



Neutral Citation Number: [2024] EWHC 2010 (KB)

Case No: QB-2022-001760

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2024

Before :

MRS JUSTICE HILL DBE

Between :

JOHN COLIN GRAHAM

Claimant

- and -

FIDELIDADE – COMPANHIA DE SEGUROS S.A.

Defendant

Sarah Crowther KC (instructed by **Levenes Solicitors**) for the **Claimant**
Lucy Wyles KC (instructed by **Irwin Mitchell LLP**) for the **Defendant**

Hearing dates: 17 and 18 July 2024

Approved Judgment

This judgment was handed down remotely at 2:00 pm on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. By a claim form issued on 6 June 2022 the Claimant seeks damages for the injury, loss and damage he suffered in an accident in Portugal on 1 September 2021. He had crossed the road at a marked pedestrian crossing when he was hit by a vehicle insured by the Defendant.
2. In March 2022 the Defendant admitted liability to compensate the Claimant for his injuries, loss and damage in open correspondence
3. On 16 June 2022, an application was made without notice for permission to serve the claim form outside the jurisdiction on the Defendant at its registered address in Lisbon.
4. By orders made without notice on 31 August 2022 and 9 December 2022, Master McCloud granted the Claimant permission to serve the claim form on the Defendant out of the jurisdiction in Portugal and extended time for service of the claim form to 6 June 2023. Service was effected on 5 May 2023.
5. On 7 June 2023, the Defendant made an application seeking an order to set aside the orders extending time for service of the claim form; and declare that the court has no jurisdiction to try the claim.
6. The Defendant relied on, in particular, two witness statements from Marian Joseph, its solicitor, dated 7 June 2023 and 2 July 2024 (“Joseph 1” and “Joseph 2” respectively).
7. The Claimant contends that (i) the orders were properly made; and (ii) he can satisfy the jurisdictional requirements.
8. The Claimant relied on witness statements from Timothy Beasley, his solicitor, dated 18 June 2022 and 8 July 2024 (“Beasley 1” and “Beasley 4” respectively). The first of these had been provided in support of the 16 June 2022 application. He also sought to rely on a further witness statement from Mr Beasley dated 26 September 2023 (“Beasley 2”) but the Defendant opposed the admissibility of this evidence. The Claimant himself also provided a witness statement dated 6 February 2024.
9. Just over an hour before the hearing of the Defendant’s application, the Claimant’s counsel indicated that, if necessary, she intended to apply for an order that any procedural defects in the applications to extend time should be remedied using the court’s power under CPR 3.10. Counsel then made this application during the course of the hearing.
10. This is my judgment on the Defendant’s application dated 7 June 2023 and the Claimant’s oral application.

The factual background

11. The Claimant is a British national. He was aged 58 at the time of the accident. The accident occurred when he was pushing his motorcycle across a marked crossing on a road between Malheiro and Portimão in Portugal. A silver VW Passat with

registration number 40-35-ZN failed to stop and struck the Claimant causing him to sustain injury, loss and damage.

12. The VW Passat was driven by a resident in Portugal. The Defendant is the insurer of the VW Passat in respect of third party liabilities arising out of its use on a public road.
13. After the collision the Claimant was thrown into the air and landed some 20 metres or so further along the road. He was treated in a series of hospitals in Portugal. On 26 October 2021 he was transferred to a rehabilitation unit. On 24 November 2021 he was discharged.
14. The Claimant sustained severe injuries to his left leg, to which vascular grafting was attempted, but ultimately it was amputated at a high transfemoral level. He also sustained fractures to his pelvic area, lumbar spine and face, as well as his left hand, and right ankle and knee and internal injuries to his kidney and liver. He has suffered urological symptoms and psychological injuries. He sustained two heart attacks whilst in hospital which were treated surgically with stenting and angioplasty.
15. At the time of the accident the Claimant was on a break from work and had been travelling around Europe in a motorhome with his partner for around 8 years. He has a property in England which he had rented out in order to generate income while he was travelling. On 20 December 2021 the Claimant returned to live in his property in England and is now habitually resident in England.
16. The Claimant has significant care needs, including with toileting. He has considerable difficulty in mobilising with crutches due to his upper limb injuries. He has required substantial care and assistance from his partner. He has severe phantom leg pain and psychological issues coming to terms with the amputation. The Claimant's injuries are further detailed in a report dated 18 January 2022 prepared by Charles Wills-Owen, a consultant orthopaedic surgeon.
17. In March 2022 the Claimant was assessed by Dorset Orthopaedic, a specialist provider of rehabilitation and prosthetics services to amputees. The initial costs for a rehabilitation programme including a prosthesis trial are £118,528.55.
18. The Claimant's case is that he has been unable to access this due to financial difficulties caused by his inability to return to work as he had planned. The Defendant disputes this, contending that one interim payment has been made and a second promised, but delayed due to the Claimant's solicitor's failure to confirm the necessary bank account details. Beasley 4, dated 8 July 2024, indicates that the Claimant does now have a prosthetic leg provided by the NHS, but this is not appropriate for his needs such that it gives way and he has suffered falls. Beasley 4 suggests that there are different reasons for the second interim payment having been rejected. It is not possible nor necessary for me to resolve this particular issue between the parties for the purposes of resolving the applications.

The issues

19. The two overarching issues to be determined are:

- (1) Should time be extended for service of the claim form (“**the extension of time issue**”)?
- (2) Do the courts of England and Wales have jurisdiction to hear and determine the matter (“**the jurisdiction issue**”)?

20. These two issues involves several sub-issues, as follows:.

(1): The extension of time issue

(a) Should the orders extending time for service of the claim form be set aside on the basis that the court had no power to make them, including because no applications for extensions had actually been made?

(b) If necessary should the Claimant be permitted to seek to cure the procedural defects in the applications at this stage, by making an application relying on CPR 3.10? If so, should the CPR 3.10 application be granted?

If, contrary to (a) and (b), applications for extensions of time had been made, that can now be reheard on notice:

(c): Should Beasley 2 be admitted?

(d): Should the orders extending time for service of the claim form be set aside on their merits?

