IN THE HIGH COURT OF JUSTICE Nos. CL-2017-000569 & CL-2017-000595
BUSINESS AND PROPERTY COURT OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2020] EWHC 1962 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 23 June 2020

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

PUNJAB NATIONAL BANK (INTERNATIONAL) LIMITED — Claimant

- and -

(1) VISHAL CRUISES (PRIVATE) LIMITED
(2) MR PRADEEP AGRAWAL
(3) SUPERIOR INDUSTRIES LIMITED — Defendants

- and –

PUNJAB NATIONAL BANK (INTERNATIONAL) LIMITED — Claimant

- and –

(1) PASSAT KREUZFAHRTEN GMBH
(2) MR PRADEEP AGRAWAL
(3) YOGESH GUPTA
(4) VISHAL CRUISES (PRIVATE) LIMITED — Defendants

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MR T. DE VECCHI (instructed by TLT LLP) appeared on behalf of the Claimant.

MS K. VORA (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Second and Third Defendants in CL-2017-000569 and the Second Defendant in CL-2017-000595.

J U D G M E N T

(Transcript produced without access to documentation)

MRS JUSTICE COCKERILL:

Introduction and Summary

1 The Claimant ("the Bank") is a bank incorporated in England and Wales. In 2012 and 2013 it lent money (to the First Defendant in the Vishal Claim ("Vishal") and to the First Defendant in the Passat Claim ("Passat")) in relation to the purchase and charter of a single vessel – the *MV Delphin*. Vishal was the purchaser of the vessel, and Passat was intended to be the charterer of the vessel from Vishal. Much of that lending remains unpaid and these actions are the result.

2 I have heard over the last two days applications made by the Second and Third Defendants in CL-2017-000569 ("the Vishal Claim") and the Second Defendant in CL-2017-000595 ("the Passat Claim", together with the Vishal Claim, "the Claims") (together, "the Applicants") (respectively) to set aside various orders of the Court concerning service out of the jurisdiction and/or challenge the jurisdiction of this Court and (in the Vishal Claim) seek an anti-suit injunction (together, "the Applications").

3 However, it is not these Defendants who are the active Defendants in these applications - or indeed in the actions generally;

i. On 12 October 2018, at a (defended) hearing before Mr Justice Butcher, the Bank obtained summary judgment against Vishal in the Vishal Claim. Judgment was entered in favour of the Bank in the sum of €16,368,919.33. So far, Vishal has failed to satisfy that judgment.

ii. Passat has not responded to the Bank's demands for repayment. On 16 November 2014, an insolvency administrator was appointed over Passat's assets by the District Court of Hamburg, Germany. Passat has not been served.

4 The claims are now actively pursued against the Applicants and are claims under a number of guarantees entered into by the Applicants in support of lending by the Bank under English law governed facilities. The Applicants do not dispute executing the relevant guarantees.

5 The Second Defendant in both Claims is a man named Pradeep Agrawal ("Mr Agrawal"), who is a businessman domiciled in India. He provided guarantees in relation to the lending extended by the Bank to both Vishal and Passat.

6 The Third Defendant in the Vishal Claim is Superior Industries Limited ("SIL"), which is a private company incorporated under the laws of India, and is associated with Mr Agrawal. It provided a guarantee in relation to the lending extended by the Bank to Vishal.

7 The Third Defendant in the Passat Claim is Yogesh Gupta ("Mr Gupta"), an individual resident in India, who also provided a guarantee in relation to the lending extended to Passat. He was served on 5 January 2018, and has not challenged jurisdiction or filed any defence.

8 The Fourth Defendant in the Passat Claim is Vishal, who provided a corporate guarantee in relation to the lending extended to Passat. Vishal was served on 16 November 2017, and has not challenged jurisdiction or filed any defence.

9 The applications pursued are fully summarised (and only properly comprehensible) at the end of the full factual background section of this judgment. In essence however, they comprise:

i. Applications to set aside the orders for service out on the basis of failure to give full and frank disclosure, in particular in relation to the existence of proceedings elsewhere;

ii. Applications to set aside the orders for service out on the basis that there was no jurisdiction to make them;

iii. Applications to set aside the orders for alternative service on the merits and on the basis of failure to make full and frank disclosure as to the relevant legal test.

10 The Claimant contends that each of these applications is misconceived; alternatively that if there was any failure to make full and frank disclosure, the correct course on the facts of this case is not to set aside the orders.

Factual Background

11 Between 2012 and 2013, the Bank provided the First Defendant in the Vishal Claim ("Vishal") (who is also the Fourth Defendant in the Passat Claim) with two facilities, the first for €10,000,000 and the second for €2,000,000 ("the First Vishal Facility" and "the Second Vishal Facility" respectively and, together, "the Vishal Facilities"). The Vishal Claim relates to sums outstanding under both Vishal Facilities.

12 The First Vishal Facility is expressly governed by English law and gives the English courts jurisdiction to settle any dispute arising out of or in connection with its subject matter.

13 The Second Vishal Facility is expressly governed by English law and gives the English courts jurisdiction (albeit non-exclusive) to settle any dispute arising out of or in connection with its subject matter.

14 In the circumstances, the Applicants (unsurprisingly) do not dispute that the Bank was entitled to serve the Vishal Claim on Vishal in Mauritius without the Court's permission.

15 In 2014, the Bank provided the First Defendant in the Passat Claim ("Passat") with an overdraft facility of up to €2,500,000 ("the Passat Facility"). The Passat Claim relates to sums outstanding under the Passat Facility.

16 The Passat Facility is expressly governed by English law and gives the courts of England exclusive jurisdiction to settle any dispute arising out of or in connection with its subject matter. Therefore, as with Vishal, there was no need for the Bank to obtain the Court's permission to serve Passat in Germany. Passat has not been served.

17 Vishal's obligations to the Bank were supported by guarantees and/or indemnities provided by Mr Agrawal and SIL. These underlie the Vishal Claim.

18 Passat's obligations to the Bank were supported by guarantees and/or indemnities provided by Mr Agrawal, Mr Gupta and Vishal ("the Passat Guarantees"). These underlie the Passat Claim.

The Vishal Guarantees

19 In the Vishal Claim, the Bank relies on the following guarantees and/or indemnities (the terms of which are paraphrased):

i. In connection with the First Vishal Facility:

a) An agreement dated 4 May 2012 according to which Mr Agrawal agreed to guarantee and/or indemnify all of Vishal's liabilities to the Bank as a primary debtor up to a maximum of €10,000,000 ("the First Agrawal Guarantee"). Clause 18 (b) of that agreement states: "*The Guarantor irrevocably submits to the non-exclusive jurisdiction of the High Court of Justice in England but this Guarantee may be enforced in any court of competent jurisdiction.*"

b) An agreement dated 4 May 2012 according to which SIL agreed to provide a guarantee and/or indemnity to the Bank in materially identical terms to the First Agrawal Guarantee ("the First SIL Guarantee"). Clause 19(b) of that agreement states: "*The Guarantor irrevocably submits to the non-exclusive jurisdiction of the High Court of Justice in England but this Guarantee may be enforced in any court of competent jurisdiction.*"

c) The Applicants (rightly) accept that the Bank was entitled to serve its claims under the First Vishal Guarantees in India, although the point is made that service must still be validly effected. In terms of value, the claims under the First Vishal Guarantees amount to more than 80% of the total sum claimed by the Bank in the Vishal Claim.

ii. In connection with the second Vishal Facility:

a) An agreement dated 28 January 2013 according to which Mr Agrawal agreed to provide a guarantee in respect of Vishal's liabilities under the Second Facility as well as any further losses and damages ("the Second Agrawal Guarantee").

b) An agreement dated 28 January 2013 according to which SIL agreed to provide a guarantee to the Bank in materially identical terms to the Second Agrawal Guarantee ("the Second SIL Guarantee").

c) The Second Agrawal Guarantee in Vishal and Second SIL Guarantee do not have express governing law or jurisdiction clauses. Both guarantees however refer to provisions of the [Indian] Contract Act, 1872. For example, clause 4 "*….The Guarantor(s) agree(s)…they are debtors jointly…and accordingly he/she/they shall not as such be entitled to claim the benefit of legal consequences of any variation in terms of the contract and to any of the rights conferred on a Guarantor by Sections 133,134,135,139 and 141 of the Indian Contract Act*".

