Neutral Citation Number: [2021] EWHC 2937 (Comm)

Case No: **CL-2019-000103**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 29 October 2021

Before :

The Hon. Mr Justice Bryan

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Between :

Daiwa Capital Markets Europe Limited	**Claimant**
- and -	
Maan Abdul Wahed Al Sanea	**Defendant**

- -
- -

Sophie Weber (instructed by **Ashurst LLP**) for the **Claimant**
Maan Abdul Wahen Al Sanea was not represented and did not appear

Hearing date: **29 October 2021**

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APPROVED JUDGMENT

MR JUSTICE BRYAN:

A. Introduction

1. The claimant, Daiwa Capital Markets Europe Limited ("Daiwa") appears before the court today seeking an order for (1) retrospective validation of alternative service of the claim form and particulars of claim; (2) permission to serve further documents by an alternative method; and (3) an extension of time to the validity of the claim form, either to serve any order I may make and associated documentation, or to have a further attempt at service.

2. The claim is brought against the defendant, Maan Abdul Wahed Al Sanea, ("the defendant"). Daiwa's application has come on as a matter of urgency, because the claim form will expire today, 29 October 2021, following a series of extensions of the validity of the claim form, most recently by paragraph 1 of the order of Mr Justice Henshaw of 9 June 2021. There have, in fact, been five previous extensions of time and accordingly, unless the proceeding are deemed served by 29 October 2021, or a further extension of time is granted, Daiwa's primary claim will become time-barred.

3. I am satisfied that informal notice of Daiwa's application was given by the sending of emails to the defendant's lawyer and an email address provided by the defendant's trustee in bankruptcy. In this regard, I have had regard to the fourth witness statement of James Levy, ("Levy4"), dated 28 October 2021 as to the steps taken to bring this hearing to the defendant's attention. No legal representative has appeared before me today on behalf of the defendant in circumstances where I am satisfied that all appropriate steps have been taken to bring this hearing to the defendant's attention. It is unsurprising that the defendant himself does not appear before me in person today because, on the evidence before me, he is currently in a prison in Saudi Arabia. In any event no one attended this hearing on his behalf. In such circumstances the hearing effectively took place without notice on notice, and as such it is acknowledged by Sophie Weber, who appears on behalf of Daiwa, that a duty of full and frank disclosure on Daiwa's part arises.

B. Background

4. Daiwa's claim against the defendant is addressed in Mr Levy's third witness statement, dated 19 October 2021 ("Levy3") as well as in the Particulars of Claim. For present purposes, it suffices to summarise the background as follows. Daiwa is a London-based subsidiary of a Japanese investment bank and broker. The defendant, Mr Al Sanea, is, on the evidence before me, a well known figure in the Kingdom of Saudi Arabia ("KSA"), who owned and/or controlled a group of companies called the Saad Group.

5. Since 18 February 2019, the defendant and one of his companies, Saad Trading Contracting and Financial Services Company, ("Saad Trading"), have been subject to a financial reorganisation process in KSA managed by a trustee in bankruptcy.

6. Daiwa's claim against the defendant arises from a judgment of Rose J, as she then was, of 16 February 2017 (the "Judgment") made against Daiwa in proceedings brought by Singularis Holding Limited ("Singularis"), a Cayman Island company, which was, before it entered into official liquidation, owned and controlled by the defendant, Mr Al Sanea.

7. The claim arose in the context of instructions from Mr Al Sanea (acting for and/or behalf of Singularis) to Daiwa to make a series of payments following the termination of a stock lending

arrangement between Daiwa and Singularis. The joint official liquidators of Singularis contended that those payments constituted a misapplication of Singularis' funds, to the detriment of Singularis and its creditors. Daiwa was held liable to Singularis for breach of contract and negligence, subject to a reduction for contributory negligence of 25%.

8. Mr Al Sanea was found to have deliberately breached his fiduciary duties to Singularis by instructing Daiwa to make the relevant payments (see [119] to [127] of the judgment). The judgment was upheld on appeal ([2018] 1 WLR, 277 (Court of Appeal)) and on appeal therefrom [2020] AC 1189 (Supreme Court).

9. Accordingly, Daiwa is liable to Singularis in an amount of US dollars 152,804,925 plus interest and costs, which Daiwa seeks to recover from Mr Al Sanea, the defendant in these proceedings.

10. A point of potential relevance is that Daiwa's claim is put in three different ways. Firstly, contribution under the Civil Liability (Contribution) Act 1978 (the "1978 Act"); secondly, restitution for unjust enrichment at common law; and thirdly, equitable subrogation.
11. Daiwa issued its claim against Mr Al Sanea, as I shall come on to address in more detail in due course, before the Supreme Court heard Daiwa's appeal. The reason for that was to protect the position so far as concerns limitation. At the same time, Daiwa also issued a writ against Mr Al Sanea in the Grand Court of the Cayman Islands, which is substantially the same as the claim advanced in these proceedings (the "Cayman Proceedings").

12. Daiwa's primary case is that England is clearly and distinctly the most appropriate forum for resolution of Daiwa's claim against Mr Al Sanea. However, the Cayman Islands proceedings were commenced, no doubt out of an abundance of caution, to protect Daiwa's position on limitation in the event that there was any challenge to the jurisdiction of the English court and these proceedings being stayed as a result of a successful challenge in relation thereto.

