IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO.: FSD 50 of 2022 (DDJ)

BETWEEN

JUAN ENRIQUE RASSMUSS RAIER

Plaintiff

- and –

(1) LUIS EDUARDO CORREA

(2) PACIFIC OVERSEAS FINANCIAL CORPORATION

(3) PACIFIC OVERSEAS ENTERPRISES LIMITED

(4) PACIFIC OVERSEAS INVESTMENTS LIMITED

Defendants

Appearances:	Jalil Asif KC and Pamella Mitchell of Kobre & Kim (Cayman) on behalf of the Plaintiff
	Richard Morgan KC, Richard Annette and Adam Russell-Knee of Stuarts Walker Hersant Humphries on behalf the First, Third and Fourth Defendants
Before:	The Hon. Justice David Doyle
Heard:	24 and 25 May 2023
Draft Judgment Circulated:	2 June 2023
Judgment delivered:	9 June 2023

HEADNOTE

Discharge of ex parte orders granted following failures in respect of the duties of full and frank disclosure of material facts and fair presentation

JUDGMENT

Introduction

1. It is important that applicants for judicial relief on an *ex parte* basis make full and frank disclosure of all material facts and make a fair presentation of the case. Judges are heavily reliant on attorneys, as officers of the court, complying with their onerous duties in respect of *ex parte* applications. If there are serious failings in respect of such duties to the Court, any orders made at the *ex parte* hearing may be discharged and they may not always be regranted.

2. On 16 March 2022, the Writ of Summons in these proceedings was issued. On considering an *ex parte* summons of the Plaintiff dated 11 May 2022, the evidence and a skeleton argument dated 25 May 2022 on the papers as requested by the Plaintiff's attorneys, the Court by Order made on 25 May 2022 gave the Plaintiff permission to serve certain documentation including the pleadings, evidence and Order upon the First Defendant out of the jurisdiction at two addresses in Chile pursuant to Grand Court Rules Order 11 r 1 and 4 (the "First Defendant Service Out Order").

3. On 12 October 2022, pursuant to various applications, the Court made the following Orders in favour of the Plaintiff without notice to the Defendants, in accordance with the usual procedure:

   (1) an Order granting leave to the Plaintiff to serve certain documentation including pleadings, evidence and Orders on the Third Defendant out of the jurisdiction (the "Third Defendant Service Out Order");

   (2) an Order granting the Plaintiff permission to serve the First Defendant with certain documentation including pleadings, evidence and orders by way of substituted service on (a) Stuarts Walker Hersant Humphries Cayman attorneys (b) by electronic mail and (c) by

way of courier or other form of certified delivery to two addresses in Chile (the "First Defendant Substituted Service Order");

(3) an Order granting the Plaintiff permission to serve the Third Defendant with certain documentation including pleadings, evidence and Orders by way of substituted service (the "Third Defendant Substituted Service Order"); and

(4) an Order extending the validity of the Writ of Summons issued on 16 March 2022 to 13 January 2023 (the "Extension of Validity of Summons Order").

4. These Orders were made for the brief reasons specified in an *ex tempore* judgment delivered on 12 October 2022.

5. In short summary, in respect of the Extension of Validity of Summons Order, I referred to *Weavering* 2014 (1) CILR 296, *Davidson* 2013 CICA J1106-1 and Roye on *Civil Litigation in the Cayman Islands* (3rd edn) 2016 at p13. I noted Mr Asif's submission that there was "no live limitation issue in this case." I considered the evidence and noted the difficulties in respect of service. At paragraphs 15, 16 and 17 I stated:

> "15. …I am satisfied in the circumstances of this case that there are good reasons for an extension. On the basis of the evidence presently before the court, the first defendant is attempting to evade service, and I note the difficulties in finding and serving the third defendant since its move from Cayman, which I infer was to make life difficult for the plaintiff. There is sufficient evidence to justify the court finding good reasons for an extension, and I so find.
>
> 16 It is unfortunate that the plaintiff did not discover the third defendant's changed location and make an application for service out earlier, and it is unfortunate that the applications for the extension were not filed well before 14 September 2022, but I do not think that these two factors militate against this court exercising its discretion in favour of the plaintiff.
>
> 17 I have considered the balance of hardship and, on the basis of the evidence and the submissions presently before the court, have concluded that it favours an extension of the writ. The claim should be heard on its merits. It would be a waste of time

and costs to refuse to extend the validity of the writ and instead leave the plaintiff to issue a fresh writ and pursue his claims in that action. I am satisfied that the plaintiff has provided satisfactory explanations as to why he has not served the writ on all defendants within its original validity. Again, I have regard to the apparent evasive conduct of the first defendant and the difficulties in ascertaining the changed whereabouts of the third defendant. All these factors go to establish good reasons and drive me to exercise my discretion in favour of the plaintiff. In all the circumstances of this case and taking into account the overriding objective, I am willing, on the basis of the facts and arguments presently put before the court, to grant an extension."

6. In short summary in respect of the First Defendant Substituted Service Order, Third Defendant Substituted Service Order, and the Third Defendant Service Out Order I referred to the evidence, the submissions and the relevant law including in respect of substituted service *MaplesFS Limited* (14 July 2022 unreported judgment) and in respect of service out *Aspect Properties Japan* (unreported judgment 27 April 2022). I stated:

> "20 I am satisfied that personal service on the first defendant is impracticable. I note the likely lengthy delay, the litigation prejudice, and the evidence to the effect that the first defendant may be endeavouring to evade service. It appears impracticable to effect personal service on the first defendant. The steps to be taken to effect service do not appear to be contrary to the general law of the country where they are to be taken. The plaintiff says that Stuarts have represented the first defendant, and Stuarts presently represent the fourth defendant, which is stated to be controlled by the first defendant. The addresses specified are the residential and business addresses of the first defendant. The email address specified is stated to be the email address that the first defendant has used in the past and may still be using. I am satisfied that the proposed steps are reasonably likely to bring the documents to the notice of the first defendant and are otherwise appropriate.
>
> 21 I note that the plaintiff intends to serve the third defendant via the registered agent or in the registered office in Barbados, and I further note that, if successful, this will be effective service on the third defendant. I note the likely litigation prejudice

and the submissions in respect of the re-domiciliation of the third defendant to Barbados. I note also the submission, supported by some evidence, albeit from a local attorney engaged in the case, that service of process in Barbados through the Hague Convention is estimated to take 9 to 12 months.

22 On a largely pragmatic basis, I am content also to make an order for substituted service in respect of the third defendant. These proceedings must be progressed against all defendants and dealt with on their merits in accordance with the overriding objective. I am satisfied that personal service is impracticable and that the proposed steps do not appear to be contrary to the law of the country where they are to be taken. Moreover, the proposed steps are reasonably likely to bring the documents to the notice of the third defendant.

23 I am also willing to give the plaintiff permission to serve the third defendant out of the jurisdiction under gateway (c), "necessary or proper party". I am satisfied that there are serious issues to be tried on the merits and that the plaintiff has a good arguable case on the jurisdictional gateway. I am also satisfied that, in all the circumstances, the Grand Court is clearly or distinctly the most appropriate forum for the trial of the dispute and that, in all the circumstances, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. The claim relates to shares in the second defendant, a Cayman Islands company, and concerns the first defendant's duties as the director of Cayman Islands registered companies.

24 On the information and evidence presently before the court, the Cayman Islands is the jurisdiction in which the case would most suitably be tried in the interest of all the parties and to meet the ends of justice. See para.14, the judgment of Judge of Appeal, Alan Moses, in *Ritchie Capital*, unreported, 18 July 2022, Cayman Islands Court of Appeal. So I am content in principle to grant the relief."

The subsequent summonses

7. By summons dated 25 November 2022 the Fourth Defendant sought Orders that the Writ of Summons against the Fourth Defendant be struck out under Order 18 rule 19 (1) (a) and the Plaintiff do pay the Fourth Defendant's costs on the indemnity basis (the "Strike Out Summons"). The grounds for the Strike Out Summons were not stated in the Strike Out Summons.

8. By summons dated 25 November 2022 and amended on 9 December 2022 (the "First Defendant's Amended Summons") the First Defendant sought the following Orders:

   (1) the Writ of Summons and the Statement of Claim and service thereof be set aside;

   (2) a declaration that the Writ of Summons has not been duly served on the First Defendant;

   (3) the First Defendant Service Out Order be discharged;

   (4) the First Defendant Substituted Service Order be discharged;

   (5) the Extension of Validity of Summons Order be discharged;

   (6) a declaration that all documents purportedly served on the First Defendant pursuant to the First Defendant Service Out Order and/or the First Defendant Service Out Order have not been duly served on the First Defendant;

   (7) a declaration that the Court has no jurisdiction over the First Defendant in respect of the claims and the relief sought; and

   (8) indemnity costs against the Plaintiff.

9. This time the grounds of the First Defendant's Amended Summons were stated in the Summons albeit on occasions in somewhat vague generalised and purportedly "non-exhaustive" terms:

(1) in respect of the First Defendant Service Out Order "the methods proposed were contrary to Chilean Law";

(2) the Plaintiff failed in his duty of full and frank disclosure and fair presentation and as a result the Court was materially misled;

(3) in respect of the First Defendant Substituted Service Order:

(a) the Plaintiff failed to show why substituted service was justified;
(b) the Plaintiff did not show that personal service on the First Defendant was impracticable; in particular there was no justification for the Plaintiff having presented himself in evidence as in any way uncertain or confused about the First Defendant's whereabouts and/or there was no justification for an inference that the First Defendant sought to evade service of the proceedings;
(c) the methods of service were contrary to the law of Chile;
(d) the Court should not have exercised its discretion to grant substituted service; and
(e) the Plaintiff failed in his duty of full and frank disclosure and fair presentation in that he failed to disclose fully and fairly the facts and matters set out in the application or to present them fairly to the Court.

(4) In respect of the Extension of the Validity of the Summons Order:

(a) the Court should not have exercised its discretion to grant the Order;
(b) the Plaintiff failed to show any good reason why the Order should be granted;
(c) the Plaintiff did not act promptly in seeking to serve the Writ of Summons;
(d) the alleged claims against the First Defendant are limitation barred and/or barred by equitable defence; and
(e) the Plaintiff failed in his duty of full and frank disclosure and fair presentation in that he failed to disclose fully and fairly the facts and matters set out in his application or to present them fairly to the Court.

10. The First Defendant seeks to list in a "non-exhaustive way" the alleged failures. Where there are applications to discharge orders on the basis of a failure in the duty of full and frank disclosure and fair presentation, the precise grounds of such applications and all the specific failings relied upon should be set out in the application. In this way the recipient of such an application will know what case he has to meet and the Court will know exactly what issues it has to determine. It is unsatisfactory and unhelpful to seek to plead in a "non-exhaustive" way and only set out the "key failures" or the "principal areas" in respect of which complaint is made. All the failures relied upon must be specifically pleaded. The authorities make it plain that a scattergun approach is not appropriate.