The Passat Guarantees

20 In the Passat Claim, the Bank seeks to rely on three guarantees and/or indemnities:

i. An agreement dated 25 October 2013 according to which Mr Agrawal agreed to provide a guarantee in respect of all of Passat's liabilities to the Bank up to a maximum of €4,500,000 and to indemnify the Bank against any further losses and damages ("the Third Agrawal Guarantee"). Clause 42 says "*This Agreement of Guarantee shall be governed by and construed in accordance with Indian law*".

ii. An agreement dated 25 October 2013 according to which Mr Gupta agreed to provide a guarantee and/or indemnity to the Bank in materially identical terms to the Third Agrawal Guarantee ("the Gupta Guarantee"). This is not relevant for current purposes.

iii. An agreement dated 25 October 2013 according to which Vishal agreed to provide a guarantee in respect of all Passat's obligations under the Passat Facility in materially identical terms to the Third Agrawal Guarantee ("the Vishal Guarantee").

21 The Third Agrawal Guarantee and the Gupta Guarantee are both expressly governed by Indian law. However, there is no express choice of jurisdiction. The Vishal Guarantee is expressly governed by the laws of Mauritius and gives the courts of Mauritius non-exclusive jurisdiction.

22 Therefore, as with the Second Vishal Guarantees, the Bank sought (and obtained) permission from the Court to serve its claims under the Passat Guarantees out of the jurisdiction.

23 By without notice applications dated 15 September 2017 in Vishal and dated 27 September 2017 in Passat, the Bank sought permission to serve Claim Form and ancillary documents on Mr Agrawal and Mr Gupta out of the jurisdiction in India. Permission was only needed for the second guarantees in Vishal and for the guarantees in Passat. There were granted by the Leggatt J orders dated 25 and 27 September 2017 in Vishal and Passat respectively.

24 Service on the Second and Third Defendants could not be effected within the time set out in the Leggatt J orders (two attempts being unsuccessfully made in January 2018) and applications dated 14 March 2018 were made by the Bank to extend time for service. These were granted on 15 March 2018 by Popplewell J and Butcher J in Vishal and Passat respectively.

25 On 16 August 2018, the Bank issued proceedings *inter alia* seeking corporate insolvency under the [Indian] Insolvency and Bankruptcy Code 2016 against SIL in before the National Company Law Tribunal, New Delhi, India (Indian NCLT proceedings). The proceedings were brought by the Bank under the First and Second SIL Guarantees and hence under the same facility documents that are in issue in the current proceedings.

26 On 22 October 2018, by third without notice applications before Picken J, the Bank sought, amongst other things, an order for service of Claim Form on Mr Agrawal by alternate means and an extension of time for service of Claim Form to 30 April 2019 in both the Vishal and Passat claims. Those orders were granted and the service documents were resubmitted to the FPS for Hague service.

27 There are two FPS reports on subsequent Hague Convention service in India. The Passat one is blank. The Vishal FPS report on service suggests Mr Parmod Kumar, an employee of Mr Agrawal, was served on 4 April 2019 and Mr Kadam, an employee of SIL, was served on 5 January 2018.

The focus of the Applications

28 In the Vishal Claim, Mr Agrawal and SIL ask that the following orders be set aside:

i. The order dated 25 September 2017 pursuant to which Leggatt J granted the Bank permission to serve the Vishal Claim on Mr Agrawal and SIL at their addresses in India.

ii. The order dated 15 March 2018 pursuant to which Popplewell J extended the deadline for the Bank to serve the Vishal Claim by 7 months ("the Popplewell Order").

iii. The order dated 24 October 2018 pursuant to which Picken J granted the Bank permission to serve the Vishal Claim on Mr Agrawal by alternative means and

extended the deadline for the Bank to serve the Vishal Claim on Mr Agrawal (but not SIL, which had already been served) by a further 6 months.

29 In the Passat Claim, Mr Agrawal asks that the following orders be set aside:

i. The order dated 4 October 2017 pursuant to which Leggatt J granted the Bank permission to serve the Passat Claim on Mr Agrawal, Mr Gupta and Vishal, all of whom are located abroad.

ii. The order dated 15 March 2018 pursuant to which Butcher J extended the deadline for the Bank to serve the Passat Claim ("the Butcher Order").

iii. The order dated 25 October 2018 pursuant to which Picken J granted the Bank permission to serve the Passat Claim on Mr Agrawal by alternative means.

30 All of these orders relate to service of the Claims ("the Service Orders"). Together, the orders of Leggatt J (service out) are referred to as "the Leggatt Orders". Together, the orders of Picken J (alternative means) are referred to as "the Picken Orders".

31 The Applicants contend that the Service Orders (together with the Claim Forms and Particulars of Claim) should be set aside on the basis that:

i. When applying for the Service Orders, the Bank breached its duty of full and frank disclosure:

a) In the Vishal claim:

i. The Bank failed to return to Court after the Leggatt J and Popplewell J orders and failed to inform Picken J that two months before Picken J heard an application to serve Mr Agrawal by alternate means, the Bank had initiated proceedings against SIL on the same documents on the same cause of action in parallel in India.

ii. The Bank also failed to disclose a number of other matters to the court including Mr Agrawal's group companies' efforts to transfer money to the Bank, the Bank's refusal to cooperate in the sale of the MV Delphin, that PNB India, acting as the Bank's agent, had imposed a lien over fixed deposits of Mr Agrawal's group companies.

iii. In the Passat claim the Bank failed to inform the Leggatt J, Butcher J and Picken J Mr Agrawal's group companies' had made serious efforts to transfer money to the Bank but were prevented due to India's foreign exchange control regulations from doing so, that PNB India, acting as the Bank's agent, had imposed a lien over fixed deposits of Mr Agrawal's group companies and other matters more fully set out below.

b) On the authorities, the Court should not have granted the Bank permission to serve Mr Agrawal by alternative means.

32 The Applicants also seek to have the Service Orders set aside on the basis that

i. CPR 6.37(1)(a) and 6.37(2) require the establishment of a reasonable prospect of success and a real issue which is reasonable for the court to try before permission to serve outside the jurisdiction can be granted.

ii. In the Vishal claim, the claim against Mr Agrawal lacks both because his guarantees are invalid and/or were unwound/cancelled by the Reserve Bank of India (RBI) by letter dated 11 December 2015, which said "… *you are advised as under (i) Unwind/cancel the personal guarantee issued by resident individual [Mr] Pradeep Agrawal and inform the date of unwinding/cancellation to our office…*" and/or their unwinding/cancellation was accepted by PNB India in exchange for a lien that it established against fixed deposits belonging to his group companies and/or the Bank accepted that RBI approval remains to be received.

iii. In the Passat claim the claim on Mr Agrawal's contract does not satisfy the jurisdictional requirements because the Agrawal Guarantee in Passat is governed by Indian law, was executed in India, was witnessed by two Indian nationals and stamped by an Indian advocate. Hearing the matter in India would not need expert Indian law evidence nor a translator for Mr Agrawal. India is therefore the *forum conveniens*. Further or alternately, the Agrawal Guarantee in Passat was executed in violation of the Indian Foreign Exchange Management Act 1999 and just as in the Vishal case, the RBI is unlikely to approve it. These arguments were initially only made in the Passat claim but have been extended at this hearing to cover the Vishal claim also.

33 In relation to the Vishal Claim, Mr Agrawal and SIL also apply for an anti-suit injunction restraining insolvency proceedings before the Indian National Company Law Tribunal ("NCLT") initiated by the Bank in relation to SIL.

34 There are thus challenges both to the original grant of the orders and to the basis on which they were presented. I will deal first as was done in argument with the original grant of the orders and the three requirements of such a grant.

Gateway, merits and *forum conveniens*
Gateways

35 There are two points to bear in mind here. The first is that the Gateway has to be established to the "better of the argument" standard as set out by Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 at [28] per Lord Sumption and endorsed by the Supreme Court in the *Goldman Sachs* case. That is because it is important that a "*substantial and not merely casual or adventitious link between the cause of action and England*".

