, the legal right was to contend that the English Court did not have jurisdiction; the facts relied on were that the Claim form did not include an address and that no application had been made for dispensation for including such; and that this meant that service was not validly effected. D3 clearly knew that the Claim form did not include an address when served. On the evidence put before me, which was skeletal, to say the least, I am not satisfied that D3 and her legal representatives thought that a dispensation for including an address had been asked for and given. In these circumstances, I find that there has been an election not to rely on a failure to effect proper service.

(2) In relation to estoppel, in my judgment the position is clearer still. As I have noted, at the time that the jurisdictional challenge was mounted, two types of challenge could be mounted. One would be on the ground that the English Court had no jurisdiction; the other would be that the Court should not exercise the jurisdiction that it has. The application in fact made was on the latter basis, and the witness statement served in support expressly accepted that no challenge based on a failure to serve validly could be made. This was the clearest possible representation that service was accepted, and that the jurisdiction of the English Court was therefore accepted. Given that the parties have been proceeding on this basis for well over a year and incurring expense on this basis, in my judgment it would clearly be inequitable to permit D3 to resile from this position.

84. Accordingly, I accept that D3 has waived the right to rely on any contention that service was not validly effected with the result that the English Court does not have jurisdiction. The sole remaining question is whether that jurisdiction should be exercised, which is the *forum non conveniens* issue which remains to be determined.

The application to set aside the order for alternative service.

85. The next matter with which I am concerned is the application, by D1 and D2, to set aside the order for alternative service.

The relevant test.

86. It was common ground between the parties that neither Jordan nor Saudi Arabia is party to the Hague Convention or any other bilateral convention governing service.

87. In those circumstances, C submitted that the relevant test is that laid down by the decision of the Supreme Court in Abela v Baadarani [2013] UKSC 44. In view of the importance of this issue, I set out the relevant paragraphs of that case in full. Lord Clarke said as follows:

> *"23. 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 on 22 October 2009 in Beirut to bring the claim form to the attention of the respondent constituted good service of the claim form upon him. The judge held that there was. In doing so, he was not exercising a discretion but was reaching a value judgment based on the evaluation of a number of different factors. In such a case, the readiness of an appellate court to interfere with the evaluation of the judge will depend upon all the circumstances of the case. The greater the number of factors to be taken into account, the more reluctant an appellate court should be to interfere with the decision of the judge. As I see it, in such circumstances an appellate court should only interfere with that decision if satisfied that the judge erred in principle or was wrong in reaching the conclusion which he did.*
>
> *24. 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….*
>
> *… 33. The question is whether the judge was entitled to hold that there was a good reason to order that the delivery of the documents to Mr Azoury on 22 October 2009 was to be treated as good service. 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 6.16 , the court can only dispense*

with service of the claim form "in exceptional circumstances". CPR 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. In the courts below, the case was argued throughout on that basis and, although there was a hint in the argument before this court that that might not be the case, it was accepted that the appeal should be determined on that basis. 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 upon 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. As the editors of Civil Procedure , 2013 ed note (vol 1, para 6.15.5), 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 [2011] EWHC 116 at [73] quoted above 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

... 43. There are five respects in which I respectfully disagree with the conclusions reached by the Court of Appeal. The first is that referred to in paras 31 and 32 above, namely that the judge did not decide that there had been valid service of the claim form under Lebanese law.
44. The second is related to the first. In paras 22 and 23 Longmore LJ said this:
"22. [CPR 6.37(5)(b)(i)] authorises the court therefore to make an order for alternative service pursuant to CPR 6.15(1) and also to make such an order with retrospective effect pursuant to CPR 6.15(2) . Nevertheless the exercise of this power is liable to make what is already an exorbitant power still more exorbitant and I am persuaded by Mr Greatorex that it must indeed be exercised cautiously and, as Stanley Burnton LJ said in Cecil v Bayat [2011] 1 WLR 3086 , para 65, should be regarded as exceptional. It would, therefore, usually be inappropriate to validate retrospectively a form of service which was not authorised by an order of an English judge when it was effected and was not good service by local law. CPR 6.40 permits three methods of service including service through the British Consular authorities and any additional method of service should usually not be necessary. The fact that CPR 6.40(4)expressly states that nothing in any court order can authorise or require any person to do anything contrary to the law of the country in which the document is to be served does not mean that it can be appropriate to validate a form of service which, while not itself contrary to the local law in the sense of being illegal, is nevertheless not valid by that law.