11. The following is alleged in the First Defendant's Amended Summons:

(a) the Court was not given any full and frank, or fair, explanation of the evidence and correspondence between the representatives of the Plaintiff and the First Defendant and the parties themselves since 2016 concerning the dispute as to the ownership of the shares in the Second Defendant, such that any concerns as to the "tipping off" the First Defendant relied on by the Plaintiff in obtaining the Orders dated 12 October 2022 were obviously unjustified;

(b) there was no fair presentation of the evidence relating to the First Defendant's whereabouts, which were known or ought to have been known to the Plaintiff;

(c) there was no fair presentation of the evidence relating to the alleged evasion of service by the First Defendant and/or the impracticability of personal service on the First Defendant; alleged evasion of service, alleged delay and litigation prejudice formed a central part of the Court's decision in relation to the First Defendant Substituted Service Order and the Extension of Validity Summons Order but none of these would have been made out had it been fairly presented in the Court;

(d) the Plaintiff did not disclose or explain fairly to the Court that the proposed methods of substituted service or the First Defendant were contrary to Chilean law; and

(e) there was no or no proper analysis of the claims made against the First Defendant, such that the issues relating to potential defences of limitation (under sections 27 and/or 42 or any other provision of the Limitation Act 1996) and laches in relation to the derivative claim alleged against the First Defendant were not properly identified or explained fairly to the Court.

12. By Summons dated 25 November 2022 and amended on 9 December 2022 (the "Third Defendant's Amended Summons"), the Third Defendant sought the following Orders:

(1) the Writ of Summons and Statement of Claim and service thereof be set aside;

(2) a declaration that the Writ of Summons has not been duly served on the Third Defendant;

(3) the Extension of Validity of Summons Order be set aside and a declaration that the Writ of Summons was a nullity when purportedly served on the Third Defendant on or around 28 October 2022;

(4) the Third Defendant Service Out Order be discharged;

(5) the Third Defendant Substituted Service Order be discharged;

(6) a declaration that all documents purportedly served on the Third Defendant pursuant to the Third Defendant Service Out Order and the Third Defendant Substituted Service Order have not been duly served on the Third Defendant;

(7) a declaration that the Court has no jurisdiction over the Third Defendant in respect of the claims and/or relief sought; and

(8) the Plaintiff do pay the Third Defendant's costs on the indemnity basis.

13. The Third Defendant relies on the following grounds:

(1) in respect of the Third Defendant Service Out Order;

(a) the Plaintiff has no good cause of action against the Third Defendant and in any event the relief sought as to the Third Defendant's share register is a matter for the Barbados Court and a matter of Barbados law;

(b) the Plaintiff's case against the Third Defendant was not and is not within the jurisdictional gateway set out in Order 11 rule 1 (1) (c): the Third Defendant was and is not a necessary or proper (I think the word "property" at paragraph 9.1(b) of the Third Defendant's Amended Summons is a typographical error) party to any

claim made against any other defendant(s) which has/have been or will be duly served on any of those other Defendants;

(c) the methods of service proposed by the Plaintiff and granted by the Court were not in accordance with Barbados law (now abandoned);

(d) the method of service used by the Plaintiff by way of purported service on or around 28 October were not in accordance with Barbados law (now abandoned);

(e) the case is not a proper one for service out on the Third Defendant and/or the Court should not have exercised and should not exercise its discretion to permit service on the Third Defendant out of the jurisdiction;

(f) the Plaintiff failed in his duty of full and frank disclosure and fair presentation and as a result the Court was materially misled.

(2) In respect of the Third Defendant Substituted Service Order:

(a) the Plaintiff failed to show any or any proper reason why substituted service was justified;

(b) the Plaintiff did not show that personal service on the Third Defendant was impracticable in particular (i) there was no attempt to serve the Third Defendant in accordance with Barbados law prior to the Plaintiff's application for substituted service (ii) there was and is no justification for the Plaintiff having presented himself in evidence as in any way uncertain or confused about the whereabouts of the First Defendant as director of the Third Defendant and/or (iii) there was and is no justification for the inference that the First Defendant, as director of the Third Defendant, sought to evade service of the proceedings;

(c) the methods of service ordered by the Court and the method used by way of purported service on or around 28 October 2022 were not in accordance with the requirements for service of local process in Barbados (now abandoned);

(d) the Court should not have exercised its discretion to grant substituted service; and

(e) the Plaintiff failed in his duty of full and frank disclosure and fair presentation.

(3) In relation to the Extension of Validity of Summons Order:

(a) the Court should not have exercised its discretion to extend the validity of the Writ of Summons;

(b) the Plaintiff failed to show any good reason why the validity of the Writ of Summons should have been extended;

(c) the Plaintiff did not act promptly in seeking to serve the Writ of Summons on the Third Defendant;

(d) the Plaintiff did not give a satisfactory explanation as to why he did not serve the Writ of Summons on the Third Defendant within the period of the original validity;

(e) insofar as any relief is sought against the Third Defendant (which is not accepted) the cause of action is limitation barred and/or barred by equitable defences;

(f) the Plaintiff had no good reason for failing to serve the Writ of Summons during its original period of validity;

(g) when the Plaintiff purported to serve the Writ of Summons on or around 28 October 2022, the Writ of Summons had expired and should not have been extended and was, accordingly, on that date a nullity; and

(h) the Plaintiff failed in his duty of full and frank disclosure and fair presentation.

14. The Third Defendant relies on the following:

(a) there was no analysis of the evidence or the written or oral submissions on the following: (i) good cause action (ii) good arguable case on any jurisdictional gateway;

(b) the governing law and appropriate forum for any relief in respect of the share register of the Third Defendant would arguably be Barbados not the Cayman Islands;

(c) the Court was not given a full, frank or fair explanation of the evidence and/or correspondence between the representatives of the Plaintiffs and the First Defendant (director of the Third Defendant) and the parties themselves since 2016 concerning the dispute as to ownership of the shares in the Second Defendant, such that any concerns as to "tipping off" of the First and/or Third Defendant were unjustified;

(d) there was no fair presentation of the evidence relating to (i) attempts to serve the Third Defendant in Barbados in accordance with Barbados law prior to seeking the Third Defendant Substituted Service Order (ii) the alleged evasion of service by the First or Third

Defendant (iii) the alleged confusion/uncertainty of the Plaintiff as to the First Defendant's whereabouts (iv) the impracticability of personal service on the First Defendant or the Third Defendant (v) the alleged difficulties in locating the Third Defendant in Barbados (vi) the alleged evasion of service, delay and litigation prejudice formed a central part of the Court's decision in relation to the Third Defendant Substituted Service Order and the Extension of the Validity of Summons Order but none of these were made out on the evidence or would have been had it been fairly presented to the Court;

(e) the Plaintiff did not disclose or explain fairly to the Court that the proposed methods of substituted service on the Third Defendant were not methods recognised for service of local proceedings under Barbados law (now abandoned);

(f) there was no full and frank disclosure or fair presentation of any possible legitimate reasons as to why the Third Defendant was redomiciled to Barbados from the Cayman Islands;

(g) there was no or no proper analysis of the claims made against the Third Defendant such that the issues relating to potential defences of limitation and/or laches were not properly identified or explained to the Court.

15. The Third Defendant says at paragraph 9.5 of the Third Defendant's Amended Summons that it was unreasonable for the Plaintiff to obtain the orders he obtained against the Third Defendant and "he should be required to pay the Third Defendant's costs on the indemnity basis of dealing with those orders."

16. In *Wang v Credit Suisse AG* (FSD unreported judgment 8 April 2022) I referred to the relevant law in respect of the duty to make full and frank disclosure of material facts in *ex parte* applications and the proper approach to discharge applications. At paragraph 32 I stated:

> "32. In the context of the cases presently before the court the following points are particularly noteworthy:
>
> (1) the duty of the applicant is to make full and frank disclosure of all material facts. Full disclosure is linked with fair presentation;
>
> (2) an applicant must make reasonable proper enquiries before making the application and address any likely defences but does not need to provide a detailed analysis of every possible point which may arise. An applicant

does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if they were present, especially when facts are disputed. Material points however should not be buried in a mass of material;

(3) this judge-made rule (which is essentially penal) cannot be allowed itself to become an instrument of injustice;

(4) in heavy commercial cases the borderline between material facts and non-material facts maybe a somewhat uncertain one and the application of the principle should not be carried to extreme lengths;

(5) a due sense of proportion must be kept and sensible limits have to be drawn especially in complex and heavy commercial cases where applicants may be attempted to abuse the principle and take an inappropriate scattergun approach;

(6) a dispute about disclosure should not be allowed to turn into a mini-trial of the merits; and

(7) it is normally inappropriate to base a discharge application on disputed facts which are properly reserved for the trial itself."

17. For a recent application of the relevant law see also *Piroozzadeh v Persons Unknown* [2023] EWHC 1024 (Ch). Trower J, in the context of an injunction restraining dealings with the claimant's cryptocurrency, at paragraph 19 referred to an applicant's "duty to make a fair presentation of the case at the without notice hearing" and added:

"19 …The duty to do so when applying without notice is trite law and is well recognised by numerous authorities. In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, Bingham J summarised the position as follows. He said that an applicant must show the utmost good faith and disclose his case fully and fairly. He must identify the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents.

He must investigate the nature of the cause of action asserted and the facts relied on before applying for relief and he must identify any likely defences.

20 In the *Pugachev* case [2014] EWHC 4336 (Ch) at paragraph 171, Mann J said in a passage with which I agree:

> "The obligation to anticipate defences in pursuit of an obligation to make full and frank disclosure is very important. An Applicant for without notice relief has actively to consider what points of defence might be taken by the defendant and put them before the court. That is a fundamental requirement and safeguard."

21 I also agree with the submission made by Mr Quest that it is not sufficient for the applicant in these circumstances to rely on the judge. One helpful illustration of the reason for this is given by Popplewell J in the case of *Fundo Soberano De Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm) at paras 51 to 53 where he said the following, a statement of general principle which will chime with any judge faced with granting injunctive relief on without notice applications:

> "The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.""

18. At paragraph 35 Trower J refers to the normal consequences of a failure of the full and frank and fair presentation duties, namely that the *ex parte* order will be discharged but the Court retains a discretion to continue or regrant the order:

"… But before it does so, there are a number of factors it must take into account which include the importance of the non-disclosure to the issues before the judge, the need to encourage compliance, the extent of any culpability and the injustice to the claimant which may occur if an order is discharged. Those principles were set out in para. 7(xii) of the judgment of Carr J in *Tugushev v Orlov* [2019] EWHC 2031 (Comm), a judgment which in the remainder of para. 7 provided a helpful distillation of the relevant authorities on the issue of fair presentation."

19. Paragraphs 7 and 8 of *Tugushev* read as follows:

"7. The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:

i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;

ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need

not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to

dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.

(See in particular *Memory Corporation plc and another v Sidhu and another* (No 2) [2000] 1 WLR 1443 at 1454 and 1459; *Behbehani v Salem* [1989] 1 WLR 723 at 735 and 730; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 at [62]; *Bank Mellat v Nikpour* [1985] FSR 87 at 89 and 90; *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] and [42] to [46]; *Todaysure Matthews Ltd v Marketing Ways Services Ltd* [2015] EWHC 64 (Comm) at [20] and [25]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2018] 2 WLR 1125 at [71] and [73]; *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at [45]; *PJSC Commercial Bank PrivatBank v Kolomoisky and others* [2018] EWHC 3308 (Ch) at [72] and [73] to [75]; *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [18] to [21]); *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch) at [203].)

