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Claim No: CL-2018-000827

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2020

Before :

MR. CHRISTOPHER HANCOCK QC sitting as a Judge of the High Court

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Between :

CHARLES RIDLEY

Claimant

-and-

DUBAI ISLAMIC BANK PJSC

Defendants

- -
- -

Matthew Morrison (instructed on a direct access basis) for the **Claimant**
Robert Anderson QC and William Edwards (instructed by **Baker and McKenzie**) for the **Defendant**

Hearing dates: 24 October 2019 with further written submissions delivered on 31 January 2020, 31 April 2020, 1 May 2020 and 6 May 2020

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Approved Judgment

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

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"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:30 AM on 26 May 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's Clerk"

Christopher Hancock QC (sitting as a Judge of the High Court):

Introduction and factual background.

1. I have to deal with a number of interlinked applications, as follows:

   (1) The application of the Defendant ("the Bank") to set aside the order of Carr J (as she then was) allowing service out of the original claim form;

   (2) The Bank's application to set aside the order of Carr J giving leave to serve the original claim form by alternative means;

   (3) The application of the Claimant ("Mr Ridley") to amend his particulars of claim.

2. The factual background is complex.

3. The starting point is the fact that Mr Ridley was guilty of a fraud committed in Dubai some years ago. Whilst both parties were in agreement that the details of that fraud were not of immediate relevance for present purposes, I think it is helpful to set them out in general terms. I take the facts set out in the following paragraphs from the judgment of Hamblen J (as he then was) in earlier proceedings between the Bank, reported at [2011] EWHC 2718 (Comm), where he said:

   "2. The Bank's case is that it was the victim of a US$330 million receivables fraud perpetrated by the Second to Fifth Defendants (Mr Cornelius, Mr Ridley, Mr Nil and CCH Europe). From 2002 onwards, the Bank (which is 30% state owned) entered into trade financing arrangements with CCH Europe. If operated as intended, CCH Europe (acting as the Bank's agent) was to enter into trade finance contracts with third parties and the Bank was to provide funding. From around 2002 to 2007 the Bank advanced around US$500 million to CCH Europe (or its parent company). These funds, so the Bank thought, were being applied for the purpose of legitimate trade financing.

   3. It turned out that a substantial proportion of the monies advanced were not used to fund trade finance transactions despite documentation to that effect being presented. The Bank discovered this in around the summer of 2007. Of the sums advanced by the Bank, only around US$160 million had been applied to fund trade finance transactions. The rest, some US$330 million, had been diverted to companies controlled by Mr Cornelius.

   4. In the second witness statement of Mr David Mills made with the authority of Mr Ridley it is stated as follows:

   "Mr Ridley, whose career has been predominately in trade finance in the Middle East, was party to a receivables fraud pursuant to trade financing arrangements made by the Bank with the Fifth Defendant, CCH (Europe) GmbH, and its parent company in 2002. That fraud involved the presentation to the Bank of false documentation.

   The fraud was brought to the attention of the Bank in 2007 by Mr Ridley himself, who recognised the failure of the genuine business schemes in which the Bank's funds had been invested to generate the revenues necessary to repay the Bank. The fraud forms the background to the two agreements of the summer of 2007, but the Bank in

comprehensive terms (cl. 12.4 of the RSA) waived and compromised all its claims against Mr Ridley and the other parties. The purpose of the RSA was to ensure that the Bank was repaid all that was owed."

5. The discovery of this deception and misuse of funds led to a Restructuring Agreement dated 19 August 2007 ("the RSA") between the Bank and (among others) the Second to Fifth Defendants. The agreement is governed by English law and subject to an English jurisdiction clause. Under that agreement, CCH Europe agreed to repay about US$501 million in accordance with a repayment schedule. Messrs Cornelius, Ridley and Nil guaranteed this repayment obligation, as well as agreeing to disclose their assets and provide security over and transfer to the Bank all proceeds derived from the advances. The RSA also gave the Bank certain security. In particular, it took security over a leasehold interest in Dubai known as Plantation. In return the Bank agreed to waive and compromise any and all claims it had against the Defendants which the Defendants contend includes claims in and complaints for the purpose of criminal proceedings.

6. In 2007, CCH Europe repaid around US$10 million and another party to the RSA (CCH Europe's parent company) repaid a further US$50 million. No other payments have been made."

4. As noted in this extract, the discovery of the fraud led to a Restructuring Agreement, the "RSA", pursuant to which the amounts due to the Bank were to be repaid, and Mr Ridley, amongst others, guaranteed such repayment. The RSA is central to these current applications. That is because that agreement, which was signed on 19 August 2007 and which is expressly governed by English law, contained the following provisions, at Recital (D) and clause 12.4:

"… (D) In settlement of any potential claims against them in respect of the application of the Advances, the CCH Individual Guarantors[1] have agreed to each provide a guarantee and indemnity to the Bank… in respect of the Company and the Parent's obligations under the Agency Agreements and the Restructuring Agreement and on the terms described herein…

…12.4 the Bank hereby agrees, to irrevocably waive and compromise any and all claims, whether existing of future, known or unknown, it has or may have against each of the Guarantors arising from or in connection with the Agency Agreements and the transactions contemplated by the Agency Agreements…."

5. The RSA also included clause 25.6, which provided that:

"Each of the parties acknowledges and agrees that a breach of the Restructuring Agreement by any other party would cause irreparable damage to each of the other parties and that they will not have an adequate remedy at law. Therefore the obligations of each of the parties shall be enforceable by a decree or order for specific

[1] Who included Mr Ridley.

performance issued by any Court of competent jurisdiction and appropriate injunctive relief may be applied for and granted in connection therewith…."

6. Finally, the RSA included a jurisdiction clause, in the form of clause 27.2, which provided that:

"The parties submit to the exclusive jurisdiction of the English Courts with respect to all disputes arising out of or in connection with the terms of this Restructuring Agreement. The parties agree that the courts of England are the most appropriate and convenient courts to settle disputes and accordingly no party to this Restructuring Agreement will argue to the contrary."

The English proceedings on the guarantee.

7. In due course, the payments required under the RSA were not made, and an action was commenced by the Bank in England (in early October 2010) seeking monies due pursuant to the agreement. As Hamblen J recorded in the earlier action:

"15. The Bank began these proceedings in October 2010. The First Defendant (PSI) is a company controlled by Mr Cornelius. The Bank's claim against it is a proprietary claim in respect of certain shares which the Bank alleges are the proceeds of assets to which it has equitable title. PSI has recently filed a Defence and the claim against it continues. The Bank obtained default judgment against CCH Europe.

16. The claim against Messrs Cornelius, Ridley and Nil is a debt claim for US$440,468,428.10 million arising under the guarantee obligations in the RSA. This is set out at paragraphs 25 to 32 of the Particulars of Claim. The Bank's application is made prior to any of the Defendants filing Defences. In the case of Messrs Cornelius and Nil, this application is made prior to the filing of acknowledgments of service and the Bank obtained permission to make the application in these circumstances."

8. An application for summary judgment was made in those earlier proceedings, which was heard by Hamblen J, and it is from his judgment on that application that the above quotations are taken. I return to the relevance of this application below, since the Bank relies on certain passages from the judgment in support of its allegation that the current proceedings involve an abuse of process by Mr Ridley.

