Neutral Citation Number: [2019] EWHC 1280 (QB)

Case No: CL-2017-000142

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 21/05/2019

Before: **CHRISTOPHER HANCOCK QC**
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between:

PUNJAB NATIONAL BANK (INTERNATIONAL) LIMITED	**Claimant**
- and -	
(1) BORIS SHIPPING LIMITED **(2) JARC SHIPPING LIMITED** **(3) ATUL JAIN** **(4) VAIBHAV JAIN** **(5) SIDDHANT JAIN** **(6) SANJEEV JAIN** **(7) NEETA JAIN** **(8) PUSHPA JAIN**	**Defendant**

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Gabriella McNicholas (instructed by **Royds Withy King LLP**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing date: 22nd February 2019

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Judgment Approved by the court

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Christopher Hancock QC

Introduction.

1. There are before me a number of applications, as follows:

   (1) An application for permission to apply for summary judgment, as against the 5th, 6th and 7th Defendants;

   (2) An application for summary judgment against those Defendants;

   (3) An application for permission to apply for summary judgment against the 3rd, 4th and 8th Defendants;

   (4) An application for the abridgement of the notice period required under CPR Part 24.4(3) in respect of the application for summary judgment against these latter Defendants;

   (5) An application for summary judgment against the 3rd, 4th and 8th Defendants.

2. The applications as against the 5th, 6th and 7th Defendants have been referred to as the first summary judgment applications, whilst the applications against the other Defendants have been referred to as the second summary judgment applications. I will refer to the two sets of applications in this way in this judgment.

The general nature of the action.

3. The First Defendant ("**Boris**") is a company registered in the Marshall Islands and the Second Defendant ("**Jarc**") is a company registered in St Vincent and the Grenadines. To the best of PNB's knowledge and belief, Boris and Jarc carried on business purchasing vessels to be broken up in shipyards in India and sold as scrap metal. In 2012 and 2013 they both approached PNB in order to obtain overdraft facilities for working capital requirements, supported by personal guarantees by the third to eighth Defendants, all of whom are connected to Boris and/or Jarc and related to each other: the third and sixth defendants are brothers, the eighth and seventh defendants are their respective wives, and the fourth and fifth Defendants are the respective sons of the two couples.

The banking facilities made available to Boris and Jarc

4. By a Facility Letter dated 15 August 2012 and a facility contract dated 6 March 2013 ("the **Boris Contract**") (as subsequently renewed by Facility Letters dated 27 March 2013 and 12 December 2014 and amended by an Amendment Agreement dated 20 May 2013, supplemental to the Boris Contract) (together "the **Boris Facility Agreement**") PNB agreed to provide an overdraft facility of USD $10 million, subsequently increased

to USD $15 million by the second Facility Letter before being reduced back down to USD $10 million by the Third Facility letter ("the **Boris Overdraft**").

5. By a Facility Letter dated 27 June 2013 and a written facility contract dated 28 June 2013 ("the **Jarc Contract**"), as subsequently renewed and amended by another Facility Letter dated 24 December 2014 (together, "the **Jarc Facility Agreement**") PNB agreed to make an overdraft facility available to Jarc in the initial sum of USD $14 million, subsequently reduced to USD $10 million ("the **Jarc Overdraft**").

6. The relevant terms, in summary, of the Boris Facility Agreement and of the Jarc Facility Agreement are set out in paragraphs 8 and 21 respectively of the Particulars of Claim. Paragraph 8 of the Particulars of Claim states as follows:

