Neutral citation no [2022] EWHC 3385 (Comm)

Claim No.CL-2018-000226

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (KBD)

Before Deputy Master Jervis Kay KC

B E T W E E N:

(1) HOTEL PORTFOLIO II UK LIMITED (IN LIQUIDATION)
(2) ELIZABETH ALEXANDRA AIRD-BROWN
(as Liquidator of Hotel Portfolio II UK Limited (in Liquidation))

Claimants / Judgment Creditors

- and -

(1) ANDREW JOSEPH RUHAN
(2) ANTHONY EDWARD STEVENS

Defendants / Judgment Debtors

- and -

(1) PHOENIX GROUP FOUNDATION
(2) MINARDI INVESTMENTS LIMITED
(3) TANIA JANE RICHARDSON

Interested Parties

The appearances

For the Claimants - James Pickering KC and Samuel Hodge instructed by Spring Law Limited t/a Spring Law

For the Second Defendant - Sebastian Kokelaarinstructed by Richard Slade and Company

JUDGMENT

regarding the Second Defendant's application dated 10th November 2022

Introduction

1. The hearing of the Second Defendant's application dated 10th November 2022 (**the Application**) which seeks to set aside and/or vary the orders of Master Gidden dated 11th and 12th October 2022 took place on the 15th December 2022. That was ordered to be an expedited hearing. A further application was made by the Claimants, dated the 9th December 2022 for an order that, if necessary, the service already effected was good service. A yet further application was made on behalf of the Second Defendant, dated the 12th December 2022 to adjourn the CPR Part 71 oral examination hearing of the Second Defendant presently listed for the 18th January 2023 on medical grounds.

Background

2. The dispute which arose between the parties related to the sale of 3 hotels near Hyde Park Hotels (which have been referred to as "Hyde Park Hotels" during the proceedings), which belonged to the First Claimant ("HPII"), to Cambulo Madeira, a company ostensibly beneficially owned by the Second Defendant. The basis of the claims was that the First Defendant was alleged to be in breach of his fiduciary duties owed to the First Claimant in that Cambulo Madeira and the Second Defendant were said to be independent of the First Defendant whereas they were, in fact, acting as secret nominees for the First Defendant. There was a subsequent sale of the property for a considerable profit which was said to

have been applied by the First Defendant for his own purposes which was alleged to be a further breach of the fiduciary duty owed by him.

3. It is to be noted that the proceedings were commenced against the Second Defendant and served pursuant to an Order of Popplewell J, dated the 12th April 2018 which permitted service out of the jurisdiction upon him at an address in Dubai, UAE and permitted service upon him by alternative means: (i) by registered post to the Dubai address, (ii) by email to aes@valuetelecom.ch and (iii) by hand to Richard Slade and Company at 13 Gray's Inn Square, London WC1R 5JD.

4. Between November 2021 and January 2022 a three week trial took place before Foxton J. and, on 23rd February 2022, Foxton J delivered his Judgment. He held:
    a. That the First Defendant had fraudulently breached his fiduciary duties to the HPII, the First Claimant, when HPII's property, the Hyde Park Hotels, were sold to Cambulo Madeira, a company ostensibly ultimately beneficially owned by the Second Defendant, by dishonestly representing that Cambulo Madeira and the Second Defendant were independent of the First Defendant when the Second Defendant and Cambulo Madeira were, in fact, acting as the First Defendant's secret nominees. Foxton J further held that the Second Defendant dishonestly assisted the First Defendant in respect of that transaction.
    b. With respect to the subsequent on-sale of the Hyde Park Hotels at a profit, that those profits were retained and further applied to the First Defendant's ends which amounted to a further breach of fiduciary duty and that the Second Defendant also dishonestly assisted the First Defendant in that.
    c. That the First Defendant was to account for the profits to HPII or alternatively pay equitable compensation to HPII for their value. That is understood to amount to about £102m. The Second Defendant was also required to pay equitable compensation of about £102m to HPII, or alternatively account to it for personal benefits which the Second Defendant made from his dishonest assistance. At the

trial the Claimants identified that sum as being about £1.5m, but HPII believes the Second Defendant made more than that.

5. A 2-day 'Consequentials Hearing' took place in June 2022, and Foxton J delivered his 'Consequentials Judgment' on 4th July 2022 and made a 'Consequentials Order' on 7th July 2022. By that the Defendants were required to pay £102.26m to the Claimants plus £59.93m of compound interest. They were also held jointly liable for the Claimants' costs of the claim, required to pay £2m on account of costs, and were separately held liable to pay the Claimants' costs of arranging security for costs (and to pay £108,000 and £162,000 on account of those costs).

6. The Second Defendants obtained permission to appeal from Foxton J at the Consequentials Hearing. Broadly the grounds of these were, the availability of equitable compensation in these circumstances against a dishonest assistant and the ability to award compound interest on the same. Permission to appeal on two other grounds was refused. These concerned limitation and the order for the Second Defendant to alternatively account for profits.

7. In addition, at the Consequentials Hearing in June 2022, the Second Defendant applied for a stay of execution of the judgment debt and costs order made by the Judge pending the appeal. That application was refused by Foxton J, not least as the Second Defendant did not file any evidence in support of it. On the other hand Foxton J also refused the Claimants' application for the Second Defendant's appeal to be made conditional on his paying the judgment debt and costs into court pending the appeal but he did require that security for costs of the appeal be provided.

