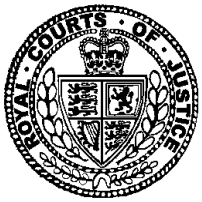

Neutral Citation Number: [2021] EWHC 1380 (Comm)

Case No: CL-2020-000010

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

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

Date: 26/05/2021

Before :

Mr Justice Butcher

- -

Between :

YA II PN LTD

Claimant

-and-

FRONTERA RESOURCES CORPORATION

Defendant

- -

- -

Paul Lowenstein QC (instructed by **Memery Crystal LLP**) for the **Claimant**
Laurence Emmett QC (instructed by **Haynes and Boone CDG, LLP**) for the **Defendant**

Hearing date: 11 May 2021

- -

Approved Judgment

.....

THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

1. An application is made by the Defendant, Frontera Resources Corporation ('Frontera') to set aside a default judgment obtained by the Claimant, YA II PN Ltd ('YA II') dated 20 April 2020 on the basis that the Claim Form was not validly served on it. YA II has made a cross-application that the court should grant retrospective permission, pursuant to CPR 6.15, to serve the Claim Form by way of personal service on 2 March 2020, alternatively for an order dispensing with service of the Claim Form pursuant to CPR 6.16, or alternatively extending time for service of the Claim Form.

Factual Background

2. The underlying claim in this action is one made by YA II for a principal sum of US$2,785,200 which it contends is owed by Frontera under a settlement deed dated 18 October 2018.

3. YA II issued the Claim Form on 7 January 2020, and made an application for permission to serve it out of the jurisdiction.

4. I considered that application on the papers. By order dated 15 January 2020, I gave permission to serve Frontera out of the jurisdiction. The Order which I made, which was in the terms sought by YA II, was as follows:

> "1. The Claimant has permission to serve the Claim Form, Particulars of Claim and any other document in these proceedings on the Defendant at its business address at 3040 Post Oak Boulevard, Suite 110, Houston TX 77056, USA (the "**USA Address**") and its registered address at Maples Corporate Services Limited, P.O. Box 309, Ugland House, South Church Street, George Town, Cayman Islands (the "**Caymans Address**").
>
> 2. In respect of the USA Address, the Defendant has (1) 22 days after the service of the Particulars of Claim to file an acknowledgment of service under CPR Part 10 and/or an admission under CPR Part 14; or (2) 22 days after service of the Particulars of Claim to file a Defence or 36 days after service of the Particulars of Claim to file a Defence, where the Defendant has filed an acknowledgment of service.
>
> 3. In respect of the Caymans Address, the Defendant has: (3) 31 days after service of the Particulars of Claim to file an acknowledgment of service under CPR Part 10 and/or an admission under CPR Part 14; or (4) 31 days after service of the Particulars of Claim to file a Defence or 45 days after service of the Particulars of Claim to file a Defence, where the Defendant has filed an acknowledgment of service."

5. The evidence before me indicates that a number of steps were taken to seek to effect service. Specifically:

   (1) On 6 February 2020 an authorised process server attempted to serve Frontera at the Texas Address stated in my order of 15 January 2020. When the process server

arrived, the doors were locked and there was a notice on the door saying that the landlord had changed the locks as the tenant had not paid the rent.

(2) Following that, YA II's US counsel obtained Frontera's public filings, which stated that Mr Zaza Mamulaishvili was Frontera's CEO and Mr Gerard Bono was Frontera's Vice President. In reliance on those filings, an authorised process server attempted to serve Mr Mamulaishvili at 355 Tynebridge Lane, Houston, Texas, USA, on 17 February 2020. The process server was told that Mr Mamulaishvili did not reside there. On 19 February 2020, an authorised process server sought to serve Mr Mamulaishvili at 3102 Newcastle Drive, Houston, Texas. The process server was told that though Mr Mamulaishvili owned the house, he did not reside there and was rarely present.

