EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0047

BETWEEN:

JSC VTB BANK

Appellant/Claimant/Respondent
to Cross Appeal

and

ALEXANDER KATUNIN

Respondent/First Defendant/
Cross Appellant

SERGEY TARUTA

Second Defendant

AND

BVIHCMAP2017/0006

BETWEEN:

JSC VTB BANK

Appellant/Claimant

and

ALEXANDER KATUNIN

Respondent/First Defendant

SERGEY TARUTA

Second Defendant

Before:

The Hon Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Anthony E. Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Clive Freedman, QC with him Ms. Clare Goldstein and Mr. Mark Rowlands
for the Appellant
Mr. Stephen Rubin, QC with him Mr. Niki Olympitis and Ms. Sara Jane Knock
for the Respondent

2017: November 22;
2018: April 18.

Commercial appeal – Validity of claim form – Case management powers – Application to extend period for service of claim form – Rules 8 and 26 of the Civil Procedure Rules 2000 – Whether the judge placed a gloss on the test of "special circumstances" and thereby raised the established threshold

On 23rd May 2014, JSC VTB Bank ("VTB"), a major Russian Bank, commenced proceedings before Bannister J [Ag.] (the "2014 Action") to enforce unsatisfied final Russian judgments against the respondent, Mr. Alexander Katunin ("Mr. Katunin"). It obtained a worldwide freezing order ("WFO") against Mr. Katunin and was, on 26th May 2014, granted ex parte leave to serve him out of the jurisdiction. Under rule 7.8 of the Civil Procedure Rules ("CPR") this required service under the Hague Convention in Russia. VTB did not attempt to effect such service. On 8th July 2014, it applied for and obtained ex parte an order for alternative service under CPR 7.8A(1) ("the Alternative Service Order").

Mr. Katunin, on 3rd November 2014, applied to set aside the Alternative Service Order. On 28th January 2015, at an inter partes hearing, Bannister J [Ag.] refused Mr. Katunin's application on the grounds that Mr. Katunin had, through his lawyers, submitted to the jurisdiction and that there were valid grounds for the Alternative Service Order. On 20th June 2016, this order was set aside by the Court of Appeal.

VTB having failed to apply before 12 months for time to be extended for service of the claim form out of the jurisdiction, the validity of the claim form in the 2014 Action lapsed on 22nd May 2015. Mr. Katunin on 4th July 2016 applied for an order to discharge the WFO on the grounds that time had expired for the validity of the claim form, in that the alternative service had been set aside and service had not been effected within the 12 months afforded to VTB under CPR 8.12. Further or in the alternative he sought the discharge of the WFO on the grounds that there was no real or continuing risk of dissipation and/or misrepresentation and non-disclosure (the "Discharge Application").

On 14th July 2016, VTB applied to extend the period for service of the claim form or otherwise make good its validity. VTB's application was pursuant to CPR 26.1(2)(k) and/or to dispense with compliance with the Rules under CPR 26.1(6). VTB also made an application to be allowed to dispense entirely with service of the claim form, under CPR 7.8B (all of this the "Claim Form Relief Application").

Wallbank J [Ag.] dismissed VTB's Claim Form Relief Application holding that the court did not have power under CPR 8.13(3)(a) or CPR 26.1(2)(k) to extend the time for making an application for an extension of time for service of a claim form beyond the primary period or any previously granted extension. He held further that although CPR 26.1(6) confers upon the court a power "in special circumstances" to dis-apply deadlines otherwise

established by the Rules the circumstances in which the court would do so must surely, truly be exceptional, and then only if to do otherwise would wreak an injustice. He held that no special circumstances existed in this case. The alternative of dispensing with service of the claim form under CPR 7.8B was not available. Flowing therefrom, the learned judge granted the Discharge Application. He stated that the claim form having not been served within the period of its validity, the WFO automatically fell away.

Subsequently, VTB, in a new action (the "2016 Action") to enforce the first Russian judgment and a second Russian judgment, such action being brought without prejudice to the 2014 Action, applied ex parte to the learned judge for a WFO against Mr. Katunin. The learned judge granted that application and ordered a WFO against Mr. Katunin which took effect at the same time that the WFO in the 2014 Action was discharged.

VTB appeals against the learned judge's decision to discharge the WFO and his refusal to afford time for service or otherwise make good the validity of the 2014 Action claim form. VTB argues that Wallbank J [Ag.] erred (a) in his determination of the meaning and effect of CPR 26.1(6) by wrongly placing an unjustified and over-restrictive gloss on the words "special circumstances", (b) in the application of CPR 26.1(6) to the facts, (c) in finding that the court had no power under CPR 26.1(2)(k) to extend time to apply for an extension under CPR 8.13 and, (d) that if the only way of saving the 2014 Action was to dispense with service of the claim form in that action, that he should have done so. The costs orders made by the learned judge are also being appealed by both VTB and Mr. Katunin.

Held: allowing the appeal; setting aside the decision in the Claim Form Relief Application; reinstating the WFO; and making various costs orders, that:

1. CPR 26.1(6) states that in special circumstances on the application of a party the court may dispense with compliance with any of these rules. This particular rule, where special circumstances are found to exist, could allow the court to wholly dis-apply the time lines established by CPR 8.13 relating to obtaining an extension of time for service of a claim form. The rule was intentionally left unqualified, open and undefined. It permits applications to be dealt with on a case by case basis. The simple question for a court to ask itself is whether, in all the factual circumstances of a particular case before it, special circumstances are made out. In the present case, the learned judge appears, within the definition of "special circumstances", to have created different categories thereof. The use of the words, "surely truly be exceptional and then only if to do so otherwise would wreak an injustice", suggests that there were degrees of special circumstances and only those that gravitated to the top end of the spectrum and had that described effect of wreaking an injustice would qualify. Alternatively, the judge appears to have elevated the bar beyond simply "special circumstances" altogether when he sought to otherwise define or explain the quality of circumstances required. In this the learned judge has fallen into error as any perceptible elevation in the established threshold is unacceptable. As such, the learned judge erred in directing himself on the proper threshold that the appellant was required to establish.

Rule 26.1(6) of the **Civil Procedure Rules 2000** applied; **Abela and others v Baadarani** [2013] UKSC 44 applied.

2. The learned judge having improperly elevated the threshold of special circumstances also incorrectly evaluated the evidence that was presented to him to satisfy the requirement of "special circumstances"; it would then be for this Court to carry out its own evaluation exercise against the correct test. In that regard, service was effected during the primary period by alternative service and at an early stage. This method was suggested, authorized and approved by Bannister J [Ag.] upon which VTB was entitled to rely until after it was set aside by the Court of Appeal. The need for and cost of a second WFO, the potentially large costs consequences of the failure of the 2014 Action, and the possibility of an enquiry as to damages are all factors to consider. CPR 1.1(1) states that the overriding objective of the Rules is to enable the court to deal with cases justly. CPR 1.1(2) sets out a non-exhaustive list of factors included in dealing justly with the case. These factors include saving expense and ensuring that a case is dealt with expeditiously. CPR 1.2 states that the court must seek to give effect to the overriding objective when it exercises any discretion given to it by the Rules or interprets any rule. In relation to the need for and cost of a second WFO, the potentially large costs consequences of the failure of the 2014 Action, and the possibility of an enquiry as to damages, these factors, in conjunction with the existence of the Alternative Service Order and the absence of sufficient fault on the part of VTB's solicitors in not seeking a protective order, did in fact go towards establishing special circumstances justifying an extension of time being granted for service of the 2014 Claim Form. The learned judge failed to have any regard to the overriding objective of saving expense and dealing with matters proportionately by allowing the first action to fail with the above consequences in circumstances where there was an almost identical second action and with an almost identical WFO.

   Rule 1.1(1) of the **Civil Procedure Rules 2000** applied; Rule 1.1(2) of the **Civil Procedure Rules 2000** applied; Rule 1.2 of the **Civil Procedure Rules 2000** applied.