8. On 29th July 2022, the Second Defendant renewed his application for permission to appeal on the two further grounds to the Court of Appeal. That application was refused by Males LJ on 2nd November 2022. On the same day Males LJ refused a renewed application by the Second Defendant for a stay of execution in respect of the judgment debt. Males LJ also refused the Claimants' application for an unless order in respect of the Second

Defendant's appeal, which had been made because the Second Defendant had failed to pay the sum of costs on account when they were due. On the 7th November 2022 Males LJ amended his Order under the slip rule to include a recommendation for mediation with the added comment: "*The appellant has indicated a willingness to mediate. In circumstances where (1) the appeal raises what the judge regarded as difficult questions, (2) the appellant is in any event liable for a significant sum now that permission has been refused on grounds 4 and 5, and (3) enforcement of the full judgment sum may be problematical even if the appeal fails, it would seem to be in the parties' interests to explore a settlement if they can, and a mediator may be able to help them to do so.*"

9. On 7th December 2022, the Claimants filed their responsive skeleton in the Court of Appeal, together with a Respondent's Notice which seeks for the Court to uphold Foxton J's decision below. The appeal is ongoing and it is anticipated that it will be listed for a hearing in around mid-2023 for 2 or 3 days. Neither Defendant has paid anything towards their liabilities for the judgment debt or costs since the Consequentials Order was made in July 2022.

10. On 12th September 2022, the Claimants applied for orders for examination of the Defendants pursuant to CPR 71, and for orders permitting service out of the jurisdiction, by alternative means. The applications were granted by Master Gidden on 11th and 12th October 2022 on the papers and orders were made. They were each sealed on 26th October 2022. The examination hearing of the Second Defendant was ordered to take place by video link on 18th January 2023 at 10.30am. The Order permitted service by (i) email to the Second Defendant's email address; and/or (ii) WhatsApp message to his mobile number; and/or (iii) by hand to D2's solicitors, Richard Slade and Company. An affidavit of service was produced at the hearing of this matter. Service by alternative means was effected on the Second Defendant on 3rd November 2022 (deemed served on 7th November 2022).

11. On 10th November 2022, the Second Defendant applied to have the Order of Master Gidden dated the 11th October 2022 ("the Part 71 Order") set aside or varied. Although the Second Defendant knew that the CPR Part 71 examination hearing was listed for 18th January 2023, he did not suggest that his own Application was something requiring the Court to deal with the matter on an expedited basis/urgently. The Claimants were concerned that unless this application was dealt with before 18th January 2023 the Second Defendant would not comply with the order for production of documents contained in the examination order and that the examination listed for that day would be ineffective and would also have result in a serious slowing down of the Claimants' attempts to move forward with enforcement.

12. Accordingly, in those circumstances, Mr Pickering KC, the Claimants' leading counsel filed a certificate of urgency which the Court considered and, on 25th November 2022, ordered the Application to be listed on 13th December 2022. In fact due to Court commitments this was subsequently moved to 15th December 2022.

13. Very shortly before the present hearing two further applications were made to the Court. These were: (i) on the 9th December 2022 by the Claimants for an Order that, in the event that the Second Defendant's application dated the 10th November 2022 to set aside Master Gidden's Order of 26th October 2022 is successful that the Court would order, pursuant to CPR 6.15, 6.27 and 6.28 that the steps actually taken by the Claimants to bring the CPR Part 71 application to the attention of the Second Defendant by alternative means amounted to good service and/or that the service of the Part 71 application documents should be dispensed with, and (ii) on the 12th December 2022, the Second Defendant applied, in any event for the hearing on the 18th January 2023 to be adjourned on medical grounds.

The issues

14. The issues on this Application are as follows:
    (1) Whether Master Gidden's CPR 71 examination order dated the 11th October 2022 should be set aside on the basis that holding the examination would be "disproportionate and oppressive" to the Second Defendant.

(2) Whether, alternatively, the Order should be varied as the Second Defendant has suggested.

(3) Whether Master Gidden's order dated the 12th October 2022 permitting service by alternative means should be set aside. According to the skeleton provided by the Claimants there was apparently a sub-issue relating to whether the Second Defendant could seek to rely on an expert legal opinion of Swiss lawyers. The Claimants objected to its admissibility on various grounds (including irrelevance).

(4) Whether, if the Second Defendant succeeds in having the CPR Part 71 examination order set aside on the basis that service by alternative means should not have been allowed, the Court should hold that, nonetheless the steps actually taken by the Claimants to bring the CPR Part 71 application to the attention of the Second Defendant by alternative means amounted to good service and/or that the service of the Part 71 application documents should be dispensed with.

(5) Whether, on the assumption that the Second Defendant's applications are dismissed and/or that the Claimant's application of the 9th December 2022 should be allowed, the hearing of the CPR Part 71 examination of the Second Defendant should be adjourned on medical grounds and, if so, when the examination should be heard.

15. In addition to the main issues referred to above additional issues arose after the hearing as the Second Defendant's solicitors have sought to put two additional witness statements from the Second Defendant before the Court and rely upon them for the purposes of the issues above. One apparently relates to the issue of whether Master Gidden's order permitting alternative service of the CPR Part 71 application should be set aside and the other apparently relates to whether there should be an adjournment on medical grounds. The Claimants have objected to the use of the witness statements, particularly with respect to the one dealing with whether Master Gidden's Order should be set aside and asked that the parties should be allowed to address the court on these matters by written submissions. As a result I suspended consideration of this matter until today to allow the submissions to be received. They were received by me on Monday the 19th December and, as they refer to

two specific issues I consider that the most expeditious means of dealing with them is to refer to them hereafter as appropriate.

Overview

16. From the totality of the evidence available it appears to me that the primary purpose of the Second Defendant's applications, with which the Court is presently concerned, is to at least slow down if not prevent or frustrate the Claimants' endeavours to enforce the judgment made in their favour by, in the first instance, seeking to hold an examination of the Second Defendant in accordance with the provisions of CPR 71. This has led the Second Defendant to make a number of submissions which are based upon an interpretation of the rules of court which are essentially technical in nature and therefore unattractive because the Second Defendant is a judgment debtor as a result of findings by Foxton J that he owes the Claimants a very large sum of money by reason of having acted with flagrant dishonesty in his dealings with the First Claimant and, if the Second Defendant's arguments are successful the result could be open to the criticism that it would be triumph for a strict interpretation of the wording of rules of procedure over common sense and fairness. In large part the judicial process involves the application of the Court's discretionary powers which, of course, must be exercised judicially and bearing in mind the overriding principle that the Court should seek to come to a fair decision.