(2): The jurisdiction issue

(a): Has the Claimant proved that the gateway test is met?

(b): Has the Claimant proved that the *forum conveniens* test is met?

(1): The extension of time issue

(a): Should the orders extending time for service of the claim form be set aside on the basis that the court had no power to make them, including because no applications for extensions had actually been made?

The law relating to extension of time for service of a claim form

21. CPR 7.5 makes provision for the methods that can be used for service of a claim form both within and out of the jurisdiction. Under CPR 7.5(2), where the claim form is to be served out of the jurisdiction, it must be served in accordance with Section IV of CPR Part 6 within 6 months of the date of issue.
22. CPR 7.6 provides as follows:

“7.6 Extension of time for serving a claim form

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

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

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

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

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

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

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

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

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

(a) must be supported by evidence; and

(b) may be made without notice.”

23. CPR PD 7A, paragraph 11 provides as follows:

“Extension of time

11.1 An application under rule 7.6 (for an extension of time for serving a claim form under rule 7.6(1)) must be made in accordance with Part 23 and supported by evidence.

11.2 The evidence should state—

(1) all the circumstances relied on,

(2) the date of issue of the claim,

(3) the expiry date of any rule 7.6 extension, and

(4) a full explanation as to why the claim has not been served”.

24. In *Hoddinott v Persimmon Homes (Wessex)* [2007] EWCA Civ 1203; [2008] 1 WLR 806 at [55], Dyson LJ (as he then was) made clear that the court should scrutinise applications for an extension of time for service of the claim form with care. As he explained at [54], there are good reasons for this. Service of the claim form serves three purposes, namely (i) notifying the defendant that the claimant has embarked on the formal process of litigation and to inform them of the nature of the claim; (ii) enabling the defendant to participate in the process and have some say in the way in

which the claim is prosecuted; and (iii) enabling the court to control the litigation process.

The procedure adopted for extending time for service of the claim form in this case

25. The Claimant's application for service out of the jurisdiction was made by way of an application notice dated 16 June 2022. It was supported by evidence in the form of Beasley 1. Box 5 of the application notice indicated that a telephone hearing was sought for the determination of the application. The court duly listed a hearing for 7 October 2022. The Claimant's solicitor, Mr Beasley, was informed of this via a notice of hearing dated 26 July 2022.
26. On 22 August 2022, Mr Beasley emailed the allocated Master, Master McCloud, indicating that he understood that applications for permission to serve out of the jurisdiction were normally dealt with on the papers and may have erred in asking for a hearing. He invited the Master to determine the application without a hearing. On 26 August 2022, Master McCloud emailed indicating that she had approved the application and asked her clerk to seal the order.
27. At 9.53 am on 31 August 2022, before he was provided with a copy of the order, Mr Beasley sent a further email to the Master. He indicated that the court's Foreign Process Office ("FPO") had informed him that it would take three months for service to be effected in Portugal; and that he had also not yet had all the documents translated. He then said:

"We will be cutting it fine unless the validity of the Claim Form for service is extended. In the circumstances would you consider the attached draft order? I will of course CE file it and pay the fee in the usual way but as time is of the essence, I hope you will not mind me making this direct approach to you".
28. At 11.59 am the Master emailed Mr Beasley back, indicating that she had approved the order and sent it for sealing. The order was sealed very promptly and sent to Mr Beasley. It extended time for service of the claim form until 6 March 2023.
29. At 12.21 pm Mr Beasley emailed Master to acknowledge receipt of the order extending time for service of the claim form, but saying that he had not yet received the order granting permission to serve out of the jurisdiction. At 12.30 pm the Master agreed to chase it up.
30. At 12.58 pm Mr Beasley emailed the Master again, apologising for the fact that the order had omitted to make provision for the timescale in which the Defendant had to serve an Acknowledgement of Service and Defence. At 1.07 pm he submitted a fresh draft order. This was sealed later that day, granting permission to serve out of the jurisdiction in Portugal pursuant to CPR 6.36 and 6BPD ground 9(a) and making provision for the Acknowledgement of Service and Defence.
31. Pausing there, paragraph 4 of the order provided that the Defendant should pay the Claimant's costs of the without notice application for permission to serve out of the jurisdiction. Such an order for costs on a without notice application is "hardly ever" appropriate: *Mackay v Ashwood Enterprises Ltd* [2013] EWCA Civ 959; [2013] Costs

LR 816 at [60]). It is hard to see how it could have been appropriate here, where the Defendant was not only not served with or aware of the application, but was a foreign Defendant outside the jurisdiction who had not yet been served with proceedings. The Claimant accepts that this element of the 31 August 2022 order should be set aside in any event and I make that order.

32. Resuming the chronology, service of the claim form was attempted via agent to agent service in accordance with advice received from the FPO. However, the local agent in Portugal refused to accept instructions to effect service in this fashion and the claim form was marked for return.
33. On 7 December 2022, Mr Beasley emailed the Master seeking a further extension of time for service of the claim form. He said that they had “lost 3 months as a result of going down the wrong road in respect of service” and explained the difficulties his firm had had with the agent in Portugal. Again he undertook to pay the court fee. On 9 December 2022 the Master approved the draft order, extending time for service of the claim form until 6 June 2023.

Submissions and analysis

34. It is clear that the combined effect of CPR 7.6(4)(a) and CPR PD 7A, paragraph 11 is that an application for an order extending time for compliance with rule 7.5 must be made in accordance with CPR Part 23; and must be supported by evidence which should address each of the matters set out in CPR PD 7A, paragraph 11.2: see [22]-[23] above.
35. It is also clear that the Claimant obtained two orders for extensions of time for service of the claim form in this case in breach of several of the procedural requirements. The emails did not address all the matters set out in CPR PD 7A, paragraph 11.2, CPR 23.6 and CPR PD 23A, paragraph 2.1. In addition:
 - (i) No valid application notices were filed, in breach of CPR 23.3. No standard N244 application notice forms were filed. While it could, perhaps, be said that Mr Beasley’s emails constituted application notices (because CPR 23.1 defines such notices simply as “document[s] in which the applicant states their intention to seek a court order”), they did not comply with CPR PD 23A, paragraph 2.1 as they were not signed; and
 - (ii) The emails were not supported by evidence verified by a statement of truth either within the body of the application notice or in a witness statement as required by CPR 22.1(1)(b) and (3).
36. The key issue between the parties was whether these procedural defects rendered the orders obtained invalid, such that they had to be set aside. This, in turn, generated three sub-issues.