23. It follows that a claimant who wishes retrospective validation of a method of service in a foreign country must (save perhaps where there are adequate safeguards which were not present in this case) show that the method of service which is to be retrospectively validated was good service by the local law. Service on Mr Azoury would not be regarded as good service on Mr Baadarani as a matter of English law merely because Mr Azoury was clothed with a general power of attorney. Can Mr Freedman show that the position is any different in Lebanese law?"

45. I do not agree that for the court to make an order under rule 6.15(2) is "to make what is already an exorbitant power still more exorbitant". I recognise of course that service out of the jurisdiction has traditionally been regarded as the exercise of an exorbitant jurisdiction. That is a consideration which has been of importance in determining whether permission to serve out of the jurisdiction should be granted, although in this regard I agree with the approach set out by Lord Sumption JSC in his judgment. In any event, in this case, it is now accepted that it was proper to serve the claim form out of the jurisdiction. The rules as to the method of service set out above seem to me to have the legitimate sensibilities of other states in mind. It is for that reason that CPR r 6.40(4) provides that nothing in CPR r 6.40(3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country of service. I have already expressed my view that the order recognising the delivery of the claim form as alternative service under English law is not contrary to Lebanese law. Moreover it was not in breach of any convention or treaty but merely recognised that the claim form (and other documents) had been brought to the attention of the respondent. I do not think, therefore, that in a case not involving the Hague Service Convention or a bilateral service treaty, an order under rule 6.15(2) must be regarded as "exceptional" or, indeed as suggested in para 29 of Longmore LJ's judgment, that there must be a "very good reason" for it. As already stated, the CPR do not so provide. They merely require good reason.

46. My third reason for disagreeing with the Court of Appeal concerns para 23 of Longmore LJ's judgment, where he says that a claimant who wishes the court retrospectively to validate alternative service abroad must "(save perhaps where there are adequate safeguards which were not present in this case)" show that the method used was good service under the local law. As noted above, that would render rule 6.15(1)(2) otiose. Without the words in brackets, the proposition in para 23 would not be correct. It is not however clear to me what safeguards the court had in mind. In any event, for the reasons already stated, Longmore LJ was wrong in my view to suggest that a court needs a "very good reason" to make an order under rule 6.15(2)where the steps taken did not constitute valid service under local law.

47. The fourth reason arises out of the Court of Appeal's reliance on the fact that the appellants did not issue the claim form until nearly the end of the limitation period. Longmore LJ stated [2012] 1 CLC 66 , para 29:

"Since, therefore, Mr Azoury had no authority in fact to accept service and since he did not, in any event, purport to do so, the delivery of the claim form

and associated documentation to him did not, in my view, constitute good service in Lebanese law. I do not, therefore, think that the judge should have retrospectively validated that service as alternative service to that directed by Morgan J unless there was very good reason to do so. The only reason to do so was to avoid the claim becoming time-barred, which is not in itself a good reason (let alone an exceptional reason) for preserving a stale claim. Mr Freedman submits that both personal service and service through diplomatic channels had become impossible, but that impossibility (as to which there was very little evidence) has only arisen as a result of the dilatory way in which the claimants have pursued the English claim. They were asking for trouble by only issuing their claim form shortly before the limitation expired. If the claim form had been issued say four years earlier, and a diligent process server had been instructed, Mr Baadarani might well have been served at one of the three address identified by Mr Houssami in his witness statement and the order of Morgan J would have been complied with. Four years might even have been long enough for diplomatic channels to be effective but it is not suggested that Mr Baadarani could only be served in that manner. If it really was proving impossible to effect service over that long period, an application for alternative service could still have been made well before the six year period had expired and no retroactive gymnastics would have been necessary."