> "Pursuant to the Boris Facility Agreement, PNB and Boris agreed (inter alia) that:
>
> a. *An overdraft facility for working capital requirements of USD$10,000,000 would be made available to Boris, subsequently increased to US$15,000,000 and then revised back to US$10,000,000 ("**the Boris Overdraft Facility**");*
> b. *The Boris Overdraft Facility was repayable in full in demand or on the last day of the renewal period (clause 6.1 of the Boris Contract);*
> c. *Interest on unpaid sums borrowed under the Boris Overdraft Facility was to accrue daily and be payable quarterly at a rate of 3 months LIBOR plus 6%, subsequently revised to 3 months LIBOR plus 5.5% (clauses 8.1 of the Boris Contract and the Facility Letter dated 12 December 2014) ("**the Contractual Interest Rate**")*
> d. *Default Interest (the" **Contractual Default Interest**") would accrue at a rate of 2% higher than the Contractual Interest Rate and would be payable (inter alia) in the event of Boris' failure to pay any amount payable by it under the Boris Facility Agreement on its due date or should there be any irregularity in relation to the Boris Overdraft Facility (clause 8.9 of the Boris Contract);*
> e. *There shall be an Event of Default if (inter alia): Boris fails to pay on the due date, in the currency and manner provided in the Boris Facility Agreement, any sum payable (clause 13.1(1) of the Boris Contract); (ii) Boris commits any material breach of any provision of the Boris Facility Agreement which is not remedied within 14 days of being notified (clause 13.1(3) of the Boris Contract; and (iii) any event or circumstance occurs or arises which, in the opinion of PNB, may have a material adverse effect on Boris' or the Boris Guarantors' ability or willingness to perform or comply with any of its obligations under the Boris Facility Agreement (clause 13.1(14) of the Boris Contract). Upon and at any time after the happening of*

a continuing Event of Default, PNB may by notice declare that: (i) any unutilised Facility under the Boris Facility Agreement shall be terminated forthwith; and/or (ii) the Facility has become due and payable (clause 13.2 of the Boris Contract);

f. *The Facility Account shall (save for manifest error) be conclusive evidence of the amount from time to time owing by Boris to PNB under the Boris Facility Agreement (clause 8.10 of the Boris Contract);*

g. *Boris would: (i) on demand indemnify PNB against every loss and expense which PNB may suffer as a result of any default in punctual payment of any money's due or from any accelerated payment (clause 7.1(1) of the Boris Contract and (ii) pay on demand and on a full indemnity basis all costs and expenses (including legal and out of pocket expenses) incurred by PNB in connection with any rights under the Boris Facility Agreement or otherwise in respect of any monies from time to time owing under the Boris Facility Agreement (clause 10.3(2) of the Boris Contract; and*

h. *The Boris Facility Agreement was to be governed by and construed in accordance with English law and the Courts of England were to have jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with the Boris Facility Agreement (clause 17.8(1) and (2) of the Boris Contract). Further, Boris irrevocably appointed Ship and Trade Corporate Services Limited to act as its agent and accept on its behalf any process or other document relating to any proceedings in the English Courts connected to the Boris Facility Agreement (clause 17.8(5) of the Boris Contract).*

7. Paragraph 21 is in exactly similar terms, save that the references to Boris were instead to Jarc.

8. In summary, therefore:

(1) the Boris and Jarc Overdrafts were both repayable on demand and in any event on the last day of the renewal period (clause 6.1 of the Boris and the Jarc Contract);

(2) failure to pay on the due date and any material breach constituted an Event of Default entitling PNB to declare that the Boris Overdraft has become due and payable (clauses 13.1 and 13.2 of the Boris and the Jarc Contract0;

(3) contractual interest was to be charged daily on any sums outstanding at the ordinary rate of 3 months LIBOR plus 5.5%, with a further 2% added as a default rate upon non-payment on the due date or any irregularity (clauses 8.1 and 8.8 of the Boris and the Jarc Contract).

9. As confirmed by Mr Gandhi at paragraphs 9 to 12 and 19 to 22 of his first witness statement and evidenced by the account statements exhibited thereto:

   (1) Boris drew down US $8,521,882.20 of the Boris Overdraft on 27 September 2012, being the principal figure, on which interest has since accrued. The renewal period of the Boris Overdraft expired on 12 December 2015, yet the sum as then outstanding was not repaid.