(i): Did the Claimant actually make applications to extend time?

37. The Defendant contended that the procedural defects meant that the Claimant had not, in fact, made any applications at all.

38. I cannot accept that submission. Although Mr Beasley's conduct was, as Ms Wyles KC for the Defendant described it, "highly irregular", he did set out in his emails (i) what order he was seeking; and (ii) briefly, why he sought the order. To that extent he complied with the basic requirements for the content of an application notice set out in CPR 23.6. He also attached draft orders. Although he did not provide evidence verified by a statement of truth, he did set out in the substance of the emails the grounds on which he sought the order. These included, for the purposes of CPR PD 7A, paragraph 11.2, the circumstances relied on and the explanations on both occasions for why the claim form had not been served. I accept the submission from Ms Crowther KC for the Claimant that had Mr Beasley provided witness statements, the content would have been the same as that set out in his emails. Finally, Mr Beasley had indicated that he would pay the court fee for each of the applications.
39. I therefore conclude that the Claimant did, on two occasions, apply for extensions of time for service of the claim form.

(ii): Were any such applications invalid?

40. The Defendant submitted that even if the Claimant had made the applications, they were invalid because the court had not waived the various procedural requirements.
41. Again, I disagree.
42. Ms Crowther KC accepted that the two principal procedural defects were (i) the failure to file application notices; and (ii) the failure to support the applications with evidence verified by a statement of truth.
43. As to (i), CPR 23.3(b) gives the court the express power to dispense with the requirement to file an application notice. Although Mr Beasley's emails did not specifically invite the Master to exercise this power and although she did not make explicit in the recitals to either order that she was doing so (both of which would have been preferable), she must have done so. Were it otherwise, this very experienced Master would have responded to Mr Beasley's emails by telling him he needed to file an application notice so that it could be processed and allocated in the usual way. She might also have reminded him of the urgent short applications list, by which a Master is available daily to deal with applications where "time is of the essence" (see the Kings Bench Guide 2024 at paragraphs 9.19-9.27).
44. As to (ii), I accept Ms Crowther KC's submission that the Master must also have waived the requirement to provide evidence verified by a statement of truth, by exercising one of the court's general case management powers under CPR Part 3. The potential powers were those to "extend or shorten the time for compliance with any rule, practice direction or court order" or to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective" under CPR 3.1(2)(a) and (m). There was also the possibility of the Master using the power to make an order to remedy "an error of procedure such as a failure to comply with a rule or practice direction" under CPR 3.10. Again, in my judgment, the Master must have exercised one of these powers or she would have declined to make the orders sought.

(iii): If the Master waived the procedural requirements, did she have power to do so?

45. The Defendant argued that even if the Master in fact waived the procedural requirements, she had no power to do so. These were mandatory requirements which were not capable of being dispensed with.
46. The Master plainly had the specific power to waive the requirement to file an application notice, that being set out in CPR 23.3(b).
47. As to the Master's use of the CPR Part 3 powers to waive the procedural requirement to provide evidence verified by a statement of truth, Ms Wyles KC drew support from *Vinos v Marks & Spencer Plc* [2001] 3 All ER 784. The Claimant had been injured at work. The claim form was not served until nine days after the four month period for service of it had expired. The District Judge refused the Claimant's application to extend time for service of the claim form. The decision was upheld on appeal by the Circuit Judge and the Court of Appeal. The Court of Appeal held that:
 - (i) The court's power in CPR 7.6(3) to extend time for service of the claim form after the period for its service has run out can be exercised "only if" the conditions stipulated in the rule are fulfilled;
 - (ii) The general discretionary power to extend time in CPR 3.1(2)(a) does not apply owing to the introductory words of the rule ("Except where these Rules provide otherwise") and cannot override the specific wording of CPR 7.6; and
 - (iii) The general words of CPR 3.10 cannot extend to enable the court to do what CPR 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.
48. Ms Crowther KC contended that *Vinos* was not relevant because CPR 7.6(3) was not in issue in this case: rather CPR 7.6(2) was applicable. The power to extend time under CPR 7.6(3) is of a different nature to that under CPR 7.6(2) because it can only be exercised when the specific conditions in CPR 7.6(3) are satisfied. By contrast, the discretion to extend time under CPR 7.6(2) is not so limited. She also drew support from *Steele v Mooney and others* [2005] EWCA Civ 96; [2005] 1 WLR 2819, which I consider below.
49. Ms Wyles KC contended that *Vinos* was authority for the proposition that CPR 7.6 was a specific "sub-code" governing applications to extend time, quoting the description of the rule given by Peter Gibson LJ at [27]. In *Vinos*, the Court of Appeal construed CPR 7.6(3) in such a way that its requirements could not be circumvented by CPR 3.1 or 3.10. The same should apply to applications made under CPR 7.6(2). She relied on *Ideal Shopping Direct Ltd v Mastercard Inc and others* [2022] EWCA Civ 14; [2022] 1 WLR 1541, to which I refer below.
50. In my judgment *Vinos* did not prevent the Master using the CPR Part 3 powers to waive the procedural requirement to provide evidence verified by a statement of truth. I say this for the following reasons.
51. First, this was a case involving CPR 7.6(2) and not CPR 7.6(3). That the ratio of *Vinos* is limited to CPR 7.6(3) situations is indicated by *Steele* at [15], where Dyson LJ described the case as holding that "rule 3.10 cannot be invoked to obtain an

extension of time for service of a claim form after the end of the period specified by rule 7.5(2) in circumstances where an extension of time is prohibited by rule 7.6(3)” [my emphasis].

