EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL)

CLAIM NO. BVIHC (COM) 0097 of 2015

Between:

[1] JSC MCC EUROCHEM
[2] EUROCHEM TRADING GMBH

Claimants

-and-

[1] LIVINGSTON PROPERTIES EQUITIES INC
[2] NIMATI INTERNATIONAL TRADING LIMITED
[3] NAUTILUS SERVICES LIMITED
[4] GLOBAL MED SERVICES INC
[5] SEVAN PROPERTIES MANAGEMENT LIMITED
[6] RUMBAY ASSETS CORP
[7] BANTER INDUSTRIES LIMITED
[8] VALERY ROGALSKIY
[9] DIMITRY POMYTKIN
[10] NEDJET BAYSAN
[11] KOPIST HOLDING LIMITED
[12] ITRADE FERTILISERS S.A.
[13] FABIO SCALAMBRIN
[14] DARLOW ENTERPRISES
[15] DARLOW INVESTMENT LP
[16] DEARBORN ENTERPRISES LIMITED
[17] GIANTHILL MANAGEMENT LIMITED
[18] DREYMOOR FERTILISERS OVERSEAS PTE LIMITED

Defendants

Appearances:

Mr. Justin Fenwick QC and Mr. George Spalton, instructed by Mr. Jonathan Addo and Mr. Christopher J. Pease of Harneys for the Claimants
Mr. Brian Doctor QC, instructed by Mr. Andrew Willins and Mr. Justin Davis of Appleby for the Eighth Defendant

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2017: December 19
2018: March 13

JUDGMENT

[1] Adderley J: The substantive applications before me are as follows:

i. An application by the eighth defendant filed 3rd March, 2017 for a declaration that he has not been served with these proceedings and also a stay of the proceedings on forum non conveniens grounds

ii. An application by the claimants filed 1st May 2017 to strike out the eighth defendant's application

iii. An application by the claimants for alternative service on the eighth defendant of the other documents in the proceedings

The Background

[2] This is an action concerning bribes and secret commissions.

[3] JSC MCC Eurochem and Eurochem Trading GMBH ("Eurochem"), the first claimant, is a company incorporated in Moscow, Russia. At all material times it was Russia's largest mineral fertilizer trader and one of the leading fertilizer companies in the world with a turnover of approximately US$7 billion in annual sales and operations worldwide.

[4] Eurochem Trading GMBH, the second claimant, at all material times was and is based in Switzerland and is a sister company of Eurochem which at all material times purchased certain fertilizer products from Eurochem and sold them worldwide.

[5] Mr Valery Rogalskiy, the eighth defendant, and Mr Dimitry Pomytkin, the ninth defendant are former employees of Eurochem and Eurochem Trading and were in charge of sales and marketing for the claimants.

[6] It is alleged that the eighth and ninth defendants obtained in excess of the equivalent of US$55 million by way of unlawful kickbacks and secret profits on the worldwide sale of a fertilizer by the claimants. These bribes were in exchange for concessional prices of products given to certain customers who paid them "kickbacks" by way of secret commissions. The bribes were paid to

various entities and individuals who are the other sixteen defendants in this action who in turn paid them on to or for the benefit of the eighth and ninth defendants. The payments were actually the property of the claimants which the claimants contend they now hold for them on constructive trust.

[7] Nine of the defendant companies are companies incorporated in the BVI, one in Switzerland, one in Panama, one in Scotland, one in Cyprus, one in Singapore, and two individuals are from Switzerland.

[8] The bribery has spurned actions in Cyprus, Singapore, and California, and of course this jurisdiction.

[9] The events have led to the filing of the claim form and statement of claim on 7th August 2015 against the 18 defendants. In their pleadings the claimants allege that the defendants have committed various torts set out in their re-amended statement of claim filed 24th January 2017 including dishonest assistance given to the eighth and ninth defendants to aid them in breaching their duty as employees of Eurochem and Eurochem Trading, the tort of injury by unlawful means, and unlawful means of conspiracy between them and the eighth and ninth defendants. Consequently the claimants are seeking an account of profits, appropriate remedies against them and the other defendants as constructive trustees of the secret profits which they have earned, equitable compensation, damages and the proprietary remedy of tracing.

[10] The claimants have a pending application for summary judgment against the eighth defendant to make an interim payment of $53,741,415.46 plus interest and the ninth defendant of $1,319,219 plus interest.