9. For present purposes, I need only note that Hamblen J rejected the application for summary judgment, holding that at least two of the (various) defences put forward had realistic prospects of success, namely an allegation that the events of default relied on by the Bank had been brought about by the Bank itself, and an argument based on an estoppel by convention. In the light of his findings on these arguments, he did not need to deal with the Defendants' other arguments, and did not do so.

10. The trial in those English proceedings was heard by Flaux J (as he then was) in September and October 2013, with judgment being given in December 2013. The judgment is reported at [2013] EWHC 3781 (Comm). Flaux J found in favour of the Bank, and ordered Mr Ridley and his co-guarantors to pay the full sums due on the guarantees, rejecting all of the arguments put forward by way of defence.

The Dubai criminal proceedings.

11. In March 2009, meanwhile, criminal proceedings had been instituted in Dubai against Mr Ridley and others. It is said on behalf of Mr Ridley that this was as a result of a radical change in the relationship between those at the Bank and him, but I do not need to express any view on this and do not do so. As part of those proceedings, the Bank was joined as a partie civile, a procedure (as I understand it) whereby a party who may be entitled to compensation for loss caused by a criminal act may recover such compensation in the criminal proceedings. I understand, however, that the Bank claimed the minimum conventional sum necessary to justify joinder but did not claim the full amount said to be due and owing.

12. Moving on in time, in December 2009 (on 27 December 2009), Law 37 of 2009 was promulgated in Dubai. I will have to consider this law in more detail below. However, it provided in outline that a party who did not repay an amount which was due and owing could be sentenced to an imprisonment pending repayment. The purpose of the measure is said to be to encourage repayment and settlement.

13. On 27 April 2011, the Dubai Court of First Instance handed down judgment in the criminal proceedings, sentencing Mr Ridley to ten years imprisonment, and ordering him to pay fines amounting to $501m and compensation in the like amount.

14. On 11 November 2014, the Dubai Court of Appeal reduced the amount to be refunded by Mr Ridley and his co-Defendants to match the amount still due and owing under the RSA, since some repayments had been made under that agreement.

15. On 7 August 2017, the Dubai Court of Cassation dismissed a further appeal by Mr Ridley.

The Bank's claims under Law 37.

16. On 27 March 2018, the Bank served a notice under Law 37 invoking the obligation to repay. That in turn led to a hearing.

17. On 1 May 2018, Mr Ridley's then lawyers wrote to contend that the lodgement of the above notice was a breach of the RSA.

18. On 8 and 13 May 2018, hearings took place in relation to the Bank's notice, following which Mr Ridley was committed to prison for a further 20 years, pursuant to Law 37.[2]

19. On 21 December 2018, Mr Ridley lodged the present claim for an injunction.

20. On 1 February 2019, Mr Ridley applied for permission to serve out of the jurisdiction and for permission to serve by an alternative method (i.e. on Baker McKenzie).

21. On 8 February 2019, Carr J (as she then was) made the orders sought.

22. On 25 March 2019, the Bank applied to set aside the orders of Carr J.

[2] I should however record that Mr Ridley reserves the right to contend that his incarceration is in fact pursuant to Article 324 of the Civil Procedures Law No 11 of 1992, since if that were so he would already have served the relevant period of imprisonment. I proceed in this judgment on the basis that he is in fact being held pursuant to Law 37.

23. That application was initially heard before me on 24 October 2019.

24. The application was adjourned to enable Mr Ridley to apply to amend his statement of case in order to meet an argument to the effect that the Court could not grant the relief sought.

25. Following an exchange of submissions and evidence, the parties agreed that I should determine the various applications on paper, particularly in the light of the COVID-19 pandemic.

26. Finally, whilst I was preparing judgment, I sought the parties' further assistance in relation to one further point which had not up until that point been debated, which was whether Article 25 of the Brussels Recast Regulation had a bearing on the case and, if so, what. I received helpful submissions from both parties in this regard during the course of late April and early May 2020.

An outline of the parties' contentions.

27. In this judgment, I therefore deal with the various applications set out above. However, before I do so, it is convenient to set out the nature of Mr Ridley's current claim in outline, together with an outline of the Bank's responses.

28. In essence, Mr Ridley contends that:

    (1) The Bank is taking proceedings by virtue of its invocation of Law 37 which it has agreed not to take by reason of clause 12.4 of the RSA;

    (2) The English Court should enjoin the Bank from taking such proceedings in order to give effect to the settlement agreement embodied in clause 12.4.

29. For its part, the Bank contends that:

    (1) This argument should have been taken in the preceding English proceedings and hence Mr Ridley's claim is an abuse of process, applying the principles set out in *Henderson v Henderson*, by reason of which it has no real prospect of success. This application is essentially an application to strike out.

    (2) Mr Ridley cannot establish that his action stands a real prospect of success, for two reasons:

        (a) The English court should not intervene because to do so would offend against principles of comity, since it would amount to the grant of an anti-enforcement injunction;

        (b) The English court should not intervene because any order made against the Bank would serve no purpose because the Bank cannot now do anything to reverse the process which invoking Law 37 involved.

    (3) Separately, that the order giving permission to serve by alternative means should not have been made.

A summary of the issues that I have to decide.

30. In my judgment, the logical order in which I should approach the various issues that now arise in this application is as follows:

    (1) Did Mr Ridley require permission to serve his claim form out of the jurisdiction and, if not, what is the relevance of this fact?

    (2) If Mr Ridley required permission to serve out, then:

        (a) Should the matter be dealt with by reference to the amended or unamended Particulars of Claim?

        (b) Should Mr Ridley be permitted to amend his Particulars of Claim?

    (3) By reference to whichever is the appropriate pleading, were the requirements for permission to serve out satisfied or should the order of Carr J be set aside?

        (a) The gateway provisions.

        (b) Forum non conveniens.

        (c) No real prospect of success.

    (4) If Mr Ridley did not require permission to serve out, should his claim nevertheless be struck out on the merits?

    (5) Should the order for service by alternative means by set aside?

31. I will deal with matters in this order.

Did Mr Ridley require permission to serve out and, if not, what is the relevance of this?

32. This was the issue that I raised with the parties whilst I was writing my judgment. It arose out of my concerns as to the applicability of Article 25 of the Brussels Recast Regulation. That Article provides as follows:

> "*If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*
>
> *(a) in writing or evidenced in writing;*
>
> *(b) in a form which accords with practices which the parties have established between themselves; or*
>
> *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce involved."*

33. This provision is then reflected in CPR 6.33, which provides that:

> *... (2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and – ...*
>
> *... (v) the defendant is a party to an agreement conferring jurisdiction within article 25 of the Judgments Regulation.*

34. Mr Morrison, for Mr Ridley, submitted that Mr Ridley's claims did come within Article 25. He submitted that this fact was relevant even though the Article and consequent jurisdictional provisions had not been relied on initially, since it made clear that *forum conveniens* and gateway provisions were really irrelevant to the arguments between the parties, and that, if I were to set aside Carr J's order, this would really be a waste of time and money since Mr Ridley could simply issue again, and serve without permission. In answer to a further argument put forward by the Bank based on the fact that the initial period of validity of the claim form had expired, he submitted that this was irrelevant since there was no issue of limitation so that a new claim form could be issued in any event.