3. CPR 26.1(2)(k) cannot be used to extend time for service of a claim form. Despite the court's general discretionary power under CPR 26.1(2)(k) to extend time, the power to extend time for service of a claim form is circumscribed by CPR 8.13 and this prevents the application of 26.1(2)(k). CPR 8.13 itself does not empower the court to grant an extension of time where permission is sought after the expiry of the period of service of the claim form. As between the regime established by CPR 8.13 and the general discretionary powers established by CPR 26.1(2)(k) the policy behind CPR 8.13 would be defeated if the conditions for obtaining an extension of time could be sidestepped by appealing to the court's discretionary powers under CPR 26.1(2)(k).

Rule 26.1(2)(k) of the **Civil Procedure Rules 2000** applied; Rule 8.13 of the **Civil Procedure Rules 2000** applied; **Kenneth Williams v Leslie Chang et al** NEVHCV2010/0153 (delivered 10th October 2012, unreported) approved.

JUDGMENT

[1] **GONSALVES JA [AG.]**: These are consolidated appeals. These appeals relate to proceedings instituted by JSC VTB Bank (hereinafter "VTB") against Mr. Alexander Katunin ("Mr. Katunin") and Mr. Sergey Taruta ("Mr. Taruta") on 23rd May 2014 (the "2014 Action"). In the events which have unfolded, VTB instituted a fresh action in 2016 (the "2016 Action") against the defendants. The relationship between the two actions will be gleaned from the facts set out below. The appeals before this Court are as follows:

(1) **Civil Appeal No. BVIHCMAP2016/0047**

(a) The appeal by VTB against the decision of Wallbank J [Ag.] dated 7th December 2016 whereby the learned judge granted Mr. Katunin's application to discharge a worldwide freezing order ("WFO") granted by Bannister J [Ag.] (the "Discharge Application") and refused VTB's application to afford time for service or otherwise make good the validity of the 2014 Action claim form filed by VTB against Mr. Katunin dated 23rd May 2014 (the "Claim Form Relief Application");

(b) The counter-notice by Mr. Katunin indicating his intention to argue as an additional ground for supporting the decision of Wallbank J [Ag.] not to extend the validity of the claim form, whether any power existed within rule 26.1(6) of the **Civil Procedure Rules 2000** ("CPR") to retroactively extend the life of an expired claim form. As will be seen later, that argument was subsequently withdrawn;

(c) The cross-appeal by Mr. Katunin from certain costs orders of Wallbank J [Ag.] dated 15th February, 2017.[1] Wallbank J [Ag.] had ordered that VTB make two separate interim payments in respect of the cost of several applications decided in favour of Mr. Katunin in the 2014 Action in the sums of US$91,000 and US$73,992 totaling US$164,492 to be held by Withers BVI, Mr. Katunin's legal representatives, pending the determination of the pending 2016 Action which had been commenced by VTB but not yet served on Mr. Katunin. He also ordered that the costs of Mr. Katunin's applications and the 2014 Action be paid to Mr. Katunin but again that these be held by Withers BVI pending determination of the pending 2016 Action. Mr. Katunin argues on appeal that he should have been allowed to use the costs ordered to be paid. Mr. Katunin also appealed the judge's decision to exclude from the costs of the 2014 Action awarded to him the costs at first instance of his ultimately successful application to set aside the Alternative Service Order (the "Service Challenge Application") which had been granted by Bannister J [Ag.] but had been reversed by the Court of Appeal. When Wallbank J [Ag.] was awarding costs of the 2014 Action, he concluded that the Court of Appeal's order[2] was silent as to costs at first instance which should therefore be considered to be the subject of "no order as to costs". Wallbank J [Ag.] consequently excluded these from Mr. Katunin's award of costs of the 2014 Action. Mr. Katunin also sought his costs of his applications for costs in the court below which Wallbank J [Ag.] decided should be "no order as to costs".

[1] Following a hearing on 6th February 2017 concerning six cost situations or applications, and all following an order of Wallbank J [Ag.] on 7th December 2016 that the costs matters be considered further at the return date – see Consolidated Interlocutory Appeal Bundle, Volume 1, Transcript of Proceedings, Tab 1, p. 31, line 5.

[2] On the Service Challenge Application, when the Court of Appeal set aside the alternative service.

(2) **Civil Appeal No. BVIHCMAP2017/0006**

(a) The appeal by VTB against paragraphs 2 to 6 and paragraph 9 of the order of Wallbank J [Ag.] dated 15th February 2017. By these paragraphs the learned judge ordered:

(i) Costs in favour of Mr. Katunin on the Claim Form Relief Application and the Discharge Application, to be assessed if not agreed within 21 days, the sums so determined to be paid by VTB to Mr. Katunin's BVI solicitors Withers BVI, to be held in escrow until determination of the 2016 Action and an order of the court permitting its release;

(ii) Costs in favour of Mr. Katunin of the 2014 Action, save for his costs of the Service Challenge Application and the ruling dated 28th January 2015 and order dated 12th February 2015 which were to be excluded, such costs to be assessed if not agreed within 21 days, the sums so determined to be paid by VTB to Mr. Katunin's BVI solicitors Withers BVI, to be held in escrow until determination of the 2016 Action and an order of the court permitting its release;

(iii) Interest to accrue at the judgment rate on VTB's costs liability to Mr. Katunin, until such time as the funds are released to Mr. Katunin or VTB's liability will be extinguished;

(iv) VTB to make an interim payment on account of the order for costs in relation to the Claim Form Relief Application, the Discharge Application and the 2014 Action in the amount of US$165,492 to be paid to Mr. Katunin's BVI solicitors Withers BVI within 21 days, who shall hold same in escrow pending determination of the 2016 Action and an order of the court permitting its release;

(v) Interest to accrue at the judgment rate on VTB's cost liability to Mr. Katunin, until such time as the funds are released to Mr. Katunin or VTB's liability is extinguished;

(vi) The inquiry as to damages be adjourned until after determination of the 2016 Action; and

(vii) No order as to costs.

Summary of Background

[2] VTB, a major Russian Bank, seeks to enforce final Russian judgments against Mr. Katunin comprising a total sum of about US$60 million under contracts of guarantee. The judgments are completely unsatisfied. VTB commenced the 2014 Action in the BVI on 23rd May 2014 to enforce the first Russian judgment (in the sum of about US$30 million) and obtained a WFO against Mr. Katunin.

[3] VTB obtained ex parte leave to serve Mr. Katunin out of the jurisdiction on 26th May 2014. Under CPR 7.8 this required service under the Hague Convention in Russia.

[4] VTB did not attempt to effect such Hague Convention service. Instead it returned to Bannister J [Ag.] on 8th July 2014 and obtained ex parte an order for alternative service under CPR 7.8A(1), permitting service on Mr. Katunin by delivering the claim form to some BVI registered companies allegedly owned or controlled by him on the ground that service under the Hague Convention was impracticable ("the Alternative Service Order"). Mr. Katunin applied on 3rd November, 2014 to set aside the Alternative Service Order. On 28th January 2015 on an inter partes hearing Bannister J [Ag.] refused the application to set aside on the grounds that Mr. Katunin had, through his lawyers, submitted to the jurisdiction and that anyway there were valid grounds for the Alternative Service Order. However, following a hearing on 21st May 2015 the alternative service was set aside by the Court of Appeal on 20th June 2016. The Court of Appeal held that there had not been a

submission to jurisdiction and that Bannister J [Ag.] was in error in granting the Alternative Service Order.

[5] Under CPR 8.12 the validity of a claim form for service out of the jurisdiction is 12 months. VTB failed to apply before 12 months had expired for time for service to be extended and thus the validity of the claim form in the 2014 Action lapsed on 22nd May 2015.[3]

[6] Mr. Katunin applied on 4th July 2016 for an order to discharge the WFO on the grounds that time had expired for the validity of the claim form in that the alternative service had been set aside and service had not been effected within the 12 months afforded to VTB for service. Further or in the alternative he sought the discharge of the WFO on the grounds that there was no real or continuing risk of dissipation and/or misrepresentation and non-disclosure ("the Discharge Application").

[7] On 14th July 2016 (and by subsequent amendment) VTB applied to extend the period for service of the claim form dated 23rd May 2014 or otherwise make good its validity. VTB based its application inter alia on the power of the court to extend time for compliance with the rules pursuant to CPR 26.1(2)(k) and/or to dispense with compliance with the Rules under CPR 26.1(6). VTB also made a rare application to be allowed to dispense entirely with service of the claim form, under CPR 7.8B (all of this "the Claim Form Relief Application").