52. Second, as May LJ in *Vinos* at [20] and Dyson LJ in *Steele* at [26] and [28] made clear, it is important to look at the “substance” of what is being applied for. Similarly, Sir Julian Flaux C, with whom Laing and Birss LJJ agreed, confirmed more recently in *Ideal Shopping* at [145] that it is important to “analyse correctly...the error of procedure which the claimants are asking the court to remedy”. Unlike Mr Vinos, what in substance this Claimant was seeking from the Master was an order under CPR Part 3 to waive the procedural requirement to provide evidence verified by a statement of truth in support of the applications. An “error of procedure” for the purposes of CPR 3.10 may take many forms, and should not be given an artificially restrictive meaning: *Steele* at [18]-[21]. The error in this case was an error of the kind specifically anticipated by CPR 3.10 in that it was “a failure to comply with a rule”, namely CPR 22.1(1)(b) and (3). It was therefore capable, in principle, of being cured by the use of CPR 3.10; and by analogy one of the other CPR 3.1 powers/
53. Third, as explained in *Steele* at [24] the key principle to be derived from *Vinos* is that CPR 3.10, and by analogy the other CPR 3.1 powers, cannot be used to achieve something that is prohibited under another rule”. I was not taken to any part of the CPR which expressly prohibits the making of an application with evidence that is not verified by a statement of truth. I cannot see that CPR 22 makes any such provision: the stated consequences of a failure to provide a statement of truth are limited to (i) the inability of the party to rely on a statement of case that is not so verified under CPR 22.2(1)(b); (ii) the power of the court to strike out such a statement of case under CPR 22.2(2); and (iii) the power of the court to direct that a witness statement not so verified is inadmissible under CPR 22.3.
54. Fourth, this case is analogous to *Steele* in that what was needed was an order to correct a drafting aspect of an application to extend time made within the time specified by CPR 7.5(2): it was not a case involving a failure to make an application at all (for the reasons given at [37]-[39] above), in which case the *Vinos* principle would have applied: see *Steele* at [28]. In *Steele*, it was held that the Claimant could rely on CPR 3.10.
55. I therefore conclude that the Master did have the CPR Part 3 powers available to her and was entitled to use them to waive the procedural requirement to provide evidence verified by a statement of truth.

Conclusion on issue (1)(a)

56. For all these reasons I conclude that the Master’s orders extending time for service of the claim form should not be set aside on the basis that the court had no power to make them.

(b): If necessary (i) should the Claimant be permitted to seek to cure the procedural defects in the applications at this stage, by making an application relying on CPR 3.10; and (ii) if so, should the CPR 3.10 application be granted?

57. In light of my conclusions on issue (a) above, it is not necessary for the Claimant to make the CPR 3.10 application at this stage such that neither of the elements of issue (b) arise.
58. Had it been necessary for me to consider issue (b)(i) above, I would have had considerable sympathy with the Defendant's argument that the CPR 3.10 application was intimated far too late for it to be fair for the Claimant to be allowed to make it. The orders in question were made almost two years ago. The Defendant's application was made over a year ago. There have been two directions orders to case manage the application to a hearing. The Claimant has served evidence and a skeleton argument. The Claimant had therefore had plenty of opportunity to indicate an intention to make such an application, and indeed to make it in writing, before the morning of the hearing.
59. The result of my conclusion on issue (a) is that the Claimant has made applications for extensions of time that can be reheard on notice, such that it is necessary for me go on to determine issues (c) and (d) to which I now turn.

(c): Should Beasley 2 be admitted?

60. Where an application is made to set aside an order which has been made without notice, the hearing is a rehearing of the original application. Whether or not further evidence is admissible at such a rehearing is a case management decision to be considered on its merits and in the light of the provisions of CPR PD 7A: *Al-Zahra v DDM* [2019] EWCA Civ 1103 at [67]-[68] and [70]-[73].
61. On such a rehearing, the application falls to be determined as matters of fact stood at the time of the original order. This means that further evidence can be adduced which sheds light on the situation which existed at that time, even if it was not previously adduced, albeit that events which occurred after the application cannot be relied upon: *Satfinance Investment Limited v Athena Art Finance Corp* [2020] EWHC 3527 (Ch) at [41]-[43]. The Claimant contended that Beasley 2 should be admitted as it fell within the principle described in *SAT Finance* as it set out what the position was at the time the applications were made.
62. Beasley 2, dated 26 September 2023, makes some points about the jurisdiction issues, in response to the Defendant's application dated 7 June 2023, at [28]-[31]. I do not understand the Defendant to object to these parts of the statement being admitted. I say this because the Defendant's stated reason for objecting to the statement being admitted is that the application to set aside the Masters' orders to extend time for service of the claim form cannot be treated as a rehearing of the original application, because there were no original applications and so there is nothing which can be reheard. That point does not apply to the original application for permission to serve out of the jurisdiction.
63. In any event I have concluded that the Claimant did, in fact, make the applications for the reasons given at [37]-[39] above, such that the Defendant's primary objection to Beasley 2, or the parts of it other than [28]-[31], falls away.
64. Although there is some force in Ms Wyles KC's second point that Beasley 2 was effectively a "second bite of the cherry" as it included evidence which should have

been provided in accordance with CPR PD 7A when the applications were first made, on balance I consider it should be admitted. It gives a little more context to Mr Beasley's emails to the Master which were provided separately, although they largely speak for themselves. Accordingly bearing in mind the content of the statement and the provisions of CPR PD 7A I consider it appropriate to admit the statement as a case management step.

(d): Should the orders extending time for service of the claim form be set aside on their merits?

The relevant legal principles

65. In considering whether an extension of time for service of a claim form should be granted under CPR 7.6(2), the court should apply the principles recently summarised by Carr LJ (as she then was) in *ST v BAI (t/a Brittany Ferries)* [2022] EWCA Civ 1037 at [62], thus:

“i) The defendant has a right to be sued (if at all) by means of originating process issued within the statutory period of limitation and served within the period of its initial validity of service. It follows that a departure from this starting point needs to be justified;

ii) The reason for the inability to serve within time is a highly material factor. The better the reason, the more likely it is that an extension will be granted. Incompetence or oversight by the claimant or waiting some other development (such as funding) may not amount to a good reason. Further, what may be a sufficient reason for an extension of time for service of particulars of claim is not necessarily a sufficient reason for an extension for service of the claim form;

iii) Where there is no good reason for the need for an extension, the court still retains a discretion to grant an extension of time but is not likely to do so;

iv) Whether the limitation period has or may have expired since the commencement of proceedings is an important consideration. If a limitation defence will or may be prejudiced by the granting of an extension of time, the claimant should have to show at the very least that they have taken reasonable steps (but not *all* reasonable steps) to serve within time;

v) The discretionary power to extend time prospectively must be exercised in accordance with the overriding objective”.

