Neutral Citation Number: [2017] EWHC 1706 (Ch)

Case No: HC-2015-001784

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 6 July 2017

Before :

David Foxton QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

MARASHEN LIMITED	**Claimant**
- and –	
KENVETT LIMITED	
	Defendant
- and –	
DMITRY IVANCHENKO	
	Third Party / Part 20 Defendant

- -
- -

Simon Salzedo QC (instructed by **Osborne Clarke LLP**) for the **Appellant/Third Party**
Tim Penny QC (instructed by **Teacher Stern LLP**) for the **Respondent/Claimant**

Hearing date: 16 June 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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David Foxton QC (sitting as a Deputy Judge of the High Court):

(1) Introduction

1. This is an appeal, brought with the permission of Mr Justice Snowden of 3 April 2017, against the order of Master Price ("the Master") of 27 October 2016:

   i) refusing the Third Party/Part 20 Defendant's ("Mr Ivanchenko"'s) application to set aside an order granting the Claimant ("Marashen") permission under CPR r.6.15 to serve an application for a third party costs order against Mr Ivanchenko by an alternative method, namely service on the Defendant's ("Kenvett"'s) former solicitors within the jurisdiction, and

   ii) ordering Mr Ivanchenko to pay the costs of that application.

2. Mr Ivanchenko advances four substantive grounds of appeal:

   i) The Master failed to make an order granting Marashen permission to serve proceedings on Mr Ivanchenko out of the jurisdiction ("Ground 1").

   ii) The Master erred in law in concluding that he had jurisdiction to make an order for service by an alternative method within the jurisdiction in circumstances in which the Hague Service Convention ("HSC") applies to the service of English court proceedings in the country of Mr Ivanchenko's residence, the Russian Federation ("Ground 2").

   iii) Alternatively, the Master erred in law in holding that the test for ordering service by an alternative method within the jurisdiction in a case in which the HSC was something less than a requirement of "exceptionality" ("Ground 3").

   iv) The Master erred in law and misdirected himself in concluding that this was a case in which the threshold for ordering service by an alternative method notwithstanding the application of the HSC was met ("Ground 4").

   In addition, Mr Ivanchenko challenges the costs order ("Ground 5").

3. Marashen has served a Respondent's Notice:

   i) In relation to Ground 1, seeking, if necessary, an order for permission to serve the s.51 Application out of the jurisdiction; and

   ii) In relation to Grounds 3 and 4, on the basis that, if the Court finds the Master did not apply the right test in ordering service by an alternative method, that test was met on the facts in any event.

4. I am very grateful to both counsel for the very high quality of their submissions.

(2) The background

5. These proceedings were commenced by Marashen against Kenvett in May 2015, seeking to recover amounts due under a loan agreement. Kenvett applied under CPR Part 11 to challenge the jurisdiction of the English court, but that challenge was rejected and a costs order made against Kenvett for the costs of the challenge.

6. Mr Ivanchenko is the beneficial owner of Kenvett, and Marashen asserts, apparently without contradiction from Mr Ivanchenko, that Mr Ivanchenko provided the instructions on behalf of Kenvett in relation to the jurisdictional challenge.

7. On 11 July 2016, Marashen issued an application under s.51 of the Senior Courts Act 1981 for an order requiring Mr Ivanchenko to pay Marashen's costs of the jurisdiction challenge ("the s.51 Application"). Marashen applied for permission:

   i) to serve the s.51 Application on Mr Ivanchenko out of the jurisdiction in the Russian Federation; and

   ii) to effect service of the s.51 Application by an alternative method, namely within the jurisdiction on Kenvett's former solicitors, Osborne Clarke LLP.

8. I describe Osborne Clarke LLP as Kenvett's former solicitors because it is said by Mr Ivanchenko that their retainer had been terminated following the failure of Kenvett's jurisdictional challenge, notice of change having been served on 18 April 2016. The efficacy of that notice may be in dispute, although I have not found it necessary to determine that issue.

9. The Master granted the application to serve the S.51 Application on Osborne Clarke LLP on 13 July 2016. The Master did not find it necessary to make an order for service of the S.51 Application out of the jurisdiction, and this gives rise to the first ground of appeal.

10. On 20 July 2016, Mr Ivanchenko instructed Osborne Clarke LLP to represent him, and he applied to set aside the order for service by an alternative method.

11. On 9 September 2016, Marashen obtained summary judgment against Kenvett (who did not participate in the application) for a sum in excess of US$7 million and for the costs of the action, and for an interim payment on account of costs of £50,000. The s.51 Application has been amended to extend to the full costs of the action which, save for the s.51 Application and issues of enforcement, has now come to an end.

12. Mr Ivanchenko's set aside application was dismissed by the Master on 27 October 2016, for reasons set out in a judgment handed down on 18 November 2016. I return to that judgment below. Mr Justice Snowden gave permission to appeal on all grounds on 3 April 2017 on the basis that Grounds 1, 3, 4 and 5 had a real prospect of success, and that the appeal on Ground 2 is interrelated with those issues.

(3) CPR r6.15

13. CPR r.6.15 provides:

> "*(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*
>
> *(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service*".

(4) Ground 1

14. As his first ground of appeal, Mr Salzedo QC argues that the application of the power to order service by an alternative method in this case arose not from the direct application of CPR 6.15, but from the terms of CPR 6.37(5)(b)(i) which provides:

> "*Where the court gives permission to serve a claim form out of the jurisdiction*
>
> *(b) it may:*
>
> *(ii) give directions about the method of service*".

15. On this basis, he contends that the power to permit service by an alternative method in the present case was premised on the court first having given permission to serve out of the jurisdiction. In circumstances in which no order granting such permission had been made, he submits that there was no basis for the order for service by an alternative method.

16. Mr Penny QC argues that it was enough that the Court would have been prepared to order service out of the jurisdiction, and, if it would have done so, there was no need for such an order to be made where the method of alternative service ordered under CPR 6.15 did not in fact involve service out of the jurisdiction. He relied upon the manner in which the issue was expressed in two leading commentaries:

    i) First, in Dicey, Morris & Collis, *The Conflicts of Law* 15th para. 11-11 which provides:

> "*Under the practice prior to the Civil Procedure Rules, the general principle was that an order for substituted service within the*

jurisdiction could not be made against a person outside of the jurisdiction. The current Rules contain no specific provision for service by an alternative method on defendants outside the jurisdiction, but it is suggested that alternative service within the jurisdiction should not be ordered unless the case is one which is otherwise suitable for an order for service outside the jurisdiction, and there is good reason for alternative service within the jurisdiction".