The first issue - Whether Master Gidden's CPR 71 examination order dated the 11th October 2022 should be set aside

Whether the examination would be "disproportionate and oppressive" to the Second Defendant.

17. Relying upon the judgment of Sir Anthony Clarke MR, as he then was, in *Masri v Consolidated Contractors International (UK) Ltd (No.4)* [2009] 2 WLR 699 Mr Kokelaar, Counsel for the Second Defendant, has submitted that the court has a discretion whether or not, in the circumstances of the case, to apply or set aside the Order made under CPR Part

71. This application was supported by the 10th witness statement of Mr Slade, the solicitor for the Second Defendant, in particular paragraphs 9-16. Mr Kokelaar has accordingly submitted that correlating the questions and documents presently proposed would be an expensive and time consuming exercise which would be oppressive and disproportionate in circumstances where: (a) there is an appeal pending, which will, if successful, wipe out the bulk of the present judgment debt and therefore, so he submits, render the Part 71 examination unnecessary, and where (b) the Claimants are unreasonably refusing to mediate pending the outcome of the appeal.

18. For the Claimants, Mr Pickering KC, accepts that as the Claimants' applications for an order for an examination hearing (and for the service out by alternative means) was dealt with on the papers without notice to the Second Defendant has a right to apply to set the relevant orders aside. Further, so far as I am aware, he does not dispute that the matter lies within the discretion of the court following *Masri* (supra). However he submits that the application, based upon the grounds put forward is misconceived.

19. In my judgment it would not be disproportionate or oppressive for the CPR Part 71 process to continue. In my judgment the arguments put forward by those representing the Second Defendant on this aspect have no merit whatsoever.

20. Judgments and orders of the Court are to be complied with unless an appeal is successful, or a stay of execution is granted. Unless and until either of those things happen, a judgment creditor has the benefit of a judgment or order and is entitled to take steps to execute it or aid enforcement, in accordance with the law and rules of Court.

21. At the present time the Second Defendant remains a judgment debtor for equitable compensation for c.£102m plus compound interest. He has twice applied for a stay of execution, and has twice failed (before Foxton J, and before Males LJ). It is to be noted that in refusing a stay Foxton J specifically referred to the fact that the refusal would permit the Claimants to continue to "*proceed down the enforcement path*" and Males LJ stated that

the Claimants should be at liberty to execute the judgment debt (and costs) so far as they can. The fact that the Court has already considered whether enforcement should be suspended on two occasions and has rejected such arguments is a circumstance which should be taken into account. Where, as in the present case no new or relevant evidence or even information on instructions to indicate that the court should change direction has been provided it would be absurd for the Court to accede to this application. Mr Pickering KC has submitted that this Application, to set aside the examination order is effectively the Second Defendant's third 'bite of the cherry in seeking to delay due processes related to enforcement/execution and prevent the Claimants from obtaining information which will assist them to recover the judgment debt (or proportions of it) which the Second Defendant owes HPII' and 'it is not open to the Second Defendant to effectively take this point yet again, and that it borders on abusive for him to argue these kinds of points again'. I agree with him.

22. With respect to Mr Kokelaar's submission that a successful appeal will effectively reduce the judgment debt from about £165 million which the Second Defendant is unable to pay to about £1.5 million which he is or may be able to pay there is no evidence available as to his present means and the assertion that he cannot pay the larger amount but could pay the lesser amount is mere assertion. In any event I find it difficult to see how this submission can possibly assist the Second Defendant in the present circumstances. At present he is liable for the sum of £165 million and, as the Court has refused a stay of execution, it follows that the Claimants are wholly entitled to take all relevant and lawful steps with respect to its recovery which include an examination of his assets pursuant to CPR Part 71. Even if the appeal is successful it is accepted on the Second Defendant's behalf that he will be liable for, at least, the lesser amount of £1.5 million. It has been apparent that the Second Defendant has not made any offer to pay that sum or of any sums related to outstanding orders for costs. In all the circumstances the Claimants are obviously entitled to take steps to enforce the judgment and orders for costs and to seek to have a CPR Part 71 examination to facilitate that process.

The unreasonable refusal to mediate issue.

23. Further Mr Kokelaar has submitted that the Claimants have unreasonably refused to mediate and that the appropriate consequence is that the CPR Part 71 Order should be set aside. In support of this contention he has drawn attention to the fact that on the 7th November 2022, Males LJ amended his Order of 2nd November 2022 to add: "*The appellant has indicated a willingness to mediate. In circumstances where (1) the appeal raises what the judge regarded as difficult questions (2) the appellant is in any event liable for a significant sum now that permission to appeal has been refused on grounds 4 and 5, and (3) enforcement of the full judgment may be problematical even if the appeal fails, it would see[m]to be in the parties' interests to explore a settlement if they can, and a mediator may be able to help them to do so*". (emphasis added).

24. With respect to the recommendation referred to Mr Kokelaar has stated that the Second Defendant indicated a willingness to mediate ahead of the appeal but that this met with a cool response from the Claimants who indicated that they would only participate if the Second Defendant demonstrated "*a genuine intention to settle, such as paying the £2m in costs he was ordered to pay*". Mr Kokelaar has submitted that this response amounted an unreasonable refusal to mediate and that the appropriate consequence is that the CPR Part 71 Order should be set aside.

25. In support of his submission Mr Kokelaar has referred to dicta of Males LJ in *Gregor Fisken Ltd v Carl* [2021] 4 WLR 91 in which Males LJ stated that the parties had been strongly encouraged to resolve their dispute by mediation and that they (or at least one of them) had not thought it worthwhile to pursue the suggestion so that no such steps had been taken. Males LJ said: "*This is highly unsatisfactory. Strong encouragement from the court to consider mediation merits careful consideration and is not simply to be ignored or rejected out of hand… I would invite submissions as to the consequences which should follow*".