Submissions in respect of both orders

66. Ms Wyles KC emphasised that the Master had made two orders extending time for service of the claim form. The Claimant would have to show that both were justified. If either was not, then the claim form had not been served within its period of validity and there was no valid claim before the court. She submitted that there were no good

reasons, or at best weak reasons, for the extensions of time and the orders doing so should be set aside.

67. It is common ground that at the time both extensions were granted there was no issue with limitation: the Defendant accepts that as a matter of the applicable Portuguese law, the current limitation (or prescription) period will not expire until August 2027. This is because the relevant five year period was interrupted by the admission of liability on 30 March 2022 and by the interim payment in August 2022, re-starting the limitation period on each occasion.
68. In respect of both the orders, Ms Crowther KC placed substantial reliance on this aspect of the case. She argued that in any case where limitation has not expired, there is little reason not to extend time for service of the claim form, because the claimant would be in a position to issue a fresh claim form in any event. The Defendant rightly referred to *Hoddinott* at [53], which makes clear that the fact that a limitation period has plenty of time to run is “not determinative”. It is, however, a “relevant consideration” in support of the Claimant because, as Dyson LJ explained, an extension of time which does not extend the time to a date when the claim has become time-barred “does not deprive the defendant of any limitation advantage”.

Specific submissions regarding the first extension of time, 31 August 2022

69. Ms Wyles KC pointed to the fact that the claim form was issued on 6 June 2022 but the first application to extend time for service of it was not made until 31 August 2022, almost half-way through the six month period of its validity: see [1] and [27] above. Almost three months had been lost because of the delay in obtaining the order permitting service out of the jurisdiction, Mr Beasley’s error in first seeking a telephone hearing and in him then taking a month to ask for it to be dealt with on paper. Further he had only sought information from the FPO about the logistics of service the day before the application was made, which was leaving such enquiries late.
70. However, looking at the case in the round, I consider that the Claimant’s solicitors had acted relatively expeditiously with respect to the claim form. They had made the application for service out of the jurisdiction just ten days after the claim form was issued (in mid-June 2022); had then liaised with the court over the means by which the application would be determined, to ensure unnecessary time was not lost (in late August 2022); and as soon as they were aware of the likely three month period for service via the FPO had made the application.
71. Further, the Claimant’s solicitor made the application to extend time at the same time as dealing with the order giving permission for service out of the jurisdiction on a protective basis, to avoid having to return to court for an extension of time closer to the date on which the validity of the claim form would lapse. This also had the benefit of ensuring that the case was still being considered by the Master.
72. Overall I accept that these were good reasons for extend time. Applying the approach set out in *ST*, and bearing in mind the position in relation to limitation and the lack of prejudice to the Defendant set out at [67]-[68] above, I conclude that it was appropriate to extend time for service of the claim form on 31 August 2022. Master McCloud’s order to this effect therefore stands.

Specific submissions regarding the second extension of time, 9 December 2022

73. Ms Wyles KC submitted that the reasons for the second extension were weak. The Claimant had “changed tack” on the method of service to be used twice: although the 31 August 2022 extension was obtained on the basis that the Claimant would serve through the FPO (as reflected in the recital to the order), the Claimant then departed from this and decided to undertake service through an agent in Portugal; and when this became difficult reverted to service through the FPO.
74. However, as Ms Crowther KC pointed out, the Claimant’s solicitor was not so much “changing” tack as adopting a “twin track” approach to service by considering different approaches at the same time. A suitable method of service was selected, in the form of agent to agent service, but the local agents in Portugal had refused to effect service by that method. It is entirely unclear why the local agent felt that it was no longer possible to effect agent to agent service. The attempt at service was made in good time and the application was made promptly once the difficulty came to light.
75. Ms Wyles KC argued that the Claimant’s solicitor relied on patently flawed foreign law advice. An email dated 22 November 2022 from Rita Pereira, his Portuguese contact, indicated that the difficulties in agent to agent service had been caused by certain EU service regulations. These did not apply to the United Kingdom after Brexit, and this should have been obvious to the Claimant’s solicitors: this was a matter of EU, not Portuguese, law and they are specialist solicitors regularly acting in cross-border cases.
76. However the Claimant’s solicitor was being presented with advice from Portuguese lawyer, to the effect that agent to agent service was unacceptable, and whether this was correct or not, agents were in fact largely refusing to assist. In those circumstances it is understandable that the Claimant’s solicitor erred on the side of caution and relied on the advice from his Portuguese lawyer, rather than from the FPO. The Portuguese lawyer advised that given the difficulties, he should revert to effecting service through the FPO, which would obviously take time.
77. Finally Ms Wyles KC pointed to the fact that in her email, Ms Pereira said that she had identified one agent who was prepared to carry out service, but the Claimant’s solicitor had chosen not to use this available method. However, Ms Pereira had given a caveat to the effect that “there is always a risk that the insurer will later argue that service is invalid”. Given the uncertainty over the legal position, again it is understandable that the Claimant’s solicitor did not want to take that risk.
78. Overall, I consider that these were acceptable, if not good, reasons for the extension of time. On balance, taken together with the lack of an issue over limitation/prejudice, I consider that the second extension of time effected on 9 December 2022 order was appropriate.

Conclusion on issue (1)(d)

79. For all these reasons I do not consider it appropriate to set aside either of the Master’s orders extending time on their merits.

Overall conclusion on issue (1)

80. I therefore dismiss the Defendant's application to set aside Master McCloud's orders extending time for service of the claim form. Both orders stand, such that the claim has been validly served. To the extent necessary, I waive the procedural requirements in the ways I am satisfied the Master did. I make clear I do so on the particular facts of this case, and without wishing to encourage others to adopt the methods used in this case to obtain the orders in question.