13. Mr Levy's third witness statement set out at some considerable length the background to this application and the history of this action to date and what steps have been taken to date in attempted service of the defendant, Mr Al Sanea. That is supplemented by a further witness statement from a Mr Abdulrahman Hassan Sheikh ("Sheikh"), dated 19 October 2021 and a letter from a Dr Baassiri on Saudi law. Mr Sheikh is a Saudi-registered lawyer with the Saudi Ministry of Justice, who works as counsel at Faisal Adnan Baassiri law firm in association with Ashurst LLP and the Ashurst Group's associated offices in KSA, which are located in Jeddah and Riyadh. Ashurst LLP are the solicitors instructed on behalf of Daiwa in these proceedings and also in the attempts to serve the defendant as well as to claim in his bankruptcy.

14. I confirm that I have read and had full regard to both the third statement of Mr Levy and the witness statement of Mr Sheikh as well as the evidence of Dr Baassiri. Mr Levy's statement essentially focuses in very considerable detail upon the procedural history to date and the attempts of service with Mr Sheikh's statement providing further evidence in relation thereto, whilst Dr Baassiri's focuses on the position as a matter of Saudi law in relation to questions of service.

15. As I shall come on to, in essence, the evidence before me is that all methods of service, which are possible under Saudi law, have been attempted and, as shall be seen, have been potentially without

success. Also addressed is the question as to whether the alternative methods of service, which are addressed in this application, are either prohibited or illegal under Saudi law. Jumping ahead slightly, the evidence is that what is proposed, whilst not an authorised method of service in Saudi Arabia, is neither prohibited nor illegal within Saudi Arabia.

16. Turning then to events to date, the claim form itself was issued on 14 February 2019. Permission to serve out of the jurisdiction was obtained on 9 April 2019 and Daiwa took steps to effect service on Mr Al Sanea through the British Embassy in KSA, as is permitted by KSA law. I should say that Saudi Arabia is not a Hague Convention country.

17. On 12 March 2020, Daiwa learnt that this attempt at service had been unsuccessful. Daiwa was provided with a note from the KSA Ministry of Foreign Affairs (the "MFA") together with an official translation, (the "MFA note"). That provides:

> "With reference to the embassy's note number (886) dated 3 November 2019 enclosing the judicial document to be transmitted to Mr Maan Abdul Wahed Al Sanea the Ministry would like to inform the embassy that it has received an advice from the Ministry of Justice, **including the refusal of the defendant** to receive the judicial documents **on the grounds that he has hired a specialised lawyer to consider these cases**. Therefore, the Ministry returns the enclosed judicial documents." (Emphasis added)

18. The MFA note did not provide any further information. On 30 April 2021, that is just over a year later, Daiwa was notified that the Cayman proceedings had been served. The unofficial translation of the note from the MFA states:

> "The Ministry wishes to advise that it has received a notification from the Ministry of Justice, has conveyed the judicial documents to the lawyer of the defendant, Mr Bander Al Misenad and has taken the necessary action." (The "Cayman MFA note")

19. Having obtained contact details for that lawyer, Mr Al Misenad, Daiwa's KSA lawyers phoned Mr Al Misenad who confirmed that (i) he was Mr Al Sanea's lawyer, but he was not authorised to accept service, and (ii) Mr Al Sanea was held in a prison in Al Khobar. Daiwa then obtained a further extension of time in order to attempt personal service on the prison warden in accordance with Saudi law. Although, as addressed by Mr Levy at paragraphs 107 and 109 of his witness evidence, Daiwa had been advised of the risk that the warden might refuse service. In that regard Henshaw J's order of 9 June 2021 recorded that it was: *"Without prejudice to Daiwa's right to apply (if necessary) in due course for an order permitting service by an alternative method and/or retroactive validation of steps already taken to serve Mr Al Sanea."*

20. On 10 August 2021, Daiwa's Saudi lawyers attempted to effect personal service on the prison warden (see Sheikh at [37]). The warden refused to accept any documents until they had been examined by the legal department of the Emirate in the province in which the prison is located. The evidence before me, again from Mr Sheikh, at [37 to 38] of his statement, is that that is not a legal requirement under KSA law.

21. On 28 September 2021, Daiwa's Saudi lawyers were informed that the Emirate had directed the warden to refuse service of documents though no reasons were given for this. Again, as addressed by Mr Sheikh at [44] of his statement.

22. In addition to these formal attempts to serve the defendant, there were also other attempts to provide the documentation to the defendant and to make him aware of these proceedings. In particular, there has been contact with the original and, following the death of the original, the replacement trustee. In that regard, Daiwa had put in a creditor's claim in the financial reorganisation process.

23. The history of that matter is set out in some detail by Mr Levy and I do not need to recount the detail of that. The reason that that correspondence with the trustee is relevant is that the trustee was provided, among other things, with the claim form and the particulars of claim. That led to a preliminary recommendation from the trustee to reject Daiwa's creditor claim.