36 The second is that only one gateway needs to be cleared. What we have in play here are Gateway 3 – necessary and proper, Gateway 6 – claim in respect of a contact and Gateway 7 – breach within the jurisdiction. Aim has been taken at Gateway 3, but no aim was formally taken at Gateway 6 or 7. It effectively follows that there is no issue here and that the first hurdle is cleared.

37 To the extent that there is – and the reference to *Global 5000 v Wadhaven* [2012] EWCA Civ 13, which concerned that gateway, rather suggested that there was – I have reconsidered the gateway issue and am satisfied that at least one gateway can be made out, the easiest being Gateway 7.

38 On this it was argued for the Applicants that correspondence shows that breach, if any, would take place in India at the time payments would have to be reported to PNB India before it could be transmitted onwards to London. That is because it was directed to go through PNB India. The Applicants submitted that the authorised dealer was the first point of contact, and that PNB acted in the transaction on behalf of the Claimant. Mr Agrawal

says he was assured by PNB India that they had knowledge to obtain permissions. It follows, the Applicants say that if a breached occurred, this would have been in India not England because of the obligation between Mr Agrawal and PNB India as the agent. However ingenious as this argument was, I am entirely persuaded that it is misconceived.

39 Each guarantee does not specify where to be performed, however the Bank, to whom Mr Agrawal owes the obligation to pay, is domiciled in England. There is no presence in India. Funds borrowed from that bank in Euros are borrowed from and owed to entities outside India. This applies to both Vishal and Passat. All the relevant facilities were English law. Similarly Passat requires payment in England: the Bank is a UK entity and payments under the Passat Facility were required to be made into its current account at the Bank as can be seen from Clause 9.1 and definitions. The suggestion that the Bank's parent company PNB India has branches all over India is irrelevant. It was the Bank that was entitled to be repaid and not PNB India.

40 Further, on the Applicants' own case, they attempted to make a payment on behalf of Passat in England. This is consistent with the general rule that, where a guarantee does not specify a place of performance, the guarantor's obligation will be the same as the place for performance of the principal debtor: *Commercial Marine Piling LTD v Pierse Contracting Ltd* [2009] EWCH 2241 (TCC) [38].

41 The Third Agrawal guarantee is governed by Indian law but there is no evidence of Indian law as to the place of payment – and I am therefore entitled to assume that it is the same as English law. The place for payment under the Third Agrawal guarantee must therefore also have been England.

42 As for the submission that PNB India was the agent of the Bank, there is one notable problem with this: the Applicants own expert evidence doesn't adopt that approach indicating rather that PNB India's role to guide the Applicants. The Bank in fact suggests that PNB India acted as an agent of the Defendants and not the Claimants. This is consistent with the Applicants evidence noted above. It is also consistent with some of the correspondence where the Bank requested the Defendants to ask PNB India to get clearance on something.

43 Overall I am quite satisfied that the Claimants has much the better of the argument on this gateway. That therefore is the end of the matter as regards this issue.

44 However for completeness, on Gateway 6: It was submitted for the Bank that a claim may be "*in respect of*" a contract for the purposes of paragraph 3.1(6) even if the contract in question is not between the intended claimant and defendant: *Greene Wood & McLean LLP v Templeton Insurance LTD* [2009] EWCA Civ 65: *Cecil v Bayat* [2010] EWHC 641 (Comm) (Hamblen J) at [43] – [49]. This is a somewhat controversial area (as the judgments in *Global 5000* to which I was referred and *Alliance Bank v Aquanta* [2012] EWCA Civ 1588 to which I was not referred, make clear). The issue is plainly one which raises strong feelings and as Court of Appeal in *Aquanta* said, the court will be slow to find the gateway is met.

45 For current purposes all I need to say is that despite the reservations which one can see *obiter* in both *Global 5000* and *Aquanta* as to the application to the two open contact situation, the Court of Appeal has left the door technically open and the gateway has been applied on occasion to two contract cases. What is necessary is that one only does so with a great degree of caution. There is now a tension between the approach of Hamblen J in *Cecil v Bayat* and the plain reservations on the later cases. In this connection, I should probably

have been minded, had this been the only ground relied on, to reach the conclusion that those more recent authorities suggest that the answer should be in the negative. But this is an issue which should be considered properly in a case where is does necessarily arise.

46 On necessary and proper party the dispute must of course be between the claimant and anchor defendant and not the claimant and this defendant, contrary to the approach taken by Applicants – otherwise the jurisdiction becomes circular. Similarly, as regards service this must be on the anchor defendant.

47 On this head it seems to me that there is a question whether one can say that there is a serious issue to be tried where there is no dispute between the claimant and anchor defendant. However, while that may be an issue in some cases at the "service out" stage, of course in this case that lack of dispute was not known of at the "service out" stage and the later disappearance of a dispute cannot avail the Applicants.

48 Subject to the points made on service, to which I will come, Vishal has acknowledged service and submitted. Mr Gupta was served in a similar way to the other defendants. Neither had challenged this Court's jurisdiction. Either would therefore be an appropriate anchor defendant. I accept that there is (or was at the time of service out) a real issue which it is reasonable for the Court to try against them, as they both signed guarantees of Passat's debt and have not paid – Mr Agrawal does not dispute this.

49 Mr Agrawal has also suggested that Mr Gupta and Vishal cannot be anchor defendants as Mr Gupta is domiciled in India and Vishal in Mauritius. This is wrong as a matter of law. A defendant outside the jurisdiction served with permission (as they were) can be an anchor: *Alliance Bank JSD v Aquanta Corp* [2012] EWCA Civ 1588 at [79].

50 More emphasis was placed on whether Mr Agrawal could properly be said to be necessary or proper given the different proper laws. However, the necessity/propriety here comes out of the fact that there are multiple guarantees, and liability overlaps. The extent of each defendant's liability in the Passat claim is intertwined. There may be questions of contribution *inter se.* The purpose of paragraph 3.1(3) is specifically designed to deal with circumstances, such as these, in which claims are interdependent, without necessarily being the same. If one tests it by asking: if he was in the jurisdiction, would Mr Agrawal be a proper party, the answer would be yes. I would therefore probably consider that this hurdle was met.

51 In the Vishal claim, this point was first raised before me, and the argument was thus too late and not in evidence. But in any event it would seem that the hurdle would be met. An important distinction in Vishal and Passat was that there were two sets of claims, in relation to the first and second guarantees. The First Guarantees have English law and jurisdiction, so there is no need for permission. In relation to necessary and proper – Vishal is the primary borrower therefore no permission is needed for that. It makes sense for both to be heard together.

52 Overall therefore I am satisfied that the first hurdle is cleared on at least one basis.

Serious issue to be tried

53 We are looking here at a low merits threshold, the summary judgment test, as has been explained in *Altimo* and *VTB.* That means what has to be established is a real as opposed to fanciful prospect of success.

54 The issue really relates to the alleged invalidity of the guarantees – if the guarantees are invalid there is no claim under them and this would be a good defence.

55 This is a matter of Indian law evidence. However what emerges from this evidence is that there is a dispute. It appears to me to be a real dispute. Mr Thacker says they were invalid when executed and continue to remain invalid until the RBI grants permission (known as post facto approval). Mr Setalvad says they were valid at the time they were signed and post facto approval can be obtained.

56 For all Ms Vora's submissions that the Claimants argument faces enormous difficulties given the fact of the problems transferring money to the Claimants, it appears to me on the material before me to be well arguable that the Bank is right on this point. It is not fanciful to say that the guarantees would be valid. It is very far from that. Furthermore, I am strongly of the view that the question could not even arise as regards the first Vishal guarantees which are governed by English law. I would also incline to the view that the point could not apply in relation to the second Vishal guarantees, essentially for the reasons outlined in the claimant's skeleton argument as to the implied proper law. While there is no express governing law clause, there would appear to be a strong argument that the second Vishal guarantees are governed by English law. Specifically:

i. The express purpose of the Second Vishal Guarantees was to guarantee Vishal's obligations under the Second Vishal Facility, which is expressly governed by English law. The obligations governed are English law obligations

ii. The Second Vishal Guarantees in effect provide that Mr Agrawal and SIL are liable jointly and severally with Vishal (i.e. under the English law facility).

iii. The Bank to whom the guarantees were given is domiciled in England. The place of payment for both primary debtor and guarantors is therefore England: *Robey & Co v The Snaefell Mining Co Ltd* (1887) 20 QBD 152

iv. Accordingly, the parties must have intended the rights and liabilities under the guarantees and those under the principal obligation to "match" in the absence of any contrary intention (see Dicey, Morris & Collins on Conflicts of Laws (15th ed) at 33-304).

