Neutral Citation Number: [2020] EWHC 1220 (Comm)

Case No: CL-2019-000118

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2020

Before :

MR JUSTICE JACOBS

- -

Between :

THE PUBLIC INSTITUTION FOR SOCIAL SECURITY	**Claimant**
- and -	
MR KAMRAN AMOUZEGAR	**Fifth Defendant**

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- -

Stuart Ritchie QC and Christopher Burdin (instructed by **Stewarts Law LLP**) for the **Claimant**
Philip Marshall QC and Simon Hattan (instructed by **Eversheds Sutherland LLP**) for the **Fifth Defendant**

Hearing dates: 28th and 29th April 2020.

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am 15th May 2020.

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MR. JUSTICE JACOBS

Mr. Justice Jacobs :

A: The application

1. This is an application by the Fifth Defendant in these proceedings, Mr. Kamran Amouzegar, to set aside an order of Teare J. made on 29 July 2019 ("the extension order"). Teare J extended time for service of a claim form which had been issued on 21 February 2019 ("the Claim Form"). Time was extended, in relation to Mr. Amouzegar and a number of other defendants, until 31 October 2019. In the usual way, that order was made pursuant to a without notice application which was determined on consideration of the papers by the judge. The effect of that order was to give the Claimant, the Public Institution for Social Security ("PIFSS"), an additional period of just over 2 months in order to serve the claim form: from 21 August 2019 to 31 October 2019.

2. PIFSS contends that the order was properly made and that there is no basis for setting it aside. However, PIFSS also applies pursuant to CPR 6.16 (1) for an order dispensing with service of the Claim Form on Mr. Amouzegar. This application only has significance in the event that the extension order is set aside. If it remains, then there is no dispute that Mr. Amouzegar was validly served on 27 August 2019 via the Office of the Civil Court in Geneva, where Mr. Amouzegar is resident.

3. The overall context of the present proceedings, in which I am the principal designated judge, is set out in my judgment on an application for freezing and ancillary orders by PIFSS against the First Defendant, ("Mr. Al Rajaan"): see [2019] EWHC 2886 (Comm). Mr. Al Rajaan was the Director General of PIFSS. The Amended Consolidated Particulars of Claim ("the POC") pleads in detail seven specific schemes ("the Schemes"), pursuant to which PIFSS claims that Mr. Al Rajaan obtained hundreds of millions of dollars in unlawful secret commissions ("the Secret Commissions"). PIFSS alleges that a very large number of individuals and corporate entities were involved in the payment of these commissions to Mr. Al Rajaan, and there are therefore numerous defendants to the present consolidated proceedings.

4. One of those individuals is Mr. Amouzegar. He was from 1997 to 2003 an associate at Pictet & Cie ("Pictet"). PIFSS alleges that from 2003 to (at least) 2015 he was remunerated by Pictet as a business finder/agent. It is alleged that Mr. Amouzegar was complicit in two of the Schemes.

5. First, Section G of the POC pleads "the Pictet Scheme". In summary, PIFSS alleges that Mr. Amouzegar was a key player in the creation and operation of the Pictet Scheme, pursuant to which: (i) between 1999 and 2015, Secret Commissions of some US$26.7 million were paid in return for Mr. Al Rajaan procuring that PIFSS invested into certain funds or investment products; and (ii) the Defendants involved in the Pictet Scheme also assisted in relation to other Schemes pleaded in the POC in the total sum of at least US$294.2 million. Mr. Amouzegar is alleged to have received at least US$3.9 million via the receipt of corrupt secret payments under this Scheme.

6. Secondly, Section J(2) of the POC pleads "the VP Banking Assistance Scheme". In summary, PIFSS alleges that, between 2006 and 2012, substantial Secret Commissions were paid pursuant to this Scheme, which also involved the relevant defendants assisting in relation to Mr. Al Rajaan's misconduct more generally. Mr. Amouzegar is

alleged to have introduced Mr. Al Rajaan to his friend Mr. Ghittini of VP Bank, and to have benefitted personally from this Scheme, via the receipt of further corrupt secret payments.

7. The present applications concern only the Pictet Scheme. This Scheme is within the ambit of the Claim Form issued on 21 February 2019, and which was the subject of the extension application and order. By contrast, the VP Banking Assistance Scheme was pleaded under a subsequent (third) claim form. There is no dispute as to service of that particular (third) claim form, and therefore jurisdiction in respect of that claim will not be affected by the outcome of the present application to set aside the extension order. Mr. Amouzegar has proposed that jurisdictional issues which arise in relation to the third claim form should await the determination of jurisdictional issues which he and certain other defendants have raised in relation to the Claim Form issued on 21 February 2019.

8. Since the Secret Commissions under the Pictet Scheme date back to 1999, there is, and was at the time that the application for an extension was made, a possibility that a limitation defence might be relied upon by a defendant allegedly involved in that Scheme (including Mr. Amouzegar). However, the potential availability of such a defence will obviously depend upon the law which is applicable to the relevant claims, since it is well-known that limitation laws can vary significantly from country to country.

B: Procedural history

9. The relevant procedural history leading to the extension order of Teare J. is as follows.

10. The Claim Form was issued on 21 February 2019. It was served on Mr. Al Rajaan on 21 June 2019.

11. Prior to service of the proceedings on 21 June, a hearing had taken place before Teare J. on 17 June 2019, pursuant to a letter which PIFSS had sent to the Commercial Court seeking directions in the present potential major piece of litigation. By that time PIFSS had issued a second claim form relating to further Schemes, but Mr. Amouzegar was not a defendant to that claim. As a result of that hearing, Teare J. ordered an expedited 1 day hearing to be listed between 3 and 12 July, with one day of court pre-reading. This was for the purposes of hearing or otherwise considering a number of applications which PIFSS intended to issue, namely: (a) for permission to serve the claim forms and other documents in both claims on defendants out of the jurisdiction; (b) for directions, including consolidation of the claims; and (c) for a freezing order and accompanying asset disclosure against Mr. Al Rajaan. Teare J. also ordered that there should be a principal and supporting designated judge assigned to the proceedings, and shortly afterwards I was appointed as the principal judge.

12. On the same date as serving Mr. Al Rajaan, PIFSS applied (as foreshadowed in the hearing before Teare J.) for consolidation of claims and directions as well as for a freezing order against Mr. Al Rajaan based on, amongst other things (i) a real risk of dissipation; and (ii) PIFSS' proprietary claim.

13. The hearing of PIFSS' applications came before me on 4 July 2019. Mr. Al Rajaan was represented by counsel, as was the second defendant (Mr. Al Rajaan's wife) who had

by then been served. By that time, and as contemplated at the hearing on 17 June, PIFSS had applied for permission to serve the proceedings out of the jurisdiction on a number of defendants. In addition, PIFSS also made an application, in relation to certain defendants (but not Mr. Amouzegar) for an extension of the time for serving the Claim Form.

14. The orders made at the hearing on 4 July 2019 were in summary as follows.

    a) PIFSS' application for freezing relief was adjourned on the basis of interim undertakings given by Mr. Al Rajaan. The full hearing of that application subsequently took place on 15 and 16 October 2019, and resulted in a worldwide freezing order in the sum of US$847.7 million being made against Mr. Al Rajaan: see [2019] EWHC 2886 (Comm). The principal argument advanced in response to the application concerned whether there was a real risk of dissipation, which encompassed an extensive argument concerning material delay in seeking relief.

    b) An order was made consolidating the Claim Form presently in issue (CL-2019-000118) with the second claim form (CL-2019-00015), and directing that Consolidated Particulars of Claim be filed and served.

    c) Permission to serve out of the jurisdiction was granted in relation to a number of defendants.

    d) In relation to certain defendants for whom permission to serve out of the jurisdiction had been granted, an order was made extending the time for service of the claim form on the basis of anticipated delays in effecting service.

    e) No order for service out of the jurisdiction was sought in relation to Mr. Amouzegar. This was because he could potentially be served without permission pursuant to CPR 6.33 and Article 6 (1) of the Lugano Convention. At that stage, no order was sought extending the time for service of the Claim Form on him. However, towards the conclusion of the hearing, Mr. Ritchie QC (who appeared then, and now, on behalf of PIFSS) indicated that such an application might need shortly to be made in relation to service of the Swiss defendants because of a concern that "we are quite close to the wire" since the "guillotine falls on 21 August". The possibility was canvassed of an application for an extension, either on paper or at a hearing, within the next 3 weeks, and I indicated that I was available for a hearing if necessary.

15. For the purposes of the 4 July hearing, PIFSS had submitted to the court three skeleton arguments. One of these skeletons ("the July skeleton") concerned the applications for permission to serve the claim forms out of the jurisdiction and for an extension of time in which to do so in respect of identified Defendants. The principal evidential material comprised the first witness statements of Mohan Bhaskaran dated 19 June 2019 and Osama Al Mogahwi dated 19 June 2019.

16. In order to obtain permission to serve out of the jurisdiction, PIFSS needed to establish that: (a) the claims raised a serious issue to be tried, such that they pass the summary judgment threshold; (b) there is a good arguable case that the claims fell within one or more gateways for permitting service out of the jurisdiction; and (c) that England was the proper place to bring the claim. The July skeleton addressed all of these issues. In relation to (b), the principal basis for jurisdiction was that: Mr. Al Rajaan was now resident in England, and by the time of the July hearing had been served with the proceedings; that he was the "anchor" defendant; and that the other defendants were necessary or proper parties.

17. In relation to (a) (serious issue to be tried), PIFSS submitted in the July skeleton that its pleaded primary case was that the Defendants' conduct gave rise to claims under Kuwaiti law, for breach of duty by Mr. Al Rajaan, primary and accessory civil wrongdoing under Kuwaiti Civil Code Articles 277 – 279 based on illicit (criminal) acts of bribery and breaches of Kuwait's Public Property Law of 1993. Alternatively, PIFSS relied on principles of English law for bribery, knowing receipt, dishonest assistance in breach of fiduciary duty and unlawful means conspiracy. These claims gave rise, under both systems of law, to remedies including restitution/disgorgement of bribes and damages/compensation. The July skeleton contained a detailed analysis of the "Governing Law" of the various claims. This explained why, as PIFSS contended as its primary case, Kuwaiti law applied to PIFSS's claims. At the conclusion of that section, PIFSS said at paragraph [60]:

> "The Defendants may argue that other systems of law apply to the claims, including Swiss law based on events, acts or omissions carried out by Defendants in Switzerland and arguments that "damage" under the Rome II Regulation was suffered there. Consideration of Swiss law principles was given in *Marino* at paragraphs 480 and following. PIFSS' case is that the better analysis of the facts is that Kuwaiti law applies. Even if that is wrong PIFSS submits that:
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> a. Putting it at its lowest, it is not clear that Swiss law applies to any claim;
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> b. Even if Swiss law applies, there is nothing in the analysis in *Marino* to indicate that the pleaded facts do not give rise to arguable claims under Swiss law."

18. In paragraphs 61-66 of the July skeleton, PIFSS addressed the question of limitation of action. It identified that the events of the claims go back to at least 1994/1995 and potentially earlier. The skeleton explained why the claims were not time-barred as a matter of Kuwaiti law. Paragraph 65 submitted that if or to the extent that English law applied or was taken to apply, PIFSS would be entitled to rely upon the "deliberate concealment" provisions of s.32 (1) (b) of the Limitation Act 1980; i.e. that limitation did not run until PIFSS had discovered the concealment or could with reasonable diligence have discovered it. The reference to "taken to apply" concerned a well-known point adverted to earlier in the skeleton: that foreign law is presumed to be the same as English law unless a party pleads and proves otherwise. Paragraph 66 explained that even if a foreign law or laws were to apply, PIFSS would seek to disapply the relevant limitation provisions: to apply them, in a case of bribery of a foreign public official on

the scale pleaded, would conflict with public policy pursuant to s.2 of the Foreign Limitation Periods Act 1984.

19. Generally speaking, applications for permission to serve out are determined by judges simply on the papers rather than at a hearing. This is also the practice of the Commercial Court in relation to extensions of time for serving a claim form (see e.g. *Euro Asian Oil SA v Abilo (UK) Ltd and others* [2013] EWHC 485 (Comm) para [3]), although from time to time a party or the judge will request or require a hearing. The complexity of the present case was such, however, that Teare J. had directed that the service out application should be heard in court at the same time as the other applications, with sufficient time allowed for pre-reading all the materials for all applications.

20. The hearing on 4 July itself naturally divided into two parts. The applications for freezing relief and consolidation were addressed first. Neither was particularly controversial at that stage, bearing in mind Mr. Al Rajaan's willingness to agree to interim freezing relief pending determination of the application at a later stage. After those matters had been addressed, and counsel for those parties had left, there were brief supplementary submissions by PIFSS on the issues of service out and extension of time and jurisdictional issues. At page 94 of the transcript, I indicated that I considered that this was an appropriate case for permission to serve out to be granted. I said that the:

> "various requirements of serious issue to be tried, good arguable case, England being the appropriate forum, have on the materials before me at the moment, and of course there may be much more considerable materials before me if there's an application to set aside, but on the materials [present] at the moment … those requirements are satisfied."

21. I also said that I was satisfied that there was a sufficient case for granting the extensions of time for service sought against a number of defendants.

22. None of the orders made at the hearing directly affected Mr. Amouzegar, save for the marginal impact of consolidating the proceedings commenced by the two claim forms.

23. Prior to that hearing, on 26 June 2019 (a matter of days after the proceedings were served on Mr. Al Rajaan) PIFSS had filed a form N510, which is one of the documents required for submission to the Foreign Process Section ("the FPS") when making a request for service abroad. One consequence of the work done in preparation for the 4 July hearing was that PIFSS decided that it should withdraw from its own civil participation in certain on-going Swiss proceedings against Mr. Al Rajaan. PIFSS considered it appropriate to file a fresh form N510, making clear that no proceedings between the parties concerning the same claim were pending before the courts of any other part of the UK or of a Lugano Convention state. A fresh form was filed on 9 July 2019.

24. On 10 July 2019, having filed a fresh form, PIFSS provided the relevant documents for service on Mr. Amouzegar to the FPS. PIFSS had been advised by the FPS that the process of service in Switzerland could take about 2 months.

25. On 24 July 2019, PIFSS notified Mr. Amouzegar of its claim by posting to him a file of documents, including: (i) the Claim Form; and (ii) PIFSS's (substantially final) draft Consolidated POC. PIFSS's covering letter explained that it was taking steps to serve Mr. Amouzegar in Switzerland and invited him to appoint lawyers for that purpose. It is common ground that Mr. Amouzegar received this file.

26. On 25 July 2019, and as foreshadowed at the conclusion of the hearing on 4 July, PIFSS filed an application for a short extension of time (from 21 August 2019 to 31 October 2019) to serve defendants who were domiciled in Switzerland, Luxembourg, Malta and Portugal. The evidence in support was brief, and was set out in Part C of the application notice. Mr. Martin Walsh, a partner at PIFSS' solicitors Stewarts, explained that permission to serve the various defendants was not required because PIFSS believed that they were all located in territories where it was possible to serve without permission (e.g. pursuant to Article 6 (1) of the Lugano Convention). He said:

> "The Claimant took steps to start the process of effecting service via this route, the first of which was to arrange certified translations of the documents for service, and to file a form N510 to explain to the Court why permission to serve the Claim Form on these defendants was not required. This process took some time, not least due to the number of defendants in this action. Further, the Claimant's legal advisers were occupied in a time intensive process of preparing the applications which were determined at the hearing on 4 July 2019, in particular the supporting evidence which included preparation of the draft Particulars of Claim, which was considered necessary so as to present material facts, and thereby explain the case."

27. Mr. Walsh's statement made reference to the hearing on 4 July, the refiling of the relevant N510 forms, and PIFSS' belief that the time to conclude the service process may extend beyond the current deadline for service of the Claim Form on the relevant defendants. This was because effecting service could take approximately 2 months, once the relevant documents for service are received by the Swiss judicial authorities. The statement concluded:

> "In so far as it may be contended that the claim forms should have been served earlier, the Claimant's response is that it was not considered appropriate to serve the Claim Form until Particulars of Claim had been prepared, given that the Claimant would come under an obligation to serve Particulars of Claim following acknowledgment of service. As stated above, that document was a very complex document to draft and its preparation was not completed until shortly prior to the hearing on 4 July 2019."