26. In response to Mr Kokelaar, Mr Pickering KC has drawn attention to the evidence of Mr James Russell, solicitor to the Claimant, in his 17th witness statement at paragraphs 15-21.

In that Mr Russell has explained how the amendment to Males LJ's order came about and referred to the correspondence relating thereto. In the light of that Mr Pickering submitted that the Claimants have not refused to mediate, and nor have they acted unreasonably. He relies upon the reasons set out in Mr Russell's 17th witness statement, as follows:

a. the Claimants presently have no real reason to believe the Second Defendant has genuine desire to mediate;
b. they suspect that suggesting mediation is a tactic to create further delay in relation to the appeal and/or that it has been suggested to provide a potential ground for this Application should Claimants not immediately accede to the request unconditionally.
c. The Second Defendant has never made a single offer to settle throughout the lifetime of the proceedings, either before or after judgment. Nothing is stopping him from doing so now – indeed the Claimants have invited him to send a settlement offer but he has not made one.
d. Nor has the Second Defendant ever offered to or made any form of good faith payment, e.g. by paying the sums he owes on account of costs.
e. The Claimants do not have any reason to believe (without evidence supporting the assertion) that the Second Defendant cannot pay the sums he owes on account of costs (as bluntly asserted by Mr Slade at §15 of Slade No. 10), not least where he is in a position to continue instructing legal teams across multiple English proceedings.

27. It is important to recognise the importance of maintaining the authority of the Court and the necessity for parties to follow its orders, directions and even recommendations as appears from the words of Males LJ in *Gregor Fisken Ltd v Carl* [2021] 4 WLR 91. However the court must exercise its discretion in each case based upon the circumstances of that case whilst bearing in mind the need to come to a fair decision in accordance with the overriding principles of justice. On the facts of the present case I consider that the following features should be borne in mind:

a. Neither Counsel nor I are aware of any case in which a failure to follow a court's direction, let alone its opinion, that mediation should be explored, has resulted in a party from being barred from pursuing his right to take legitimate steps to enforce a judgment nor in which a recommendation to mediate has been held to be a good reason justifying set aside of an examination order under CPR 71. Nor, when one considers that the invariable sanction for a failure to mediate or engage in settlement negotiations at the direction of the court would result in an order for costs thrown away, do I consider that a result whereby the Claimants are prevented from pursuing their rights with respect to Part 71 could possibly regarded as appropriate or proportionate without there being some very special circumstances which do not appear to me to be present in this case.
b. Whereas in *Gregor Fisken Ltd v Carl* [2021] 4 WLR 91 it appears that the court had given strong encouragement to the parties to act in a particular way it is much less likely that this was intended in the present case where the Court only appeared to express an opinion that the parties should explore settlement through mediation '*which might be in the parties interest*'.
c. The reference to mediation by Males LJ was an amendment to an order which was made on the papers and was made as a result of the Second Defendant's solicitor's request that the Order should refer to mediation. It was therefore made at the request of one party and does not appear to have been the subject of any consideration between the parties before the Court as to its possible effect or consequences in the circumstances of the present case.
d. The Second Defendant has put forward no evidence to demonstrate that the lack of mediation is in any way disproportionate or oppressive to him. In fact it is difficult to envisage any such evidence which could be sensibly provided in circumstances where he is the judgment debtor and has failed to satisfy any part of the judgment.
e. In fact this part of the Second Defendant's application appears to be solely based upon the proposition that the Claimants have failed to comply with a 'recommendation' made by the court which must be punished for that failure by being prevented from pursuing its right to enforce the judgment.

f. It is obviously in the Second Defendant's interests to delay enforcement as long as possible and his conduct in relation to the CPR part 71 examination has, in my view, clearly been to seek to put it off as long as possible.

g. The judgment of Foxton J has made it clear that the Second Defendant has been a central figure in the fraud which was perpetrated on the First Claimant. His conduct was clearly dishonest and he is a person whose word should be treated with the greatest caution unless it is independently corroborated.

h. Bearing all the circumstances in mind it seems to me that there is good reason to consider that the purpose of the request to Males LJ to include mediation in his order combined with the correspondence which took place thereafter was engineered to create a situation in which the present application to set aside the Order of Master Gidden could be made in the terms which it has been. That is supported by the tenor of the correspondence in which it is apparent that the Claimants are being interpreted as having made an outright refusal to mediate which was not, in fact, the case.

i. Although the advisers for the Second Defendant have sought to argue that the Claimants have refused to mediate, that is putting the case much too high. The Claimants did not refuse to mediate. What they did was to ask for some re-assurance or indication that that the Second Defendant's suggestion of mediation was genuine and suggested a means of demonstrating that. The Claimant's position is succinctly, and in my view correctly, put by Mr Callum Knight in his email dated 23rd November 2022 when he said: "*LJ Males simply recommended that mediation may be beneficial to the parties. We have made the Claimants' position clear on this matter. The Claimants, as always, are willing to engage in genuine and meaningful settlement discussions. However due to D2's history of dishonesty (as found by Mr Justice Foxton within his judgment) and the frequent deployment of delaying tactics, the Cs simply requested that D2 demonstrate a genuine intention to settle. To date D2 has not made any offers to settle nor displayed any genuine intention to settle. Accordingly, the Cs have cause to believe that D2's attempt to fix a mediation*

is nothing more than a delaying tactic, with the sole objective of pushing enforcement further down the road."

Conclusion on the First Issue.

28. In my judgment, and for the reasons set out above, I am convinced that the submissions of the Second Defendant on this aspect must be rejected and that this element of the Application should be dismissed. Therefore the examination order made by Master Gidden should not be set aside.