(2): The jurisdiction issue

The legal principles

81. The Defendant having applied to set aside the Master's order granting permission to serve the claim form out of the jurisdiction, the court's task is to decide *de novo*, by way of rehearing, whether permission to serve out should be given.
82. In order to obtain permission, the Claimant must prove that:
- (i) There is a serious issue to be tried on the merits, ie. a substantial question of fact or law, or both. The test is that used in respect of a summary judgment application, namely whether there is a real (as opposed to a fanciful) prospect of success ("**the merits test**");
 - (ii) There is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context, good arguable case connotes that one side has a much better argument than the other. The classes of case in which permission to serve out may be given, namely the jurisdictional "gateways", are set out in CPR PD6B ("**the gateway test**"); and
 - (iii) In all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction ("**the forum conveniens test**"): *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd and others* [2011] UKPC 7; [2012] 1 WLR 1804 at [71], per Lord Collins.
83. Although the Defendant brought the application to set aside the Master's order, the legal burden of satisfying the court that the various elements of the jurisdiction test are met remains on the Claimant. The Defendant accepted that the Claimant could meet the merits test, but disputed his ability to meet the other two tests.
84. A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *Altimo Holdings* at [81]. This principle applied to the gateway test here.

(a): Has the Claimant proved that the gateway test is met?

85. The Claimant's claim is brought under a statutory right of action as a direct claim for indemnity against the Defendant as insurer, based on the insurance contract relating to the vehicle.

86. The Claimant relied solely on the “tort” gateway CPR PD 6B, paragraph 3.1, Ground 9, to the following effect:

“(9) a claim is made in tort where –

(a) Damage was sustained or will be sustained within the jurisdiction,
or

(b) Damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.”

87. Ms Crowther KC relied on the fact that the Claimant now lives in England and seeks damages to reflect his pain and suffering and the other losses caused by his injuries, which are ongoing. He will continue to sustain such losses. On that basis, she contended that the Claimant can satisfy the damage element of the gateway test in limb (a) of Ground 9. The Defendant did not seek to persuade me otherwise.

88. The key issue between the parties was whether the Claimant’s claim is in fact a claim “made in tort”.

(i): *General principles of interpretation relating to the gateway*

89. There is no general definition of “tort” for the purposes of the gateway.

90. In those circumstances it is appropriate to consider whether the claim is “in substance” a tortious one: *Tulip Trading v Bitcoin Association for BSV* [2022] EWHC 667 (Ch); [2022] All ER (Comm) 624 at [165], per Falk J (*obiter*, but citing *Twin Benefits v Barker* [2017] EWHC 1412 (Ch) at [112]-[113], per Marcus Smith J).

91. Similarly, it is helpful to consider whether the claim has an “underlying” tort. Sir Michael Burton GBE, Sitting as a Judge of the High Court, adopted this approach in *Samsung Electronics Co Limited v LG Display Co Limited* [2021] EWHC 1429; [2022] 1 All ER 717 at [11]. He construed the phrase “claim in tort” “purposively in the light of the juridical history of the tort gateway”, by reference to the earlier wording of “founded on a tort”: [11] and [6]. I do not understand this aspect of his judgment (unlike his reliance on assimilation to the Brussels Regulation) to be adversely impacted by *FS Cairo v Brownlie* [2021] UKSC 45; [2022] AC 995 (“*Brownlie II*”). He held that a contribution claim under the Civil Liability (Contribution) Act 1978 is a claim in tort for gateway purposes, even though it was a claim made by a joint tortfeasor rather than the original victim.

92. In my judgment the Claimant’s case is “in substance” tortious. He seeks damages for the loss and injury sustained to him as a result of the driver’s tortious actions. The Defendant is required to compensate the Claimant for those losses, on behalf of the driver. It is correct, as Ms Wyles KC highlighted, that the Defendant is not itself in breach of a tortious duty of care owed towards the Claimant, but the claim is nevertheless based on the “underlying” tort committed by the driver. It is “founded on a tort”.

93. General principles of interpretation therefore suggest that the Claimant can satisfy the gateway test.

(ii): *The choice of law cases on direct actions of this kind*

94. Ms Crowther KC drew support from *Maier v Groupama Grand EST* [2009] EWCA Civ 1191; [2010] 1 WLR 1564 was also a direct action against an insurer arising out of a road traffic accident abroad, where liability was admitted. The Court of Appeal held that because the issue of the level of damages to be paid to the claimants was a procedural matter, relating to remedy, it fell to be assessed by English law. Sharp J (as she then was) had reached the same conclusion in *Knight v AXA Assurances* [2009] EWHC 1900 (QB); [2009] Lloyd's Rep IR 667.
95. Ms Wyles KC argued that it was wrong to rely on these authorities, because they relate to choice of law rather than jurisdiction; and it is clear from *Brownlie II* at [42] that choice of law and jurisdiction are "distinct and not analogous" issues. One difference is that for jurisdiction purposes the relevant question is whether there is a "claim" in tort, not whether the particular issues for determination within the claim are tortious, which was the focus in *Maier* and *Knight*.
96. However, in my judgment, *Maier* and *Knight* do provide some support for the Claimant's case in relation to the gateway, because in order to determine the choice of law in those cases, consideration was given to the substance of the claims.
97. For example, in *Maier* at [22], Moore-Bick LJ (with whom Etherton and Mummery LJ agreed), in upholding the decision of Blair J at first instance, held that:
- "The only question that matters is how English law characterises the particular issue that arises for determination, namely, how much should Mr and Mrs Maier receive to compensate them for the injuries they have suffered. It is an issue that falls to be decided primarily in the context of a claim against the person responsible for the accident, M Kress, and I think it is clear that it is an issue that arises in tort, not contract".
98. Similarly, in *Knight* at [25], Sharp J held that:
- "The only question for the English court to resolve...is the amount to be awarded to the claimant for the injury caused to him by the tortfeasor's admitted wrongdoing. And that is a tortious issue, not a contractual one. The insurer's liability is for the policyholder's tort and has nothing to do with the contractual relationship between the insured and the insurer".
99. In *Maier* Blair J had also placed some reliance on the joint report of the Law Commission and the Scottish Law Commission on Private International Law: Choice of Law in Tort and Delict (Law Com no 193; Scot Law Com no 129) (1990), which had concluded as follows:
- "The direct action is not in any real sense contractual since the claimant is not suing a party with whom he is in privity of contract. It is true that neither has a wrong been perpetrated by the insurer on the claimant. However, the action against the wrongdoer's insurer may be more akin to a claim in tort than contract, since what would normally

be the claimant's primary remedy would be a tortious action against the wrongdoer. If the claimant's action against the actual wrongdoer would be tortious, an action against the insurer may be better seen as an extension of the tortious action. Although the direct action cannot exist in the absence of the contract of insurance, neither would the direct action exist in the absence of any wrongdoing": *Knight* at [12].