48. As I read para 29, the delay prior to the issue of the claim form was a significant part of the reasoning of the Court of Appeal, although, as I understand it, it was not a point taken on behalf of the respondent. I would accept the submission that (save perhaps in exceptional circumstances) events before the issue of the claim form are not relevant. The focus of the inquiry on an issue of this kind is not and (so far as I am aware) has never been on events before the issue of the writ or claim form. The relevant focus is on the reason why the claim form cannot or could not be served within the period of its validity. The judge held that there was an issue to be tried on the question whether the appellants' claim was time-barred. In resolving the issues of service, the court had therefore to treat the claim form as issued in time."

88. I think it is also relevant to remind myself of the decision in Barton v Wright Hassall, to which I have already made reference. There the Supreme Court said:

"*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. This court recently considered the question in Abela v Baadarani [2013] 1 WLR 2043 . That case was very different from the present one. The defendant, who was outside the jurisdiction, had deliberately obstructed service by declining to disclose an address at which service could be effected in accordance with the rules. But the judgment of Lord Clarke of Stone-cum-Ebony JSC, with which the rest of the court agreed, is authority for the following principles of more general application:*

(1) The test is 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" (para 33).

(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a "critical factor". However, "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) " (para 36).

(3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.

(4) Endorsing the view of the editors of Civil Procedure (2013), vol i, para 6.15.5, Lord Clarke pointed out that the introduction of a power retrospectively to validate the non-compliant service of a claim form was a response to the decision of the Court of Appeal in Elmes v Hygrade Food Products plc [2001] EWCA Civ 121; (2001) CP Rep 71 that no such power existed under the rules as they then stood. The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.

10. This is not a complete statement of the principles on which the power under CPR rule 6.15(2) will be exercised. The facts are too varied to permit such a thing, and attempts to codify this jurisdiction are liable to ossify it in a way that is probably undesirable. But so far as they go, I see no reason to modify the view that this court took on any of these points in Abela v Baadarani . Nor have we been invited by the parties to do so. 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."

89. Mr Houseman KC sought to persuade me that this was not in fact the test that I should apply in this case.

90. First, he referred me to a number of authorities predating the Abela case, in which matters above and beyond pure delay were in issue.

91. The first was Cecil v Bayat [2011] 1 WLR 3086, a decision involving an application to extend time for service in circumstances in which a limitation defence might be prejudiced, and involving service in New York (the US being a party to the Hague Convention). He relied on that decision for the proposition that the mere fact that the proceedings would come to the attention of the Defendant more rapidly if served via an

alternative method was not enough to justify such an order. The passages which were expressly relied on were as follows:

> "*61. The judge's reasons for his decision on this issue are to be found in para 199 of his judgment, which I have set out above. In it, he referred to service as a means of bringing proceedings to the attention of the defendants. However, service is more than that. It is an exercise of the power of the court. In a case involving service out of the jurisdiction, it is an exercise of sovereignty within a foreign state. It requires the defendant, if he is to dispute the claim, to file an acknowledgement of service and to participate in litigation in what for him is a foreign state….*
>
> *…65. In modern times, outside the context of the European Union, the most important source of the consent of states to service of foreign process within their territory is to be found in the Hague Convention (in relation to the state parties to it) and in bilateral conventions on this matter. Because service out of the jurisdiction without the consent of the state in which service is to be effected is an interference with the sovereignty of that state, service on a party to the Hague Convention by an alternative method under CPR r 6.15 should be regarded as exceptional, to be permitted in special circumstances only.*
>
> *66. It follows, in my judgment, that while the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention is a relevant consideration when deciding whether to make an order under CPR r 6.15 , it is in general not a sufficient reason for an order for service by an alternative method.*
>
> *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] 1 WLR 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.

70. It follows that in my judgment there was no good reason for an order granting permission to serve the defendants by alternative methods….

…112. I turn to the separate question of David Steel J's order for alternative service. I agree with what Stanley Burnton LJ says about that, although it is not decisive in the light of the previous point about the invalidity of the extensions of time for service.