Procedural History

[11] On 19th November 2015, Farara J (Ag) gave leave to serve the ninth defendant outside the jurisdiction, and on 25th February 2016 the Court of Appeal allowed an appeal against a judge's refusal to impose a freezing order on the assets of the eighth defendant and imposed one itself. These court decisions indicate on principle that the court is of the opinion that there is a serious

issue to be tried in respect of these causes of action and a good arguable case that the case comes within one of the gateways for service out.

[12] The first through seventh and the seventeenth defendants are companies incorporated in the British Virgin Islands.

[13] According to the statement of claim, the first, second and third defendants at all material times were owned and controlled by the eight defendant and the fourth and fifth and seventeenth defendants were ultimately owned and controlled by him. These companies are hereinafter called "the Rogalskiy Companies".

[14] The sixth and seventh defendant, as pleaded in the statement of claim, was at all material times owned and controlled by the ninth defendant ("the Pomytkin Companies").

[15] As of the time of writing, one of the Rogalskiy Companies (first defendant), the two Pomytkin Companies and the fifteenth defendant have been placed into liquidation by this court.

[16] Five of the Rogalskiy Companies (The second, third, fourth, fifth, and seventeenth defendants) are contesting the jurisdiction of the BVI courts, as is the tenth, eleventh, twelfth, thirteenth, sixteenth, and eighteenth defendants. They have appealed a decision of Wallbank J rejecting their jurisdictional and forum challenges. The appeal hearing took place in November 2017 and a judgment of the Court of Appeal is pending.

[17] The eighth defendant has challenged service and jurisdiction. The applications were heard on 19th December 2017. There is also a pending application to serve other court documents in the proceedings on him by way of alternative service on Appleby.

[18] The ninth defendant has not taken any steps or otherwise engaged in the proceedings to date. There is an extant order dated 16th November 2017 obtained before Wallbank J to serve the claim form and statement of claim as well as other court documents in these proceedings on him by service on the registered office of Rumbay Assets Group (in liquidation) which was purportedly owned by him.

[19] The validity of the claim form and statement of claim which was to expire 18th January 2018 was extended on 15th February 2018 to 27th June 2018.

[20] Due to the pending judgment of the Court of Appeal I will deal only with the question of service which is not before the Court of Appeal, and give judgment on the other matter at a later date after that court has rendered its decision.

Service

[21] The order given by Farara, J (Ag) in November 2015 gave the Claimants leave pursuant to ECSC CPR 7.3 (2) (a) to serve the eighth and ninth defendants and eight others from Switzerland, Panama, Scotland, Cyprus and Singapore outside the jurisdiction.

[22] As it relates to the eighth defendant the operative part of the Order states:

> "IT IS ORDERED that:
>
> 1. The Applicants be permitted to serve the Claim Form, Statement of Claim and all other documents filed in these proceedings on the following Defendants (together the "Foreign Defendants") at the addresses set out in Schedule 1 to this Order:
>
>   i. The Eighth Defendant, Valery Rogalskiy…"
>
> The address given for Valery Rogalskiy in Schedule 1 was "73, Palitsy Village, Moscow, Russia".

[23] The Eastern Caribbean Supreme Court Civil Procedure Rules 2000 as amended (CPR) 7.9 (3) provides:

> "A claim form to be served on a defendant in any country which is a Party to the Hague Convention may be served
>
> (a) Through the authority designated under the Hague Convention in respect of that country…."

THE EIGHTH DEFENDANT'S CASE AGAINST SERVICE

[24] The eight defendant's case is that there has been no service on him. His skeleton arguments are summarized as follows:

a. The burden of proving that service of the claim form has taken place is on the claimants. They have failed to discharge that burden for the following reasons:

i. Permission was granted by Farara J on 19th November 2015 to serve the claim form out of the jurisdiction on the eighth defendant at 73 Palitsy Village, Moscow.

ii. Before service was attempted, the claim form was amended and a new amended claim form was issued on 3rd February 2016. The original claim form ceased to have any validity as it is not supported by a certificate of truth (and was not so supported when the document was sent to Russia for service).

iii. The amended claim form is not in the form required by the Rules because it does not contain a defendant's notice, and contains no notice to the eighth defendant that his acknowledgement of service or defence must be served by any particular time. If the amended claim form is the one on which the claimants rely, it is ineffective and, in any event, the eighth defendant is not subject to any time limit for serving an acknowledgment or defence. Even if it was served, he could do so at any time.

iv. The amended claim form was never authorized by the court for service out. The amended claim form was never served under The Hague Convention as required by the Rules. The Certificate issued by the Russian court states exactly that. The Russian rules relating to deemed notice of hearings is of no relevance to the question whether service has been effected.