57 Some reference was made, essentially by way of a back-up argument to the *Ralli Brothers* case. That is, of course, a case which establishes that the court will not uphold a contract which is illegal in the place of performance and it was submitted that the guarantees were for this reason illegal. In a sense, that is a "cart before the horse" argument because, as I have indicated, the question as to illegality is one which is very much capable of being disputed. Of course, the principle would offer a defence; but even were it not for the fact of the arguability of the question of Indian law illegality, it is plainly of no relevance here because the performance of the guarantees was required in England and so Indian law would not be relevant. Mr De Vecchi pointed out that there was indeed a contrasting situation in *Ralli Brothers* where payment was required in Barcelona and that was the place of performance and that is why there was an illegality in that case.

58 It is not the case of the Applicants that the guarantee was unlawful or illegal *per se*. It was possible to perform the guarantee in a legal way so there cannot possibly either be a *Foster v Driscoll* point; where you have the complementary principle that if somebody intends to do

something illegal it is caught and is not capable of being enforced. So, essentially, for those reasons, I form the view that the "serious issue to be tried" hurdle is surmounted.

Forum Conveniens

59 That brings us to *forum conveniens* and it is of course important that *forum conveniens* is also considered. Mr Agrawal contends that England is not the appropriate forum for a trial of the bank's claims relating to the Third Agrawal guarantee and, indeed, in relation to some of the other guarantees as well. His submission is that the Agrawal guarantee in Passat is governed by Indian law and there would need to be evidence on Indian law with cross-examination of experts. He says that the specific choice of law without a jurisdiction clause is a persuasive argument in favour of the action being brought in India. He says that there are only two connecting factors with England: the incorporation of the claimant; and the facility agreement being governed by English law and covered by a jurisdiction clause. He submits that the Agrawal guarantee in Passat was executed in India. The primary witnesses in relation to it are not resident in the UK. He points to the fact that he himself is an Indian citizen and a resident without any connection with English territorial jurisdiction. He does not carry on business here. He does not have a place of business here, or assets, or any form of presence. His mother tongue is Hindi and he points out that that will make it difficult for him to appear in the English Courts because he would need to do so through an interpreter. All in all, the submission was that the centre of gravity in this claim is therefore India, not England.

60 The Bank maintains that in all of the circumstances England is nonetheless clearly and distinctly the appropriate forum in which to determine Mr Agrawal's liability to the bank. Having carefully considered these submissions, I accept the Bank's submission. It is artificial in my judgment to try to divorce the claims when one deals with the practical question of forum. As is apparent from the rehearsal of the facts of this case, the two claims (Vishal and Passat) are entirely intertwined. The guarantees are complementary to the Passat facility. The Passat facility is governed by English law and disputes in relation to it must be determined in the English Courts.

61 The Vishal proceedings will in any event be pursued here because in relation to part of them jurisdiction has been established as of right. There is therefore no scenario in which all claims can be determined in India. To accede to the submission of *forum non conveniens* here would mean two sets of claims in relation to the substantive proceedings. That, of course, gives rise to a risk not just of multiplicity of proceedings but also of irreconcilable outcomes and that is something which this court always seeks to avoid. Nor is the Indian law issue one which gives me pause. This court is well used to dealing with issues of foreign law. There will also in any event be Indian law evidence here because of the other claims.

62 In Passat, the Bank has its concurrent claims against the other guarantors, Vishal and Mr Gupta, which will be determined in this jurisdiction in circumstances where both have been served and neither has challenged jurisdiction. That in itself would raise questions about the shape of proceedings and the appropriateness of two sets of proceedings. But it is added to in this case by the fact that the actual form of the guarantee signed by Mr Gupta which will therefore be considered in the proceedings here is materially identical to the Third Agrawal Guarantee; so if the claim against Mr Agrawal were to proceed in India there would be a risk of inconsistent judgments as to the particular form of guarantee.

63 The court has previously found that England is the appropriate forum in which to determine Mr Agrawal's liability under the First and Second Agrawal guarantees. There is a close factual relationship between the claims and it would be appropriate for all of the Bank's claims to be dealt with together.

64 There are, of course, extant proceedings in India but they are not proceedings in relation to these specific claims in relation to these specific contracts between these parties. The Delhi proceedings, of which more later, were commenced after the Passat claim by a third party and are effectively about a lien and security. The NCLT proceedings are in the nature of insolvency proceedings and they are only against SIL and not Mr Agrawal. Therefore, I consider that little weight, though some weight, needs to be given to them.

65 I also note that in the *Srinivasan* case (with which I shall deal more fully in due course) Chancellor Vos disagreed with Chief Master Marsh on the question of *forum conveniens* on the basis that he gave too much weight to proceedings elsewhere, noting that some parallel proceedings can be necessary, for example where enforcement against real property is required. Overall, bearing in mind all of these factors, I am satisfied that the centre of gravity of the dispute viewed overall and in the light of the lending relationship is in London.

Non-disclosures

66 I then pass to the question of non-disclosures. In relation to the law, there is obviously much which can be said about the obligation to give full and frank disclosure. I was referred in particular by Ms Vora to *OJSC ANK Yugraneft* [2008] EWHC 2614 (Ch) and, in particular, the passage which runs from paragraphs 68 to 70 in that judgment which sets out a number of the very well-known quotations on the subject, including Bingham J, as he then was, in *Siporex*, Mummery LJ in *Memory Corporation v Sidhu* and Ralph Gibson LJ in *Brink's Mat v Elcombe*.

67 I was not referred to, but I have also in mind, some of the other authorities in the area such as *PJSC Commercial Bank v Kolomoisky* [2019] EWCA Civ 1708, which has a useful passage at paragraphs 250 to 253, and the well-known passage from *Knauf UK v British Gypsum* [2001] EWCA Civ 1570 at 65.

68 The Bank referred me in particular to the authorities dealing with the question of the relevance of any non-disclosure to the impact on the judge's decision-making, such as the judgment of Toulson J in the *MRG* case, and accepted that there was a continuing duty to mention something at a second hearing if anything changed that was material, though a query remained in the submissions over whether there was a continuing duty if there was no hearing. I am proceeding on the basis that I should assume that there is such a duty. I do not actually think it makes any difference in this case.

69 Before I proceed to consider the non-disclosure arguments one by one, I should say a word about the judgment in the case of *Punjab National Bank (International) Ltd v Srinivasan & Ors*. The principal one to which I will refer is [2019] EWHC 3495 (Ch) but that itself was an appeal from the decision of Chief Master Marsh at [2019] EWHC 89 (Ch).

70 That was a case where the same claimant as in these proceedings was criticised for concealing from the English Courts the existence of Indian proceedings and US between it and some of the defendants. Permission to serve outside jurisdiction was set aside on this ground. Chief Master held at [88] that there was plainly a duty not just to bring the existence

of a claim against the defendants to the attention of the Court but also to explain its scope and how it interrelated with the claim before the English Court.

71 Vos CHC held at [71]

> "In my judgment, PNB's failure to alert the Chief Master to the… Chennai proceedings was a serious default. It was deliberate in that PNB and its solicitors were fully aware of those proceedings. The relevance of the foreign proceedings must have been obvious to any lawyer. The English proceedings were in large part duplicative of the… Chennai proceedings. It is of little importance that the duplication might have been justified. PNB had a duty to tell the court the full story and it failed to do so. The Chief Master was absolutely right to conclude that the normal consequence of such a default was that the orders made should be set aside…".