28. In his subsequent witness statement, Mr. Walsh accepted that the explanation there given was brief. Mr. Marshall QC criticised this supporting evidence in numerous respects, contrasting it with the lengthy evidence which was submitted in *JSC BTA Bank v Ablyazov* [2011] EWHC 2988 (Comm), where Teare J. referred at [12] to the application for an extension of time being supported by a witness statement of 22 pages, 90 paragraphs and 93 pages of exhibits. A particular criticism was the failure to refer

to the impact of any extension on the potential limitation defences which had been addressed in the papers submitted for the 4 July hearing: see Section H below.

29. On the same day (25 July) as filing the application, Stewarts wrote to my clerk referring back to the hearing on 4 July when

> "… Mr. Ritchie QC addressed Mr. Justice Jacobs on the possibility that further time may be required to effect service of proceedings on certain European defendants. We enclose a copy of the transcript of the hearing, and refer in particular to pages 96 – 98".

30. The letter stated that PIFSS had on that day issued an application for a short extension of time to serve the defendants who are domiciled in Switzerland, Luxembourg, Malta, and Portugal "for the reasons set out in the enclosed Application Notice". PIFSS proposed that the application should be dealt with on paper, but indicated that counsel would be available for a short hearing if I considered it appropriate.

31. In fact, the matter was dealt with on paper by Teare J. very swiftly. This was because the application was filed on the CE-file system, and Teare J. was responsible that week for dealing with 'paper' applications. He granted the application in the terms sought by PIFSS, thereby extending time for service of the Claim Form to 31 October 2019.

C: Service on Mr. Amouzegar and the application to set aside

32. Very shortly after Mr. Amouzegar had been notified of (but not served with) the Claim Form (shortly after 24 July 2019), his evidence is that he left Switzerland on holiday. He was away from "the end of July" 2019 until Monday 26 August 2019. Whilst he was away (and in advance of the original deadline for service of the Claim Form on 21 August 2019), on 13 August 2019 the Swiss authorities sent Mr. Amouzegar a "*Summons*" to collect documents from the Office of the Civil Court of Geneva. The summons requested collection by no later than Monday 5 August 2019. This was an error, since 5 August pre-dated the letter and it was not a Monday. I do not consider that anything turns on this error in the letter.

33. Mr. Amouzegar says that he received this letter when he returned from holiday on Monday 26 August 2019, after which he attended the Office of the Civil Court of Geneva on Tuesday 27 August 2019. He therefore accepts that he was served with the Claim Form on 27 August 2019; i.e. 6 days after the original deadline for service of the Claim Form by 21 August 2019.

34. PIFSS was not in a position to dispute, and therefore did not dispute, the evidence that Mr. Amouzegar was away on holiday during this period, and that this was the reason why the Claim Form was not served upon him until 6 days after the original deadline.

35. On 15 October 2019, Mr. Amouzegar applied for an order (1) setting aside Teare J.'s extension order of 29 July, and (2) setting aside "the Claim Form". The application thus combined a challenge to the extension order, together with a more general challenge to the jurisdiction of the court. The application was supported by a witness statement of Neville Paul Byford, a partner at Eversheds Sutherland (International) LLP. The witness statement was focused on the challenge to Teare J.'s extension order. It dealt

only briefly with the more general jurisdictional challenge. In that latter regard, Mr. Amouzegar adopted the content of applications made on behalf of five other defendants. In due course, PIFSS and Mr. Amouzegar agreed that the application to set aside the extension order should be addressed first, essentially as a preliminary issue within the overall jurisdictional challenge.

36. In his witness statement, Mr. Byford made a number of criticisms of different aspects of the service which had been effected, such as an incomplete response pack, and incomplete documentation. However, the only substantial arguments ultimately advanced at the hearing concerned the question of whether this was an appropriate case for an extension pursuant to CPR 7.6 (2), and the related question of whether there had been material non-disclosure on the application for the extension.

37. In relation to the former, Mr. Byford said that the reasons supplied by the Claimant were not sufficient to justify an extension of time, for reasons to be elaborated on in oral submissions. He said that it was difficult to see why there was a delay of over 4½ months before PIFSS even filed the relevant documents with the FPS, and that it was no answer for PIFSS to say that it did not consider it appropriate to serve the Claim Form until Particulars of Claim had been prepared. The Claimant had chosen to bring this claim and its responsibility was to ensure that it was able to meet procedural deadlines.

38. The complaint as to non-disclosure to Teare J. was in the following terms:

> "The Application Notice makes no reference to the possibility of the Defendants raising a limitation defence to the claims made against them, as I suggest it should have done in view of the fact that the order was being sought *ex parte* to Mr. Amouzegar. It is clear, however, that the Claimant was alive to the possibility of such a defence being mounted since: (i) the fact that Defendants may raise limitation defences was explained in witness statements served by the Claimant in support of the separate applications determined by the Court at the hearing on 4 July 2019; and (ii) at that hearing, the need to preserve the Defendants' limitation position was canvassed in relation to the application for consolidation and limitation was discussed in the context of an application to serve out of the jurisdiction on other Defendants." (Internal cross-references omitted).

39. It will be apparent that this complaint was in the most general of terms, namely that there should have been a reference to the possibility of the Defendants raising a limitation defence. There was no identification of any system of law pursuant to which any particular limitation defence would arise. Although Swiss law is now relied upon by Mr. Amouzegar as the relevant law under which a limitation defence would potentially arise, and which would be potentially affected by the extension, there was no reference to Swiss law in the witness statement, and no evidence of Swiss law adduced in support of the application. Nor is there any evidence before me that, at this stage at least, Mr. Amouzegar had himself sought and obtained Swiss law advice as to any potential limitation defence.

40. On 19 November, Mr. Walsh served a witness statement in response. In paragraph 6 of his witness statement, Mr. Walsh summarised PIFSS' response on the "extension issue" as follows:

> "[6.2] …Mr Byford contends that no proper explanation of the delay between issue and service of the Claim Form was provided. I accept that the position was explained only in brief. Further information is provided below.
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> [6.3] As explained below the extension was required as a result of the complexity of the proceedings, the need carefully to formulate detailed particulars of claim in respect of a very substantial fraud case before serving proceedings, and to marshal multiple procedural elements for the benefit of all parties and of the Court, and the need to proceed via the Foreign Process Section ("**FPS**"). In the event, the extension sought was modest (a little over two months). On Mr Amouzegar's own case, service would have been effected on him prior to the original deadline but for his alleged absence on holiday for 4 weeks at the relevant time. In any event service was effected just six days after the original deadline.
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> [6.4] Mr Amouzegar has challenged the alleged delay of over four months between issue of the proceedings against him on 21 February 2019 and the provision of documents to the FPS on 10 July 2019. However, he leaves out of account the Claimant's need to bring this exceptionally complicated case before the court in an appropriate, logical and efficient manner, which required the Claimant to synchronise (i) service on the principal defendant, Mr Al Rajaan with proceedings and the Asset Protection Relief Application (as defined in paragraph 18 below); (ii) issuing of an application for permission to serve out of the jurisdiction on a number of defendants; and (iii) early case management directions to consolidate claims CL-2019-000118 and CL-2019-000151 and to grant permission to serve consolidated Particulars of Claim. The above applications were issued on 21 June 2019 and Mr Al Rajaan was served with (i) and (iii) on the same date.
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> [6.5] It would not have been appropriate to serve the claim form on Mr. Amouzegar (or other Defendants) prior to service of proceedings against Mr. Al Rajaan, which could not take place (i) without a fully formulated claim in the form of draft Particulars of Claim, and factual investigations continued to be undertaken in that regard on behalf of the Claimant following the issue of the claim forms so as to present particularised claims against each of the defendants, and (ii) without establishing that Mr Al Rajaan was present within this jurisdiction, so that he could be served as anchor defendant. Earlier service of the claim form, prior to the above steps, would have caused other case

> management issues and potentially jeopardised (at least) the Asset Protection Relief Application against Mr Al Rajaan.
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> [6.6] Further, a lever-arch file of key documents was sent to Mr Amouzegar on 24 July 2019, including the Claim Form and a number of key documents. Accordingly, this is not a case where a late extension was sought or the defendant was unaware of the claim until after the original expiry of the Claim Form: the extension application was made in time, and extensive documents were provided to Mr Amouzegar nearly a month before the original deadline; but, for the various reasons explained below (including an alleged supervening holiday on the part of Mr Amouzegar at the point when service was attempted), there was a delay in effecting service. Accordingly, PIFSS's position is that as well as supporting its response to the application to set aside permission to extend time for service of the proceedings, these facts justify an application by PIFSS under CPR Rule 6.16 to dispense with service, given that the claim form and the proceedings were brought to the attention of Mr. Amouzegar, as he accepts, prior to expiry of the validity of the claim form (even without the extension)."

41. This summary was expanded upon in paragraph 15 of the witness statement as follows:

> "[15] The preparation and service of these proceedings have posed the Claimant with exceptional procedural and logistical challenges. Although the Court will be familiar with many of these matters, I summarise them briefly as follows:
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> [15.1] The investigation into Mr Al Rajaan's (and the other Defendants') conduct has been complex, wide and time-consuming, in particular because:
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> [15.1.1] As set out at 15-29 of the First Affidavit of Mohan Bhaskaran dated 20 June 2019 (the "Bhaskaran/Aff1"), Mr Al Rajaan took extensive steps to conceal the payment of corrupt payments to him and his associates; and
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> [15.2.2] As summarised at 64(b) of Bhaskaran/Aff1, the primary source of evidence that the Claimant has reviewed and relied upon in preparing proceedings has been material prepared by the prosecutor in Switzerland (the "Swiss Material"). However, the Claimant's access to that material has been severely limited by the restrictions put in place by the Swiss court following appeals by Mr Al Rajaan.
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> [15.2] Moreover, in light of the seriousness of the allegations made in these proceedings against a number of individuals, many of them with a significant public profile, and the

absence of pre-action correspondence against many of the Defendants, the Claimant considered that the appropriate and prudent course was to complete investigations sufficient to allow it to plead properly focussed Particulars of Claim before service.

[15.3] At the same time, it needed to verify that Mr Al Rajaan and the Second Defendant, ("Ms Al Wazzan") were in fact domiciled within the jurisdiction notwithstanding the extant extradition proceedings. As set out at 19-20 of the First Witness Statement of Mohan Bhaskaran dated 19 June 2019 ("Bhaskaran/WS1"), my firm obtained the assistance of private investigators and these were able to confirm the presence of Mr Al Rajaan and Ms Al Wazzan in May and June 2019. Prior to those enquiries, PIFSS believed that they were present and domiciled within this jurisdiction. Form N510 (which PIFSS had to complete for the Lugano and Brussels jurisdiction defendants) requires a claimant to declare that the claim form can be served out of the jurisdiction without the permission of the court; the Claimant wanted clarity as to the domicile of Mr. Al Rajaan before making that declaration.

[15.4] Further, given the nature of the wrongdoing alleged, and for the reasons set out in Bhaskaran/Aff1, the Claimant sought asset protection relief on an urgent basis (albeit on notice) against Mr Al Rajaan (which was in the event granted by Mr Justice Jacobs after a hearing on 15 and 16 October 2019). Accordingly:

> [15.4.1] It was necessary to prepare the Asset Protection Relief Application to this effect for service alongside the service of proceedings; and further
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> [15.4.2] As noted above, given both the complexity of the action and the need to make the Asset Protection Relief Application, draft Particulars of Claim were required in order to satisfy the tests for freezing order relief in respect of both proprietary and non-proprietary claims, and more generally to enable the Court to understand the nature and scope of the claim.
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> [15.4.3] If proceedings had been served on any of the defendants before any relevant application was made, this could have increased the risk that Mr Al Rajaan might have learned of the proceedings and taken steps to frustrate that application.

[15.5] There were also a number of procedural reasons why it was important to prepare Particulars of Claim before any claim was served:

[15.5.1] The Claimant was required to apply for permission to the serve the claim on a number of defendants out of the jurisdiction, including defendants (amongst them co-defendants of Mr Amouzegar to the Pictet Scheme claims) whose alleged wrongdoing overlaps with that of Mr Amouzegar. This application was made *ex parte* and therefore invoked obligations of full and frank disclosure, and therefore required both draft Particulars of Claim and detailed evidence in support.

[15.5.2] The Claimant considered that the efficient and appropriate course was for steps to serve the claims relating to those defendants, Mr Amouzegar and others to be taken at the same time and following the grant of permission. Mr Amouzegar would therefore be clear that permission had been granted to serve those related defendants out of the jurisdiction.

[15.5.3] Equally, the Claimant required early case management directions to (*inter alia*) consolidate the Claim Form and the Second Claim Form, and for permission to serve consolidated Particulars of Claim in the consolidated action.

[15.5.4] Further, had the Claimant commenced service of the Claim Form and Second Claim Form on defendants (including Mr Amouzegar) shortly after issue of the claims in February and March 2019 respectively, it would have faced a situation whereby under CPR 58.5 it would have been required to serve Particulars of Claim within 28 days on such defendants who indicated an intention to defend the claim, in circumstances where the Particulars of Claim were not ready and the Claimant had no order for consolidation or for permission to serve consolidated Particulars of Claim.

[15.6] The Claimant therefore found itself under significant pressure, for a range of substantive and procedural reasons, to draft Particulars of Claim so as to serve both the proceedings and the above applications at the same time. The process of preparing draft Particulars of Claim was itself complex, both because of the length and complexity of that document (amounting to 143 pages in total, in the version provided to Mr Al Rajaan on 21 June 2019), and because of the restrictions placed on the Claimant's access of the critical Swiss Material.

[15.7] In the event the suite of documents referred to above (draft Particulars of Claim, the Asset Protection Relief Application, and further applications for permission for service out and consolidation, with accompanying evidence

> primarily in the form of Bhaskaran/Aff1 and Bhaskaran/WS1) were not finalised until mid-June 2019.
>
> [16] Further, and as summarised at 65 of Bhaskaran/Aff1, another complicating factor was the ongoing criminal process, which proceeded in parallel with the above and in which the Claimant was, until 3 July 2019, a civil participant. As the Claimant explained to the Court on 4 July 2019, the Claimant withdrew to avoid any potential dispute as to the Court first seised for the purposes of "lis pendens" under Article 27 of the Lugano Convention.
>
> [17] Accordingly, the Claimant's position was that (i) proceedings could not be served on Mr Al Rajaan until the Asset Protection Relief Application was ready, (ii) those proceedings and that application could not be served until draft Particulars of Claim were ready, (iii) other heavy applications, for service out and consolidation, could also not be pursued until draft Particulars of Claim were ready, and (iv) other defendants could not sensibly be served until proceedings had been served on Mr Al Rajaan, which was dependent on establishing that he was domiciled in the jurisdiction. The Claimant sought to bring the matters to the court in an appropriate, logical and efficient manner, and I respectfully submit that the approach taken was preferable to an alternative approach whereby defendants (including Mr Amouzegar) were served piecemeal at earlier points in time."

42. In later paragraphs, Mr. Walsh analysed the time periods from 21 February to 21 June 2019 (when documents were served on Mr. Al Rajaan), and 21 June to 10 July 2019 (when the documentation was provided to the FPS for service on Mr. Amouzegar). In relation to the first period (which was the focus of Mr. Marshall's submissions at the hearing), Mr. Walsh resumed the themes set out earlier:

> "[35] As I have described at paragraphs 14-18 above, following the issue of the Claim Form on 21 February 2019 the Claimant was involved in an intensive process of (i) further investigation of the facts relevant both to the claim issued on 21 February and the claim issued on 11 March and (ii) drafting so as to ensure that it could serve proceedings and the Asset Protection Relief Application on Mr Al Rajaan at the earliest opportunity, as well as the applications for permission to serve out of the jurisdiction and consolidation.
>
> [36] The exceptional nature of the proceedings and of the Asset Protection Relief Application was such that the proper course was for the Claimant to prepare Particulars of Claim and serve proceedings and the Asset Protection Relief Application on Mr Al Rajaan before taking steps to serve proceedings on Mr Amouzegar and the other defendants for the substantive, practical and procedural reasons explained above.