24. That document provides, in a section entitled "Debtor's Reply to the Claim", that the trustee had written:

> "**Upon presenting the claim to the debtor** he indicated the creditor had not submitted supporting documents, judgments or decisions issued by judicial or arbitral authorities, located with Saudi Arabia and [sic: or] recognised by the Saudi Arabia execution judiciary if issued outside Saudi Arabia in accordance with the Riyadh agreement for judicial co-operation. The Saudi execution law and its implementing regulations. In support of his reply he submitted an Excel spreadsheet indicating that there is no debt listed in the debtor's records." (emphasis added)

25. It is said on behalf of Daiwa, both by Mr Levy and by Ms Weber, that this translation suggests that the debtors, that is Mr Al Sanea and the Saad Trading, had been made aware of Daiwa's claim, and this is relied upon in support of the submission that Mr Al Sanea is aware of the current claim. That was on 25 July 2021.

26. Thereafter, on 22 August 2021, the trustee had provided his final recommendation regarding Daiwa's creditor claim in the financial reorganisation process. As Mr Sheikh informed those acting for Daiwa, the trustee's final recommendation was partially and conditionally to approve Daiwa's claim to the amount of SAR 573,018,479 which is equating to USD 152,804,925.

27. Attached to the covering email from Mr Sheikh was a copy of the trustee's final recommendation in Arabic, which outlined the trustee's final recommendation in full. An informal English translation of that final recommendation was followed by a certified translation and provides, among others, matters as follows: firstly, under the "Debtor's Reply to the Claim" section, the section states:

> "**On presenting the claim to the debtor he indicated that the** creditor had not submitted supporting documents, judgments or decisions issued by judicial or arbitral authorities located within Saudi Arabia and [sic: or] recognised by the Saudi execution judiciary if issued outside Saudi Arabia in accordance with the Riyadh agreement for judicial co-operation, the Saudi execution law and its implementing regulations ..." (emphasis added)

28. It is submitted on behalf of Daiwa, that in circumstances where the documents submitted by Daiwa to the trustee as part of its "claim" included among other matters a letter explaining the basis of the current proceedings against Mr Al Sanea along with translated and attested copies of the claim form and particulars of claim, this response from the trustee suggests that Mr Al Sanea was made aware of Daiwa's claim against him.

29. In this regard, the trustee's final recommendation also states that following the trustee's preliminary recommendation: *"The debtor sent an email containing its acceptance of the initial recommendation with reservation and did not submit any additional documents."* Again, it is submitted that this statement from the trustee strongly suggests that Mr Al Sanea is aware of Daiwa's current proceedings against him.

30. It will be recalled that when the proceedings were served through official channels, the MFA note stated that:

> "It has received advice from the Ministry of Justice, including the refusal of the defendant to receive the judicial documents on the grounds that he has hired a specialised lawyer to consider these cases."

31. As I've already foreshadowed, a lawyer was in due course identified, but when contacted said that whilst he was Mr Al Sanea's lawyer, he was not instructed to accept service. Equally, the trustee said that he was not instructed to accept service, but he provided an email address which has also been communicated with, notifying, it is said, Mr Al Sanea with details of these proceedings.

32. It is against that backdrop that Daiwa now seeks an order (1) that the steps set out in schedule 1 to the draft order taken to bring the claim form and particulars of claim to Mr Al Sanea's attention be retrospectively validated as constituting good service; and (2) permission be granted that any order made at this hearing and any further documents in the proceedings can be served by email. It is also said that if the court were not minded to make an order retrospectively validating service, Daiwa should be granted permission to serve the claim form and particulars of claim prospectively by an alternative method vis by email.

33. During the course of this hearing and following discussion with the Court, Ms Weber, on behalf of Daiwa, asked that even if I was minded to give the relief sought, ie retrospectively validating the service as good service, then out of an abundance of caution, I should also go on to extend the validity of the claim form in order to make a further service of the claim form and particulars of claim via an alternative method by email to the email addresses both the email address at which it is said will come to the attention of Mr Al Sanea (that is the email address provided by the trustee) or the email address of the lawyer in case any challenge were made hereafter to the retrospective validation of service.

C. Applicable legal principles

34. The court has power to order service by alternative methods and to validate such service retrospectively. See CPR 6.15, CPR 6.27, CPR 6.37(5)(b)(i) or implied generally to the rules governing service abroad (see the well-known case of *Abela v Baadarani [2013] 1 WLR 2043* at [19 to 20], As is recognised in CPR 6.15(3)(b) an application for such an order may be made without notice.

35. The basis on which the Court exercises the alternative service jurisdiction in cases where the relevant country is not a party to the 1965 Hague Convention on the service abroad of judicial and extra judicial documents in civil and commercial matters (the "Hague Convention") or any other civil procedure treaty, was, as stated by the Supreme Court in *Abela* and subsequently confirmed by the Supreme Court in *Barton v Wright Hassall LLP [2018] 1 WLR 1119*. The test is whether there is "a good reason" or "good reason" for alternative service in all "the circumstances of the particular case" (*Abela*) at [23], [32] and [35] and *Barton* at [9] and [9.1].

36. Notwithstanding it having been suggested at certain times, it is not right to add a gloss that CPR 6.15 can only be used in "exceptional circumstances". See *Abela* at [33]. In particular, I have had drawn to my attention, and bear well in mind, what was said by Lord Sumption in *Barton v Wright Hassall* supra at [9] and [10], and also what was said by Popplewell J (as he then was) in *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS [2017] EWHC 667 (Comm)* at [49], where he summarised the relevant principles in relation to rule 6.15 (upheld on appeal[2019] 1 WLR 346. I bear those passages well in mind.