113. 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] 1 Lloyd'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 Aghanistan 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).

114. It is plain, however, that the problem of permission to serve out had been left until late in the day, even after two previous extensions, and the claimants were unwilling to take the risk of being refused the length of extension required to ensure service by the normal means. The excuse used, that of ensuring that the defendants were served wherever they happened to be, did not need the sidestepping of the Hague Convention , for the reasons explained by Stanley Burnton LJ ".

92. The next case relied on by D1 and D2 was *Marconi v PT Pan Indonesia Bank* [2004] 1 Lloyd's Rep 594. D1 and D2 relied upon paragraphs 44 and 45, in which the judge said this:

"*44. Here there is no question of the claimant seeking to steal a march on Panin Bank. Whilst it is pointed out in the evidence filed by Panin Bank that part of the elaborate procedure laid down for service of proceedings in Indonesia has a 14-day time limit, there is no challenge to the assertion emanating from Marconi that, overall, the process of service would take "at least one year". Given the contemplated length of proceedings in that jurisdiction referred to earlier in this judgement, this assertion strikes me as entirely plausible. As I understood the thrust of the defendant's submission, it was to the effect that good reason for alternative mode of service could not be established absent it being shown that service out of the jurisdiction was impractical. This strikes me as an attempt to reintroduce the equivalent provisions of the rules in force prior to the implementation of CPR. In my judgment the discretion afforded by the new rules is much broader than that.*

45. Whilst it cannot be said that service was impractical in Indonesia, it would involve very extensive delay in a claim which was already stale. Furthermore the inference I draw, given the apparent lack of merit in the defence, is that delay was the sole aim of the defendant rather than any genuine desire to ensure the proprieties of service where met. It is notable that Panin Bank had appointed Messrs. Thomas Cooper and Stibbard in September, 2002 in response to service of Marconi's petition out of the jurisdiction by courier post to their principal office some time in August. Albeit the petition was dismissed, it does not appear to be in issue that Thomas Cooper and Stibbard were still actively involved in the proceedings on the question of costs. In all these circumstances I regard the claimants as having established a sufficiently good reason to justify the alternative mode of service."

93. Next, the Defendants relied on paragraphs 33 and 34 of the decision in *JSC BTA Bank v Ablyazov* [2011] EWHC 2988 (Comm), in which Teare J said:

"*33. It is common ground that the court's jurisdiction to permit alternative service out of the jurisdiction stems from CPR r.6.15 . This was assumed by Stanley Burnton LJ and Rix LJ in Cecil v Bayat whose view has been followed*

by Tugenhadt J. in Bacon v Automatic Inc. & Others [2011] EWHC 1072 (QB) . Thus the court may order alternative service where there is "good reason" to do so.

34. Although the observations of both Stanley Burnton LJ and Rix LJ in Cecil v Bayat as to how this jurisdiction should be exercised are strictly obiter dicta *they were made after hearing full argument and therefore are of very persuasive authority. It is necessary to note the following observations in particular. Stanley Burnton LJ said, at paragraph 66, that whilst the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention is a relevant consideration, it is in general not a sufficient reason for an order for service by an alternative method. He further said, at paragraph 67, that in general the desire of a claimant to avoid the delay inherent in service under the Hague Convention cannot of itself justify an order for service by alternative means. 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"; see paragraph 68. Rix LJ agreed that the mere desire for speed was unlikely to amount to good reason. However, he left out of account those cases where service can take very long periods and observed that "it may be that some flexibility should be shown in dealing with such cases, especially where litigation could be prejudiced by such lengthy periods"; see paragraph 113.*"

94. The next authority on which reliance was placed was <u>*BNP Paribas v Open Joint Stock Company*</u> [2012] 1 Lloyd's Rep. 61, at paragraphs 136-138, where the Court said this:

"*136. It is said by the second defendant that there was no special circumstance justifying an order for alternative service in the present case. One of the factors identified as such in Cecil v Bayat is the case of urgency. The second defendant points out that in making its application to the court, the claimant relied upon section 44(4) Arbitration Act 1996. That provides that if the case is not one of urgency, the court can only act with the permission of the arbitral tribunal. That is to be distinguished from the power in section 44(3) which gives the court a general power to make orders for the purpose of preserving evidence or assets if the case is one of urgency.*