> [37] At 30.1 and 30.2 of Byford1, Mr Amouzegar does not acknowledge the importance of this process or the very powerful reasons why the Claimant did not seek to serve Mr Amouzegar before service on Mr Al Rajaan. This also addresses, I would respectfully submit, Mr Amouzegar's complaint about the preparation of Particulars of Claim. In particular:
>
> > [37.1] In an ordinary case, it may be that a claimant will not be entitled to seek an extension for service of a claim form on the sole basis that it wishes to prepare particulars of claim, not least because it will not normally be necessary (in an ordinary case) for a claim form to be served with particulars of claim.
> >
> > [37.2] However, the present case is far from ordinary. Given the nature and scale of the Asset Protection Relief Application, the application for permission to serve out of jurisdiction, the application for consolidation, and the complexity of the proceedings as a whole, it was considered essential to ensure that (i) proceedings and the applications were served together, and (ii) draft Particulars of Claim were available at the date of service – not least so as to be able to explain and justify the claim to the Defendants beyond the details provided in the claim form, given the absence of pre-action correspondence with many of the defendants.
>
> [38] As to the four months required to complete the above steps, I would suggest that the length of time required to prepare the draft Particulars of Claim and the Asset Protection Relief Application was proportionate to the complexity of the matters in issue, particularly given the limitations under which the Claimant was operating: see paragraph 15 above.
>
> [39] Accordingly, I would suggest that there was no relevant or unjustifiable delay over the period from 21 February to 21 June 2019. It would have been unwise for the Claimant to have taken steps to provide documents to the FPS prior to service on Mr Al Rajaan."

43. In relation to limitation, Mr. Walsh pointed out that Mr. Amouzegar had made no attempt to advance, or even describe, his alleged potential limitation defence, and that it was therefore difficult to

> "[50.2] … address such an argument in the abstract or to understand what it is that Mr. Amouzegar says ought to have been disclosed. If Mr. Amouzegar is not running a limitation defence, limitation has no relevance to the Claimant's extension application".

44. Mr. Walsh then drew attention to the materials which were before the court on 4 July, in which limitation had been addressed, and where PIFSS' skeleton argument had

explained why PIFSS considered any limitation defence in respect of its claims under Kuwaiti law and English law to be without merit.

45. In relation to full and frank disclosure, Mr. Walsh said that:

> "[54] … the application was addressed to Mr Justice Jacobs on the reasonable (but in the event mistaken) assumption that it would be passed to him as the designated Judge in the proceedings. Given that the issue of limitation had been canvassed in some detail before Mr Justice Jacobs at the hearing on 4 July 2019, the Claimant proceeded on the basis that the learned Judge had limitation firmly in mind when considering the application. However, in the event, the application was determined on paper by Mr Justice Teare. Limitation had in fact been canvassed before Mr Justice Teare at an initial directions hearing on 17 June 2019: [MW1 pages 3 and 6]. However, given the limited material before Teare J on that occasion and the nature and brevity of the hearing, I accept that the learned Judge may not have had this point in mind when he made the Extension Order.
>
> [55] If the Claimant was at fault in not drawing attention to limitation in its application notice, it apologises. I would make two comments: (i) the error was inadvertent, and (ii) in the Claimant's submission, there is no reason to believe that the Court would have made a different order had the issue been raised squarely with it. Accordingly, I would respectfully suggest that this complaint does not provide a basis for setting aside the Extension Order. Alternatively, I would respectfully ask the Court to continue the Extension Order as a matter of its discretion."

46. The parties had previously agreed that Mr. Amouzegar's responsive evidence should be served by 4 pm on 10 December 2019. On 6 December 2019, this was extended, again with the agreement of the parties, to 20 December. In the event, both dates passed without any responsive evidence being submitted by Mr. Amouzegar. Nor was there any clarification in response to Mr. Walsh's point that it was difficult to understand what it was that Mr. Amouzegar said ought to have been disclosed.

47. Shortly before the deadline for service of Mr. Amouzegar's reply evidence, however, it emerged that Mr. Amouzegar wished to adduce expert evidence under Swiss law. Eversheds' letter of 17 December indicated that it was unlikely that their client would serve further factual evidence, but that:

> "…on review of the factual evidence, it is now apparent that expert evidence is needed as to the limitation period under Swiss law applicable to the pleaded claims."

48. The letter proposed a somewhat protracted timetable for the service of such evidence, with Mr. Amouzegar having until 14 February 2020 to serve Swiss law evidence and ultimately a hearing after 15 May 2020.

49. The evidence shows, therefore, that it was only at this stage, over two months after Mr. Amouzegar's application had been served and 3 days before his reply evidence was due, that consideration was being given to Swiss law as being relevant to a possible limitation defence. The formal instruction letter to Mr. Amouzegar's Swiss lawyers was dated 19 December 2019.

50. Following further correspondence, an application was made by Mr. Amouzegar on 8 January 2020 to adduce Swiss law expert evidence as to the limitation period applicable to the proceedings. It is not necessary to describe in detail the correspondence and further witness evidence which followed. It suffices to say that, pursuant to an order dated 22 January, Mr. Amouzegar served his Swiss law evidence. This comprised a jointly written report of Messrs. Guillaume Tattevin and Lezgin Polater of the law firm Archipel in Geneva.

51. Whilst maintaining that the evidence should not be admitted, PIFSS later indicated that, for the purpose of the hearing of the application to set aside the extension order, it did not intend to take issue with the substance of the report and did not object to the judge reading the report in preparation for the hearing. In the light of this, and although a hearing had been arranged to determine admissibility, I decided to defer any ruling on admissibility until the start of the hearing listed for 28 April 2020. At the start of the hearing, I indicated that in the light of the arguments which had developed in the parties' skeleton arguments, I considered that the report should be admitted; albeit without prejudice to its relevance and as to any issues of costs.

52. No further evidence relating to the merits of the substantive applications (as opposed to the admissibility issue) was served by either side in advance of the hearing, save for a further statement from Mr. Walsh. This was responsive to a point on non-disclosure which had developed in Mr. Marshall's skeleton argument, where it had been suggested that there had been a conscious decision not to reveal certain matters to the court. In his 8th witness statement, Mr. Walsh said:

> "[12] To the best of my recollection (and having discussed the matter with other relevant members of the Claimant's legal team who agree) we filed the Extension Application with the belief that this application was an extension of the matters raised with the Court on 4 July, such that any and all relevant disclosure required was already before the Court (and in particular Mr Justice Jacobs) by reason of (a) the evidence filed for the hearing 3 weeks beforehand, and (b) submissions made at the hearing, such that it was unnecessary to incorporate this material in the Extension Application. That was particularly so given that other extension applications had been sought and granted on 4 July and that this Extension Application had been expressly trailed at the earlier hearing.
>
> [13] On 29 July 2019 I received the sealed Order. I noticed that it had been approved by Mr Justice Teare and not Mr Justice Jacobs. I knew that Mr Justice Teare had already made initial orders in the case in June 2019. In the circumstances explained above and in Walsh 1, this did not prompt me to question whether there was a need to make further disclosure of possible

> limitation defences to the Court (as paragraph 20.6 of Mr Amouzegar's skeleton suggests there was). I have discussed the matter with other relevant members of the Claimant's legal team who are of the same recollection.
>
> [14] No further consideration was given to the issue until receipt of Mr Amouzegar's application in October 2019.
>
> [15] In light of the above, I deny any suggestion that PIFSS deliberately failed to comply with its duty of full and frank disclosure by deliberately not drawing Mr Amouzegar's alleged limitation defence to the attention of the Court.
>
> [16] The position is that, as is clear from the submissions at the 4 July 2019 hearing and from PIFSS's Application Notice itself, PIFSS regarded the Extension Application as a continuation of the matters already brought before the Court through the designated judge and in the context of the matters previously disclosed to the Court. That was the general premise on which the application was made. Neither PIFSS nor Stewarts consciously decided to hold back mention of a possible limitation defence."

D: Limitation and the Swiss law evidence

53. There was no submission on behalf of Mr. Amouzegar that the extension prejudiced a possible limitation defence under either Kuwaiti law (which is the law relied upon by PIFSS in relation to the claim) or English law (which is the law presumptively applied in the absence of plea and proof of another foreign law). In its application for permission to serve proceedings out of the jurisdiction, PIFSS had explained why there was no merit to any limitation defence under both of these laws. Mr. Marshall did not seek to persuade the court otherwise.

54. Mr. Amouzegar's case, as to the relevant limitation defence potentially impacted by the extension order, was a potential defence under Swiss law. There is an important dispute in these proceedings as to whether Swiss law is applicable to the claims. Mr. Ritchie acknowledged that it would not be appropriate to try to resolve a dispute as to applicable law in the context of an extension application. It was therefore accepted by PIFSS, for the purposes of the present application, that it was arguable that Swiss law governed the claims. For the purposes of the present application, the Swiss law evidence is not challenged, although it may be that disputes will in due course emerge if the substantive case against Mr. Amouzegar continues.

55. As ultimately identified by Mr. Amouzegar, the impacted defence under Swiss law related to a relatively small part of the overall claim advanced by PIFSS. An unusual feature of the impacted defence is that it did not arise under ordinary Swiss civil law limitation principles, but because of the potential applicability of Swiss criminal law limitation principles. The relevant applicable Swiss law on limitation, as explained in the report of Mr. Tattevin and Mr. Polater, is in summary as follows.

56. PIFSS' causes of action against Mr. Amouzegar are 'civil wrongs' that would be considered claims in tort under Swiss law. The general limitation period for tort claims is one year from the time the injured party becomes aware of the damage, with a maximum of ten years from the date the damage occurred.

57. Where, however, the relevant acts would give rise to a criminal offence under Swiss law, the limitation period for civil claims is extended so that it is the same as that relating to the criminal offence. In the present case, if the alleged wrongs were regarded as criminal offences under Swiss law, the relevant limitation period would be likely to be 10 years (for acts prior to 1 October 2002) and 15 years (for acts thereafter). The burden would be on the claimant to show that the conditions for the relevant criminal offence are met and that the longer limitation period therefore applied.

58. Time will normally start running when the injured party becomes aware of the damage and of the person who caused the damage, sufficient to be able to initiate a claim. For the purposes of the overall 10-year limit for tort claims, time will run from the date on which the damage occurred. If the extended criminal limitation period applies, time will run from the date of the wrongful act.

59. In calculating the overall 10-year period under the civil law, or the extended criminal limitation period (10 or 15 years), it is relevant to take into account repeated acts. In the case of durable, or repeated, behaviour causing injury, the 10-year civil law limitation period starts running from the date of the last wrongful act or the end of the wrongful continuous behaviour. With respect to the criminal limitation period, however, the situation in the case of durable or repeated behaviour is different. Prior to 2004, the Swiss Federal Supreme Court ("SFC") had regarded repeat offences in criminal law as a single offence for the purposes of limitation. Repeat offences now, however, each have their own limitation period, unless they can be considered sufficiently related and close in time to be taken as one. There is no formal definition of what constitutes acts which are considered sufficiently close for these purposes, but in one case the SFC considered two acts that occurred a month apart as separate.

60. Applying the above principles to the present case, the submission on behalf of Mr. Amouzegar as developed in his skeleton argument prior to the hearing was that the limitation position was as follows.

61. First, PIFSS had knowledge sufficient to start time running under the standard tort limitation period at the latest by February 2016. In this regard, reliance was placed on the evidence of Mr. Bhaskaran (served in support of the July application for permission to serve out of the jurisdiction) that PIFSS became aware of the Pictet Scheme in February 2016. It was for this reason, to protect the limitation position under Kuwaiti law, that it issued proceedings in February 2019. The 1-year limitation period under Swiss civil law would therefore expire in February 2017. However, in the event that Mr. Amouzegar's name was not revealed in 2016, time would have started running in July 2017 when PIFSS obtained access to certain documentation known as the "Swiss Domestic Material". (This is described in Section G below). This meant that the latest point for accrual of the Swiss civil limitation defence was August 2018.

62. Secondly, the overall maximum 10-year civil law limitation period would not be of any assistance to PIFSS under Swiss law. This was, in short, because the limitation period with respect to the overall claim would have expired (as the Swiss lawyers explained

in paragraph 43 of their report) one year after PIFSS became aware of Mr. Amouzegar's identity; at the very latest on 1 August 2018.

63. The consequence of these submissions is, as PIFSS correctly identified in their skeleton argument prior to the hearing, that (at least on the basis of the Swiss law evidence put forward by Mr. Amouzegar at the present hearing) the extension did not risk depriving Mr. Amouzegar of an ordinary civil law limitation defence. Whilst a potential Swiss law limitation defence did arise in relation to the claim, the Swiss law evidence was to the effect that it had already arisen, in relation to the entire claim, approximately a year prior to the extension application.

64. Thirdly, however, there was the possibility that the extended criminal limitation period might be applicable. If that limitation period were found to be applicable, then limitation would have started to expire in relation to individual acts from 2009 onwards. This was because the first acts of Mr. Amouzegar, relied upon by PIFSS, took place in 1999, at which time the relevant criminal limitation period was 10 years. (The period was 10 years for acts prior to 1 October 2002, and 15 years thereafter). That period would have continued thereafter to expire for each act, so that (as submitted in Mr. Amouzegar's skeleton argument):

> "… Mr. Amouzegar will have a limitation defence in relation to all of the claims unless some extended criminal limitation period could apply but even then there would be a limitation defence to part of them. As it is, no criminal case has ever been brought in relation to Mr. Amouzegar and no criminal liability has been pleaded or even referred to."

65. Mr. Marshall provided a short "speaking note" on the morning of the hearing. This identified, for the first time, the reasons why a potential limitation defence, arising under the extended criminal limitation period, was impacted by the extension. The point is best illustrated by reference to an appendix (Appendix 3.1) to PIFSS' Particulars of Claim which set out a schedule of "investments/payments" concerning the Pictet Scheme. This appendix summarised the investments and commissions (totalling US$ 26.7 million) generated in respect of financial services provided by Pictet to PIFSS and procured or authorised by Mr. Al Rajaan. The schedule contained 96 entries with a column headed "Date of Opening", which appears to represent the date of a relevant transaction. There were 17 entries prior to December 2003, 4 entries between June and July 2004, and 75 entries between March 2005 and August 2015. Although the precise date of each payment of a secret commission was not shown in the appendix, it was not disputed that (at least for present purposes) it could be assumed that this could be equated with the date shown in the "Date of Opening" column.

66. Mr. Marshall's speaking note focused on the 4 entries between June and July 2004. Applying the 15-year extended criminal limitation period Swiss law, the position was that the claims in respect of (17) payments made prior to 20 February 2004 were all time-barred under Swiss law prior to the issue of the Claim Form. This was because the extended criminal limitation period could not save claims in respect of those payments, since they were made 15 years prior to the issue of the Claim Form, and were not sufficiently closely linked to later payments so as to enable the "durable" or "repeated" principle to apply. The 74 payments made after March 2005 were also not affected by the extension, but for a different reason. Assuming that the 15-year criminal limitation

period applied, the limitation period in respect of the first of these payments would not expire until March 2020, and for the last payment not until August 2030.

67. However, the 4 entries (numbered 18-21 on the schedule) in June and July 2004 were potentially impacted by the extension, on the assumption that the criminal limitation period applied. This was because the issue of the Claim Form in February 2019 was made prior to the expiry of the limitation period in respect of these items, but the Claim Form then had to be served within the 6-month period if these payments were not to become time-barred. The extension order had the effect of extending the period of service until 31 October 2019, and therefore had the potential to avoid a limitation defence in respect of payments made between 21 February 2004 and 31 October 2004. This was "the Relevant Period" as defined in the speaking note. It was therefore submitted that these transactions had occurred during this "Relevant Period". It was also likely that commissions would have been paid to Mr. Amouzegar during the Relevant Period; since PIFSS's case was that he had entered into an agreement in 2003 which entitled him to commissions which would then likely have been paid on a regular and periodic basis.

68. In addition to the claims relating directly to the US$ 26.7 million allegedly paid by way of secret commissions in respect of financial services provided by Pictet to PIFSS, claims were also advanced against Mr. Amouzegar in relation to the establishment and operation of the wider scheme to facilitate corrupt payments to Mr. Al Rajaan. It was highly likely that some of the actions relied on in support of those claims took place during the Relevant Period as well.