   (2) Jarc drew down US $13,350,000 of the Jarc Overdraft on 28 June 2013, however the principal amount was subsequently reduced to US $10,000,000, on which interest has since accrued. The renewal period of the Jarc Overdraft expired on 24 December 2015, yet the sum as then outstanding was not repaid.

The Personal Guarantees

10. By separate guarantees contained in deeds dated 20 May 2013, the third, fourth, fifth and sixth Defendants ("the **Boris Guarantors**") each separately indemnified and guaranteed PNB in respect of the Boris Facility Agreement to ensure that PNB continued to make the Boris Overdraft available ("the **Boris Guarantees**").

11. Likewise, by separate guarantees contained in deeds dated 28 June 2013, the sixth, seventh and eighth Defendants ("the **Jarc Guarantors**") each separately indemnified and guaranteed PNB in respect of the Jarc Facility Agreement to ensure that PNB continued to make the Jarc Overdraft available ("the **Jarc Guarantees**").

12. The Boris and Jarc Guarantees are all governed by English law (clause 20.1 of all guarantees) and they contain the following identical provisions regarding the "*Guaranteed Obligations*" (defined in clause 1.1 as all monies, debts, and liabilities of any nature from time to time due, owing or incurred by Boris/Jarc to PNB on any current or other account under or in connection with any present or future banking or credit facilities provided by PNB to Boris/Jarc):

   (1) An obligation as principal obligor to indemnify and keep indemnified PNB in full and on demand from and against all and any losses, costs, claims, liabilities, damages and expenses suffered or incurred by PNB arising out of, or in connection with, any failure of Boris/Jarc to perform or discharge any of its obligations or liabilities in respect of the Guaranteed Obligations (clause 2.2 of the Boris and of the Jarc Guarantees).

   (2) To guarantee, whenever Boris/Jarc does not pay any of the Guaranteed Obligations when due, to pay on demand the Guaranteed Obligations (clause 2.1 of the Boris and of the Jarc Guarantees.

   (3) To pay interest to PNB before and after judgment on all sums demanded at the Contractual Default Interest Rate set out in the Boris/Jarc Facility (clause 4.1 of the Boris and the Jarc Guarantees.

(4) To pay, on a full indemnity basis, all costs and expenses (including legal and out-of-pocket expenses) which PNB incurs in connection with the exercise and enforcement of any rights under or in connection with the Boris/Jarc Guarantee (clause 5 of the Boris and the Jarc Guarantees).

13. As Boris and Jarc Guarantors the third to the eighth Defendants all irrevocably appointed Mr Steven Wilkinson as their agent in the UK to receive service of any proceedings in England (clause 20.3 of the Boris and Jarc Guarantees).

14. The final signature page of each of the Boris and Jarc Guarantees contains a signed statement by a solicitor confirming that the relevant guarantor has been provided with independent legal advice as to the meaning and effect of the contents of the guarantee. The statement also confirms the belief that the document has been executed voluntarily and with understanding of its meaning.

Notices and pre-action communications with the Defendants

15. The Boris and the Jarc Facility Agreements were subject to the jurisdiction of the English Court (clause 17.8 (2) of the Boris and Jarc Contract) and the Boris and Jarc Guarantees are subject to the exclusive jurisdiction of the English Court (clause 20.2 of each of the Boris and Jarc Guarantees).

16. Notices demanding repayment of the outstanding balances under the Boris and Jarc Facility Agreements were sent by letters to the registered address of Boris and Jarc on 28 September 2016 and 26 October 2016. Further letters of demand were sent to Boris and Jarc on 30 January 2017, informing them that the failure to pay constituted an Event of Default and that all amounts owed were immediately repayable under clause 13.2 of each of the Boris and Jarc Facility Agreements.

17. Letters demanding repayment were also sent to each of Boris Guarantors and the Jarc Guarantors on 30 January 2017 by post to their last known address in India; by email to their last known email address; and to Mr Steven Wilkinson by post and by email. No response or repayment was received and Letters before Action were therefore sent to both the Boris and Jarc Guarantors on 6 February 2017.