35. Mr Anderson QC, for the Bank, put forward two arguments under this head.

36. First, he said that it was too late now for Mr Ridley to raise this point, relying on *Ketteman v Hansel* [1987] AC 189 in this regard. That was a case in which the House of Lords discussed the approach to be taken to amendments sought to be made shortly before trial.

37. In my judgment, where, as here, the wish to rely on different arguments arises right at the outset, the guidance given in that case is not really in point. Far more relevant is the approach mandated more recently by a unanimous Supreme Court in *NML Capital v Republic of Argentina* [2011] 2 AC 495 (a case in which the claimant sought to amend so as to advance an entirely different ground for permitting service out), where Lord Phillips said:

> *"Where an application is made to amend a pleading the normal approach is to grant permission where to do so will cause no prejudice to the other party that cannot be dealt with by an appropriate order for costs. This accords with the overriding objective. Where all that a refusal of permission will achieve is additional cost and delay, the case for permitting the amendment is even stronger. I can see no reason in principle while similar considerations should not apply where an application is made for permission to serve process out of the jurisdiction. It is, of course, highly desirable that care should be taken before serving process on a person who is not within the jurisdiction. But if this is done on a false basis in circumstances where there is a valid basis for subjecting him to the jurisdiction, it is not obvious why it should be mandatory for the claimant to be required to start all over again rather than that the court should have a discretion as to the order that will best serve the overriding objective" (at [75]).*

38. This paragraph of Lord Phillips' judgment was applied by a powerfully constituted Guernsey Court of Appeal, presided over by Michael Beloff QC, in one of the

interlocutory disputes as to jurisdiction which arose in *Carlyle Capital Corporation Limited v Conway* (Guernsey Judgment 11/2012), where it was said that:

"It seems to us that so long as the proposed amendments were not demurrable and had an independent purpose, the mere fact that they also, if allowed, added weight to the Liquidator's forum arguments could not be a valid basis for objection. Indeed if they had both substance and purpose, it would be very difficult, if not impossible, to find that they were advanced only for inappropriate tactical reasons" (at [23]).

39. Finally, Lord Phillips' views were endorsed, and a submission to the effect that a different approach applies in Hague Convention cases was rejected, by Flaux J in *JSC VTB Bank v Skurikhin* [2013] EWHC 3863 (Comm) at [8]-[10]).

40. The second point taken by the Bank was that the provisions of CPR 6.33 were not apposite here since not every claim made in the claim form and, thereafter, the Particulars of Claim were within Article 25. In particular, it was argued that the claim for injunctive relief in the claim form and the claims in the Amended Particulars of Claim for orders seeking to require the Bank to take steps to desist from the actions being taken in Dubai which are alleged by Mr Ridley to be in breach of contract were not within Article 25.

41. I cannot accept this submission. The question, in my judgment, is whether the dispute is within the scope of the jurisdiction clause. That clause, to which I have referred above, is a broad one. It refers to all disputes arising out of or in connection with the terms of the RSA. The question of whether the pursuit by the Bank of its claims in Dubai is a breach of the settlement provisions of the RSA is clearly within that clause. The fact that different remedies are sought from the Court in respect of that breach does not detract from the fact that the underlying disputes arise in connection with the terms of the RSA.

42. Accordingly, I hold that no permission was in fact needed to serve out of the jurisdiction. However, it remains the case that permission was sought and granted, and Mr Morrison does not seek to rely on this fact other than in the respects I have already identified. I deal with these matters at the appropriate times in this judgment.

Should the application to set aside be dealt with by reference to the original Particulars of Claim or the amended Particulars of Claim (if permission is otherwise appropriate)?

43. I can deal with this point briefly. In my judgment it is answered by the decision of the Supreme Court to which I have already made reference in the *NML* case. It is clear that the view of the Court was that, in the light of the overriding objective, the matter should be dealt with on the basis of the amended material, and I so hold.

Should permission to amend be granted?

44. Mr Morrison accepts that the pleading can only be amended with consent (which has not been forthcoming) or by leave of the Court. However he argues that:

    (1) In keeping with the philosophy of the CPR that the earlier an application to amend is made, the less controversial it ought to prove, the notes to the White Book 2019 state at 17.3.2 that *"If the application is made at an early stage of*

the proceedings it may be appropriate to request the court to deal with it without a hearing" (see also PD17, para. 1.1).

(2) Mr Morrison accepts that any amendment must be supported by evidence and must overcome the real prospect of success test (*Groveholt v Hughes* [2010] EWCA Civ 538 at [50]). Effectively, a reverse summary judgment test applies, and the applicant must show that the claim sought to be advanced is more than fanciful. However, in the present case there is no scope for the application of the more stringent review of the merits and balance of justice which is undertaken by the Court in the context of a late or very late amendment (see White Book 2019, 17.3.7).

45. I did not understand the Bank to contest the underlying approach to amendment.

46. Mr Ridley asks for permission to amend to add:

(1) A series of paragraphs dealing with the orders that he asks the Court to make to ensure that the Bank takes steps designed to ensure his release, in place of the original claim which was simply for a mandatory injunction requiring the Bank to discontinue its claim in Dubai;

(2) A series of paragraphs dealing with the principles and arguments as to Dubai law relied on;

(3) A new claim for damages for breach of clause 12.4.[3]

47. The pleading retains the original claim for "further or other relief".

48. The Bank resists this application on the following grounds.

(1) First, it said that Mr Ridley is estopped from putting forward the case now sought to be made by virtue of an issue estoppel arising from the decision of the Dubai Court to imprison him;

(2) Secondly, the evidential basis for the new claim is said to be insufficient;

(3) Thirdly, in relation to at least one of the ways that the claim is put forward, England is not the *forum conveniens*;

(4) Fourthly, it is said that the new case has no real prospect of success;

(5) Fifthly, in relation to a claim that the Bank could request the application of the federal laws of the UAE, so as to displace Law 37 (in which case Mr Ridley could be released since he would already have served the appropriate term), this was not within the gateway;

(6) Sixthly, in relation to the damages claim, there was no real prospect of establishing breach.

[3] For ease of reference, a copy of the draft is annexed to this judgment.

49. The Bank did not suggest that it would suffer any prejudice by virtue of the amendment being allowed.

50. I will consider each of the six objections noted above in turn.

51. The first issue is the suggested issue estoppel. As I understand it, the issue estoppel relates to the argument that the RSA itself amounts to a settlement for the purposes of Law 37. However, and subject to any further comments from either party, I do not consider this to be a point which is suitable for summary determination. Thus:

    (1) Whether there is an issue estoppel must depend on an analysis of what the foreign court decided and why.

    (2) Here, the foreign court is the civil judge in front of whom the Law 37 claim was made.

    (3) It may be that the Bank suggests that the foreign court determined that the RSA was not an amicable settlement within Law 37. I do not read the judgment in this way. There is no mention of the RSA in the judgment.

    (4) The Bank also now suggests that the new case involves a challenge to the correctness of the finding of the Dubai Court requiring the Claimant to be imprisoned. Again, I think that this is a matter which would require full argument and I am of the view that the point is not one which has such obvious force that it results in the case now sought to be put forward having no real prospect of success.

52. Secondly, it is said that the evidence of Dr Alhadhrami, the managing director of Dr Hassan Al-Marzooqi Advocates and Legal Consultants, does not comply with the provisions of CPR Part 35 and that his evidence does not set out the provisions of Dubai law. I think that this is a fair criticism, and in due course the relevant provisions, commentaries and materials will have to be identified. I also take the view that similar criticisms might be levelled at the evidence of Mr Al Hamrani, although again I take the view that the relevant remedy for this is a more fulsome report from each party. I do not think that this is a sufficient reason for refusing permission to amend.