The Second Issue – Whether the Order should be varied as the Second Defendant has suggested.

29. Mr Kokelaar has submitted that the Part 71 procedure is to enable a judgment creditor to obtain information about the judgment debtor's means and any other matter about which information is needed to enforce the judgment or order pursuant to CPR Part 71.2(1)(b) and that the Second Defendant has objected to a number of the additional questions put forward by the Claimant which appear in Appendix 1 and to the production of certain of the documents set out in Appendix 2 of Master Gidden's Order of the 11th October 2022. The basis of these objections is that the questions and documents are irrelevant to the enforcement of the judgment and/or that they are too wide or imprecise. Mr Kokelaar submitted that precision is of importance because failure to comply with the court order might lead to committal for contempt.

30. After discussion at the hearing it was decided that an updated schedule is to be provided setting out each party's case on the questions (Part 1) and documents (Part 2) which are presently the subject of dispute with a view to the Court expressing an opinion upon them in advance of the Part 71 examination. The present schedules in Mr William Russell's 17th witness statement at paragraph 25 with respect to questions proposed and paragraph at 27 with respect to documents sought, each containing 3 columns, are to form the basis of the

updated schedule. The Part 71 examination is due to take place on the 18th January 2023 and it is necessary that the issues relating to the proposed questions and documents required are resolved or clarified as soon as possible. The timetable is to be that the Second Defendant will add a fourth column setting out any further case/submissions on each question or document in dispute by 2400 on the 21st December 2022 and the Claimants will add a fifth column setting out their further case/submissions on each question or document in dispute by 1600 on the 29th December 2022 (the times are to those current in the United Kingdom).

The Third Issue - Whether Master Gidden's order dated the 12th October 2022 permitting service by alternative means should be set aside.

31. According to the skeleton provided by the Claimants there was apparently a sub-issue relating to whether the Second Defendant could seek to rely on an expert legal opinion of Swiss lawyers. The Claimants objected to its admissibility on various grounds (including irrelevance) and the fact that no permission has been obtained to admit the opinion in evidence. Mr Kokelaar's skeleton does not indicate an application for permission to adduce this evidence and he made no submission to that effect during the hearing. It therefore appears that the Second Defendant's reliance upon the opinion referred to has disappeared. However if I have misunderstood the true position I consider that Mr Pickering is correct in his skeleton when he says that a report as to foreign law is a matter for an expert and that permission to put such a report in evidence would need to be obtained from the Court. As no such permission has been given it is not to be used as evidence in this matter.

32. Another issue in relation to evidence arose after the hearing had been completed. At 1839 on Friday the 16th December 2022, which was the day after the hearing had taken place, Mr Richard Slade, the solicitor for the Second Defendant, sent an email to Mrs Sweeney, the clerk to the court, attaching two witness statements made by the Second Defendant and requesting that they should be put before me as a matter of urgency. Mrs Sweeney forwarded Mr Slade's email to me at 1853 on Friday. Mr Hodge, junior counsel for the Claimants, sent an email to Mrs Sweeney at 1924 on Friday the 16th December informing

the Court that the witness statements attached to Mr Slade's email related to the Second Defendant's health and his residential address and objecting to the court reading those witness statements attached to Mr Slade's email until the Claimants had had an opportunity to consider them further and to make submission on their admissibility. Mrs Sweeney forwarded Mr Hodge's email to me at 1927 on the same day. However I was not in a position to see the emails until the morning of Saturday the 17th December 2022 when I firstly opened the mail from Mr Hodge and, at 1156, sent an email to Mr Hodge (copied to the Counsel and solicitors for both parties) stating that I would not open Mr Slade's email until I heard from the parties.

33. I received an email from Mr Hodge timed at 1126 on Monday the 19th December 2022. In that Mr Hodge stated that the Claimants did not object to the court considering the Second Defendant's witness statement which was pertinent to his health (referred to as "Stevens 4") but pointing out that the appropriate time to consider that evidence is when, and if, the Second Defendant re-makes his application for an adjournment of the hearing on the 18th January 2023 the deadline for doing which is on the 29th December 2022. However Mr Hodge renewed the Claimants' objection to the Second Defendant's witness statement (referred to as "Stevens 3") regarding his address and provided submissions prepared by Mr Pickering KC and himself. Having read those submissions I formed the provisional opinion that the Claimants had made out a strong case for the court to exclude Stevens 3. In those circumstances I did not, at that time, consider the last part of the submissions which were only put forward in the event that the Court did decide to admit or read Stevens 3.

34. I then opened an email from Mr Kokelaar timed at 16.30 on Monday the 19th December 2022 which had the Second Defendant's submissions attached which I read. The title of these indicated that they were intended to be responsive to those of the Claimants and it was therefore surprising to find that Mr Kokelaar's submissions, rather than simply responding to the issue of whether Stevens 3 should be admitted in evidence, went so far as to state what is in the contents of Stevens 3 and make submissions as to the effect of that 'new evidence' upon the application to strike out the Order of Master Gidden for alternative

service. Shortly thereafter I found an email from Mr Hodge timed at 1716 on the 19th December 2022 protesting the effective inclusion of the evidence in Mr Kokelaar's submissions and a further email from Mr Kokelaar timed at 1736 on the 19th December in which he states: *"I respectfully submit that the Deputy Master cannot decide whether to admit Stevens 3 into evidence without considering its contents. The significance of the evidence contained in Stevens 3 to the issues arising on the Set Aside Application is plainly a relevant factor in making that decision, regardless of whether the approach to be adopted is that set out in Denton or that set out in Foster v Action Aviation Ltd (cited in para. 13 of the Claimants' post-hearing submissions).*"

35. In my view it was not necessary for Mr Kokelaar to have made his submissions by reference to the particularity of what was contained in Stevens 3 or alternatively he should, at least, have proposed that the Court read Stevens 3 *de bene esse.* I do not consider that he should have simply ignored the process which arose from the conduct of his own client in putting forward the witness statement at such a late stage. However faced with the situation I decided to read Stevens 3 *de bene esse* and, as it appears fair to the Claimants, I have read the additional submissions provided by Mr Pickering KC and Mr Hodge on the same basis.