8. There is no suggestion that the same principles do not apply to a without notice application for permission to serve out as they do on a without notice application for a freezing order (as confirmed for example in *PJSC Commercial Bank PrivatBank v Kolomoisky and others* (supra) at [169] and *Sloutsker v Romanova* [2015] EWHC 545 (QB) at [52]) ."

20. Parties and their attorneys have been warned in the past over the need to strictly comply with their onerous duties of full and frank disclosure and fair presentation at *ex parte* hearings. An aggressive, over-zealous, one-sided unbalanced approach is not appropriate. Parker J in *Ritchie Capital Management LLC v Lancelot Investors Fund Limited* 2021 (1) CILR 128 (footnotes omitted) stated:

Full and frank disclosure

271 The final argument advanced by GE is that, irrespective of whether or not Ritchie has established a proper case for service of these proceedings on GE out of the jurisdiction, it failed at the *ex parte* application to comply with its duty to give full and frank disclosure and to make a fair presentation, which were sufficiently serious failures to justify setting aside the service out order in any event.

Legal principles

272 A court, in order to ensure fairness, usually proceeds by hearing both sides, for obvious reasons. There are well known exceptions relating to urgency and secrecy. One of the procedural exceptions is where leave is sought to serve a foreign defendant out of the jurisdiction.

273 Applicants seeking permission to serve proceedings out of the jurisdiction without notice are required to give full and frank disclosure. This imposes a duty that can be challenging for an applicant, but it is very important that it is complied with. Individuals and entities are brought into the jurisdiction without any opportunity to show why that should not be the case. As has been demonstrated in the present case, they are then exposed to very considerable resource expenditure and delay to bring forward an application to set jurisdiction aside.

274 Therefore the duty is very important and it is broad. It extends to disclosure of all facts which reasonably would or could be taken into account by the judge in deciding whether to grant the application. Such material facts extend beyond those which are actually known to the applicant and include matters which he would have known had he made proper enquiries. The duty is that of the applicant and its legal advisers.

275 In the context of the application for leave to serve proceedings out of the jurisdiction in this case, whether or not the claims had a realistic prospect of success against Lancelot and GE, whether GE was a necessary and proper party to the claims against Lancelot, issue estoppel and the appropriate forum are all issues pursuant to which the question of materiality is to be judged.

Application

276 The key question is whether the presentation of the application was fair in all material respects.

277 In a complex case such as this, the task of the judge in making a decision on a without notice basis is difficult one, and the court relies on the applicant making a fair and even-handed presentation.

278 It is important that the application is balanced and not presented in a way which taken as a whole is unfairly one-sided, self-serving or misleading. It is not enough, for example, if disclosure is made in some part and the judge is then invited to read other parts in full, if points of defence or difficulty to the applicant are not properly presented and their significance explained to the court.

279 The applicant has a duty to signal and explain the relevant legal tests, defence arguments and relevant evidence in a fair and balanced way. That includes pointing out material flaws and difficulties with the applicant's case.

280 The consequence of a finding of material non-disclosure at a without notice hearing is to deprive the plaintiff of any advantage derived, which means that the order granting leave will be set aside …

Analysis

Key principles

282 The key question is, applying the legal principles above, whether the presentation made to the court was fair in all material respects.

283 In this regard, it is important to bear in mind that the presentation will not be fair if it is not balanced. That means that there must be disclosure of a material flaw or difficulty that could be taken against it, even if on the applicant's case it is without merit.

284 Properly alerting the court to the existence of a material counter-argument irrespective of whether the applicant considers it to be well founded is important. The court is typically not in a position to conduct the analysis itself. The applicant should not make the determination based solely upon its own views and should err on the side of caution.

285 Moreover, the issue needs to be properly and fairly explained to the court. The court needs to be given the essentials of the argument that could be taken against it by an applicant and then doing the best it can, the applicant needs to show how it might reasonably be argued if the defendant were present.

286 This is so that the court can make a balanced and fair assessment of the defence case and properly exercise its discretion having considered all material facts relevant to the issues. As I have said the court places significant reliance on the applicant and its legal team to comply with this obligation in the absence of the putative defendant in complex cases."

21. Sir Alan Moses JA with whom C Dennis Morrison, JA, and President Sir John Goldring agreed in refusing leave to appeal on 18 July 2022 stated:

"25. During the course of the hearing, I raised the question whether the duty of disclosure was less onerous in an *ex parte* application to freeze assets, than in an *ex parte* application, such as this, to serve out of the jurisdiction. An exchange of authorities after the close of submissions demonstrates that the obligation to make frank disclosure is no less serious in the one case than the other. It is true, as the Applicant's reliance on *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 teaches, that what is material in an application for a freezing order will differ from that which is relevant in an application to serve out of the jurisdiction [25]-[27]. But the need for full and frank disclosure is no less and the consequences may be no less severe.

26. In *Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC 1452, Bryan J underlined the importance of the obligation in relation to service out of the jurisdiction. In that case, like the instant application, there had been a failure to refer to matters relevant to a limitation defence. Bryan J pointed out that it was no answer to say that the matters which had not been disclosed were points to be taken by way of defence at [107]. At [120] he said:

"*The importance of the duty of full and drank disclosure, on applications for permission to serve out, cannot be overstated. There is a difference in terms of*

what the disclosure must be directed at, and the matters being considered, but the underlying reason and rationale for the duty remains the same, as is the need to comply with the same. A failure to comply with that duty is by its very nature serious --- an individual or entity has been brought into the jurisdiction without having had the opportunity to address the court as to why permission should not be granted, and as demonstrated by the present case, they are then exposed to very considerable costs upon an application to set jurisdiction aside."

27. Nor is it arguable that the judge was not entitled to reach the conclusions he did as to the fact and relevance of the omissions. He had heard the application by way of the *ex parte* hearing, and was in the best position to judge, in the light of what emerged at the subsequent *inter partes* hearing, the nature and effect of the failures. His reliance on those failures to set aside his own order fell well within the legitimate range of conclusion (see *Kazakhstan Kagazy Plc v Arip* [2014] EWCA Civ 381 [70] and [72])."

22. In *MRG,* Toulson J stated:

"25. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it …

26. The focus of the inquiry [in respect of an application for permission to serve out of the jurisdiction] is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case …

34. … Time in the Commercial Court is a precious commodity, and the purpose of sparing the judge from reading unnecessary material is to enable judicial time to be used productively."

The same could be said of the Financial Services Division of the Grand Court.

23. In *Arip,* Longmore LJ sitting in the English Court of Appeal referred to issues of non-disclosure in cases of "any magnitude and complexity" and referred to the importance of preserving a due sense of proportion. Elias LJ at paragraph 70 stated in effect that the duty to disclose cannot mean that a party must rehearse before the Court at the without notice application a detailed analysis of the "range of possible inferences which the defendant may seek to draw in support of his limitation defence" and added "The judge was satisfied that there was adequate disclosure in the circumstances, and he was particularly well placed to make that determination given that he was also the judge who heard the original without notice application."

Evidence

24. I have considered the evidence before the Court and focused on the evidence highlighted by counsel in their submissions.

Law

25. I have already made reference to various judgments on the relevant law and make brief references to other authorities below. I record that I have considered the authorities referred to by counsel in their written and oral submissions.

Submissions

26. I also record that I have considered all the written and oral submissions put before the Court. It should be apparent from the determination section of this judgment those submissions I have accepted and those I have rejected.

27. On 22 May 2023 Appleby (Cayman) Limited acting for the Second Defendant, a company incorporated under the laws of the Cayman Islands, indicated that they had acknowledged service of the Writ of Summons and, as the matters before the Court did not directly concern the Second Defendant, did not intend to appear at the hearing "in the interests of preserving the Court's resources".

The way in which the matters were put before the Court leading to the hearing in October 2022

28. The Plaintiff in his affidavit sworn on 21 March 2022 refers at paragraph 48 to his disappointment at the lack of progress and the considerable time and expense incurred trying to reach agreement with the First Defendant and says:

> "After 9 September 2019, I decided that there was no value in further correspondence with Mr Correa or his attorneys."

That decision by the Plaintiff may lie at the heart of the subsequent procedural difficulties in this case.

29. Pamella Anita Mitchell ("Ms Mitchell"), an attorney-at-law at Kobre & Kim (Cayman), in her second affidavit sworn on 25 August 2022 at paragraph 8 stated:

> "Despite four separate attempts at personal service on 9 June 2022, 16 June 2022 and twice on 22 June 2022, Mr Mery's attempts were unsuccessful."

30. At paragraph 10 Ms Mitchell says that the "Plaintiff has informed me, through his Chilean counsel and family attorney that, he believes that the First Defendant is attempting to evade service of the proceedings."

31. Ms Mitchell at paragraph 13 says that she has been advised by Chilean counsel that Article 76 of the Chilean Code of Civil Procedure "requires the processing of an internal warrant or letters rogatory which must be sent to the Ministry of Foreign Affairs, who in turn send it to the Supreme Court for final determination". This mandatory requirement was not highlighted by Mr Asif and Ms Mitchell in their skeleton argument dated 25 May 2022 in respect of their application for leave to serve the First Defendant out of the jurisdiction which they requested the Court to deal with on the papers. The Court did not benefit from oral submissions and no expert evidence as to the law of Chile was put before the Court in May 2022 despite what Ms Mitchell says in a subsequent affidavit which I shall turn to shortly. In fairness I should point out that at the October 2022 *ex parte* hearing Mr Asif did subsequently make passing reference to Article 76 and the "cumbersome" procedure in Chile (pages 34 – 35 of the transcript) but suggested that it was not a problem and

because Chile was not a Hague Convention country the Court was "not hampered by the Hague Convention limitations on alternative service."

32. Ms Mitchell in her second affidavit sworn on 25 August 2022 said at paragraph 14 "that based on the technical report prepared by the Plaintiff's Chilean counsel on service and the experience of Chilean counsel that he has provided to me, it is very likely that the process under Chilean domestic rules would take over 6 months to complete." At paragraph 15 Ms Mitchell says absent an order for substituted service the Plaintiff will have to make a separate application to extend the validity of the writ for between 9-12 months. Ms Mitchell at paragraph 23 says: "I believe that it is impracticable for the Plaintiff to serve the proceedings personally on the First Defendant." In fact the "Technical Report" referred to an "international" warrant, not an "internal" warrant and did not make any reference to a period of 6 months or a period of 9-12 months but did refer to processing being subject to joint action of the executive branch and judicial branch "which often implies an excessive delay in the processes."

33. In her third affidavit sworn on 26 August 2022 Ms Mitchell at paragraph 6 highlights "the issues with previous attempts to serve the First Defendant". Ms Mitchell says at paragraph 7 that the Plaintiff's claims are summarised at paragraphs 6-14 of her first affidavit and adds that they consist of (i) a claim for rectification of the Second Defendant's share register and (ii) a derivative claim brought on behalf of the Second Defendant in respect of the First Defendant's breaches of his fiduciary duties to the Second Defendant whilst he was the sole director of the Second Defendant. She adds that the Plaintiff "believes that it is important that [the Third Defendant] is joined to ensure that it is bound by any judgment in the Plaintiff's favour. [The Third Defendant] should therefore be joined as a party to these proceedings."