Mr Penny QC relies on the words "*or otherwise*" to contend that this passage supports the view that no order for service out is in fact necessary. I would note, however, that the statement that "*the current Rules contains no specific provision for service by an alternative method on defendants outside the jurisdiction*" does not directly address the contention that there is such an express power, albeit expressed in more general terms in CPR 6.15(b)(i).

ii) Second, Professor Briggs in *European Jurisdiction and Judgments* (6th) para. 5-12 which states:

"*As a matter of principle … an order permitting service by alternative means should not be made in respect of a defendant who could only be served out of the jurisdiction with the permission of the court unless the court is satisfied that it would have been prepared to grant permission to serve the defendant out of the jurisdiction*".

I accept that this passage directly supports Mr Penny QC's argument, although no authority is cited in support of the formulation adopted.

17. On this issue, I am satisfied that Mr Salzedo QC's submissions are correct, and that an order for service by an alternative method within the jurisdiction against a defendant who is resident outside of the jurisdiction can only be made if the court has satisfied itself that the case is a proper one for service out of the jurisdiction, and has made an order to that effect.

18. I have reached this conclusion essentially for the reasons which Mr Salzedo QC advanced:

i) In Abela and others v. Baadarani and another [2013] UKSC 44, the Supreme Court considered the exercise of the powers set out in CPR 6.15 in cases in which the defendant was resident out of the jurisdiction. Lord Clarke of Stone-cum-Ebony JSC, in a judgment with which the remainder of the Supreme Court agreed, recorded at [20] his agreement with the concession that CPR 6.15(2) could be used retrospectively to accept the parties' actions as constituting good service where the defendant is outside the jurisdiction as well as when the defendant is inside the jurisdiction. He stated:

"*I would accept that that concession was correctly made. The judge was to my mind correct to hold in para. 71 that, just as the power under rule 6.15(1) prospectively to permit alternative service in a service out case is to be found in rule 6.37(5)(b)(i) or is to be implied*

generally into the rules governing service abroad (because that must have been the intention of the drafter of the 2008 amendments to CPR rule 6), so rule 6.37(5)(b)(i) is to be construed as conferring the power, via rule 6.15(2) , retrospectively to validate alternative service in such a case, or such a power is to be implied generally into the rules governing service abroad. In any event, the contrary was not contended before this court".

ii) In this paragraph, Lord Clarke approved the approach adopted by Sir Edward Evans-Lombe in the first instance decision, [2011] EWHC 116 (Ch.) at [71]. After referring to certain first instance decisions, including Mr Justice Andrew Smith in Andrew Brown & ors v. Innovatorone Plc. [2009] EWHC 1376 (Comm) and His Honour Judge Chambers QC in Amalgamated Metal Trading Limited v. Alain Baron [2010] EWHC 3207, both of which had suggested that the power to order service by an alternative method in respect of a defendant outside of the jurisdiction derived from CPR 6.37, Sir Edward Evans-Lombe stated at [71]:

"I accept Mr Penny's written submission that there is no reason to differentiate between the power conferred by CPR 6.15(2) and 6.15(1) . Just as the power to order alternative service in a service abroad case is to be found either from a construction of CPR 6.37(5)(b)(i) or is to be implied generally into the rules governing service abroad because that must have been the intention of the drafter of the 2008 amendments to CPR rule 6 , so CPR 6.37(5)(b)(i) is to be construed as conferring the power under CPR 6.15(2) on the court dealing with service abroad or such a power is to be implied into CPR 6.37(5)".

iii) The effect of these judgments, therefore, is that the source of the power to make an order for service by an alternative method in respect of a defendant out of the jurisdiction is via CPR 6.37(5)(b)(i), which in turn presupposes that an order for service out of the jurisdiction has been made.

19. Mr Penny QC argued that whilst this might be the case where the alternative method of service itself involved service out of the jurisdiction, as was the position in Abela, for example, this was not true of a case such as the present in which the method of alternative service provided for service within the jurisdiction. I accept that this provides a potential point of distinction from the facts of Abela but I do not accept that it has the effect that the source of the power to order service by an alternative method as against a defendant out of the jurisdiction differs depending on whether the alternative method of service in question is one providing for service within or outside the jurisdiction:

i) If Mr Penny QC's submission was correct, then the only order establishing the jurisdiction of the court over the defendant would be the order under CPR 6.15. However, it is clear that CPR 6.15 is not a provision capable of establishing jurisdiction. In Plantation Holdings (FZ) LLC v. Dubai Islamic Bank PJSC and others [2013] EWCA Civ. 1229 at [39], Gloster LJ (giving the judgment of the Court) stated:

"*Rightly, Mr Cakebread did not pursue the argument contained in Plantation's grounds of appeal that there was no need for permission to serve out of the jurisdiction to be given, prior to the consideration of an order for alternative service. He rightly accepted that, in a case where leave to serve a claim form out of the jurisdiction is required, that requirement cannot be circumvented simply by an order for alternative service under CPR Pt 6.15 . That rule is not a freestanding foundation for jurisdiction*".

ii) Later at [47], Gloster LJ proceeded on the basis that effective joinder of the defendant would require the claimant:

"*expeditiously [to] obtain orders for leave to serve the second action on the Bank out of the jurisdiction and for alternative service within the jurisdiction*".

iii) Not only, therefore, does Gloster LJ's judgment support the view that, in a case such as this one, it is necessary to obtain an order for permission to serve out before an order for service by an alternative method within the jurisdiction can be made, but Gloster LJ makes the important point that CPR 6.15 cannot itself provide a freestanding foundation for jurisdiction.

iv) Further, Mr Penny QC's argument would give rise to difficulty in those cases where an alternative method of service was adopted which did not prescribe at the outset whether it was to take place within or outside the jurisdiction (for example that service on a company could be effected by service on an individual beneficial owner who moved between this and another jurisdiction), with the result that it would not be known whether or not an order for permission to serve out was required until service had been effected.