[8] VTB submitted below that (1) the court has power after the primary period of 12 months to extend the time for making an application to extend the period of service and/or to dispense with the requirement to make the application within the primary period, and (2) there was "some other special reason" to extend the period for service. VTB's position was that within the primary period, alternative service had been effected pursuant to an order of the court. The order was made both initially

[3] That would have been the retroactive result of the Court of Appeal's ruling on 20th June 2016. Until then the Alternative Service Order remained valid.

ex parte and then inter partes by an experienced Commercial Judge. This order was not set aside by the Court of Appeal until after the expiry of the primary period.

[9] Wallbank J [Ag.] dismissed VTB's Claim Form Relief Application and in effect decided that:

(1) The court did not have power under EC CPR 8.13(3)(a) or EC CPR 26.1(2)(k) to extend the time for making an application for an extension of time for service of a claim form beyond the primary period or any previously granted extension. Under the CPR "the ordinary position is that applications to extend the period for service of a Claim Form can only be made within that time"[4]. Subject to one qualification, the rules for extending the validity of a claim form are strict and do not admit expressly of exceptions allowing an extension to be granted after expiry of the validity of a claim form;[5]

(2) The stricter approach in the EC CPR, compared to the English CPR, is balanced by the consideration that the periods for service under the EC CPR are twice as long for service out as under the English CPR;[6]

(3) The Court of Appeal judgment in **Robert Allen Stanford v Stanford International Bank Limited (In Liquidation) (Acting by and through its Joint Liquidators, Marcus A. Wide and Hugh Dickson) et al**[7] supports the strict construction. In the **Stanford** case the Court of Appeal had an obvious opportunity to correct the approach of

[4] Transcript of Proceedings, p. 18, lines 11-14.
[5] Transcript of Proceedings, p. 17, lines 7-11.
[6] Transcript of Proceedings, p. 17, lines 12-15.
[7] ANUHCVAP2014/0013 (delivered 15th October 2015, unreported).

Wallace J in **Kenneth Williams v Leslie Chang et al**[8] in this regard if it was wrong, but did not do so;[9]

(4) However, CPR 26.1(6) confers upon the court a power "in special circumstances" to dis-apply deadlines otherwise established by the Rules. This could in principle enable the court to extend time for service of the claim form even if no application to do so has been made in time but afterwards. However, the circumstances in which the court would do so must "surely, truly be exceptional, and then only if to do otherwise would wreak an injustice";[10]

(5) On the evidence he was far from satisfied that "special circumstances" existed;[11]

(6) The alternative of dispensing with service of the claim form under EC CPR 7.8B[12] was not available.

[10] Accordingly, Wallbank J [Ag.] dismissed the Claim Form Relief Application. Flowing therefrom, the learned judge also allowed the Discharge Application and discharged the WFO on the ground that the claim form having not been served within the period of its validity, the WFO automatically fell away.[13]

[11] However, in a new action (the "2016 Action") commenced on 3rd November 2016 to enforce the first Russian judgment and a second Russian judgment (also in the sum of about US$30 million), such action being brought without prejudice to the 2014 Action, VTB applied ex parte to the learned judge for a WFO against Mr.

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[8] NEVHCV2010/0153 – there the High Court held that CPR 8.13 constituted an exhaustive arrangement for dealing with extension of time for service of the claim form and displaced the general discretion to extend time given under CPR 26.1(2)(k).
[9] Transcript of Proceedings, p. 17, line 25 to p. 18, lines 1-3.
[10] Transcript of Proceedings, p. 18, lines 15-18, & 24 and p. 19, lines 1-5.
[11] Transcript of Proceedings, p. 19, lines 6-7.
[12] Transcript of Proceedings, p. 20, lines 7-9.
[13] Transcript of Proceedings, p. 20, lines 13-14.

Katunin.[14] The learned judge granted that application and ordered a WFO against Mr. Katunin which took effect at the same time that the WFO in the 2014 Action was discharged.[15] In the 2014 Action, the learned judge did not find proven the allegations of misrepresentation/non-disclosure or that there was no real risk of dissipation. On the contrary, he accepted that there was such a real risk. In the 2016 Action the learned judge granted the WFO because he accepted that there was a real and continuing risk of dissipation.[16]

[12] Wallbank J [Ag.] gave both parties permission to appeal against his decisions dismissing the Claim Form Relief Application and granting the Discharge Application.[17] In relation to costs the learned judge directed that the costs of the various matters before him (the "Costs Applications") were to be considered further at the return date.[18]

[13] On 6th February 2017 the Costs Applications were heard by Wallbank J [Ag.] and judgment thereon was handed down on 15th February 2017. Similarly, Wallbank J [Ag.] granted both parties permission to appeal.[19] The cross-appeal by Mr. Katunin in relation to the orders made on the Costs Applications is set out at paragraph 1(1)(c) above of this judgment and the appeal by VTB in relation to the orders made on the Costs Applications is set out at paragraph 1(2) above of this judgment. These will be considered later in this judgment.

The Appeal in Respect of the Claim Form Relief Application and the Discharge Application

[14] In respect of the Claim Form Relief Application and the Discharge Application, VTB appealed against the decision of Wallbank J [Ag.] on 4 grounds. VTB argued that Wallbank J [Ag.] (a) erred in his determination of the meaning and effect of

[14] Transcript of Proceedings, p. 21, lines 1-5, p. 25, lines 6-8.
[15] Transcript of Proceedings, p. 31, line 1, p, 43, lines 7-12.
[16] Transcript of Proceedings, p. 30, lines 20-25.
[17] Transcript of Proceedings, p. 37, lines 13-14.
[18] Transcript of Proceedings, p. 31, lines 4-7.
[19] Transcript of Proceedings, p. 39, lines 18-21.

CPR 26.1(6), (b) erred in the application of CPR 26.1(6) to the facts, (c) erred in finding that the Court had no power under CPR 26.1(2)(k) to extend time to apply for an extension under CPR 8.13 and, (d) that if the only way of saving the 2014 Action was to dispense with service of the claim form in that action, that he should have done so.

[15] In relation to its first ground of appeal, VTB argued that whilst accepting the power to dispense with compliance under CPR 26.1(6)[20] the learned judge wrongly placed an unjustified and over-restrictive gloss on the words "special circumstances". The learned judge defined the same as meaning circumstances which were "surely, truly exceptional and then only if to do so would wreak an injustice". This, according to VTB, was far too high and emasculated the application of the plain words by, firstly, two adverbs "surely" and "truly" and the adjective "exceptional" connoting something absolutely remarkable, coupled with, the need to "wreak an injustice".

[16] In this regard VTB relied on the UK Supreme Court case of **Abela and others v Baadarani**[21] where Lord Clarke,[22] with whom the other Justices agreed, held in connection with the "good reason" required for alternative service under English CPR 6.15 that, "I do not think that it is appropriate to add a gloss to the text by saying that there will only be a good reason in exceptional circumstances". VTB argued that Lord Clarke bore in mind that this was to import different language which existed in UK CPR 6.16 in connection with dispensing with service altogether of the claim form, but not in CPR 6.15. So too argued VTB, in the EC CPR, the learned judge wrongly provided a gloss to the test by importing exceptional circumstances which phrase is contained in EC CPR 7.8B (the equivalent of UK CPR 6.16) but is not contained in EC CPR 26.1(6) or 8.13(4)b.

[20] Which reads "In special circumstances on the application of any party the court may dispense with compliance with any of these rules".
[21] [2013] UKSC 44.
[22] At para. 33.

[17] According to VTB it was wrong to have imported "exceptional circumstances" instead of "special circumstances". It was worse still to have applied the glosses referred to above even to "exceptional circumstances" by the adverbs "surely" and "truly" and the requirement of needing to "wreak an injustice". VTB went on to submit that even if, which it denied, the test as explained by Wallbank J [Ag.] was justified, it was on the facts satisfied.

[18] Mr. Katunin's original position as set out in his skeleton argument was to challenge whether a power to extend the life of an expired claim form could be squeezed from the words of CPR 26.1(6) at all and that VTB was seeking to use EC CPR 26.1(6) to extend time in circumstances where both EC CPR 8.13(3) and EC CPR 26.1(2) did not contemplate it (i.e. retrospectively, after the claim form had expired) and on the contrary say it is not allowed. However, Mr. Rubin, QC conceded during oral argument that such a power did exist under EC CPR 26.1(6).