72 The submission was made that I should give great weight to *Srinivasan* because it was essentially a parallel case. Ms Vora for the Applicants submitted that there were parallels in, for example, the finding of duplicative proceedings there in the US and Chennai, in the finding of serious breach in a failure to disclose something which was known about which was characterised as having culpability at a high level, the fact that there were issues there as to the serious issue to be tried and the fact that there was a conclusion at least before Chief Master Marsh that it was not *forum conveniens* in the circumstances of there being parallel proceedings and, finally, that if there was a conclusion that there had been a breach of the obligation of full and frank disclosure, the conclusion of the Chancellor was that the service should not be reinstated.

73 Plainly, there are some parallels between the cases, quite apart from the coincidence of claimant, but I am not persuaded that there is such a resemblance between this case and that that it should take me out of my usual course in considering the issues on this case entirely on their own merits and not by reference to the facts of *Srinivasan*.

74 That was a case where there were significantly different facts so far as the merits were concerned. The key cause of action which gave rise to the anchor claim was a cause of action in misrepresentation and deceit. This was a very significant point because that is the kind of claim where merits can at the very early stage be very close to the line. On the facts it was therefore about as far from a claim on a guarantee, the existence of which has never been disputed, as one could well find.

75 There was a question about duplicative proceedings. However, there were again significantly different facts. For one thing, the timing was different. The US proceedings in that case had been issued before the application to serve out. The Indian proceedings were debt recovery proceedings in the Debt Recovery Tribunal seeking enforcement and the US proceedings were proceedings actually on the guarantees to recover the debt by way of enforcement on property. So while both sets of proceedings were enforcement proceedings they were also both in a sense proceedings to recover the debt in question, and hence they were duplicative in a very real sense. Here there is a very real difference both in the nature and merits of the claim to which I have already averted, the nature of the other proceedings in the timeframe and the timeline. These latter issues I will deal with further as we go through the live issues.

76 I therefore start with the complaint as to non-disclosure of the NCLT proceedings. This was perhaps the main area of target in the submissions, not least because of the authorities such

as *Masri v Consolidated Contractors International Company* [2011] EWHC 1780 (Comm) which indicate that the existence of overlapping proceedings in a foreign jurisdiction between the same or related parties (whether pending or prospective) is likely to be a particularly relevant matter as it goes to the issue as to whether England is an appropriate forum.

77 For all this I am not persuaded that the NCLT proceedings fell to be disclosed. The first reason is that those were proceedings which were not on foot at the time of service out. The timeline is: September 2017 for service out, January 2018 for actual service of SIL and 15 March 2018 and 22 October 2018 for the applications extending time to serve. In relation to the last of these it should be noted that this was done at a point when in fact SIL had (subject to the arguments below) been served, but there was no knowledge that SIL had been served.

78 But all but that last of these dates were well before the NCLT proceedings incepted. It is not until 16 August 2018 that the NCLT proceedings are instituted and those proceedings concern SIL only. Therefore, as a matter of analysis, the question of these proceedings only goes to the last order of Picken J to extend time to serve, and could be relevant only if I were to conclude that there had been no service.

79 One then has to look at whether the issue in question could be relevant to the question which Picken J had to look at, namely the extension of time. On that, I form the view that it could not. But, in any event, I look at it on its merits and, assuming that there were still live an obligation to disclose at this point, this is obviously the kind of point which this court would look at very closely because duplicative proceedings are a matter of very real concern.

80 What one would be looking at in the context of service out is two aspects, the first relating to the merits, do these proceedings affect the arguability of the claim, and the second relates to *forum conveniens*. In relation to both, obviously, the NCLT proceedings could not affect the arguability of the claim and, as regards *forum conveniens*, I am again not persuaded that it would have any real impact because it is not like the *Srinivasan* case where there were properly duplicative proceedings.

81 The second point which has been relied on is the sale of the MV Delphin. The Applicants say that the Court should have been told that Vishal had made three attempts to sell the MV Delphin in December 2015, March 2016 and November 2018 and that it should also have disclosed that the bank had failed to consent to the first two proposed sales which the Applicants say was in breach of an implied obligation not to unreasonably withhold consent and thereby effectively block the possibility of Vishal reducing its debt.

82 I am unpersuaded that there is anything in this which could count as a breach. In particular, the point is neither relevant nor material. It is not a point which could go to "serious issue" because it could not give rise to a defence. The only relevance of these allegations to the claims against the Applicants would be if they afforded Vishal itself a defence, which they did not. These allegations would rather go to paying down the quantum owing and not to a full defence. In any event, it is dubious whether they, even if they could go to full amount, could have any impact because the guarantees incorporate "no set-off clauses". I note that the fact that this argument does not give rise to a defence can be seen in the reasoned judgment of Butcher J dated 12 October 2018, where he held that allegations about the first two attempts to sell the Delphin gave rise to no defence on Vishal's part with any real prospect of success. Consequently, this was not a material matter to draw to the court's attention. It would not have had a bearing on the court's conclusion that there was a serious

issue to be tried as against Vishal or either of Mr Agrawal or SIL. It is not relevant to *forum conveniens* or any of the other questions which the court had to consider.

83 The next issue is that of lien. Here the Applicants rely on the fact that the claimant did not disclose that its 100 per cent parent company, PNB India, had imposed a lien on fixed deposits belonging to the Second Defendant's group associated company, Superior Drinks, and two others and that there had then been proceedings initiated before the Delhi High Court. In this regard the Applicants also rely on some of the evidence served on behalf of the claimants where Mr Setalvad says "*in the present case PNB India has marked lien on FDRs with Superior Drinks Limited on behalf of its wholly owned subsidiary outside India i.e PNBIL. I am not sure, however, as to the reasoning adopted by PNB India for this action. Suffice to say that any orders passed by the Delhi High Court in respect of the said lien is likely to have an impact on the claim initiated by PNBIL before the English Court*". That therefore is the background to this point.

84 I entirely accept that if this point offered a legal defence or even a 100 per cent defence to quantum this would be a matter which would be required to be disclosed. However, the key point here is that the lien does not offer anything like a legal defence. It is not in fact suggested that it does. To say that it offered a legal defence would be inconsistent with the defence being advanced in those proceedings in India. An argument that it did offer some form of defence was dismissed without difficulty on a summary basis by Butcher J in the judgment to which I have already alluded. So much for defence to liability.

85 Nor does it offer a full defence to quantum. It is common ground that the sums in question would not have been sufficient. Those sums are less than the principal owing under the first Vishal facility, which was €10 million. What was said that was that if you added together the MV Delphin and this point, there would be essentially a full quantum answer and so the two should be considered in the round, and should in the round have been disclosed. Again, I refer back to the question as to no set-off but, in any event, in the light of the position which I have already reached on the MV Delphin point, this question of adding the two points together cannot assist in making one good point. This is the more so when what one is looking at is an obligation to make full and frank disclosure.

86 The other significant issue here is that in any event the lien would only give rise to security, rather than even affecting quantum, until the cause of action were completed; and the fact that there is security would therefore not be material in this context. Now, obviously, that would be different if this were a freezing injunction that we were considering but, in the context of service out, the focus has to be on whether there is a defence and so the question of relevance of security has a different status. It is, I accept, telling that it has not been suggested that any other security held should have been disclosed; so all this point does is to raise a question over the amount of the ultimate recovery. As such, it is a matter for later in the proceedings. It is not a question which is referable to the merits argument on service out.

87 The real focus of the complaint appears to be that the claimant got its parent to impose the lien and, essentially, that was a terribly unfair thing to do. But that is not an argument which has relevance to the points which are in issue here. It is also an argument which has all sorts of problems. It is an argument which would involve piercing the corporate veil - for which there seems to be no legal justification. It also depends on an entirely unevidenced assertion as to the claimant's connection to what on its face, based on the material that I have seen, looks more like an action regarding the associated company's own relationship and trading relationship with the defendants.

88 Further, the original proceedings, and those which were live at all the relevant points in the timeline for these purposes, were against PNB India - which is a different party. Subject to there being any mileage in the point in relation to agency, with which I have already dealt, that effectively means that there was no commonality of parties. There were no common parties until January of this year. I am therefore satisfied that there was no breach of the obligation as regards the lien.