137. My conclusion in this respect is as follows. The claimant's evidence in support of its application made it clear that although, at that time, the claimant did not envisage an urgent application for interlocutory relief, there was nevertheless "some element of urgency" in the matter. In particular, it was stated that "the relief sought is sufficiently urgent that to wait for service to be effected under the Hague Convention on the second defendant (which could take between three to six months) would likely defeat the purpose of this application, which in order to be effective, must be heard before the Russian proceedings are concluded. I understand [said the deponent] that there is English authority that allows for service of foreign process by an alternative method, and I believe that service on the second defendant's

lawyers would not prejudice the second defendant as its lawyers already represent it in the Russian proceedings".

138. At the time of the application to the court, the arbitration was underway. Two procedural orders had already been made before the application to the arbitrator which resulted in the order giving permission to bring the anti-suit proceedings. I do not consider that it is surprising that the claimant thought it right in those circumstances to seek permission from the arbitrator. Nor do I consider that the fact that his permission was sought requires a conclusion that the matter was not sufficiently "urgent" to fall within the kind of special circumstance envisaged by the court in Cecil v Bayat. Hamblen J was the judge at first instance in that case, and was well acquainted with the issues. I consider that he was right to make the order he did, and reject the defendants' contentions to the contrary."

95. In a later decision in the *Paribas* case, Teare J said this:

"*12. Mr. Houseman submitted that there was good reason to make a retrospective declaration of good service. His principal reasons were these:*

i) The proceedings involve an arbitration claim form and injunctive, anti-suit, relief. Such proceedings were the "paradigm" case in which the court should deal with matters "robustly" and make an order under CPR 6.15(2) . In such a case the court would be expect to determine the arbitration claim swiftly and so it was appropriate to make such an order so as to avoid delay in bringing the Second Defendant before the court.

ii) The Foreign Process Section had transmitted the documents for service under the Hague Convention to Russia on 26 July 2011 but there has as yet been no response. Almost 9 months has elapsed. On 13 February 2012 the FPS advised that service might take one year or more. Such a long period of delay was inappropriate when disclosure was to take place in August 2012 with an exchange of witness statements thereafter leading up to an expected trial involving the other defendants in December 2012. Delay in serving the Second Defendant would prejudice that trial.

iii) Article 15 of the Hague Convention envisages that a court may give judgment if six months from transmission of the papers for service elapses without service. That period has already elapsed….

…17. In the present case the nature of the relief sought against the defendants is an anti-suit injunction designed to protect an arbitration taking place in London between the Claimant and the First Defendant. In such a case there is a particular need for the trial to be heard promptly. If service can only take place via the Hague Convention there is a risk, on the evidence now before the court, that it may not take place in sufficient time to enable the trial against all defendants to take place in December 2012. Disclosure has been agreed, subject to questions of jurisdiction and service, to take place in August 2012. That is just over one year from the date when the papers were transmitted by the FPS to Russia. Service may not take place until some time thereafter and so the projected early trial may be put at risk.

18. In principle I consider that such considerations are capable of amounting to "good reason" to make a retrospective declaration of good service. I do not consider that such an approach is inconsistent with the guidance of the Court of Appeal in Cecil v Bayat . The considerations to which I have referred are "facts relating to the proceedings" of a type recognised by Stanley Burnton LJ in paragraph 68 of his judgment as justifying an order under CPR 6.15 . They are also considerations resulting from a long period of delay in service which Rix LJ recognised might require flexibility where litigation could be prejudiced."

96. Finally, reference was made to *Avonwick v Castle Investment Fund* [2015] EWHC 3832 (Ch), although Mr Houseman made reference to this case simply because it had been relied on by C.

97. Overall, D1 and D2s' submission was that in each of these prior cases, mere delay in service had not been enough to justify an order for alternative service. There had always been some other reason – whether it be the danger that the Defendant would take steps to evade service, or the fact that relief was sought (eg injunctive relief) which made it urgent to get to trial. Mere delay without more was not enough.