(3) On 2 March 2020, an authorised process server personally served the Claim Form on Mr Gerard Bono at 10819 Cranbrook Road, Houston, Texas, USA. Mr Bono was not by that time an officer of Frontera but its public filings had not been kept up to date. It is not in issue that on 2 March 2020, Mr Bono received a pack of documents, nor that, on 6 March 2020 Mr Bono informed Mr Steve Nicandros, CEO of Frontera, as to what had happened. On that latter date, Mr Bono sent Mr Nicandros a text saying "Steve, i was served documents related to the attached last week. I am almost sure you have this but just in case in a slim chance you dont i wanted you to be aware of this. There is a deadline to respond." The "attached" was a photo of the cover-page, which said it was a "Citation". The "Citation" is headed with the title to the English proceedings, in a format that falls somewhere between the traditional English and US styles of heading. It then said that it was "Directed To":

> "Frontera Resources Corporation
> Steve C. Nicandros
> Non-Executive Chairman and
> Registered Agent
> 3040 Post Oak Blvd., Suite 1100
> Houston, Texas, 77056"

This was followed by the following text:

> "YOU HAVE BEEN SUED. YOU MAY EMPLOY AN ATTORNEY. IF YOU OR YOUR ATTORNEY DO NOT FILE A WRITTEN ANSWER BEFORE MR JUSTICE BETCHER WITHIN 22 DAYS AFTER SERVICE OF THE PARTICULARS OF CLAIM TO FILE AN ACKNOWLEDGEMENT OF SERVICE UNER CPR PART 10, AND/OR AN ADMISSION UNDER CPR PART 14, OR 22 DAYS OF SERVICE OF THE PARTICULARS OF THE CLAIM TO FILE A DEFENCE OR 36 DAYS AFTER SERVICE OF THE PARTICULARS OF CLAIM TO FILE A DEFENSE WHERE THE DEFENDANT HAS FILE AN ACKNOWLEDGMENT OF SERVICE." (sic)

Mr Nicandros responded, "Jerry…Thanks for sending this. I had not seen/received it. Sorry it darkened your doorstep. When did you receive?"

(4) In the evening of 2 March 2020, YA II's process server in the USA produced a "Return of Service". It stated that:

> "ON Monday, March 2, 2020 AT 6:30 PM, I, Jayme Chacon, **PERSONALLY DELIVERED THE ABOVE-NAMED DOCUMENTS TO:** FRONTERA RESOUCES CORPORATION C/O GERARD BONO, 10819 CRANKBROOK RD, HOUSTON, HARRIS COUNTY, TX 77042." (sic)

6. On 20 March 2020, YA II lodged with the court a Certificate of Service. It identified the address where service had been effected as "Frontera Resources Corporation c/o Gerard Bono, 10819 Crankbrook Road, Houston, Harris County Texas TX 77042" (sic). It further stated that service had been effected "by other means permitted by the court", and specified:

> "In accordance with the Order of Mr Justice Butcher dated 15 January 2020 and pursuant to Sec 5.251 of the Texas Business Organizations Code permitting service of a corporation via any of its vice presidents, the documents were personally served on Gerard Bono. Return of Service is attached."

7. On 16 April 2020, YA II filed with the court a Request for judgment and reply to admission (specified amount), which certified that Frontera had not filed an admission or defence, and on 20 April 2020 judgment in default of an Acknowledgement of Service or a Defence was entered in the amount of £2,286,202.87 (inclusive of costs).

8. On 5 June 2020 YA II filed a petition in the Harris County District Court in Texas to enforce the default judgment of 20 April 2020. Frontera was represented by attorneys in relation to those proceedings from 3 August 2020.

Applications made

9. On 28 October 2020, Frontera issued its application in this court to set aside the judgment in default dated 20 April 2020. The grounds were said to be that the conditions in CPR 12.3(1) were not satisfied prior to the default judgment being obtained, and that "the validity of service is challenged on the basis that there had been non-compliance with the order of Mr Justice Butcher of 15 January 2020 giving permission to serve out of the jurisdiction and the requirements in CPR 6.40."

10. On 9 December 2020, YA II responded to Frontera's application to set aside, advancing its primary argument that there had been effective service and issuing its cross application to validate the purported service if it was found that there was any defect therein.

11. CPR rule 12.3 provides in part:

> "(1) The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which the judgment is entered –
> (a) The defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and
> (b) The relevant time for doing so has expired. …"

12. CPR rule 13.2 provides:

> "The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –
> (a) In the case of a judgment in default of an acknowledgment of service, any of the conditions in rule 12.3(1) and 12.3(3) was not satisfied …"

13. Frontera's case was that the condition in rule 12.3(1) had not been satisfied because the time for acknowledgment of service had not expired at the time judgment was entered. This was because, Frontera contended, there had been no valid service of the Claim Form at that time.

14. In this regard, Frontera submitted, YA II did not dispute, and I accept, that, as was decided in Shiblaq v Sadikoglu [2004] EWHC 1890 (Comm), [2005] 2 CLC 380, first judgment paragraphs 20-24, if there was no valid service, there will have been no obligation on the defendant to serve an Acknowledgment of Service, and no default in failing to do so, and a judgment in default entered in such circumstances must be set aside, subject only to the possible effect of an order retrospectively validating such service (an issue to which I come below).