18. As the sums due under the Boris and Jarc Facility Agreements remained unpaid, this claim was issued on 2 March 2017.

Default Judgment against Boris and Jarc

19. Although both Jarc and Boris filed Acknowledgments of Service indicating that they wished to contest the jurisdiction of the Court, no such application was subsequently made nor was any defence forthcoming and default judgment was granted against both on 25 May 2017. As confirmed by Mr Kapadia at paragraph 39 of his first witness statement, although steps were subsequently taken to enforce the judgment debt these have been to no avail and no money has been recovered to date.

20. A letter was received from Boris and Jarc on 13 November 2017, which recognises that sums are indeed outstanding and seeks to explain why these have not been repaid.

The first summary judgment application, against the 5th, 6th and 7th Defendants.
The issuance of the claim form.

21. A claim form was issued against all the Defendants on 2 March 2017. I understand from paragraph 50 of the first witness statement of Mr Kapadia that a copy of the claim documents was sent to the process agent named in the guarantees, and I have seen a copy of the proof of delivery from the Royal Mail evidencing delivery of those documents. As I have noted, judgment in default was obtained against Boris and Jarc on 25 May 2017.

Service of the claim form.

22. Steps were then taken to serve the claim form on the various guarantors pursuant to the provisions of the Hague Convention on the Service Abroad of Judicial and Extra Judicial documents in Civil and Commercial Matters 1965 ("the Hague Convention"). It will be necessary for me to make further reference to this Convention in due course but, for ease of reference, the most relevant provisions of the Convention for present purposes are the following:

"Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I - JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either -

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with -

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 15

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.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures."

23. India has entered an objection under Article 10, with the result that documents must be served in India via the central authority. The UK, for its part, has made a declaration within Article 15.

24. The claim forms and supporting documentation were delivered to the FPS office at the High Court on 7 March 2017. On 23 March 2017 the requisite N224 forms were submitted to the FPS. The FPS acknowledged service of these documents on 27 March 2017.

25. An application was made to the Commercial Court on 4 August 2017 to extend the validity of the various claim forms, and an order granting an extension up to 1 March 2018 was made on 10 August 2017.

26. The Claimant began receiving notifications as to service towards the end of December 2017.

    (1) By letter dated 30 November 2017 the FPS confirmed that service had been successfully effected on the 5th Defendant on 6 July 2017.

    (2) By letter dated 21 December 2017 the FPS confirmed that service had been successfully effected on the 6th Defendant on 6 July 2017.

    (3) By letter dated 9 February 2018 and documents sent on 24 April 2018, the FPS confirmed that service had been validly effected on the 7th Defendant on 6 July 2017.

27. As regards the first summary judgment application, therefore, the evidence, in my judgment, quite clearly establishes that service was effected, in accordance with the provisions of the Hague Convention, on the 5th, 6th and 7th Defendants, on 6 July 2017.

The application for summary judgment.

28. The period for acknowledgment of service expired 37 days after the service of the Claim form. Thus, in relation to these Defendants, the time expired 37 days after 6 July 2017. This means that time expired on about 15 August 2017.

29. At that point, it was open to the Claimants to apply for default judgment. However, the Claimants did not wish to do so, since they wished, responsibly, to obtain a judgment on the merits, involving a judicial determination. Accordingly, they issued an application for summary judgment against the Defendants who had been validly served pursuant to the Hague Convention (ie the 5th, 6th and 7th Defendants) on the dates set out above.

30. The Claimants then had to meet two requirements.

    (1) First, they had to obtain the Court's permission under CPR Part 24 to apply for summary judgment. It is clear from a number of cases, including the decision of Andrew Baker J in F BN Bank (UK) Ltd v Leaf Tobacco A Michailides SA [2017]

EWHC 3017 (Comm) at [17] that the application for permission can be made at the same time as the application for summary judgment.

(2) Secondly, CPR Part 23 makes clear that the application for summary judgment had to be served on the 5th, 6th and 7th Defendants.

Permission.