34. At paragraph 8 she says that she truly believes that the Plaintiff has "a good cause of action against the Third Defendant, as well as against the other Defendants who are actively sued."

35. In respect of the Third Defendant, Ms Mitchell at paragraph 10 of her third affidavit said that on 10 May 2022 she was told by Mr Lawrence Edwards ("Mr Edwards") an individual employed by those who provided a registered office in Cayman for the Third Defendant that the Third Defendant had been redomiciled to another Caribbean jurisdiction which "might have been Bermuda or Barbados" and which "may have occurred in or about September 2021." At footnote 2 of paragraph 32 of her fifth affidavit Ms Mitchell says that the date of 10 May 2022 in paragraph 10 of her third affidavit

was "erroneously stated" and instead should have referred to the date of 6 July 2022. Ms Mitchell could have made reasonable enquiries to ascertain the jurisdiction within which the Third Defendant was in existence. There was no proper evidence in respect of the position of service of foreign proceedings in Chile under the law of Chile. This was a serious failing on behalf of the Plaintiff and his legal representatives. At paragraph 11, without giving a date, Ms Mitchell says she conducted online research which enabled her to identify that the Third Defendant was registered in Barbados. At paragraph 12 she adds that on 25 August she telephoned the relevant authorities in Barbados and from paragraph 13 it appears that on 26 August 2022 she obtained details of the registered office of the Third Defendant. It is also somewhat surprising that enquiries were not made of the First Defendant's attorneys as to the redomiciliation and any legitimate reasons for it. The topic of redomiciliation had appeared a number of times in prior correspondence between the attorneys. The Plaintiff was under a duty to make reasonable enquiries to ascertain the position before he made allegations at an *ex parte* hearing that there was something improper going on in respect of the redomiciliation of the Third Defendant. The alleged "tipping off" concerns should not have prevented reasonable enquiries being made and prompt action being taken. I am unimpressed with the way in which the Plaintiff and his legal representatives dealt with their *ex parte* applications.

36. At paragraph 14 Ms Mitchell says that the Third Defendant is a necessary or proper party to a claim brought against other Defendants who have been duly served within the jurisdiction. At paragraph 15 she says that the claims against the Defendants arise out of the same facts and involve the same issues. At paragraph 16 she adds that the proceedings were served on the registered office of each of the Second and Fourth Defendants on 10 May 2022. At footnote 1 to paragraph 5.8 of her fifth affidavit Ms Mitchell says that this date was a typographical error. The correct date appears to be 6 July 2022 and this is the date which appears in the agreed chronology.

37. At paragraph 19 she says that Barbados is a party to the Hague Convention on Service and she understands that "the estimated timeframe for formal service in Barbados under the Hague Convention is 9 to 12 months." At paragraph 20 she says she understands that service on a limited company in Barbados can be effected in many ways including by leaving the claim form at the registered office of the company. At paragraph 21 Ms Mitchell unhelpfully states:

> "I am unable to confirm whether service by way of any of the above means will be permissible …"

Ms Mitchell does not refer to any evidence from a Barbados qualified attorney.

38. At paragraph 23 Ms Mitchell says "the First Defendant appears to have been evading personal service of the proceedings upon him in Chile."

39. In her fourth affidavit sworn on 12 September 2022 Ms Mitchell at paragraph 6 refers to "the Plaintiff's conclusion that the First Defendant is seeking to evade service, based on the refusal of the First Defendant to give his Cayman lawyers authority to accept service on his behalf, the inability to serve the First Defendant in Chile and the contradictory information as to the First Defendant's whereabouts given to Mr Salinas and Mr Mery on 22 June 2022 by those associated with the First Defendant".

40. Ms Mitchell at paragraph 8 says that on Friday 9 September 2022 Mr Castro and Mr Salinas tried again, unsuccessfully, to serve the First Defendant at his office.

41. At paragraph 12 Ms Mitchell says:

> "I believe that it is impracticable for the Plaintiff to serve the proceedings personally on the First Defendant, in particular because he is trying to evade service."

42. At paragraph 15 Ms Mitchell says:

> "The writ was issued on 14 March 2022, shortly before the expiry of the limitation period."

43. Ms Mitchell says that Mr Zarhi took steps to identify an address for service on the First Defendant in Chile and did so through publicly available information in order "to avoid tipping off the First Defendant." Ms Mitchell then attempts to explain the various delays on behalf of the Plaintiff, again I have to say somewhat unconvincingly now that such have been placed under a spotlight and microscope at the *inter partes* hearing.

44. Ms Mitchell at paragraph 21 says she served the proceedings on the Second and Fourth Defendants at their registered offices in the Cayman Islands on 6 June 2022 "despite that this would be likely to tip off the First Defendant that the Plaintiff was also trying to serve him." I note at paragraph 16 of her third affidavit that she said that the Second and Fourth Defendants were served on 10 May

2022 and at footnote 1 to paragraph 5.8 of her fifth affidavit Ms Mitchell says that this date was a typographical error. The correct date appears to be 6 July 2022.

45. Ms Mitchell at paragraph 24 of her fourth affidavit refers to a further attempt at personal service on 22 June 2022 and states that "the Plaintiff concluded that the First Defendant was aware that the Plaintiff was trying to serve proceedings on him and had instructed his employees or had otherwise put mechanisms in place to assist him to avoid personal service. Based on the Plaintiff's belief that the First Defendant would continue to frustrate any further attempts at effecting personal service on him, for practical and commercial reasons, the Plaintiff temporarily ceased further attempts at personal service on the First Defendant".

This seems to go against the Plaintiff's duty not to dally but to proceed promptly once a writ has been issued and to take all necessary action to progress proceedings.

46. Ms Mitchell at paragraph 27 refers to her third affidavit and says that she had identified "the Third Defendant's new country of registration and its Registered Agent/office … during the week of 22 August 2022".

47. Ms Mitchell at paragraph 28 said that "the writ was due to expire on 14 September 2022".

48. Ms Mitchell in her fifth affidavit sworn on 6 October 2022 at paragraph 3 outlines the four purposes of her affidavit which includes "to provide evidence of evasive conduct by the First Defendant". Ms Mitchell attempts, again somewhat unconvincingly, to explain the delay in respect of the 8 week period 14 March 2022 to 11 May 2022 which she rightly accepts "requires an explanation".

49. Ms Mitchell at paragraph 15 refers to Mr Zarhi's opinion on service of process in Chile on 27 April 2022 but does not seek to correct "the mistake" at paragraph 18 of her fourth affidavit. Ms Mitchell's attempts to explain the other subsequent periods of delay are also unconvincing.

50. At paragraph 45 Ms Mitchell sets out the factors upon which the Plaintiff relies as "evidence that the First Defendant has sought to evade service of the writ on him." She refers at paragraph 45.3 to the First Defendant's staff in Chile engaging in "obstructive conduct" "for example, given inconsistent and misleading information regarding his whereabouts or refused entry for the purpose of effecting service". At paragraph 47 to drive the prejudice home she adds "it is clearly impossible to serve the First Defendant in Chile in circumstances where the inference is that he is actively

evading service." At paragraph 49 Ms Mitchell refers to "once it became apparent that the First Defendant was in fact evading service". This was far from a balanced or fair presentation of the evidence as to service in this case. The evidence did not fairly support a serious allegation that the First Defendant was "actively evading service."

51. Ms Mitchell refers to the hardship to the Plaintiff if an extension was disallowed.

52. For the *ex parte* hearing in October 2022 the Plaintiff had filed no less than 5 skeleton arguments/written submissions.

53. In the Plaintiff's written submissions on substituted service on the First Defendant dated 29 August 2022, Mr Asif and Ms Mitchell refer briefly to GCR O.65 r.4 and *Bush v Baines* 2016 2 CILR 274. There is no reference to my judgment in *MaplesFS Limited* (FSD unreported judgment 14 July 2022) which went online shortly after it was delivered.

54. The evidence is summarised in about 12 lines. It is stated that service via the Court system in Chile is likely to take at least 6 months and that "It appears that the First Defendant has been trying to avoid service". It is stated that "it is impracticable to effect personal service on the First Defendant". It is added that "the proposed methods of service to be used in Chile are not prohibited there". There is no fair analysis of the law of Chile in respect of the service of foreign proceedings. At paragraph 11 b) it is stated that "It is factually correct that the writ was issued near the end of the limitation period". At paragraph 11 d) it is stated that "The Plaintiff has recently learned that the Third Defendant appears to have redomiciled away from the Cayman Islands". At paragraph 11 e) of the written submissions "In any event, the delay has caused no prejudice to the Third Defendant". At paragraph 12 the bold submission is made that "this is a case which satisfies the requirements of GCR O.65 r.4 and is squarely within the applicable principles".

55. In the Plaintiff's written submission in support of the application to serve the Third Defendant out of the jurisdiction dated 29 August 2022 Mr Asif and Ms Mitchell at paragraph 2 (b) (iii) make little sense when they state:

> "GCR O.11 r.4 provides that the applicant must satisfy the Court … there is evidence: … the method of service to be used (if not personal service) …"

56. This was an unfortunately worded sub-paragraph. What was not brought to the Court's attention either in writing or orally was the need under Order 11 rule 4 (1) (e) for the application to be supported by an affidavit stating "if service is not to be effected personally the method or methods of service which are in accordance with the law of the country in which service is to be effected". The written submissions contained no reference to the expert evidence on the point let alone a fair summary of it. These were serious failings.

57. No authority is referred to in respect of the Order 11 r 1 (1) (c) gateways. In particular there was no reference to *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 or any of the other leading authorities in this area of the law. All that is said at paragraph 5 is that "The Plaintiff's claim against the Third Defendant is within GCR O.11 r.1 (1) (c) because the Second and Fourth Defendants are both Cayman Islands companies, who have been duly served within the jurisdiction, and the Third Defendant is a necessary or proper party to the claims against the Second and Fourth Defendants because the Plaintiff's claims include a claim that the First Defendant breached his fiduciaries (sic) duties as a director of the Second Defendant, and used the Third Defendant and the Fourth Defendant to effect those breaches of duty."

58. What was not highlighted in the written submissions or orally was the statement at paragraph 7 of the Statement of Claim that the Plaintiff was not making "a claim" against the Fourth Defendant. At the end of the hearing on 25 May 2022, Mr Asif accepted that the writ against the Fourth Defendant should be struck out as it disclosed no reasonable cause of action against the Fourth Defendant.

59. At paragraph 9 b) of the written submissions, the Plaintiff says that "It is factually correct that the writ was issued towards the end of the limitation period."

60. On substituted service there is reference at paragraph 11 to *Bush v Baines* 2016 (2) CILR 274 and the "legal principle" that the "words contrary to the law of that country" in Order 11 rule 5 (2) mean expressly or positively prohibited by the laws of the other country. An alternative method of service can be ordered even if it is not expressly permitted by the foreign jurisdiction; it need not be a method expressly permitted by the other country's laws provided it is not prohibited." At paragraph 12 c) it is stated that service of process in Barbados through the Hague Convention is estimated to take 9 to 12 months. At paragraph 14 it is again stated: "… it appears that the First Defendant is seeking to avoid personal service."