89 That then takes us on to the question of the relevance of the Delhi proceedings themselves. Here I conclude, as I have indicated briefly already, they are not duplicative. The point which is made is that they are likely to have an impact. That is a point, as I said, made on the basis of a line in the Claimant's expert evidence. No specific basis for that assertion has been made on behalf of the Defendants until prompted in reply and certainly there is no evidence from the Defendants on this point. Digging down, it is an argument which appears to have been based on commonality of parties, that commonality which has now come about but which would not have been the case at the time. The way it was put in argument is that the court may now be able to make decisions regarding the guarantee's validity; but the position now cannot assist for the question of non-disclosure at the point of making the application for service out. The reality is that if there is an impact from the Delhi proceedings it really goes back to exactly the same point, the quantum point, which does not assist because it only goes to potentially, at some point, reduce the amount which might be owing.

90 As to *forum conveniens*, the duplicative nature of the proceedings argument comes into play here but it cannot impact the question of *forum conveniens* because (again) there is no true duplication. The question of liability has to occur here and that was the case when the application for service out was made. There might have been a slightly different balance had there been true commonality of parties at the time but, based on the parties as they were at the time the application was made, there could be no question as to liability having to occur here.

91 We then come to the question of the alleged RBI and FEMA violations in the context of non-disclosure. There were a number of aspects where this was relied on. The first was in relation to what was sometimes called genuine attempts to send or difficulties of sending. In relation to that point, while I entirely appreciate the way that this appears to the Defendant, the fact that there may have been attempts to send funds and that there were difficulties sending does not make that point relevant or material to any of the relevant issues for the purposes of the application for permission to serve out. The issue is, as Mr De Vecchi submitted, one which essentially has to be taken up with PNB India in its role as authorised dealer in relation to the Second and Third Defendants. The correspondence does not suggest an agency relationship with the Bank. It rather suggests, as I have already noted, the advisory relationship of an authorised dealer assisting the Second and Third Defendants. That again is reinforced by the letter to which I have already referred where the Defendants are being asked to take things up with PNB India.

92 So far as the RBI direction is concerned, that is a matter which could only be binding on PNB India. There is no evidence that it is binding on anybody else other than an entity which is regulated by RBI and, therefore, I see no basis for an argument that it would be relevant to the merits of this case such that it ought to have been disclosed.

93 Neither of these points seem to me - and Ms Vora has not been able to make clear to me otherwise - to afford any form of defence. There are in this case a number of guarantees,

and some of them are English law guarantees. All of the guarantees are ones which, as a matter of law, either do or must be assumed to have an obligation to pay in England. The issues as to the difficulty of sending from India or the RBI direction cannot affect the obligations under those guarantees.

94 The most substantive point is the question about whether there should have been disclosure of the argument that the guarantees were invalid because of FEMA. However, I am still not persuaded that there was a breach of the obligation of full and frank disclosure, bearing in mind the merits hurdle that we are talking about in this context. At this point the bank was not in the position I am in now. The issue had been raised by Mr Agrawal in correspondence. It was not supported by any detail and it was against a background where he could have applied for permission from RBI and it was not clear why he had not done so. One needs to look at the position of the person making the application. Although the obligation of full and frank disclosure is a serious one which the courts expect to be strictly observed, one must also bear in mind the dangers of hindsight and the dangers of requiring too much. One must look at the situation that the person making the application was in and the obligation is to some extent a sliding scale rather than absolute. So there is authority that one should take into account such factors as how long they have had to make the application and so forth.

95 In this case, what could the Claimants have done? At best they could have said that there had been an assertion of a defence which was not understood. That is not going to be something which is going to affect - even to the extent of possibly affect - the reaching of the hurdle. One sees that, for example, in the authorities to which Mr De Vecchi drew my attention such as *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm) *and The Electric Furnace Company v Selas Corporation of America* [1987] RPC 23.

96 This was a case where the Applicants could go no further than saying that somebody had asserted something which might amount to an argument. That is not a matter which it seems to me is material to be disclosed against the background of the very low merits hurdle which had to be met. I do not accept, for the avoidance of doubt, that it was incumbent upon the claimants on the back of the broad assertion by Mr Agrawal in correspondence to go out and get expert evidence on Indian law in order to comply with the obligation of full and frank disclosure. I note also that any defence, and hence any obligation would, for the reasons I have given above, have pertained only to the Third Agarwal guarantee.

97 That then brings me to the question of the missing pages from the guarantee. It is pointed out by the Applicants that the copy of the Third Agrawal Guarantee that was disclosed is missing some lines. It is said that the Bank should have made this clear. I do not accept that this is a matter which should have been disclosed. This is a minor matter which has no impact on whether or not there is a serious issue to be tried in relation to the claim. It was not at all suggested that the missing lines in some way invalidated or affected the fact of the existence of the guarantee. The relevant question really was: is there a guarantee which on its face is valid? The particular pages are not needed for that. There is no suggestion even now that there was something within the guarantee itself which would give rise to a relevant defence. Therefore, I am completely untroubled by this as a suggested non-disclosure.

98 For completeness, I will just consider the position had I been persuaded, for example, that there had been a non-disclosure in relation to the FEMA point. In this event, I would in any event have upheld the service out. This is again, as I have already said, a very different case to *Srinivasan*. One can see in the judgment of the Chancellor at paragraph73 of that case the

factors which impelled his conclusion that the right thing to do in that case was not to uphold. Those factors included the very weak merits and the high culpability. That is the kind of balance which is in play.

99 In this case there is a very different balance. As I have made clear, I do not regard the merits here as marginal by reference to the relevant test. On the contrary, the relevant hurdle is cleared by some distance. Nor, if I were to find non-disclosure, would I find the full range of non-disclosures alleged or such culpability as there was in the *Srinivasan* case. If there were to be a case on breach it would be a case which related to the defence only and it would be on the basis that there was effectively some authority which suggests that, in general, defences should be disclosed regardless. On this basis there are authorities which take slightly different views as to the margins. The *Kolomoisky* case to which I have already referred makes clear that at the margin of materiality/non-materiality there are difficult questions, so on this basis the claimant would have fallen just the wrong side of the line. There would on this hypothesis have been non-disclosure but it would not be a highly culpable non-disclosure.

100 Also going into the equation at this point would be circumstances where there is no issue as to the existence of the guarantees. No defences other than the FEMA one has been suggested. The Applicants accept the funds advanced to Vishal and Passat have not been repaid. The only other point which has now been suggested - actually at the hearing today and without any evidence - was the question of limitation.

101 Therefore, I am confident that if there had been a non-disclosure, if the Court had had the full facts before it, permission to serve out of the jurisdiction would still have been given and the further orders that followed would still have been granted. Soo far as concerns the question of the "repeat offender" submission, as I said, I do not think the case of *Srinivasan* is sufficiently close that it needs to impede the way I approach this case and the submission that there were effectively three offences seems to me to be in any event ill-founded. *Srinivasan* was one case with two judgments. *Boris Shipping* did not concern non-disclosure and I also bear in mind, in this hypothetical exercise of whether to uphold service regardless of non-disclosure, the factual situation in relation to where this action is and the fact that there could be a reissue of the claim form and a service of a new claim form and a consolidation of the two actions. Not upholding would simply lead to delay and increasing costs, which is contrary to the overriding objective.

Service

102 I come now to the question of service. There are issues as to whether the Applicants were served with both claims. That is, Mr Agrawal and SIL in the Vishal claim and Mr Agrawal in the Passat claim. What is required is for them to be served in accordance with the Hague Convention. Article 5 requires "*by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory*".

103 The Applicants' position is that while they accept that the service documents were delivered to the correct addresses for Mr Agrawal and SIL and received (in Vishal) by Mr Kumar and Kadam, service was not effected "*by a method prescribed by*" Indian law as, in essence, the documents were handed to individuals who were not authorised to accept service. So in relation to Mr Agrawal in Vishal there is a certificate of service on Mr Kumar. It is disputed that service on Mr Kumar is good because Mr Kumar is not Mr Agrawal's employee, does not reside with him and is not a relative. There is no certificate of service for Mr Kumar in Passat, though the evidence suggests that the documents were presented at the same time. In

relation to SIL, in the Vishal case there is a certificate of service on somebody called Kadam but Mr Agrawal says that Kadam is not his employee or agent but a security guard for the entire building with no actual authority to accept post, and service on a company has to be on an officer or by leaving at the registered address and also the time of service was not noted on the certificate.