37. Whether there is a good reason for alternative service is essentially a question of fact (see *Abela* at [33]). As was said in *Barton* at [9] in the passage I've just referred to, the *"factual evaluation ... does not lend itself to over-analysis or copious citation of authority".*

38. As was also said in *Société Générale v Goldas Kuyumcluk* :

> "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 the relief (eg allowing the claimant to pursue a meritorious claim) if it is outweighed by other circumstances which are reasons not to grant the relief."

39. Whilst the mere fact that a defendant has learned of the existence and content of the claim therefore cannot without more constitute a good reason to make an order under CPR 6.15, this is a critical factor because the most important purpose of service is to ensure that the contents of the documents served are communicated to the defendant. See *Abela,* at [36] and [37] and *Barton* at [9(2)] and [16].

40. As was said in *Société Générale* at paragraph 49(3):

> "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, maybe weaker or even non-existent where the contents of the claim form become known throughout other means."

41. As was said in *Abela* at [39] and *Société Générale* at [49(5)], there will inevitably be focus on the reason why the claim form cannot or could not be served within the period of its validity, though this is not the only area of enquiry.

42. It is not, however, necessary for a claimant to show that he has taken "all" the steps he could reasonably have taken to effect service by the proper method. See *Barton* at [10] and [21].
43. Other relevant factors include: (1) what, if any, prejudice the defendant would suffer by retrospective validation of a non-compliant service of the claim form, bearing in mind what he knew

about its contents (see *Barton* at [10]), (2) whether service through diplomatic channels had proved impractical and further attempts would lead to unacceptable delay and expense (see *Abela* at 39), and (3) whether a defendant was playing "technical games" which was stated in *Abela* at [39] to be "a highly relevant factor".

44. Delay may be an important consideration, and the culpability of the claimant for any delay may have been an important factor, see *Société Générale* at [49(6)]. However, as was made clear in *Abela* at paragraphs [40] and [48], the fact the claimant has delayed before issuing the claim form, if the claimant has delayed before issuing the claim form, would not, save in the most exceptional circumstances, be relevant.

45. The fact that the defendant may have a limitation defence is a highly relevant factor, but does not preclude the making of an order for alternative service. See *Abela* at [40] and *Société Générale* at [49(8)], upheld on appeal, at [28] to [29].

46. As was said by Longmore LJ in *Société Générale* at [28]:

> "The requirement of a good reason for the purpose of CPR 6.15 must contemplate an enquiry into the reason for not achieving proper service before the expiry of the limitation period otherwise limitation becomes irrelevant and that is not the law. The Supreme Court in Abela concluded that the defendant was evading service or 'playing technical games' with the claimant because he had deliberately obstructed service by declining to disclose his address. That shows, to my mind, that the good reason in that case did indeed 'impact' on the expiry of the limitation period."

47. The test remains whether there is "a good reason" to grant relief (see *Société Générale* at [49(8)(A)]). The good reason must generally, and I use the word "generally" because in *Société Générale* at [26] Longmore LJ stated that the requirement is not an "absolute one", impact on the expiry for 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.

48. 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 (see *Société Générale* at paragraph [49(8)] upheld on appeal at paragraphs [25] and [28]).

49. CPR 6.15 can only be used in cases where: (1) none of the methods set out in CPR 6.40(3) have been successfully adopted; and (2) the requirement of CPR 6.40(4) that the party was not being authorised or required to do anything which was contrary to the law of the country where the claim form was to be served was observed. (See *Abela* at [24]).

50. The Supreme Court thus recognised that the function of CPR 6.40(4) is to prevent service only by a method forbidden by the law of the place of service so that another method, which is not in accordance with that law but is not actually illegal, may be adopted (see the White Book 2021, paragraph 6.40.3, page 388):

> "... the proposed method of service may not be permitted by the law of that country; the bar applies only where such method is positively contrary to the law of that country."

51. The burden of proof is on the applicant to establish on the balance of probabilities that service would not contravene the relevant foreign law (see *Von Pezold v Border Timbers Ltd [2020] EWHC 2172 (QB)* at [30], per Julia Dias QC sitting as a Deputy Judge of the High Court).
52. In *YA II PN Ltd v Frontera Resources Corporation [2021] EWHC 1380 (Comm)*, Butcher J explained that it is implicit in CPR 6.15(4) that the deadline for filing acknowledgement of service should be after the date on which the alternative service order is made (at [59]):

> "This gives the effect to the fact that it would ... be unfair and unjust for there to be no period after the defendant can know that there has been valid(ated) service in which he can enter an acknowledgement of service. In that case the judge gave the defendant seven days from the date of his judgment to acknowledge service"

53. I will need to return to this if I am minded to grant the relief sought.

D. Discussion of Daiwa's application

54. I am satisfied that there is good reason in the present case to validate retrospectively alternative service of the claim form and particulars of claim and in fact to grant permission prospectively for service by an alternative method. This is so for a number of reasons.

55. First, I am satisfied that the claim form has not yet been successfully served, or may not yet have been successfully served, on Mr Al Sanea because of the very real difficulties in effecting service on him in the KSA in relation to which I am satisfied Daiwa does not bear responsibility.