69. The upshot was that simply by reference to the transactions reflected in appendix 3.1, it was likely that payments which form the basis of claims against Mr. Amouzegar were made during the Relevant Period, and that accordingly the granting of the extension had the potential to deny Mr. Amouzegar a limitation defence which would otherwise have been available to him in relation to those claims. When the acts said to constitute Mr. Amouzegar's involvement in the establishment and operation of the alleged wider scheme to facilitate secret payments were taken into consideration, the likelihood of prejudice to his limitation position was even stronger.

70. On behalf of PIFSS, Mr. Ritchie drew attention to the fact that this analysis had only been produced at the last minute, and that PIFSS had been given very little time to think about it. Whilst that is so, I consider that it is difficult to see any flaw in the analysis which leads to the conclusion that a potential limitation defence under Swiss law was impacted in the way in which it was ultimately identified on behalf of Mr. Amouzegar.

71. Mr. Ritchie also drew attention to the fact that this particular limitation defence is contingent on various issues being answered in a particular way. In particular, Mr. Amouzegar will have to succeed in his argument that Swiss law is the relevant applicable law. If so, he will also have to succeed in overcoming an argument that the relevant criminal acts (if they were criminal acts) were sufficiently related and close in time to be taken as one; so that the 15-year criminal extension period did not commence until some later point in time, possibly as late as August 2015. In addition, the potential application of the 15-year extension will only arise if Mr. Amouzegar's acts amounted to punishable acts under Swiss law, an issue which Mr. Amouzegar disputed.

72. Accordingly, there are indeed a number of issues which will need to be resolved before it will ultimately be known whether or not the extension did in fact make any difference to any limitation defence. However, the case-law discussed in Section E below shows that it is not appropriate to try to resolve disputed limitation issues on an application to extend time. What matters is whether a potential limitation defence has been impacted. In the present case, this has in my view been established, albeit in respect of a relatively small sub-set of the overall claims made against Mr. Amouzegar. That sub-set comprises claims in respect of such offences as may have been committed by Mr. Amouzegar under Swiss law during a period commencing on 21 February 2004 and terminating no earlier than 21 August 2004, on the assumption that the offences committed during this period were not sufficiently related and close in time to subsequent offences committed after the period in question. I note that, as described in Section I below, there is a dispute as to whether this period ends on 21 August 2004 (being 15 years prior to the original date for service of the Claim Form), or 31 October 2004 (being 15 years after the date to which time was extended).

E: Extensions of time – legal principles

73. The present application was made prior to expiry of the 6-month period for service of the Claim Form. Accordingly, the applicable CPR provision is 7.6 (2) rather than 7.6 (3). Mr. Marshall submitted that the decision in *Cecil v Bayat* [2011] EWCA Civ 135 has the effect of making the requirements set out in 7.6 (3) mandatory in a case where the extension impacts upon a limitation defence. I disagree. For reasons set out below, *Cecil v Bayat* shows that it is likely to be much harder to obtain an extension under 7.6 (2) in a limitation case, but the application remains an application under 7.6 (2).

74. I was referred to a trilogy of Court of Appeal cases in the 2000's in which Dyson LJ gave the leading judgment: *Hashtroodi v Hancock* [2004] EWCA Civ 652; *Collier v Williams* [2006] EWCA Civ 20; *Hoddinott v Persimmon Homes Ltd* [2007] EWCA Civ 1203. A helpful summary of the principles which emerge from those cases is to be found in the judgment of Blackburne J. in *Sodastream Ltd v Coates* [2009] EWHC 1936 (Ch), at [50]. He described the discretion to extend time under CPR 7.6 (2) as being 'at large', and he distilled the following propositions:

> "(1) An application to set aside an order extending time obtained on a without notice application is a rehearing of the matter, not a review of the decision to extend time.
>
> (2) The principal and frequently the only question is to determine whether there was a good reason for the claimant's failure to serve the claim form within the period allowed by the rules.
>
> (3) If there was a very good reason for the failure to serve within the specified period, an extension of time will usually be granted, for example where the court has been unable to serve the claim form or the claimant has taken all reasonable steps to serve but has been unable to do so.

> (4) Conversely, the absence of any good reason for the failure to serve is likely to be a decisive factor against the grant of an extension of time.
>
> (5) The weaker the reason for failure to serve, the more likely the court will be to refuse to grant the extension.
>
> (6) Whether the limitation period applicable to the claim has expired is of importance to the exercise of the discretion since an extension has the effect of extending the period of limitation and disturbing the entitlement of the potential defendant to be free of the possibility of any claim.
>
> (7) The fact that the claimant has delayed serving the claim form until the particulars of claim were ready is not likely to provide a good reason for the failure to serve.
>
> (8) The fact that the person to be served has been supplied with a copy of the claim form or is otherwise aware of the claimant's wish to take proceedings against him is a factor to be considered.
>
> (9) Provided he has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve the claim form, so that the fact that the potential defendant has simply sat back and awaited developments (if any) is an entirely neutral factor in the exercise of the discretion."

75. The impact of limitation was the subject of detailed consideration in *Cecil v Bayat* where judgments were delivered by both Stanley Burnton LJ and Rix LJ. I approach those judgments (as did Wilson LJ and as reflected in paragraph [111] of the judgment of Rix LJ) on the basis that their effect is substantially the same. The judge in that case was held (by Rix LJ at paragraph [108]) to have directed himself correctly about the need to take limitation into account. The relevant part of Hamblen J's judgment (set out at paragraph [22]) was as follows:

> "As to the relevance of limitation, whether the claim has become statute-barred since the issue of the claim form is a matter of importance. Where an extension of time is sought in circumstances where the claim has, or may have, become time-barred since the date on which the claim form was issued, or will become time-barred in the extended period, the court should have regard to the fact that an extension of time might disturb a defendant who is entitled to assume that his rights can no longer be disputed as a matter of importance when deciding whether to grant an extension of time for service."

76. Burnton LJ said at [49] that the "general rule" is that the good reason that must be shown for the exercise of the discretion under CPR 7.6 (2) must be a difficulty in effecting service. In that context, he cited a passage from the judgment of the district judge in *Hoddinott:* few applications were being made unless there are real difficulties in actual physical service. Burnton LJ then referred at paragraph [55] to the need for "exceptional circumstances" where the effect of an extension would be to deprive the defendant of a limitation defence.

77. Rix LJ's judgment addressed the issue at greater length. He said at [91] that an "especially good reason" is required where this would impact upon the defendant's potential limitation defence. Accordingly, the law reports are not replete with examples of extensions being granted "where the claimant has not established a real problem in carrying out service". It is clear from Rix LJ's discussion of *Steele v Mooney* in paragraphs 93 – 94 that the concept of a real "difficulty" in serving is not confined to cases where, for example, the responsible authorities accomplish service very slowly, or where there is some other physical difficulty with service such as the inability to locate the defendant. There was a difficulty in *Steele* because the claimant could not responsibly proceed against any of the defendants without the report of an expert, and the report was delayed because one defendant had not responded to proper requests for clinical notes.

78. In the concluding paragraphs of this part of his judgment, Rix LJ said:

> "[108] … as Stanley Burnton LJ says (at para 54), the primary question is whether, if an extension of time is granted, the defendant will or may be deprived of a limitation defence. That is plainly shown by *Battersby's* case [1945] KB 23 and *Dagnell's* case [1993] 1 WLR 388 always to have been the attitude of the courts, on the highest authority. It is therefore for the claimant to show that his "good reason" directly impacts on the limitation aspect of the problem, as for instance where he can show that he has been delayed in service for reasons for which he does not bear responsibility, or that he could not have known about the claim until close to the end of the limitation period. If he cannot do that, he is unlikely to show a good or sufficiently good reason in a limitation case.
>
> …
>
> [109] … That means that in a limitation case, a claimant must show a (provisionally) good reason for an extension of time which properly takes on board the significance of limitation. If he does not do so, his reason cannot be described as a good reason. It is only if a good reason can be shown that the balance of hardship could arise."

79. It is clear from subsequent authority (as well as the passages themselves) that the exercise of the court's discretion, in a limitation case, is not confined to cases (illustrated by the decision in *Ablyazov)* where the delays are attributable to the authorities responsible for effecting service. Thus, in *The Khan Partnership v Infinity Distribution Ltd (In Administration)* [2016] EWHC 1390 (Ch), discussed in more detail

below, Roth J. applied *Cecil v Bayat* in the context of a case where there had been no physical problem in effecting service.

80. One other important point is clear from the authorities. Where a debatable limitation issue arises, its validity cannot generally be resolved at the stage of the application to set aside the extension. It is therefore enough for a defendant to show that he might be deprived of a defence of limitation if time for service of a claim form is extended: see e.g. *Hoddinott* at paragraph [52], and *City & General (Holborn) Ltd v Royal & Sun Alliance Plc* [2010] EWCA Civ 911 at paragraph [7].

F: The parties' submissions

Mr. Amouzegar's submissions

81. Mr. Marshall submitted, in summary, that there was no good reason for extending the time for service of the Claim Form. Even if there had been no potential limitation defence in the present case, there was no sufficient reason for extending time. The argument which ultimately came to the forefront of his submission was the impact of the extension on Mr. Amouzegar's potential limitation defence, and the effect of *Cecil v Bayat*. The circumstances in which the court should extend time, when there was potential prejudice to an arguable limitation defence are extremely limited. In the present case, the matters advanced in Mr. Walsh's witness evidence did not amount to the sort of exceptional circumstances which would justify an extension of time which would potentially impact on that limitation defence.

82. He submitted in opening that difficulties in effecting service were the only circumstances which might justify an extension in a limitation case. In opening, he said that nothing will do as an excuse unless there was a physical problem in serving the documents. Here there was no physical problem because Mr. Amouzegar's address was known, and service in Switzerland could be accomplished relatively quickly. In his reply submissions, Mr. Marshall acknowledged that there might be cases other than a physical problem in service where an extension was permissible; but this would have to be a very exceptional case where the defendant has perhaps inhibited the claimant's ability to serve "or there's some other dramatic problem".

83. However, Mr. Marshall was critical of Mr. Walsh's evidence as to the need for an extension in the present case. In particular, that evidence went considerably beyond the reasons given for the extension in the application notice. The evidence should be treated with caution. In so far as reasons were given in the application notice, those were not good reasons for an extension, particularly in a limitation case. In so far as other reasons were given – in particular the concern that early service of the Claim Form would potentially lead to difficulties in establishing jurisdiction against Mr. Al Rajaan or obtaining effective freezing order relief against him – these did not bear analysis and in any event were overstated.

84. There was no need to delay service on Mr. Amouzegar in order to ensure that Mr. Al Rajaan could himself be served and jurisdiction established against him and thereby against other defendants as necessary and proper parties under CPR Part 6 or similar jurisdictional provisions. PIFSS had kept Mr. Al Rajaan under surveillance for some

time, and had clear evidence that would be sufficient to establish his domicile for the purposes of establishing jurisdiction against him. Even if he were to leave his home in England and seek to evade service, PIFSS would still be able to demonstrate that he was domiciled in England. PIFSS would also be able to serve other parties even if Mr. Al Rajaan had not himself been served or was disputing jurisdiction: see *Canada Trust v Stolzenberg* [2002] 1 AC 1.

85. Nor was there any need to delay service on Mr. Amouzegar because of PIFSS' desire to obtain a freezing order against Mr. Al Rajaan. The argument was based on the theory that service of the Claim Form on Mr. Amouzegar and others would potentially result in Mr. Al Rajaan being tipped off as to PIFSS' intention to commence proceedings in England and might then possibly start moving himself or his assets around. This was fanciful. In particular, Mr. Al Rajaan could not avoid jurisdiction by moving himself from England. This line of argument was a complete afterthought. It had not been referred to in the application for the extension, and was not a "true reflection of what really was in the minds of the claimants at the stage when this all began." It was a "pretty far-fetched idea". PIFSS had issued proceedings against the Man group which related to alleged secret commissions paid to Mr. Al Rajaan, and had publicised those proceedings. The Claim Form in the present case would have been available for inspection by Mr. Al Rajaan. Since no steps had been taken to 'seal' the public register, Mr. Al Rajaan could have learnt about the present proceedings anyway, either by inspecting the register himself or reading about any report of the commencement of the proceedings. If there were a real concern as to the possibility of tipping off, PIFSS could have addressed this by seeking a "gagging order" against Mr. Amouzegar and any other defendants who were to be served.

86. It followed that the only real reason in the present case for the delay in serving Mr. Amouzegar was that PIFSS were busy on a number of fronts, and in particular were trying to finalise its particulars of claim. The authorities clearly showed, however, that drafting particulars of claim is not a sufficient reason for the grant of an extension. Nor is the fact that a claimant's proposed proceedings involve a considerable amount of work. Solicitors acting for a claimant in a complex case, including a fraud case, had to ensure that there were sufficient resources to do the work.

87. It was also submitted that, in any event, there had been material non-disclosure which should produce the result in the present case that the extension order should be set aside. The non-disclosure case was put in a number of different ways, but ultimately it focused on the failure of PIFSS to put evidence of Swiss law before the court at the time of the without notice application, and to explain the potential Swiss law limitation defence which might arise and which might therefore be impacted by the extension sought.

88. Once it was decided that the extension should be set aside, there was no basis for producing the same result via an application to dispense with service pursuant to CPR 6.16. Nor would it be appropriate to seek to sever the causes of action which were potentially impacted by the extension from those which were unaffected. The extension order should therefore be set aside in its entirety, and PIFSS should commence fresh proceedings.

PIFSS' submissions

89. Mr. Ritchie submitted that the reasons given by Mr. Walsh in his witness statement for not taking steps to serve prior to 21 June constituted, in the circumstances of the present case, a good reason for extending time, even in a case which where there was a possible limitation defence under Swiss law. In the present case, the particular Swiss law defence would only arise if a number of points were decided in a particular way, including that Swiss law was the relevant applicable law. In the exercise of the court's discretion, he placed particular reliance upon the fact that the Claim Form would have been served during its original currency, but for the fact that Mr. Amouzegar had gone away on holiday. That happened in circumstances where Mr. Amouzegar had been sent the Claim Form, and advised to appoint solicitors. This should also be seen in the context of service taking place only 6 days after the original expiration date.

90. Mr. Ritchie placed particular reliance the importance of PIFSS obtaining a freezing order against Mr. Al Rajaan, and the risk that service of proceedings on Mr. Amouzegar would pose for that application. It was essential not to give Mr. Al Rajaan notice of the present proceedings prior to the time when he was served. To do so would risk Mr. Al Rajaan seeking to take steps to avoid the jurisdiction of the English court or to make it more difficult for PIFSS to establish a case for English jurisdiction. He said that it was not appropriate to serve other defendants in advance of assuring that Mr. Al Rajaan was in the jurisdiction, because without the assurance of a defendant who was an anchor defendant in the jurisdiction, PIFSS would have had very controversial litigation on its hands. He drew attention to the difficulties, outlined in my judgment on the freezing order application, which Mr. Al Rajaan had created in relation to Swiss proceedings. It was not practical or reasonable to serve Mr. Amouzegar, and hope that "it would all work out", in circumstances where Mr. Al Rajaan would then have been heavily incentivised with knowledge of the litigation to seek to avoid it.

91. Service on the other defendants would also risk the dissipation by Mr. Al Rajaan of his assets between the time when notice was given and PIFSS were ready to serve their application for a freezing order. In that regard, the court has held, on a contested application determined in October 2019 (after Mr. Al Rajaan had been served) that there was a real risk of dissipation of assets.

92. He placed emphasis on PIFSS' lack of knowledge of any of the schemes until 2015. The schemes were concealed from PIFSS. It then acquired some knowledge of the Pictet Scheme in February 2016, but PIFSS' knowledge then developed and continued to develop during the period after the Claim Form had been issued. He referred to the section of Mr. Bhaskaran's witness statement (in support of the orders made on 4 July) which described the Pictet Scheme, when information relating to this scheme had come to light, and the difficulties which PIFSS had encountered in obtaining the relevant documents and analysing materials even after it had had some knowledge of the Pictet Scheme. This was therefore a case where there was a complicated claim, where the relevant facts had been concealed for a considerable time. The reasons for not serving the Claim Form promptly were a consequence or continuum of the earlier concealment, and PIFSS had not sat on its hands.