v) In addition, there is something unsatisfactory in there being a requirement which it is common ground applies in this case, that the case be a suitable one for service out, without a formal determination of that question in an order which is susceptible to direct challenge. The benefit of analysing a case such as this one as requiring (a) an order for permission to serve out of the jurisdiction; and (b) a decision as to the method of service which allowed service to be effected in the jurisdiction, is that it clearly separates the two different issues under consideration, allowing the resolution of each in accordance with the applicable regime. Thus, as Mr Salzedo QC pointed out, in the present case it should be for the claimant to meet the forum conveniens burden which applies to a party seeking permission to serve out, rather than for the defendant to identify a more convenient forum as is the case when a stay is sought of proceedings commenced by service within the jurisdiction (applying Spiliada Maritime Corp. v. Cansulex [1987] A.C. 460). Similarly, so far as the first issue is concerned, the requirements of CPR Part 11 should be satisfied.

20. In fairness to Mr Penny QC, Marashen had sought such an order, and their own submissions had proceeded on the basis that an order for service out of the jurisdiction was required. The Master, adopting the same analysis as Professor Briggs, took the view that where the alternative service was taking place in the jurisdiction, no order for permission to serve out need be made. Marashen then sought to list an application for permission to serve out at the same time as Mr Ivanchenko's set aside application, but were not able to get that application listed at the same hearing. As a result, that application was made before me by way of Respondent's Notice.

21. This is clearly a case in which it is appropriate to make an order giving permission to serve the s.51 Application out of the jurisdiction, and I do so. There is an express jurisdictional gateway for this purpose (Practice Direction 6B para. 3.1(18)). Mr Salzedo QC rightly accepted that there was a serious issue to be tried on the application. And it is very difficult to see how this could not be a proper case for service out in circumstances in which England and Wales is the only forum in which s.51 relief is available, and when the order sought is ancillary to legal proceedings which took place in this jurisdiction. As Mr Justice Cooke noted in Deutsche Bank AG v. Sebastian Holdings Inc and another [2014] EWHC 2073 (Comm) at [38]:

"*Because no other court has the discretionary jurisdiction in respect of costs that this court has, if permission to serve out of the jurisdiction is set aside, that jurisdiction cannot be exercised at all. Logic requires that, if in the court's view, there is a good arguable case that the circumstances justify the making of a non-party costs order in respect of an action where, ex hypothesi, the court has jurisdiction over the parties to that action, leave be given to serve out of the jurisdiction on the relevant non-party*".

22. Mr Salzedo QC had not been instructed to make submissions on the application for permission to serve out, and did not do so. However, it is right that I should note that the application was effectively made *inter partes*, with Mr Ivanchenko having very substantial notice of it and being represented by counsel at the hearing at which the application was made.

23. The result of my decision on the first point is that the order for service by an alternative method made by the Master falls to be set aside. However, in circumstances in which I have granted permission to serve out of the jurisdiction, it would be open to me to make the same order under CPR Part 6.15, or perhaps (there being no argument on this issue) to exercise the power under CPR Part 6.15(2) to order that steps already taken to bring the claim form to Mr Ivanchenko's attention amount to good service. However, I could only take these steps if satisfied that the Master's order for service by an alternative method under CPR Part 6.15(1) was one which should stand if considered independently of the first ground of appeal.

(5) Ground 2

24. Mr Salzedo QC's second argument was to submit that service by an alternative method was not permissible in circumstances in which the defendant was

resident in an HSC country, as it is common ground Mr Ivanchenko is. The argument proceeded as follows:

i) There is a statutory presumption that Parliament does not intend to act in breach of international treaty obligations, and where different meanings can reasonably be attributed to legislation, one of which is consonant with treaty obligations and the other of which is not, the former is to be preferred: Diplock LJ in Salomon v. Customs and Excise Commissioners [1967] 2 QB 116 at 143.

ii) This principle should be applied to the interpretation of the CPR, such that CPR 6.15 should not be interpreted so as to allow service within the jurisdiction, in circumstances in which this would involve a breach of the HSC.

iii) Where it applies, the HSC provides an exclusive regime for the service of judicial documents.

iv) Article 1 of the HSC provides that it applies "*where there is occasion to transmit a judicial or extrajudicial document for service abroad*" in an HSC state.

v) As permission to serve out is required under the CPR in this case (as I have held when deciding Ground 1), it follows that this is a case "*where there is occasion to transmit a judicial or extrajudicial document for service abroad*" in an HSC state.

25. Save that there may be an issue as to whether the relevance of the obligations of the United Kingdom government under the HSC is as to the proper interpretation of CPR 6.15(2), or as to the proper exercise of the discretion afforded by CPR 6.37(5)(b)(i) and CPR 6.15(2), I am willing to accept for present purposes the first four stages of Mr Salzedo QC's argument.

26. Mr Salzedo QC accepted before me that the issue of whether there was an "*occasion to transmit a judicial or extrajudicial document for service abroad*" was a question for the law of the forum. He helpfully referred me to judgments to this effect of the United States Supreme Court in Volkswagen Aktiengesellschaft v. Schlunk 486 U.S. 694 at 705 (1988) (majority judgment of O'Connor J, Rehnquist CJ, White, Stevens, Scalia and Kennedy JJ)); and of the Alberta Court of Appeal in Metcalfe Estate v. Yamaha Motor Canada Ltd. (2012) 356 DLR (4^{th}) 58 at [37], [41].

27. There are two first instance decisions which have held that the Hague Convention does not apply to service effected within the jurisdiction of the requesting state under CPR 6.15 or its predecessor. The first is Knauf UK v. GmbH v. British Gypsum Ltd. [2001] CLC 1,141. In that case, service had been effected within the jurisdiction against a German partnership ("Peters") under the-then CPR 6.8 as well as in Germany under the HSC, to ensure that the English court was "first seised" of the dispute within the framework of the Brussels Convention. David Steel J. rejected Peters' argument that the HSC,

which operated as between the United Kingdom and Germany, precluded an order permitting service within the jurisdiction, holding at [25]:

"*It was in accordance with this Convention that, in order to ensure adequate notice of the proceedings, service was additionally effected on Peters as required by Aikens J. However, the Convention expressly does not detract from any bilateral treaty nor does it purport to deal with the legitimacy or otherwise of service effected within the jurisdiction of the requesting state*".