61. In a 17-page document dated 12 September 2022 and headed "Plaintiff's skeleton argument for applications listed for hearing on 14 September 2022" Mr Asif and Ms Mitchell make numerous points. It is stated that the previous two sets of written submissions are "superseded by this skeleton argument". A brief background is provided at paragraph 4. At paragraph 5 it is stated "P wishes to bring claims for rectification of D2's register of shareholders and a derivative claim on behalf of D2 against D1 for breach of his duties as a director of D1. D3 and D2 were companies within the structure, and D1 used them to facilitate his extraction of D2's assets." The second reference to D1 is an error and should read D2.

62. At paragraph 6 it is stated "The writ was issued on 14/03/22, shortly before the limitation period expired." Reference is made to *Bush v Baines* and also on this occasion to *MaplesFS* and at paragraph 19 the following question is raised: "Are the steps to be taken to effect service contrary to the general law of the country where they are to be taken?" At paragraph 20 reference is made to the significance of delay and litigation prejudice. At paragraph 23 d) it is stated that "service via the Court system in Chile is likely to take at least 6 months". It appears to be accepted that service via the "court system in Chile" would be the appropriate way to proceed but concern is expressed in respect of anticipated delays. At paragraph 24 it is stated:

> "Chile is *not* a signatory to the Hague Convention on Service. Thus, the judicial hesitation to permitting substituted service does not apply with the same rigour."

63. At paragraph 25 it is stated "Requiring P to use the Chilean court system to effect service would therefore be likely to result in significant prejudice to P and a substantial windfall to D1".

64. The skeleton argument contains no detailed analysis of the expert evidence on the law of Chile. There is no fair or balanced presentation in that respect.

65. At the May 2023 hearing Mr Asif conceded that the burden was on the Plaintiff to prove to the Court that the proposed method of service was not contrary to the laws of the country in which service was being effected. Even now the evidence on the law of Chile presented on behalf of the Plaintiff does not comply with section B5 of the FSD Guide. The material instructions and facts upon which the opinion is based are not stated. There is no statement of truth. There is no statement that the expert has read and complied with the General Requirement of the Guide. The document

described as the "Technical Report" is undated. Ms Mitchell in her fifth affidavit at paragraph 15 stated:

> "Mr Zarhi [described in paragraph 11 as the Plaintiff's Chilean counsel] had concluded his investigations into the First Defendant's whereabouts and completed the Spanish version of his opinion on service of process in Chile on 27 April 2022. Mr Zarhi then arranged for an English translation of his opinion to be prepared, which he provided on 3 May 2022."

66. Mr Zarhi refers to the "Notification of lawsuits" and adds: "Once having filed a lawsuit abroad involving a person domiciled in Chile, he must resort to the framework established in article 76 of the Chilean Code of Civil Procedure" and an 'international warrant' or 'letter rogatory' must be prepared" and then underlined "the letter rogatory must be sent to the Ministry of Foreign Affairs, who in turn will send it to the Honourable Supreme Court to be processed." (his underlining)

67. Nowhere in the "Technical Report" is there reference to the proposed methods of service in this case not being "contrary to the law" in Chile.

68. I asked Mr Asif at the May 2023 hearing whether the "Technical Report" had been prepared specifically for this case as it did not refer to instructions and appeared to be of a very general nature. Mr Asif assured the Court that it was prepared for this case but realistically recognised its flaws.

69. At paragraph 26 of the skeleton argument dated 12 September 2022 it is stated that "D1's conduct supports the inference that he is seeking to evade service", "it appears that he is deliberately making himself unavailable", "it is impracticable to effect personal service". At paragraph 28 "The methods of service sought to be used are not prohibited in Chile". At paragraph 32 b) it is again stated "It is factually correct that the writ was issued near the end of the limitation period". At paragraph 33 the bold submission is repeated that "P therefore submits that this is a case which satisfies the requirements of GCR O.65 r.4 and is squarely within the applicable principles."

70. At paragraph 36, it is stated "GCR O.11 r.4 provides that the applicant must satisfy the court b) there is evidence … (iii) the method of service to be used (if not personal service)". The authors of these documents appear to wish to keep away from the phrase which appears in GCR Order 11 rule 4 (1)(e) "methods of service which are in accordance with the law of the country in which

service is to be effected" and in Order 11 rule 5 (2) "contrary to the law of that country", or it may just be a typographical error or a poorly phrased sub-paragraph which has not been properly checked prior to sign off by the two attorneys.

71. At paragraph 39, it is stated that "P's claim against D3 is within GCR O.11 r.1 (1) (c) because D2 and D4 are both Cayman Island companies, who have been duly served within the jurisdiction, and D3 is a necessary or proper party to the claims against D2 and D4 because P's claims include a claim that D1 breached his fiduciary duties as a director of D2, and used D3 and D4 to effect those breaches of duty."

72. The authors do not add reference to paragraph 7 of Statement of Claim which states that the Plaintiff does not make "a claim" against the Fourth Defendant.

73. At paragraph 43 b) it is again stated that "It is factually correct that the writ was issued towards the end of the limitation period".

74. Mr Asif and Ms Mitchell produce yet another skeleton argument this time dated 6 October 2022 and entitled "Plaintiff's skeleton argument for application to extend the validity of the writ of summons". The procedural chronology is set out, as are the legal principles. Reference is made to *Weavering* 2014 (1) CILR 296. Under the heading "Summary of Plaintiff's evidence" at paragraph 12 it is stated:

> "The Court does not need to read the affidavit in detail, but will observe that the Plaintiff appears to have a strong claim for both rectification of D2's register of members and a derivative claim for breach of fiduciary duty by D1 in his dealings with D2's assets whilst he was its sole director."

75. At paragraph 16, it is stated that D1 "evaded attempted service in Chile on 5 occasions." The repeated use of the emotive and prejudicial word "evaded" was not a fair presentation even solely on the basis of the Plaintiff's evidence and without the evidence now filed by the relevant Defendants in respect of service, which is uncontradicted by any evidence in rebuttal filed on behalf of the Plaintiff although the Plaintiff had an opportunity to file such rebuttal evidence.

76. At paragraph 20 it is stated that "The court can infer that D1 redomiciled D3 from Cayman deliberately to prevent or make it difficult for P to effect service on D3 – there is no business reason

for D3 to move as, on D1's case, it is essentially a dormant entity." Again that was not a fair presentation of the position and the Plaintiff had not taken adequate steps when the redomiciliation finally came to his attention to ascertain its reasons. Instead, it appears to have suited his purposes to assume the worst without making proper inquiries or fairly putting the position before the court. The Plaintiff's failure to raise the issue with the First Defendant's attorneys is not properly explained away by his apparent "tipping off" concerns.

77. At paragraph 22 under the heading "Good Reason – D3" it is stated:

> "Impossibility or great difficulty in finding or serving a defendant, particularly when a defendant is evading service has been accepted by the English courts as "*good reason*" for failing to serve the writ during its original period of validity …"

78. The registered office of the Third Defendant in Barbados was ascertainable and, on a fair presentation, there was no evidence that the Third Defendant or indeed the First Defendant were actively "evading" service.

The hearing on 12 October 2022

79. At the hearing on Wednesday 12 October 2022, Mr Asif appeared with Ms Mitchell for the Plaintiff and handed up an additional authority. I indicated that I had had "a full opportunity of reading into the various bundles …. So I have largely read into the matter." Mr Asif apologised for "a little bit of repetition simply as a result of the way that the applications have developed over time". Mr Asif started with the application to extend the validity of the writ. I queried as to what public information was available on the public register in respect of redomiciled companies. I referred to and asked if there were any limitation concerns in the case. Mr Asif stated that the better analysis is that there are not:

> "…the Plaintiff brings two different claims. The first is for rectification of the first defendant's register of members and, my Lord, so long as the register continues to contain incorrect information, the plaintiff is entitled to have the register rectified … It is a continuing wrong that needs to be put right. So, my Lord, as far as that is concerned, I say there is no limitation period … the other part of the claim that it is intended to be brought once everyone has been served is a derivative claim on behalf of the second defendant

against the first defendant. My Lord, because that derivative claim is framed in terms of breach of fiduciary duty, again, it is not strictly a limitation period at common law, but it is arguably subject to the equitable doctrine of laches".

This was a remarkable *volte face* from repeated prior references to the writ being issued towards the end of the limitation period to a submission that there were no limitation concerns.

80. Mr Asif did not address the Court on *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2; [2015] BCC 521 where the Judicial Committee of the Privy Council had referred to the summary nature of the jurisdiction to rectify the register of members which they said made it an unsuitable vehicle if there was a substantial factual question in dispute. In this case there is plainly a substantial factual question in dispute between the parties. Mr Morgan at the hearing in May 2023 in effect submitted that the claim for rectification should await the outcome of the substantive dispute between the parties, presumably primarily against the First Defendant in Chile and, when that is determined, a formal claim for rectification could be made against the Second Defendant in the Cayman Islands and against the Third Defendant in Barbados. Indeed, at the hearing in May 2023 Mr Asif accepted that this Court did not have the power to rectify the share register of a foreign company.

81. Mr Asif at the hearing in October 2022 provided a summary of the factual background to the claims.

82. I referred to the skeleton argument at paragraph 6 where it stated that the writ was issued on 14 March 2022 "shortly before the limitation period expired" and added "When I first read that, I thought I need to be addressed on the limitation point". Mr Asif responded: "My Lord, I am afraid that is my error. I had not stopped to think through the limitation issues as clearly as I should have done". Indeed it now appears that the Plaintiff and his legal representatives did not stop to properly think as to how they should properly fulfill their duties of full and frank disclosure and fair presentation. It appears that in their desire to obtain the *ex parte* relief they were seeking they over-zealously put their case in an unbalanced way to the Court.

83. Mr Asif at the October 2022 hearing did however properly take me through a commentary on the relevant law in respect of extending the validity of a writ.

84. Mr Asif submitted that the evidence showed that the First Defendant "is actually evading service rather than it simply being an impossibility or great difficulty in finding him." In my judgment, and on a fair and balanced review of the evidence, to suggest evasion of service was putting it far too high for the purposes of an *ex parte* hearing. As Mr Morgan submitted "The headline point is that not being present at an address when a process server turns up unannounced is not evading service. Evading service is when somebody knows they are going to be served and runs away or avoids an appointment or avoids making an appointment for service, so as to frustrate a known attempt to serve … Here the highest that the Plaintiff's evidence could ever properly be put was that Mr Correa was not at the relevant addresses on the five occasions when the process servers were being persuaded to attend on behalf of the Plaintiff. That simply cannot properly be described as evasion, just on a neutral analysis of the facts …"

85. I put it to Mr Asif at the hearing in October 2022 that he was saying in effect that "D3's re-domiciliation was not for commercial reasons. You say, in effect, that D3 is trying to make life difficult for you." Mr Asif responded "Yes, my Lord, we do. I think there is a sentence to that effect later on in the skeleton". Again I think that was unfairly putting the position far too high. The Plaintiff should have made reasonable enquiries from the First Defendant as to the redomiciliation and the reasons for it. The subject of redomiciliation had been previously raised in correspondence between their attorneys. To say he did not bother to do that because he was concerned over "tipping off" is not a satisfactory answer to the Plaintiff's failures to make reasonable enquiries.