93. He submitted that there had been no material non-disclosure in the present case. It is incumbent on a party who alleges non-disclosure to identify exactly what should have been disclosed, so that the other party can answer the point. Here all that was alleged

was that there was a 'possibility' of a limitation defence. There was no reason why this 'possibility' should have been disclosed. And in any event, there was no deliberate non-disclosure in circumstances where the possibility of limitation defences had been addressed in the papers for the 4 July hearing and at the hearing itself, where PIFSS had explained that there was no merit to a limitation argument arising either under Kuwaiti law (which was the law relied upon in support of the claim) or English law (which is presumed to be applicable unless another law is pleaded and proved).

94. Mr. Ritchie also submitted that the limitation argument relied upon only potentially impacted claims relating to a limited time period. It was possible and appropriate for the extension to be treated as generally valid, but to be inapplicable to the claims in that period. If necessary, PIFSS would offer an undertaking so as to give effect to this severance.

95. Finally, he relied on the availability of an order for dispensing with service pursuant to CPR 6.16.

G: Extension of time - discussion

96. If no limitation issue had arisen in the present case, I would have had no hesitation in saying that sufficiently strong reasons had been shown to justify the grant of an extension. This is not a case which involves dilatory or incompetent conduct of a claim by a claimant's legal advisers. This is complex litigation which, for reasons which are outlined in my judgment on the freezing order application (see e.g. paragraphs [58] – [62]), has been difficult to commence and prepare. In particular, the claim concerns numerous schemes as to which PIFSS had only limited knowledge prior to 2017. Thereafter, whilst further documentation did become available, this happened incrementally over a period of time. PIFSS' ability to analyse this material, and to formulate the present claim, was handicapped by its inability to make copies of the critical documentation.

97. Nor is this a case where all that a claimant is saying is that service of the Claim Form was delayed because of a desire to draft or finalise particulars of claim. It is well-established that this is not a sufficient reason to warrant an extension. Here, however, the particulars of claim were intended to, and did, serve very significant additional purposes. They provided the necessary foundation for PIFSS' application for a freezing order against Mr. Al Rajaan, as well as an important foundation for PIFSS' application to serve out of the jurisdiction on a large number of defendants. Whilst in theory it might have been possible, on the freezing order application, for PIFSS to explain its substantive factual and legal case through a very lengthy Affidavit, in practice the only sensible way of doing so was to set out that case in carefully and properly drafted Particulars of Claim. I remain of the view that I expressed in paragraph [68] of my judgment on the freezing order application, namely that "any court is likely to require properly formulated particulars of claim before being satisfied that it is appropriate to grant a worldwide freezing order involving hundreds of millions of dollars."

98. I also accept Mr. Walsh's evidence that there were real and genuine concerns that service of proceedings on other defendants (for example Mr. Amouzegar) would have a potential adverse impact on the claim for a freezing order and ancillary disclosure against Mr. Al Rajaan. For the reasons set out in the following paragraphs, I do not consider that the concerns were without justification, or can be dismissed as a "pretty

far-fetched idea" as Mr. Marshall submitted. Nor do I accept that this evidence should be disregarded on the basis that it was an 'afterthought' which was not expressly referred to in the application for the extension. Nor do I consider that there were sensible steps by which these concerns could have been allayed or side-stepped.

99. In a case where there is (as I held in my judgment on the freezing order) a real risk of dissipation of assets by a defendant, a claimant will not sensibly signal his intention to seek a freezing order a long time in advance. Were he to do so, he would not only risk a dissipation of assets, but would also be met with the argument that the giving of a lengthy signal showed that there was no real risk of dissipation. An element of surprise is therefore a usual feature of such applications. The need to avoid a signal is potentially more important in a case where the jurisdiction of the English court may be in issue, and where notice of intended proceedings may cause a defendant to move to another residence abroad (if he has several) in order to assist on potential jurisdictional arguments, or simply leave the jurisdiction in order to attempt to evade service.

100. In the present case, Mr. Al Rajaan was served in June 2019. There is no indication that he either knew that a claim form had been issued some months earlier, or that he anticipated the commencement of these proceedings against him in England. I was told (consistently with paragraph [68] of my judgment on the freezing order application) that Mr. Al Rajaan's solicitors had said that he had not known of the present proceedings until around the time that he was served. This is unsurprising, since one would not be expecting Mr. Al Rajaan to be taking steps to inspect the High Court register of claims in order to see whether unserved proceedings had been issued against him, or to read any specialist legal bulletins where the commencement of proceedings may be reported.

101. Having served proceedings on Mr. Al Rajaan, PIFSS moved swiftly to obtain a freezing order. PIFSS had already, prior to service, appeared before Teare J. on 17 June 2019 in order to obtain a date for the hearing of its application. That hearing was fixed for 4 July, and in the event Mr. Al Rajaan gave satisfactory undertakings pending the outcome of a hearing which then took place in October 2019.

102. PIFSS' need to obtain a freezing order against Mr. Al Rajaan – an application which was justified for the reasons set out in my October judgment – did in my view present a real practical difficulty in terms of prior service of the proceedings on other defendants such as Mr. Amouzegar; i.e. prior to the time that Mr. Al Rajaan was served. There is no doubt (as Mr. Marshall said) that 'physical' service of the Claim Form on Mr. Amouzegar and others could have been accomplished relatively easily, since it is clear that Switzerland is a country which effects service with relative efficiency, and Mr. Amouzegar's address was known.

103. However, although physical service could be accomplished relatively easily, there was an obvious risk that such service would alert Mr. Al Rajaan to the fact that he was now to be made a defendant to major civil litigation in England. I accept Mr. Walsh's evidence that this would have increased the risk that Mr. Al Rajaan might have taken steps to frustrate the effect of the freezing order application. PIFSS were in my view in the position that they could not safely serve the proceedings on Mr. Al Rajaan until the freezing order application was ready; those proceedings and that application could not be served until draft Particulars of Claim were ready; and other defendants could not sensibly be served until the proceedings had been served on Mr. Al Rajaan.

104. Mr. Marshall submitted that the focus now placed on the need to avoid Mr. Al Rajaan being alerted to the proceedings, because of concerns as to the impact on the freezing order relief, was not apparent from the terms of the application notice which had been submitted to Teare J. It was a point which had only been made by Mr. Walsh in his evidence responsive to the application. I should therefore reject it, or at least treat it with some scepticism.

105. I see no reason, however, not to accept the evidence of a partner with responsibility for this case. It is obvious that PIFSS would not have wanted to alert Mr. Al Rajaan to PIFSS' intention to proceed in England whilst the preparation of the freezing order application was underway. Indeed, this point was also touched upon in paragraph [67] of my October 2019 judgment on the freezing order application, where it was relevant in relation to an argument that PIFSS could have sought incremental worldwide freezing order relief. In that context, there is nothing implausible in the notion that PIFSS would not have wished to alert other defendants – with whom Mr. Al Rajaan had previously been closely associated and from whom he is alleged to have received significant sums in secret commissions – of the present proceedings.

106. The evidence is also, in my view, not inconsistent with the relatively brief explanation of the position in the application in support of the extension. It is true that the application did not expressly refer to the need to avoid alerting Mr. Al-Rajaan to the proceedings because of PIFSS' intention to seek a freezing order. However, the application did refer to the time intensive process of "preparing the applications to be heard on 4 July 2019" and the supporting evidence including the draft Particulars of Claim "which was considered necessary so as to present material facts, and thereby explain the case". One of those applications (probably the most important) was the freezing order application.

107. Mr. Walsh's explanation is also consistent with the evidence of what actually transpired. Prior to service on Mr. Al Rajaan, the application was made to Teare J. in order to arrange for a prompt hearing of the application for a freezing order. The application to Teare J. to arrange a date was made prior to service. This was itself somewhat unusual, but it showed PIFSS' desire to proceed as quickly as possible once service had been effected. Service on Mr. Al Rajaan was then accomplished on 21 June, and in the ensuing days the papers to be lodged with the FPS were finalised. The Form N510 was lodged on 26 June, and after revision of this document, a complete set of documents was submitted by 10 July.

108. Mr. Marshall submitted that the need to avoid alerting Mr. Al Rajaan was not consistent with the fact that PIFSS had started proceedings in 2018, relating to the allegedly corrupt payments to Mr. Al Rajaan, against the ED & F Man group of companies. The existence of those proceedings had received some publicity. Indeed, PIFSS had itself issued a press release relating to those proceedings. Furthermore, no attempt had been made to obtain an order for the "sealing" of the court register of claims in respect of the Claim Form which had been issued in February 2019. Accordingly, Mr. Al Rajaan could have found out about the issue of the Claim Form by paying to search the register.

109. I did not consider that these points had any real force, or provided a reason why I should reject or treat with scepticism the evidence of Mr. Walsh. The claim against the Man group, which was issued in late 2018, did <u>not</u> include any claim against Mr. Al Rajaan. It is therefore difficult to see why Mr. Al Rajaan should draw any conclusions from that

claim as far as his own position was concerned, even assuming that he learnt about it. (There is no evidence that he did). If any conclusion were to be drawn, it would have been that PIFSS were suing other parties in England, not Mr. Al Rajaan.

110. The Claim Form issued in February 2019 did, of course, name Mr. Al Rajaan as the first defendant. Whilst it is true that no order was requested for sealing of the register, I was not persuaded that there was any real likelihood of Mr. Al Rajaan learning of the present proceedings via that route, and there is no evidence that he did so. On the contrary, he learnt of the proceedings only at around the time of service. By contrast, if proceedings were served on individuals with whom Mr. Al Rajaan had previously been associated, and from whom he had allegedly received substantial secret commissions, the likelihood that he would then learn of the present proceedings is obvious and very real.

111. In a short post-hearing submission, Mr. Marshall drew attention to the recent decision of the Court of Appeal in *Al-Zahra (PVT) Hospital and others v DDM* [2019] EWCA Civ 1103. He stopped short of submitting, however, that the evidence of Mr. Walsh should not be admitted in relation to the present application. I consider that it was far too late to take any point that Mr. Walsh's evidence should not be admitted. The authorities show that the application to set aside is a re-hearing, and not a review of the original decision. Mr. Walsh provided his detailed witness statement on 19 November 2019, and no point was taken as to its admissibility either prior to or during the 2 day hearing which then took place. It is in accordance with the overriding objective that I should decide this case by reference to the evidence as a whole, including Mr. Walsh's evidence which directly addressed the points raised by Mr. Byford, and of which Mr. Amouzegar had fair notice.

112. Mr. Marshall also submitted that if there were genuine concerns that Mr. Amouzegar or some of the other defendants would "tip off" Mr. Al Rajaan as to the existence of the present proceedings, then the Claim Form should nevertheless have been served, but that an application could have been made for an injunction in the form of a "gagging order". This would prevent Mr. Amouzegar and others from revealing the existence of the action to Mr. Al Rajaan.

113. I did not consider that this was realistic. An application for a gagging order in the present context would be very unusual, and I was not referred to any authority in the context such as the present where such an order had been granted. I agree with Mr. Ritchie that there would have been difficulties in making such an application. In order to be intelligible and persuasive, PIFSS would have needed coherent and formulated evidence relating to their intention to seek a freezing order. But this would have required the submission of the particulars of claim which were then still being formulated, and whose lack of availability was the reason why PIFSS was not ready to apply for the freezing order itself.

114. There was also, in my view, an obvious danger in making such an application. PIFSS would need to reveal (on this hypothesis) their future intention to seek a freezing order against Mr. Al Rajaan, since this would form the basis of the proposed injunction. If, however, the application for a gagging order was successfully opposed, then information as to PIFSS' intended application could have been provided by Mr. Amouzegar to Mr. Al Rajaan. If granted, a question would arise as to the enforceability of such an order. The route to enforcement of the order is questionable in circumstances

where there is no evidence that Mr. Amouzegar is present within the jurisdiction or has assets in England. In order to be effective, it would be necessary to obtain an equivalent order from a local court in the place where Mr. Amouzegar resided. Even if orders were obtained, however, they would not provide a watertight guarantee against leakage of information to Mr. Al Rajaan by those to whom the order was directed.

115. Accordingly, I consider that, if no issue of limitation had existed, there was in the present case a very good reason why service of the Claim Form on Mr. Amouzegar was delayed after issue, and why the process of serving upon him only commenced after Mr. Al Rajaan had himself been served. This is because of the importance of the justified application against Mr. Al Rajaan for freezing relief, and the potential adverse consequences to PIFSS if other defendants were served and then alerted Mr. Al Rajaan to what was happening.

116. Had this factor not been present, I do not think a good reason would have existed. In that regard, PIFSS relied upon various additional matters including the desirability of consolidated particulars of claim, the need to present a clearly formulated claim in the context of complex litigation where applications for permission to serve out were being made, and the fact that very careful consideration needs to be given to the formulation of claims in fraud. However, the complexity of the litigation, including fraud litigation, does not require different principles to be applied in the context of applications to extend, as is clear from *Cecil v Bayat*. The desirability of consolidated particulars of claim is not in itself a sufficient reason, since this is really no different to the unsuccessful arguments of claimants who have relied simply upon their wish to serve particulars of claim. The same in my view applies to the fact that PIFSS' needed to apply for permission to serve out against other defendants. Those applications did not concern Mr. Amouzegar, and the need for such applications would not provide a reason for service of the Claim Form upon him to be delayed.

117. Reliance was also placed by Mr. Ritchie upon the need to avoid alerting Mr. Al Rajaan to the proceedings because of a concern that he might take steps to leave the country, and thereby make it more difficult to serve proceedings upon him or to establish jurisdiction. Had this point stood alone, I do not consider that it would have provided a sufficient reason for the extension. Mr. Bhaskaran's witness statement (served in the context of the 4 July 2019 applications) shows that Mr. Al Rajaan was kept under surveillance. This provided evidence as to his continued presence in England. The position is therefore that he could have been served without any real difficulty. The real problem was the need for service to be effectively combined with the application for freezing relief and an ancillary disclosure order.

118. If no limitation issue had arisen, I would also have considered that discretionary factors strongly favoured the grant of the extension.

119. An important factor in that regard is that on 24 July 2019, Mr. Amouzegar was sent (and he later received) a letter from Stewarts enclosing a file of documents which included the two claim forms and other relevant materials. Stewarts' letter advised Mr. Amouzegar of the hearings that had taken place on 17 June and 4 July, and the orders which had been made. Mr. Amouzegar's attention was drawn to Section G of the draft Particulars of Claim, and invited him to provide a substantive response to the claim. The letter went on to state:

> "We are not aware that you have instructed lawyers in England to accept service on your behalf. Our client is therefore taking the necessary steps to serve these proceedings directly on you in Switzerland.
>
> However, in view of the overriding objective, and in the interests of avoiding unnecessary costs and delay, we invite you to consider appointing English lawyers and instructing them to accept service of these proceedings on your behalf. Should you not do so we will draw this correspondence to the court's attention at the appropriate time.
>
> In any event you are strongly advised to take urgent legal advice in relation to this matter and ask your advisors to contact us or provide us with their details."

120. Accordingly, Mr. Amouzegar was given full details of the claim, and a copy of the relevant Claim Form, well within the original period of its validity.

121. A further factor which would favour the grant of the extension is that, as Mr. Ritchie submitted, PIFSS and the local Swiss authorities did all that they had to do within this original period in order to effect service. The final step to accomplish service was a step to be taken by Mr. Amouzegar himself. Having been notified of the proceedings in early August, he had to collect the documents. The only reason that service was not effected within the original time period of the Claim Form was that Mr. Amouzegar had left on holiday only very shortly after he had received the letter of 24 July. He therefore only collected the documents a matter of days after the original period had expired. At the time he left for his holiday, however, he had full details of the claim.

122. It also follows that in respect of the majority of PIFSS's claims, where no limitation defence was arguably impacted by the extension, there was a good reason for the extension that was sought.

123. The critical question, however, is whether the matters which I have described provided a sufficiently good reason in the light of the fact that the extension did potentially impact, in the manner described above, a limitation defence available to Mr. Amouzegar. The authorities indicate that a strict approach is taken to extensions of time when limitation defences are in play and are potentially impacted by the extension sought. The defence in this case potentially affected only a relatively minor part of the claims advanced by PIFSS. However, the Claim Form covers all the claims referred to therein, and I think that (leaving aside for present purposes the argument in relation to severance) this leads to the need for a sufficiently good reason for the extension to be shown in relation to all the claims which are thereby initiated. *Cecil v Bayat* shows that this "good reason" hurdle needs to be crossed before more general discretionary considerations come into play. It is therefore in my view no answer for the claimant simply to be able to say, as it can properly say in the present case, that the overwhelming majority of its causes of action were not impacted, under Swiss law, by the grant of the extension, and that a sufficiently good reason existed in relation to this majority.