Was there valid service?

15. Frontera's case was that there had not been valid service for either or both of two reasons:

(1) That the order of 15 January 2020 only gave permission to serve at specified addresses. Service was not effected, and is not said to have been effected, at either.

(2) There was no valid service in accordance with the relevant US law, whether that law was federal or Texas law.

Frontera's case is that, if the court concluded that (1) applied, then there would be no need to consider (2); but that even if (1) were not applicable, there was no good service because of (2). I will accordingly take the two points in turn.

16. In relation to the first point, Frontera points out that the order for service out which YA II sought, and which the court granted, was not in the standard form of PF 6B. That form, which is very frequently employed, provides in part:

> "1. the claimant has permission to serve the claim form on (*party*) at (*address at which party is to be served*) **or elsewhere in** (*country in which service is to be effected*)…." (bold emphasis added)

In the present case, the order did not include the words "or elsewhere in…", or any equivalent thereof, and was confined to the specified addresses. Furthermore, in paragraphs 2 and 3 of the order, the time for acknowledgment of service was related to service at the identified addresses. Frontera pointed out, correctly, that, on any view, service had not been effected, and it was not contended by YA II that it had been

effected, at either of the identified addresses. Accordingly, Frontera argued, service was not in accordance with the order of 15 January 2020 and was irregular.

17. I consider that Frontera is correct about this. It was by virtue of the order of 15 January 2020 that YA II had permission to serve the Claim Form out of the jurisdiction. The permission was, on its terms, limited to service at particular addresses. Service was not effected in accordance with the permission granted.

18. YA II sought to rely on CPR 6.40(3)(c), which provides:

> "(3) Where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served –
> …
> (c) by any other method permitted by the law of the country in which it is to be served."

YA II's argument was that if there was service by a method permitted by the relevant US law, though at an address different from that specified in the order of 15 January 2020, that would be good service in accordance with CPR 6.40(3)(c). I do not accept that submission. CPR 6.40(3)(c) is subject to any restrictions or limitations which may be imposed by the order. If a place for service has been specified, CPR 6.40(3)(c) does not allow service at another place. If YA II's argument were correct, then an order which had the "or elsewhere in…" wording, and one which did not, would have exactly the same effect, and those words would be unnecessary surplusage. To my mind that is not how the words of formal orders of the court should be understood.

19. Little in the way of authority was cited on this point. The decision in McCulloch v Bank of Nova Scotia [2006] EWHC 790 (Ch), appears to have proceeded on the basis that, in a case in which the order for service out specified an address for service and did not include the "or elsewhere in…" wording, then in the absence of the agreement between the parties that there could be service elsewhere, there would not have been valid service: see paragraphs 10, 30. The point was not, however, decided.

20. Nor was there any decision on the point in Abela v Baadarani [2013] 1 WLR 2043. In that case, again, the order for service out specified that the Claim Form could be served out of the jurisdiction on the defendant at a specified address in Lebanon and had not included the "or elsewhere in…" wording. The documents were in fact sent to a lawyer working in Lebanon, who had a power of attorney from the defendant, at an address different from that specified in the order. It is apparent from the judgment of Longmore LJ in the Court of Appeal [2011] EWCA Civ 1571, paragraph 10(1), that it was accepted by the claimant that service on the lawyer was not authorised by the order granting permission to serve out. In the Supreme Court, there was no dispute that that service had not been in accordance with the order for service out, nor that that service had not been good service in accordance with Lebanese law: see paragraph 8. Paragraph 32 of Lord Clarke's judgment was concerned simply to dismiss the notion, which the Court of Appeal had appeared to espouse, that there could only be an order deeming there to have been good service if the judge was satisfied that the method of service was permitted by local law. When Lord Clarke said that "there would have been no need for the declaration", it is to my mind clear that he was considering only whether a declaration was necessary based on the method of service (on the attorney)

and not on whether service had been rendered at a place other than specified in the order.

21. I do not regard my conclusion on this first point as unduly technical or narrow. There is no difficulty in avoiding the problem. It is only because the order sought and granted in this case was not in the standard PF 6B form that the issue arises. Furthermore, even without the "or elsewhere in…" wording, if the Claim Form was delivered to the defendant at another address within the relevant country then the court can, if there is good reason, make an order under CPR 6.15 retrospectively validating the service which was made. Those considerations seem to me to militate against giving to the order in this case, or similarly worded orders, an interpretation or effect other than that dictated by their terms.