(iii): The relevance of Youell

100. Ms Wyles KC relied on *Youell v Kara Mara Shipping* [2002] 2 Lloyd's LR 102. This was a claim for an anti-suit injunction, Aikens J held that a direct right of action against a tortfeasor's insurer pursuant to a Louisiana statute was a claim in contract for jurisdictional purposes. At [55] he held that in order to decide whether the claim was contractual or not, the court had to perform the analysis from the viewpoint of English law concepts of a "contractual" claim: the nature of the claim should not be considered "through Louisiana law spectacles". That general principle is applicable here.
101. However beyond that *Youell* is of limited assistance. I agree with Ms Crowther KC that the factual context of the claim was very different to that present here. In any event the fact that Aikens J found that this sort of action was contractual is not determinative of the Claimant's position here: there is no rule that a claim must only pass through one of the gateways.

(iv): The classification of the claim under Portuguese law

102. The parties have obtained evidence from experts in Portuguese law who agree that the Claimant's claim "is to be considered under Portuguese law as a non-contractual claim (tort)".
103. Beasley 2 at [29] had conceded that the characterisation of the claim under Portuguese law is irrelevant, but Ms Crowther KC resiled from that concession. She submitted that in a case where the law of a country other than England and Wales applies, that country's law may be relevant to the question of characterising the claim as being in tort, in reliance on *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2015] 3 WLR 409 at [37]-[39] and [44].
104. These passages were *obiter* and I am not convinced they can be used to generate the general principle Ms Crowther KC sought to elicit from them, which would appear to conflict with *Youell*.

Conclusion on issue (2)(a)

105. In light of my conclusions on issues (i)-(iii) above, the Claimant has proved that the CPR PD6B gateway test is met.

(b): Has the Claimant proved that the *forum conveniens* test is met?

The legal principles

106. The relevant principles are derived from Lord Goff's speech in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, as recently summarised in material part by

Butcher J in *Mercedes-Benz Group AG and another v Continental Teves UK Ltd and others* [2023] EWHC 1143 (Comm); [2023] 5 CMLR 21 at [21](1) and (3)-(5), to the effect that:

- (i) It is necessary to identify the forum in which the case can be suitably tried for the interest of all the parties and the ends of justice;
- (ii) In service out cases, the burden of proof is on the claimant not just to show that England and Wales is the appropriate forum for the trial of the claim, but that this is clearly so;
- (iii) In determining which of the competing fora is the appropriate forum, the court will look to see what factors point in the direction of this, and of the other forum;
- (iv) The “natural forum” is “that with which the claim has the most real and substantial connection”. The court must first look for “connecting factors” which will include “not only factors affecting convenience or expense (such as availability of witnesses)”, but also “other factors such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business”; and
- (v) As general rule, the court will not be deterred from refusing permission to serve out simply because the claimant will be deprived of a “legitimate personal or juridical advantage”, such as damages on a higher scale or a more generous disclosure regime, unless it is shown through “cogent evidence” that there is a risk that “substantial justice will not be done in the natural forum”.

107. Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required: *Altimo Holdings* at [97].

108. The forum conveniens principle is an “appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England”; and a “robust and effective mechanism for ensuring that claims which do not have their closest connection with this jurisdiction will not be accepted here”: *Brownlie II* at [79] and [82], per Lord Lloyd-Jones.

(i): *What is the “natural forum”?*

(a): *Convenience, expense and the availability of witnesses*

109. The Claimant will need to be examined by a series of experts: Mr Charles Willis-Owen has recommended that reports be obtained from a clinical psychologist or psychiatrist, an upper limb expert, a care expert, a rehabilitation medicine expert, a urologist and a maxillofacial surgeon. He will also need to will need to give evidence at the trial of this claim about his difficulties and his needs for the future.

110. The Claimant has suffered serious and life-changing injuries which have left him with significant physical limitations, as summarised at [16] and [18] above and detailed in the medical evidence. These include significant difficulties with mobility and

continence. In light of these it would clearly be more convenient for the Claimant to be examined by the experts in England and give his evidence in England, than if he had to travel by Portugal for either of these purposes.

111. The Portuguese law experts have confirmed that it would be possible for the Claimant to attend the trial by video link. He would require an interpreter at all times as he cannot speak Portuguese and expert evidence is that the Portuguese language must be used at all times in the courts. This would be less convenient for the Claimant than being able to attend court in person and follow proceedings in English. Further, I accept Ms Crowther KC's submission that to expect him to give evidence about his serious injuries over a video link and through an interpreter would possibly lead to poorer quality evidence and hamper his ability to present his claim.
112. The Claimant intends to rely on factual witnesses as to his needs, including his partner. I am told that they are all based in England. It would be more convenient for them to give evidence from England.
113. The Defendant does not intend to rely on any factual witnesses.
114. If the claim was tried in Portugal all the documentation would need to be translated into English for the Claimant. Ms Crowther KC suggested that if the claim was tried in England, the Defendant might not need all the material (such as the Claimant's Department for Work and Pension) records translated in full. It is therefore possible that there would be a saving of translation costs if the claim was tried in England, but the position was a little unclear.
115. By far the more persuasive argument under this heading is that the witnesses are largely if not entirely based in England and it would be more convenient for them to give evidence in England. In my judgment the Claimant's extensive health difficulties make the convenience to him of a trial in England particularly clear.