124. I do not accept that, in the limitation context, a sufficiently good reason is confined to a situation where there is a physical difficulty in effecting service. The judgments of

Burnton LJ and Rix LJ in *Cecil v Bayat* do not provide such a firm restraint on the exercise of the court's discretion, as Mr. Marshall's submissions in reply ultimately recognised and as the decision in *The Khan Partnership* illustrates. Significantly in the present context, Rix LJ referred to the possibility of an extension, even in a limitation case, where the claimant could not have known about the claim until close to the end of the limitation period. That judgment therefore contemplates that matters occurring prior to the issue of a claim form may have a knock-on effect which provides a sufficiently good reason for not serving within the four or six month period after issue. Rix LJ said that the good reason must therefore take account of limitation, and directly impact on the limitation aspect problem. This particular concept must not be analysed as though it were a statute, and it is broad enough to cover a number of potential situations. The question is whether it does so here.

125. I consider that it does. The reason why PIFSS was not in a position to serve the Claim Form in the present case was because, on its case, it had been the victim of very serious wrongdoing by Mr. Al Rajaan, and justifiably wished to seek a freezing order against him. This alleged wrongdoing related to a number of schemes. The case advanced against Mr. Amouzegar (under the general heading concerning "the Pictet Scheme") relates not only to the specific investment arrangements identified in Appendix 3.1 to the POC, and which allegedly resulted in the payment of around US$ 22 million to Mr. Al Rajaan and US$ 3.9 million to Mr. Amouzegar. The case also extends to claims in relation to various other schemes, as described in paragraphs 205 onwards of the POC under the heading "Assistance in relation to other unlawful schemes". The claim in relation to those schemes is US$ 294.2 million. These schemes formed part of a wider picture involving other schemes (albeit that no claim is made against Mr. Amouzegar in respect of all of them), and this is reflected in the amount of the freezing order granted in October 2019, some US$ 847.7 million (representing a relatively small increase in the sum which was the subject of Mr. Al Rajaan's undertakings given in July 2019). There was justification for seeking freezing order relief against Mr. Al Rajaan in respect of these substantial claims, and it was important to do so in order to assist with the utility of the litigation to be commenced against him and others (including Mr. Amouzegar) with whom he had been associated.

126. A substantial reason why the freezing order application could not be made earlier, and hence why the Claim Form could not be served earlier, is that information about the various schemes had (on PIFSS' case) been concealed from PIFSS for a considerable time. Paragraphs 202 and 203 of the POC set out detailed particulars of concealment relating to the period from the start of dealings between Pictet and Mr. Al Rajaan and continuing up until 2017. It is alleged that Mr. Amouzegar himself was party to at least some of the concealment that took place during that period.

127. The year 2017 is a significant one in the context of the present litigation. The position in 2015/2016, as I explained in paragraph [58] of my judgment on the freezing order application, was that PIFSS had knowledge of only two schemes, Mirabaud and Pictet. The total of those two schemes was in round terms US$ 100 million, including around $ 20 million for Pictet. However, as I explained in paragraph [62]:

> "It was in June 2017 that the claimant for the first time gained access in Switzerland to documentation relating to schemes other than Mirabaud and in August 2017 that it first considered these documents. Mr. Al Rajaan had fought a long and hard battle to

> prevent the claimant from obtaining access to those documents but, ultimately, the claimant succeeded. Nevertheless, there were difficulties for the claimant in analysing the documents because, as a result of opposition from Mr. Al Rajaan, they were not permitted to take copies. They could send people to look at the documents, which were in a number of different languages, and notes could be taken of what the documents said, but copies of the documents could not be made or taken away. Inevitably, this was a laborious process and resulted in the claimant having to pursue, in a slow and difficult way, a complicated trail of alleged financial corruption on a very large scale… It is also important to bear in mind that the Swiss materials are not a static body of documentation. They have been added to over time as more documents have become available. The factual position has therefore changed incrementally."

128. I then held that there had been no material delay (in the context of the application for the freezing order) because of the time taken to formulate the case and make the application:

> "I agree that the period taken to formulate the present claim, which is around two years from the time that access was first granted to the time when the application for freezing relief was made, does seem long. It might have been possible for it to be shorter, but, in view of the complexity of the transactions, the scale of the corruption alleged, the claimant's inability to take copies of documents, the fact that the picture has been developing as more materials are added and the care which is required when major allegations of fraud are made as the basis for an application for a worldwide freezing order, it is not surprising, in my view, that it has taken the claimant some considerable time. A party is not to be criticised for taking its time and making reasonable enquiries prior to launching an application where fraudulent activities are alleged. That was the conclusion of David Steel J in *Fiona Trust v Privalov* [2017] EWHC 1217 (Comm) at [69]. Nor is a claimant to be criticised for making an application inter partes. That is something which assists a respondent and cannot in my view be prayed in aid as showing that a worldwide freezing order is not appropriate."

129. The position specifically in relation to Pictet was described in paragraphs 51 – 60 of Mr. Bhaskaran's first witness statement. This evidence shows that PIFSS had some knowledge of the Pictet Scheme in 2016. As I understand it, this knowledge related to part of the scheme concerning investments with Pictet which generated approximately US$ 22 million for Mr. Al Rajaan and US$ 3.9 million for Mr. Amouzegar. It was, however, only subsequently that PIFSS could begin to see the wider picture of Pictet's involvement. Mr. Bhaskaran explains that it was through PIFSS's access rights to the "Swiss Domestic Material" (which were only obtained in 2017) that PIFSS was "able to review the detail of Pictet's activities in more detail, in both the bank's report to FINMA and other primary evidence, together with those of its purported business

finders, Mr. Nasrallah and Mr. Amouzegar". This provided knowledge of how two particular Pictet banks were materially involved in Pictet's overall role in Mr. Al Rajaan's wrongdoing, in particular by facilitating the payment and concealment of secret commissions and operating bank accounts for Mr. Al Rajaan. He explained that:

> "PIFSS did not become aware of the involvement of Pictet Bahamas and Pictet Singapore until it was given access to the Swiss Domestic Material. The scale and complexity of the transactions relating to these entities means that PIFSS's ability to fully understand the extent of their involvement is limited and privileged investigations remain ongoing."

130. Mr. Bhaskaran's witness statement also contained details of work carried out in order to investigate schemes other than Pictet. He said (in paragraph 42) that the complex nature of the wrongdoing alleged, and the steps taken by Mr. Al Rajaan and others to prevent PIFSS from gaining access to evidence, meant that "PIFSS' information is incomplete" and PIFSS expected to add further details to its claims and join further defendants. The difficulties of analysing the documentation were also explained in paragraphs 24-33 of Mr. Al Moghawi's witness statement served for the purposes of the July hearing:

> "In a complex financial corruption case where the file is large, much of which is comprised of financial information requiring the assistance of forensic accounts, this access protocol has been very difficult to operate effectively and has severely hampered PIFSS' ability to understand the full nature of the Defendants' conduct, evidenced within the criminal file…
>
> …
>
> Although PIFSS has … had access to the Swiss Domestic File since July 2017 it has only been able to understand the nature of its claims on a gradual and incremental basis as a result of the slow and difficult process explained above."

131. Mr. Ritchie submitted that, against this background, this was a case where PIFSS did not know about its potential claims, certainly to their full extent, until close to the end of the limitation period, bearing in mind the different potential limitation periods which were potentially applicable. Access to the critical information was only obtained in 2017, and thereafter it was a laborious process to analyse very complex transactions which had previously been concealed. The scale of the corruption alleged in the present case was very substantial, as was the concealment. It was appropriate and justifiable to apply for a freezing order: the asset protection relief was an important and central part of the claim. That application could not be made effectively until the time that it was actually made. The Claim Form could therefore not be served promptly, with the consequence that a very short extension was required. This was therefore a case where the good reason did directly impact on the limitation aspect of the problem.

132. I consider that this submission is well-founded. The good reason in the present case is the need to apply for and obtain the freezing order. The reason that this delayed service of the Claim Form, with the consequent accrual of the limitation period relating to conduct in 2004, was the various difficulties which confronted PIFSS. These started with the original and subsequent concealment at least until the Swiss materials became available in mid 2017, and thereafter continued because of the very considerable difficulties in analysing that material and thereby formulating the overall claim (including the very substantial claim in respect of assistance provided for schemes other than the $ 26.7 million claim for the Pictet Scheme) for which the justifiable application for a freezing order was made. The good reason does therefore directly impact on the limitation aspect of the problem.

133. By contrast, I did not consider that Mr. Marshall's response to this aspect of PIFSS argument convincing. He submitted in reply that the evidence of concealment was disputed. That may be so, but substantial evidence to support the allegation was provided by PIFSS.

134. He said that the limitation rules cater for a case where a claimant does not acquire knowledge of a claim in order to bring proceedings. In that context, he referred to the one-year period provided for under Swiss civil law. It did not seem to me, however, that this point really addressed the argument that, applying English law principles concerning extensions of time, there was a good reason in the present case which impacted on the limitation aspect of the problem. It was also unclear as to why this 1 year period was relevant in circumstances where the limitation aspect of the present problem arises not because of the 1 year provided by Swiss civil law, but because of the 15 year extension period under Swiss criminal law; a period which does not depend upon the claimant's knowledge. Furthermore, as Mr. Marshall's argument identified, the 1 year period under Swiss law is significantly less than the additional 6 years that exists under English law in a case of deliberate concealment.

135. He also submitted that PIFSS had done nothing in the additional period of 1 year allowed under Swiss law. For reasons already given, I do not consider that the 1-year period under Swiss civil law provides the relevant framework for consideration of the present issue. But in any event, the argument that PIFSS had done nothing in the year following the grant of access to the Swiss materials was, in my view, not consistent with PIFSS' evidence that considerable investigatory work was carried out, albeit under serious handicaps.

136. Having decided that a good reason does exist in the present case, taking account of the limitation defence, it remains necessary to consider whether this is nevertheless a case where the discretion should be exercised in favour of the grant of an extension. I consider that it does. Mr. Amouzegar had notice of the present proceedings when he received the letter of 24 July. The only reason that he was not served within the original period of validity of the Claim Form was that he was away for a fairly long holiday. He was in fact served within just 6 days of its expiry, in circumstances where the only step needed to complete service was for Mr. Amouzegar to attend to collect documents which, as a result of the 24 July letter, he knew were coming. The extension has a potential impact only on a relatively small part of the overall claim against him. He still faces very substantial claims indeed: both the claim which is the subject of the present Claim Form and the third claim form. There is nothing which suggests, therefore, that

his conduct during the 'relevant period', starting in February 2004 and ending later that year, is critical conduct on which his overall liability will depend.

137. In reaching these conclusions, I have considered the question of whether there was material delay between 21 June (when the proceedings were served on Mr. Al Rajaan) and 10 July (when the documents were lodged by PIFSS with the FPS). Mr. Marshall's main argument was based upon the delay after issue of the Claim Form, but he did suggest that there was delay in this 3-week period as well. The reasons for this short period of delay were provided by Mr. Walsh in paragraph 41 of his witness statement. As far as the Swiss defendants were concerned, work was required to prepare the relevant documents for service and to arrange for certified translations of all relevant documents into (in Mr. Amouzegar's case) French. I did not think that the reasons given for the delay in this period were particularly impressive. They included reference to the need to serve other defendants and to prepare for the applications heard on 4 July. I think that it could fairly be said that once Mr. Al Rajaan had been served on 21 June, the good reason for delaying service of the Claim Form no longer existed, and that documents should have been lodged very promptly with the FPS and arguably should have been ready to be lodged once the trigger of service on Mr. Al Rajaan had been pulled. However, a claimant who invokes CPR 7.6 (2) must show that he has taken "reasonable" steps: see *Cecil* at paragraph [48]. Here, the further delay which occurred was short and in any event I do not consider it was material. Even if the papers had been lodged with the FPS more quickly after 21 June, the prospective 2 month delay in serving documents in Switzerland would have meant that PIFSS would have needed to apply for a short extension in any event. There would have been a need to do so in the present case because Mr. Amouzegar's departure on holiday would have made it improbable that service could be accomplished even if papers had been lodged at some point during the period 21 June to 10 July.

138. Accordingly, subject to the argument on full and frank disclosure, it is not appropriate to set aside the order of Teare J.

H: Full and frank disclosure

Legal principles

139. The extension application was made without notice, as CPR 7.6(4) expressly permits. The duty of full and frank disclosure that without notice applications imply was summarised by Lawrence Collins J. in *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, at [180] as follows:

> "On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350,1356-

> 1357. But 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 it were present."

140. 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: see Toulson J in *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), at [25].

141. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the non-disclosure is non-culpable. Thus, in *OJSC ANK Yugraneft v Sibir Energy* [2008] EWHC 2614 (Ch), Christopher Clarke J. said at [106]:

> "As with all discretionary considerations, much depends on the facts…The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

142. When an allegation of material non-disclosure is made, an important principle is stated in *Gee on Commercial Injunctions* (6th edition) paragraph 9-032:

> "A party seeking to have without notice relief discharged for non-disclosure must give adequate notice that this ground is relied upon together with sufficient particulars enabling the other party to understand the case to be advanced. An allegation of non-disclosure is potentially serious both for the other party and his legal advisers and the party complaining of non-disclosure must give sufficient notice of his complaint so that there can be a fair hearing, and it should be made without unnecessary delay."

143. Authority for this proposition is to be found in *Bracken Partners Ltd. v Gutteridge* (unreported but available on Westlaw 2001 WL 1560833), where Stanley Burnton J. said:

> "Claimants and their lawyers have a serious responsibility to the Court on any application made without notice to put all material facts and issues before the Court. That responsibility is the more onerous when the injunction sought and obtained is an asset freezing injunction.
>
> Correspondingly, an allegation that a Claimant or his lawyers have failed in that duty is a serious allegation involving misconduct or default on the part of the Claimant or his lawyers. If it is to be made, adequate and clear notice of it must be given

> and full details provided of the non-disclosure or misrepresentation alleged."

Discussion

144. When the issue of material non-disclosure was raised in Mr. Byford's first witness statement, it was put in the most general of terms in paragraph 30.3:

> "The Application Notice makes no reference to the possibility of the Defendants raising a limitation defence to the claims made against them, as I suggest it should have done in view of the fact that the order was being sought *ex parte* to Mr. Amouzegar."

145. The paragraph went on to explain why, based on the material submitted for the applications heard on 4 July 2019, "the Claimant was alive to the possibility of such a defence being mounted".

146. There was therefore no indication by Mr. Byford as to the law under which the possibility of such a defence arose, or the nature of the defence, the merits of that defence, or as to how and why the extension application and order impacted upon such defence. To the extent that any particulars of the non-disclosure were provided, the paragraph simply referred to certain materials which had been provided for the application on 4 July 2019. This suggested that Mr. Byford's criticism was that PIFSS had not disclosed, on the extension application, the potential limitation issues which had been disclosed on the application which had been made and determined three weeks earlier. This certainly seems to have been the way in which Mr. Walsh, reasonably in my view, understood the argument. It was to this criticism that his responsive evidence (and indeed his later evidence in the form of his 8th witness statement) was addressed.

147. Mr. Marshall submitted that this was a mis-reading of Mr. Byford's witness statement: Mr. Byford was only referring to those materials to demonstrate that PIFSS knew about a potential limitation defence, and was not suggesting that it was those materials which needed to be disclosed. It seemed to me, however, that on a fair reading of that paragraph as a whole, Mr. Byford was suggesting that the materials or information concerning limitation, previously provided to the court for the 4 July hearing, should have been provided again. There was certainly no suggestion that any other materials should have been provided. In particular, there was no suggestion that (as Mr. Marshall later argued in the course of his oral submissions in reply) a detailed explanation of Swiss law on limitation, similar to that which was ultimately contained in the Tattevin & Polater report, should have been provided to the court.