56. Taking the various attempts to effect service pursuant to the methods permitted by CPR 6.40(3) in turn, these have all failed. Thus, in relation to CPR 6.40(3)(a)(ii) and CPR 6.42(2)(b), since Mr Al Sanea's precise whereabouts were not known when Daiwa obtained permission to serve out, as I have already noted, Daiwa took steps to effect service on Mr Al Sanea through a British consular authority. As is clear, that attempt would appear to have been unsuccessful although given the lack of accompanying reasons it remains unclear why it was not successful. I say unsuccessful, but, as I shall return to, the content of the MFA note does suggest from the reference to the refusal of the defendant, that the defendant may well in fact have been served with the documentation because in order for him to give such a refusal and to say that such matters are going to be dealt with by his lawyer, it may well be the case that the defendant actually did have possession of the documents and that there was service. The position however remains unclear.

57. Secondly, so far as CPR 6.40(3)(c) is concerned, prior to the provision of the Cayman MFA note, Daiwa was at that time unable to use any other method of service permitted by Saudi law because it did not know of Mr Al Sanea's precise whereabouts or the identity of Mr Al Sanea's lawyer in the KSA.

58. Whilst it is true that Daiwa did have a last-known business address for Mr Al Sanea which it included on the claim form, I am satisfied that it was not sensible to use that address for service in KSA in circumstances where service via the diplomatic route had failed and Daiwa did not know whether Mr Al Sanea was actually operating from that address. In this regard, it is pertinent to note that Mr Al Sanea had not taken part in the proceedings between Daiwa and Singularis and Daiwa did not know whether he had English solicitors. Then, after Mr Al Misenad been identified, it transpired that the documents could not be served upon him because he said he was not authorised to accept service (see Sheikh at [12]).

59. Equally, the most recent attempts to serve the documents, this time on the warden of Al Khobar prison, in which Mr Al Sanea is being held, were also unsuccessful. I am satisfied that Daiwa has done all it can to effect service on Mr Al Sanea. In that regard, it is relevant to note that there are, in fact, no other methods of service permitted by Saudi law open to Daiwa on the evidence before me as to Saudi law in the form of Sheikh at [48] and also the letter from Dr Bassirri at paragraph 4.1.

60. I am also satisfied that a yet further attempt at service via the diplomatic route would lead to further, and in all likelihood, unacceptable delay, nor can there be any guarantee that it would result in a successful outcome. One of the conundrums in this case is as to why the Cayman proceedings appear to have been successfully served whereas those in these proceedings were not. Unfortunately, in neither case does the accompanying note explain why one was successful and the other was not.

61. Thirdly, and I consider of particular importance, is that I am satisfied that Mr Al Sanea is already aware of Daiwa's claim as a result of the steps which have been taken by Daiwa, those steps being set out in schedule 1 to the draft order. I am satisfied that it can be inferred from the MFA note, and the passages I have highlighted, that the overwhelming likelihood is that Mr Al Sanea did receive the documents, including the claim form and the particulars of claim, which were accompanied by certified Arabic translations, in circumstances where the MFA note expressly refers to the defendant and in order for Mr Al Sanea to refuse service and to give the reason that matters were to be dealt with by a "specialised lawyer" Mr Al Sanea must have read the documents in sufficient detail to understand what the documents were, and in such circumstances I consider, based on what is said in the MFA note, that Mr Al Sanea must have chosen to refuse to accept the document.

62. As I've already foreshadowed it may be, in fact, that he did actually receive the documents, they were served upon him, he was in possession of them and he then read them. If that was the case, then the position would be *a fortiori*. But even if he was simply aware of the contents of the documents that would be an important factor.

63. Yet further, the claim form and particulars of claim, together with certified Arabic translations, were also sent by email, as I have noted, to the firm of Mr Al Sanea's lawyer. That happened on 6 June 2021 and the same date to the trustee in bankruptcy. Also on 7 June 2021, they were sent to an email address that Mr Al Sanea's trustee in bankruptcy had provided to Daiwa to communicate with "the debtors" being a reference to Mr Al Sanea and Saad Trading as addressed by Mr Sheikh at paragraphs 18 to 23 of his statement.

64. It is submitted by Mr Levy in his witness statement at paragraph 140(b) with, I'm satisfied, some force, that an inference should be drawn from that that those documents will have come to Mr Al Sanea's attention. I am also satisfied that it is overwhelmingly likely that Daiwa's claim will also have come to Mr Al Sanea's attention as a result of Daiwa filing its contingent creditor claim, which I have already mentioned, with Mr Al Sanea's trustee in bankruptcy. That claim included, as I foreshadowed, copies of the claim form and particulars of claim. Indeed, accompanied by certified and attested translations thereof into Arabic.

65. I have already quoted the trustee's initial recommendation in respect of Daiwa's claim on 25 July, and his final recommendation received on 22 August, and highlighted relevant passages from which I am satisfied that Daiwa's creditor claim had been presented to Mr Al Sanea and that he must have been aware of its substance.

66. Fourthly, set against the matters that I have already identified, and that cumulative picture, the overwhelming impression I have is that this is a case where Mr Al Sanea is doing whatever he can to avoid or resist service of these proceedings. This is a case, I am satisfied, where the Court should not permit a litigant to pursue those "technical games" (see *Abela*, supra).