36. In these circumstances I consider that I would be justified in refusing to allow the admission of the 'new evidence' contained in Stevens 3 upon the basis of the Claimants' submissions to that effect and the manner in which the witness statement has been put forward. However upon reading Stevens 3 I consider that it would not be unfair to the Claimants to allow it because I do not consider that it does anything to support the Second Defendant's case but, on the contrary, does much to support the Claimants' case for the reasons put forward by Mr Pickering and Mr Hodge in their submissions dated the 19th December 2022 and summarised in paragraph 26 thereof.

The principles to be applied

37. In making his case as to why the Order of Master Gidden relating to alternative service should be set aside Mr Kokelaar has submitted that the principles below are relevant:

a. CPR Pt 71.3 which provides that "*an order to attend court must, unless the court otherwise orders, be served personally on the person ordered to attend court not less than 14 days before the hearing*".

b. That it will not normally be appropriate for the court to dispense with the requirement for personal service unless there has been an attempt at personal service first: see the commentary in the *White Book* (2022) at 71.3.2 and *Slade v Abbhi* [2020] EWHC 935 (QB).

c. That, because Mr Stevens is outside the jurisdiction, CPR 6.40(3) and (4) apply, which provide:

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

d. CPR Pt 6.15(1) and (2) confer a power on the court to permit service by alternative methods, or retrospectively to validate service by alternative methods. They provide:

> "*(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.*

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."

e. In *Abela v Baadarani* [2013] 1 WLR 2043 the Supreme Court held that, in the context of service out of the jurisdiction, service by a method "not otherwise permitted by this Part" involved service otherwise than by the methods provided in CPR 6.40(3).

f. The following principles may be derived from the authorities:

   i. In a case such as the present, where service is to be effected in a country which is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 ("the Hague Convention"), service by alternative methods should be regarded as exceptional, to be permitted in special circumstances only: *Cecil v Bayat* [2011] 1 WLR 3086 and *Marashen Ltd v Kenvett Ltd* [2018] 1 WLR 288.

   ii. Where the state in question has objected to service being effected otherwise than through its designated authority is a pertinent factor: *Société Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS and Ors* [2019] 1 WLR 346 at para. 31.

   iii. Considerations of expense and delay are not "exceptional circumstances", not least because most litigants would wish to avoid these elements and thus orders for alternative service would become the norm and risk subverting the Hague Convention: *Cecil* at paras. 66-67; *Marashen* at para. 62; *Société Generale* at para. 31.

   iv. Examples of "exceptional circumstances" include where there are grounds for believing that the defendant has or will seek to avoid personal service where that is the only method permitted by the foreign law, where an injunction has been obtained without notice, or where an urgent application on notice for injunctive relief is required to be made: *Cecil* at para. 68.

38. With respect to the relevant law and principles Mr Pickering has referred to:

a. CPR 71.3(1) which provides: "*An order to attend court must, unless the court otherwise orders, be served personally on the person ordered to attend court not less than 14 days before the hearing"*.

b. CPR 6.37(5)(b)(i) which provides: "*Where the court gives permission to serve a claim form out of the jurisdiction – […] it may […] give directions about the method of service".*

c. CPR 6.40(3) which also makes provision for method of service of documents on parties outside of the jurisdiction where conventions are in place.

d. CPR 6.15 which provides (inter alia):

> *"(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."*

e. CPR 6.27 which provides that CPR 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly.

f. CPR 6.28(1) which provides that the Court may dispense with service of any document which is to be served in the proceedings. It is noted that this power is unfettered and does not require exceptional circumstances to do so, c.f. in the case of claim forms (CPR 6.9); *General Dynamics United Kingdom Ltd v State of Libya* [2022] AC 318 at [78]; *Unión Fenosa Gas SA v Egypt* [2020] EWHC 1723 (Comm).

g. It is settled law that the Court has jurisdiction to permit service of documents out of the jurisdiction by alternative methods (derived from the power to give directions under CPR 6.37(5)(b)(i): see White Book 2022 commentary at 6.40.4). The question for the Court is whether there is good reason to declare service by the proposed method or at the proposed place shall be regarded as good service (in

prospective cases) or as having amounted to good service (in retrospective cases). Speed is a relevant consideration but, in general, the desire of a claimant to avoid delay inherent in service by the methods permitted by r.6.40 cannot *of itself* justify an order for service by an alternative method.

h. In *Marashen Ltd v Kenvett Ltd* [2017] EWHC 1706 (Ch), David Foxton QC (sitting as a Deputy High Court Judge) held that there is jurisdiction to make an order for service by an alternative method in a Hague Service Convention or a bilateral service treaty which is exclusive in its application provided sufficiently exceptional circumstances exist. Again, mere delay or expense in serving in accordance with the treaty cannot of itself, without more, suffice. Where the documents relate to enforcement of orders or awards, however, the Court should take an approach which favours obtaining finality with speed: see *M v N* [2021] EWHC 360 (Comm).

39. From the foregoing there are, I consider, areas where the parties are in agreement as to the relevant principles. On the one hand, if the Hague Service Convention (HSC) applies then the Court should only make orders for alternative service where the supporting circumstances are exceptional. If however service is outwith the ambit of the Hague Service Convention the Court may make an order for alternative service in circumstances where there are, more simply, good reasons for doing so.