[25] Counsel for the eighth defendant also raised a number of technical points about claim forms and amended claim forms which, in his submissions, made those served on him invalid for several reasons, including that the claim form had a notice indicating that it was valid for 6 months but the amended claim did not; although the claim form was accompanied by the response pack the amended claim form was not; and while the claim form had on it a statement of truth the amended Claim form did not.

THE CLAIMANT'S ANSWER

[26] Taking the last point first, with regard to the technical points concerning the claim form versus the amended claim form, counsel for the claimants pointed out that these matters are addressed by

Pereira J, as she then was, in Belzerian v Weiner[1]. The short answer is that the amended claim form subsumes the claim form. In other words as she stated at paragraph 12 and 13; "*In short, the claim form, albeit amended, is still, to all intents and purposes, the claim form".* In addition, on the evidence it is clear that both the original and the amended claim forms were in the service package of documents for service on the eighth defendant, and that packet included instructions and timelines for filing acknowledgement of service.

HAGUE CONVENTION PROCEDURE IN RUSSIA

[27] The claimants contend that they used the correct procedure under the Hague Convention and exhausted the procedure to effect service of the claim form and other documents on the eighth defendant, and it is pellucid that the intent of the order was that he could be served outside the jurisdiction somewhere in Russia .

[28] Two experts nominated by each party provided reports, Professor Anton Asoskov and Mr. Timur Aitkulov ("Mr. Aitkulov") for the claimants and Mr. Maxim Kulkov and Mr. Dmitry Lovyrev ("Mr. Lovyrev") for the eighth defendant. What appears below are excerpts from the reports of Mr. Aitkulov and Mr. Lovyrev.

[29] Both experts agree that The Hague Convention is the only Russian international treaty that governs the service of documents originating in the BVI, and there are no other applicable treaties.

[30] By virtue of Article 15 (4) of the Constitution of the Russian Federation ("Constitution") and Article 5 of the Federal Law No. 101-FZ dated 15 July 1995 On International Treaties of the Russian Federation , the Hague Convention is an integral part of Russian's statutory framework.

[31] Judicial documents originating in the BVI may be served within the territory of Russia only in accordance with the provisions of the Hague Convention. Russia has expressly objected to the use of alternative methods of service listed in Hague Convention Article 10 by making a declaration under Hague Convention Article 21:

[1] SKBHCAP2012/0028

VI. Service of documents by methods listed in Article 10 of the Convention is not permitted in the Russian Federation.

[32] Accordingly, the following methods listed in Hague Convention Article 10 cannot be used in Russia to serve documents originating in the BVI by personal service on persons or judicial officers in Russia:

a) The freedom to send judicial documents, by postal channels, directly to persons abroad.

b) The freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

c) The freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

[33] The Ministry of Justice of Russia (the "Ministry") is the Central Agency in charge of receiving service requests under the Hague Convention and forwarding them to Russian courts.

[34] Russian courts must execute a Hague Convention request in an oral hearing, of which they must properly notify the service recipient. If a Russian court has properly notified the service recipient of the hearing, but the service recipient does not appear or take receipt of the foreign documents, he is deemed served with the documents.

[35] Under Hague Convention Article 3 the authority or judicial officer competent under the law of the State in which the documents originated shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalization or other equivalent formality.

[36] According to Russian procedural rules, a judicial request from the court abroad is to be forwarded to the Russian court that is to execute the request for service ("Serving Court") by the Ministry of Justice of the Russian Federation of the Civil Procedure Code of the Russian Federation ("CPC RF").

[37] The Serving Court must then schedule the date, time and place of the hearing ("Service Hearing") and send a summons to the person(s) to whom the judicial documents are addressed ("Service Recipient")[2].

[38] The summons is usually sent by registered mail. However Russian law also envisages other means of sending a summons, including by fax, telegram or other means allowing the fact of service to be established[3].

[39] According to Article 113 (4) of the CPC RF a summons addressed to a person participating in court proceedings must be sent to that person's address specified by a party to the case. If the intended recipient does not reside at the address specified by the party to the case, the summons may be sent to the intended recipient's place of work.