[19] Mr. Rubin, QC therefore relied on what was originally his second argument, that the learned judge was correct to interpret the expression "special circumstances" in the context of EC CPR 26.1(6) as requiring "exceptional" or "truly exceptional" as the word "truly" does not add anything here. According to Mr. Rubin, QC, the rule provides an escape route, allowing the court a power to dis-apply any rule or series of rules. Therefore, the use of such power must, by its very nature, be limited to circumstances which are exceptional, otherwise the rules themselves would be undermined.

[20] According to Mr. Rubin, QC, the judge did not place a gloss on the test for special circumstances. The phrase "truly exceptional" was at most intended to distinguish special circumstances from circumstances which were merely unusual and was a reference to the fact that the power is exercised rarely. Similarly, the judge's reference to the power being exercised only where otherwise "injustice" would be caused does no more than clarify why the power exists, otherwise there would be no reason to dis-apply the rules. In any event, argued Mr. Rubin, QC, the judge

went on to set out expressly the factors which (rightly in his submission) led him to conclude that there were no special circumstances in the present case.

[21] Mr. Rubin, QC continued that the point is well illustrated by considering EC CPR 7.8B which allows, following a specified procedure, the court in "exceptional circumstances" to dispense with service of the claim form entirely. Plainly a claimant cannot side-step that rule and rely instead upon some lower test under EC CPR 26.1 (2). What is more, this suggests, as the judge thought – in finding that the lack of special circumstances, including the availability of "steps [VTB] could have taken to prevent [its] current difficulty" was also "fatal" to its application to dispense with service altogether[23] – that there is no difference between "special circumstances" and circumstances that are "exceptional" in this context.

[22] On this ground the issue for determination by this Court is whether or not the judge did place a gloss on the test of "special circumstances" and thereby raised the established threshold. CPR 26.1(6) reads as follows, "In special circumstances on the application of a party the court may dispense with compliance with any of these rules".

[23] The part of the judgment where the judge dealt with CPR 26.1(6) reads as follows:[24]

> "I accept the Claimant's argument, however, that CPR 26.1(6) confers upon the Court a power in special circumstances to disapply deadlines otherwise established by the rules. That is framed as an all encompassing provision. It is clearly intended to ensure that the CPR are not used as an instrument of injustice, whereby substantive justice and fairness become a slave to procedure. That all encompassing provision is not contained in CPR Part 8.
>
> I am prepared to accept that CPR Part 26.1(6) can in principle enable the Court to extend time for service of a Claim Form even if no application to do so has been made in time, but afterwards. But the circumstances in

[23] Transcript of Proceedings, p. 20, lines 4-9.
[24] Transcript of Proceedings, commencing at p. 18, lines 15-25 and p. 19, lines1-7.

> which the Court would do so must, surely, truly be exceptional, and then only if to do so otherwise would wreak an injustice.
>
> In this case, I am far from satisfied that any such special circumstances apply."

[24] By the learned judge's expression at the end of his explanation that "In this case, I am far from satisfied that any such special circumstances apply", one might find some support for Mr. Rubin, QC's argument that, regardless of the words used earlier, the learned judge was cognizant at all times that the test was that of "special circumstances" and was simply applying that test in the context of a strict regime, which required that applicant to have some very good reason. Mr. Rubin, QC also argued that for present purposes, "special circumstances" and "exceptional circumstances" were the same or much the same things, and within the context of the type of rule being dis-applied, the attempt to distinguish between "special" and "exceptional" is of no merit. Accordingly, the Court should not attach too much significance to how the judge expressed himself as he was simply reflecting the importance of the decision and not importing a higher test.

[25] I am unable to agree with Mr. Rubin, QC. The difficulty with his approach is that it is evidently circular. The suggestion that, in context, the Court should not attach too much significance to how the judge expressed himself, is premised on a predetermination that how the judge expressed himself did not have the effect of importing a higher test. But that very determination firstly requires this Court to focus precisely on how the judge expressed himself as that is the clearest indicator of the position he adopted, and his understanding of what he perceived to be the established threshold. The judge did not, as Mr. Rubin, QC suggested he was doing, attempt to explain "special circumstances" by suggesting the circumstances had to be more than merely unusual. The judge explained that the circumstances must "surely truly be exceptional, and then only if to do so otherwise would wreak on injustice". The word "special" is defined to mean "better, greater, or otherwise different from what is usual". The word "exceptional"

is defined to mean "unusual; not typical"[25]. While it may be arguable that the term "exceptional" may be an acceptable synonym for "special" and the word "truly" may add nothing to an already specified qualification, the words were not used in isolation. Firstly, they were used together. Secondly, to them was added the requirement of avoiding wreaking an injustice. The words must be read together and then also in context.

[26] Here, context is everything. Reading the entirety of the judge's explanation, I cannot escape the conclusion that the judge was perhaps doing one of two things, both of which would in my opinion have been objectionable. Firstly, the judge appears, within the definition of "special circumstances", to have created different categories thereof. The use of the words, "surely truly be exceptional and then only if to do so otherwise would wreak an injustice", suggests that there were degrees of special circumstances and only those that gravitated to the top end of the spectrum and had that described effect of wreaking an injustice would qualify. This would be somewhat similar to the case in **Abela** where Lord Clarke at page 6 paragraph 45 expressed that the relevant CPR did not require "a very good reason" only "a good reason" thus suggesting that any perceptible elevation in the statutorily established threshold was unacceptable. Alternatively, the judge appears to have elevated the bar beyond simply "special circumstances" altogether when he sought to otherwise define or explain the quality of circumstances required, in the robust manner that he did. In CPR 26.1(6) the phrase used was "special circumstances." It was intentionally left unqualified, open and undefined. It permits applications to be dealt with on a case by case basis. Seeking to further define the term "special circumstances" is likely to be unhelpful. The simple question for a court to ask itself is whether, in all the factual circumstances[26] of a particular case before it, special circumstances are made out. The application of the facts by the judge is then an evaluative process, with which

[25] Concise Oxford English Dictionary 11th edn. 2008.
[26] See Lord Clarke at para. 3 in Abela and others v Baadarani [2013] UKSC 44.

appellate courts are traditionally reluctant to interfere.[27] In this case with the greatest respect to the learned judge, I do believe he erred in directing himself on the proper threshold that the appellant was required to establish. I need go no further than state that by using the description "But the circumstances in which the Court would do so must, surely, truly be exceptional, and then only if to do so otherwise would wreak an injustice" he imposed a higher burden than that laid out by the phrase "special circumstances" and thereby improperly elevated the evidential hurdle the appellant was required to cross. The explanation above is sufficient to dispose of this ground. But for completeness, I would mention that Mr. Rubin, QC's argument that the phrase "truly exceptional" was at most intended to distinguish special circumstances from circumstances which were merely unusual, did not assist him. By his very explanation he was seeking to suggest that an event that was "merely unusual" would not be sufficient to satisfy "special circumstances" thereby suggesting that something higher than "merely unusual" was required. But the fly in the ointment here is that "special" is itself defined to mean "…otherwise different from what is usual". Therefore Mr. Rubin, QC's implied suggestion that "special circumstances" required something more than circumstances that were "merely unusual" itself is unsupportable. I would therefore allow this ground of appeal.