28. This issue was not addressed by the Court of Appeal, in their judgment reported at [2002] 1 WLR 907. The Court of Appeal overturned David Steel J.'s judgment on the ground that the requirement of "good reason" for making the alternative service order had not been made out. However, the terms of the Court of Appeal's judgment do not support Mr Salzedo QC's submission that there is no jurisdiction to order service by alternative means within the jurisdiction in an HSC case, as opposed to a jurisdiction which could only rarely be exercised. Delivering the judgment of the Court, Henry LJ stated at [47]:

"*It was argued by Peters before the judge that the Hague Service 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. Peters 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*".

29. The Court, therefore, contemplated that there might be "exceptional orders" for service within the jurisdiction under the-then CPR 6.8, even in an HSC case.

30. The second decision is that of Blair J. in BNP Paribas SA v. Open Joint Stock Company Russian Machines & Anor [2011] EWHC 308 (Comm) who held at [116]-[117]:

"*[116] Overall, my conclusions are as follows. The CPR r. 6.15(2) power applies to a foreign defendant (see Abela v Baadarani [2011] EWHC 116 (Ch) at [66], Sir Edward Evans-Lombe). So far as the first defendant argued that the power could not be exercised against a Russian defendant on the basis that service could only take place under the Hague Convention , I reject such argument. Since this was a point*

which was raised in the evidence, I should say that I do not think that questions of the legality of service under foreign law arise if the court exercises power to order service on a foreign defendant in England.

[117] However the first defendant was right to submit that in cases of service out of the jurisdiction, CPR r. 6.15 cannot be invoked where convenience or pragmatism is the only justification. This is clear from the decision in Cecil v Bayat, ibid, a case under CPR r. 6.15(1) . Stanley Burnton LJ (with whom Wilson and Rix L JJ agreed) said that 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 (at [65]). Speed is a relevant consideration when deciding whether to make an order under CPR r. 6.15 , but in general not a sufficient one (at [66]). In general, the desire of a claimant to avoid the delay inherent in service by the methods permitted by CPR r. 6.40 cannot of itself justify an order for service by alternative means (at [67])".

31. In addition, there are a number of cases which, without specifically addressing the point, proceed on the basis that there is jurisdiction to make an order for service by an alternative method in an HSC case provided sufficiently exceptional circumstance exist. I address these authorities in the context of Mr Salzedo QC's third ground of appeal below, but the authorities, and their effect, are helpfully summarised by Mr Justice Popplewell in Société Générale v. Goldas Kuyumculuk Sanayi and others [2017] EWHC 667 (Comm) at [48] and [49(9)]. For present purposes, I would simply note the observation of Stanley Burnton LJ in Cecil v. Bayat [2011] 1 WLR 3086 at [68] that:

"*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*".

32. I informed the parties at the hearing that in circumstances in which two first instance judges had already held that an order for alternative service within the jurisdiction did not breach the HSC, and in which a number of other judgments had proceed on that basis, the appropriate course was for me to follow those judgments. In any event, I believe that the conclusion reached by Mr Justice David Steel and Mr Justice Blair is correct.

33. First, I do not accept Mr Salzedo QC's submission that it necessarily follows from my decision in his favour on Ground 1 that an order under CPR 6.37(5)(b)(i) together with CPR 6.15 for alternative service within the

jurisdiction necessarily constitutes "*an occasion to transit a judicial or extrajudicial document for service abroad*". It seems to me that this conflates two issues. The first is whether, as a matter of the law of the forum, it is appropriate for the Court to exercise jurisdiction over someone resident abroad, which is answered by the order made on the application for permission to serve out. The second is whether, an order for permission to serve out having been made, the method of service in fact adopted pursuant to CPR 6.37(5)(b)(i) involves "*transmit[ting] a judicial or extrajudicial document for service abroad*". The effect of the order under CPR 6.15 in this case was that service was effected in this jurisdiction, and there was no transmission of a document for service abroad and no service abroad. Were matters otherwise, it would appear to follow from Mr Salzedo QC's submissions that in a case in which the court gave permission to serve proceedings out of the jurisdiction and then an order was made under CPR 6.16 as applied pursuant to CPR 6.37(5)(b)(i) dispensing with service, there would nonetheless be *"an occasion to transmit a judicial or extrajudicial document for service abroad"*. This outcome is counterintuitive.

34. Second, Mr Salzedo QC's reliance on the need to obtain an order under CPR 6.37 for service out of this jurisdiction as the touchstone for when Article 1 of the HSC applies to alternative service within the jurisdiction would create an anomaly when considering service in family cases, in which the same rule applies to service in and out of the jurisdiction (c.f. Maugham v. Wilmot (No. 2) [2016] 1 WLR 2200 at [27]-[28]).

35. Third, the result for which Mr Salzedo QC contends would deprive the Court of any power to order alternative service within the jurisdiction even in the most exceptional case, when the considerations identified by Stanley Burton LJ in Cecil at [68] were in play. I would be reluctant to adopt an approach to CPR 6.15 which so tied the court's hands unless compelled to do so.

36. Finally, the legitimate concerns raised by Mr Salzedo QC that CPR 6.15 should not be used to circumvent the requirements of the HSC can, to my mind, be sufficiently addressed by giving appropriate weight to this factor when considering whether "good reason" for an order under CPR 6.15 has been made out. This is the issue raised by Mr Salzedo QC's third ground of appeal, to which I now turn.

(6) Ground 3

Introduction

37. If Mr Salzedo QC's second ground of appeal fails, he contends in the alternative that an order for service by an alternative method against a defendant resident in an HSC state could only be appropriate in an exceptional case, and that the Master had wrongly applied a lower threshold. He relied in this connection on a number of cases which had emphasised the requirement for exceptional circumstances before an order for service by alternative means could be made within the jurisdiction in an HSC case.