53. The third argument put forward by the Bank related only to the amendment to introduce the contention that the RSA itself was a settlement within Law 37. The contention is that the most appropriate place for the resolution of this particular dispute, even if it comes within the contract gateway is not England, but Dubai; and that the waiver of *forum non conveniens* considerations does not apply to this argument because the circumstances giving rise to this particular contention, i.e. the introduction of Law 37, were unforeseen and unforeseeable at the time of the contract.

54. Again, I take the view that this point is ill founded.

    (1) The exclusive jurisdiction clause relates to all disputes, foreseen or unforeseen.

    (2) That clause indicates the parties' intent that considerations of *forum non conveniens* should not come into play, no doubt in the interests of certainty.

(3) As regards considerations of *forum non conveniens*, in my judgment the parties should prima facie, be held to their bargain. That is the normal approach of the English Courts.

(4) I do not find the authorities relied on by the Bank of much assistance.

(a) *Donohue v Armco* was a case involving an exclusive jurisdiction clause. The House of Lords made clear in that case (an anti suit injunction claim) that normally parties would be held to their bargain, though in that case there were good reasons for not granting the injunctions. The contracts in that case did not contain a waiver of *forum non conveniens* clauses, as far as I can see.

(b) I note however that the *Standard Chartered Bank* case relied on by the Bank, involved a non-exclusive jurisdiction clause, and in that case the Court did indeed say a waiver of *forum non conveniens* clause might be ignored if facts which were unforeseeable occurred. Accordingly in such a case a stay might be granted despite the presence of a waiver of *forum non conveniens* and a non-exclusive jurisdiction clause. However, the Court declined to order a stay in that case.

(5) Here, in my judgment, it would certainly be undesirable for this particular contention to be litigated in Dubai and all of Mr Ridley's other arguments dealt with in this jurisdiction, with obvious risks of duplication, inconsistent judgments and superadded costs.

(6) Finally, if the original order were set aside, then a new claim form with Particulars of Claim could be issued for service outside the jurisdiction without leave, as I have indicated. In such circumstances, no question of *forum non conveniens* would arise. I take the view that to require the setting aside of an order on a ground which would be irrelevant on an immediately subsequent application would be contrary to the overriding objective, and I reject the suggestion.

(7) Accordingly, I reject this contention on the part of the Bank.

55. Next, it is said that this particular new case has no real prospect of success, since the remedy sought is discretionary and since Mr Ridley could achieve the same result in Dubai himself without these proceedings. In my judgment, this proposition involves a non-sequitur. The mere fact that Mr Ridley might be able to achieve the same result in Dubai (a fact which, as I understand it, the Bank strenuously denies) does not mean that the English claim has no real prospect of success.

56. Fifthly, in relation to the claim that the Bank could request the application of the federal laws of the UAE, so as to displace Law 37 (in which case Mr Ridley could be released since he would already have served the appropriate term), the Bank, as I have said, argues that this was not within the gateway relied on; and no proper basis is put forward for the relief sought.

57. As to this:

(1) The case put forward by Mr Ridley, as I understand it, is that the Bank was obliged not to take the action it has in fact taken, invoking the provisions of Law 37.

(2) One of the answers that the Bank put forward to this claim is that a claim in England should not be allowed since it would serve no purpose. I consider this argument more generally below.

(3) This argument which Mr Ridley now wishes to put forward is a response to that case. He argues that the Bank should not have claimed under Law 37; that it remains open to the Bank to withdraw that claim, or to otherwise remedy its breach.

(4) One way in which it is alleged that the Bank can in fact remedy its breach is by asking for Federal law to be applied to his case, rather than Law 37.

(5) The root allegation of the claim remains, however, the obligation of the Bank under the RSA not to bring other claims.

(6) It follows, in my judgment, that this claim does indeed fall within the contractual gateway, since it relates to the RSA.

(7) The basis for the claim, as I understand it, is that the Bank is obliged to take steps to comply with its obligations under the RSA, and this is one such step which is open to the Bank. The allegation that it is open is supported by the evidence of Dr Alhadhrami.

(8) Again, although I agree that the claim is a relatively abbreviated and involved one, I cannot say that it has no real prospect of success and it is, in my judgment, within the contractual gateway.

(9) Finally, the same point again arises that I have dealt with above, namely that if the current claim were to be set aside, a new claim could immediately be issued in circumstances in which the question of whether a contractual or other gateway provision was satisfied would be irrelevant. In these circumstances, in my judgment, the overriding objective militates against taking such course.

58. Sixthly, in relation to the damages claim, the Bank argues that there is no real prospect of establishing breach, because the claim to enforce made pursuant to Law 37 is not a claim within the RSA. Once again, in my judgment, the Bank's assertion is not sufficient. In my judgment, Mr Ridley has a real prospect of establishing that the taking of the steps under Law 37 amounted to a breach of clause 12.4 of the RSA, as I have already found.

59. I conclude that this is an appropriate case to grant permission to amend, and I so order.

Should the order granting permission to serve out be set aside?

The gateway provisions and forum non conveniens.

60. In this regard, I was reminded by both parties of the relevant approach to applications under CPR 6.36. For my part, I take that test from the decision of the Privy Council in

Altimo Holdings and Investment Ltd v Kyrgzy Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, where Lord Collins said:

"71. On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438 , 453–457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. Carvill America Inc v Camperdown UK Ltd [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457 , at [24]. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547 , 555–7 per Waller LJ, affd [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45, [2007] 1 WLR 12 , [26]-[28]. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

61. That approach was reiterated by the Supreme Court in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 in which Lord Sumption said:

"3. Before permission can be given for the service of originating process out of the jurisdiction, it is necessary for the claimant to establish (i) that the case falls within at least one of the jurisdictional gateways in paragraph 3.1 of Practice Direction 6B supplementing CPR Pt 6 , (ii) that she has a reasonable prospect of success, and (iii) that England and Wales is the proper place in which to bring the claim. The third of these conditions reflects the principle of forum conveniens, and there is no issue about it in this case. It is accepted that England is a proper place in which to bring the present claim if the first two conditions are satisfied. So far as the claim is founded on contract, Lady Brownlie's application for permission to serve out was based on paragraph 3.1(6)(a) ("the contract ... was made within the jurisdiction"). So far as it was founded on tort, it was based on paragraph 3.1(9)(a) ("damage was sustained ... within the jurisdiction"). Holdings says, first, that Lady Brownlie has not established that the contract with the hotel was made in England, but that wherever it was made, it was not made with them. Their case is that they are a group holding company whose subsidiaries provide certain central services to hotels of the Four Seasons hotel chain but neither own nor operate them. Gateway (6)(a) does not therefore apply. Secondly, they say that gateway (9)(a) does not apply because the damage which is the basis of the claim in tort was not sustained in England. Thirdly, they say that Lady Brownlie does not satisfy the requirement of CPR r 6.37(1)(b) that there should be a "reasonable prospect of success". It is common ground that any relevant contract for the services of the car and driver was governed by Egyptian law."