[27] At this point it is convenient to consider VTB's third ground of appeal. On this ground VTB argued that Wallbank J [Ag.] erred in finding that the court had no power under EC CPR 26.1(2)(k) to extend time to apply for an extension under CPR 8.13. The Court disagrees with VTB on this point. In **Kenneth Williams v Leslie Chang et al** the High Court there had to decide whether it should exercise its general discretionary power under CPR 26.1(2)(k) and grant an extension of the period within which the claim might be served notwithstanding that the power to extend time for service of the claim form was circumscribed by CPR 8.13. In

[27] See Lord Clarke in Abela and others v Baadarani [2013] UKSC 44 at para. 23 – "In doing so he was not exercising a discretion but was reaching a value judgment based on the evaluation of a number of different factors. In such a case, the readiness of an appellate court to interfere with the evaluation of the judge will depend on all the circumstances of the case. The greater the number of factors to be taken into account, the more reluctant an appellate court should be to interfere with the decision of the judge."

that case the court decided that the requirements of CPR must strictly be complied with since, unlike the UK CPR 7.6(3), our CPR 8.13 does not empower the court to grant an extension of time where permission is sought after the expiry of the period of service of the claim form. The court there concluded that the policy behind CPR 8.13 would be defeated if the conditions for obtaining an extension of time could be sidestepped by appealing to the court's discretionary powers under CPR 26.1(2)(k). The court there relied on the principle that general discretionary powers cannot be used to achieve something that is prohibited under another rule and concluded that CPR 8.13 constituted an exhaustive arrangement for dealing with extensions of time to serve the claim form and displaced the general discretion to extend time and in particular the discretion under CPR 26.1(2)(k). I agree. CPR 26.1(2)(k) has no application to the regime under CPR 8.13. Consequently, I am of the view that VTB fails in relation to this ground.

[28] The learned judge having placed an inappropriate gloss on the requirement for special circumstances, it would surely follow that he would thereafter have been evaluating the factual material before him against that incorrectly imposed higher threshold. This leads into VTB's second ground. In relation to its second ground, VTB argued that the learned judge erred in the application of EC CPR 26.1(6) to the facts. VTB argued that the learned judge erred in concluding that there were no special circumstances whether due to applying the wrong test or because he reached a wrong and unjust conclusion on the facts. VTB is arguing here that when the facts are properly applied to the correct test, special circumstances do exist and this empowers the Court to extend time under EC CPR 26.1(6). VTB submitted that since the judge applied the wrong test, the appellate court is entitled to consider the matter afresh. I agree. The judge having evaluated the facts against the wrong test, it would be for this Court to carry out its own evaluation exercise against the correct test. In considering the matter afresh, the Court will consider the arguments made by VTB that criticized the judge's approach. These arguments, although presented for critiquing the judge's evaluation process, will be considered not for the purpose of reviewing the

evaluation exercise conducted by the judge, but for the purpose of assisting this Court in performing its own evaluation exercise.

VTB's Arguments

[29] In this regard VTB argued that the learned judge found that there was no element of error on the part of counsel on behalf of VTB in failing to apply within the primary period given that application had been made for alternative service and such order had been made and affirmed inter partes by an experienced judge of the Commercial Court, Bannister J [Ag.]. As the learned judge accepted, namely "hindsight...is a wonderful thing" and "I absolutely do not suggest that Counsel for the Claimant should be professionally embarrassed at this omission".

[30] VTB argued that Wallbank J [Ag.] erred in the following respects namely:

(1) Having found no negligence, the judge should have found that acting on the alternative service order and having effected alternative service within the primary period provided special circumstances for not having issued a further hypothetical application during the primary period;

(2) Further or in the alternative, the learned judge erred in failing to attribute any or any adequate weight to avoiding unjustified and significant potential consequences of not saving the 2014 Action including exposing VTB to the following unjustified and/or disproportionate prejudice, namely:

(a) the need for and cost of a second WFO;

(b) the potentially large costs consequences of the failure of the 2014 Action;

(c) the possibility of an enquiry as to damages;

(d) the possibility of contrived arguments in the 2016 action of a new bar to the enforcement of the Russian judgments;

(1) The learned judge failed to have any regard to the overriding objective of saving expense and dealing with matters proportionately by allowing the first action to fail with the above consequences in circumstances where there was an almost identical second action and with an almost identical WFO.

[31] VTB argued there were special circumstances to dispense with compliance with the requirement to bring the application to extend time within the primary period and/or to extend time for making the extension application. Further, there was some special reason to extend time as aforesaid, and the learned judge should have so held.

[32] According to VTB, if the learned judge had applied the correct test, he would have found that "special circumstances" were established in that:

(1) Service was effected during the primary period by alternative service and at an early stage. This method was suggested, authorized and approved by Bannister J [Ag.] upon which VTB was entitled to rely until after it was set aside by the Court of Appeal;

(2) Nobody was at fault for the fact that the extension was not sought during the primary period (as the learned judge expressly found);

(3) A hypothetical application was unnecessary. Indeed, this would be unending – an application every six months if a judge did not stay the application: an application even after success if VTB had succeeded in the Court of Appeal pending the matter being considered by the Privy Council;

(4) Further or in the alternative, even if, which is not admitted, an application for an extension could theoretically have been brought within the period, and even if, contrary to the judge's finding, there was any fault on the part of VTB, there were still special

circumstances in that the arguments to keep alive the 2014 Action are compelling as follows:

(a) there is no prejudice to Mr. Katunin in ordering that the 2014 Action stand other than the loss of a windfall of procedural advantages devoid of any merit. They include (a) potentially large costs consequences in the 2014 Action notwithstanding the fact that the same costs will be incurred in the 2016 Action in the enforcement of the Russian judgments, and/or (b) an application for a possible inquiry as to damages notwithstanding the WFO in the 2016 Action, and/or (c) whatever procedural arguments Mr. Katunin wishes to advance in the 2016 Action as a distraction from his failure to pay any part of the Russian judgments despite having very large resources to pay for all these procedural steps;

(b) there is one overriding dispute straddling the 2014 Action and the 2016 Action, namely the enforcement of the Russian judgments. The court did not discharge the WFO by reference to risk of dissipation of assets and indeed in without notice applications in the 2014 Action and the 2016 Action respectively, the court found a good arguable case in respect of the first judgment and latterly in respect of both Russian judgments and a real and continuing risk of dissipation of assets. These were matters which were telling special circumstances for not permitting the windfalls to occur;

(c) the overriding objective of saving expense and dealing with matters proportionately was to reject applications founded simply in the expense of a failed 2014 Action when the 2016 Action remained;

(d) taking into account the reason why service was not effected within the primary period, and taking into account the need to deal with cases justly which is the overriding factor, the balance of justice is served by granting the extension and/or to dispense with the requirement to apply before the expiry of the primary period; and

(e) in the circumstances which did occur of a successful appeal against the alternative service order, a retrospective application at that stage were special circumstances, and the application should have been permitted.[28]

[33] VTB argued that further or in the alternative, even applying a higher test of special circumstances of "exceptional" or "out of the ordinary" circumstances, the test was satisfied by the above facts and matters both as regards the basis for applying to extend the claim form outside its primary period and, or a special reason to allow the application to extend time under EC CPR 8.13(4)(b). However, based on this Court's finding in relation to ground 1 above, this argument is unnecessary.

[34] VTB also argued that the learned judge further erred in his treatment of the limitation factor as an issue pointing in favor of not preserving the 2014 Action, i.e. as not being a factor that was to be considered in VTB's favor indicating the existence of special circumstances. VTB argued that the learned judge found the fact that the 2016 Action to enforce the Russian judgments was not barred by limitation was a point in favor of not preserving the 2014 Action. However, this should have been a point which favoured relief to preserve the 2014 Action. As the English Court of Appeal has indicated:

> "But where it is clear that an extension of time beyond the four months' period will not extend the time to a date when the claim has become time-

[28] In Mahmood Hastroodi v Terence Hancock [2004] 1 WLR 3206, the CA held that the power under rule 7.6(2) (where there was no threshold) must be exercised in accordance with the overriding objective (para. 18); the court will determine and evaluate the reason why the claim form was not served within the specified time period, in order to reach a conclusion as to how to deal justly with the case (para. 18): see Collier v Williams [2006] 1 WLR 1945 at paras. 85-88.

> barred, the considerations are quite different. In such a case, an extension of time does not deprive the defendant of any limitation advantage. Nevertheless, in our view the fact that a claim is clearly not time-barred is a relevant consideration to be taken into account in favor of the claimant when the court decides whether to grant an extension of time."[29]

[35] VTB argues that whilst the absence of a limitation bar is a factor rather than necessarily determinative in favor of a claimant, that is explained by Dyson LJ in **Gerrard Richard Hoddinott et al v Persimmon Homes (Wessex) Ltd**[30] at paragraph 54 because service of a claim form notifies the defendant of the claim process and it enables the court to control the litigation process. This has no application in the instant action in that long ago in 2014 Mr. Katunin knew about the claim and was able to participate in it, but he chose to concentrate his arguments on resisting alternative service and arguments about submitting to the jurisdiction and latterly to seek to discharge the WFO. Mr. Katunin was not lulled into a false sense of security because the alternative service had taken place. The claim form had been brought to the attention of Mr. Katunin himself and his legal representatives, and he knew well its details.[31]

[36] It follows, says VTB, that the fact that (a) a second action could be brought without a limitation defense, (b) a second WFO was justified and (c) Mr. Katunin was not prejudiced by not having been served with the claim form, comprise or are part of special circumstances and a special reason which justify a retrospective extension of time for making an application out of time to extend the claim form and for extending the claim form.