38. Mr Penny QC, in response, submitted that the Master had applied the right test, which he accepted was a requirement of exceptionality, provided that this was understood in the sense in which that phrase is used in various costs cases, as meaning "out of the norm": see for example Dymocks Franchise Systems (NSW) Pty Ltd. v. Todd [2004] UKPC 44 at [25] (S.51 order). He did, however, submit that the test to be met before service by alternative means within the jurisdiction would be appropriate in a HSC case had been attenuated to some degree by the decision of the Supreme Court in Abela v. Baadarani [2013] UKSC 44, and that this was reflected in subsequent authorities. He submitted that the effect of these authorities was that an order for service by an alternative method could not be made in "run of the mill" HSC cases, but was not more stringent than that.

The pre-Abela position

39. There was clear appellate authority before the decision of the Supreme Court in Abela that an order for alternative service within the jurisdiction should be an exceptional order in a HSC case, to avoid the provisions of the HSC being circumvented. I have referred at paragraph [28] above to the judgment of the Court of Appeal in Knauf at [47] that the-then CPR 6.8 should not be used "*as a means for turning the flank*" of the HSC, whilst recognising that it might be "*necessary to make exceptional orders*".

40. In Cecil v. Bayat [2011] 1 WLR 3086 at [61], Stanley Burton LJ rejected the contention that service was simply a means of bringing proceedings to the attention of the defendants, describing it as "*an exercise of sovereignty within a foreign state*". Turning to the relevance of the HSC, he stated:

> "*[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.

[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".

41. Rix LJ addressed this issue in what might be described as a slightly less prescriptive sense at [113], although broadly to the same effect:

"*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 Afghanistan law and therefore pursuant to CPR r 6.40 by registered post and courier to its registered business address. Therefore, the claimants did not require more than about two months for service. In such a case, I agree that some special circumstance is needed to amount to good reason: after all, any case of service out earns the claimant an additional two months for service (the difference between the standard initial period of four months in a case of service within the jurisdiction and six months in the case of a claim form for service outside the jurisdiction)".*

42. At [72] Wilson LJ agreed with both judgments.

Abela

43. The Supreme Court in Abela considered a challenge to an order under CPR 6.15 (in that case for alternative service effected outside the jurisdiction by way of service on a lawyer in Lebanon). This was not a case in which either

the HSC or any bilateral service condition was applicable, and the particular aspect of CPR 6.15 which was in issue was an order for the retrospective validation of a party's actions as constituting good service under CPR 6.15(2). The Court held that the test to be applied in this context was whether in all the circumstances of the case, there was good reason to make the order. In reaching this conclusion, the Court held that the most important purpose of service was to inform the defendant of the contents of the claim form and the nature of the claimant's case.

44. In my judgment, it is clear that the decision in Abela was not addressing the position in which the HSC, or some other treaty which was exclusive in its effect as to the service of English judicial proceedings in another country, was applicable. For example, at [33] Lord Clarke of Stone-cum-Ebony JSC held at [33]-[34]:

> "[*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 r 6.16 , the court can only dispense with service of the claim form "in exceptional circumstances", CPR r 6.15(1) and, by implication, also 6.15(2) require only a "good reason". It seems to me that in the future, under rule 6.15(2) , in a case not involving the Hague Service Convention or a bilateral service Treaty, the court should simply ask whether, in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service.*
>
> *[34] This is not a case in which the Hague Service Convention applies or in which there is any bilateral service convention or treaty between the United Kingdom and Lebanon. 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*".

45. There is a similar statement at [45].

46. As I have noted, Lord Clarke also noted that the most important function of service was to bring the fact and nature of the claimant's claim to the defendant's attention (at [37]), and at [45] he associated himself with the

observations of Lord Sumption JSC that an order for service out of the jurisdiction should no longer be regarded as "exorbitant" (as a number of English cases had previously characterised it). Those observations of Lord Sumption JSC (with which the other members of the Supreme Court agreed) appear at [53]:

"*In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an "exorbitant" jurisdiction, which would be made even more exorbitant by retrospectively authorising the mode of service adopted in this case. This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. The basic principles on which the jurisdiction is exercisable by the English courts are similar to those underlying a number of international jurisdictional conventions, notably the Brussels Convention (of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L304 , p 36)) (and corresponding Regulation (EC) No 44/2001 (OJ 2001 L12 , p 1)) and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (OJ 2009 L147 , p 5). The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ ("We command you …"). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum*".

47. It will be noted that Lord Sumption JSC rejected the characterisation of service as "*an assertion of sovereignty*", one of the grounds which Stanley Burton LJ had given in Cecil v. Bayat for his conclusions in relation to alternative service. This has led to the argument that the "exceptional" test propounded by Stanley Burnton LJ might need to be qualified in the light of Abela.

48. Mr Salzedo QC and Mr. Penny QC referred me to a number of authorities in which that argument has been considered.

The post-Abela authorities

49. Mr Salzedo QC relied on Deutsche Bank AG v. Sebastian Holdings Inc. [2014] EWHC 112 (Comm at [19]-[28], in which Mr Justice Cooke addressed this argument as follows:

"*[19] I was referred to the decision of the Court of Appeal in Cecil v. Bayat [2011] 1 WLR 3086 and that of the Supreme Court in Abela v. Baadarani [2013] 1 WLR 2043 in relation to the exercise of the jurisdiction to order alternative service out of the jurisdiction. It was agreed that these decisions set out the relevant principles to be applied. The former was a decision involving service in a country which was party to the Hague Convention whereas the latter was not. In my judgment that is a critically important distinction, as submitted by Mr Stephen Rubin QC. The USA, Monaco and the UK are all parties to that Convention.*

[20] It is plain from paragraph 45 of the judgment of Lord Clarke in Abela and paragraph 53 of the judgment of Lord Sumption with whom Lords Neuberger, Reed and Carnwath agreed, that it is no longer realistic to see the court's exercise of jurisdiction over a foreign defendant as an interference with the sovereignty of the state where process is served. There is no need for "muscular presumptions" against service out which are implied by the use of adjectives such as "exorbitant" when describing this jurisdiction over foreign individuals or corporations in modern commercial life. The need for some sort of connecting factor with England and the fact that a similar jurisdiction is exercised by many other countries on a similar basis, whether under international conventions or otherwise, means that the question of exercising sovereignty over a foreigner in another sovereign state is of limited significance.