104 The question of service is one of fact, including as to Indian law. So far as the Vishal claim is concerned, I am not minded to go behind the certificates issued by the Indian Ministry of Law and Justice which *prima facie* record service under Indian Law. One point which potentially slightly troubled me was in relation to service on SIL where there is some evidence suggesting that the service performed would fall outside of proper service as a matter of Indian law, however surprising I may find the interpretation of the provision for leaving at the registered office in the *Shalamar Ropeworks* case to which my attention was directed. However, what this issue points up is the question of how one treats the certificate. On the one hand, we have in relation to SIL and in relation to the Agrawal claim in Vishal a certificate from the Indian authorities confirming that service was undertaken in accordance with local law. On the other hand, certainly in relation to SIL, there is, as I have said, some evidence suggesting that if one analyses it strictly as a matter of Indian law that might not be quite proper service. Is the certificate from the Indian authorities therefore to be taken as effectively determinative?

105 It was not suggested by Mr De Vecchi that it should be taken as actually determinative and I would shy away from such an answer, certainly without further authority being cited on the point. However, I do consider that it must at least offer a very strong presumption. This is because of the position in relation to deemed service under Article 15 of the Hague Convention. That provision states:

> "Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -
>
> ….
>
> Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled -
>
> a) the document was transmitted by one of the methods provided for in this Convention,
>
> b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
>
> c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed."

106 We can thus see from an examination of Article 15 of the Convention that it offers protection when there is actually no certificate; so there is assumed service on the basis of

transmission and the lapse of time under Article 15. If that were the case and if a certificate did not at least offer a very strong presumption and very possibly an irrebuttable presumption, the Applicants' argument would mean that somebody would be in a better position if there were no certificate than in circumstances where there was a certificate. That is a proposition that would be extremely odd and extremely uncomfortable. I therefore reach the conclusion that the certificate in relation to the Vishal claims should be taken as offering a very strong presumption and that very strong presumption is not rebutted by anything relied upon by the Applicants.

107 I reach that conclusion still more comfortably in relation to the Vishal claims where there is quite a body of other material which is consistent with that; so it is common ground there that the Applicants received the service documents via the Indian process server. There was previously an admission by a person authorised to make a witness statement for Mr Agrawal that Mr Kumar is one of Mr Agrawal's employees and is thus apt to be Mr Agrawal's agent. Mr Kumar himself seems to have signed to confirm receipt on behalf of Mr Agrawal.

108 As for SIL, it is accepted that the service documents were in fact delivered to SIL's registered address and there is acceptance that service can be effected by leaving documents at the registered office in certain circumstances. Whoever Kadam was or was not, he was in a position to apply a company stamp of SIL and he did so, confirming receipt. That action indicates a degree of authority. Further, the authorities summarised by Mr Setalvad perhaps suggest that the Indian courts would not take an overly formalistic approach to service in cases where there is, as in this case, notice and actual receipt of the documents. Those indications suggest that the certificate should be taken at face value. Such a position is also consistent with other authorities here. I have found in another matter as a matter of English law that service on a receptionist for a building in which a company is based would be good service in circumstances where there was no indication that it was not the appropriate place to leave something for a particular company and where that address was also the registered office of the company.

109 That leaves the question of Passat, which is slightly more complex. There appears to have been some confusion within the foreign process section, because on the same day they both wrote to the bank indicating that the Indian authorities had been unsuccessful in serving the Passat claim and wrote to the bank informing it that the Vishal claim had been successful, enclosing documents which included a handwritten report from the process server which covered the Passat claim and stated that service had been effected on Mr Agrawal. So the position is that two reports were filed by the process server which can only relate to the Vishal and Passat claims respectively and both of those say that service was effected on the same day. It makes obvious sense that the Indian authority, in being requested to serve two sets of claim documents on the same person at the same address, would do so on the same occasion and there is no other sensible explanation as to why there are these two handwritten reports which come together. Therefore, as a matter of fact, I conclude that both claims were served on Mr Agrawal on the same occasion, that is 4 April 2019, and that the certificate in relation to the Passat claim was left blank in error. I conclude that the burden of proof in relation to service has been met and that service was validly effected.

110 However, if I were to be wrong about that, the question arises of whether there is an error of procedure which can be put right under CPR 3.10 or whether I should dispense with service. As regards CPR 3.10, the question to be asked is whether the attempts to serve the claim form were or were not ineffective so that it can be said that there was an "error of procedure" and in relation to that I was pointed to the direction of Popplewell J in *Integral v SCU-Finanz* [2014] EWHC 702 (Comm) where he said that the use of the rule is:

> "*particularly apposite for treating as valid a step whose whole function is to bring a document to the attention of the opposing party where such function has been fulfilled. It prevents a triumph of form over substance*".

111 I consider that it would be apposite in this case, but only to the extent that the problem was a failure of completion of the certificate or the other technical point which was made in relation to signature of a certificate. I am not persuaded that the other defects, if they were defects, that is any more substantive defects, would be apt to be cured under this provision; and so for the wider range of arguments I would consider that the argument would be likely to have to proceed under CPR 6.16.

112 Under that provision the test is exceptionality, as the Claimants accept, and the Claimants also accept that it is right that the court should be cautious to exercise its discretion under this provision, where it may mean that the claimant is able to circumvent a limitation period or flout procedural rules. However, this is not, so far as I have any evidence, a case where a limitation period is in issue and it is not a case of flouting procedural rules. If there has been any breach of procedural rules that has plainly been accidental during the course of the Hague service process, over which the claimant has had no control. In effect, neither of those issues arises in this case.

113 The Claimants rely on the case of *Lonestar Communications v Daniel Kaye and Others* [2019] EWHC 3008 (Comm) and, indeed, the Claimants say that this case is *a fortiori Lonestar*. That was a case where there was a single attempt to serve via Hague followed by a series of what the judge described as "heroic" attempts to notify the defendants via social media. The Claimants also relied on the case of *Olafsson v Gissurarson* [2008] EWCA Civ 152 where the problem was a consular official failing to sign a receipt.

114 Here we have a situation where three proper attempts have been made to serve Mr Agrawal and SIL under the Convention rules. From the time that documents were first submitted to the Foreign Process Section to the third attempt, when service was either successfully or (on this hypothesis) very nearly successfully made, on 4 April 2019, almost eighteen months elapsed. The documents, it is common ground, were ultimately received by the Applicants. Acknowledgements of service were duly filed. In those circumstances, there is a real flavour of opportunism about this argument. Furthermore, as in the *Lonestar* case, further efforts were made to make sure that the documents came to Mr Agrawal's attention; so TLT sent all the relevant documents to his then solicitors Zaiwalla & Co by hand and by email. Zaiwallas provided contact details and suggested they were authorised to accept service of documents in relation to the claims on Mr Agrawal's behalf.

115 In addition, bearing in mind Mr Agrawal's close association with all of the defendant companies, including as a director of Vishal, on whom both the claim forms and the related documents were served, it seems highly implausible that Mr Agrawal has not been long aware of the nature of the Bank's claims against him. Indeed it appears that in March 2019 a phone call was made on Mr Agrawal's behalf in relation to the claim, so this is a situation where notice has plainly been successful.

116 So, in sum: The documents have in fact come into the hands of the Defendants. There have been repeated efforts to serve by Hague. There have been repeated efforts to notify by other means. The Claimants could start all over again but, as I have already noted, that would lead to increased costs and delay and further attempts could take many months. The claims against other served Defendants would either be stalled or there would be a disjunction

between the claims. It was submitted that I should take into account in relation to trying to ascertain whether there is exceptionality the question of non-disclosure but *ex hypothesi* I have found that there is no such non-disclosure. There is no prejudice to the Applicants from the making of such an order. In all the circumstances, I am persuaded that this is a case where the hurdle of exceptionality has been met. It is similar to, and I agree it is possibly, in the light of repeated attempts to serve by Hague, *a fortiori Lonestar*.