67. In this regard, the terms of the MFA note are such that it would appear that Mr Al Sanea, having either received the documents or at least had sight of them, made a conscious and deliberate decision to refuse formally to accept the documents when personal service was attempted. He deflected matters by refusing service via the diplomatic route on the basis that he had appointed a "specialised lawyer". But when that specialised lawyer, who undoubtedly was acting for Mr Al Sanea, was contacted he stated that he was not authorised to accept service of English proceedings. Daiwa has, in effect, been passed by Mr Al Sanea from pillar to post. Indeed, when Mr Al Misenad's firm referred Daiwa to Mr Al Sanea's trustee in bankruptcy, he too refused to accept service on Mr Al Sanea's behalf and provided Daiwa with an email address to use in order to communicate with Mr Al Sanea. That was no more successful.

68. Yet further, when Daiwa attempted to serve the documents on the prison warden, the evidence before me as to Saudi law suggests that there is no additional requirement that permission be obtained from the Emirate of the relevant province whose legal department had to consider the documents, whether generally or on the purported basis that was given, that the claim against Mr Al Sanea was a sensitive issue due to their volume and magnitude. The consequence of this was that in due course the Emirate directed the prison warden to refuse service. Why that was done is not clear in the absence of reasons having been given, but it is said on behalf of Daiwa in circumstances where Mr Al Sanea is a high-profile individual in KSA, it cannot be excluded that this was done at Mr Al Sanea's instigation or at least with his blessing in an attempt to assist him to avoid service of the English proceedings.

69. Taking those matters individually and also cumulatively, the overall picture is indeed one of a defendant who is doing all he can to avoid or resist service of proceedings, effectively thwarting every method of service that is permitted in Saudi Arabia.

70. Turning, then, to the question of delay, I am satisfied that there has been no culpable delay on the part of Daiwa. Daiwa issued the present claim on 14 February 2019 shortly before the two-year limitation period for its primary claim under the 1978 Act expired. At that time, Daiwa had been granted permission to appeal to the Supreme Court although the hearing had not yet taken place. It in fact took place on 23 to 24 July 2019, with judgment being handed down on 30 October 2019. It might be asked why did Daiwa not apply immediately, as soon as its right to a contribution arose. I am satisfied that it was reasonable for Daiwa not to issue proceedings immediately at the time judgment was handed down and to let the appeal run its course so far as possible, because in circumstances where the Supreme Court had granted permission, Daiwa had at least an arguable chance to have the judgment overturned such as no contribution claim against Mr Al Sanea would arise. Until all appeal roads had been exhausted, it would have resulted in unnecessary expense being incurred. Indeed, had Daiwa been ultimately successful, then Daiwa would have had to pick up the cost of the proceedings that had been issued.

71. The reason why the proceedings were issued when they were was because the two-year period was shortly to expire. I do not consider, to the extent that it is relevant, that Daiwa can be criticised for the time at which the present proceedings were commenced.

72. Turning, then, to the position after the issue of the claim form, I am satisfied that Daiwa has taken all reasonable steps to effect service of the claim form in the time available. In this regard, its knowledge varied at different times and the steps it took were also being taken in the context of the global COVID-19 pandemic. I have had regard to everything that is said by Mr Levy in his third statement in this regard. But summarising the steps that were taken and why I consider that there was no culpable delay, firstly, once the proceedings were issued I am satisfied that Daiwa acted quickly to seek service by the diplomatic route, not least in circumstances where they did not know Mr Al Sanea's whereabouts at the time. In this regard, it mentioned no less than three separate addresses/locations on the claim form to improve the chances of such service by diplomatic route succeeding. The diplomatic route by its very nature takes a considerable period of time, all the more so in the context of the COVID-19 pandemic and the difficulties caused in terms of communicating with, and receiving responses from, those entities involved in that diplomatic route during the course of the pandemic.

73. When Daiwa was informed on 12 March 2020 that service via the diplomatic route had not been successful, it attempted to obtain further information by making a request to the Foreign & Commonwealth Office, asking questions and regularly followed that up. Following the Cayman MFA note and the reference to a specialised lawyer, in due course Daiwa's Saudi Arabian lawyers were contacted with a view to locating the contact details for Mr Al Sanea's Saudi lawyer. That ultimately occurred, as we know, and advice was also given as to what other methods of service were permitted by KSA law.

74. As is known and as I've already addressed, there was also, on 9 June 2021, a further extension of time which was successfully obtained in order to permit an attempt to serve on the prison warden in accordance with Saudi law, rather than taking the step at that stage of applying for an order for alternative service. Inevitably, that itself took time, with the result that service on the warden was only attempted on 10 August.

75. Such delays as have occurred, and clearly a considerable period of time has passed since the claim form was issued, are not, I am satisfied, culpable delays, but delays inherent in the complicated process that had to be followed and the fact that Daiwa's knowledge was initially limited and subsequently, as more knowledge was gained, the product of that knowledge had to be followed up, which itself took time.

76. There is no suggestion in the present case that there was any delay as a result of, for example, neglect or any lack of competence on Daiwa's part. Importantly, the present application was made during the current period of validity of the claim form, and I am satisfied that Daiwa issued its application as soon as possible upon being notified that its attempt at serving the prison warden had been unsuccessful. A period of time of some three weeks to 19 October was then taken before making the application, but as is clear from the length and content of Levy3 in addition to Mr Sheikh's statement, there was a very lengthy and complicated story which it was necessary to tell the Court about, not least in the context of the fact that this is, and was, a without notice (on notice) application, carrying with it a duty of full and frank disclosure.