86. Mr Asif at the October 2022 hearing said:

> "Can I just remind your Lordship that, of course, the second, third and fourth defendants are all controlled by the first defendant, and the second and fourth defendants have both been served and have acknowledged service, and the first defendant has caused each of them to instruct different attorneys. Stuarts are acting for one and Appleby are acting for the other. So, leaping ahead, this does smack of playing games, as Mangatal J described it in a slightly different context."

87. Mr Morgan in a submission that had some force made at the May 2023 hearing says in effect it does not lie in the Plaintiff's mouth to accuse the First Defendant of playing games in this respect. He refers to the correspondence and the Plaintiff's complaints of conflict of interest and submitted

that is why separate legal representation was arranged. It was quite wrong for the Plaintiff at the *ex parte* hearing to accuse the First Defendant of "playing games" in this respect. Again this was unfair presentation. The issue of a conflict of interest had been raised in the correspondence. For separate attorneys to be instructed is not "playing games." What Mr Asif was trying to do, and he succeeded at the *ex parte* stage, was to create an impression that the First Defendant was actively evading service, redomiciling the Third Defendant to create difficulties for the Plaintiff and playing games and consequently the writ needed to be extended and substituted service was required. Had the correct picture been fairly presented to the Court it would have been clear that orders extending the validity of the writ and for substituted service were not justified and they would not have been granted.

88. Mr Asif at the October hearing made reference to *Weavering* and *Davidson*.

89. Mr Asif referred to the attempts to effect service in Chile and stated that "this is someone who is chopping and changing in order to make sure that he is not served with these proceedings" "my submission is this is a case of evasion or, at the very least, great difficulty in locating the first defendant in order to service him. My Lord, I say it is evasion." Again the submission on evasion was not fair presentation of the evidence.

90. I asked Mr Asif for an explanation for not having the application for the extension ready for the September Court hearing. Mr Asif said that at that stage they were hopeful they would get an order from the Court for permission to serve by email and "to serve, literally, that very day". I said that was dangerous as "I might have reserved judgment."

91. Mr Asif in respect of the Third Defendant, said "the point is that, really, until the end of July it was not possible to identify even which jurisdiction the third defendant had moved to. At the end of July it became apparent that it was Barbados… and there was no information as to the registered office. That information only became available at the end of August on 25 of 26 August …"

92. The Plaintiff could have instructed attorneys in Barbados to ascertain the registered office much earlier than it was apparently actually ascertained in this case.

93. Mr Asif, in respect of the application for substituted service on the First Defendant, submitted that "the first defendant is evading service … so that personal service of the writ on the first defendant is not really feasible." Again that was not fair presentation.

94. Mr Asif did briefly touch upon Order 11 rule 5 (3). Mr Asif referred to paragraph 13 of Ms Mitchell's affidavit and the reference to Article 76 of the Chilean Code of Civil Procedure. There was reference to six months and Mr Asif said "I appreciate that delay on its own is not enough". Mr Asif referred to the litigation prejudice point and submitted that the inability to serve the First and Second Defendants was preventing the Plaintiff "from really moving forward with this litigation at all against any of the defendants". Mr Asif attempted to put my mind at rest in respect of Article 76 and service of foreign process in Chile through proper official channels by submitting:

> "So, my Lord, because Chile is not a Hague Convention country, the judicial preference for going through Hague Convention service in preference to means of alternative service does not apply. So your Lordship's hesitation about saying, "Well, there is an available procedure; you ought to do that in preference to me giving you permission for substituted service", in my submission does not apply with the same rigour … your Lordship is not hampered by the Hague Convention limitations on alternative service."

95. Mr Asif, in respect of the Third Defendant and service out relied on Order 11 rule 1 (c) "necessary or proper party" submitting "it is important that the third defendant is bound by any judgment your Lordship gives on the substantive claim in due course." I was not addressed in detail as to any cause of action against the Third Defendant.

96. Mr Asif, in respect of the service on the Third Defendant stated that Barbados is a Hague Convention country "so it may be said by the ….third defendant, that, actually, what the plaintiff ought to do is go through the Hague Convention service and use that mechanism. Now, my Lord, what we say is that we are not prohibited from service out on the third defendant's registered office in Barbados."

97. I asked "where is the evidence that it is not contrary to the law of Barbados?" The best Mr Asif could do in response was:

> "My Lord, I do not think there is express evidence saying it is not contrary, but there is no material before the court to indicate that it is. Your Lordship, in the absence of evidence of foreign law, your Lordship is entitled to assume that the law of Barbados is the same as the law of the Cayman Islands."

98. With my prompting, Mr Asif referred to paragraphs 20 and 21 of Ms Mitchell's third affidavit.

99. Mr Asif at the October 2022 hearing referred to concerns that if the Third Defendant was to change its registered office they would have to serve on the new registered office: "My Lord, given the history of evasion by the first defendant, that is not an impossible situation for us to be in." Again that was not a fair presentation. It was wrong to continually stress that the First Defendant was evading service. That was not a fair presentation of the evidence before the Court in October 2022. Mr Asif made no attempt to look at that evidence through the eyes of the First Defendant or to fairly analyse it before the Court.

100. Mr Asif addressed me on the length of the extension and I proceeded to give an *ex tempore* judgment in respect of all the applications before the Court.

The Statement of Claim dated 14 March 2022

101. It may be useful at this stage to briefly refer to the Statement of Claim dated 14 March 2022.

102. At paragraph 7 it is expressly stated that the Plaintiff "does not currently make a claim in respect of" the Fourth Defendant which "is joined as a defendant for the purposes of discovery and, in light of the matters concerning [the Third Defendant] alleged below, to ensure that it is bound by any judgment given on [the Plaintiff's] other claims."

103. A summary of the claim is provided at paragraphs 10 and 11 of the Statement of Claim.

104. At paragraph 10 it is stated that the Plaintiff claims against the First Defendant and the Second Defendant for rectification of the Second Defendant's share register to record the registration in his name of the 67 shares in the Second Defendant that are currently registered in the name of his late father.

105. At paragraph 11 it is stated that the Plaintiff "brings this derivative claim on behalf of [the Second Defendant] in respect of the [First Defendant's] breaches of his fiduciary duties to [the Second Defendant] whilst he was the sole director of those companies following Mr Rassmuss Sr's death in disposing of its assets to [the First Defendant] at a gross undervalue; and/or [the First Defendant's] wrongful self-dealing with [the First Defendant's] assets in breach of his fiduciary duties to [the Second Defendant]."

106. The Plaintiff also seeks "an order to rectify [the Third Defendant's] register of members to record the ownership by [the Second Defendant] of all of the issued shares in [the Third Defendant]".

107. The Third Defendant is now (and appears to have been since September 2021, well before the Statement of Claim was signed) a company existing under the laws of Barbados.

Some correspondence

108. Counsel took me through the correspondence at some length.

109. Harneys who were then acting for the Plaintiff wrote to the Second Defendant on 23 March 2017 enclosing a requisition for an extraordinary general meeting of the company.

110. The First and Second Defendants responded on 12 April 2017 and the correspondence continued.

111. Stuarts Walker Hersant Humphries ("Stuarts") appear to have come on the scene and on behalf of the Second Defendant wrote to Harneys on 19 April 2018.

112. Kobre & Kim (Cayman) informed Stuarts by letter dated 2 October 2018 that they had been instructed by the Plaintiff in place of Harneys and stated that they believed that "the substantive dispute centres on the beneficial ownership of 17 … [shares in the Second Defendant] which [the Plaintiff] contends are beneficially owned by him. [The First Defendant] accepts that our client is entitled to have the other 50 shares registered in his name." Kobre & Kim also raise "the question of the conflict of interest of" Stuarts in acting both for the First Defendant and for the registered agent of the Second Defendant.

113. Stuarts in their letter of 18 October 2018 say that the Second Defendant "is no longer a trading business and its role in principally acting as a holding company has come to an end. There is no

business left to manage." Mr Asif prays this letter in aid to answer a criticism of Mr Morgan that at paragraph 20 of the Plaintiff's skeleton argument dated 6 October 2022 in support of the application to extend the validity of the writ of summons the "dormant entity" comment in respect of the Third Defendant had no evidence to support it. Paragraph 20 read:

> "The Court can infer that D1 redomiciled D3 from Cayman deliberately to prevent or to make it difficult for P to effect service on D3 – there is no business reason for D3 to move as, on D1's case, it is essentially a dormant entity."

There is a separate section in the letter in respect of the Third Defendant but nowhere does it expressly state that the Third Defendant is "essentially a dormant entity."

114. Kobre & Kim write again to Stuarts on 29 November 2018 requesting information and documents and proposing a without prejudice meeting. Kobre & Kim refer to various companies including the Second, Third and Fourth Defendants and ask for the First Defendant's undertaking that he will not take any steps without the Plaintiff's written agreement "to make any changes to the Memorandum or Articles of Association of any of [the Third or Fourth Defendant]; to re-domicile any company out of the Cayman Islands …"

115. Kobre & Kim wrote to Stuarts again on 13 October 2020 stating that they continued to act for the Plaintiff and that his position regarding Stuarts' representation of both the First and Second Defendants remained reserved. Kobre & Kim indicated that their client intended to seek permission from the Grand Court to continue a derivative claim on behalf of the Second Defendant. The redomiciliation point is raised again.

116. Stuarts respond by letter dated 27 October 2020 on behalf of the First Defendant. Stuarts refer to the First Defendant's delays. Stuarts refer to a standstill agreement. There is reference to an undertaking which is stated to concern the Second Defendant alone.

117. Kobre & Kim respond by letter dated 11 December 2020 again reserving the "joint representation" issue and asked for confirmation that Stuarts had instructions to accept service on behalf of the First Defendant. The correspondence then seems to have dried up or at least is not included in the evidence before the Court or if it is I was not taken to it by counsel.

Determination

118. I now set out briefly the determination of the various issues before the Court.

The First Defendant Service Out Order

119. I discharge the First Defendant Service Out Order. The Plaintiff now accepts that the burden was on him to satisfy the Court that service out of the jurisdiction in Chile was not contrary to the laws of Chile. It was plainly the intention not to serve the First Defendant through official channels.

120. Ms Mitchell in her third affidavit sworn on 26 August 2022 at paragraph 18 refers to what she describes as "an expert report" of Mr Zarhi produced on 27 April 2022 in Spanish and adds:

> "An English translation of the report was provided on 3 May 2022, and was then included in the evidence in support of the application for leave to serve the First Defendant in Chile."

121. Mr Morgan describes that last statement as false. Mr Asif tried to explain it away by describing it as an "error". It is a serious matter for an attorney-at-law, an officer of this Court, to insert inaccurate information into an affidavit. The truth still matters especially in affidavits from attorneys. Suffice to say for present purposes it is now common ground that the Court was not provided with that report or any other expert evidence on the law of Chile prior to the making of the First Defendant Service Out Order. The Court was simply provided with the summons dated 11 May 2022, the affidavit of Ms Mitchell sworn on 11 May 2022 and a skeleton argument dated 25 May 2022. The two service addresses were a residential address and a business address of the First Defendant in Chile (the "Service Addresses").