[21] In Abela there was no applicable bilateral treaty for service of proceedings and the terms of CPR rule 6.15(1) which require "good reason" to order service by alternative means was held not to require "exceptional circumstances" before such an order could be made. …

[25] It will be noted however that Lord Clarke, with whom three other Lords agreed, specifically abjured saying anything about the position where there is a relevant convention or treaty between the states in question.

[26] Thus reference must be made to Cecil v Bayat …

[27] The critical parts of the judgments of these two Lord Justices with whom Wilson LJ agreed, are to be found at paragraphs 60-61, 65, 68–69 and 113, for relevant purposes. Whilst the Supreme Court disapproved the major reason advanced by the Court of Appeal for its decision when looking at a case where there was no bilateral treaty for service of proceedings, there remains a significant difference between that situation and a position where a bilateral treaty does apply. The Court of Appeal referred to service as more than a means of bringing

proceedings to the attention of a defendant. The exercise of a power of the court was an exercise of sovereignty within a foreign state requiring the defendant to file an acknowledgement of service and participate in litigation in another country, if he wished to dispute the claim. Although the Supreme Court considered that to talk of "interference with the sovereignty of a foreign state" was to overstate the position, the fact remains that where there is an applicable convention, the two states in question have specifically agreed to the service of foreign process in accordance with it. In such circumstances, this must represent the prime way of service in such a contracting state. Even if service by alternative means is not to be seen as "exceptional" and to be permitted in special circumstances only, there must still be good reason for allowing service by a means other than that provided by CPR 6.40(3)(b) namely in accordance with a relevant convention. Otherwise the Convention would be subverted.

[28] When the facts are examined in the present case, I can find no good reason other than questions of convenience and possible speed to justify service by alternative means. Whilst finding Mr Vik to serve process on him personally may prove difficult because he travels the world it appeared that service under the Hague Convention did not require such personal service in Connecticut. There was no evidence of what was required in Monaco but paragraph 39 of Snelling Eight inferred that personal service was not required there either. There was no evidence before me to show how delayed service would be under the Hague Convention and it is to be inferred that, in the absence of such evidence, any delay would not be substantial. In the context of this application in this long-running case, a 2–3 month delay would not be of enormous significance, even when considering the supposed summary nature of the proceedings and the desire of the claimants to make progress speedily and inexpensively. There are not inconsiderable sums of money at issue here, particularly since further costs may be ordered over and above the payment on account".

50. He also relied on the decision of Mr. Justice Popplewell in Société Générale v. Goldas Kuyumculuk Sanayi and others [2017] EWHC 667 (Comm). Mr Justice Popplewell was referred to all of the authorities on this issue, including those cited by Mr Salzedo QC and Mr Penny QC, which he identified at [48]. He summarised the principles to be drawn from those authorities at [49], which included at (9)

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

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

(b) It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections: see Shiblaq at [57]. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in Cecil at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in Knauf at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of Abela was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of Abela, there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Conventions case: Bank St Petersburg at [26]".

51. In response, Mr Penny QC relied on three authorities.

52. The first was an *obiter dictum* of Longmore LJ in Bank of St Petersburg v. Arkhangelsky [2014] 1 WLR 4360. The Court heard three interlocking appeals the first of which was an appeal against an order of HHJ Mackie QC refusing to dispense with service under CPR r.6.16. In the event, it was not necessary for the Court to determine this issue, and Longmore LJ stated at [26]:

"*In these circumstances, the first appeal does not need to be decided. I will confine myself to saying that while it may be difficult to say that this case is sufficiently exceptional to justify dispensing with service pursuant to CPR r 6.16, the case for alternative service on Baker & McKenzie being retrospectively validated pursuant to CPR r 6.15 is, as Lewison LJ perceived, highly arguable in the light of Abela v. Baadarani [2013] 1 WLR 2043. Although the Supreme Court pointed out that nothing they said would necessarily apply to Hague Convention cases, it would be surprising if there could never be good reason for alternative service in such cases. I do not read the decision of Cooke J in Deutsche Bank AG v. Sebastian Holdings Inc. [2014] 1 All ER (Comm) 733 as so deciding. It would be surprising if a judge, who was prepared to hold that the application of a foreign limitation period had caused undue hardship to a claimant, were to hold that there was not good reason retrospectively to validate alternative service in England on a firm of solicitors which was already conducting the mirror image of the*

proceedings in England, at least if an application for alternative service were brought at the appropriate time".

53. In my judgment, this decision does not provide much assistance to Mr Penny QC. Not only did the issue not need to be decided, but while Longmore LJ was clearly of the view that the HSC did not preclude orders for alternative service altogether (i.e. Ground 2 of Mr. Salzedo QC's appeal), the Court did not address what test should apply to the making of an order for alternative service in a HSC case, nor did he suggest that Mr Justice Cooke's analysis in Deutsche Bank AG v Sebastian Holdings Inc was wrong.

54. The second authority is the decision of Mr Justice Mostyn in Maugham v. Wilmot (No. 2) [2016] EWHC 29 (Fam). That was a case in which a wife was seeking to serve Family Division proceedings on her husband, who was described as having taken "*many … meritless points*", deluged his wife and the court with documents by email, and then sought to raise a complaint after the hearing had been concluded that service by documents on him by email had not constituted proper service ([9]). Mr Justice Mostyn held that the husband had forfeited his right to raise the argument (at [10]) but went on to consider the validity of the objection in the alternative. For this purpose, he summarised the relevant paragraphs in Cecil v. Bayat (at [23]-[25]), and then held at [26]-[28] that:

> "*26 In my judgment these views cannot survive the decision of the Supreme Court in Abela v. Baadarani [2013] 1 WLR 2043. The decision is clear. The purpose of service, indeed the only purpose of service, is to inform the defendant of the contents of the claim form and the nature of the claimant's case. That is what the first recital to the Hague Service Convention says. Service is not "more than this". To my mind the judgment of Lord Sumption JSC really sums up why the old views are now to be regarded as unworldly in this data age …*
>
> *27 In my judgment the key features of the modern age of international mobility and the use of information and communication technology require a fresh view of the old tropes about service out of the jurisdiction. FPR r 6.1 applies to all the rules about service whether in or out of the jurisdiction. It provides that: "This Part applies to the service of documents, except where— (a) another Part, any other enactment or a practice direction makes a different provision; or (b) the court directs otherwise."*
>
> *28 In my judgment FPR r 6.1(b) certainly permits the court to disapply the terms of Chapter 3 of Part 6 and to authorise e-mail service on a defendant out of the jurisdiction, if there is good reason to do so. The existence of this power is obvious to me in family proceedings where there is no requirement to obtain permission to serve out. It would be bizarre if the position was more restrictive in family proceedings, where there is no such requirement, than in civil proceedings, where there is. Plainly, if the other country is a Hague Service Convention country (or if there exists a bilateral treaty about service with that country) the court would want to know why the treaty route was not being followed. The*