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[29] See Hoddinott v Persimmon Homes (Wessex) Ltd. [2007] EWCA Civ 1203 per Dyson LJ at para. 53, and Ehsanollah Bayat et al v Lord Michael Cecil et al [2011] 1 WLR 3086 at paras. 52-55.
[30] [2007] EWCA Civ 1203.
[31] The knowledge on the part of a defendant of the nature and details of a claim is a relevant factor in the exercise of the court's discretion: Lakah Group et al v Al Jazeera Satellite Channel et al [2003] EWHC 1781 and para. 8 of the summary of principles set out by Blackburne J at para. 50 of Sodastream v Coates [2009] EWHC 1936.

[37] Further, argued VTB, the learned judge was wrong to use the language that "It is no part of [the] Court's function to 'save' a claim".[32] In the circumstances of this case, a part of the overriding objective was to save this claim as being the most just and economical way of proceeding and in the context of the special circumstances and the special reason having been established as above. According to VTB, to regard this as being no part of the court's function in any case has the consequence in this case of procedure becoming a master and not a servant.

[38] Without in any way seeking to derogate from the importance of service of a claim form, argued VTB, the rules as to service are designed to ensure, so far as possible, that the claim form is brought to the attention of the defendant, and where he is represented, his legal representatives.[33]

[39] VTB also sought to rely, by way of analogy, on the Admiralty case of **Gold Shipping Navigation Co. SA v Lulu Maritime Ltd**[34] where the court considered provisions similar to English CPR 7.6(3) under the Merchant Shipping Act 1995 and late service where there were limitation issues. Having found that the solicitors were not culpable or, if they were, the fault was slight, it was determined that it would be unjust and unfair in all the circumstances for the defendant not to be able to counterclaim, and it would provide the claimant with a windfall.

[40] According to VTB, in the circumstances, the refusal of an extension is to reward Mr. Katunin for what have become technical games and to provide the potential windfalls referred to above. Given the intimate connection between the 2014 Action and the 2016 Action, all designed to enforce the Russian judgments and to

[32] Transcript of Proceedings, p.19, lines 8-9.
[33] Collier v Williams [2006] 1 WLR 1945 at para. 100. Reliance was also placed on the words by Lewison J cited by Lord Clarke at para. 38 in Abela v Baadarani [2013] UKSC 44 agreeing with para. 4 of the judgment of Lewison J therein dated 14th April 2010 who said "The purpose of service proceedings, quite obviously, is to bring proceedings to the notice of the defendant. It is not about playing technical games."
[34] [2009] EWHC 1365 (Admiralty) paras. 35-39, 43 and 49.

prevent risk of dissipation, the just resolution would have been to make orders which allowed the 2014 Action and the 2014 WFO to continue.

Mr. Katunin's Arguments

[41] Mr. Katunin's response on this point was intertwined with his argument that in expressing himself by the case of the term "exceptional", the judge was not establishing a higher standard but was simply reflecting on the importance of the decision to be made. Mr. Rubin, QC argued that the Court should consider the reason advanced by the judge on page 142 of the transcript of the judgment for his not being satisfied. If there was no legal misdirection, then it must be accepted that different judges might very well have arrived at different decisions.

[42] Having conceded that the court did have power to grant a retrospective extension under EC CPR 26.1(6), and this Court having found above that the learned judge did misdirect himself on the law as it related to the threshold of "special circumstances", Mr. Rubin, QC's argument set out at paragraph 35 of his skeleton would now have to be viewed solely as being supportive of his argument that it could not be said that the learned judge in the evaluation of the evidence (now on the lower threshold) was wrong, and the Court ought not to interfere with what Mr. Rubin, QC described as the judge's exercise of his discretion.[35] As this Court has indicated that it is considering the matter afresh, Mr. Rubin, QC's submissions will be taken in this context. In this regard Mr. Rubin, QC relied on the following submissions:

(1) VTB led Bannister J [Ag.] to believe that Mr. Katunin had deliberately not appeared at the Russian trial and was thus likely to evade service. As the Court of Appeal held at paragraphs 35 and 36 of its judgment, there was no evidence to challenge Mr. Katunin's case that he had not been informed of the proceedings.

[35] The Court notes however that this is not an exercise of discretion but an evaluation.

(2) VTB knew that this was Mr. Katunin's position before the hearing at which Bannister J [Ag.] made the Alternative Service Order on 8th July 2014. Yet Bannister J [Ag.] was not told.

(3) VTB had not even made an attempt to serve Mr. Katunin correctly under the Hague Convention before it asked Bannister J [Ag.] for an order permitting Alternative Service.

(4) This short cut was a blatant and misconceived disregard of the rules and practice.[36] The Hague Service rule is strict and cannot be dispensed with or side-stepped. The idea that any Russian bank (let alone a state-owned bank like VTB) should be relieved of serving properly in Russia because it is "impracticable" to do so is frankly quite extraordinary.

(5) VTB, wasted a further two years in maintaining that service was valid, wrongly relying on a last minute allegation that Mr. Katunin had submitted to jurisdiction through his BVI lawyers, which was rejected by the Court of Appeal and not disturbed by the Privy Council.

(6) In the meantime, VTB took no steps to extend the claim form even though the court had granted it the draconian relief of a worldwide freezing injunction on the basis of that claim form.

(7) VTB had from 12th February 2015, when Mr. Katunin was granted leave to appeal by Bannister J [Ag.], to 22nd May 2015 to apply to extend the claim form but did not. Even though the appeal was heard on 21st May 2015, the same week as the claim form was to expire, VTB, apparently confident of success on the appeal, did not even apply for an extension.

(8) This failure to seek an extension is particularly stark given that VTB obtained the Alternative Service Order in the first place from Bannister J [Ag.] ostensibly relying on its alleged concern that the claim form would

[36] See Deutsche Bank v Sebastian Holdings and Vik [2014] 1 All ER (Comm) 733.

expire un-served on 22nd May 2015 unless an order for alternative service was granted.

(9) In any case, VTB has suffered no prejudice that could warrant being described as an exceptional (or, if different, special) circumstances. It has filed (and says it is in the process of serving under the Hague Convention) a new action covering the claim in this action for US$30 million and another claim for another US$30 million, which it would have had to file separately anyway, as it post-dates the claim form in the current action. If this Court allowed the appeal, there would be two overlapping actions running in tandem in any event.

[43] Mr. Rubin, QC concludes that it cannot be said that the evolution of the evidence of Wallbank J [Ag.] was wrong. Put another way, he would be submitting that this Court ought to find that the facts submitted by VTB did not satisfy a conclusion that special circumstances existed.

Analysis

[44] Having considered the argument on both sides, I am of the opinion that the learned judge having improperly elevated the threshold of special circumstances also incorrectly evaluated the evidence that was presented to him to satisfy the requirement of "special circumstances".

[45] Firstly, I start from the premise that all that is required is that the circumstances are "special". Secondly, I consider that the circumstances presented by VTB, when taken together, did constitute special circumstances. My reasons are as follow:

(a) The primary reason why no application to enlarge time had been made within the relevant period was because, on the invitation of Bannister J [Ag.], an order had been obtained for alternative service, which had been effected, and which service had been upheld on an inter partes hearing. It is undeniable that, as Wallbank J [Ag.] stated, a protective

application could have been made to safeguard VTB's position in the event Mr. Katunin succeeded on appeal, which he eventually did. But the very existence of the Alternative Service Order on its own was an important factor. This can be demonstrated by contrasting the situation with one where no alternative service order had been obtained and the claimant had been totally inactive during the primary period allowed for service of the claim form. This was not the situation here.