[40] Service of a summons may result in the following outcomes:

a) If the summons is delivered and received by the Service Recipient, the Service Recipient is deemed notified of the date, time and the place of the Service Hearing;

b) If the Service Recipient refuses to accept the summons, he/she is equally deemed notified of the date, time and place of the Service Hearing[4].

c) If the Service Recipient cannot be found at the address where the summons is sent, the Serving Court takes note of the Service Recipient's absence at his/her last known place of residence.

[41] Russian procedural rules do not specify a separate procedure for serving documents. If a party to proceedings has been duly notified of the court hearing, he/she has the right to review the case files and the relevant documents[5].

[42] According to Article 165.1 of the Civil Code of the Russian Federation (the "Civil Code"), a notice is also deemed delivered in those cases in which it has reached the person to whom it was sent (the addressee) but, due to circumstances within his control, it was not handed to him, or he did not acquaint himself with it. For instance, a notice is deemed delivered if an addressee refuses to pick

[2] (See Article 407 of the CPC RF)
[3] (See Article 113 (1) of the CPC RF)
[4] (see Article 117 of the CPC RF)
[5] (see Article 35 of the CPC RF)

up a notice at the post office and this leads to the notice being returned at expiry of the holding period. The addressee bears the risk associated with non-delivery of the notice. Art.165.1 of the Civil Code can also apply to the service of court notices and summonses.

[43] Evidence was given of the preponderance of case law from the Russian courts of general jurisdiction in which they have ruled that addressees were properly notified in instances in which summonses were not received by the addressee due to the expiry of the holding period, i.e. the addressee failed to collect a writ of summons (or telegram) from the post office.

[44] For instance, Mr. Aitkulov refers to a ruling of the Krasnoyarsk District Court dated 27 June 2016 in case No. 33 – 6960/2016[6] as authority that a person's refusal to take receipt of correspondence that is evidenced by its return to the sender upon expiry of the holding period, is considered proper notification of a case hearing.

[45] The same principles apply if the Serving Court sends the documents to the Service Recipient's registered address. Mr. Aitkulov referred to an appeal ruling of the Moscow City Court dated 14 September 2016 in case No. 33 – 36785[7] which found that the argument that the defendant had not been properly notified of the date and time of the court hearing was not proven because the court of first instance had sent the writ of summons to the defendant's registered address and the writ of summons had been returned to the court due to *"expiry of holding period".*

[46] Also according to the appeal rulings of the Moscow City Court dated 8 April 2016 in case No. 33-12626/2016 (TDA1, page 58-64) and in case No.33-12052/2016 (TDA1, page 50-57), the court, based on the provisions of Art. 165.1 of the Civil Code and Arts 113,117 of the CPC, RF, rejected the arguments that the defendants had not been properly served by the court because the writ of summons and telegrams had been sent to the defendant and the writ of summons had been returned due to expiry of the holding period. Mr. Aitkulov stated that he is aware of rulings to the contrary but "the preponderant case law" reflects the correct approach to the interpretation of Articles 113-117 as to what constitutes proper notification and it is in line with what he outlined.

[6] (TDA1, page 36 – 43)
[7] (TDA1, page 44 – 49)

THE NOTIFICATION OF THE HEARING

[47] The Hague Convention process began with Letters Rogatory being dispatched to the Ministry of Justice of the Russian Federation on 29th March 2016. The end of the process was when the official report sent back by the Russian Ministry was received by the Supreme Court of the British Virgin Islands on 3rd March 2017. During that process of almost a year Mr. Rogalskiy was served with notices to appear to the court applicable to his official address as well as two additional addresses. He did not appear at the hearing set for 15th June 2016. The judge adjourned that hearing to 20th July and in the meantime he was sent a letter and a telegram. He also did not appear at the 20th July hearing and the hearing proceeded in his absence.

[48] The transcripts of the hearing in the Krasnogorsk City of the Moscow Region with presiding Judge S V Puchikova, records that at a public hearing of the letter of request from the High Court of Justice of the British Virgin Islands for the conduct of individual legal proceedings in respect of Mr. Rogalskiy, the appearances of persons at the court hearing was checked and he failed to appear. The court confirmed that it received a report from the Russian Federal Migration Service that Mr. Rogalskiy's registered address was that indicated on the Letter of Request namely Apt 8, 11/1 Volokolamskoye Shosse, Krasnogorsk, Moscow Region. The eight defendant gave as his registration address on his acknowledgement of service dated 1st March 2017 filed with this court the same address, and in paragraph 8 of his first affidavit in these proceedings he stated "Volokolamskoe shosse 11/1, Apt 8, 143402 Krasnogorsk, Russia, Moscow, Russia which is the address at which I have been registered for the last thirty years or thereabouts". Mr. Aitkulov gave a case authority (above) where the Russian court ruled against a party who sought to argue that he was not notified because he was served with documents at his registered address that he did not answer to. Mr. Aitkulov was of the opinion that this was the exact address and that there could be no confusion as to which court was referred to in the notice.