122. At paragraph 18 of Ms Mitchell's first affidavit sworn on 11 May 2022 she states:

> "It is the Plaintiff's intention to arrange for a process server in Chile to attempt to serve the Documents upon the First Defendant personally at both of the Service Addresses."

123. Ms Mitchell at paragraph 20 of her first affidavit sworn on 11 May 2022 stated that it appeared from an online search that she conducted that the Third Defendant "has been redomiciled to another

jurisdiction" and she stated that she was "currently making enquiries to ascertain where it has moved to and when the transfer occurred." Ms Mitchell at paragraph 10 of her third affidavit stated:

> "On 10 May 2022, I attempted to effect service of the proceedings on the Third Defendant at the address that I believed was its Registered Office. However, I was told by Mr Lawrence Edwards, an individual employed by Kingfisher Management Ltd, that POEL had been redomiciled to another Caribbean jurisdiction. Mr Edwards could not confirm the jurisdiction to which POEL had moved but said that it might have been Bermuda or Barbados. Mr Edwards said that he believed that the redomiciliation may have occurred in or around September 2021."

124. My reading of the plain wording of that paragraph is that Ms Mitchell was provided with information by Mr Edwards on 10 May 2022. Ms Mitchell however at paragraph 32 of her fifth affidavit states:

> "On 6 July 2022[2], I attended at the office of Kingfisher Management Ltd to serve the proceedings on the Second and Fourth Defendants. I took the opportunity to make enquiries regarding the Third Defendant's new location. I spoke to Lawrence Edwards, an individual employed by Kingfisher Management Ltd, who told me that the Third Defendant had redomiciled to another jurisdiction in the Caribbean. He said that he believed that it might have been Bermuda or Barbados or some other Caribbean island beginning with the letter "B"."

125. Footnote 2 appeared after "6 July 2022" and read: "Not 10 May 2022 as erroneously stated at paragraph 10 of my third affidavit, for which I apologise." That important correction and apology should not have been hidden away in a footnote.

126. The mistakes in the evidence Ms Mitchell presented the Court at an *ex parte* hearing, to say the least, leave a lot to be desired. The Court does not benefit from any evidence from Mr Edwards.

127. As soon as information was available that the Third Defendant had redomiciled, the Plaintiff's legal representatives should have communicated with the First Defendant's legal representatives with whom they had previously been in detailed correspondence, and raised questions as to the redomiciliation (an issue specifically referred to in previous communications between the lawyers.)

and the Third Defendant's present whereabouts. I am not impressed with the supposed "tipping off" concerns. The Plaintiff and his legal representatives failed to make even these most basic enquiries and rushed to the conclusion that the First and Third Defendants were engaged in improper evasive conduct and were "playing games". To present their subjective conclusions in such a way was not a fair or balanced presentation to the Court.

128. At paragraph 34 of her fifth affidavit, which lacks precision, Ms Mitchell says that she was able to speak with "Mr Lawrence" "towards the third week of July 2022, at which time he told me that the Third Defendant had redomiciled to Barbados." I note the vague reference to "towards the third week of July 2022." When giving a Court an explanation for delays, precise dates should be given.

129. Ms Mitchell says that the Plaintiff relies on GCR Order 11 rule 1 (1) (c) (necessary or proper party) and (ff) (director officer or member).

130. The 5-page skeleton argument dated 25 May 2022 from Mr Asif and Ms Mitchell at paragraph 5 summarised the Plaintiff's claims as a) a claim for rectification of the Second Defendant's share register and b) a derivative claim on behalf of the Second Defendant against the First Defendant and said that the First Defendant was a necessary and proper party. There was no reference to the proposed service at the Service Addresses being contrary to the law of Chile. No reference was made to the methods of service being "in accordance with the law of the country in which service is to be effected" (see GCR Order 11 rule 4 (1)(e) and Order 11 rule 5 (3)(a)). Moreover there was no reference to Order 11 rule 5 (2) which provides that nothing in that rule "or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country."

131. On the second day of the hearing in May 2023 Mr Asif handed up two additional authorities namely *Heinrich Bernd Alexander Josef Von Pezold v Border Timbers Ltd* [2020] EWHC 2172 (QB) and a commentary on Rule 6.40.3 of the English Civil Procedure Rules. CPR Part 6.40 (4) provides as follows:

> "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."

132. In *Von Pezold* the Deputy High Court Judge at paragraph 24 referred to *The Sky One* [1998] 1 Lloyd's Rep 238 and stated at paragraph 24:

> "In that case, as in this, the position was not that the claim could not be served at all; it was simply that service on behalf of a foreign state had to be effected in a particular manner. In particular, there was no suggestion that service by private means was inherently unlawful in itself. Staughton J considered the expert evidence on Swiss law from both parties' respective experts and concluded that service by private means did indeed involve a breach of Swiss law, notwithstanding that the method of service was not said to have been inherently unlawful."

133. The commentary provided by Mr Asif included the following statements:

> "…where service of a claim form is purportedly made in a foreign country by a private person instructed by the claimant, and where the law of that country stipulates that service should be through official channels, the English court will not, except in a very strong and unusual case, exercise discretion to allow the purported service to stand … The burden of proof is on the claimant to establish that service would not contravene the relevant foreign law, and … the relevant standard of proof is on the balance of probabilities rather than a good arguable case."

134. At the hearing in May 2023, I asked Mr Asif if the expert evidence in respect of the service of foreign process in Chile was before the Court when I made the First Defendant Service Out Order on 25 May 2022 and the following exchange took place:

> "Mr Asif: No my Lord.
> Justice Doyle: Should it have been?
> Mr Asif: Yes, my Lord, I'm sure it should have been.
> Justice Doyle: Are you going to deal, was it paragraph 18 of an affidavit that said it was?
> Mr Asif: Well, my Lord, all I can say is that there was obviously an error in the affidavit.
> Justice Doyle: An error in that affidavit? A sworn affidavit by an officer of the court?"

Later on, the following exchange took place:

"Justice Doyle: I'm a very simple soul and I need things taken in a very straightforward way, not least because I don't want the wool pulled over my eyes by the very experienced counsel that appear before me. Take me back to basics. You're making an application for service out of the jurisdiction. It's an *ex parte* application. What do you have to bring to my attention, that the service that's to be effected shouldn't be contrary to the law in Chile?

Mr Asif: Yes.

Justice Doyle: Is that what you have to do?

Mr Asif: Yes.

Justice Doyle: Where is that evidence – and the burden is on you to do that?

Mr Asif: Yes, my Lord, it's got to be.

Justice Doyle: Where was the evidence at the *ex parte* hearing in May … that it wasn't contrary to the law of Chile? Take me to the evidence you put in – well, you didn't put any evidence before the court in May, so that's a difficulty for you, is it not?

Mr Asif: That's a difficulty … Well, my Lord, it's difficult for me to point to a positive assertion …

Justice Doyle: But that's a problem for you, isn't it?

Mr Asif: Yes it is."

135. The evidence and arguments placed before the Court in written form in May 2022 were inadequate and the Court was misled by those acting for the Plaintiff. Moreover there was no fair presentation.

136. Mr Asif when referring to Order 11 rule 5 (3)(a) at the hearing in May 2023 initially, insofar as I understood his argument, attempted to argue that if personal service was proposed in Chile it did not need to be in accordance with the law of Chile but subsequently abandoned the argument.

137. The Plaintiff in respect of the *ex parte* application in May 2022 failed to provide the Court with appropriate evidence or proper submissions on the position in respect of service of foreign process in Chile. The Plaintiff failed in his duty of full and frank disclosure and fair presentation in seeking the First Defendant Service Out Order and it must be discharged.

The Extension of Validity of Summons Order

138. I also set aside the Extension of Validity of Summons Order as I am satisfied that when it was granted and as at the date of this hearing there was no good reason to extend the validity of the writ of summons. As the authorities make plain it was the duty of the Plaintiff to serve the writ promptly and he cannot "dally for the period of its validity; if he does so and gets into difficulties as a result, he will get scant sympathy."

139. I accept that "impossibility or great difficulty in finding or serving the defendant, more particularly if he is evading service" may amount to good reason.

140. I do not accept that a fair presentation of the evidence in this case at the October 2022 hearing should have led the Court to conclude that the First Defendant was evading service or that there was great difficulty in finding the First Defendant. His residential and business addresses were known.

141. The evidence before the Court in October 2022 on the attempted personal service on the First Defendant was as follows:

(1) Luis Ignacio Manquehual Mery a lawyer and Notary Public says he was unable to personally serve the First Defendant at the residential service address on Thursday 9 June 2022 at 6.46pm "because he was not present" as informed "by a female adult person who identified herself as was his wife."

(2) Mr Mery says on Thursday 16 June 2022 at 3.15pm he was at the business service address and was unable to personally serve the First Defendant "because he was not present" as informed "by Ms Ana Maria Villablanca, assistant to [the First Defendant], indicating that she did not know at what time he would be arriving."

(3) Francisco Munoz Salinas, a process server, says that at 6.45pm on 9 June 2022 there was "Non-Service" "as I was informed by a female adult person who identified herself as was his wife, that (the First Defendant), that he was not at home at that time and that she did not know at what time he would be arriving."

(4) Mr Salinas, says that at 3.15pm on 16 June 2022 there was "Non-Service" "as I was informed by Ms Ana Maria Villablanca, (assistant to the First Defendant) that he was not in the office at that time and that she did not know at what time he would be arriving."

(5) Mr Mery, says on "Thursday 22 June 2022 at 3.50pm" he was at the business service address and was unable to personally serve the First Defendant "because he was not present … was informed …by Ms Ana Maria Villablanca, assistant to [the First Defendant], indicating that he would not be in the office all week."

(6) Mr Salinas, says at 3.50pm on 22 June 2022 he was at the business service address and there was "Non-Service" "as I was informed by Ms Ana Marie Villablanca, assistant to [the First Defendant], that he would not be in the office all week."

(7) Mr Mery, says on "Thursday, 22 June 2022, at 4.29" he was at the residential service address and was unable to personally serve the First Defendant because he was informed "by Mr Yordi Sandoval, who identified himself as a worker at the residence and indicated that he did not know what time he would be arriving. Then, after being asked whether [the First Defendant] was at work, he replied, also in my presence, that he was." 22 June 2022 was a Wednesday.

(8) Mr Salinas says at 4.29pm on 22 June 2022 he was at the residential service address and there was "Non-Service" as "I was informed by Mr Yordi Sandoval, who identified himself as a worker at the residence and indicated that [the First Defendant] was not at the residence at the time and he did not know at what time he would be arriving; after being asked whether the person being served was at work, he replied … that he was, which was contradictory to my registered information as, previously, at 15.50, Ms Ana Maria Villablanca, assistant to the person being summoned, had informed us that he was not in the office at that time and that he would not be in the office all week."

(9) Mr Salinas says that at "2.25pm" on 9 September 2022 there was "Non-Service" at the business service address as he was informed by a female person of legal age who did not identify herself that the First Defendant "was not in the office at that time."