(b) It is undeniable that a protective application could have been made to safeguard VTB's position in the event that Mr. Katunin succeeded on appeal. I do not agree with Mr. Freedman that such an application should be termed "hypothetical" after the date of the appeal of the Alternative Service Order had been filed. This brings into sharp focus the issue not merely of responsibility, but of fault. I am of the firm position that if VTB's solicitors were found to be sufficiently culpable in not making that application for a protective order within the period, that would be a very strong factor pointing away from the existence of any special circumstances. But as Wallbank J [Ag.] found, in essence, and with which I agree, it was understandable that this did not come into sharp focus. In light of the existing Alternative Service Order, I would be unwilling to attribute to VTB's solicitors the requisite amount of fault that would be sufficient to automatically disentitle VTB from successfully arguing the existence of special circumstances. This is in no small part attributable to the fact that although no extension was sought as a protective measure, it was against the backdrop of positive action having been taken to obtain the then still valid Alternative Service Order. To the extent that I need to comment on it at all since this Court is conducting its own evaluation exercise, I recognize an uncomfortable connection between the primary finding of Wallbank J [Ag.] that VTB's solicitors should not be professionally embarrassed and his subsequent determination where he proceeded to either dilute or dismiss that very finding when he stated, "when, as one must,

consider the matter dispassionately, there were steps the Claimant could have taken to prevent their current difficulty". Having found VTB's solicitors not to have been at fault, the judge nonetheless went on to treat VTB as if it were at fault. This stark inconsistency could not have been correct. In so doing the judge was dismissing his previous determination of the absence of the notion of fault or the requisite degree thereof as an important factor in his evaluation exercise. In this regard, I agree with the treatment of the absence of fault or of a sufficient degree of fault in the approaches set out by Bannister J [Ag.] in **Rondex Finance Inc Ministry of Finance of the Czech Republic et al**.[37] and Teare J in **Gold Shipping Navigation Co. SA v Lulu Maintime Ltd**.[38] Putting the judge's treatment of this factor aside, on my own evaluation, I do not in the factual circumstances attribute to VTB's solicitors the requisite degree of fault that would disentitle VTB from seeking to establish special circumstances.

(c) In relation to the need for and cost of a second WFO, the potentially large costs consequences of the failure of the 2014 Action, and the possibility of an enquiry as to damages, I am of the opinion these factors, not on their own but in conjunction with the existence of the Alternative Service Order and the absence of sufficient fault on the part of VTB's solicitors in not seeking a protective order, did in fact go towards establishing special circumstances justifying an extension of time being granted for service of the 2014 Claim Form. The very fact that the judge re-imposed the WFO in relation to the 2016 matter and made the peculiar cost orders on the termination of the 2014 Action in the manner that he did hinted strongly at the special circumstances of this case. Firstly, CPR 1.1(1) states that the overriding objective of the Rules is to enable the court to deal with cases justly. CPR 1.1(2) sets out a non-exhaustive list of factors included in dealing justly with the

[37] BVIHCV2010/0069 (delivered 13th May 2011, unreported); see para. 11.
[38] [2009] All ER (D) (181) at paras. 43 and 49.

case. These factors include saving expense and ensuring that a case is dealt with expeditiously. CPR 1.2 states that the court must seek to give effect to the overriding objective when it exercises any discretion given to it by the Rules or interprets any rule. The discharge of the first WFO as an automatic effect of the lapsing of the 2014 Action, with the immediate grant of a WFO in identical terms in the 2016 Action, with the attendant costs consequences and the possibility of an enquiry as to damages, do not accord with the ideas of saving expense or ensuring that matters are dealt with expeditiously. Neither does the windfall that would arise in favour of Mr. Katunin in relation to the costs orders that have been made that all flow from the automatic termination of the 2014 Action. The very fact that the judge made the costs orders in Mr. Katunin's favour subject to conditions that the funds in question be held by Mr. Katunin's BVI solicitors and not be paid out demonstrates some sense of discomfort with the windfall that was being awarded to Mr. Katunin, a position that I on my own determination fully endorse.

(d) Further, I also agree with Mr. Freeman that the judge's treatment of the limitation point as being one in favour of not finding that special circumstances existed was incorrect and that it should have been a factor, in these circumstances, though not determinative, that pointed towards or supported the existence of special circumstances, in that any extension could not have deprived Mr. Katunin of any limitation defence.

[46] In relation to the judge's statement that it is no part of the court's function to save cases, I am somewhat sympathetic to the judge's position, but only when placed in context. I believe it was said simply as a general statement that the court is to look at matters dispassionately, and if certain rules when properly applied result in the termination of a claim form, then so be it. So here it would not have been the

role of the court to seek to characterize any circumstances as special circumstances in order to achieve any desired purpose of saving a claim form.

[47] In relation to the countervailing arguments by Mr. Rubin, QC, I do not find these to be compelling. I do not think that at this stage the reason given by this Court for setting aside the Alternative Service Order or the criticisms leveled by Mr. Rubin, QC of the approach adopted by VTB when it applied for the Alternative Service Order ought to be of any real assistance in determining whether special circumstances exist. It is correct that VTB could have taken steps to obtain a protective order but I have already determined that I am unable to attribute to VTB or its solicitors a sufficient degree of fault to disentitle it from relying on special circumstances.

[48] In the circumstances, I would allow VTB's appeal on this ground. The effect is that I would set aside the order of Wallbank J [Ag.] dated 7th December 2016 refusing VTB's application filed on 14th July 2016 to afford it further time for service of or otherwise to make good the validity of the claim form filed in May 2014. I would extend time for service of the claim form in the 2014 Action to 6 months from the date hereof. In his submissions on the costs appeal, Mr. Rubin, QC commented that the making of an order by this Court extending time for service of the 2014 Claim Form would not necessarily result in a reinstatement of the 2014 WFO as a WFO has been obtained under the 2016 Action. However, I think it is correct that the order of Wallbank J [Ag.] made on the application of Mr. Katunin dated 4th July 2016 discharging the WFO granted by Bannister J [Ag.] in May 2014 and continued in July 2014 is also set aside and I would make that order. I would reinstate the WFO made in May 2014 and continued in July 2014 as from today's date. It will be left for the parties to determine whether and to what extent any consequential applications are made in relation to the existing 2016 WFO.

The Cost Orders

[49] As has been pointed out earlier, VTB appealed against paragraphs 2-6 and 9 of the order of Wallbank J [Ag.] dated 15th February 2017 (the "2017 Costs Order"). These particulars were set out at paragraph 1(2) above of this judgment. For context I set out again the specific portions of the 2017 Costs order appealed against by VTB:

> "(2) The First Defendant shall be awarded his costs of the Claim Form Relief Application and the Discharge Application to be assessed if not agreed within 21 days. Following such agreement or assessment, the sum or sums so determined shall be paid by the Claimant to the First Defendant's BVI Solicitors being Withers BVI, to be held in escrow until determination of the 2016 Action and an order of the court permitting its release.
>
> (3) The First Defendant shall have his costs of and occasioned by the present claim in the Commercial Division of the High Court, save for his costs of the Service Challenge Application and the ruling dated 28 January 2015 and Order dated 12 February 2015 which shall be excluded, such allowed costs to be assessed if not agreed within 21 days. Following such agreement or assessment, the sum or sums so determined shall be paid by the Claimant to the First Defendant's BVI Solicitors being Withers BVI, to be held in escrow until determination of the 2016 Action and an order of the court permitting its release.
>
> (4) Interest shall accrue at the judgment rate on the Claimant's cost liability to the First Defendant, until such time as the funds are released to the First Defendant or the Claimant's liability will be extinguished.
>
> (5) The Claimant shall make an interim payment on account of the order for costs in relation to the Claim Form Relief Application, the Discharge Application and this claim in the amount of US$165,492, to be paid to the First Defendant's BVI Solicitors being Withers BVI within 21 days, who shall hold these funds in escrow pending determination of the 2016 Action and an order of the court permitting its release.
>
> (6) The inquiry shall be adjourned until after determination of the 2016 Action.
>
> (9) No order as to costs.