22. For this reason, I consider that service on Mr Bono on 2 March 2020 was not valid service when made. Whether it should now be validated is a matter to which I will return below.

23. In case I am wrong in relation to that point, it is necessary to consider Frontera's second argument as to why service was invalid, namely that the service on Mr Bono on 2 March 2020 was not by a method permitted by the law of the country in which service was effected.

24. This argument gave rise to a number of sub-issues.

    (1) The first issue debated was as to what had to be shown. It was not in issue that it was for YA II to show that there had been valid service, but there was an issue as to the standard of proof. YA II's case was that it had to show a good arguable case that there had been valid service; Frontera's case was that YA II had to show it on the balance of probabilities.

    (2) The second was as to whether the relevant law was state (Texas) or federal law.

    (3) The third was whether there was valid service in accordance with whichever law was applicable.

25. In relation to the second and third of these issues, the parties relied on expert evidence of US lawyers: in the case of YA II on two reports of George C Haratsis, an attorney with McDonald Sanders; and in the case of Frontera on a report of Karlene Poll, an attorney with Kuhn Hobbs PLLC. The parties agreed that they should have, but did not, obtain appropriate orders from the court for the service of expert evidence, but as they were in agreement that I would be assisted by them they were put before me without cross-examination of the authors.

26. I turn to the first of the three issues which I have set out above, namely the standard to which YA II must show that there was service in accordance with the law of the country where service was to be effected.

27. In my judgment, YA II must establish this on the balance of probabilities. A judgment in default of acknowledgement of service is dependent on there having been an obligation on the defendant to acknowledge service, which itself presupposes valid

service. If the claimant wishes to have the benefit of a default judgment it must show that it is entitled to it by proving that there was such valid service. If there is any dispute about it, this must entail that the claimant shows it on the balance of probabilities. Judgment should not be entered against a defendant on the basis simply of an arguable case – even a good arguable case – falling short of a showing on the balance of probabilities that it was served. Moreover, in relation to issues of whether service was validly effected, the facts should be capable of relatively straightforward ascertainment.

28. This conclusion that the appropriate standard of proof is, in the context of an application to set aside a judgment in default, that the claimant must show valid service on the balance of probabilities, is the same as that reached in Estate of Michael Heiser v Islamic Republic of Iran [2019] EWHC 2074 (QB) by Stewart J (at paragraphs 213-216). It was the approach of Colman J in Shiblaq v Sadikoglu, loc cit, first judgment paragraphs 20-24, and second judgment paragraphs 3-28. It was also, as it seems to me, the approach of Langley J in Credit Agricole Indosuez v Unicof Ltd [2002] EWHC 77 (Comm), especially paragraphs 8, 10-13. I also consider that it is consistent with the approach adopted in Société Générale v Goldas Kuyumculuk Sanayi [2017] EWHC 667 (Comm) at paragraphs 34-36 by Popplewell J in relation to the issue of whether claim forms had been validly served in Dubai within the time for doing so.

29. While Mr Lowenstein QC submitted that Gorbachev v Guriev [2019] EWHC 2684 (Comm) was a case which supported the proposition that the standard of proof was of a good arguable case, that was a case involving a jurisdiction challenge under CPR 11.1. It was not a case involving a default judgment. Further, the relevant legal principles were not the subject of argument in that case (see paragraph 28).

30. The second issue is whether the relevant law was federal or state (Texas) law. As to this, Mr Haratsis and Ms Poll were in agreement that Federal Rule of Civil Procedure ('FRCP') 4 controls service of a foreign lawsuit on a US company. Ms Poll's evidence, however, was that under FRCP 4 (e) and (h) a plaintiff has an election as to whether to serve in accordance with state law or with federal rules. She further opined that YA II had elected to proceed under Texas law, as evidenced by the Certificate of Service which made reference to the Texas Business Organization Code, and the fact that the document purportedly served was called a 'Citation' rather than a 'Summons'.

31. For his part, Mr Haratsis denied that there was any requirement for a plaintiff to make an election. In any event, he disputed that anything done by YA II could be said to elect service by state law as opposed to federal law.

32. I doubted that, even if there was a relevant principle of election, it could be said that YA II had elected state law. In particular I considered that Mr Lowenstein was correct to say that the reference in the Certificate of Service to the Texas Business Organization Code was to an aspect of Texas company law, rather than an indication that there had been a choice to serve in accordance with state law, rather than federal law. Ultimately I concluded, however, that it was not necessary to reach a final conclusion on whether there was a principle of election and if there was whether there had been an election, because in my judgment it does not make a difference in this case as to whether the relevant law was federal or state law.

33. I will consider first state law. In this regard, it appeared to be common ground between the experts that the requirements of Texas law as to what constituted valid service were stricter than under federal law. Ms Poll cited what was said by the Texas Supreme Court in the case of Spanton v Bellah, 612 S.W.3d 314, 316-17 (Tex. 2020): "We indulge no presumptions in favor of valid issuance, service, or return of citation… Service of process that does not strictly comply with the rules' requirements is 'invalid and of no effect'". I nevertheless understood Ms Poll to agree with Mr Haratsis that even under Texas law there did not need to be "obeisance to the minutest detail" in order for service to be valid (see Poll report paragraph 39).

34. In Ms Poll's view there was non-compliance with the requirements of Texas law in the following respects:

    (1) The Citation did not contain the required admonishment that failure to answer could result in a default judgment, as required by Texas Rules of Civil Procedure ('TRCP'), Rule 99.

    (2) That the service deviated from the order of this court of 15 January 2020;

    (3) That the Return deviated from the name and address in the Citation, in that the Citation required service on Mr Nicandros and the Return referred to service on Mr Bono;

    (4) That the street name in the Return does not exist, in that it referred to "Crankbrook Ave" rather than "Cranbrook Ave"; and

    (5) The Return did not identify Mr Bono as an authorized representative of Frontera for service purposes.

35. I do not consider it necessary to come to a conclusion on each of these because I am satisfied that there was non-compliance with the requirements of Texas law, in a way which went beyond compliance with "minutest details", at least in the following two respects.

36. First, that TRCP Rule 99 was not complied with. Rule 99 lays down requirements for the form of a Citation, and, by (c) provides that the Citation is to include a notice to the defendant in these terms:

> "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10.00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

37. It is clearly the case, as Mr Lowenstein submitted, that it was not necessary for the Citation in this case, which involved service of foreign process, to contain exactly that wording. Nevertheless, it seems to me clear, as Ms Poll opined, that the Citation had to contain a statement that a default judgment might be entered if a written answer was not filed in a timely manner. It also seems to me clear that the Citation did not do so. While it is not necessary to go as far as Mr Emmett QC, who described the language which I have quoted in paragraph 5(3) above as "gibberish", it is incoherent, and in

particular lacks any reference to the possibility of a default judgment (or indeed any consequence) if a "written answer" is not filed. Mr Haratsis's answer was that the Response Pack was also served, and it referred to CPR Part 10, which discloses the risk of default. There is, however, no indication in any of the material I was shown that such an indirect reference to the possibility of default judgment could take the place of the direct statement required in TRCP 99 to be included in the Citation itself. I found compelling Ms Poll's conclusion that this omission from the Citation "would render any service ineffective under Texas law, both under Texas' strict-compliance service standards and on constitutional due process grounds" (Poll, paragraph 31).

38. Secondly, under TRCP 106(a), service may be in accordance with that rule "unless… an order of the court otherwise directs". Ms Poll's evidence is that this court's order of 15 January 2020 would count as a relevant order for these purposes, and that there was clear non-compliance because service was not at the US address specified in that that order. Mr Haratsis does not apparently dispute that this court's order is a relevant order (Haratsis 2, paragraph 17). It appears reasonable to suppose that this court's order of 15 January 2020 should so count, given that the Citation is itself clearly seeking to embody parts of that order (and uses the Commercial Court's reference number, specifies my name, identifies the US address included in that order, and takes the time period of 22 days from that order).

39. In those circumstances, I was persuaded by Ms Poll's evidence (paragraph 35) that "the deviations from the procedures in [the order of 15 January 2020] render service invalid under Texas law."

40. If the relevant law is federal law, the experts were agreed that the relevant rules were those provided for by rule 4 of FRCP. Ms Poll, as I have said, accepts that those rules are not as stringent as Texas state service rules, but gives evidence, by reference to Armco, Inc. v Penrod-Stauffer Bldg. Sys. Inc., 733 F.2d 1087, 1089 (4th Cir. 1984) and Soos v Niagara County, 195 F. Supp. 3d 458, 463 (W.D.N.Y.) 2016, that "plain requirements for the means of effecting service of process may not be ignored", and that "[a]lthough minor or technical defects in a summons in certain circumstances do not render service invalid, defects that are prejudicial to the defendant or show a flagrant disregard for the rule do."

41. FRCP 4(a)(1)(E) is a requirement that the summons must notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint. Ms Poll gives evidence that a failure of the summons to include a notification that if a written answer is not filed default judgment may be entered, is "fatally defective under federal law", and cites in that regard Osrecovery, Inc. v One Group Intern., Inc. 234 F.R.D. 59, 61 (S.D.N.Y. 2005) and Franke v ARUP Labs. (D. Utah Feb 26, 2008).

42. Given the evidence of Ms Poll, I am not persuaded on the balance of probabilities that service of a summons (which the Complaint must, ex hypothesi be, if federal law is relevant) without a notice that default judgment might be entered if a written answer was not given, constituted valid service. While Mr Haratsis is correct to say in relation to Osrecovery that that was a case in which a summons had not been served, what had been served was a copy of an order of the court to show cause. The court concluded that that was not sufficient and, in that regard, drew particular attention to the fact that

the court order did not notify the parties that a failure to appear would result in a default judgment (61). The court also pointed out that the fact that actual notice was effected was not sufficient to sustain personal jurisdiction over a defendant. Given the incoherence of, and absence of any mention of a consequence for failure to respond in, the notice here, I consider Ms Poll's evidence that that defect meant that service was ineffective under federal law to be persuasive.

43. For those reasons I do not consider that it has been shown on the balance of probabilities that there was valid service under the relevant US law.

YA II's cross application

44. YA II has applied, in case the court should find there not to have been valid service, for an order that would retrospectively validate the service on Mr Bono on 2 March, pursuant to CPR 6.15, alternatively an order dispensing with service of the Claim Form pursuant to CPR 6.16, alternatively an order extending time for service of the Claim Form pursuant to CPR 7.6 with permission to serve this on Frontera at the offices of its solicitors. This third limb of the application is not opposed by Frontera.

45. I will take YA II's application under CPR 6.15 first. That rule provides:

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

46. The main principles applicable to the exercise of the jurisdiction under CPR 6.15 were distilled by Popplewell J at paragraph 49 of his judgment in Société Générale v Goldas Kuyumculuk Sanayi, loc cit, an exercise on which he was congratulated by the Court of Appeal in the same case: [2018] EWCA Civ 1093, at paragraph 36, and were also the subject of consideration by the Supreme Court in Barton v Wright Hassall LLP [2018] UKSC 12. In that case, Lord Sumption JSC said this at paragraphs 8 to10:

> "8. The Civil Procedure Rules contain a number of provisions empowering the court to waive compliance with procedural conditions or the ordinary consequences of non-compliance. The most significant is to be found in CPR 3.9, which confers a power to relieve a litigant from any "sanctions" imposed for failure to comply with a rule, practice direction or court order. These powers are conferred in wholly general terms, although there is a substantial body of case law on the manner in which they should be exercised: see, in particular, *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1 WLR 3926 (CA), esp at para 40 (Lord Dyson MR and Vos LJ), *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] 1 WLR 4495 (SC(E)). The short point to be made about them is that there is a disciplinary factor in the decision whether to impose or relieve from sanctions for non-compliance with rules or orders of the court, which has become increasingly significant in recent years with the growing pressure of business in the courts. CPR rule 6.15 is rather different. It is directed specifically to the rules governing service of a claim form. They give rise to special

considerations which do not necessarily apply to other formal documents or to other rules or orders of the court. The main difference is that the disciplinary factor is less important. The rules governing service of a claim form do not impose duties, in the sense in which, say, the rules governing the time for the service of evidence, impose a duty. They are simply conditions on which the court will take cognisance of the matter at all. Although the court may dispense with service altogether or make interlocutory orders before it has happened if necessary, as a general rule service of originating process is the act by which the defendant is subjected to the court's jurisdiction.

9. What constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation, which does not lend itself to over-analysis or copious citation of authority. This court recently considered the question in *Abela v Baadarani* [2013] 1 WLR 2043. That case was very different from the present one. The defendant, who was outside the jurisdiction, had deliberately obstructed service by declining to disclose an address at which service could be effected in accordance with the rules. But the judgment of Lord Clarke of Stone-cum-Ebony JSC, with which the rest of the court agreed, is authority for the following principles of more general application:

(1) The test is whether, "in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service" (para 33).

(2) Service has a number of purposes, but the most important is to ensure that the contents of the document are brought to the attention of the person to be served (para 37). This is therefore a "critical factor". However, "the mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2)" (para 36).

(3) The question is whether there is good reason for the Court to validate the mode of service used, not whether the claimant had good reason to choose that mode.

(4) Endorsing the view of the editors of *Civil Procedure* (2013), vol i, para 6.15.5, Lord Clarke pointed out that the introduction of a power retrospectively to validate the non-compliant service of a claim form was a response to the decision of the Court of Appeal in *Elmes v Hygrade Food Products plc* [2001] EWCA Civ 121; (2001) CP Rep 71 that no such power existed under the rules as they then stood. The object was to open up the possibility that in appropriate cases a claimant may be enabled to escape the consequences for limitation when a claim form expires without having been validly served.

> 10. This is not a complete statement of the principles on which the power under CPR rule 6.15(2) will be exercised. The facts are too varied to permit such a thing, and attempts to codify this jurisdiction are liable to ossify it in a way that is probably undesirable. But so far as they go, I see no reason to modify the view that this court took on any of these points in *Abela v Baadarani*. Nor have we been invited by the parties to do so. In the generality of cases, the main relevant factors are likely to be (i) whether the claimant has taken reasonable steps to effect service in accordance with the rules and (ii) whether the defendant or his solicitor was aware of the contents of the claim form at the time when it expired, and, I would add, (iii) what if any prejudice the defendant would suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew about its contents. None of these factors can be regarded as decisive in themselves. The weight to be attached to them will vary with all the circumstances."

47. To that summary, it is helpful to add two particular aspects which were part of Popplewell J's distillation in Société Générale v Goldas Kuyumculuk Sanayi. The first is that at paragraph 49(3), where in relation to the significance to be attached to the fact that the defendant became aware of the existence and contents of the claim form, Popplewell J said this:

> "If one party or the other is playing technical games, this will count against him … This is because the most important function of service is to ensure that the content of the document served is brought to the attention of the defendant… The strength of this factor will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an attempt at formal service. It may be weaker or even non-existent where the contents of the claim form become known through other means…"

48. The other relates to the situation where service is required to be effected in a country which is party to the Hague Service Convention (as the USA is) or to a bilateral service convention. Popplewell J said this (at paragraph 49(9)):

> "(9) Cases involving service abroad under the Hague Convention or a bilateral treaty:
>
> (a) Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost: *Knauf* at [47], *Cecil* at [66], [113].
>
> (b) It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections: see *Shiblaq* at [57]. In

> such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in *Cecil* at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in *Knauf* at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of *Abela* was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of *Abela*, there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Convention case: *Bank St Petersburg* at [26].

This was approved by the Court of Appeal in that case: [2018] EWCA Civ 1093, at paragraphs 32-33, where Longmore LJ said that "special circumstances" were required to justify validating a method of service to which a Hague Convention country had not consented.

49. As is apparent from Popplewell J's summary, it will be a matter of significance if the method of service which the court is being asked to sanction is one not permitted under the relevant Convention. This will particularly arise where the country in question has stated an objection under Article 10 of the Hague Convention to service otherwise than through the designated authority of that country. In the present case, the relevant country is the USA, which has not stated an objection under Article 10 of the Hague Convention.

50. Applying these principles to the present case, I consider that there is good reason to validate the service which was made on Mr Bono on 2 March 2020. This is for the following reasons:

    (1) The Claim Form, and accompanying documents were delivered to Mr Bono, and he brought them promptly to Mr Nicandros's attention. Mr Bono warned that a response was required. Frontera, by Mr Nicandros, had been made fully aware of the Claim Form, its nature and contents, by early March 2020, and knew that there had been an attempt at formal service.

    (2) The reason why personal service was not effected on a current officer of Frontera, but rather on Mr Bono, who had ceased to be such at the time of service, was because Frontera had not updated its public filings, as it should have done, and because none of the addresses provided for Mr Mamulaishvili was his current address. The address provided for Mr Nicandros in Frontera's public filings was Frontera's office address, which had been found locked.

    (3) The method of service is one which is permitted under the Hague Convention. Although there were defects in the way in which it was effected, it was an attempt at "service of judicial documents directly through the judicial officers, officials or

other competent persons of the State of destination", which is allowed for under Article 10 of the Convention.

(4) No prejudice will be caused to Frontera by the retrospective validation of service. This is not, for example, a case in which any question of limitation arises.

51. Although this is a Hague Convention case, because what was involved was a flawed attempt at service by a method which was permitted by the Convention, rather than by a method which was not permitted under it, I do not consider that the test of "special" or exceptional circumstances should apply. In any event, and if that is wrong, I consider that the matters I have identified, in particular because of those in sub-paragraphs (1) and (2), do amount to special or exceptional circumstances for the purposes of the jurisdiction under CPR 6.15.

52. Because I will grant relief under CPR 6.15, I do not need to consider the application under CPR 6.16.

What is the consequence for the default judgment?

53. What happens to the default judgment is the real cause of the matter having been debated before me. Frontera had made it clear in advance of the hearing that it did not object to YA II's being able to proceed on the basis that delivery of the documents to Mr Bono was good service. What it did object to was the contention that that service had permitted default judgment to be entered, or that if there were retrospective validation of that service under CPR 6.15 that would validate the default judgment.

54. At the hearing Mr Lowenstein made it clear that YA II did indeed wish to maintain the default judgment. He said that YA II did not accept that Frontera had any real defence to the claim, and wanted to avoid the delay which would be involved in the setting aside of the judgment.

55. Mr Lowenstein submitted that, if there was an order under CPR 6.15, then the validation of the service would validate all subsequent steps. He referred in support of this submission to what was said by Aikens LJ, in a judgment with which Sharp and Bean LJJ agreed, in Kaki v National Private Air Transport Co [2015] EWCA Civ 731 at paragraph 43.

56. Mr Lowenstein, however, also drew to my attention the authority of Dubai Financial Group LLC v National Private Air Transport Co (National Air Services) Ltd [2016] EWCA Civ 71. I gratefully acknowledge Mr Lowenstein's very proper professional conduct in this regard. In that case, the majority of the Court of Appeal held that, where there has not been valid service, the defendant has no obligation to acknowledge service, and a default judgment entered in those circumstances is one which can be set aside under CPR 13.2. As McCombe LJ put it at paragraph 41:

> "If a defendant has never become under a valid obligation to acknowledge service, either as specified under the rules or by order of the court, I do not see how it can be that a judgment can be entered against him in default of such acknowledgment. He is simply not in default at all."

57. Further, the majority regarded there as being a clear requirement, under CPR 6.15(4)(c) for any order retrospectively validating service to specify the period for filing an acknowledgment of service. In that case, the order validating service had not done so, and judgment in default had been entered immediately. But it is clear that the majority considered that in any case in which there is a retrospective validation of service the court should at that point give the defendant a further period in which to acknowledge service. At paragraph 30 Treacy LJ said:

> "In those circumstances where, ex hypothesi, a defendant cannot know that he has been validly served, to deprive him thereafter of any period during which he can acknowledge service in the usual way seems to me unfair and unjust. In effect it denies a defendant part of the due process involving the ability to contest a claim once the claimant has established, through a CPR 6.15(2) order, that the mechanism requiring him to respond if he is to contest the claim has been triggered."

58. The majority of the Court of Appeal held that what had been said in paragraph 43 of Kaki v National Private Air Transport Co was not applicable and not binding on the court, because Kaki did not deal with a default judgment and did not consider CPR 6.15(4).

59. I consider that I am bound by, and even if not should follow, the decision of the majority of the Court of Appeal in Dubai Financial Group. That requires that, having retrospectively validated service, I should set a time for the filing of an acknowledgment of service. It is implicit in CPR 6.15(4) that the period specified for filing an acknowledgment of service (or admission or defence as the case might be) should be after the date on which the order is made. CPR 6.15(4)(c) does not refer to a deemed date on which the acknowledgment of service should have occurred, and may be contrasted with CPR 6.15(4)(b), which refers to specification of the deemed date on which the claim form was served; and in referring to the period "for filing" it is using prospective language. This gives effect to the fact that it would, as the majority of the Court of Appeal in the Dubai Financial Group case said, be unfair and unjust for there to be no period after the defendant can know that there has been valid(ated) service in which he can enter an acknowledgment of service.

60. On that basis, the default judgment must be set aside under CPR 13.2, because it was entered at a point when the time for acknowledgment of service had not expired. I will set a time in which there should be acknowledgment of service, which will be 7 days from the date on which this judgment is handed down.

Disposal

61. Thus, the overall disposal of these applications is:

(1) I find that the service when initially effected on Mr Bono on 2 March 2020 was invalid;

(2) That service is retrospectively validated under CPR 6.15;

(3) Judgment in default is set aside; and

(4) The period for filing an acknowledgment of service will be 7 days from the date of the hand down of this judgment.