148. Mr. Amouzegar's case on non-disclosure, as it emerged at the hearing, was in my view materially different to the case that had been put forward in Mr. Byford's witness statement, and indeed in the skeleton argument exchanged shortly before the hearing. The latter alleged, consistently with Mr. Byford's witness statement, a non-disclosure as to the "possibility that Mr. Amouzegar might raise a limitation defence". In his opening submissions, however, Mr. Marshall submitted that disclosure was required of the fact that the limitation period had expired or "possibly, that, by the grant of further extensions of the validity of the claim form, you may be causing limitation defences to be lost". By the time of his reply submissions, he submitted that "what should have been put before the court is what is set out in our expert report; it explains what the

limitation periods are, how they work and how they impacted on the relevant allegations in our case." It was no longer suggested that the materials or information as to limitation, which were before the court for the 4 July hearing, should have been provided. Indeed, at one stage in his submission Mr. Marshall criticised the disclosure which had been made in those materials for the purposes of the application for permission to serve out, although ultimately he accepted that the disclosure made may have been adequate to show "a good arguable case" for those purposes.

149. In my view, where non-disclosure is alleged it is indeed incumbent on the party making the allegation to give proper particulars of the case being advanced, so that it can be fairly responded to by the other party. There was here, as Mr. Ritchie submitted, a moving target. As far as the original ground relied upon is concerned, I do not consider that it is sufficient, in the context of an allegation of non-disclosure, for a party simply to allege that the 'possibility' of a limitation defence was not disclosed. There are two reasons for this.

150. First, there needs to be some discernible merit in the particular limitation defence which, it is alleged, should have been disclosed. A party cannot be criticised for failing to disclose the 'possibility' of a limitation defence which is not said to have some prospect of success. The point is relevant in the present case because there was no attempt by Mr. Marshall to argue, at this hearing, that there was any merit to the two possible limitation defences which were discussed in the evidence to which Mr. Byford referred; i.e. limitation defences under Kuwaiti law and English law.

151. Secondly, I consider it self-evident that there must be a material connection between the extension application and the limitation defence relied upon. Rix LJ explained in paragraph [76] of *Cecil v Bayat,* that:

> "What is important for present purposes is a cause of action which might expire in between the issue of the claim form and the expiry of time for service under it: for if the claim form has not been served and time for service therefore needs to be extended, the decision whether to extend or not will involve a decision whether the claimant is forced to issue anew, which may leave him exposed to a limitation defence, or else will be permitted in effect to extend time for getting his litigation underway albeit under the protection of a claim form originally issued within time".

Burnton LJ held at paragraph [54] that, in the context of limitation, the primary question was "whether, if an extension of time is granted, the defendant will or may be deprived of a limitation defence".

152. In the context of an application to extend time, what therefore matters is not whether there may exist in general terms a limitation defence, but whether the extension sought will impact upon that limitation defence. These two concepts are not necessarily the same. The present case provides an illustration of how a defendant can raise a limitation defence to a claim in circumstances where the extension has no potential impact on that defence. Thus, an important issue in the present case is whether the law applicable to PIFSS' claims against Mr. Amouzegar is Kuwaiti law or Swiss law. Mr. Amouzegar did not suggest that the extension impacted a limitation defence under Kuwaiti law, or

indeed that there was any limitation defence under that law at all. His principal point under Swiss law is that, applying the ordinary approach in civil cases, the limitation period expired 1 year after PIFSS had knowledge of Mr. Amouzegar's alleged wrongs. The case set out in his Swiss law evidence is that this was August 2018 at the latest, based upon Mr. Amouzegar's name being identified in the Swiss law materials disclosed in mid-2017. If that principal point were accepted, it would follow that the Swiss limitation period expired prior to the commencement of the present proceedings, and was therefore not impacted by the extension which was sought in July 2019.

153. Mr. Amouzegar's case, as it has eventually emerged, is that the potential limitation defence impacted by the extension is (as described in Section D above) the defence which may arise in the event that (i) Mr. Amouzegar succeeds in showing that Swiss law is applicable, (ii) PIFSS succeeds in showing that Mr. Amouzegar's conduct was punishable under Swiss law, and that therefore the 15-year extended criminal law limitation period applies, and (iii) Mr. Amouzegar's alleged criminal acts in 2004 are not sufficiently closely connected to later acts so that the date of the subsequent acts would not be taken as the starting point for the running of time.

154. However, no particulars of that case were provided in Mr. Byford's witness statement. That statement did not even identify the law under which Mr. Amouzegar's limitation defence was said to arise, let alone the manner in which the extension impacted upon that defence. The point was fairly made, in Mr. Walsh's evidence in response statement, that Mr. Amouzegar had not attempted to advance or even describe this alleged potential limitation defence, and that it was difficult for PIFSS to address "such an argument in the abstract or to understand what it is that Mr. Amouzegar says ought to have been disclosed". This statement, which was made on 19 November 2019, was not responded to by way of any evidence in reply. It was only in December that Mr. Amouzegar intimated an intention to rely upon Swiss law, and therefore a limitation defence arising under that law. However, there was even then no explanation in any evidence served on his behalf as to how it was said that the extension impacted upon the potential availability of the defence. Nor was that explanation forthcoming in the skeleton argument served on behalf of Mr. Amouzegar for the purposes of the hearing. The submission there was that a limitation defence arose under Swiss law, unless some extended criminal limitation period could apply. But in relation to the latter, the substance of the submission was that this extended period would not apply, because "no criminal case has ever been brought in relation to Mr. Amouzegar and no criminal liability has been pleaded or even referred to". The first time that Mr. Amouzegar provided an explanation of the potential impact of the extension on limitation was when Mr. Marshall produced his "speaking note" on the first morning of the hearing. None of this provides a firm or realistic foundation for an allegation of non-disclosure, which is of course a serious allegation to make.

155. Mr. Marshall relied upon the decision of Rix J. in *The Hai Hing* [2000] 1 Lloyd's Rep 300, 308 in support of a general proposition that it was always material, on an application to extend time, to disclose a limitation defence. That case concerned a potential Hague Rules time-bar which, if applicable, expired between issue of the writ and the application to extend time. It was therefore a case where the potential limitation defence was impacted by the extension, albeit that there was a possible argument (based upon blank reverse sides of the bills) that the Hague Rules were inapplicable to the

contract of carriage. It was in that context that Rix J. said that proper disclosure required:

> "a fair exposure of the issues as they ought reasonably to have been apparent at that time. It is clear from the letter written by Atlantis on July 20, 1998 that, at that time, it was considered that the Hague Rules did apply and that its time bar would expire shortly. By the first application on Nov. 20, 1998 it was known that the reverse of the bills was blank, but the time bar issue should have been fairly and frankly explained."

156. I do not therefore consider that *Hai Hing* is authority for the general proposition that the existence of the "possibility" of a limitation defence must always be disclosed on an application to extend time, irrespective of whether the extension potentially impacts upon that defence.

157. Since the case originally advanced by Mr. Byford is not in my view sustainable, and since particulars of the matters subsequently relied upon by Mr. Marshall were not provided in sufficient time to enable PIFSS to meet that case, I reject Mr. Amouzegar's case in so far as it is based on non-disclosure.

158. It is therefore not necessary for me to deal in detail with the wider case that Mr. Marshall sought to advance. I will however indicate my conclusions on that wider case, whilst bearing in mind that PIFSS did not have the opportunity of addressing that case in its evidence.

159. First, the argument that there was non-disclosure as to the potential impact of a Swiss law limitation defence did not strike me as having any real strength. At the time of the extension application, PIFSS did not know that Mr. Amouzegar intended to rely upon Swiss law, or upon the Swiss law of limitation. There had been no relevant pre-action correspondence in which Mr. Amouzegar had intimated the possibility of such reliance. The authorities do show that the disclosure obligation extends to facts which a party would have known if he had made proper enquiries, or issues (as Rix J. said in *The Hai Hing*) which ought reasonably to have been apparent at that time. On the materials before me, I was not persuaded that PIFSS should have appreciated that Mr. Amouzegar intended to rely on Swiss law, or the Swiss law of limitation, or that they ought to have appreciated the potential impact of the extended criminal limitation period under Swiss law on a relatively small part of their overall case.

160. In that regard, it is a striking feature of the case that Mr. Amouzegar and his advisers did not themselves identify the relevance of Swiss law, or the Swiss law of limitation, until some considerable time after Mr. Amouzegar had challenged jurisdiction. Thus, at the time when Mr. Byford's first witness statement was served, they had not identified the points now relied upon. Judging from Mr. Byford's witness statement in support of the application, coupled with the fact that no reference was made by Eversheds to Swiss law until 17 December 2019, it would appear that it was only in December 2019 that Mr. Amouzegar gave consideration to placing reliance on Swiss law and to limitation in that regard. The argument on non-disclosure therefore posits that, as at July 2019, PIFSS should reasonably have been aware of issues which Mr. Amouzegar and his advisers did not themselves identify or raise at the time when they should have been raised (i.e. when the evidence in support of the jurisdictional

challenge was served) or until some considerable time after that. Furthermore, the particular impact of the Swiss criminal law extension period on PIFSS' causes of action was not identified until the first morning of the hearing. None of this is a promising basis on which to allege non-disclosure.

161. Secondly, even if there had been non-disclosure of Swiss limitation law and its impact on PIFSS' causes of action, this is not a case where I would have set aside the extension on that basis. Mr. Marshall made it clear that he was not alleging that PIFSS had sought to mislead the court. The belated reliance by Mr. Amouzegar on Swiss limitation law, and in particular the belated identification by Mr. Amouzegar of the manner in which the extension impacted upon his limitation defence, illustrates how (per Christopher Clarke J. in *OJSC ANK Yugraneft*) in a complicated case, it is just to allow some margin of error, and that it is "often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose".

162. Here, despite a very considerable amount of work carried out by Mr. Amouzegar's legal team over some months, it was not until the morning of the hearing that there was any identification by him of the way in which the extension impacted upon potential limitation defences. If it took Mr. Amouzegar's team so long to identify what to my mind is the critical point, it is unrealistic to suggest that there was any non-disclosure by PIFSS which would warrant the setting aside of the extension order.

163. It is also clear to me that if there were any non-disclosure in the present case, it was "innocent" rather than deliberate, and not sufficiently culpable so as to warrant the setting aside of the order. The factual background is that in their papers for the applications heard on 4 July, PIFSS had specifically addressed the issue of limitation in the context of both Kuwaiti law and English law. The substance of its case was that there was no merit in a limitation defence under either law. The former law is important because it is the law pursuant to which the claim is brought. The latter is important because it presumptively applies in the absence of a case and proof that a foreign law is different to English law.

164. This is not therefore a case where a claimant has decided to withhold from the court information about a potential limitation defence. Rather, PIFSS had addressed the issue squarely, and identified why there was no limitation defence under either of these laws. In relation to those laws, Mr. Amouzegar does not challenge the validity of the arguments which were advanced.

165. Having reviewed the materials which were provided to the court, I decided on 4 July 2019 that this was an appropriate case in which to grant permission to serve out of the jurisdiction. In order to reach that conclusion, I needed to be satisfied that there was a serious issue to be tried, and I indicated that I had been so satisfied. I accept Mr. Marshall's argument that, on analysis, the fact that there is a serious issue to be tried on the question of limitation, in the context of an application for permission to serve out, does not necessarily lead to the conclusion that there is no arguable limitation defence which needs to be disclosed on a subsequent without notice application for an extension of time. However, it appears that this distinction was not appreciated by PIFSS. Indeed, the distinction was not appreciated by Mr. Byford when he served his witness statement. He did not draw any distinction between the disclosure required for the 4 July hearing, and the disclosure required for the extension application. In so far as he identified what

should have been disclosed, his statement referred to the materials which had previously been disclosed to the court for the purposes of the 4 July hearing. It was only in the course of Mr. Marshall's opening submissions that the distinction was identified.

166. As I have said, PIFSS reasonably understood that Mr. Byford was suggesting that the materials provided for the 4 July hearing should have been disclosed again to the court. PIFSS met this case by explaining, convincingly in my view, the reasons why this happened. The materials had been provided for the previous application. They had been read and considered by me, the assigned judge. The order for service out of the jurisdiction had then been made. PIFSS had expected that the application for an extension, which had been trailed at the 4 July hearing, would come back before me. In the event, the matter was dealt with by Teare J. As Mr. Walsh explained in his 8th statement, however, it did not occur to him or to anyone on his team that it was necessary to explain the limitation point to a new judge. There was therefore, on the evidence before me and contrary to Mr. Marshall's submission, no conscious decision by PIFSS not to raise the limitation issue.

167. When these matters are considered in the round, it is clear that any non-disclosure was neither deliberate nor culpable, and would not have been such as to justify setting aside the order obtained.

I: Severance

168. In view of my conclusion, for the reasons set out above, that the extension order should not be set aside, it is not necessary for me to address the additional argument of Mr. Ritchie that the extension order could stand, save in relation to the limited group of causes of action which were (on Mr. Amouzegar's case) impacted by the extension order. I will, however, address this issue because I consider that it provides an additional reason why the order should not be set aside.

169. The issue of 'severance' arose after Mr. Marshall had produced his speaking note, which identified that the impact of the extension concerned only a limited part of the claims that were made by PIFSS. By way of introduction to that note, Mr. Marshall submitted that it was important to bear in mind that insofar as acts took place between February 2004 and 15 years before the date of actual service, 27 August 2004, "those are the acts or the conduct giving rise to a claim in respect of which the extension of the validity of the … claim form … has been critical." Subsequently, Mr. Marshall said that this was not quite right, because the extension granted by Teare J. had been until 31 October 2019, and accordingly the relevant period for considering the impact of limitation defences terminated on 31 October 2004.

170. In the course of his submissions, Mr. Ritchie said that if the extension were to be set aside at all, then it should be set aside only insofar as it concerned the acts or conduct during the period critical to Mr. Amouzegar's limitation argument. He submitted that if there were causes of action that had or would otherwise have expired in a given period, these could be excluded from the extension. This period, which he described as the 'target' period, was the period from the issue of the Claim Form through to 27 August, when service was actually effected. The end-point was not 31 October 2019, because that was beyond the time when service was actually achieved. He said that in

principle his clients would, subject to appropriate wording, give an undertaking that they would not seek to take a limitation point in respect of claims over that period; i.e. in relation to claims in which limitation would otherwise expire during that period. Effectively, therefore, PIFSS would treat the position as if the Swiss law limitation provisions, as analysed by Mr. Amouzegar's Swiss experts, applied.

171. In arguing for severance, he relied upon the decision of Roth J. in *The Khan Partnership LLP v Infinity Distribution Ltd (In Administration)* [2016] EWHC 1390 (Ch), which had considered the decision of the Court of Appeal in *City & General v Royal & Sun Alliance* [2010] EWCA Civ 911.

172. In response, Mr. Marshall submitted that the Court of Appeal in *City & General* indicated that severance was not generally permissible in a case in which there were arguments about precisely when each claim became statute barred. He said that there was scope for debate as to the constituents which, under Swiss law, bring about the barring by limitation. The material at the moment was insufficient to make any assessment on that topic, and PIFSS had not provided any formulated basis for segregation. The case law indicated that unless the process of severance was going to be very straightforward, the court should simply leave the claimant to issue fresh proceedings. He said that *Khan* was a very unusual case, involving conduct of a defendant who effectively denied the claimant the opportunity to issue fresh proceedings in time.

Discussion

173. The issue of severance, in the context of an application to set aside an order for an extension of time, has been addressed in only two cases. In *City & General*, an argument on severance, or separate consideration for each head of claim, was addressed for the first time on appeal. That case involved three belated claims made by the claimant against its insurers. The first cause of action was likely to have been time-barred before proceedings were issued. The second cause of action expired between the issue of the claim form and the time when the extension application was made, so that the extension would deprive the defendant of a limitation defence. The third cause of action was possibly time-barred as well, if the particular problem (giving rise to the insurance claim) arose at the time of the matters giving rise to the first and second causes of action. The Court of Appeal rejected the argument that the judge should have considered each of the three claims separately, coming to a separate conclusion about the time-bar in respect of each claim. The court said:

> "[6] The short answer to this ground of appeal is that the judge was never asked to consider the extension of time on this basis and it is, too late, on appeal to ask this court to do so for the first time. Both parties contended for an all or nothing approach and the judge cannot possibly be criticised for adopting the same approach.
>
> [7] Moreover, any such approach would not only be complicated, it would almost certainly not be justified in a case in which there were arguments about precisely when each claim became time-barred. It is well-settled that when debatable issues of limitation arise, it is inappropriate to attempt to decide them

> on an interlocutory application for an extension of time for service of a claim form. If the claimants' argument that the claims are not time-barred is correct, they can always begin a fresh action in which, if a time-bar is asserted, it can be adjudicated upon."