(b): The law governing the claim

116. All other things being equal, a case should be tried in the country whose law applies. That factor is of particular importance if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues: *VTB Capital v Nutritek International v Nutritek* [2013] UKSC 5; [2013] 2 AC 337 at [46], per Lord Mance.
117. Here, the Claimant's case is that Portuguese law applies. Ms Wyles KC argued that this is a key consideration, especially because there are relevant differences in the applicable legal principles or rules, such as the use of the Disabilities Table in Civil Law in calculating compensation, the doctrine of "adequate causality" and the role of the criterion of equity/fairness, as explained at section 5 of the joint Portuguese law experts' report.
118. However, I accept Ms Crowther KC's submission that, like *VTB* at [49], the "key issues in this litigation will on the face of it be factual not legal". Further, the differences between the legal systems do not seem as stark as the Defendant contended: for example, the evidence suggests that Portuguese law calculates pecuniary (or "patrimonial") losses in a very similar way as English law; and the

doctrine of adequate causality is described by the experts as meaning that it is “sufficient that the accident or event contributed to the severity of the overall injury”, a concept familiar to English law.

119. Moreover, this is not a situation where “all other things [are] equal” so as to engage the principle set out in *VTB*. I say this because in my judgment factor (a) above militates strongly in favour of trial in England.

(c): Where the parties respectively reside or carry on business and their connections with Portugal

120. The Claimant and his partner had been travelling around Europe in their motor home for several years when the accident happened. They had lived in Portugal over several winters, and one summer, often travelling around parts of northern Europe during the summer. He had obtained residency due to the changes implemented by Brexit but had not collected his biometric residence card. He had a Portuguese tax number. However, before the accident, they had decided to return to England for a range of reasons including issues over money and his partner’s health. After the accident the Claimant moved back to England and now resides here. He has no plans to return to Portugal. I conclude that he no longer has any real connections with Portugal: rather he resides in and has connections with England.
121. The Defendant is a Portuguese insurer, domiciled in Portugal. The Defendant is entitled to have its interest in having the claim heard in its own jurisdiction considered. However the Defendant is a global insurer and can expect to face claims from around the world from time to time.
122. Overall I consider this factor militates, slightly, in favour of trial in England.

(d): The place of commission of the tort

123. The accident took place in Portugal, and such immediate damage as the Claimant may prove was sustained by him in Portugal. Understandably, therefore, the Defendant prayed in aid the principle that the place of commission of the tort is “a relevant starting point” when considering the appropriate forum for a tort claim: *VTB* at [51].
124. However, as Lord Mance continued to explain in the same paragraph, “[r]eferences to a presumption” to this effect are “unhelpful”; to view this factor in isolation may be “over-simplistic”; and “[t]he significance attaching to the place of commission may be dwarfed by other countervailing factors”. Here, there are other persuasive countervailing factors, namely those under (a)-(c) above.

(e): The location of related proceedings

125. The Defendant has brought proceedings against the driver in the Portuguese court in Portimao. These will inevitably focus on the details of the accident. The Portuguese law experts agree that these proceedings “are different regarding the parties, the claim and the cause of action” and that these proceedings would not affect this claim. Accordingly the fact that the Defendant has chosen to bring these different proceedings in Portugal does not show that England is not the natural forum for this claim.

(f): Enforcement

126. The Defendant suggested that there might be some difficulties in enforcing an English judgment in Portugal.
127. However the Portuguese law expert evidence demonstrates that there is not a significant risk of this. Portuguese law provides for a “merely formal review” of the judgment to verify that it meets certain formal requirements. The Defendant’s expert suggested that there might be difficulties if “punitive” damages were awarded or an order requiring the losing party to pay “disproportionate lawyer’s fee”, but only if either of these was considered “incompatible with the international public order principles of the Portuguese State”. This seems unlikely: the Claimant’s expert was clear that she “[did] not anticipate any obstacles from the point of view of the Portuguese international public order concerning the recognition and enforcement of lawyer’s fee and we have not found any case-law in which the recognition of lawyer’s fee was denied”.
128. Again, therefore, this factor does not show that England is not the natural forum for this claim.

Conclusion on issue (2)(b)(i)

129. Taking into account all these factors, I conclude that the natural forum, namely the one with which the claim has the most real and substantial connection, is England.

(ii): Is there a risk that substantial justice will not be done in the natural forum?

130. Given that I have concluded that England is the natural forum I do not need to determine the Claimant’s alternative case that if Portugal is the natural forum, there a risk that he will not obtain substantial justice there.
131. Had I been required to do so, I would have accepted the cogent evidence in *Beasley 4* that the Portuguese law and procedure with respect to interim payments means that the Claimant is unlikely to be able to secure the prosthetic assistance he needs during the currency of the claim. Prosthetic assistance is integral to the Claimant’s quality of life and long-term rehabilitation and a key aspect of the claim. Accordingly, while fully acknowledging the comity principle at [107] above, I would have accepted that there is a risk that “substantial justice” would not be done to this Claimant, on these facts, by the claim being tried in Portugal.
132. However I would have concluded that the Claimant could not make out his alternative argument that the Claimant’s financial difficulties would mean he could not litigate a claim in Portugal at all. This argument was not trailed in the evidence beyond the Claimant explaining his own impecunious position. There was no cogent evidence that this would mean he could not bring a claim in Portugal: the Portuguese expert evidence was that there is legal aid available, but there was no evidence as to whether the Claimant would be eligible for it; nor was there evidence that he could not access other potential funding models.

Conclusion on issue (2)(b)

133. For all these reasons the Claimant has proved that England is clearly the appropriate forum for this case. It is the place where the claim can be suitably tried for the interest of all the parties and the ends of justice. It is the natural forum as it is the place with which the claim has the most real and substantial connection.

Overall conclusion on issue (2)

134. For the reasons set out above the Claimant has satisfied the gateway test and the *forum conveniens* test. In all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction in Portugal.

Conclusion

135. Accordingly I dismiss the Defendant's applications to set aside Master McCloud's orders and the challenge under CPR Part 11. I order a fresh Acknowledgement of Service and a Defence to be served.