98. However:

(1) All of these cases, as Mr Houseman candidly accepted, predated the decision in *Abela*.

(2) All of these cases, as again Mr Houseman accepted, involved service in countries with which there were service conventions.

99. In my judgment, it is clear from the decision of the Supreme Court in the *Abela* case that the relevant test, both for CPR6.15(1) and (2) is that there should be a good reason to depart from the method of service that would otherwise be required under the Rules, to allow alternative service. Although Mr Houseman argued valiantly that this case should be distinguished because it related to CPR 6.15(2) rather than 6.15(1), I do not accept this submission. I do accept that considerations as to whether or not documents have in fact come to the attention of the Defendants are more obviously relevant to retrospective applications under CPR 6.15(2), but I do not accept that a different test is to be applied under the two limbs of the rule. I consider that this conclusion is clearly supported by paragraphs 23, 24 and 33 of the case, and is also the view taken by the editors of the White Book at 6.15.3.

100. Accordingly, in my judgment, the question for me is whether there was a good reason to authorise alternative service in August 2022.

The relevant material.

101. The second preliminary issue that I should deal with is whether the question of good reason should be dealt with by reference to the material available in August 2022 or the material available now. In truth, as I indicated at the hearing, I think that this is a non-issue, since there is no change in the relevant material. Had it been relevant, I think that the correct approach would have been to look at the material put forward in August 2022; but I express no concluded view on this.

Was or is the test here satisfied?

102. I turn to the most important issue under this head, namely the application of the test to the facts.

103. D1 and D2 contended as follows:

(1) The starting point is that a Defendant is entitled to expect that he or she will be served in accordance with the provision laid down for service in that country. That is the default position under CPR 6.40. That rule may be displaced under CPR 6.15, but only where C can show a good reason for cutting through formal service in the interests of justice.

(2) The classic cases justifying such are inordinate delay, causing prejudice to C's legal rights; where a coercive order has been granted, with the result that there is a disparity between the contempt regime and final relief; and where there is a later joinder of a party which might lead to a fixed trial date being imperilled.

(3) Here, C grounded her claim on the application for a freezing order, which failed. At the hearing before Butcher J, three points were made, namely:

(a) The need to avoid delay;

(b) The progress of the claim against D3;

(c) [redacted]

(4) None of these grounds justified the making of the orders, and those orders should now be set aside.

(a) C had made no efforts to set in train normal processes and had delayed in commencing proceedings;

(b) The need to progress claims together could not justify alternative service where the claims had only just been brought;

(c) [redacted] was not evidenced in any way.

The Claimant's contentions.

104. C obtained permission to serve out via email, when there was no provision of Saudi or Jordanian law which prohibited service by email. There was no dispute that the claim forms came to the notice of D1 and D2. [redacted] Whilst C accepted that the application for service by alternative means was based primarily on the grounds for the freezing order, this order was not granted, and it logically followed that the basis for the grant of the order for service out by alternative means must have been something else.

105. In these circumstances, C submitted that:

(1) the '*most important*' purpose of service is to '*ensure that the contents of the document served*' is '*communicated to the defendant*': *Abela* per Lord Clarke at §37 citing *Olafsson v Gissurarson (No 2)* [2008] 1 WLR 2016 at §55. The Supreme Court went on at §38 to approve the comments of Lewison J at first instance in that case, where he emphasised that:

> '*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.*' (emphasis added)

(2) the fact that a defendant has in fact '*learned of the existence and content of the claim form*' cannot, without more, constitute good reason for retrospective validation under rule 6.15(2) but is a '*critical factor*': *Abela* at §§36 & 38;

(3) the question is whether there is a "good reason", there does not need to be a "very good reason" or "exceptional circumstances": *Abela* at §§45-46.