31. CPR 24.4(1) provides as follows:

> *"(1) A claimant may not apply for summary judgment until the defendant against whom the application is made has filed – (a) an acknowledgment of service; or (b) a defence, unless – (i) the court gives permission; or (ii) a practice direction provides otherwise*."

32. As confirmed by Andrew Baker QC, as he then was, in *F BN Bank (UK) Ltd v Leaf Tobacco A Michailides SA* [2017] EWHC 3017 (Comm) at [17] and again by Bryan J in *The European Union v The Syrian Arab Republic* [2018] EWHC 1712 (Comm) at [62], there is no requirement for a party to have obtained permission under CPR 24.4(1) before issuing a summary judgment application, rather the two applications may be made in the same notice.

33. As to the principles relevant to the exercise of the Court's discretion, the guidance which can be derived from recent authorities is helpfully listed at paragraph 61 of the judgment of Bryan J in *The EU v The Syrian Arab Republic*, and is as follows:

(1) The purpose of the rule are to ensure that no application for summary judgment is made before a defendant has had an opportunity to participate in the proceedings and to protect a defendant who wishes to challenge the Court's jurisdiction from having to engage on the merits pending such application.

(2) Generally, permission should be granted only where the Court is satisfied that the claim has been validly served and that the Court has jurisdiction to hear it. Once those conditions are met there is generally no reason why the Court should prevent a claimant with a legitimate claim from seeking summary judgment.

(3) The fact that a summary judgment may be more readily enforced in other jurisdictions than a default judgment is a proper reason for seeking permission under CPR 24.4(1).

(4) Here, I am quite satisfied that these conditions are met. The proceedings against these Defendants have been validly served and they have had every opportunity to engage with them. The English Court clearly has jurisdiction to deal with the claim pursuant to the exclusive jurisdiction agreement. This is also a case in which a summary judgment is more readily enforceable than a default judgment. Accordingly, I grant permission for a summary judgment application to be made.

Service.

34. It was accepted, in my view rightly, by the Claimants that the application notice was a judicial document to which the Hague Convention applies. Accordingly, on the face of things, the application notice had again to be served in accordance with the provisions of the Hague Convention.

35. The Claimants, however, chose at this stage, in the light of their previous experience with service of the claim form, to apply to the Court for an order for service by alternative means, under CPR Part 6.15. That application was made on paper and without notice to the Court. The judge, Knowles J CBE, granted the application and made the order sought. However, the judge did not have his attention drawn to a line of authority dealing with the interplay between orders for substituted service and the Hague Convention.

36. This interplay was considered by Popplewell J in the case of Societe Generale v Goldas & Ors [2017] EWHC 667 (Comm), at paragraph 49(9). That summary was affirmed on appeal [2019] 1 WLR 346 and is set out below:

"(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 Convention case: Bank St Petersburg at [26]."

37. The question therefore arises of whether the judge would have made the order that he did had he had his attention drawn to these authorities, and whether, as the Claimants

put it, I should "retrospectively validate" that order. In this regard, Ms McNicholas suggested that there were a number of matters which meant that this case was one which involved exceptional circumstances of the type referred to by Popplewell J in the above case. She relied on the following:

(1) The third to eighth Defendants have all contractually agreed to be served by a method alternative to that set out in the Hague Convention, namely by service on their nominated agent in the UK. The alternative method for which permission was and is sought is more likely to ensure that the Summary Judgment Applications come to the attention of the Defendants than the method they agreed to themselves.

(2) Significant efforts have been made to ensure that the Claim Documents come to the attention of the third to eighth Defendants by personal service in India, their country of residence, pursuant to Article 5 of the Hague Convention.

(3) The time for acknowledging service, and therefore disputing the Court's jurisdiction, has lapsed, at least in the case of the fourth, fifth and sixth Defendants. Furthermore, any application to challenge jurisdiction would have no real prospect of success in light of the fact that they have all submitted to the exclusive jurisdiction of the English Court in their respective deeds of guarantee.