40. Mr Kokelaar has submitted:

a. In the present case, HPII has not even tried to comply with CPR 71.3 prior to obtaining the Alternative Service Order. No attempt has been made to effect personal service on Mr Stevens at 11 Grand Rue, Geneva, which is the address provided by Mr Stevens in these proceedings, or indeed anywhere else.

b. Nor are there any exceptional circumstances which would justify a departure from the methods of services prescribed by CPR 6.40(3). HPII is simply seeking to avoid the additional delay and expense that would be involved in effecting service by those methods (in particular service in Switzerland through the Hague Convention).

41. Mr Kokelaar then referred to the matters set out in Mr Russell's 16th witness statement (paras. 54 to 104) and considered whether each of them could be considered to constitute exceptional circumstances. In his submission they do not. It follows that the Second Defendant's case is wholly dependant upon whether or not the HSC applies to the present case and, if so, whether the reasons put forward by the Claimants are exceptional.

42. In his skeleton dated the 9th December 2022 Mr Pickering KC made the following overarching comments: (i) that the Second Defendant has not challenged Master Gidden's order permitting service out of the jurisdiction but has applied for the order allowing alternative service to be set aside and (ii) that the point taken by the Second Defendant is taken for tactical reasons. In fact the Second Defendant has received the relevant examination application documents and is clearly in a position to fully prepare for the examination. The examination is an adjunct to the existing proceedings, and the Second Defendant has submitted to the jurisdiction in these proceedings.

43. In his oral submissions Mr Pickering KC made four propositions: (i) the Court can make an order for service by alternative means if there is a good reason, (ii) If the Court is satisfied that the HSC applies then it is necessary to show that there are exceptional circumstances in order to obtain the relevant order, (iii) In the present circumstances the Court cannot be satisfied that the HSC applies and, in fact, the reasons put forward by Mr Russell were 'good reasons' so that it was proper to make the order for alternative service, (iv) Even if the HSC does apply then the circumstances of the present case are exceptional in any event.

44. With respect to whether the HSC applies Mr Pickering posed the question "Where does the Second Defendant live" and pointed out that there is no clear evidence of where he lives and that he has been "coy" about his address from the beginning. There is evidence that he has had a number of addresses including in the Middle East, in Megeve, France, in Geneva and now he has an address in Milan possibly since a date in 2021 (according to his identity

card). The point is that if there is uncertainty about his address, there is uncertainty about whether the HSC applies and this uncertainty gives rise to an exceptional circumstance of its own.

45. In addition Mr Pickering drew attention to the Service Order made by Popplewell J on 12th April 2018. By that the Claimants were given "*permission pursuant to CPR 6.36-6.37 to serve the Claim Form, Particulars of Claim and any other documents in these proceedings (Documents) out of the jurisdiction upon the Second Defendant at Royal Beach Residence [at an address in Dubai] or elsewhere in the United Arab Emirates by 6.40 or by any other method permitted by CPR 6.42-6.43.*" In addition by para 3 of that Order "*The Claimants also have permission pursuant to CPR 6.15(1) and CPR 6.37(5)(b)(i) to serve the Documents upon the Second Defendant by an alternative method and at an alternative place as follows: (1) by registered post to Royal Beach Residence [the Dubai address above]; and (2) by email to aes@valuetelecom.ch; and (3) by hand to Richard Slade and Company [at Gray's Inn]*". (emphasis added) The Claim Form was duly served and the Acknowledgment of Service which was dated the 21st May 2018 was signed by Richard Slade giving as the relevant address that of his firm at Gray's Inn.

46. In my judgment the Order of Popplewell J is of importance. An order was made in this case allowing service of "any other documents in these proceedings" as provided for. As a matter of fact there is no suggestion that the HSC applied at the time that order was made and in any event there has been no suggestion that that Order was not made in accordance with the rules. In my view that Order was still effective and there was no need for the further Order sought from Master Gidden which is therefore rendered otiose. It may be thought that because the procedure under CPR 71 requires personal service that an order for alternative service was necessary in respect of that however as there was already an alternative service order in place; all that the Order of Master Gidden needed to do was to refer back to the Order of Popplewell J. If it had I do not consider that the Second Defendant would have had any basis for making his present application. In fact is it noteworthy that Master Gidden's Order as to alternative service was the same as that of Popplewell J with

respect to the email address and service upon Richard Slade and Co. The only difference between the alternative method of service orders was: whereas Popplewell J required service at a Dubai address, Master Gidden's order did not require that, but allowed service by WhatsApp to the Second Defendant's mobile number.

47. Another question is whether the addition of the Geneva address at paragraph 1 of Master Gidden's order was sufficient to alter this from being a claim which was already being administered on the basis of being non HSC into a claim to which the HSC applied. In my view it was not as there was already an alternative service order in place and all that Master Gidden's Order added was an additional service address to circumstances where service was already permitted to the stated email address and/or to Richard Slade and Co. Upon this basis I do not consider that it was necessary for the Claimants to demonstrate any reasons at all to Master Gidden let alone reasons which were exceptional. In the face of the Order made by Popplewell J I consider that Master Gidden was entitled to make the Order which he did upon the basis of the information before him.

48. However if I am wrong about that it is clear from Mr Russell's witness statement that the Claimants were concerned about whether they had a proper address for service upon the Second Defendant. The fact that the Geneva address appeared to be office accommodation which, on the information then available to the Claimants had no connection with him, the fact that the Second Defendant has been so "noticeably coy" (see paragraph 77 of Foxton J's 'Consequentials Judgment') about his whereabouts that even his own counsel was unable to clarify the matter, the fact that he has provided no other address (and has not done so until his recent witness statement) are all reasons for the Claimants having a genuine concern as to his whereabouts and how to serve him. As Mr Pickering has pointed out this situation was entirely of the Second Defendant's making. I do not consider that it is helpful to dissect Mr Russell's witness statement on an item by item basis some of which may have greater or lesser weight. What is important is whether the overall situation and circumstances are such that, in the mind of the Court, it is established that they are 'exceptional'. In my view what was known about the Second Defendant's dishonesty and

the matters set out by Mr Russell in his witness statement when combined with the stated concern about where the Second Defendant could be served do amount to the exceptional circumstances which would support the Order made by Master Gidden at the time he made it and still support the effect of that Order

Issue 4 -Whether, in the alternative the Court should hold that the steps actually taken by the Claimants to bring the CPR Part 71 application to the attention of the Second Defendant by alternative means amounted to good service and/or that the service of the Part 71 application documents should be dispensed with.