> *normal answer would I expect be delay or inability to pin down the defendant's location. Those would be good reasons. I note that in Cecil v. Bayat [2011] 1 WLR 3086, para 68, Stanley Burnton LJ, accepted that there were some special circumstances where service by alternative means would be appropriate even where the Hague Service Convention was in play. So the pass has been sold. In my opinion the effect of Lord Sumption's judgment in Abela v. Baadarani [2013] 1 WLR 2043 (with which Lord Neuberger of Abbotsbury PSC, Lord Reed and Lord Carnwath JJSC agreed) is merely to lower the bar somewhat*".

55. The final authority to which I was referred was Bill Kenwright Limited v. Flash Entertainment FZ LLC [2016] EWHC 1951 (QB), a decision of Mr. Justice Haddon-Cave. That case concerned proceedings against a UAE company, in circumstances in which there was a bilateral treaty for the service of legal proceedings between the United Kingdom and the UAE. The claimant obtained an order for service by alternative means, namely by registered post on the defendant in the UAE. Mr Justice Haddon-Cave found that service by registered post was not contrary to UAE law (at [50]), but the order for alternative service was challenged on the basis that there was no sufficient reason for not serving under the bilateral treaty. Mr Justice Haddon-Cave rejected that argument at [54]-[55]:

> "*It is clear that the existence of a Service Treaty is relevant to the court's discretion as a matter of comity and must be taken into account when considering whether there is good reason to make an order for alternative service. However, the matter is not immutable. In my view, both Deutsche and Knauf are clearly distinguishable from the present case. In Deutsche, unlike the present case, it was not suggested that the delay there to service would be significant in the context of the proceedings. In Knauf, unlike the present case, there was evidence that the claimant was trying to steal a march in order to gain priority under the Brussel's Convention by serving using a quicker method than that provided for by Treaty. The application for alternative service in the present case was not characterised by a mere desire for speed but included proof of lengthy delay in the context of the case if the Service Treaty method was used*."

56. Mr Salzedo QC produced a copy of the bilateral treaty in issue in Bill Kenwright Limited, and noted that the effect of Article 7 of that treaty was that, unlike the HSC, it was not exclusive in its application, and that it permitted service by "*a particular method desired by the Requesting Party, unless such method is incompatible with the domestic law of the Requested Party*" (which Mr Justice Haddon-Cave had found service by registered post was not). This certainly provides a relevant point of distinction between that case and a HSC case, although this distinction does not appear to have been raised in the case itself.

Conclusion

57. In my judgment, the current state of the law is as set out in the decisions of Mr Justice Cooke in Deutsche Bank AG v. Sebastian Holdings Inc. and Mr Justice Popplewell in Société Générale v. Goldas Kuyumculuk Sanayi and others

[2017] EWHC 667 (Comm), and that in HSC cases, or cases in which there is a bilateral service treaty which is exclusive in its application:

i) "exceptional circumstances", rather than merely good reason, must be shown before an order for alternative service other than in accordance with the terms of the treaty can be used; and

ii) mere delay or expense in serving in accordance with the treaty cannot, without more, constitute such "exceptional circumstances". I say "without more" because delay might be the cause of some other form of litigation prejudice, or be of such exceptional length as to be incompatible with the due administration of justice.

58. As I have set out above, the Supreme Court in Abela took care to make it clear that it was not addressing the use of CPR 6.15 in a service treaty context. There is nothing in that decision which calls into question what I regard as the key reason why an "exceptional circumstances" test is appropriate, viz the need to ensure that the provisions of the treaty are not circumvented. While it is true that Stanley Burnton LJ's characterisation of the service of legal proceedings abroad as constituting interference with the sovereignty of another state now falls to be qualified, I do not regard that as an essential part of his reasoning when identifying the approach to be adopted in service treaty cases.

59. In this regard, it is significant that one of the reasons which Lord Sumption JSC gave in Abela as to why the "*muscular presumptions against service out which are implicit in adjectives likes `exorbitant' were no longer appropriate*" was the accession by the United Kingdom to a number of conventions, and the greater measure of practical reciprocity which now exists. While Lord Sumption JSC was referring to jurisdiction conventions, service conventions themselves reflect the new reality to which Lord Sumption JSC was referring, and provide a formal reciprocity on service issues. In these circumstances, I see nothing in Lord Sumption JSC's observations which would justify a court in being more ready to subvert or by-pass a service treaty now than was the case before Abela.

The Master's approach

60. There was a dispute before me as to whether the Master had adopted the "exceptional circumstances" test, or a lesser test. The Master reviewed the relevant authorities before and after Abela. At [11], after referring to Maughan v. Wilmot (No. 2) and Mr Justice Mostyn's suggestion that Cecil v Bayat may not survive the decision in Abela, he stated:

"*In the light of the Deutsche Bank case it seems to me that it is not possible to go that far, although it may well be the case (as Mostyn J. suggests) that the bar in relation to service by alternative means in cases such as these has been somewhat lowered. The statement in Dicey and Morris that speed and convenience are not themselves sufficient to make a case exceptional requires therefore to be qualified; it will depend on the extent of the delay and inconvenience*".

61. At [15], the Master identified the issue he had to decide as whether:

"*there is a good reason for the order of 13 July 2016 on the basis that this is an exceptional case*".

62. In these circumstances, I believe a fair summary of the test applied by the Master is that he directed himself that an exceptional case had to be shown, but that this might be done by showing delay or inconvenience if service had to be effected under the HSC. As I have set out above, I have concluded that mere delay or expense cannot constitute a sufficient reason for ordering alternative service within the jurisdiction in a case in which the defendant is resident in an HSC country. It is necessary, therefore, to consider whether there was material before the Master on which it was reasonably open to him to conclude that there were factors here, going beyond mere delay or expense, which met the "exceptional" requirement for a CPR 6.15 order. This requires consideration of the final ground of appeal.

(7) Ground 4

63. The Master's reasons for concluding that the requirement for making a CPR 6.15 order in an HSC case were met appear from his judgment at [15] where he referred to the following factors:

i) The case did not involve service of originating process, but an application made in the context of a prior history of litigation between Marashen and Kenvett and their "alter egos", Mr Rubstov for Marashen and Mr Ivanchenko for Kenvett.

ii) The evidence of prospective delay in serving the proceedings on Mr Ivanchenko in the Russian Federation under the HSC of 8 to 12 months, with the Master's own experience suggesting that delay of 12-18 months was not unknown.

iii) The expense and delay required in translation of all the documents into the Russian language.

64. In Abela v. Baadarani [2013] UKSC 44 at [23], Lord Clarke of Stone-cum-Ebony JSC observed that in deciding that there was "good reason" for making an order for service by an alternative method under CPR 6.15(1), a judge:

"*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 on 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*".

65. In the present case, the Master essentially relied on three factors: the nature of the proceedings, the time it would take to effect service under the HSC and the cost of translation.

66. As to the first of these factors, an application under s.51 has something of a hybrid character. As against the respondent, it is clearly a form of originating process, commenced by a Part 8 Claim Form, and for which specific provision exists to allow service out of the jurisdiction. However, when such an order is sought after a trial, the application is normally to be heard by the trial judge, and the respondent will generally be someone whose connection to the proceedings is sufficiently close to make it just that he is bound by the findings of fact at the trial. As the Court of Appeal observed in Deutsche Bank AG v. Sebastian Holdings Inc. [2016] EWCA Civ. 23 at [21]-[22]:

> *"[21] These principles have been applied in a number of subsequent cases, but it is unnecessary to consider them in detail because they all turn to a greater or lesser degree on their own facts. When an order for costs is sought against a third party, the critical factor in each case is the nature and degree of his connection with the proceedings, since that will ultimately determine whether it is appropriate to adopt a summary procedure of the kind envisaged in the authorities, leading to what Neuberger LJ in Gray v. Going Places Leisure Travel Ltd. [2005] EW CA Civ. 189; [2005] CP Rep. 21 described as "the overall order made by the court at the conclusion of the trial." ...*
>
> *[22] ... Our view there is a clear distinction to be drawn between the process by which the court makes an order for costs at the conclusion of a trial, whether that order involves the parties alone or one or more persons who are not parties, and separate proceedings against a third party consequent upon the outcome of the trial. In the former case, the ordinary rules of evidence do not apply, precisely because the person against whom an order for costs is sought has had a sufficiently close connection with the proceedings to justify the court's treating him as if he were a party".*

67. Is this hybrid character of s.51, and the fact that the application is generally made against someone with close prior contact within the prior proceedings, relevant to the court's determination of whether a CPR 6.15 order can be made in an HSC case? As the HSC applies to the service of all judicial documents, the fact that the judicial document in question is an application for an s.51 order cannot itself meet the exceptionality requirement in an HSC case. The nature of a s.51 application might be relevant where the application depended heavily on evidence given at the trial, and service of the s.51 application under the HSC would involve submissions to and a reference by the trial judge to that evidence taking place a substantial period after the evidence was given. However, no one suggests that this is such a case. The proceedings to date have involved an unsuccessful jurisdictional challenge before Mr Justice Males and a summary judgment application which Kenvett did not participate in. Mr Penny QC realistically accepted that there was no basis for supposing that the s.51 Application would or should go back before Mr Justice Males for determination.

68. The other two matters referred to by the Master were the length of time it would take to serve in the Russian Federation, and the expenses of preparing the translations.

69. As to the former, the evidence before the Master was that service in the Russian Federation would take between 8 and 10 months from the receipt of the request from the United Kingdom authorities, to which an estimate of 2 months for translation has been added (which seems surprisingly long). The Master appears to have been aware from his own experience of service taking longer (he referred to delay of 12 to 18 months being *"not unknown"*), but there was no evidence to this effect, and it is unclear whether there were any unusual features of the cases to which the Master was referring.

70. When considering the period of delay inherent in service under the HSC, Mr. Salzedo QC drew attention to Article 15 which provides:

> "*Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —*
>
> *(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or*
>
> *(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.*
>
> *Each contracting state shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—*
>
> *(a) the document was transmitted by one of the methods provided for in this Convention,*
>
> *(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,*
>
> *(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed*".

71. Mr Salzedo QC submitted, and I accept, that the effect of Article 15 is that, if Marashen had sought to effect service under the HSC, whilst at the same time taking steps to bring the s.51 Application to Mr Ivanchenko's attention otherwise than by service, it would be open to it to apply to the court for judgment once a period of six months had elapsed from transmission.

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

73. So far as the issue of expense is concerned, there was no evidence before the Master as to the cost of translation, and nothing to suggest that these were in any way disproportionate to the sum sought in the s.51 Application. There might be cases in which the costs of effecting service under the HSC are out of all proportion to the size of the claim, and an appropriate and proportionate alternative method of service is available, when the costs of service might be capable of meeting the requirement of exceptionality. The court is not blind to the realities of litigation for relatively small amounts (cf. Stronghold Insurance Co. Ltd. v. Overseas Union Ltd. [1995] CLC 1628). However there was no evidence to suggest this was a factor in this case

74. In these circumstances, I have reluctantly come to the conclusion that if the Master had applied what I have found to be the correct test for the making of an order for service by an alternative method in an HSC case, it would not have been open to him to find that that test was satisfied on the material before him.

75. It follows that Mr. Salzedo QC succeeds on his fourth ground of appeal.

(8) Conclusion

76. For the reasons I have given:

    i) The order made by the Master under CPR 6.15 is set aside.

    ii) Marashen is given permission to serve the s.51 Application on Mr Ivanchenko out of the jurisdiction.

    iii) I decline to make a fresh order for service by an alternative method under CPR 6.15.

77. I will hear the parties on all issues consequential on these orders, including issues of costs.