(4) The First Summary Judgment Application does not involve service of originating process and is made in circumstances where PNB is entitled to Judgment in Default (for which no notice would be required: CPR 12.11(4)) because of a belief that it will be more readily enforceable in India.

(5) The third Defendant (the husband of the eighth Defendant and father of the Fourth Defendant) and the Fifth Defendant (the son of the Sixth and Seventh Defendants) both attended the London office of PNB to discuss the liabilities of the guarantors on 8 January 2019. The fact that they were seeking to come to an arrangement for repayment and were informed of PNB's unwillingness to abandon the English proceedings evidences the fact that the debt is not disputed and that the choice not to engage in these proceedings is deliberate, their focus instead being on out of court settlement.

(6) On 3 December 2018, the sixth Defendant (who was served with a letter at his last known address) confirmed receipt thereof by email and requested 25 days' notice of the hearing of the First Summary Judgment Application; he was duly personally served at the same address on 13 December 2018 yet has failed to engage with the proceedings further, despite recent enquires by email.

(7) As for the third and fourth Defendants, as is clear from the second affidavit of service, they are at this stage deliberately seeking to evade service.

38. In my judgment, none of these matters amounts to exceptional circumstances within the meaning of the authorities to which I have been referred. Dealing with each in turn, and concentrating at this stage on the position of the relevant Defendants (ie the 5th, 6th and 7th Defendants):

(1) The fact that the Defendants have agreed to a method of service within the jurisdiction which has not in fact been employed cannot justify a failure to serve outside the jurisdiction in a manner not provided for by the Hague Convention.

(2) Whilst it is true that attempts have been made to draw the relevant documents to the attention of the Defendants, these attempts have been made in a way which the Indian government has indicated, by virtue of its invocation of the right to make a reservation under Article 10, are not to be sufficient.

(3) I am quite prepared to accept that the 3 Defendants in question in relation to the first summary judgment application – ie the 5th, 6th and 7th Defendants – can no longer challenge jurisdiction, if they ever could. However, this has no bearing on the question of whether service of the application notice issued within the English proceedings can be served otherwise than in accordance with the Hague Convention.

(4) The fact that judgment in default would be available is, in my judgment, also immaterial in circumstances in which this is not the relief sought by the Claimant, and indeed is specifically not a form of relief that they wish to obtain. Instead, they wish to obtain summary judgment, and for this purpose the relevant application must be served, and must be served in the appropriate way.

(5) The fact that the Defendants have been willing to discuss settlement of the debt again does not, in my view, excuse compliance with the necessary procedural requirements in relation to service.

(6) The fact that the 6th Defendant has responded to the service of the document, in December 2018, cannot, in my view, justify retrospectively the making of an order against all three Defendants. I consider below whether it would justify an order for alternative service going forward. This does not show that, as at November 2017, there were exceptional circumstances justifying an order allowing service other than in accordance with the Hague Convention.

(7) Finally, as regards the evidence of evasion of service, this does not apply to the 5th, 6th and 7th Defendants and again it postdates the making of the order. It cannot therefore justify the making of that order.

39. Accordingly, I conclude that the order for service by alternative means should not have been made, and I set it aside. I am quite satisfied that, had the judge been directed to the relevant authorities, he would not have made the order. That in turn means that the service in fact effected in reliance on that order is not valid.

40. There is also evidence before me (in the form of witness statements of Mr Kapadia, a senior associate at the Claimant's solicitor and Mr Gandhi, a banker employed by the Claimant) that proves that the Claim documents were served in England personally on the third Defendant. However, as I understand it, the application notice was not in the documents so served; and the fifth Defendant, although at the meeting, was not served,

although he will have thereby received notice of the claim documents with which he had already been served in India.

41. I have also considered whether I should make an order now for service of the application notice by alternative means in the future. That involves consideration of the question of whether there are now shown to be exceptional grounds, viewed as at today's date, which justify an order for such alternative service. The further grounds, as at today's date, which might be said to be exceptional in relation to these Defendants are the fact that the sixth Defendant has now responded to the document; and the fact that the fifth Defendant has taken part in settlement discussions.