174. The case therefore does not provide encouragement for an approach involving severance. It does not, however, reject this approach as a matter of principle. The argument there arose in the context of a case where an attempt was being made to take a point on appeal for the first time. Moreover, the judgment indicates that argument did not lead anywhere, because the third claim (which arose latest in time) was potentially time-barred as well.

175. The issue then arose in *The Khan Partnership* case. There were two claims in issue in a solicitors negligence action. These related to (i) a success fee, and (ii) an interest fee. The defendant solicitors had in effect deducted both of these fees from monies due to the claimant, and the proceedings sought damages in respect of these deductions. The claim form was issued on 14 July 2014, and was just in time in relation to the success fee claim where limitation would arguably have expired shortly after 16 July 2014. It was more comfortably in time in relation to the interest fee claim, where the limitation period would arguably expire on 24 December 2014. The claimant did not serve the claim form within time, but obtained an extension (on a without notice application) in November 2014. The master granted an extension, but only up until 30 January 2015. The effect of this extension was potentially to deprive the defendant of a limitation defence both in relation to the success fee claim and the interest fee claim: see the judgment of Roth J. at [32].

176. On an application to set aside the extension, the master extended time for service of the claim form, but excluding the success fee claim (i.e. the claim where time arguably expired in July 2014). It was a case where there was no good reason for the extension which had been obtained, in relation to either claim. The decision to seek an extension, rather than to serve, was a "serious error of judgment": see [53]. Nevertheless, Roth J. upheld the master's decision to limit the setting aside of the extension to the success fee claim. The extension was therefore upheld in relation to the interest fee claim. The reason why this was treated differently was because the defendant had delayed in serving its application to set aside the extension order until 23 December. The application was served only the day before the limitation period for the more substantial interest fee element of the claim would expire, leaving no time for a fresh protective claim form to be issued. Roth J. considered, applying *Cecil v Bayat*, that the facts were sufficient to warrant the grant of an extension notwithstanding the impact on the defendant's limitation defence.

177. What is important for present purposes, however, is not the reason why the extension was granted in that case, but Roth J.'s discussion as to whether it was permissible to treat the claims differently:

> "[63] Ms Mulcahy also challenged the jurisdiction of the court or the propriety of allowing what was in effect a partial extension of time. It is not altogether clear from the judgment of Judge Walden-Smith giving permission to appeal whether she thought that this was an independent basis on which the Chief Master's

> decision could be impugned or whether she considered that it was erroneous because it was based on a mistaken view that the limitation period in respect of the interest fee claim had not expired. But in any event, I see no reason in principle why such an approach is impermissible where it is clear that the relevant limitation affected only a discrete part of the claim. The Chief Master had regard to what Longmore LJ said in City & General v Royal & Sun Alliance [2010] EWCA Civ 911, [2010] BLR 639, at [7], but those observations, which were *obiter* in that case, do not seek to preclude such an approach where the severed claims are distinct and do not relate to the question of when the remaining claim became time barred. Such an approach seems to me entirely sensible and in accordance with the overriding objective."

178. I consider that the same approach can and should be taken in the present case. The relevant Swiss law limitation defence relied upon arises on the premise that certain acts (if punishable under Swiss criminal law) within a defined period were distinct, such that the Swiss criminal law 15 year extension period applies to each act separately. The relevant defined period begins, as is common ground, 15 years before the date when the Claim Form was issued: 21 February 2004. It ends on either 27 August 2004 or 31 October 2004. No case was advanced that the extension had an impact on any causes of action based on acts which took place after 1 November 2004. The overwhelming majority of the causes of action relied upon by PIFSS were not potentially affected by the extension application; either because, on the Swiss law evidence as it currently stands, they were already time-barred (if Swiss law applies at all) or because they took place after 1 November 2004.

179. Furthermore, it is in my view in accordance with the overriding objective to take this approach in the present case. There are strong case management reasons for upholding the extension with a limited carve-out. To require PIFSS to re-issue and re-serve proceedings seems to me to be a futile and potentially disruptive exercise, in circumstances where there are substantial claims against Mr. Amouzegar which PIFSS clearly intend to pursue, and where Mr. Amouzegar is party to the further related proceedings concerning the VP Banking Assistance Scheme. Those proceedings have been consolidated with the claim made under the Claim Form currently in issue, and where no similar point on service has been taken. I am also mindful of the potential disruption to the orderly determination of the jurisdictional challenges of the 3rd, 4th, 8th, 9th and 10th Defendants, whose applications Mr. Amouzegar supports. These applications are due to be heard by the court over 4 days in July 2020, and it is clearly appropriate and desirable that Mr. Amouzegar should participate in that hearing so that the court can determine the relevant issues (essentially as to the court's jurisdiction in relation to the Pictet scheme) in relation to all interested parties. If, however, re-issue and re-service were to be required, then there would be a risk that this would not happen, at least unless Mr. Amouzegar decided to appoint solicitors to accept service of the reissued proceedings. The desirability that the July hearing should determine the relevant issues in relation to all interested parties is in my view reinforced by the matter which was addressed at the conclusion of the hearing on 29 April, where Mr. Amouzegar suggested that a further jurisdictional challenge to the third claim form should be stayed pending the determination of the applications on the Pictet scheme

which are to be heard in July. For this stay to make sense, it is desirable if not necessary for Mr. Amouzegar to remain party to the July hearing.

180. In view of my prior conclusions, it is not necessary to resolve any issues as to the wording of appropriate undertakings, or whether the end-point of the relevant period is 27 August 2004 or 31 October 2004.

J: CPR 6.16 - the cross-application

181. CPR 6.16 provides that the court may "dispense with service of a claim form in exceptional circumstances".

The parties' arguments

182. PIFSS submitted that the exercise of the power under this rule was a matter for the court's discretion, subject only to the requirement that the circumstances be "exceptional". They submitted that this was an appropriate case for the exercise of the court's discretion under CPR 6.16 for a number of reasons.

183. First, even if (because no extension is granted) the Claim Form was served on Mr. Amouzegar 6 days late, the purpose of service was achieved (comfortably within the initial 6-month period for service by 21 August 2019) when Mr. Amouzegar received the Claim Form and other documents shortly following 24 July 2019. Accordingly, the Claim Form was communicated to the defendant within time, and thereby fulfilled what Lord Clarke in *Abela v Baderani* [2013] UKSC 44 considered (at paragraph [37]) to be the "most important" purpose of service.

184. Secondly, the Claim Form would also have been formally served in time when Mr. Amouzegar was sent a summons from the Swiss authorities dated 13 August 2019 (requiring him to collect the Claim Form from the Office of the Civil Court of Geneva) but for the fact that Mr. Amouzegar took a 4-week holiday from late July to 26 August 2019.

185. Thirdly, the fact that service was not formally completed by 21 August 2019 was happenstance and not PIFSS's fault. There is a relevant similarity between Mr. Amouzegar and the defendant in the recent decision of Marcus Smith J. in *Absolute Living Developments Ltd v DS7 Ltd*. [2019] EWHC 550 (Ch). The defendant in that case appears to have refused receipt of the documents on technical and unmeritorious grounds. In the present case, Mr. Amouzegar accepts that he received the Claim Form shortly following 24 July 2019 but is now contesting service on technical and unmeritorious grounds.

186. Fourth, if service is not dispensed with, PIFSS will be forced to issue a new claim form, consolidate it with the Claim Form, and re-start the process of serving on Mr. Amouzegar via the FPS. That would cause delay and increase costs. The delay will be further exacerbated in circumstances where it appears that Mr. Amouzegar will want to contest jurisdiction against the new claim form (on non-service grounds), which will probably lead to a hearing after the other parties to the Pictet Scheme contesting jurisdiction have had their applications heard in July 2020. Requiring PIFSS to re-issue would also be a triumph of form over substance in circumstances where Mr. Amouzegar has known about PIFSS's claim since July 2019.

187. On behalf of Mr. Amouzegar, Mr. Marshall submitted that the application was misconceived. In the event that the extension order were set aside, Mr. Amouzegar would not have been validly served, and the Claim Form will have expired. In circumstances where the court has seen fit to take this course, there could be no proper justification for dispensing with service under CPR 6.16. Reliance was placed upon the decisions of the Court of Appeal in *Godwin v Swindon BC* [2002] 1 WLR 997 and *Anderton v Clwyd CC (No. 2)* [2002] 1 WLR 3174 at [50] – [59], in support of the proposition that once the claim form had expired, it would be contrary to principle for the jurisdiction under CPR 6.16 to be used to relieve the claimant from its difficulty. Once the time for service had expired, PIFSS would have to bring the case within the requirements of CPR 7.6 (3), since otherwise CPR 6.16 would be used circumvent those requirements. There was no jurisdiction under CPR 6.16 to do this. Any application therefore had to be made under CPR 7.6 (3). It was misconceived to seek to revitalise their Claim Form via CPR 6.16.

Discussion

188. I reject the proposition that the cross-application must fail because no application is being made under CPR 7.6 (3), or that no such application could be made. In *Anderton*, the Court of Appeal rejected that very proposition. That decision concerned a number of cases where a claim form had not been effectively served within time, and where a limitation defence arose. At paragraph [46] of its judgment, the court made it clear that it was not contended that the court had power in any of the cases to extend time for service claim form. Nevertheless, the court considered it appropriate to dispense with service under CPR 6.9 (the equivalent of the present CPR 6.16) in two cases (the third case and the fourth case) where a claim form had come to the attention of the defendant prior to the expiry of the time for service, even though the effect of the CPR was that such service had not taken effect until a later time. The court took into account the prejudice that would be suffered by a claimant by a refusal of an order dispensing with service, since he would be unable to serve the claim form "because he cannot obtain an extension of time for service under rule 7.6 (3)": see paragraph [58].

189. At paragraph [53], on which Mr. Marshall placed reliance, the court set out the defendants' argument as follows:

> "It was argued that an order dispensing with service should not be granted, if it is in fact for the purpose of treating late ineffective service of the claim form as effective service. Rule 7.6(3) is a complete procedural code for an extension of time for service of the claim form after the end of the 4 month period. The discretionary power to dispense with service under rule 6.9 should not be used as a means of circumventing and rendering nugatory the statutory limitation provisions and to do what is forbidden by the clear provisions of rule 7.6(3). The court should only dispense with service where there is a possibility of effective service, which is capable of being dispensed with. There is no possibility of effective service where, as is the case in some of the appeals, the time for service of the claim form has already expired."

190. However, the court did not accept that argument, holding in paragraph [55] that rule 6.9 was sufficiently widely worded to entitle the court to dispense retrospectively with service of the claim form in an appropriate case:

> "As a general rule applications made for retrospective orders to dispense with service will be caught by the reasoning in Godwin. There may, however, be exceptional cases in which it is appropriate to dispense with service without undermining the principle in Godwin that rule 6.9 should not be used to circumvent the restrictions on granting extensions of time for service as laid down in rule 7.6(3) and thereby validate late service of the claim form."

191. The court then distinguished between two categories of case:

> "[56] In our judgment there is a sensible and relevant distinction, which was not analysed or recognised in Godwin, between two different kinds of case.
>
> [57] First, an application by a claimant, who has not even attempted to serve a claim form in time by one of the methods permitted by rule 6.2, for an order retrospectively dispensing with service under rule 6.9. The claimant still needs to serve the claim form in order to comply with the rules and to bring it to the attention of the defendant. That case is clearly caught by Godwin as an attempt to circumvent the limitations in rule 7.6(3) on the grant of extensions of time for service of the claim form.
>
> [58] Second, an application by a claimant, who has in fact already made an ineffective attempt in time to serve a claim form by one of the methods allowed by rule 6.2, for an order dispensing with service of the claim form. The ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service within the period of 4 months, or an extension thereof. In the circumstances of the second case the claimant does not need to serve the claim form on the defendant in order to bring it to his attention, but he has failed to comply with the rules for service of the claim form. His case is not that he needs to obtain permission to serve the defendant out of time in accordance with the rules, but rather that he should be excused altogether from the need to prove service of the claim form in accordance with the rules. The basis of his application to dispense with service is that there is no point in requiring him go through the motions of a second attempt to complete in law what he has already achieved in fact. The defendant accepts that he has received the claim form before the end of the period for service of the claim form. Apart from losing the opportunity to take advantage of the point that service was not in time in accordance with the rules, the defendant will not

> usually suffer prejudice as a result of the court dispensing with the formality of service of a document, which has already come into his hands before the end of the period for service. The claimant, on the other hand, will be prejudiced by the refusal of an order dispensing with service as, if he is still required to serve the claim form, he will be unable to do so because he cannot obtain an extension of time for service under rule 7.6(3).
>
> [59] In the exercise of the dispensing discretion it may also be legitimate to take into account other relevant circumstances, such as the explanation for late service, whether any criticism could be made of the claimant or his advisers in their conduct of the proceedings and any possible prejudice to the defendant on dispensing with service of the claim form."

192. The two different kinds of cases discussed in these paragraphs concerned service in England (hence the reference to CPR 6.2), but I consider that the approach can be applied to service in Switzerland in the present case by analogy. The present case does not fit within the first category described at paragraph [57]. This is a case in which PIFSS did make an attempt to serve the Claim Form in time by the relevant method permitted by the rules. Here, the Claim Form required service via the FPS and the Swiss authorities. Within the period for service, PIFSS, the FPS and the Swiss authorities had done everything that they needed to do in order to effect service. The only reason why service was not completed was, according to Mr. Byford's evidence, that Mr. Amouzegar was on holiday between from "the end of July 2019 until Monday 26 August 2019". The reason that this mattered was that under Swiss law service was only effected on Mr. Amouzegar on the date on which he collected the documents from the Swiss authority. That happened on Tuesday 27 August.

193. The present case also does not precisely fit within the second category, described at paragraph [58], either. There was certainly here an ineffective attempt to serve the Claim Form by a permitted method: it was ineffective only because Mr. Amouzegar was away on holiday. It is also the case that the Claim Form had become known to Mr. Amouzegar during its currency: Mr. Amouzegar received Stewarts' letter dated 24 July before he went on holiday. But (in contrast to the category as described in paragraph [58]) Mr. Amouzegar had not received or had his attention drawn to the Claim Form by a permitted method of service. This is because it was not possible to serve the Claim Form on Mr. Amouzegar by post. (In the two cases where the Court of Appeal decided, in *Anderton*, that it was appropriate to dispense with service, the claimants had been able to and had served the claim form by post or fax).

194. I did not consider that the decision in *Absolute Living Developments* was of much assistance in the present context. The decision does not establish any point of principle, and the facts have no real analogy with the present case. It involved a defendant taking a point as to the lack of translations of the documents to be served, even though she was a British citizen. This was a case where the documents were provided to the defendant's Swiss lawyers, and this service seems to have taken place within the currency of the claim form.

195. I consider that the essential question here is whether the facts of the present case are sufficiently close to the second category of case discussed in *Anderton* to make it

appropriate to make an order dispensing with service on the basis of "exceptional circumstances". I have concluded that they are not. Whilst it is true that Mr. Amouzegar had been sent the Claim Form and other relevant documents on 24 July, this was not a permitted method for service of those documents. It is also true that PIFSS and the Swiss authorities had, by early August, done all that they could do in order to effect service, and that it only remained for Mr. Amouzegar to attend to collect the documents. However, the fact remains that service had not yet been effected by that time, and that there is no suggestion that Mr. Amouzegar's holiday was not genuine or that he had been seeking to evade service following receipt of the letter on 24 July. In fact, the evidence is that Mr. Amouzegar collected the documents promptly upon his return from holiday. In these circumstances, I do not consider Mr. Amouzegar's argument to be an opportunistic one: he was not served within the currency of the Claim Form, and bears no responsibility for that fact. I accept that the reason that he was not served was not the fault of PIFSS. The difficulty in the present case arose because service of the Claim Form was delayed for the reasons which I have described, and that the necessary steps then needed to be taken at a time when people are often away on holiday. If (contrary to my conclusion) there was not a sufficiently good reason for extending the time for service of the Claim Form, then I do not think that the present circumstances are sufficiently exceptional to warrant the making of an order under CPR 6.16.

Conclusion

196. For the above reasons, the application to set aside the extension order is dismissed.