77. Equally, the application having been issued, it has been brought on remarkably promptly, no doubt with some considerable assistance from the Commercial Court and with a weather eye on the fact that the existing validity of the claim form expires today.

78. Turning, then, to the question of limitation. The effect of the order sought by Daiwa may be to deprive Mr Al Sanea of a limitation defence. The limitation period for Daiwa's claim under the 1978 Act has expired, although Daiwa's claim against Mr Al Sanea was commenced within the two-year limitation period under section 10 of the Limitation Act 1980.

79. It is relevant to note, however, that Daiwa does have alternative claims within the existing action which are not, on any view, time-barred. So there is a claim for restitution for unjust enrichment at common law. That claim would only arise if, contrary to Daiwa's case, Daiwa's contribution claim were to fall outside the scope of the 1978 Act (see section 7(3) of that Act). And there is also a claim for equitable subrogation. That is a claim which is not excluded by section 7(3) of the 1978 Act.

80. Dealing with those matters in a little more detail, the two-year limitation period in section 10 of the 1978 Act does not apply to contribution claims at common law which are governed by the usual six-year law, nor to contribution claims in equity which are governed by the same rule by way of analogy. (See Goff & Jones The Law of Unjust enrichment 9th edition at [33-9] footnote 27 and *Hampton v Minns [2002] 1 WLR 1*, at [115]).

81. Common law claims in unjust enrichment are generally barred after six years unless a different period is laid down by the Limitation Act 1980 or another statute (see paragraph 33.7(f) of Goff & Jones and the authorities there cited). The limitation period runs from the date when the claimant's cause of action in unjust enrichment accrues which will usually be the date when the defendant receives the benefit from the claimant (see Goff & Jones at paragraph 33.11).

82. So far as Daiwa's common law cause of action is concerned, it accrued, I am satisfied, when it made the payments for which it now seeks a contribution under indemnity, which would be when it paid the relevant sums into court, which, on the evidence before me, were on various dates in 2017 and 2018, as addressed at paragraphs 22 and 24 of the particulars of claim.

83. As part of the duty of full and frank disclosure, it was noted that Mr Al Sanea might seek to argue that a claim against him for breach of fiduciary duty owed to Singularis, which forms the basis of Daiwa's contribution claim, is time-barred because the relevant payments were made in June and July 2009. I am satisfied, however, that any such argument which he might advance would not be meritorious.

84. First, section 1(3) of the 1978 Act provides that it is irrelevant that the claim, here Singularis' claim, may now be time-barred provided that the time bar does not extinguish the cause of action. It is well established that limitation under English law does not extinguish the cause of action, and the evidence before me as a matter of Cayman law (Gale 1, at [89(a)], is to like effect.

85. Secondly, Daiwa's pleaded case is that Mr Al Sanea acted in deliberate and dishonest breach of fiduciary duty. For such claims there is no limitation period under English law (see section 21.1(a)

of the Limitation Act 1980) and the case of *Haysport Properties Ltd v Ackerman [2016] 2 BCLC 522*. The evidence before me is that the same is true in Cayman law (see Gale 1 at [89]).

86. The "good reason" for not having served the claim form, ie the difficulties in effecting service that I have identified, does, I am satisfied, impact directly on the expiry of the limitation period and, as I have found, I do not consider Daiwa to be culpable for the delay which has led to the expiry of the two-year limitation period of its primary claim.

87. There is, therefore, a good reason for the delay, both looking at the delay in the abstract and also having regard to Mr Al Sanea's conduct to date, which I am satisfied, "surmounts" the limitation defence such that the circumstances of the present case do constitute "exceptional circumstances" to grant the order sought by Daiwa.

88. I would also add that, for the reasons that I have given, that Mr Al Sanea is himself at least in part responsible for the difficulties and delay encountered by Daiwa in effecting service in the Kingdom of Saudi Arabia. In particular, I have in mind the fact that he appears to be attempting to avoid service. In this regard I am satisfied that inferences can be drawn from, for example, the MFA note for the reasons I've already given, but in any event, having regard to Mr Al Sanea's conduct to date, that is to be weighed in the balance against any limitation defence.

89. Turning, then, to the question of prejudice, I am satisfied there is no other real prejudice suffered by Mr Al Sanea. In that regard, I also bear in mind that the other claims of Daiwa, ie the claim for unjust enrichment at common law under equitable subrogation, are not presently time-barred.

90. Set against that, however, I am satisfied that there is a risk of serious prejudice being suffered by Daiwa if I do not make the order that is sought. In this regard, and as I've already noted, on 22 August 2021 Daiwa was told that the trustee in bankruptcy had partially accepted Daiwa's creditor claim on condition that Daiwa obtains a judgment against Mr Al Sanea. The evidence before me, from Mr Sheikh at paragraph 55, is that the relevant KSA bankruptcy law is relatively new and that there is no guidance as to when such condition needs to be satisfied.

91. The advice that has been given to Daiwa from their Saudi lawyers is that Daiwa should try to get a judgment as soon as possible, ideally before the court of first instance finalises its list of creditors. It is in those circumstances that Daiwa is keen to advance these proceedings as soon as possible to avoid the risk of Daiwa being shut out of the next step in the KSA process. There is, I am satisfied, therefore, a real risk of prejudice on the part of Daiwa if it cannot proceed and proceed expeditiously to continue the action against the defendant in England.