42. Again, I do not think that these points amount to exceptional circumstances justifying service other than in accordance with the Hague Convention in India on these two Defendants. Each might be relied upon in support of the submission that service is not necessary, but no such application is made.

43. To summarise, therefore, in relation to the first summary judgment application:

(1) I am satisfied that the claim forms have been validly served in accordance with the provisions of the Hague Convention.

(2) The relevant period for the filing of a defence or acknowledgement of service disputing jurisdiction has expired, and no such defence or acknowledgement of service has been filed.

(3) It was therefore open to the Claimants to either enter default judgment or make application for a summary judgment. They chose to do the latter.

(4) I give permission for such application to be made.

(5) However, on the face of things, that application had to be served in accordance with the provisions of the Hague Convention.

(6) Instead, the Claimant chose to apply for an order for service by alternative means. Such an order should only be granted where there are exceptional circumstances; but the judge was not directed to the line of authority which establishes this.

(7) Here, there were and are in my judgment no exceptional circumstances. Had the judge been apprised of the relevant test, I am satisfied that he would not have made the order. Accordingly, I set aside that order.

(8) The service in fact effected in reliance on that order is therefore not good service.

(9) There are in my judgment no exceptional circumstances as at today's date.

44. Accordingly, it is open to the Claimant to continue its application for summary judgment but it must serve that application. It may choose to do so in the jurisdiction, in reliance on the contractual agreement in relation to service; or outside the

jurisdiction, pursuant to the Hague Convention. It will be a matter for the Claimant as to which course to take.

The second summary judgment applications, against the 3rd, 4th and 8th Defendants.

45. I turn to the second summary judgment applications.

Service of the claim form.

46. The start point here is the fact that, unlike the claim forms in relation to the 5th, 6th and 7th Defendants, the claim forms in this regard were not successfully served in accordance with the Hague Convention. In this regard:

(1) A report dated 7 July 2017 states that the bailiff unsuccessfully attempted to serve the 3rd Defendant on 6 July 2017. Notice of this fact was only received by the Claimant on 23 April 2018.

(2) A report dated 6 July 2017 stated that the bailiff unsuccessfully attempted to serve the 4th Defendant on 6 July 2017. A certificate of unsuccessful service was received from the FPS on 30 November 2017, but the relevant supporting documents were not received until 2 February 2018.

(3) On 9 November 2017 the Claimant received a letter from the FPS confirming that service on the 8th Defendant had been unsuccessful.

47. Efforts to serve in accordance with the Hague Convention continued, despite this, but in addition an application for service by alternative means was made by Knowles J along with the application to serve the application notice against the 3rd, 4th and 8th Defendants which I have considered above. As at the date of that application, there were, in my judgment, no exceptional circumstances which would justify the making of an order for service of the Claim Documents by alternative means. In this regard, I would reiterate what I have said above. The only difference between the position of the Defendants who have been served with the claim form and those who have not is that service of that document has not yet been successful. It was argued before me that these Defendants are evading service, based on the second Affidavit of Service. I am not convinced that this, at least at present, amounts to an exceptional circumstance, although it may become so.

48. Returning to the position under the Hague Convention, then the following further events occurred:

(1) The validity of the claim forms was extended to December 2018 by order made in February 2018, and then again (by order dated November 2018) to 1 June 2019.

(2) Documents were lodged again with the FPS on 23 March 2018.

(3) Acknowledgment letters were received from the FPS dated 23 November 2018 relating to the 4th and 8th Defendants; this did no more than acknowledge matters, and contained no update on service.

(4) No further update has been received in relation to the progress of service pursuant to the Hague Convention.

49. This leads to the necessity to consider Article 15 of the Hague Convention, as set out above. In this regard, the Claimant submits that:

(1) The documents were transmitted abroad for service in accordance with the Hague Convention, and the evidence establishes that service of the documents has been effected on the 3rd, 4th and 8th Defendants in accordance with the internal law of India (albeit not by the central authorities), so that the conditions laid down in the first paragraph of Article 15 are satisfied; and/or

(2) Despite the fact that no certificate of successful service has been received, the document has been transmitted, a period of 6 months has elapsed, and reasonable efforts have been made to obtain a certificate, so that the conditions laid down in the second paragraph of Article 15 are satisfied.