(4) save in 'exceptional circumstances', events 'before the issue of the claim form are not relevant': *Abela* at §48;

(5) rather, the focus is rather on why the claim form *cannot or could not be served within the period of its validity*': *Abela* (ibid). To that end, orders permitting alternative service may be '*not unusual'* in the case of countries '*where there are no bilateral treaties for service and where service can take very long period, of up to a year*' per Rix LJ in *Cecil v Bayat* [2011] EWCA Civ 135 at §113 (emphasis added); and

(6) in cases of retrospective authorisation, the reasonableness of the steps taken by C, and the prejudice (if any) to D are also relevant: see *R (ex parte Good Law Project) v Secretary of State for Health and Social Care* [2022] 1 WLR 2339 per Carr LJ at §55.

(7) Although each case falls to be determined by reference to whether good reason exists or existed on its own facts, by way of brief illustration:

  (a) in the non-Hague Convention case of *Marconi Communications International Ltd v PT Pan Indonesia Bank* [2004] 1 Lloyd's Rep 594 (cited by Rix LJ in *Cecil v Bayat* at §113), the Court granted permission under CPR 6.15 where service by diplomatic processes would take at least a year, where service would therefore involve a '*very extensive delay* and where on the facts '*delay was the sole aim of the defendant rather than any genuine desire to ensure the proprieties of service were met*' (per David Steel J at §§44-45), which I have set out above; and

  (b) even in cases to which treaty provisions do apply, there comes a point where delay in service through the relevant diplomatic process may supply the "good reason", in particular where it may prejudice the litigation: see (i) *Cecil v Bayat* (above per Rix LJ at §113; (ii) *JSC BTA Bank v Ablyazov* [2011] EWHC 2988 per Teare J at §§39-41 (where the Court considered, amongst other factors, delay of between nine months and two years, being a '*long period of time*' (§39) which might '*impede*

the proper disposal' of the proceedings); and (iii) *Bill Kenwright Limited v Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB) per Haddon-Cave J at §§47-55 (an eight month delay in service through bilateral treaty arrangements with the UAE was an '*inordinate*' delay in the context of that case; defendant was aware of the dispute; service by post was not contrary to UAE law).

My conclusions.

106. Despite the ingenuity and complexity of the arguments put before me by the parties, I consider the issues here to be of limited compass.

(1) As I have noted already, I consider that the question is whether there was a good reason for alternative service to be ordered. As I have also indicated, I think that this must be judged by the evidence available as at August 2022.

(2) In my judgment, there was indeed good reason for an order for alternative service to be made, and I would make such an order were an application to be made to me on the current facts. I reach this view for the following reasons.

(a) As at August 2022, it was clear that service of the claim form by the normal methods could not be achieved within the period of validity of the claim form. The evidence was that service through diplomatic means in Saudi Arabia would take a year, and service in Jordan would also take a year.

(b) Conversely, it was also clear that notice of the claims would be brought to the attention of the Defendants more rapidly via email service, and that the Defendants had no real interest in service by any other means. I do not think that it is right that a Defendant has an entitlement to service in accordance with that Defendant's local law, as long as the service which is effected is not contrary to that local law, as was the case here.

(c) Notice of the proceedings was given to the Defendants most effectively by service by alternative means.

(d) Service had been validly effected on D3, with the result that it was desirable that the proceedings against all three Defendants continue in parallel and without delay.

(e) The Defendants had no good or pragmatic reason for wishing service to be via some other route.

(f) I do not accept the submission that delay, on its own, cannot be a good reason, in the absence of some other indication that the Defendant is, for example, seeking to evade service. I consider that the rapid resolution of proceedings may be a good reason to justify service by alternative means, since, in my view, that is in accord with the overriding objective.

107. I accordingly conclude that the order for alternative service was rightly made, and I decline to set it aside.

108. I have specifically not based this decision on the allegation that there might have been a refusal, [redacted] to serve without delay. This assertion was a very serious one, and whilst I do not say it should not have been made, I have concluded that the material relied on is not sufficient to enable me to draw such serious inferences.

109. It follows from this part of my judgment that:

(1) Service of the proceedings on D3 was valid.

(2) Service on D1 and D2 was also valid.

110. The application set down for February 2024 will therefore go ahead, in accordance with the directions agreed between the parties following the hearing before me.