[49] The court also saw the envelope dated 30th June 2016 containing the summons, the telegram containing the summons to Mr. Rogalskiy dated 29th June 2016, and the notification from the

telegram service indicating failure to deliver the telegram as the addressee failed to appear to collect.

[50] The return of the Letter of Request due to the non-appearance, *duly notified,* was discussed. There were no objections and the certificate was filled out. The court determined that the Service Hearing transcript, the case file assembled, and the Letter of Request file and a certificate shall be dispatched to the Main Administration of the Ministry of Justice of Russia for forwarding to the High Court of Justice of the BVI pursuant to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters.

[51] On the facts and Russian law, as it was explained by the experts, it seems reasonable for the court to have concluded that he was duly notified. That is consistent with the decision of Sloutsker v Romanova[8], a case in which Mr. Aitkulov gave evidence as well. In that case Mr Aitkulov expressed the opinion that service of the summons by registered post and by telegram "were sufficient and constitute effective service" even if the service recipient did not receive it. In this case, despite the evidence before it that he failed to appear to collect the telegram, the minutes of the court hearing refer to Mr. Rogalskiy as "duly notified". The trial judge in Sloutsker noted the expert advice that there is no separate procedure for actually serving the documents. He noted that all available procedural steps for notifying the defendant of the foreign proceedings had been exhausted and if in those circumstances, the defendant, having been notified of the hearings, refused to attend or alternatively refused to accept the document, he/she is deemed served.

[52] Between 23rd May 2016 and 20th July 2016 the proper Russian Court issued two notices to the eighth defendant at his registered address. In each case, on both 15th June 2016 and 20th July 2016 the eighth defendant failed to appear at hearings before the Serving Court. At the latter date, despite his non-appearance the court proceeded and made a note to that effect and a note, notwithstanding that he was duly notified, that he was not served. This note was sent through the official channels and reached the BVI High Court on 3 March 2017.

[8] [2015] EWHC 545 QB

[53] On that same date the eighth defendant filed an application challenging the court's jurisdiction, giving Appleby's address as his address for service, and seeking a declaration that service of the BVI claim form and statement of claim on him in Russia was defective under Russian law.

DISCUSSION

USE OF THE WORD "MUST" IN THE RULES

[54] In his oral presentation much was made by Counsel for the eighth defendant of the use of the word "must" before certain procedures prescribed by the CPR, who argued that they were mandatory. The construction of the word "must" as being mandatory and the word "may" as being directory in all cases has long been abandoned by the courts. Whether the word "must" is to be considered mandatory or directory will be determined in context. One must construe the rules as purposive and interpret them in the light of their overall objective.

[55] The court has a general power to rectify matters where there has been a procedural error. Despite the language used in a rule, CPR 26.9 provides "…where the consequence of failure to comply… has not been specified" by any rule, practice, direction or court order, an error or failure to comply does not invalidate any step taken in the proceedings and the court can make an order "to put matters right". This general power must be exercised judicially with a view to achieving the overriding objective. That objective is set out in Part 1 of the ECSC Civil Procedure Rules 2000 ("the Rules") as amended as follows:

"The overriding objective"

1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.

Application of overriding objective by the court

1.2 The court must seek to give effect to the overriding objective when it-
(a) exercises any discretion given to it by the Rules; or
(b) interprets any rule

THE EXPERT OPINIONS

[56] Both experts, Mr. Lovyrev and Mr. Aitkulov, agree on the following:

i. The Russian court normally sends the notice to the party to be served by registered mail, but may also send the notice by fax, telegram, or other method allowing the fact of service to be fixed.

ii. The court sends the notice to the address indicated by a party. If the recipient does not reside there, the court investigates the recipient's last known address of residence.

iii. If the recipient does not collect the notice at his last known address of residence and, as a result, the post office returns the notice to the court due to the expiry of the holding period, the recipient is deemed properly notified of the hearing.

iv. The court does not have any power to compel the recipient of the notice to attend the hearing. If the court has evidence before it that the recipient has been properly notified, the court can then proceed with the hearing and dispose of the action.

[57] There is no doubt that Russian authorities proceeded on the request as being one sanctioned by the High Court of the British Virgin Islands. According to copies of the Russian documents placed in evidence the Ministry of Justice of the Russian Federation Main Administration of the Ministry of Justice of the Russian Federation sent "*the letter of request from the High Court of Justice of the British Virgin Islands*" requesting the service of process on Valery Rogalskiy residing…" After completing the process under the Hague Convention they returned their report to the proper receiving party under the Hague Convention, namely the British Virgin Islands High Court.

[58] As his alternative ground Mr. Lovyrev has posited that the delivery of the Letter of Request by officers of the court who were acting for the claimants was fatal to the process of service. He points out that under paragraph 15(2) of the Russian Ministry's Practice Guidelines on Organization of Work on Execution of International Undertakings of Russia in the Area of Legal Assistance, the Ministry's officials should check if the sender of the request is a competent authority under the Hague Convention and set out the following extract:

> "Request for legal assistance received in violation of the procedure set out in the international treaty (the sender is not a competent foreign authority or the central office of the Ministry of Justice of Russia) shall be sent to the central office of the Ministry of Justice of Russia without execution together with the sender's envelope (or its copy)".

[59] It seems to me, notwithstanding the valid judgment of the Court, administratively the delivery of the request by private attorneys instead of directly by the High Court, apparently without consultation, was at least a breach of protocol as it relates to the High Court of the BVI and probably disrespectful to the High Court, whether wittingly or unwittingly. The documents really ought to have been sent by the High Court and that action by private attorneys ought not be repeated in the future. It probably was open to the Russian authorities to refuse it in accordance with their internal guidelines under paragraph 15(2). However, the request was treated as coming from the proper authority as evidenced on the face of the Russian records and it was dealt with as such, including their sending the certificate with the results back to the appropriate "receiving" authority under the Hague Convention, namely, the British Virgin Island High Court. So the breach of protocol was obviously waived. It certainly was not a fatal breach of the Hague Convention in light of Mr. Aitkulov's opinion that while there was an express designation of a "receiving" authority there is no express reference to a "sending" authority' for this purpose in the Hague Convention.

[60] Furthermore, there does not appear to be a breach of CPR Rule 7.9 because the documents were obviously served through the correct Russian authorities. CPR 7.9 (3) under the rubric "*Service under the Hague Convention* " provides:

> "A claim form to be served on a defendant in any country which is a party to the Hague Convention may be served-
>
> (a) through the authority designated under the Hague Convention in respect of that country.

[61] Nor is the production of the certificate in breach of CPR 7.10. CPR 7.10 (4) states:

> "A certificate which—
>
> (a) is made by...
>
> (iii) any other authority designated in respect of that country under The Hague Convention or any other relevant Civil Procedure Convention;
>
> (b) states that the claim form has been served in accordance with the rule either personally or in accordance with the law of the country in which service was effected; and
>
> (c) specifies the date on which the claim form was served; is evidence of the facts stated therein.

[62] A certificate has been received from the Russian authorities but it does not state that the claim form has been served and as such it cannot be used as proof that it was served. In fact it states the opposite.

[63] Mr. Lovyrev in his expert report points out that in essence when a Russian court executed a judicial request of another court, it fulfills an administrative function rather than a judicial function, and that under Russian case law the validity of the service is an issue to be decided by the court that has requested the service and makes the final judgment, or the court seized with enforcement of such a judgment. Therefore there is no issue of comity on this point. CPR 7.10(4) provides that a certificate (from Russian authorities) which states that a person has been served may be used as evidence of the facts stated in the certificate. It does not provide the corollary for a person who was stated not to have been served. It remains open to this court to decide whether service could be deemed to have taken place.

[64] The certificate for the Russian authorities is in standard form. It commences by stating *"The undersigned authority has the honor to certify, in conformity with article 6 of the Convention,*1) that the document has been served in one of the following methods authorized by article 5: … 2) that the document has not been served by reason of the following facts.". Under 1) it provides " *a) in accordance with the provisions of sub-paragraph (a) of the first paragraph of article 5 of the Convention. b) in accordance with the following particular method [a space is left to insert the method]. and c) by delivery to the addressee which he accepted voluntarily*." Under 2) it states "*that the document has not been served by reason of the following facts"* and there a space for the inserting an explanation why it was not 'served'.

[65] Sub-paragraph (a) of the first paragraph of article 5 of the Convention provides for service "…*by a method prescribed by its internal law for service of documents in domestic actions upon persons who are within its territory*". The note to article 6 which sets out how the certificate should be completed provides:

> "*The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to*

whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service".

[66] It appears on its face and by the notes in the Convention to the paragraph, that "service" in the certificate means some sort of 'delivery'. This is consistent with the advice of Mr. Lovyrev that the validity of the 'service' (in contradistinction to the 'delivery') is a matter for the sending country to decide.

[67] No evidence was drawn to my attention that any objection has been taken by the British Virgin Island's court to the procedure used and the Russian authorities have clearly accepted the request and acted on it. For those reasons I do not accept, as Mr. Lovyrev has posited as the first major ground in support of his view that the eighth defendant has not been served, that the delivery of the letter by lawyers who are officers of the court but were acting for the claimants in the action was fatal to the process of service of the claim form and other documents to the Russian "receiving" authority.

[68] In Mr. Aitkulov's Second Expert Report of dated 15 June 2017 he concludes in the following statement at paragraph 36 of his report that Mr. Rogalskiy has been properly served. He states:

> "Based on the analysis set out in paras. 7 – 35 above, I believe that nothing contained in the LR [expert report of Dmitry Evgenievich Lovyrev] changes my analysis or conclusions set out in the First Report; therefore, the measures taken to serve the Hague Service Documents on VR [Mr. Rogalskiy] in Russia were sufficient and constituted good service.

[69] Mr. Aitkulov also stated that if a court has made a finding against the rights of a person in Russia, in this case that he was duly notified and the statement was not true, he could complain to the appropriate court. The eighth defendant has not made any application in Russia to complain.

[70] Mr. Lovyrev, as his second major ground alternative to that of the alleged fatally flawed initiation process, was of the view that the eighth defendant was never deemed notified for several reasons. If that were so he concluded that Mr. Rogalskiy could not have been served because notification is a precondition for being served. He therefore reached the following conclusion based on this second major ground:

> "47.These multiple defects alone show that as a matter of Russian Law, VR was not properly notified of the service hearings in the Serving Courts, and, therefore, was not validly served with the documents."

[71] Having read both expert reports I prefer the conclusion of Mr. Aitkulov for several reasons. Based on the facts of this case and the law on which both experts agree as to what amounts to deemed notification of the Service Hearing I am satisfied that the eighth defendant was duly notified about the 20th July Service Hearing.

[72] Having been duly notified and not having made an appearance it was open to the court to proceed in his absence. I also take note of the mention on the court transcript that he was duly served with the notice of the Service Hearing. As stated by Mr. Lovyrev, deemed service is a matter to be decided in the jurisdiction of the receiving state, and Mr. Aitkulov gave a positive opinion that the eighth defendant was indeed deemed to have been served with the documents.

[73] Putting aside the question of whether the letter of request was sent from the proper authority , Mr. Lovyrev's alternative reason for holding the opinion that the eighth defendant was not served was based solely on his opinion that the eighth defendant was not duly notified of the service hearings. Presumably if he had reached the conclusion that there had been proper notification of the hearings, he would have reached the conclusion that the eighth defendant had been deemed to have been served. Of the issues raised, relevant though they were, there was no evidence either way whether or not the certain procedures with which he took issue had been complied with but he seemed to have reached the conclusion that they might not have been complied with and that was enough to taint the process.

[74] Among those issues raised by Mr. Lovyrev were that on the face of the certificate there is no record to indicate that certain processes were done such as, for example, in the case of service at the Krasnogorsk address that Judge Puchkova sent the notice of the first hearing to the eighth defendant, or that DHL attempted to deliver the notice of the second hearing to the eighth defendant, and the telegram did not contain the address of the Krasnogorsk court (even though the letter did). In the absence of any Russian law on the point I can apply BVI law and the evidential presumption of *omnia praesumuntur* especially since we have one expert opinion as well as the opinion of the court which conducted the Service Hearing that the eighth defendant had been duly

notified based on principles accepted by both experts. In relying on his experience that oftentimes staff in the Russian Ministry are not as careful as they should be in filling out the forms, Mr. Lovyrev has erred in failing properly to weigh the clear statement on the face of the certificate that the eighth defendant was duly notified about the Service Hearing.

[75] On the issue raised by Mr. Lovyrev that the court address was not exact enough because of certain abbreviations used in the name, no evidence was brought to my attention that the eighth defendant challenged the Russian authorities that because some parts in the name were abbreviated he could not know which Moscow court to attend for the Service Hearing. Nor is there any evidence that he challenged their report that he was duly notified about the Service Hearing at his admitted registered address. According to the expert evidence he could have mounted such a challenge if he thought that he was not duly notified. Precisely such challenges were raised in the cases referred to by Mr. Aitkulov above and in his Report.

[76] I prefer the opinion of Mr. Aitkulov's that the description of the court was sufficient for the purpose of identifying it to the eighth defendant.

Submission to the Jurisdiction

[77] The claimants submitted that the eighth defendant had submitted to the jurisdiction. The acts relied on are set out in the Fourth Affidavit of Andrew Gilliland and the First Affidavit of Andrey Meshcheryakov. These acts included filing of an affidavit of assets, that his attorney did not reserve his position on jurisdiction until half way through the hearing on 11th October 2016, that before the hearing on 20th October 2016 relating to the sequestration of his assets his attorney signed for and accepted service of the claimants' application to cross examine without reserving the eighth defendant's rights, agreed to an adjournment during the same hearing contesting fees on the merits, and on 24th January 2017 at the hearing to settle the terms of the order requiring the eighth defendant and others to disclose the source of their funding for legal fees, the eight defendant's attorney sought to reserve his position but the judge noted that his former attorney may have already failed to reserve his position. I take the comments made by Carrington J, in context, as not being intended to render a decision on whether the defendant had submitted to the

jurisdiction, because the issue was not argued before him and neither party had had an opportunity to be heard on it.

[78] The principle as outlined by the Court of Appeal in Katunin v VTB BVIHCVAPP [2016] N0 4 and SMAY Investments Ltd v Sachdev (Practice Note) [2003] EWHC 474 (Ch) is that to conclude that a party has agreed to submit to the jurisdiction the act must be unequivocal and only explained by consent to submit. In the context in which they took place these acts were too equivocal to constitute evidence of submission to the jurisdiction, and the acknowledgement of service filed 1 March 2017 clearly reserved the eighth defendant's position. I therefore dismiss that part of the application.

[79] Based on the facts of this particular case although not forming any part of the basis for my decision, the court draws the inference that the eighth defendant and his attorneys were very familiar with the claim form and other documents at each step of the process. He was and is clearly aware of the proceedings in this jurisdiction, has employed counsel for several years and has been engaging the court since as early as 2016 for threatened contempt proceedings and even up to receiving the favourable Court of Appeal decision handed down in July 2017. It appears that he has also been present for some of the hearings, for example, the 19th January and 7th February 2017. As an indication of his acute involvement the court notes that he made his application to set aside service on 3rd March 2016 the very same day that the service documents were returned from Russia to the British Virgin Islands High Court.

CONCLUSION

[80] In the circumstances and in line with the overall objectives set out in Part 1 of the Rules, and the ratio in Belzerian v Weiner, I order that the technical defects, referred to in the objections by the eighth defendant to the extent that any objections are valid including serving the eighth defendant at his registered address instead of the address in the order, be put right under my general powers under CPR 26.9.

[81] For the reasons stated, I refuse the declaration sought by the eighth defendant that he has not been served with the claim form and amended claim form in this action, and declare instead that he is deemed to have been served from 20th July 2016.

ALTERNATIVE SERVICE

[82] I grant the application of the claimants to henceforth serve all other documents in the action on the eighth defendant by serving a copy on his primary attorney in the British Virgin Islands who for the time being is Appleby and if that should change he should forthwith notify the court.

[83] I feel constrained to say that if the facts such as those in this case do not qualify as deemed service, we would be left with the untenable situation that all a defendant in Russia would have to do in order to avoid service of foreign documents is to refuse to obey a summons to appear at the Russian Serving Court hearing. As the service process takes the better part of a year in Russia, it would mean that in each and every case where a person took that route, service would effectively be delayed until all of the steps had been taken before alternative service was possible under the rules. That is probably not what the framers of nor the contracting parties to the Hague Convention intended.

[84] As it could be said that there was a bone fide dispute about whether he had been served, in the interest of justice I grant the eighth defendant an extension of time of 28 days in which to file his defence to run from the date judgment on his stay application herein is given.

[85] I will hear the parties on costs.

Hon. K. Neville Adderley
Commercial Judge (Ag.)

By the Court

Registrar