50. I will deal with each of these submissions in turn.

51. As to the first limb of Article 15, in my judgment the following needs to be shown:

(1) The document in question (here the claim form) was transmitted in accordance with the Hague Convention. Here, the document was so transmitted, on the second occasion, in March 2018, as I understand matters.

(2) The Defendants have not appeared – this is clearly established.

(3) The documents in question have been served in accordance with Indian law. I have been shown evidence of service and the opinions of Indian lawyers which show this. However, what I have not seen is any evidence that this service was made by the authorities designated under the Hague Convention. I return to this subject below.

(4) The Defendants have had sufficient time to engage with the action and to properly defend this action. I am quite satisfied that this is the case. Not only were the Defendants served in accordance with local law some time ago (on 13 December 2018, as I understand it, when the documents were left with the wife of one of the Defendants, a method of service which is valid under Indian law) but various of the Defendants have made clear that they know of the proceedings and have indeed taken steps to seek to resolve them.

52. Overall, I would be prepared to hold that, despite the fact that the service here was not effected by the Indian central authorities, it suffices to satisfy the provisions of Article 15 of the Hague Convention. However, I do not base my decision on this. Instead, I turn to the second part of Article 15.

53. Under this heading, the following must be established:

(1) The document must have been transmitted by one of the methods provided for in the Hague Convention;

(2) A period of not less than six months, considered sufficient by the judge, has elapsed since the transmission of the document; and

(3) No certificate of any kind has been received, even though every reasonable effort has been made to obtain it.

54. In my judgment, the requirements set out above are here clearly satisfied. The documents have been sent to the FPS; a period of about 12 months has elapsed since then; and no certificate has been obtained, despite reasonable efforts to obtain such.

55. It would be open therefore to me to give judgment. However, it is also open to me to conclude that the claim documents have indeed been served, and thus that it is now open to the Claimant to seek summary judgment. I do so conclude.

56. Since the hearing of this matter, and whilst I was finalising this judgment, I am informed that the Claimant's solicitors received (on 30 April 2019) a notice from the FPS dated 29 April 2019, confirming that the 3rd Defendant had been served in accordance with the Hague Convention on 12 December 2018. The period for acknowledgment of service, which was 37 days, expired on 18 January 2019.

57. Whilst this reinforces my view that the 3rd Defendant has been validly served, it does not detract from my conclusion as set out above, namely that as at the date of the hearing, I was entitled to conclude, pursuant to Article 15 of the Hague Convention, that the 3rd, 4th and 8th Defendants had been validly served.

Permission to apply for summary judgment.

58. Again, I conclude that this is clearly a proper case in which to give permission to apply for summary judgment and I do so, for the same reasons as I have set out in relation to the first summary judgment application.

Service of the application notice seeking the second summary judgment order.

59. In the same way as I have indicated in relation to the application notice as regards the first summary judgment application, it is necessary for the Claimants to serve the application notice in relation to the second summary judgment application.

60. As I have already noted, this may be served pursuant to the Hague Convention or by service on the process agent within the jurisdiction. This is a matter for the Claimant.

Abridgment of time for notice of hearing.

61. In view of my decisions above, this point does not arise.

Summary of conclusions in relation to the second summary judgment application.

62. My conclusions are as follows:

(1) The claim forms have been validly served on these Defendants.

(2) I give permission for the Claimant to apply for summary judgment against these Defendants.

(3) I hold that the application for summary judgment has not yet been served on these Defendants.

(4) The application will thus have to be served on these Defendants. This may be either pursuant to the Hague Convention or via the agent for service within the jurisdiction. It is up to the Claimant to decide which method is to be used.

63. I would be grateful if Counsel would draw up an order reflecting my decision.