92. I am also satisfied, in circumstances where KSA is not a party to the Hague Convention or any civil procedure treaty with the UK providing for service, that the order for alternative service sought does not subvert the provisions of any convention or treaty.

93. Equally, and on the basis of the evidence of Dr Bassirri, Daiwa's Saudi lawyer, and as required by CPR 6.40(4), I am satisfied that by making an order for alternative service the court will not be authorising or requiring Daiwa to do anything which would be contrary to KSA law. In this regard, the evidence before me is that whilst service by email pursuant to the Saudi civil procedure law does not constitute good service as a matter of KSA law, such service is not prohibited or otherwise

illegal (see paragraphs 2.25 and 2.26). Equally, the Saudi commercial law permits service by email if the parties both agree (see paragraph 2.27). An order of the English court holding that delivery of documents by email constitutes good service as a matter of English law would not itself, on the evidence before me, be contrary to KSA law (see paragraph 3.3).

94. For those, reasons, therefore I grant the relief sought giving the retrospective validation of alternative service of the claim form and particulars of claim.

95. Turning to procedural matters in terms of deadlines required by CPR 6.15(4), the first issue that arises is what the date of deemed service of the claim form and particulars of claim should be. I do not believe anything turns on this. The options are essentially either the date of deemed service of the claim form or particulars of claim as 22 August 2021 on the basis that was date of the trustee's final recommendation in respect of Daiwa's creditor's claim because this shows that Mr Al Sanea has been made aware of Daiwa's claim or, alternatively, the date of the order which Daiwa seeks in this application. I consider, to the extent that it is relevant, that the appropriate date is the date of this order.

96. The second issue that arises is as to the period of time from the date of service of the alternative service order, for Mr Al Sanea to file an acknowledgement of service. The standard period is 24 days, as provided for by CPR 6.37(5) and PD6B paragraph 6.3. In their written application, Daiwa were seeking an order that that be reduced from the 24 days to 7 days. The reason for that is that Daiwa are keen to advance these proceedings as soon as possible and without unnecessary delay and to avoid any potential prejudice to Daiwa. However, in circumstances where Mr Al Sanea is in prison and the route of communication via an email address may mean that there is a passage of time between service by email and matters coming to his attention, I consider that the standard 24 days, as provided by CPR 6.37(5) and the Practice Direction, is the appropriate period of time and I so order.

97. The deadline for Mr Al Sanea to file his defence is, I am satisfied, to be the usual period of 24 days and 38 days in case Mr Al Sanea files an acknowledgement of service (see CPR 6.37(5) and PD6B paragraph 6.4) such period to start running from the date of service of the alternative service order on Mr Al Sanea.

98. Turning, then, to the application for an extension of time to serve the claim form and the particulars of claim, the claim form currently expires on 29 October 2021 pursuant to paragraph 1 of the order of Henshaw J of 9 June 2021. The question arises as to what extension should be sought and for what purpose. There are two possibilities, either a short extension pursuant to CPR 7.61 and 7.62 until 30 November 2021 essentially to get the translations undertaken and the order made at this hearing to be served upon Mr Al Sanea, or for a longer period in order to effect a further service, if there has not already been service, upon Mr Al Sanea to the email addresses where this order will be served.
99. I consider that of those two approaches (and assuming it is appropriate to grant an extension of time at all), it is the latter which is the more appropriate. It may be a belt and braces approach, but lest there be any possibility that it was not appropriate to retrospectively validate alternative service of the claim form and particulars of claim, as I have done, then the alternative would be to extend time to give time for a further attempt at service via email by way of alternative service.

100. The applicable principles in relation to an application for an extension of time are set out in CPR 7.6, in particular an application for an extension of time may be made without notice, that is CPR 7.6(4)(b), and the basis on which and principles on which the court exercises its power under CPR 7.6(2) are set out and conveniently summarised by Jacobs Jin *The Public Institution for Social Security v Amouzegar [2020] EWHC 1220 (Comm)* at [73] to [80] and [124]. In particular I have had regard to the principles set out at [74], where a number of the relevant principles were distilled.

101. I am satisfied, based on the matters that I have already identified in the context of the alternative service application, that there was: (1) "good reason" for Daiwa's failure to service the claim form within the period allowed by the CPR; (2) Daiwa has acted promptly and taken all reasonable steps to serve the claim form, although it has been unable to do so; and (3) the fact that Daiwa's "good reason" surmounts any limitation defence whether alone or coupled with Mr Al Sanea's conduct. I also bear in mind, as I have already identified that on any view the nature of Daiwa's claim has already been brought to Mr Al Sanea's attention and I can see no real prejudice to Mr Al Sanea if Daiwa were granted an extension to allow further service upon him.

102. In those circumstances, I am satisfied that it is appropriate to extend the validity of the claim form to 31 January 2022. Within that time period, there will be time to serve the claim form and particulars of claim by email and for Mr Al Sanea, if he sees fit, to file acknowledgement of service or a defence and again, if he sees fit, to challenge any order that I have made in the usual way as is provided for in the draft order. Thereafter, it would be a matter for Daiwa to consider as to whether or not any further extension of time of the validity of the claim form was necessary, dependent on how matters proceed hereafter.

103. Accordingly, and for the reasons given herein, I make the orders that I have identified in this judgment. I will now address the finalisation of the order with counsel.