49. By its application dated the 9th December 2022 the Claimants invite the Court to make an Order pursuant to CPR Part 6.15 and 6.27 that the steps already taken to bring the CPR 71 documents to the attention of D2 amounts to good service, or dispense with personal service (or any form of further service) at this stage. Mr Pickering KC has submitted that given that the Second Defendant is clearly completely aware of the documents and the examination, and has engaged considerably with the substance, in attempting to critique the questions to be asked and documents to be provided. To require the Claimants to go through the motions of serving Second Defendant with documents he already has through means permitted in Switzerland (when he may not even be living there), which he has been able to consider in detail and has already fully engaged with, would be an absurdity. The most important function of service is to ensure the content of the documents being served is brought to the defendant's attention so that they may prepare and respond in advance of any procedural timelines. That has clearly happened here. The Second Defendant will suffer no prejudice in the event the steps taken to effect service on him are held as good service or if re-service is dispensed with. Mr Slade has identified no prejudice suffered by the Second Defendant as a result of the Second Defendant having received documents in the manner he has.

50. For his part Mr Kokelaar has submitted that this is a curious application because if the Court were persuaded there were no proper grounds for dispensing with personal service

and/or permitting service by methods other than those set out in CPR 6.40(3) it is difficult to see on what basis it could properly exercise the power under CPR 6.15(2) and that to validate the steps taken retrospectively would be inconsistent.

Discussion

51. The provisions of the CPR which allow the Court to declare that the steps already taken are to be treated as good service are untrammelled by requirements for good or exceptional reasons and must lie within the general discretion of the Court to exercise its powers judicially and within the overriding principle.

52. It is trite that the reasons behind the rules providing for service of claim forms and other documents is essentially twofold. In part it is necessary to establish the jurisdiction of the English Court and in part it is to ensure that the Defendant in all cases is given due notice of the claim or where it has already been begun of any applications or other proceedings associated with the claim itself. The Second Defendant's application was to set aside the Order of Master Gidden dated the 12th October arising from the fact that the Second Defendant now appears to have an address in a country to which the Hague Service Convention which was not the case when the original claim form was issued. It is only that change which has allowed Mr Kokelaar to submit that unless there were exceptional reasons for the making of the alternative service direction by Master Gidden it should be set aside. He has tied his case to that submission which, on any view rests upon a technicality of the rules.

53. The reality is that the Second Defendant has undoubtedly received notice of the hearing and all the documents necessary with respect to the CPR Part 71 hearing proposed. As the Second Defendant is a judgment debtor for a substantial amount (even if the Appeal is successful) following the Judgment of Foxton J in which the Second Defendant was found to have acted fraudulently it is apparent that the present application is being made to put

off or delay the Claimants in their lawful endeavours to recover equitable compensation (and costs) due to them. It follows that the Second Defendant's stance is unsatisfactory.

54. In my view Mr Kokelaar's submission as to the curiosity of the application and whether it would be inconsistent to make such an order cannot be accepted. Mr Kokelaar has not pointed to any procedural prejudice which can attach to the Second Defendant if it does proceed and it is difficult to see how there can be any. The power given to the Court is precisely to allow the proceedings to continue without further delay when it is fair to do so. Given the circumstances of these proceedings I have no doubt that this is a proper case in which to make a declaration/order that the steps already taken by the Claimants to effect service of the Part 71 hearing have been sufficient and that no more needs to be done.

Issue 5 – Whether there should be an adjournment of the Part 71 on the 18th January 2023 on medical grounds – the Second Defendant's application dated the 12th December 2022

55. At the hearing I considered the Second Defendant's application for an adjournment of the CPR 71 hearing listed for the 18th January 2023. I was concerned that the evidence provided did not comply with the dicta of Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch), and, given the background to the proceedings including the Second Defendant's apparent underlying unwillingness to attend the Part 71 hearing, I was sceptical about the genuineness of the application. However I did indicate that, if necessary, I could sit in London to hear the Part 71 hearing on Wednesday the 8th of February 2023 and would mark it in my diary as a back-up date. On that basis it was left that if the Second Defendant wished to renew his application he could do so provided that this was made no later than the 29th December 2022 and that I would consider it on the papers available.

Conclusion

56. On the basis of the foregoing I have decided the issues raised as follows:

a. Whether Master Gidden's CPR 71 examination order dated the 11th October 2022 should be set aside on the basis that holding the examination would be "disproportionate and oppressive" to the Second Defendant – The Second Defendant's application dated the 10th November 2022 is dismissed.
b. Whether, alternatively, the Order should be varied as the Second Defendant has suggested. The parties are to prepare a Schedule for the further consideration of the Court with respect to the which questions may be permitted and/or which documents or groups of documents are to be produced by the Second Defendant.
c. Whether Master Gidden's order dated the 12th October 2022 permitting service by alternative means should be set aside. The Second Defendant's application dated the 10th November is dismissed.
d. Whether the steps actually taken by the Claimants to bring the CPR Part 71 application to the attention of the Second Defendant by alternative means amounted to good service and/or that the service of the Part 71 application documents should be dispensed with. The Claimants' application dated the 9th December 2022 succeeds.
e. Whether the CPR Part 71 examination of the Second Defendant to be held on the 18th January 2023 should be adjourned on medical grounds. The application is not, at present allowed, but the Second Defendant has until the 29th December 2022 to renew it.

Dated the 28th day of December 2022