(10) Juan Cristian Berrios Castro, a lawyer and Deputy Notary Public says that he is able to verify that on Friday 9 September 2022 at "14.25pm" at the business service address Mr

Salinas was unable to serve the First Defendant "because he was not present at the aforementioned address at that time …"

142. This was the evidence before the Court in October 2022.

143. The agreed procedural chronology also refers to an attempt to serve at the residential service address on 9 September 2022. The entry refers to paragraph 23 of Ms Mitchell's fifth affidavit which in turn refers to paragraph 8 of her fourth affidavit which refers only to an attempt at service on the business service address on 9 September 2022. It makes no reference to an attempt of service at the residential service address on 9 September 2022.

144. Subsequently in November 2022 the First Defendant's wife provided a declaration which included the following: on 9 June 2022 around 6.30pm two people came to her house and requested to speak to her husband. She informed them that her husband was not at home. They asked her where my husband would be that day and at what time he was expected to return. She said he was at his office and he would arrive late because of prior commitments. They asked her what time they could find her husband the following day and she informed them that he would be home at 8pm. She says her husband was at the house the following day "but they didn't come."

145. On 23 November 2022 Ann Maria Villablanca Villaseca, described as an employee, made a declaration which included the following: she has worked as secretary for the First Defendant for 9 years at the business service address. On 16 June 2022 at around 15:20 hours two people arrived at the office and requested to speak to the First Defendant saying that they needed to notify him of a lawsuit. She told them that he was expected to arrive "soon" since he had a scheduled meeting at 1600 hours to be held at the office and they could wait for him. They answered that they did not have time to wait and left without leaving any documentation or business card. About 20 minutes later the First Defendant arrived at the office.

146. On 23 June 2022 (she does not remember the exact time) a person came to the office (she saw him through the video camera of the intercom) and told her he was looking for the First Defendant. She informed him that the First Defendant "would not attend the office that week".

147. On 9 September 2022 two people came to the office. One of them said they were looking for the First Defendant to notify him of a lawsuit. She told them that the First Defendant was not at the

office "he asked when he would arrive, and I told him I didn't know. That day Mr Correa was having a lumbar column surgery and, therefore, I didn't know when he would be able to return to work."

148. Yordi Leonel Sandoval Valdes a housekeeper in a declaration on 23 November 2022 says that he has worked at the residential service address for 9 years. On 23 June 2022 after lunch two people came to the house asking for the First Defendant. He informed them he was not at home. They asked him where he was and since he didn't know he told them so.

149. By letter dated 12 December 2022 Kobre & Kim wrote to Stuarts referred to the timetable for evidence and emphasised "the need for our client to revert to the individuals involved in attempting to serve your client in Chile, we anticipate that it will take until early January 2023 to be able to complete the exercise". They proposed that the Plaintiff file and serve any evidence in response by 16 January 2023.

150. As it transpires the Plaintiff filed no further evidence from the "individuals involved in attempting to serve" the First Defendant in Chile was forthcoming. The relevant Defendants' evidence therefore is uncontradicted by any evidence filed subsequently on behalf of the Plaintiffs.

151. It is trite at the interlocutory stage without the benefit of cross-examination a Court cannot usually resolve factual disputes. Mr Asif attempts to explain away the failure to file evidence in rebuttal by referring to the disciplinary complaint the First Defendant filed at the Court of Appeal of Santiago de Chile in November 2022 against Francisco Dario Munoz Salinas, judicial receiver and against public notaries Luis Ignacio Manquehual Mery and Juan Cristian Berrios Castro. Mr Asif, without any evidence in support, in effect suggests that those involved in attempts at service may have been reluctant to give evidence to this Court because of the pending complaints. I have to say I find that explanation somewhat unconvincing. One would reasonably expect process servers, lawyers and notaries to be a little more robust and thick skinned than that. Be that as it may, the fact remains that the Plaintiff has filed no evidence to rebut the evidence filed on behalf of the relevant Defendants on the attempted service point. Moreover having now had the luxury of considering the evidence and submissions on this point in more detail I have concluded that even on the sole basis of the Plaintiff's evidence on attempted service in Chile I do not think that in October 2022 that it could have fairly been stated that the First Defendant was actively evading service.

152. One of the main foundations of the Plaintiff's case to try and explain away his delay and justify an extension of the validity of the writ and substituted service has collapsed. The highest that it should have fairly been put was that the Plaintiff had difficulties in serving the First Defendant. I have to say that the evidence does not reveal that the process servers tried particularly hard to effect service. Moreover the service difficulties do not adequately explain the Plaintiff's delay from March to May in applying for service out of the jurisdiction and his subsequent inaction in July and August whilst he considered the scope of work and budget. Once the writ was issued in March 2022 he was duty bound to proceed promptly. He should have had all his ducks in a row before issue. I appreciate that unforeseen events may arise after issue but plaintiffs have to react to them with expedition.

153. If the Plaintiff had promptly started the process to serve through Article 76 official channels and had encountered delays that may have been a sufficient reason to extend the validity of the writ but the Plaintiff had deliberately chosen not to proceed down that route and must take the consequences of his decisions.

154. The Plaintiff's delay in investigating the redomiciliation issue promptly, raising it with the other side and undertaking prompt and proper inquiries at the relevant public bodies to ascertain the correct position is also unsatisfactory. I do not regard as satisfactory the explanation put forward on behalf of the Plaintiff that there was no contact directly with the First Defendant or his lawyers on this point as he did not want to "tip off" the First Defendant. Frankly the way in which the Plaintiff and his legal representatives failed to promptly progress the service of the writ and their conduct of these proceedings has been unimpressive.

155. The Courts rely on applicants for *ex parte* relief and their legal representatives to give a fair presentation of their case and not to over-enthusiastically stretch matters too far in their evidence or submissions. Having had the luxury of time to consider the evidence, the submissions and the relevant law in detail and benefiting from submissions made on behalf of the First, Third and Fourth Defendants, I have to say that my overriding sense is that the Court was badly let down by the Plaintiff and his legal representatives at the *ex parte* hearings.

156. I have considered the evidence and the chronologies. The writ was issued on 16 March 2022. There seem to be some significant delays in seeking an order for service out and then in attempting service in Chile. For a large part of the summer it appears that the Plaintiff delayed his agreement

for an "expanded scope of work and budget". The Plaintiff requested that the hearing in September 2022 be vacated. The applications were then heard on 12 October 2022. I am totally unconvinced by the Plaintiff's attempts to explain the significant delays by his reference to a need to verify the First Defendant's location and address and his taking "stock of potential next steps" in July and August 2022. Having had the opportunity to consider the position in detail it appears that the Plaintiff was dragging his feet from the date the writ was issued and did not promptly progress matters. Now that the proper picture has been presented, he should expect scant sympathy from this Court. There was no good reason justifying the extension of the validity of the writ. The Court was badly let down by the Plaintiff and his legal representatives in the presentation of the *ex parte* application which led to the making of the order. They failed in their duty of fair presentation. It was unfair of them to paint a picture of evasion of service, redomiciliation of the Third Defendant to cause difficulties and the playing of games in respect of the instructions to separate attorneys. There was no good reason for an extension. I therefore conclude that I must discharge the Extension of the Validity of Summons Order.

157. In view of that conclusion I can deal with the remaining orders relatively briefly.

The First Defendant Substituted Service Order

158. I discharge the First Defendant Substituted Service Order. It should not have been granted. The evidence was insufficient to prove that personal service on the First Defendant was impracticable. The Plaintiff was aware of the residential and business addresses at which the First Defendant could be found. The evidence was insufficient to establish that the First Defendant was actively evading service. There was no evidence as to litigation prejudice or that the time taken to go down the mandatory Article 76 route would be of such exceptional length as to be incompatible with the due administration of justice. As the authorities make it plain (see for example *MaplesFS Limited* FSD unreported judgment 14 July 2022) the mere desire for speed is insufficient to justify an order for substituted service. Again the Court was badly let down by the Plaintiff and his advisers in the presentation of this application.

The Third Defendant Service Out Order

159. I discharge the Third Defendant Service Out Order. The claim for rectification of the register of members of the Third Defendant, now a company existing under the laws of Barbados, is not a good cause of action. Mr Asif accepted that the Court has no power to rectify the register of members of a company existing under the laws of Barbados. Any claim for the rectification of the register of members of the Third Defendant must proceed in Barbados.

The Third Defendant Substituted Service Order

160. Again the Plaintiff showed no good reason why personal service on the Third Defendant was impracticable and has now achieved service on the Third Defendant. As the order should not have been granted in the first place I discharge it.

No regranting of Orders

161. In my judgment I should not exercise my judgment in regranting any of the Orders. As can be seen from this judgment in my view there is serious culpability on the Plaintiff and his legal representatives for their failures and this Court needs to send out a message to applicants for *ex parte* orders and their legal representatives that if they fail in their important duties to the Court there will be consequences. I do not go so far to say that the serious failings of the Plaintiff and his legal representatives were the result of intentional and deliberate decisions to attempt to mislead the Court. It appears that the errors were made because of an aggressive, unfair and unbalanced approach to the *ex parte* proceedings. The Plaintiff and his legal representatives must take responsibility for their serious failings and recognise that this is not the proper way to progress *ex parte* applications. The Court should not exercise its discretion in their favour and regrant the orders. Indeed on the evidence and submissions now before the Court it would be inappropriate to do so.

162. There can be no doubt that, when applying for *ex parte* relief the duties of full and frank disclosure and fair presentation on applicants and their legal representatives are onerous. In respect of discharge applications the Court must keep a sense of realism and proportionality. In complex commercial cases defendants are sometimes desperate to seek discharge on grounds of failure of

these onerous duties when their case on the merits may be weak. I am conscious of that. I am not seeking to apply the relevant legal principles in an unrealistic and disproportionate way and I am not engaging in strictly adhering to a counsel of impossible perfection. Even the Plaintiff and his legal representatives must recognise that there were serious failings in this case, whatever their views are on the merits of the dispute. I am simply trying to ensure that parties and their attorneys in respect of applications for *ex parte* relief properly assist the Court and comply with their onerous duties, whether they like it or not. It is incumbent on the Court to mark the Court's disapproval of the improper way in which the Plaintiff and his legal representatives presented the *ex parte* applications in this case. I do that by discharging the orders.

The Fourth Defendant Strike Out Summons

163. Although initially attempting to argue against it at the 59th minute of the 11th hour Mr Asif having given advice and taken instructions sensibly did not oppose the relief granted in the Fourth Defendant Strike Out Summons. There is no reasonable cause of action against the Fourth Defendant. The pleading advances no claim against the Fourth Defendant. I make an Order that the writ of summons against the Fourth Defendant be struck out.

Costs

164. Subject to consideration of any concise (no more than 3 pages) submissions to the contrary to be filed within 7 days of the delivery of this judgment I am minded to grant orders for costs against the Plaintiff to be taxed on the indemnity basis in default of agreement. The relevant Defendants have been successful with their applications and costs should follow the event. The Plaintiff's conduct (and in this respect he is also tainted by the conduct of his legal representatives) has been unreasonable and improper to a high degree. Such conduct is and should be outside the norm.

Orders

165. Counsel should within 5 days following the delivery of this judgment forward to the Court draft Orders reflecting the determination in this Judgment.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT