Case No: QB-2019-000043/46/48/49/50/51

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Neutral Citation Number: [2020] EWHC 2229 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/08/2020

Before :

MASTER COOK

- -

Between :

(1) DRAGICA JOVICIC	**Claimants**
(2) BOJAN JOVANOVIC	
(3) MILICA SELMANOVIC	
(4) SASHA TRICKOVIC	
(5) KOSANA JOVICIC	
(6) VICTORIJA MTROVIC	
- and -	
THE SERBIAN ORTHODOX CHURCH-SERBIAN PATRIARCHY	**Defendant**
-and-	
KESAR & Co	**Respondent**

- -
- -

Mark Friston (instructed by **Kesar & Co**) for the **Respondent**
Michael McParland QC (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date: 20 May 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.

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MASTER COOK

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 on Thursday 13 August 2020.

MASTER COOK:

1. On 17 January 2020 following the hearing of applications made by the Defendant in each of the above cases and having given an extempore judgment I made an order pursuant to CPR r 11.1 (a) declaring that the Court had no jurisdiction to try the claims and that the claim forms be set aside. I also made a declaration that the purported service of the claim forms within the jurisdiction was invalid and of no effect because it took place outside the permitted four-month period of time permitted by CPR r 7.5 (1). I ordered the Claimants to pay the Defendant's costs on the indemnity basis and made a direction under the provisions of CPR r. 46.8, PD 46 para 5 and section 51 of the Senior Courts Act 1981 requiring the Respondent (the Claimants' solicitor Kesar & Co) to show cause why they should not pay the Defendant's costs of the applications.

2. At this stage it is probably helpful to give a brief description of the claims and to describe the issues arising under CPR r 11.1(a). The factual background can be best summarised by reference to paragraphs 7 to 10 of the transcript of my judgment:

> "7. The claims, it is conceded, have no immediate connection with England and Wales. Each of the claimants is either a Serbian or Croatian citizen residing out of the jurisdiction. It is equally, accepted and is common ground that none of the events which are alleged to have given rise to these claims occurred in England and Wales. Without going into details, each of the claims involves alleged abuse by clergy belonging to the Serbian Orthodox Church. In respect of what I will call claims (1), (2) and (5), the events took place between 1998 and 1999 in Bosnia-Herzegovina; in relation to claim (4), the events took place in 2003 in Croatia; in relation to claim (3), the events took place between 2007-2009 in Serbia; and in relation to claim (6), the events took place in January 2014 in Serbia.
>
> 8. As I have indicated, it is accepted on behalf of the claimants none of them have a personal connection with England and Wales and none of them are present or resident within the jurisdiction. Each of the Claimants are either domiciled in Serbia or Bosnia-Herzegovina.
>
> 9. It is also common ground that none of the claimants have suffered any loss or damage which could be said to have occurred within the jurisdiction of England and Wales, and that all damage alleged in these proceedings has occurred in either Croatia, Serbia or Bosnia-Herzegovina.

> 10. It is also common ground that English law is not the applicable law to any of these actions; that concession is made either under the provisions of the Private International Law Miscellaneous Provisions Act 1995 or the provisions of the Rome II Regulation law applicable to non-contractual obligations. According to either of those sources, the applicable law is either the law of Croatia, Serbia or Bosnia-Herzegovina and all relevant limitation periods will be covered governed by those laws."

3. The claim form in each of the six actions was issued on 8 January 2019. In each claim the Defendant was named as the Serbian Orthodox Church. No application was made by the solicitors for permission to serve out of the jurisdiction. In the circumstances under CPR r 7.5 valid service of the claim forms would have to take place on the Defendant before midnight on 8 May 2019.

4. On 28 May 2019 Mr Kesar of Kesar & Co submitted six applications seeking an extension of time for service of the claim form on the basis that he had not been able to obtain the necessary medical evidence to append to the statements of claim. It would appear that Mr Kesar chose not to utilise the CE-file electronic filing system, which was not mandatory for professional users at the time, but instead sent the documents to the court by e-mail. The covering letters accompanying the applications which were scanned on to the court file are however stamped as received by the court on 29th May 2019. The application notices each had the box "without a hearing" ticked. As the application notices were seeking an order which was not being made by consent, they were referred to me and I directed they should be listed for a hearing.

5. A hearing date on 12 July 2019 was duly listed. On 3rd July 2019 Mr Kesar e-mailed the Court stating that he had made the applications at a time when the "*expert evidence could not be considered, filed and served within the prescribed time limit*". In the circumstances he requested the court to vacate the hearing. The e-mail ended "*The Claimants will propose to resolve this matter by consent, subject to the defendant's response. If agreement cannot be reached, the claimants will leave this matter to the court but we will need to check counsel's availability"*. The hearing remained in my list and on 12 July 2019 nobody attended. The court file however records that the application was "vacated". Since 12 July 2019 Mr Kesar has not sought to revive or re-list any these applications.

6. The order to show cause was made by me in response to an oral application made by Mr McParland QC at the conclusion of the hearing in accordance with PD 46 6 para 5.5 (b).

7. My order also contained a series of directions to enable the wasted costs issue to be considered in a fair and orderly manner.

8. In response Mr Kesar served his second witness statement and 26 pages of legal submissions prepared by Mr Friston, who had not appeared at the hearing on 17 January 2020. At the outset of his written submission Mr Friston complained that it was unclear what allegations the Defendant was relying on and even less clear whether those allegations were that the solicitors had acted unreasonably, improperly, or negligently.

9. In reply the Defendant filed the fourth witness statement of Mr Donnelly. In his statement Mr Donnelly set out 18 specific reasons (a) to (r) which the Defendant put forward as grounds on which it would seek a wasted costs order against the Claimants' solicitor.

10. On the 9 March 2020 I made a further order directing that the particulars (a) to (r) set out in Mr Donnelly's witness statement were to stand as the grounds on which a wasted costs order was sought and directed that the hearing of the Defendant's application be set down with a time estimate of a half day.

11. On 27 April 2020 Mr Kesar served his third witness statement responding to the Defendant's grounds together with a further 15 pages of legal submissions from Mr Friston.

12. The hearing of the Defendant's application took place on 20 May 2020, neither party having suggested that the time estimate was inadequate or unrealistic. In advance of the hearing Mr McParland QC produced 46 pages of written submissions. According to my note Mr McParland addressed me for approximately 1 hour and 10 minutes. Mr Friston took the remainder of the allotted hearing time. Approximately 15 minutes before the scheduled conclusion of the hearing I informed Mr Friston that I would sit for a further 20 minutes beyond the scheduled time to enable him to conclude his submissions. As matters transpired, I heard Mr Friston for a further 30 minutes. At the conclusion of the hearing I said that I would accept written submissions from Mr McParland QC in reply which I hoped would be the last word but gave Mr Friston the opportunity to respond if he felt necessary. This invitation resulted in a further 27 pages of submissions from Mr McParland QC and a further 15 pages from Mr Friston together with a short e-mail from Mr Donnelly on 26 May 2020.

13. The result of all this is that despite the court's best intentions the issues in this application have become obscured by a blizzard of legal and factual submissions. As I pointed out in the course of argument there were two core grounds underpinning the wasted costs application. First, that the claim forms had been permitted to expire before service with the result that the costs of the application to challenge the court's jurisdiction were wasted. Second, that the court could never have had jurisdiction to try these claims on the grounds advanced by Mr Kesar before and at the hearing on 17 January 2020 with the result that Defendant incurred the costs of the application to challenge the court's jurisdiction unnecessarily. In the circumstances I have not considered many of the other allegations and issues raised by the parties but have restricted myself to the allegations relating to the two core grounds.

Wasted Costs: General Principles

14. The principles governing the making of a wasted costs order have been helpfully summarised by the Court of Appeal in ***Fletamentos Maritmos SA v Effjohn International BV*** [2003] Loyd's Rep.P.N26

> "The power to make a wasted costs order is to be found in s 51 of the Supreme Court Act 1981 as amended. Section 51(l) gives the court a wide general discretion over costs. Section 51(6) provides:

> In any proceedings mentioned in ss 1 the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

Section 51(7) provides:

> In ss 6, "wasted costs" means any costs incurred by a party —
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

The principles upon which these provisions are to be applied have been established by a trilogy of recent cases in this court: Ridehalgh v Horsefield [1994] Ch 205, Tolstoy-Miloslayskv v Aldington [1996] 1 WLR 736, and Wall v Lefever [1998] 1 FCR 605. Amongst them are these (and here I quote only the essence of principles elaborated in these authorities with very great care):

1. Improper conduct is that which would be so regarded "according to the consensus of professional (including judicial) opinion." Unreasonable conduct "aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive.... The acid test is whether the conduct permits of a reasonable explanation." Negligent conduct is to be understood "in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession." (all from Ridehalgh)

2. "Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject their advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved.... It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are in abuse of the process of the court.... It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which

> is which and if there is doubt the legal representative is entitled to the benefit of it." (all from Ridehalgh)
>
> 3. "A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel." (Ridehalgh) The role which leading and junior counsel played in Tolstoy in putting their signatures to the statement of claim "did not exonerate the solicitors from their obligation to exercise their own independent judgment to consider whether the claim could properly be pursued; they were not entitled to follow counsel blindly."
>
> 4. "The jurisdiction to make a wasted costs order must be exercised with care and only in a clear case." (Tolstoy) "It should not be used to create subordinate or satellite litigation, which is as expensive and as complicated as the original litigation. It must be used as a remedy in cases where the need for a wasted costs order is reasonably obvious. It is a summary remedy which is to be used in circumstances where there is a clear picture which indicates that a professional adviser has been negligent etc." (Wall v Lefever)"

15. The notes to the White Book (46.8.3) suggest that when a wasted costs order is contemplated a three-stage test should be applied:

    a) Had the legal representative of whom complaint is made acted improperly unreasonably or negligently?

    b) If so did such conduct cause the application to incur unnecessary costs?

    c) If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

Issue 1. Service of the claim forms

16. This issue is raised by grounds (f) (l) (m) and (o) set out in Mr Donnelly's fourth witness statement.

17. Mr Kesar's response is set out at paragraphs 35 to 39 of his witness statement of 11 February 2020 and at paragraphs 50 to 57 of his witness statement of 27 April 2020. In essence his position was that he reasonably believed he had made an in time application to extend the life of the claim forms on 8 May 2019 and that these applications had not been listed at the time of the hearing on 17 January 2020. In the circumstances Mr Friston submitted the position was governed by CPR 7.6 (2) rather than the more stringent provisions of CPR 7.6 (3). Although Mr Kesar did not explicitly say so in his evidence Mr Friston submitted that it was only at the hearing on 17 January 2020 that Mr Kesar discovered that the court had not received and processed the applications until a much later date. In the circumstances Mr Friston submitted that Mr Kesar's error was "to jump the gun by serving the claim forms

before having obtained an extension". This he suggested was an error but did not meet the high threshold required for a wasted costs order.

18. Mr Friston also submitted the fact the claim forms were served without having obtained an extension did not cause costs or any significant costs to be wasted or incurred as the solicitors would have simply issued new proceedings as they were entitled to do. Mr Friston referred to ***Aktas v Adepta*** [2010] EWCA 1170 and of the note in the White Book at 7.6.9:

> "There is nothing in the cases to suggest that, if there is still time to start a new action it cannot be done. (ii) A mere negligent failure to serve a claim form in time for the purposes of r.7.5(6) is not an abuse of process. The phrase "mere negligent failure" is intended to distinguish the typical case of such failure to be found in these appeals from any more serious disregard of the rules. For a matter to be an abuse of process, something more than a single negligent oversight in timely service is required: the various expressions which have been used are "inordinate and inexcusable delay", "intentional and contumelious default", or at least "wholesale disregard of the rules"."

19. Lastly, Mr Friston made one further point on causation. He submitted that the court had been asked to deal with the jurisdictional issues on the basis that the Claimants' solicitors had threatened to bring other similar claims and that in the circumstances the costs of the jurisdictional dispute would have been incurred in any event.

Issue 2 Jurisdiction.

20. This issue is raised by grounds (b) (c) (d) (e) (m) and (n) set out in Mr Donnelly's fourth witness statement.

21. Mr Kesar's response is set out at paragraphs 16 to 34 of his witness statement of 11 February 2020 and at paragraphs 7 to 24 and 61 to 65 of his witness statement of 27 April 2020.

22. At paragraph 8 of his witness statement of 11 February 2020 Mr Kesar asserts the privilege of his clients on the basis of instructions received from the 2nd Claimant and states that in the circumstances he cannot reveal the instructions he received from his clients or the advice he received from counsel. At paragraph 9 of his witness statement Mr Kesar asserts that he relied upon advice from counsel and that he followed that advice. Mr Kesar set out the occasions he had received advice from counsel:

> "a. On 5 October 2018 counsel wrote a 16-page Advice that dealt with the issue of jurisdiction in detail.
>
> b. On 17 October 2018 counsel wrote a 7-page Further Advice which mainly concerned issues of funding, but also mentioned the issue of jurisdiction and confirmed the advice previously given.

> c. On 29 November 2018 counsel wrote e-mail advice that dealt with the issue of jurisdiction (again in the context of funding).
>
> d. On 2 July 2019 counsel drafted Particulars of Claim which advanced a positive case.
>
> e. On 16 January 2020 counsel drafted a Skeleton Argument (which this court has already seen)."

23. Mr Friston submitted that as the Claimants have not waived privilege the court must proceed with extreme care and must be satisfied that the decision to bring proceedings in this jurisdiction was quite plainly unjustifiable. He also submitted that in view of counsel's involvement the only conclusion that could be reached was that Mr Kesar acted in accordance with counsel's advice.

Discussion

24. It seems to me that the relevant factual considerations are as follows;

i) Mr Kesar was aware from the outset that there was a potential issue as to jurisdiction and concerning the identity of the Defendant and service at the address of the London Parish. This was made clear to him in the responses to the letters of claim by both the London Parish and the solicitors instructed on their behalf, DWF.

ii) The letters of claim sent by Mr Kesar in February and June 2018 were sent many months before he first obtained any advice from counsel in October 2018. The letters of claim confirmed that the Claimants had entered into conditional fee agreements with Kesar & Co and addressed the jurisdiction of the English Court as follows:

> "**Jurisdiction**
>
> The Serbian Orthodox Church is an autochthonous, autocephalous Orthodox Christian congregation with a strict centralised government based in Belgrade, Serbia. The Defendant has 27 eparchies in the Balkans (mostly in the territories of Former Yugoslavia) and 12 other eparchies in the Countries of Western Europe (including the UK), North and South America and Australia, New Zealand. The Patriarch, Holy Assembly and Synod directly manage and supervise all SOC eparchies in Serbia and worldwide. Their powers are defined in the SOC constitution of 1947 (amended in 1957) and various protocols. The Patriach's office (Patrijarsija) is directly responsible for appointment, management, transfer and dismissal (when necessary) of the Episcops both in Serbia and abroad. More junior clergy is appointed by the Episcops but their appointment must be reported to and approved by the Patriarch's office.

> It is understood that the eparchies, including any charitable organisations, trusts and monasteries on their territories and associated with SOC do not have any independence and are directly subordinated to the Patriarch's office in Belgrade. The eparchies and Patriach are in direct contact and they provide financial and other assistance to each other, when required. There is frequent exchange of clergy who assist each other and closely co-operate with each other.
>
> The Defendant is not domiciled in the UK for the purpose of this claim and the Regulation (EU) No 1215/2012 does not apply. Instead, the Claimant [sic] is seeking to proceed in accordance with the common law principles. The Claimants' evidence shows that there is a real risk that justice will not be obtained in the courts of Serbia or Bosnia Herzegovina because of the lack of independence, undue influence of the Defendant and close links SOC has with the agents of the state. In other words, the UK court is the Claimant's forum of necessity"

iii) Following their instruction, DWF wrote on 6 April;

> "Please also expand on your client's case as to why it says the UK courts have jurisdiction. With respect, referring simply to an intention "to proceed in accordance with common law principles" is not sufficient. I would be grateful if you could explain your position with reference to appropriate authority so that I can consider the same"

iv) Mr Kesar responded to that request on 9 April 2018

> "Your last point is probably a result of the inadequate instructions. This is understandable since you could not have had much time to understand the issues in this matter. If you referring to *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, the fact of this case are significantly different and the claimants will seek that jurisdiction should be accepted in accordance with *Okpabi* (fn. 2 *Okpabi and others v Royal Dutch Shell plc and another* [2017] EWHC 89 (TCC)."

v) DWF responded on 10 April 2018 pointing out that the analogy with the case of *Okpabi* was absurd;

> "The Claimants in *Okpabi* sought to establish that a UK holding company owed a duty of care to the Claimants with respect to the activities of an overseas subsidiary. The basis of the claimant's argument for the imposition of that common law duty was by reason of the control that the UK holding company exercised over its Nigerian subsidiary.

> Ignoring for the moment the fact that the Serbian Orthodox Church is not [a] multinational commercial organisation structured using an umbrella of companies within the way that Royal Dutch Shell Plc and its subsidiaries are, as you have explained in your letters, the Serbian Orthodox Church is based / headquartered (for want of a better word) out of Belgrade, Serbia. Coming back to the analogy with *Okpabi* you are effectively seeking to sue the subsidiary in its jurisdiction with respect to the actions of the foreign holding company (in that foreign jurisdiction)- it is the polar opposite to the position in *Okpabi* and you cannot sensibly suggest that a subsidiary should be liable for the acts of the holding company because of the control it exercised over the holding company- the analogy is absurd. …
>
> … if you intend to proceed with this claim, we require that you respond to our email of 6 April to set out, in a way which is at least capable of basic understanding, what claim you are pursuing and why you say the UK courts have jurisdiction to hear that claim. As things stand, if you issue and serve proceedings without dealing with the points in our 6 April email, that claim will be struck out and we will pursue a wasted costs order against Kesar & Co…"

vi) In the absence of any meaningful reply on 22 May 2018 DWF wrote:

> "If your clients intend to ask the English Courts to accept jurisdiction with respect to a claim in relation to acts perpetrated against citizens of Serbia and Bosnia-Herzegovina by individuals / entities domiciled in Serbia and Bosnia-Herzegovina in relation to acts committed in Serbia and Bosnia-Herzegovina then the appropriate step would be to ask the English Court for permission to serve UK proceedings within the jurisdiction of Serbia and / or Bosnia-Herzegovina.
>
> Such a claim would have nothing to do with our client and our client's address would not be an appropriate address to correspond with those foreign domiciled Defendants, nor to serve any documentation or proceedings"

vii) On 23 May 2018 Mr Kesar responded and asserted jurisdiction on the following basis;

> "The claimants will resort to the UK court as a forum non-conveniens leaving the burden on the defendant not just to show that the UK is not the natural or appropriate forum, but to establish that there is another forum which is clearly or distinctly more appropriate than the UK court. The defendant has managed to evade justice for years using their influence in the Balkans. The criminal prosecution was frequently delayed and undermined by the state and non-state agents. The Senior

> Serbian courts permitted the legitimate persecution to lapse (Pachomius, Ilarion, Stojanovic etc) which undermined both access to justice and credibility of the judiciary in the countries of Former Yugoslavia. The civil proceedings have been made impossible for the same reason. The claimants are not alleging that they are unlikely to have access to justice and fair court proceedings [sic]. It is clear that they have no access to any remedy, criminal or civil and that the defendant has achieved the absolute immunity from criminal prosecution, public and private law remedies. …The claimants will seek to bring proceedings in the UK simply because without this, there will be no civil action anywhere and the defendant, having admitted the breach, will be allowed to get away with impunity"

viii) On 16 July 2018 DWF wrote again in relation to jurisdictional issues;

> "In any event, the English courts have no jurisdiction to hear this matter which appears to us should be heard in the jurisdiction of Serbia and applying Serbian law. The London Parish does not accept service of documentation or correspondence or legal proceedings on behalf of any other parish, dioceses, bishop, the Assembly or the Patriarch. We look forward to receiving confirmation that we and our clients may close our file of papers. If you wish to seek to persuade the English Courts to accept jurisdiction then you will have to seek the Court's permission to serve any proceedings outside of the jurisdiction on the appropriate Defendants and not our clients"."

ix) On 8 January 2019 Mr Kesar issued the 6 claims naming "The Serbian Orthodox Church" as Defendant.

x) On 17 January 2019 DWF wrote again on the issue of jurisdiction;

> "I make clear that my client is firmly of the view that the English courts do not have jurisdiction to hear these claims. If proceedings are served my client will apply to the court disputing jurisdiction. Please confirm your intention as to service of proceedings. Are you applying to the court for permission to serve these claims outside of the jurisdiction of England and Wales, or is it your intention (as you have stated previously) to purport to effect service within the jurisdiction of England and Wales. You have stated to my client that it is your intention to effect service on the Eparchy of Scandinavia & the United Kingdom. Is it therefore your intention to attempt to effect service in Sweden and if so have you made an application seeking the court's permission to serve proceedings outside of the jurisdiction of England and Wales?"

xi) Mr Kesar responded to this communication on 18 January 2019:

> "We have issued the claims and we will serve proceedings in good time setting out how the claims are put in the particulars of claim, including jurisdictional issues…"

xii) On 5 April 2019 DWF wrote to Mr Kesar again on the issue of jurisdiction and specifically drew his attention to the fact that the claim forms were nearing expiry;

> "l write further to our previous emails, the last of which was my below email of 26 February. I note that it (sic) we are now approaching 4 months from the date you issued the claim forms. Please could you confirm whether you are still instructed to pursue these claims and, if you are, your intentions as to service of proceedings and the identity of the Defendant'"

xiii) On 10 April 2019 a holding response was sent by Kesar & Co;

> "… our instructions are that the defendant must be named in accordance with the Serbian law and constitution of the Serbian Orthodox Church."

xiv) On 10 April 2019 DWF responded,

> "It is clear we are acting for the entity that you are seeking to sue ie the legal entity which represents the Patriarchate, the most senior legal entity/body of the Serbian Orthodox Church) The issue is one of simple legal identity. Accordingly, please confirm that you will send to us a copy of the proceedings whilst they are, on your case, "served" on the named Defendant so we are aware of the position."

xv) On 6 May 2019 Mr Kesar responded;

> "Thank you for your recent email. I apologise for not responding earlier. I note your submissions and the certificate which confirms that the Serbian Orthodox Church – Serbian Patriachate (Patriarchy) is an organisational unit of the Serbian Orthodox Church. I confirm that copies of the claimants claims will be sent to your office. Could you clarify whether your position has changed? Have you been authorised for service of the proceedings orders etc or they have to be served on the defendant directly? If you are not authorised to receive the claimants' claims, do you accept to receive the documents by email?"

xvi) On 7 May 2019 DWF wrote two e-mails to Kesar & Co. One on behalf of the London Parish and one on behalf the Serbian Patriarchy again attempting once more to deal with the issues of jurisdiction and service.

> "I refer you to our previous correspondence in relation to the issues of the identity of the Defendant, jurisdiction and

anticipated purported service of proceedings that you have issued against the "the Serbian Orthodox Church".

As you are aware I also act on behalf of the Serbian Orthodox Church of St Sava London Church Congressional Council (hereinafter the "the London Parish") and I have just e-mailed you on behalf of the London Parish in connection with the e-mail you have sent to them regarding purported service upon them of claims issued against the "the Serbian Orthodox Church"

I note from your email to the London Parish that it is your intention to serve the claims upon the London Parish. My clients (both the London Parish and the Patriarchy) maintain that the "Serbian Orthodox Church" does not have the necessary legal persona capable of being sued and, as such, dispute that service of any claim against the "Serbian Orthodox Church" on the London Parish would be valid service The London Parish does not appear to be your intended defendant.

Your intention to effect service in this way appears to me to be an abuse of process to facilitate service of a claim within the jurisdiction of England and Wales against a defendant which does not (a) have the necessary legal persona capable of being sued/served; and (b) which does not reside or have its seat of business within the jurisdiction of England and Wales.

I am acting for the entity which it appears you really wish to direct your claim to – namely the Patriarchy, which is domiciled and has its seat of business in Serbia. I have previously indicated that my client would be prepared to facilitate service of proceedings against the Patriarchy upon this firm to enable it to be served within the jurisdiction of England and Wales so that I can acknowledge service on behalf of the Patriarchy and apply to the court disputing jurisdiction (ie simply for expediency and so the legal costs required to be expended are concentrated on the proper issues).

As I have previously indicated, my client would only be prepared to provide these instructions should you agree that by so accepting service it would not be interpreted as submission to the jurisdiction of the English and Welsh Courts. You have not provided that confirmation and you appear still to be intent on serving proceedings naming "the Serbian Orthodox Church" as the Defendant which means that I am unable in any event to confirm that I am instructed to accept service given the disagreement between us as to whether "the Serbian Orthodox Church" has the necessary legal persona and so is capable of being sued."

xvii) Later that day Mr Kesar purported to send e-mails to the Court and to the Defendant attaching applications to extend the time for service of the claim form by a period of four weeks. However as noted in paragraph 5 above the Court has no record of receiving these e-mails and the covering letter on the court file is dated 28 May 2019.

xviii) On 31 May 2019 DWF noted that the applications had been issued and pressed for a response to the questions which had previously been put in relation to jurisdiction. There was no response form Mr Kesar despite further reminders on 10 June, 11 June and 26 June 2019.

xix) On 2 July 2019 Kesar & Co purported to serve the claim forms particulars of claim and other documents by post at the London Parish address 89 Lancaster Road. At this point it is relevant to note the following. Mr Kesar knew that the court was proposing to list his application for an extension of the claim form on 12 July 2019. He had been told and should have known that the four-month life of the claim form had expired. The only reason Mr Kesar had ever put forward for an extension of time for service of the claim forms was delay in obtaining medical reports. Kesar & Co did not attend the hearing which was listed on 12 July 2019 and no attempt has ever been made to revive or relist the application and no application was ever made to amend the claim forms.

xx) The particulars of claim accompanying the claim forms described the Defendant as "The Serbian Orthodox Church – Patriarchy of Serbia". Under the heading "Jurisdiction" the particulars of claim state:

> "4. This claim is served in the UK against the Defendant in the form of the eparchy/diocese of Great Britain and Scandinavia.
>
> 5. In anticipation that the Defendant will invoke the principle of forum non conveniens, and say that the claim should be brought in Serbia, the Claimants will rely on the House of Lords decision in *Connelly v RTZ Group (No. 2)* [1998] AC 854 as authority for the proposition that a claim may be brought in the UK where it is in the interests of justice to do so.
>
> 6. In *Connelly*, the claim was against a UK parent company of a Namibian subsidiary company. In this case, the claim is against a eparchy/diocese of the Defendant church. The Claimants will say that there is no material difference.
>
> 7. It is in the interests of justice that the claim be brought in the UK because the Claimants are unable to properly access justice in Serbia. To this effect, the Claimants rely on the expert reports of Sasa Ivanisevic, a practising lawyer in Serbia, copies of which are served with these Particulars of Claim.
>
> 8. In particular, the Claimants will rely on the following:
>
> i. The Defendant has influence over the executive in Serbia, which includes the provision of legal aid. The Claimants

> would be unable to obtain duly independent legal representation in Serbia.
>
> ii. The Defendant's influence in Serbia extends to the police, prosecuting authorities and the judiciary by virtue of its pastoral and clerical role in the community There are reasons to suspect that the Defendant has, and would, use this influence to deny the Claimants justice."

xxi) The only reason given by Mr Kesar in correspondence for describing the Defendant as "Serbian Orthodox Church Patriarch of Serbia" was that DWF had insisted that the defendant's name is different from the one displayed upon London Parish web site, constitution, statutes and statutory instruments and that the Claimant simply followed this request and would be prepared to amend the claim forms. On any view this is a gross misrepresentation of the position set out by DWF in the correspondence referred to above.

xxii) In his witness statement dated 6 December 2019 prepared in response to the Defendant's application Mr Kesar did not address the issue of the expiry of the claim form and effectively maintained the argument on jurisdiction he deployed in his letter before action.

Expiry of the claim form

25. As Lord Sumption said in ***Barton -v- Wright Hassall LLP*** [2018] 1 WLR 1119 [23] a litigant who leaves service of the claim form to the last minute "*courts disaster*".

26. I cannot accept Mr Friston's submission that there was a "mere negligent failure" on the part of Mr Kesar to serve the claim forms. In my extempore judgment I expressed the view that Mr Kesar seemed to have no proper understanding of the effect of CPR r 7.5 or the difficulty presented by CPR r 7.6 (3). I expressed this view because, as explained in my judgment, the application for an extension of time had in fact been made to the court after the time specified by CPR r.7.5. In his witness statement dated 27 April 2020 Mr Kesar suggests that he reasonably believed the applications to extend time for service of the claim form were made in time by reason of the e-mails he alleges he sent to the court on 8 May 2019. Mr Kesar expanded on this explanation at paragraphs 52 to 56:

> "52. Whilst I was instructed to issue proceedings on 8 January 2019, I did not receive translated versions of the Claimants' medical evidence until 8 May 2019 (this being for reasons that I am unable to explain without waiving privilege, but which I can say were not as a result of any failure on the part of my firm). There was insufficient time for counsel to deal with matters, so I applied for an extension of time. As I will explain in my response to Ground (o), I reasonably believed that those applications had been made in time, and that as such, that CPR, r 7.6(2) (as opposed to CPR, r 7.6(3)) applied.
>
> 53. On 2 July 2019, I filed and served the claims in anticipation of those applications being allowed or agreed. I was conscious

> that, should the court reject those applications, the claims would have been re-issued. As such, I thought that it was sensible to serve them sooner rather than later.
>
> 54. On 3 July 2019 (ie, the day after), I phoned the court clerk, Ms Baditoiu, and asked for an update regarding the Claimants' applications. As I will explain in my in response to Ground (o), I do not believe I that asked the court not to list those applications at all (and certainly did not intend to do this), but I did ask her not to list it on the day that Ms Baditoiu proposed, namely, 12 July 2019. As such, I believed that the applications to extend time would be listed at some other point in the future.
>
> 55. I did not fail to attend a court hearing, as no hearing was ever listed (other than that on 17 January 2020). I believed that the application would be dealt with at the hearing in January 2020.
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> 56. In view of the above, I believed that the Claimants had extant 'in-time' applications for an extension of time. It was only at the hearing on 17 January 2020 that I discovered that the court thought otherwise."

27. There are a number of difficulties with this explanation. First, if the only reason an extension of time to serve the claim forms was required was to finalise the particulars of claim, the claim forms should have been served and an application made to extend the time for service of the particulars of claim under CPR 7.4(2). In other words, it would still have been necessary for Mr Kesar to show a good reason for extending the time for service of the claim forms, and the reason he relied upon was arguably not a good reason, see *Cecil v Bayat* [2011] EWCA Civ 135. Second, Mr Kesar's evidence fails to deal with his letter to the court dated 28 May 2019 and received by the court on 29 May 2019. On any view the expiry of the claim forms was an important issue. Mr Kesar chose to do nothing about this until the day before notwithstanding that his attention had been drawn to the very point by DWF in correspondence, the last occasion being in the letter of 5th April 2020. Mr Kesar did not seek an urgent listing of his application, which he could have done by attending the daily urgent and short applications list before the Queen's Bench Masters. Instead he marked the application notice "*to be considered without a hearing*" which would not be appropriate unless the parties were agreed. In the circumstances described at paragraphs 4 and 5 above the court directed the applications to be listed on 12 July 2019. Mr Kesar's evidence that he wrote to the court to ask it not to list the applications is also incorrect. What Mr Kesar actually stated in his e-mail of the 3 July 2019 to my listing clerk was that having filed and served the claims on 2 July 2019 he "believed the hearing could be vacated". At this point it must have been blindingly obvious to any competent solicitor that proceedings had been served without an extension of time for service having been granted and that regularising the situation was a matter of the upmost urgency. If Mr Kesar truly believed that he was waiting for the court to list his applications there is no explanation for his failure to contact the court or make any arrangements for these applications to be listed prior to the 1 August 2019 when the Defendant's application to strike out was issued.

28. Once the Defendants' application had been issued and served it was also obvious from the face of the application notice that the Defendant was seeking orders setting aside service of the claim form or the setting aside of any order which may have been made to extend the time for service of the claim forms yet still Mr Kesar took no steps to relist his applications or actively seek an extension of time for service of the claim forms and did not even address the issue in his witness statement of 6 December 2019 prepared in opposition to the strike out application.

29. Against this background the Defendant's application to strike out the claims was always going to succeed unless Mr Kesar took some active steps to regularise the position before the strike out hearing, however he took none. In the circumstances I do not see this as a mere negligent failure to serve the claim within the required period. Mr Kesar's conduct goes beyond that and continued down to the date of the strike out hearing. Mr Kesar could not have reasonably believed that he had done all that was necessary in this regard. Having specifically asked the court to vacate the hearing of his application to extend time the onus was on him to actively progress the matter. In my judgment Mr Kesar's conduct in failing to serve the claim forms within the required period and then taking no effective steps to attempt to remedy the position before the strike out application was heard permits of no reasonable explanation. In the circumstances, in relation to this issue, I find the first stage of the test made out.

The jurisdictional issue

30. I accept Mr Friston's submission that in circumstances where privilege has not been waived it is necessary to proceed with extreme care and that I must be satisfied that the decision to bring proceedings in this jurisdiction was quite plainly unjustifiable.

31. There were three core strands to the Defendant's application, in my judgment all well made. First, The Defendant, the Serbian Orthodox Church Serbian Patriarchy ("the Serbian Patriarchy") is domiciled in Serbia, and has not been, and cannot be, personally served in England & Wales in accordance with any of the required service provisions set out in the table in CPR 6.9(2). Second, The Claimant did not seek, and could not obtain, the permission of the English Court to serve these claims out of the jurisdiction on the Defendant in Serbia under CPR 6.36, 6.37 and PD 6B. This is because (at the very least) none of the Claimants have a good arguable case that their claims fall within any of the jurisdictional gateways in paragraph 3.1 of PD6B. Third, Mr Kesar's claims in correspondence and in the Particulars of Claim that the English court has jurisdiction as a "forum of necessity" or in "the interests of justice", were woefully misconceived.

32. As I observe at 24 (ii) above Mr Kesar had set out his case on jurisdiction and signed up his clients to Conditional Fee Agreements many months before taking any advice from counsel. In this respect the correspondence speaks for itself. Mr Kesar repeatedly stated that the Claimants were proceeding "*in accordance with common law principles"* and the "*UK court is the Claimant's forum of necessity."* In my extempore judgment I accepted Mr McParland QC's characterisation of Mr Kesar's argument as set out in his letter of 23 May 2018 as "*irresponsible and nonsensical"*. I remain of the view, that the principle of "*forum of necessity*" does not exist in English law, and, unlike the position in some civil jurisdictions, there is no provision in English law for the exercise of "*universal jurisdiction"* by the English courts. The

absence of both those concepts in English law was highlighted in the judgments of the European Court of Human Rights in the case of *Nait-Liman Switzerland* (51357/07) ECHR (second Section (21 June 2016, and ECHR (Grand Chamber) (15 March 2018), [2018] 3 WLUK 861).

33. One then comes to the jurisdictional grounds relied upon in the particulars of claim as set out at paragraph 24 (xx) above. The first and most obvious point to note is the statement "*This claim is served in the UK against the Defendant in the form of the eparchy/diocese of Great Britain and Scandinavia*". I accept Mr McParland QC's submission that any reasonably competent solicitor should have realised that such a case was nonsensical. First, the Claimants were not suing the eparchy/diocese of Great Britain and Scandinavia for anything. Second, Mr Kesar chose not to apply to amend the claim forms. Third, the eparchy is domiciled in Sweden not London. If this did represent Counsel's advice then it was not advice which Mr Kesar was entitled to blindly follow.

34. Once the part 11 applications had been served by the Defendant it is clear that Kesar & Co did not seek further advice from counsel. It is clear at this point that counsel's involvement was limited to appearing at the hearing and drafting a short skeleton argument. Mr Kesar prepared his own witness statement without input from counsel and its contents can only have reflected his own opinion. In that witness statement at paragraph 8 ,Mr Kesar erroneously contended that the court had jurisdiction by confusing the standard to be applied when considering whether the court has jurisdiction under a permitted gateway, with arguments as to the substantive merits of the case;

> "8. I believe that the jurisdiction point should be considered with reference to the particulars of claim but also by using the approach in the recent case *Tugushev v Orlov & Ors* [2019] EWHC 645 (Comm) (27 March 2019) where the court gave priority to consideration whether the claimants had a good arguable case. This is relevant both in respect of consideration of the common law approach, forum non conveniens or even Rome II as the Claimants must satisfy the Court that England is clearly and distinctly the appropriate forum to try the claim"

At paragraph 25 of his witness statement Mr Kesar reasserted the approach to jurisdiction set out in his early correspondence;

> "The Claimants have already indicated that they invited the court to consider these claims in accordance with the forum non convenience doctrine and rely on the approach adopted by the court in *Connelly v RTZ Group (No. 2)* [1998] AC 854."

35. Mr Friston spent some time developing the submission that the case Mr Kesar intended to develop was that the Serbian Orthodox Church had a legal persona capable of being sued and that church could be sued in this jurisdiction under CPR 6.9(2) on the basis that it was carrying out its activities here. The factual basis for this submission was set out in Mr Kesar's second witness statement at paragraphs 18 and 25:

> "18. I was also aware that the London Parish and all other Parishes in England and Wales were UK charities and benevolent trusts, but for the reasons set out below I took the view that was, at the very least, arguable that they were also integral parts of the Serbian Orthodox Church and under its control, and the church was carrying on its activites in this jurisdiction."
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> "25. So in view of the above, I took the view that the Serbian Orthodox Church had at least a degree of control over the clergy in this jurisdiction and to that extent at least was carrying on its activities in this jurisdiction."

36. The difficulty with this submission is that Kesar & Co never claimed in the contemporaneous correspondence or in submissions to the court that they were entitled to serve the London Parish under the provisions of CPR 6.9(2) paragraph 7. Further such a stance is contrary to the position taken by Mr Kesar in his first witness statement where Mr Kesar claimed, at paragraph 38, that he had attempted service on the London Parish as "an alternative place" under CPR 6.15:

> "…The Claimants believe that it was therefore correct to effect service using an alternative method, since the Defendant does not have a representative authorised for service, and at the alternative address, which is one of their parishes in the UK (Part 6.5 CPR). Given the exceptional circumstances of this case, and in the alternative the Court is invited to apply Part 16.6 (sic) and dispense with this requirement."

37. However CPR 6.15 can only apply *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* . Both CPR 6.15 and 6.16 require applications to be made to the Court which are supported by evidence. No such applications were made and as Mr McParland QC observes, the issue was not even mentioned in counsel's skeleton argument.

38. In the circumstances I accept Mr McParland QC's submission that this is an entirely new case put forward to suggest that Mr Kesar was not acting improperly, unreasonably or negligently in issuing and purporting to serve six actions in England & Wales, in respect of which the court had no jurisdiction over the Defendant or indeed any defendant who could arguably be responsible for the matters complained of.

39. I make full allowance for the inability of Mr Kesar to refer to his instructions or to the advice he received from counsel. The relevant principles governing service of the proceedings and jurisdiction require a solicitor to have regard to the criteria set out in CPR 6 and PD 6B. These are essentially legal issues and it is inconceivable that Mr Kesar's clients would have anything useful to say on these issues. Indeed, such evidence as there is suggests that Kesar & Co were given power of attorney by at least one client to conduct the proceedings as they saw fit. In the circumstances I consider that making full allowance for anything that might have been said to Kesar & Co by their clients or in the advices from counsel it was wholly unreasonable and negligent to issue these claims in this jurisdiction. DWF did all that was in their power to alert

Mr Kesar to the correct jurisdictional position, however in my judgment he chose to proceed with a wholly unarguable position through to the hearing of the strike out application. In the circumstances the first stage of the test is made out in relation to the issue of jurisdiction.

40. Did the unreasonable conduct I have found at paragraphs 29 and 39 above cause the Defendant to incur unnecessary costs? In my judgment the answer to this question must be yes. The Defendant (the Serbian Patriarchy) incurred the costs of issuing the Part 11 application and attending the hearing. I reject Mr Friston's submission that the fact the claim forms were served without having obtained an extension did not cause costs or any significant costs to be wasted or incurred as the solicitors would have simply issued new proceedings as they were entitled to do. These costs would still have been incurred even if new proceedings were issued as Mr Kesar continued to resist the application. He did not even apply to amend the claim forms to reflect the Defendant named in the particulars of claim. I also find Mr Friston's causation point to be without merit. Whilst it is true that the court was asked to deal with the jurisdiction issue on the basis that further claims had been threatened following its observation quite early in the hearing that the claim forms had expired. It is clear from the notice of application that the jurisdictional issues were raised in the context of this case and provided an alternative basis for striking out the claim. In my view no extra costs were incurred because the court went on to determine the jurisdictional issues, these costs had to be incurred in any event. Therefore in my view all costs incurred after 27 December 2018 when the Defendant instructed DWF were caused by the negligent and unreasonable conduct of Kesar & Co.

41. Having regard to the above is it just in all the circumstances to order Kesar & Co to compensate the Defendant for the whole or part of the relevant costs?

42. The Defendant has been forced to come to this jurisdiction to deal with issues that I have taken the view no responsible solicitor could have continued to pursue. This is not a situation where the qualified one-way costs ("QOCS") provisions are relevant, they only apply to a claimant and do not operate to protect a legal representative, however it is clear that the Defendant has no realistic prospect of recovering its costs from any other party.

43. In the circumstances, this being in my view a clear and obvious case, I consider that it is just in all the circumstances for Kesar & Co to pay the entirety of the costs incurred by the Defendant on the indemnity basis from 27 December 2018.