Alternative service

117 Finally, in relation to service, the question of service by alternative means. This does not arise if service was good because service was actually made before the order in question was made. To the extent that it matters, the Applicants contended that the Bank breached its duty of full and frank disclosure in relation to the application to serve Mr Agrawal by alternative means. In particular, it is said that the claimant failed to draw Picken J's attention to the threshold test in relation to service by alternative means that was set out in *Marashen v Kenvett* [2018] 1 WLR 288 and which has now been endorsed by the Court of Appeal in *Société Générale v Goldas* and that, of course, is a test of exceptionality. It is said that as a result of the failure Picken J applied the wrong test.

118 I am not persuaded that the absence of citation of the *Marashen* case was in breach of the obligation of full and frank disclosure. It is not every point of law that needs drawing to the attention of the judge in every case. The current state of play on this area of law is one which is well documented routinely in the **White Book** and it is also not a subject on which any experienced judge of this court is likely to require the citation of authority, as it is a question which has to be considered very frequently.

119 But in any event I am satisfied that the test of exceptionality, as it applies in this context, was met. What is required under the rule is technically, under the text of the rule, "good reason" which has to be considered contextually and, as a result, that means that in the case of a Hague Convention country one is looking at exceptionality. As a result, one needs to look for something which goes beyond mere delay or increase of costs. That is well established. So mere delay will not be enough, delay plus something more is what is needed; and something more of a quite significant nature in order to qualify as exceptionality.

120 But on the facts, delay and something more of a quite significant nature is exactly what we find here, essentially for the reasons I have already given in relation to dispensing with service. You have a delay for each attempt to serve by judicial process estimated to be ten months. By October 2018, when Picken J was looking at this, it was clear that there had been two failed attempts to serve Mr Agrawal under the Hague Convention. There had been no report back from those executing the Hague process of what other attempts had been made to serve him and there had been considerable delay after the last attempt. Service had already been effected on the rest of the Defendants, including the companies associated with Mr Agrawal through proper channels. It was plain that Mr Agrawal was effectively aware of the proceedings because of the notification to the solicitors acting. There were attempts to bring the matter to his attention through other means than Hague service. The Bank were faced with the prospect of starting again with another ten-month delay and no particular prospect that any better outcome would result from Hague service.

121 So, in those circumstances, I would be entirely satisfied that the relevant exceptionality test for alternative service was met and would be met. But, of course, the objections to the decision to grant permission for service by alternative means are not relevant in

circumstances where Mr Agrawal has in fact been served in accordance with the Hague Convention.

Anti-Suit injunction

122 That brings us to the very final question which is that of the anti-suit injunction. This arises because I have upheld service of the Vishal claim. The Applicants apply for an anti-suit injunction preventing the bank until further order from commencing, continuing or participating in proceedings before "*any court or tribunal in India or any other court*", including the NCLT, against either Mr Agrawal or SIL in respect of any dispute arising out of or in connection with the present claims. The application notice thus suggests that the injunction is sought in relation to both SIL and Mr Agrawal, though the NCLT proceedings are only against SIL. The evidence focuses on only on those proceedings and on SIL's position. I can see absolutely no basis for any anti-suit injunction in relation to Mr Agrawal.

123 So far as the application in relation to SIL is concerned, reference has been made to *American Cyanamid v Ethicon* [1975] AC 396 and also on *Michael Wilson & Partners v Emmott* [2018] EWCA Civ 51 at 37 where the principles governing the anti-suit injunctions were confirmed. The Applicants say the purpose of the anti-suit injunction would be to restrain the NCLT proceedings on the basis that they are vexatious and oppressive in the event that the court allows the Bank's claims against SIL to proceed. So the relief which is actually sought does not match the relief which the Applicants seek in the Application Notice, being considerably narrower.

124 But, in relation to the NCLT proceedings, the real focus of the application, the Applicants rely on the fact that the bank has brought proceedings here, then started the NCLT proceedings based on the same agreements and say that there has been a refusal to adjourn those proceedings and there is an indication from that that the bank is not seriously pursuing the NCLT proceedings either, on the basis that it has sought multiple adjournments and has refused an invitation to stay proceedings. The Applicants submit that if those proceedings are withdrawn or stayed, the same claim would be capable of being made before the English Court, but if they continue and move on to the next phase where the Third Defendant is admitted into insolvency, irreparable harm would be caused, as well as risk of irreconcilable judgments. Thus, what is effectively prayed in aid is on one level vexation and oppression and, on another, by irreparable harm, the other "ends of justice" head for the grant of an anti-suit injunction.

125 This is not, of course, a case where the Applicants suggest there is any contractual right on SIL's or Mr Agrawal's part not to be sued in India; so they therefore have to pass the more stringent test of establishing that the pursuit of the proceedings which they seek to restrain would be vexatious, oppressive or unconscionable or that the aims of justice require the granting of the injunction. Those are high hurdles and, in my judgment, the Applicants cannot come close to meeting any of them, in circumstances where India is the country of domicile of both of the Applicants, it is the Applicants' position that the Passat claim should be litigated in India, the Applicants contracted for non-exclusive jurisdiction or SIL contracted for non-exclusive jurisdiction and that carries with it anticipation and accepting the possibility of parallel proceedings. That would include potentially insolvency proceedings other than in England.

126 The NCLT proceedings are, as I have already noted, essentially in the nature of insolvency proceedings. Those are classically seen as the business of the courts of the place of incorporation of a company. It is nowhere explained how the remedy sought in the

insolvency proceedings could be sought here. So far as any problems arising from the NCLT procedure are concerned, it is open to the Applicants to make submissions in those proceedings both as to jurisdiction, as to the timing of proceedings and as to the ultimate outcome. In fact, submissions have already been made as to jurisdiction. I am unpersuaded that the NCLT proceedings overlap in any significant respect with the Bank's claims under the first SIL guarantee and the second SIL guarantee, where the purpose of the English proceedings is to determine whether or not SIL is liable to the Bank and when the NCLT proceedings are considering the entirely separate question of whether SIL should be placed into insolvency. That is, as I have already noted, an important distinction as regards the *Srinivasan* case.

127 So far as irreparable harm is concerned, that is in the nature of the proceedings. It is not a matter for this court and it is a matter on which the Applicants can make submissions in those proceedings. As such, it would certainly not meet the hurdle of "interests of justice".

128 As regards the various other matters, I am entirely satisfied that when one bears all of these matters in mind it cannot be said that the hurdle of vexation or oppression comes close to being met.

129 I also note that even if I were otherwise persuaded that the jurisdiction to grant an injunction were engaged, SIL is unable or unwilling to offer any cross undertaking in damages. In those circumstances, I would in any event have declined to grant the injunction sought, as a matter of discretion.

130 In conclusion, although Ms Vora for the Applicants has done an excellent job of marshalling and presenting her many and various points, the challenges brought are a collection of issues, all of which lack merit. I therefore dismiss the applications.

LATER

131 Ms Vora, I am refusing you permission to appeal. I infer that you are seeking it on the basis that there is a real prospect of success on these various points. In relation to the Passat claim in relation to the merits threshold not having been met, that was a point on which it seemed to me that the contrary was close to unarguable. That is because what you have is a clash of Indian Law evidence at this stage and so it simply cannot be the case that the merits hurdle was not met when that is a low hurdle. It follows that I do not see any real prospect of a Court of Appeal judge disagreeing in relation to that.

132 In relation to the anti-suit, again, I do not see a real prospect of success in circumstances where the hurdle for an anti-suit injunction on the basis of vexation, oppression, unconscionability is very high and you have the various factors to which I have alluded which indicate that one would have an anticipation that there might be other proceedings and, given the different nature of the other proceedings in this case.

133 In relation to the alleged breach of the full and frank disclosure requirement, the argument seems to be put on the basis that I have made a mistake as to the nature of the claim in not equating it to *Srivanasan*. That does not seem to me to have any impact at all on the question of whether there has been a breach of full and frank disclosure and nor do I think that there is any real prospect of success that the Court of Appeal would say that if I was right in relation to the application of the general tests the fact the *Srinivasan* judgment went the other way was something which should lead to the conclusion that there was a breach of the obligation of full and frank disclosure. The relevant question is whether the tests are

met. I was very clear on that and no specific issue is taken with that analysis. I do not think there is a real prospect of success.

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5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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