62. In my judgment, Mr Morrison was right to submit that the relevant test was whether Mr Ridley could show a real (as opposed to a fanciful) prospect of success on his claim, on

the merits. The language of good arguable case is applicable to the question of whether the claim falls within one of the jurisdictional gateways. Here, the claim is on a contract governed by English law and thus there can be no doubt that this test is satisfied. I did not understand this point to be seriously challenged by the Bank at the hearing in front of me, or in the further submissions that were served.

63. I can also deal briefly with a further point raised, somewhat faintly, by the Bank in its submissions of 31 January 2020, which was that I had to be satisfied that England was the *forum conveniens* for the dispute to be determined. Here, the contract provided that England was to be the exclusive jurisdiction for the determination of disputes and also a waiver of *forum non conveniens* arguments. The Bank, relying on *Donohue v Armco* [2001] UKHL 64, [2002] 1 All ER 749, and *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm)), [2016] 1 All ER (Comm) 233, argued that such waiver clauses were capable of being displaced by sufficiently strong reasons, unforeseen and unforeseeable at the time of contracting. The only such unforeseeable reason put forward by the Bank related to one of the grounds Mr Ridley now seeks to put forward by way of amendment and I have dealt with this above.

No real prospect of success.

64. I turn therefore to the question of whether Mr Ridley's claim has a real prospect of success, which is in my judgment the real question on this application.

65. In this connection, the Bank raises five points, as I have noted:

(1) It submits that Mr Ridley's claim is an abuse of process.

(2) It suggests that the Court will not grant an injunction of the type sought, since this amounts to an anti-enforcement injunction.

(3) It suggests that any order made by the Court would lack any utility since the Bank cannot withdraw any claim made under Law 37.

(4) It suggests that the Court would deny Mr Ridley relief because of his delay in applying for such.

(5) Finally, in relation to the case based on amendment, it relies on the issue estoppel argument I have referred to above.

66. I will deal with each point in turn.

<u>Abuse of process.</u>

67. Under this heading, the Bank relies on the well known principle in *Henderson v Henderson* [1843] 7 WLUK 87, to the effect that all claims or arguments should be brought forward in one case, in order to ensure that litigation has an end. Mr Anderson QC, for the Bank, referred me to the well known statement of Lord Bingham in *Johnson v Gore-Wood*, [2002] AC 1 in which he said:

"It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in Henderson v. Henderson : A new approach to successive civil actions

arising from the same factual matter," 19 Civil Justice Quarterly , (July 2000), page 287), that what is now taken to be the rule in Henderson v. Henderson , has diverged from the ruling which Wigram V.–C. made, which was addressed to res judicata. But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

68. Turning to the facts of this case, Mr Anderson QC argued that:

(1) At the time of the earlier English proceedings, which led to the judgment of Flaux J in December 2013, Mr Ridley knew of the existence of Law 37 and the potential for a prolongation of his period of imprisonment. This is quite apparent from the decision of Hamblen J on the application for summary judgment in those proceedings, and in particular from paragraph 21, which states:

> *"21. As outlined above, the RSA arose out of what the Bank contends was a major fraud against it. Criminal consequences also followed. Mr Cornelius and Mr Ridley stood trial in Dubai for the fraud. On 27 April 2011, the Dubai Criminal Court convicted both. They were sentenced to 10 years imprisonment. In addition the Court ordered that US$501 million be paid in compensation to the Bank and imposed a further US$501 million fine. Following the enactment of a new law in Dubai the Defendants potentially face a further 20 years in jail if the fines have not been paid within 10 years. Mr Nil (in respect of whom an international arrest warrant has been issued but who remains at large in Turkey) was also tried and convicted in his absence. Mr Fitzwilliam was tried and acquitted."*

(2) The point is also addressed in the pleading settled by leading Counsel, Ms Lindsay Boswell QC on behalf of Mr Ridley in those proceedings. In Mr Ridley's Defence, it is stated (in outline) that:

(a) The Bank had obtained the sums of $501m in compensation in Dubai (which I understand was later reduced on appeal to $432m);

(b) That claim was co-terminous with the claim under the RSA being pursued in England, which document settled the claims which were being pursued in Dubai;

(c) The Bank's claim in Dubai was made in breach of the terms of clause 12.4 and was an attempt to achieve double recovery;

(d) The Bank's Dubai claim involved assertions that the RSA was void and was thus inconsistent with the assertion in the English proceedings that it was valid;

(e) The Bank was not entitled to pursue two claims seeking the same relief premised on two inconsistent assumptions.

(3) Despite the pleaded case set out above, these arguments were not in fact pursued at trial. If Mr Ridley wished to rely on clause 12.4, then he should have done so by pursuing the arguments now raised in that earlier action.

69. Overall, therefore, it would now be an abuse of process to allow Mr Ridley to raise this new claim.

70. Mr Morrison, for Mr Ridley, made the following points in response:

(1) Throughout the Bank's English proceedings from 2010 and 2013 it is Mr Ridley's evidence that he was labouring under the misapprehension that the Bank had itself made a claim in the criminal proceedings to obtain the criminal restitution order. If his belief had been correct, the Bank's conduct would have been prohibited by clause 12.4. However, both the Bank and Mr Ridley now accept that Article 82 mandated the criminal court to order criminal compensation and that this was not something that the Bank could seek or stop.

(2) It was because of his misapprehension that Mr Ridley averred (incorrectly) at paragraph 71 of his Amended Defence that the claim for criminal restitution must have involved the Bank breaching clause 12.4. The Bank denied this in paragraphs 30 to 31 of its Reply and further made clear in these paragraphs that it had only ever lodged a nominal claim so as to become a partie civile, rather than the full amount of the criminal compensation.

(3) In Mr Ridley's Amended Defence, no relief was founded directly upon his averral that the claim to criminal compensation was a breach of clause 12.4: nor could it have been given that the criminal compensation had already been ordered.

(4) Instead, Mr Ridley relied upon this inaccurate averral for two purposes:

(a) First, to argue that the Bank would be obtaining double recovery if it recovered amounts under the RSA in the English proceedings which had already been awarded by way of criminal compensation; and

(b) Second, to advance the further argument (that Mr Ridley now concedes was also incorrect) that the Bank could only have sought such criminal compensation in Dubai by disavowing the RSA, clause 12.4 of which would otherwise have prevented it from so doing. On the strength of this further argument, Mr Ridley contended that the Bank's claim under the RSA was an abuse of process.

(5) Mr Ridley also frankly concedes that he had a limited understanding of Law 37 and the default sentences which would result from any failure to pay the criminal compensation and the fine. As a result he believed (wrongly) at the time that a 20 year period of imprisonment would follow automatically as a result of his non-payment of the criminal compensation and fine. His statements to this effect in the pleadings and witness statements filed in the Bank's English proceedings are now unequivocally admitted to have been incorrect. For the purposes of the present case, it is noteworthy that the Bank did not admit Mr Ridley's contention that the additional 20 year sentence was automatic in paragraph 30 of its Reply.

71. In its abuse of process arguments, Mr Morrison therefore submits that the Bank seeks now to rewrite history so as to assert that Mr Ridley was running defences which would have impacted upon its present ability to bring the Law 37 claim. In particular, the Bank seeks to suggest that Mr Ridley cannot now rely on: (1) the fact that the Bank was unable to seek or stop the criminal compensation proceedings, with the result that the decision of the criminal court to impose criminal compensation did not offend clause 12.4; and (2) any argument to the effect that Law 37 does not apply automatically, and requires the Bank to present a request by petition which can be restrained as a breach of clause 12.4. In his submission, the first of these points is now common ground; and the second, he argues, could not have been the subject of Mr Ridley's amended defence or evidence in the Bank's English proceedings which were concluded years before it had any ability to present a petition under Law 37. It is no answer, Mr Morrison submits, to suggest that Mr Ridley knew that the Bank would take steps under Law 37 some years' hence, because he believed that any such extension would be automatic. It was therefore impossible for him to have contemplated that the Bank would subsequently bring a claim which could be restrained by clause 12.4.

72. Neither in Mr Morrison's submission, can Mr Ridley properly be criticised for failing to seek some sort of quia timet injunction against a Law 37 claim between 2010 and 2013. The Bank had no ability to bring a claim until the end of his sentence and such a claim might never have been brought. This is especially so given the doubt cast by Mr Chalhoub as to whether or not Law 37 can apply to offences committed prior to its passing, a matter to which I return below.

73. Dealing first with the abuse of process argument, I have concluded that Mr Ridley's claim should not be struck out on this basis. My reasons for this conclusion are as follows:

(1) There is a very substantial dispute of fact as to what Mr Ridley knew at the time of the earlier English proceedings. The Bank's case is premised on the proposition that Mr Ridley knew of Law 37 and also knew that it was up to the Bank to invoke the law; Mr Ridley's case is that he did not know this and instead believed that the law would be automatically invoked. I cannot resolve such a dispute on an application such as this.

(2) This is part of a more general consideration, which is that an abuse of process argument such as this one is a fact sensitive one, which will depend on weighing all of the relevant evidence. An interlocutory application such as this one is not an appropriate theatre for such a determination.

Anti enforcement injunction?

74. Mr Anderson QC submits that:

(1) The proceedings under Law 37 are enforcement proceedings, designed to enforce the judgment imposing civil compensation obligations in the criminal proceedings in Dubai;

(2) English Courts will not in general grant injunctive relief to preclude such enforcement proceedings.

75. In support of his former proposition, Mr Anderson QC relies on the evidence of Mr Al Hamrani. It was submitted that, since he was the lawyer who acted for the Bank in the underlying proceedings, I could not place weight on his testimony. I accept that his involvement in the proceedings may be argued to have a bearing on the weight to be ascribed to his testimony; but I do not accept that this means that he does not have the necessary expertise to express a view.

76. The contrary proposition was advanced by Dr Alhadhrami. His evidence was that the proceedings could only be initiated by the Bank; that they were civil proceedings; that they can be withdrawn at any time by the Bank. He also, in his later witness statement, suggested that the RSA itself might be viewed as a settlement within Law 37.

77. There is clearly a significant disagreement between these two foreign lawyers. I take the view that I cannot sensibly determine who is right on an application such as the present one. However, in my judgment, the following material would seem to be relevant to this point.

(1) Starting with the original criminal proceedings in Dubai, as I understand the position (and my understanding cannot be said to be perfect), the Bank joined as a *partie civile*, but did not claim the full compensation in fact awarded. It claimed a lower sum to give it standing, in effect, to take part in the proceedings.

(2) Despite the fact that it was not claiming the full sum awarded, the Bank was, as I have noted above, awarded the full sum.

(3) It seems clear that, following that award, any further proceeding would have to be initiated by the Bank.

(4) The Bank did indeed initiate the proceedings in Dubai pursuant to Law 37.

78. In support of his latter proposition, namely that Mr Ridley's claim amounted to a claim for an anti-enforcement injunction, of a type which the English Court would not countenance, Mr Anderson QC referred me to the decision of the Court of Appeal in *Ecobank v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231. As the headnote in that decision records:

"Held , dismissing the appeal, that both general discretionary considerations and the need for comity required that an application for an anti-suit injunction had to be made at an early stage; that the longer an action continued without any attempt to restrain it the less likely a court was to grant an injunction; that an applicant who did not apply for an injunction until after judgment was given in the foreign proceedings was unlikely to succeed unless he could not have sought relief before the judgment was given, either because the relevant agreement was reached post-judgment or because he had no means of knowing that the judgment was being sought until it was served on him; that when considering whether to grant an anti-enforcement injunction the court would have regard to all relevant considerations, including the extent to which the respondent had incurred expense prior to any application being made, the interests of third parties, including in particular the foreign court, and the effect of granting an anti-enforcement order; that time during which the foreign jurisdiction was challenged fell to be taken into account when considering delay; that it was not a precondition to the refusal of an injunction that the respondent should establish detrimental reliance; and that, in the circumstances, it had been open to the judge to hold that in the light of the claimant's delay injunctive relief should be refused"

79. Mr Morrison, for his part, emphasised the following facts.

(1) The need for the Court to take a balanced approach, taking into account all relevant considerations.

(2) The need for the Court to consider the question of how far advanced the proceedings in the other jurisdiction were and how much had been spent in them. Here the Bank had spent very little.

(3) The need for the Court to consider questions of comity, and whether they were in fact engaged on the facts of the case. Here, Mr Ridley's claim does not involve any challenge to the jurisdiction of the civil judge in Dubai, since it simply seeks an order requiring that the Bank take certain actions.

80. For my part, I see force in the Bank's argument in this regard, since it seems to me that the injunction here sought is in the nature of an anti-enforcement injunction. However, I take the view that this does not render Mr Ridley's claim hopeless, applying the test of no real prospect of success. I reach this conclusion for the following reasons:

(1) The start point is that the grant or refusal of an injunction is a discretionary matter, in relation to which all material considerations should be taken into account. I think it is impossible to say that there is no real prospect that a Court may conclude that this is an appropriate case for injunctive relief, even if it is a claim for anti-enforcement relief.

(2) It is clear that delay is an important factor, since if an applicant fails to apply for an anti-suit injunction, thereby allowing judgment to be entered, this will militate strongly against the grant of an injunction. However, in this case it is not clear that an anti-suit injunction could have been sought, given the criminal nature of the Dubai proceedings and the fact that the Bank was not making the claim for compensation now relied on.

(3) However, considerations of comity are also very important. Here I come back to the dispute between the experts as to Dubai law. Insofar as the grant of relief would amount to interference with the Courts in Dubai, this will be a powerful factor militating against the grant of an injunction. However, for present purposes, I do not regard the evidence as sufficiently reliable to enable me to form a view on this, especially bearing in mind the submission that all that is asked for is an order against the Bank, taking effect *in personam*. Again, therefore, I feel unable to conclude that Mr Ridley's claim has no reasonable prospect of success.

Lack of utility?

81. Under this head, the Bank contended that, now the Bank has invoked Law 37, there was nothing that the English Court could do to halt the Dubai process. Essentially, it was submitted that the die was now cast; that the English Court would not act in vain; and accordingly, that Mr Ridley's case was hopeless.

82. There was a sharp division of opinion between the experts on this issue.

(1) The start point is the witness statement of Mr Chalhoub, managing partner of the Dubai law firm of Counsels, Advocates and Legal Consultants. His evidence was that:

(a) Mr Ridley had served his original sentence in full.

(b) Law 37 had been passed on 27 December 2009, after Mr Ridley's initial arrest. There was some debate in Dubai as to whether it was retrospective.

(c) The law is engaged not by the state, but by the judgment creditor. The entire process is civil and not criminal, and the execution judge is the civil judge.

(d) The creditor can stop the process at any time after it has been initiated in the event settlement or payment occurs.

(e) Mr Chalhoub attended the hearing of the claim under Law 37. The judge told him that he could not suspend execution. However, the judge also said "any time the bank tells me to lay off under Article 5, I will do so."

(f) The result of the Bank having lodged and served its claim would be that Mr Ridley will remain in gaol for 20 years. However, if the Bank relinquished its claim, Mr Ridley would be released from gaol.

(2) This evidence was in turn countered by a statement by Mr Al Hamrani, dated 25 March 2019. I have already noted and rejected the criticism of Mr Al Hamrani's credibility. Mr Al Hamrani's evidence was as follows:

(a) First, he expressed the view that the Bank was enforcing the order of the criminal court and that this was not a claim released by reason of clause 12.4 of the RSA.

(b) In support of this, he set out the background to Law 37. In my judgment, there is really nothing between the experts in their description of Law 37.

(c) He went on to state that, absent Law 37, a party who had been awarded criminal compensation would have to commence a new action under the civil code to recover this.

(d) Mr Al Hamrani stated that the Bank had participated in the original criminal proceedings as a *partie civile*, claiming AED 201,000 the usual amount required to give a party standing.

(e) He then reiterated his view that the claim for payment of the criminal compensation was not a claim within the RSA.

(f) Next, he set out an account of the hearings pursuant to Law 37 in May 2018. Again, there would appear to be no real difference between the account of Mr Chalhoub and that of Mr Al Hamrani.

(3) In turn, Mr Ridley adduced the statement of Dr Khaled Ali Alhadhrami. The relevant parts of his evidence are as follows:

(a) First, Dr Alhadhrami noted that the default provisions regulating the imprisonment of individuals for failure to pay criminal compensation are provisions of federal law in Articles 309 and 311 of the Penal Procedures Law. The maximum period of imprisonment under these sections is one year.

(b) Secondly, he notes that the order committing Mr Ridley to prison after the expiry of his initial period of imprisonment states that it was made under the provisions of Article 324 of the Civil Procedures Law No. 11 of 1992. The maximum period of imprisonment under this section is 36 months, which would therefore already have expired.

(c) The proceedings under Law 37 were not automatic. Instead, they had to be initiated by a request from the creditor, in the form of a new civil claim.

(d) As a consequence of this, it was and is up to the creditor to make the request and to stop the Law 37 proceedings.

(4) Shortly before the first hearing, the Bank tendered a further statement from Mr Al Hamrani, dated 11 October 2019. He made a series of further points, as follows:

(a) He stated that the monies that Mr Ridley had originally stolen were public funds. The order of the Court was not an original or new claim, nor a civil matter, but was the execution of a criminal judgment.

(b) Secondly, he expressed the view that the provisions of Law 37 were designed to supplement and enhance provisions of federal law.

(c) Thirdly, he indicated that the award of the criminal court should be regarded as an order for restitution, not compensation, and that this was important.

(d) Fourthly, he denied the relevance of Article 324 of Civil Procedures Law No. 11 of 1992.

(e) Finally, he reiterated his view that the application of Law 37 was a mandatory procedure.

(5) A further statement was then produced after the adjournment from Dr Alhadhrami dated 7 November 2019. In this statement he made the following points.

(a) First, he reiterated his evidence to the effect that it was for the judgment creditor to make an application under Law 37.

(b) Secondly, he also stated that there was nothing to prevent the creditor from withdrawing that request.

(c) Thirdly, he reiterated his evidence to the effect that the creditor could request that the relevant federal laws be applied.

(d) Fourthly, he suggested that the settlement in clause 12.4 might be sufficient to amount to a settlement within Law 37; and also said that the creditor could simply write a letter agreeing to settle.

(e) In any of these cases, it was his evidence that the procedure to be applied would be a simple one.

(6) On 16 December, a further witness statement was filed by the Bank from Mr Al Hamrani. He made a number of points.

(a) First, he took issue with the suggestion that the Bank could simply withdraw its claim.

(b) Secondly, he took issue with the idea that a settlement within Law 37 could include a pre-existing settlement such as that in clause 12.4.

(c) Thirdly, he took issue with the idea that the acceptance by the Bank that it had settled its claims would amount to a settlement within Law 37.

(d) Fourthly, he said that, whilst the Bank might have been able to ask that the federal law be applied at the time of its original application, it could not do so now.

83. It will be apparent from the exchanges that I have set out in summary form above that there is a very significant dispute as to the content of foreign law between these two lawyers. In my judgment, it is simply impossible for me to determine the rights and wrongs of this point on a summary application such as this one and I decline to do so.

Delay

84. The Banks' next argument was that Mr Ridley's claim had no chance of success because the Court hearing the claim would be bound to dismiss it because of delay on the part of Mr Ridley in seeking the injunctive relief now sought.

85. In my judgment, it is again impossible to say at the present time that Mr Ridley's claim is bound to fail. I say this for the following reasons:

(1) Whether a Court decides to refuse an application for an injunction is a matter of discretion. That must in turn depend on an assessment of all of the evidence. At this stage I do not have that evidence.

(2) It is likely that at least part of that evidence will relate to the knowledge of the parties from time to time. Thus, by way of example, no proceedings were in fact taken by the Bank between the date of the final verdict in Dubai in August 2017 and the lodgement of the Law 37 application in March 2018. Mr Ridley's lawyers then wrote in May 2018 to contend that the lodgement of that application was a breach of the RSA, following which there was participation to some extent at least in the proceedings in Dubai.

(3) Mr Ridley's situation, namely in prison in Dubai, may plainly have an impact on his ability to take legal steps in Dubai and London.

(4) Overall, the Bank's submission will have to be considered in the light of all of the evidence, which is not available at present.

(5) Accordingly, this is not an appropriate case for summary disposal.

Issue estoppel.

86. As regards the alleged issue estoppel, the Bank argues that Mr Ridley's case now involves an argument that the Dubai Court should not have decided to imprison him; that he is estopped from so contending; or alternatively that this amounts to a collateral attack on the decision of the Dubai Court. I have dealt with this above in relation to my decision on amendment.

Conclusion on the merits points.

87. For all the reasons I have set out above, I conclude that this is not a case suitable for summary determination, and I reject the Bank's application to set aside the decision of Carr J giving permission to serve the claim out of the jurisdiction.

The application to set aside the order for alternative service.

88. Carr J gave permission to serve on Baker McKenzie, solicitors for the Bank, pursuant to CPR 6.15(1). That rule provides that "*(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*"

89. The principles relevant to alternative service, as the Bank rightly pointed out, were set out in the judgment of Popplewell J (as he then was) in *Societe Generale v Goldas* [2017] EWHC 667 at paragraph 49, where he states:

> *"49. I would endeavour to summarise the relevant principles as follows:*
> *(1) As the wording of Rule 6.16 makes clear, the Court will only dispense with service in exceptional circumstances.*
> *(2) In deciding whether to authorise service by an alternative method under CPR Rule 6.15 , whether prospectively or retrospectively, the Court should simply ask itself whether there is "a good reason": Abela at [35]. This is the same test as whether there is good reason (without the indefinite article): Barton at [19(i)]. The Court must consider all the relevant circumstances in determining whether there is a good reason for granting the relief; it is not enough to identify a single circumstance which taken in isolation would be a good reason for granting relief (e.g. allowing the claimant to pursue a meritorious claim) if it is outweighed by other circumstances which are reasons not to grant the relief. I do not read Aikens LJ as saying anything different in Kaki at [28] when emphasising the existence of the indefinite article "a good reason"; he did so in order to make the point that although all the relevant factors for and against granting relief inform the conclusion as to whether there is a good reason (see his paragraph [33]), no subsequent and separate discretion falls to be exercised if there is a good reason for granting relief.*
> *(3) A critical factor is whether the defendant has learned of the existence and content of the claim form: Abela at [36], Barton at [19(ii) and (iii)]. If one party or the other is playing technical games, this will count against him: Abela at [38]; Barton at [19(vii)]. This is because the most important function of service is to ensure that the content of the document served is brought to the attention of the defendant: Abela at [37]). The strength of this factor will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an attempt at formal service. It may be weaker or even non-existent where the contents of the claim form become known through other means. It is well known that sometimes issued claim forms are sent to a defendant "for information only" because the claimant does not want for the time being to trigger the next steps. Sometimes a claim form may be sent in circumstances which although less explicit do not suggest that the sending is intended to amount to service. The defendant may happen to learn of the claim form and its contents from a third party, or a search, in circumstances which might not suggest an intention by the claimant to serve it or to pursue the proceedings, or might positively suggest the reverse.*
> *(4) However the mere fact that a defendant learned of the existence and content of the claim form cannot of itself constitute a good reason; something more is required: Abela at [36], Barton at [19(ii)];*
> *(5) There will be a focus on whether the claimant could have effected proper service within the period of its validity, and if so why he did not, although this is by no means the only area of inquiry: Abela at [48], Kaki at [33], Barton at [19(iv)]; generally it is not necessary for the claimant to show that he has taken all the steps he could reasonably have taken to effect service by the proper method: Barton at [19(v)]; however negligence or incompetence on the part of the claimant's legal advisers is not a good reason; on the contrary, it is a bad reason, a reason for declining relief: Hashtroodi at [20], Aktas at [71].*

(6) Delay may be an important consideration. It is relevant whether the application for relief has been made promptly and, if not, the reasons for the delay and any prejudicial effect: Anderton at [59]. It is relevant if the delay is such as to preclude any application for extension of the validity of the claim form because the conditions laid down in 7.6(3)(b) and/or (c) cannot be fulfilled, i.e. if the claimant has not taken reasonable steps to serve within the period of validity of the claim form and/or has not made the application promptly: Godwin at [50], Aktas at [91]. The culpability of the claimant for any delay may be an important factor. Particular considerations arise where the delay is abusive (see (7) below) or may have given rise to a limitation defence (see (8) below).

(7) Abuse:

(a) It is relevant whether any conduct of the claimant has been an abuse of process of the proceedings.

- *(b) At one extreme, there will rarely if ever be "good reason" where the claimant has engaged in abusive delay or abusive conduct of the proceedings which would justify striking them out if effective service had been made when attempted under the principles established in Grovit v Doctor [1997] 1 WLR 640 and Habib Bank v Jaffer [2000] CPLR 438 .*
- *(c) However even where the abuse is not of that character, any abuse of process will weigh against the grant of relief.*

(8) Limitation:

(a) Where relief under Rule 6.15 would, or might, deprive the defendant of an accrued limitation defence, the test remains whether there is a good reason to grant relief: Abela .

(b) However save in exceptional circumstances the good reason must impact on the expiry of the limitation period, for instance where the claimant can show that he is not culpable for the delay leading to it or was unaware of the claim until close to its expiry: Cecil at [108] and see Godwinat [50].

(c) It is not ordinarily a good reason if the claimant is simply desirous of holding up proceedings while litigation is pursued elsewhere or to await some future development; the convenience for a claimant of having collateral proceedings determined first is not a good reason for impinging on the right of a defendant to be served within the limitation period plus the period of validity of the writ: Battersby per Lord Goddard at p.32; Dagnellper Lord Browne-Wilkinson at p. 393C. Cecil at [99]-[106].

(d) Absent some good reason for the delay which has led to expiry of the limitation period, it is only in exceptional cases that relief should be granted under Rule 6.15 or 6.16 ; there is a distinction between cases in which there has been no attempt at service and those in which defective service has brought the claim form to the defendant's attention (Anderton at [56]-[58], Abela [36]), with relief being less readily granted in the former case, but even in the latter case exceptional circumstances are required: Kuenyehia at [26];

(e) Absent some good reason for the delay which has led to expiry of the limitation period, it is never a good reason that the claimant will be deprived of the opportunity to pursue its claim if relief is not granted; that is a barren factor which is outweighed by the

> *deprivation of the defendant's accrued limitation defence if relief is granted; that is so however meritorious the claim: the stronger the claim, the greater the weight to be attached to not depriving the defendant of his limitation defence: Cecil at [55], Aktas at [91].*
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> *(9) Cases involving service abroad under the Hague Convention or a bilateral treaty:*
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> *(a) Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost: Knauf at [47], Cecil at [66], [113].*
>
> *(b) It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections: see Shiblaq at [57]. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in Cecil at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in Knauf at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of Abela was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of Abela , there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Conventions case: Bank St Petersburg at [26].*
>
> *(10) The mere fact that a party is a litigant in person cannot on its own amount to a good reason, although it may have some relevance at the margins: Barton at [19(vi)]."*

90. The Bank submitted that here there were no exceptional circumstances, and no good reason, to allow alternative service. They pointed out that the grounds put forward as justifying such were that service via the treaty would take a long time; that in the meantime Mr Ridley would remain incarcerated; and that this would amount to exceptional circumstances. The Bank submitted that there was no evidence that service pursuant to official channels would take many months; and that any delay that there was paled in significance besides the delay already caused by Mr Ridley, who had not issued his claim until 21 December 2018, and then not issued his application until 1 February 2019.

91. Mr Morrison, for Mr Ridley, submitted as follows:

(1) First, although the guidance given by Popplewell J was accepted, the test of exceptional circumstances only applied where the country in which service was to be effected had stated objections to service other than through official channels, which the UAE has not.

(2) Here, there were good reasons, beyond avoiding additional time and cost, because:

(a) Disproportionate delay is a good reason, such as may exist under this treaty, which involves 10 different stages and may take 6 to 12 months: see *Libyan Investment Authority v JP Morgan Chase and Co and others* [2019] EWHC 1452.

(b) The delay in question would lead to exceptional prejudice because it leads to a prolongation of Mr Ridley's incarceration.

(c) There was no good reason to insist on service through the normal channels in circumstances in which the Bank had known of Mr Ridley's claim since 1 May 2018, when complaint was made by Mr Ridley's then lawyers.

(d) The Bank was, to adopt the words of Popplewell J, "playing technical games".

(3) The criticism of Mr Ridley on account of delay was misplaced. The delay in commencing proceedings and issuing the application for service out was due to the difficulties inherent in finding Counsel and experts willing to act pro bono, and in giving appropriate instructions to them.

92. I have concluded that this application should also be dismissed, essentially for the reasons put forward by Mr Morrison. For my part, I would regard this as an appropriate case for service out by an alternative method.

93. I am grateful to Counsel and their teams for their helpful and detailed submissions. I would ask the parties to draw up an order giving effect to the terms of this judgment.