[50] Mr. Katunin's cross appeal in relation to costs is set out at paragraph 1(1)(c) above of this judgment. In essence Mr. Katunin argued that he should have been allowed to use the costs ordered to be paid, and that the judge's decision to exclude from the costs of the 2014 Action awarded to him, the costs at first instance of his ultimately successful challenge to set aside the Alternative Service Order which had been granted by Bannister J [Ag.] but which had been reversed by the Court of Appeal. When Wallbank J [Ag.] was awarding costs of the 2014 Action he concluded that the Court of Appeal's order was silent as to costs at first instance which should therefore be considered to be the subject of "no order as to costs". Mr. Katunin also sought his costs of the applications for costs in the court below in relation to which Wallbank J [Ag.] decided there should be "no order as to costs".

[51] VTB submits that its costs appeal is inextricably linked to the matter under appeal in BVIHCMP2016/0047. According to VTB, the 2017 Costs Order is predicated on the correctness of the substantive judgment that is being appealed in BVICMAP2016/0047, and if it were to succeed in that appeal (as indeed it has), it should succeed in this appeal (6 of 2017) as a matter of course. It contends that if it succeeds in the appeal in BVIHCMAP2016/0047 (as it has), the costs orders should instead be made in VTB's favour as set out in the notice of appeal. This costs appeal, according to VTB was brought out of an abundance of caution to ensure that if it succeeded in BVIHCMAP2016/0047, there could be no question but that the 2017 Costs Order should also be set aside and consequential orders made.

[52] Mr. Katunin rejected VTB's contention that if it succeeded in appeal 47 of 2017, the setting aside of the 2017 Costs Order would follow, and that costs orders should instead be made in VTB's favor.

[53] Firstly argued Mr. Katunin, as regards paragraph 2 of the 2017 Costs Order, the relief which VTB invited the court below to grant and the relief which it now seeks

from this Court is at the very least exceptional. In the circumstances, even if VTB's appeal against the Claim Form Expiry Order were granted, it would be quite wrong to award VTB its costs on an application seeking exceptional relief from the consequences of its own failures.

[54] Also even if VTB's appeal against the Claim Form Expiry Order were allowed, it does not follow that the WFO in this application will be reinstated as VTB has already obtained an alternative WFO in relation to the 2016 Action. Mr. Katuin argued that it would be wrong to award VTB the costs of the Discharge Application as the application was properly made and granted, VTB's claim having lapsed unserved. Thus, even if VTB is able to secure its claim through some exceptional form of relief (which it has) Mr. Katunin should not be penalized in costs.

[55] Mr. Katunin further argued that even if VTB's appeal against the Claim Form Expiry order were allowed, Mr. Katunin still seeks the "Excluded Costs" referred in paragraph 43 to 50 of his submissions in support of his cross appeal in Civil Appeal No. BVIHCMAP2016/0047 and paragraphs 19 and 22 (c) of his cross-notice of appeal. Mr. Katunin's submission here is that the interpretation of Wallbank J [Ag.] on the Court of Appeal's silence on costs in the court below on the set aside of service application to mean "no order as to cost" was incorrect.

Analysis

[56] There is force in a number of the arguments made by Mr. Rubin, QC. Under CPR 64.6(1) where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. Under CPR 64.6(1) the court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs. Costs on the Claim Form Relief Application and the Discharge Application were dealt with by Wallbank J [Ag.] under paragraph 2 of the 2017 Costs Order.[39] I agree with Mr. Rubin, QC

[39] See para. 49 above.

that VTB's application in the court below to extend time (the Claim Form Relief Application) was a form of special relief. Under CPR 65.11(b) where a party makes an application to extend the time for doing any act under these rules or an order or direction of the court, the court must order the applicant to pay the costs of the respondent unless there are special circumstances. Specifically, on the issue of costs of the Claim Form Relief Application, there are no special circumstances that would dis-apply this rule. In the circumstances, I would uphold the award by Wallbank J [Ag.], but for different reasons, of costs on the Claim Form Relief Application to Mr. Katunin to be assessed if not agreed within 21 days. Other than as aforesaid, and due to my determination of the issue of costs on the Discharge Application set out at paragraph 57 below, I would set aside the entirety of paragraph 2 of the 2017 Costs Order.[40]

[57] In relation to the Discharge Application in the court below, Mr. Katunin's application to discharge the WFO was filed on 4th July 2016. On that date, undeniably there existed good grounds for that application as the time for service of the 2014 Claim Form had already lapsed. VTB then filed its Claim Form Relief Application some 10 days later on 14th July 2016, with an amended notice being filed on 25th November 2016. One is left to conclude that it was Mr. Katunin's application to discharge the WFO that catapulted VTB into filing its Claim Form Relief Application. Although this Court has reinstated the WFO in relation to the 2014 Claim Form, it would be inappropriate to order any costs against Mr. Katunin on the Discharge Application in the court below and the proper order here is that there be no order as to costs on the Discharge Application in the court below.

[58] In relation to the order contained in paragraph (3) of the 2017 Costs Order, this is set aside as the 2014 Action now continues. I note however, that I see no error in the interpretation of Wallbank J [Ag.] on this Court's silence on the issue of the costs in the Service Challenge Application in the court below being interpreted to

[40] Thus the part of the order requiring payments into escrow, and the part of the order made in relation to the Discharge Application, are set aside.

mean “no order as to costs.” This determination has the effect of addressing one of the two issues raised by Mr. Katunin in his cross appeal.

[59] In relation to the orders in paragraphs (4) and (5) of the 2017 Costs Order, the escrow requirement in relation to the Claim Form Relief Application, and the substantive costs orders in relation to the Discharge Application and the 2014 Claim having been set aside, the attendant orders in paragraphs (4) and (5) are hereby set aside. The other issue raised by Mr. Katunin on his cross appeal, that is in relation to his ability to use the funds ordered to be paid into escrow, automatically falls away with this Court having removed that limitation in relation to the costs ordered in his favour on the Claim Form Relief Application, and the other various costs orders in his favor having been set aside.

[60] In relation to the paragraph (6) of the 2017 Costs Order, this is set aside as there can be no inquiry as the 2014 WFO has been reinstated.

[61] In relation to the order by Wallbank J [Ag.] contained in paragraph (9) of the 2017 Costs order that there be no order as to costs on the costs application itself, bearing in mind this Court’s determinations above, I see no basis to interfere with the judge’s determination.

[62] In relation to the costs on these appeals, costs are awarded in favour of VTB on the appeal and cross appeal in 47 of 2016, to be assessed if not agreed within 21 days. VTB argued that it filed appeal 6 of 2017 out of an abundance of caution in that the costs orders of Wallbank J [Ag.] were inextricably linked to the determination of the substantive appeal in 47 of 2016. I agree. In the circumstances there will be no order as to costs on appeal 6 of 2017.

Conclusion

[63] In conclusion I would order as follows:

(1) The decision of Wallbank J [Ag.] dated 7th December 2016 refusing VTB's application to afford time for service or otherwise make good the validity of the 2014 Action filed against Mr. Katunin dated 23rd May 2014 is set aside.

(2) The time for service of the 2014 Action is hereby extended to 6 months from the date hereof.

(3) The decision of Wallbank J [Ag.] dated 7th December 2016 granting Mr. Katunin's application to discharge the world wide freezing order granted by Bannister J [Ag.] in the 2014 Action is hereby set aside. The said worldwide freezing order is hereby reinstated.

(4) (a) Subject to 4(b), and (5) below, the orders of Wallbank J [Ag.] contained in paragraphs (2), (3), (4), and (5) of the 2017 Costs Order are hereby set aside.

(b) 4(a) above shall not affect the determination by Wallbank J [Ag.] that the costs of the Service Challenge Application in the court below were subject to an order of "no order as to costs".

(5) In relation to the Claim Form Relief Application in the court below, Mr. Katunin is awarded his costs to be assessed if not agreed within 21 days.

(6) In relation to the Discharge Application in the court below, the order is no order as to costs.

(7) In relation to paragraph (6) of the 2017 Costs Order, this is set aside as there can be no inquiry as the 2014 WFO has been reinstated.

(8) The order contained in paragraph (9) of the 2017 Costs Order as to no order as to costs in relation to the costs application in the court below is affirmed.

(9) In relation to the costs of these appeals, costs are awarded in favour of VTB on the appeal and cross-appeal in 47 of 2016, to be assessed if not agreed within 21 days. There will be no order as to costs on appeal No. 6 of 2017.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar