Neutral Citation Number: [2023] EWHC 2856 (KB)

Case No: QB-2021-000470

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10.01.24

Before :

MASTER THORNETT

- -

Between :

STUART LUNN	**Claimant**
- and -	
ANTARCTIC LOGISTICS CENTRE INTERNATIONAL (PTY) LTD	**Defendant**

- -
- -

Mr Christopher Loxton (instructed by Fieldfisher LLP) for the Claimant

Miss Sarah Crowther KC (instructed by Hunters Law LLP) for the Defendant

Hearing date: 18 October 2023

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JUDGMENT

Master Thornett :

1. This is a reserved judgment deciding certain preliminary points arising in the Defendant's Application dated 14 February 2023. At the hearing on 18 October 2023 of the Defendant's Application, as listed for two hours, both parties relied upon not only detailed arguments on jurisdiction but also procedural points. I decided certain procedural points should first be considered and concluded. Because the Claimant had complained that the Defendant had not made clear until service of Miss Crowther's skeleton argument that certain points were being relied upon, I directed that written submissions were to submitted in concluding those points. However as sometimes can happen, in directing for concluding written submission further or other points have been taken (now by the Claimant). I am satisfied that I have sufficient material from both parties to decide at least the points that follow in this judgment. There seems no point in obliging attendance for concluding argument, at least as far as the following points are concerned.

2. *Background*

2.1 The claim concerns an injury at work sustained by the Claimant on 12 February 2018 whilst operating as a self-employed aircraft engineer for a Malta based company at the Novo Air Base, Schirmacher Oasis, Queen Maud Land, Antarctica. Briefly, the Claimant was thrown from a mobile set of stairs accessing an aircraft owing to the engine thrust from a passing aircraft taxiing very nearby.

2.2 The Claimant resides in this jurisdiction. By a Claim Form sealed on 10 February 2021, proceedings were issued against five defendant companies, all of whose addresses for service are out of the jurisdiction. In the conventional way in the Kings Bench Division, the Claim Form was marked "Not for Service Out of the Jurisdiction" upon issue.

2.3 By his Particulars of Claim, however, the Claimant elects only to pursue the First Defendant, a company based in South Africa and which is alleged to have been the occupier and operator of the Air Base. The claim focuses upon the degree of control and operation of the movement of aircraft on the Base by the (now singular) Defendant. The Particulars of Claim submits that the jurisdiction of England and Wales is the proper place in which to bring the claim.

2.4 By a without-notice Application dated 15 July 2021, the Claimant applied for permission to serve out of the jurisdiction and an extension of time for service of the Claim Form. The Application was supported by a Witness Statement dated 14 July 2021 from the Claimant's solicitor, Mr Barrett.

2.5 By my Order sealed on 3 August 2021, I granted permission to serve out and the extension of time as sought. The 3 August 2021 Order adopted the draft as submitted by the Claimant and reflected the decision had been without notice to the Defendant.

The full order read:

> 1. The Claimant is permitted the serve the Claim Form and supporting documents on the Defendant, who is out of the jurisdiction, pursuant to CPR rule 6.36.
> 2. Time for service in paragraph 1 above is extended to 29th January 2023.
> 3. A party affected by this Order may apply within 28 days of service of a copy of

the sealed Order to suspend, vary or revoke the same.

4. Costs in the case.

2.6 A further extension of time to 29 July 2023 for service was granted by Order sealed on 24 January 2023. That too featured the same wording as the earlier Order for challenging the direction by a party affected.

2.7 The Defendant was served on 24 August 2022 with the Claim Form, the Particulars of Claim, a Provisional Schedule of Loss, a medical report, the Application to serve out and extend time, the Order to serve out and extend time, a N224 request for service out of the jurisdiction, and a Response Pack. It does not seem in issue that, however, the Defendant was not served with the witness statement of Mr Barrett in support of the original Application to serve out of the jurisdiction. The Defendant did not receive the latter until shortly before the hearing, during interim period of which the Defendant had been unsure both as to the reasons and justification relied upon by the Claimant for service out and whether the permission as granted followed a hearing or not.

2.8 The Defendant acknowledged service on 1 February 2023. The pro-forma N9 made clear that the Defendant intended to contest jurisdiction. The Defendant's subsequently issued 14 February 2023 Application endorsed that it sought:

"….for an interim order (a draft of which is attached) under CPR 3.1(2)(a) to extend the time limit in CPR 11(4)(a):

- *Allowing for further time to be granted for the defendant to produce evidence in support of their application with a time extension granted of two months.*

We intend to apply for an order (a draft of which is attached) under CPR 11 once the defendant has filed its evidence:

- *Setting aside purported service of the claim form and accompanying particulars of claim on the first defendant.*
- *Setting aside the order dated 3 August 2021 granting permission to serve the claim form and particulars of claim on the second defendant out of the jurisdiction.*
- *Declaring that the English court has no jurisdiction to try the claim brought against the defendant, alternatively it should not exercise any jurisdiction which it may have.*
- *An order for costs of the respondent to be assessed or agreed.*

This order is sought because:

- *As to the extension of time; key personnel of the defendant are currently at the Russian airbase in Antarctica (the Nova Base) and are unable to provide instructions or evidence.*
- *As to the main application; the defendant is based in South Africa and not in the jurisdiction of England and Wales and does not submit to this jurisdiction.*
- *The documents purportedly served on the defendant did not contain the witness statement made in support of the application to serve out of the jurisdiction which is a relevant document and required in order to assess the basis upon which full and frank disclosure was made to the court and the grounds for such an application could be made.*
- *The claim form was issued under file number QF-2021-011918 and yet the response pack contains the file number QB-2021-000470 and no explanation has been given for this change.*
- *The claimant is unable to show a good arguable case that the claim falls within any of the grounds set out in PD 6B 9 in that the alleged tort occurred outside of the jurisdiction. The tort gateway should not have been passed.*
- *England and Wales is not the proper place in which to bring the claim against the defendant on the basis of forum non conveniens.*

2.9 A "Draft Order" annexed to the N244 sought that (i) service of the Claim Form and accompanying Particulars of Claim on the Defendant be set aside (ii) the Order dated 3

August 2021 granting permission to serve the claim form and Particulars of claim on the second respondent out of the jurisdiction is set aside (iii) a declaration that the English court has no jurisdiction to try the claim brought against the Defendant, alternatively it should not exercise any jurisdiction which it may have.

2.10 A "Draft Interim Order" sought an extension of time to 15 April 2023 for service of evidence supporting the Application and that the case be stayed pending a decision on jurisdiction. The parties in fact came to agree that the date of service of the supporting evidence be extended to 15 May 2023 and for the Defendant's Application to be listed on the first available date after 12 June 2023. There is on CE File a draft Consent Order signed by both parties but this does not seem ever to have been approved by the court and so never became a sealed Order. I am not sure why this was. Be that as it may, it seems clear that the parties had agreed those dates as between themselves, even if that agreement did not receive the approval of the court.

2.11 The hearing on 18 October was listed by Notice dated 19 July 2023.

2.12 The Defendant did not serve (or CE file) the factual evidence to support the challenge to jurisdiction by the agreed date of 15 May 2023 but did so instead on 15 June 2023, in the form of a Witness Statement dated 15 June 2023 from Ms Mirella Kruger. That statement introduces the factual basis on which jurisdiction is challenged. By Application dated 6 October 2023, the Defendant applies for permission to rely on the statement out of the agreed time. The Application is expressed as seeking relief from sanction, as consequent upon failing to comply with CPR 32.10. The explanation and reasoning for the relief is the Witness Statement from the Defendant's South African Attorney, Mr Salvatore Puglia, dated 6 June 2023. The Claimant challenges that relief from sanction should be granted.

2.13 The parties' respective solicitors have exchanged various witness statements. That most relevant to the preliminary points in this judgment is the Second Witness Statement from Mr Barrett dated 12 October 2023, which opposes reliance by the Defendant on the statement from Ms Kruger. The same statement goes on to deal with points going to jurisdiction in the event permission is granted to the Defendant.

3 *The Preliminary Points*

(1) Whether the application for extension of time for service of the Claim Form was made outside a four month period of validity, such that permission ought not to have been given on 3 August 2021 as a matter of principle. The Claimant had neither acknowledged the Application was being made out of time nor put before the court evidence to satisfy the court that the higher threshold provisions under CPR 7.6(3) were satisfied;

(2) The procedural status of the Defendant's 14 February 2023 Application in seeking the relief it does;

(3) Whether the Defendant has sought to challenge jurisdiction in time.

4 *Preliminary Point (1)*

4.1 Miss Crowther on behalf of the Defendant submits that the effect of the Claim Form having been marked "Not for Service Out of the Jurisdiction" means the Claim Form is therefore to be

treated as for service within the jurisdiction and accordingly must be served within 4 months, unless there has been an Order extending time for compliance within the period specified by rule 7.5 (rule 7.6(2)(a)). She submits that the address for service given is not determinative of the length of validity of the Claim Form in circumstances where the "Not for Service Out of the Jurisdiction" marking appears.

CPR 7.5 provides:

> (1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.
> [Table]
>
> (2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue.

4.2 The Defendant submits that the clear effect of rule 7.5 is to present a binary test. A Claim Form is either for service within the jurisdiction or for service out of the jurisdiction. Therefore, if the court has marked the Claim Form as "Not for service out of the jurisdiction" it has by simple deduction to be a Claim Form for service within.

4.3 In consequence, therefore, because the Claimant did not apply to extend time for service of the Claim Form until 14.07.21, the four month period for its service had by then already expired (by 11 June 2021). As is well known, the predicament of a party that seeks to extend time of a Claim Form outside the four-month period is limited to the strict provisions of CPR 7.6(3). It is said that the cannot demonstrate that (a) he has acted promptly in making the application and (b) and taken all reasonable steps to serve the claim form within the 4-month period.

4.4 The Defendant relies upon the case of *American Leisure Group Ltd v Garrard* [2014] EWCH 2101 (Ch) in support of the proposition that where the address for service is outside the jurisdiction, but no permission to serve has been obtained, the Claim Form is only for service in the jurisdiction and the four-month time limit applies. Further, in *National Bank of Greece SA v Outhwaite* [2001] CP Rep 69 it was held that the effect of giving permission to serve outside the jurisdiction was to breathe new life into a claim form and this was always an important consideration when determining whether permission to serve out of the jurisdiction ought to be given. Accordingly, the Defendant submits, it should only be in a rare case where the effect of an order would be to set aside the general rule of four-month validity after its expiry should be granted if there has not been compliance with CPR 7.6(3).

4.5 Mr Loxton on behalf of the Claimant did not accept this interpretation as a matter of principle but also argued it was not properly reserved in the Defendant's 14 February 2023 Application to be relied upon anyway because it first appeared only upon receipt of Miss Crowther's skeleton argument. It was for this reason that I permitted Mr Loxton to conclude his response to the "four month" point by relying upon a written submission to be filed and served following conclusion of the hearing (and with like permission to reply from the Defendant).

4.6 In his concluding submissions, Mr Loxton's central point is that the Defendant's interpretation is both against authority on that specific point in *Anderton v Clywd CC* [2002] EWCA Civ 933, as applied in *Nesheim v Kosa* [2006] EWHC 2710 (Ch), as well as constituting a misreading of *American Leisure Group Ltd v Garrard* [2014] EWHC 2101 (Ch).

4.7 *Anderton* was a combined appeal in which included the appeal in *Cummins v Shell International*. In *Cummins*, the claimant had issued a claim against two defendants, one in this jurisdiction and the other in Singapore. The Claim Form had been marked "Not for service out of the jurisdiction". The claimant subsequently applied for and obtained permission from a Master to serve out of the jurisdiction but this was reversed by the High Court judge who held that an application to serve out of the jurisdiction (where not automatically permitted by the rules) must be made within four months of the date of issue.

The Court of Appeal allowed the appeal on this point, Lord Justice Mummery holding that:

> 97. Our conclusion on the construction of the relevant provisions of the CPR is that, on their natural and ordinary meaning, the discretion to grant permission to serve a claim form out of the jurisdiction is not subject to any express or implied requirement or condition
> 1) that the application must be made before the end of the period of 4 months from the issue of a claim form marked "not for service out of the jurisdiction"; or that
> 2) different discretionary criteria apply to an application for such permission made after the end of the period of 4 months from the issue of the claim form than apply to an application made within that period ; or that
> 3) the criteria set out in rule 7.6(3) apply directly or indirectly to the exercise of the discretion, whether the application is made before or after the end of the period of 4 months from the issue of such a claim form.
>
> 98. The relevant provisions governing permission to serve a claim form out of the jurisdiction are in the "Special Provisions" in Section III of Part 6 (see also rule 6.5(1)), not in the general provisions in Part 7 , save for the time for service of the claim form out of the jurisdiction in 7.5(3), as to which no extension of time was required, as the 6 month period for such service had not expired. In those circumstances it would require clear words to restrict, in the manner contended for by Mr Young, the exercise of the discretion to grant permission to serve the claim form out of the jurisdiction. There are no such restrictive words in Part 6 or Part 7 CPR nor are there any strong contextual indicators that the discretion was intended to be so circumscribed….

4.8 In the case of *Nesheim v Kosa* [2006] EWHC 2710 (Ch), nine days after the expiry of the four month period in CPR 7.5(1), the claimants had the Claim Form resealed for service out of the jurisdiction. The defendant in that case raised the same point that because in its original form as issued the Claim Form was "not for service out of the jurisdiction", the four-month period applied and the application to extend after that period was ineffective. Briggs J described this point as 'plainly wrong' [Para 36] and cited the judgment of the Court of Appeal in *Anderton*.

4.9 On the basis of such clear authority affirming the Claimant's submission, there seems little more to be said save that I agree with the Claimant's submission that the *American Leisure* case does not enable a different or distinguishing approach of the kind submitted by the Defendant. The feature in that case was that the Claim Form featured two addresses for first defendant, one in the jurisdiction and one in Switzerland. It had been marked "Not for Service". The first defendant had not been served at his English address in the four-month period. The claimant obtained permission to serve three other defendants out of the jurisdiction, in response to which order solicitors for the first defendant said they had instructions to accept service. However, upon service the first defendant applied for a declaration that the claim form was out of time. The claimant argued that because one of the addresses for the first defendant was in Switzerland then the Claim Form was to be regarded as one to be served out of the jurisdiction and so could be validly effected within six months. Richards J was clear at [19] as to the clear distinction between the provisions for service of a Claim Form respectively within the jurisdiction and out of the jurisdiction. Service out of the

jurisdiction is subject to the quite separate provisions within section IV of Part 6. A Claim Form accordingly can only be served in accordance with section IV "if it is served out of the jurisdiction". Accordingly, he rejected the submission that contemplation of service at an address out of the jurisdiction had any bearing on the feature of attempted service at different address in the jurisdiction. Service on the London address was ineffectively attempted because it was out of the four month period applicable for service at that address.

4.10 In this case, the Claim Form has always been from the time of issue proposed to be served on defendants out of the jurisdiction. There is no dual character or choice as to addresses within or without, as there was in *American Leisure*. It is, in terms of the rule 7.5(2) distinction, a claim to be served out of the jurisdiction. I am satisfied that that case provides no support for the proposition that marking "Not for Service out of the jurisdiction" is anything more (nor indeed anything less) than procedural confirmation that permission of the court will still be required because grounds of entitlement to serve out of the jurisdiction had not been presented at issue, per CPR 6.34.

4.11 Aside of the question whether the claim is properly brought in this jurisdiction, I am satisfied that the court was therefore entitled to extend time for service of the Claim Form.

5 *Preliminary Points (2) and (3)*

5.1 There is some overlap between these two points. The second draws upon the Claimant's submission that the 14 February 2023 Application does not appear to seek to set aside my 3 August 2021 Order and dispute jurisdiction but is simply an application to extend time to do so. By way of the third point, the Claimant further submits there is no application that expressly seeks to set and/or dispute jurisdiction consequent upon any extension of time as may have come to have been either agreed or impliedly granted. In short, the Defendant in breach of the strict requirements of CPR 11 "Procedure for disputing the court's jurisdiction".

5.2 I am clear that the second point has no real substance. It seems to me on a simple reading of the N244 that the Defendant seeks – as part of the same Application – directions respectively for (i) an extension of time for the Applicant to conclude its application for a direction that the 3 August 2021 Order should be set aside; (ii) that purported service of the Claim Form be set aside and (iii) a declaration that this court has no jurisdiction in respect of the claim. Critically, the N244 refers to and annexes separate draft Orders to support the distinction between being granted an extension and then for declarations. It is clear that the narratives at Section 3 and 10 condescend not just to reasoning why further time is required but also the basis on which jurisdiction will be challenged. At least in terms of the drafting of this Application, I do not accept the Defendant is limited merely to pursuing a stay or extension of time in order to formulate an Application that has never been issued.

5.3 Treating the 14 February 2023 Application as challenging the Claimant's procedural ability to seek an extension of time for service of the Claim Form (that is, irrespective of whether permission should also have been granted to serve out of the jurisdiction), the Defendant was therefore entitled at least to argue this point even if, for the reasons discussed above, it was an argument contrary to authority.

5.4 The third point is the more complex, however: the very date of the Defendant's Application in going further to challenge jurisdiction. A copy of the sealed 29 July 2021 Order and the Claim form with Particulars of Claim were served on the Defendant on 24 August 2022. A Response Pack was also served on the Defendant on 24 August 2022, stating that CPR 6.35 and 6.37(5) were relevant 'if served outside the jurisdiction'. Focusing upon and isolating the 14 February 2023

Application as (as I find it also to be) an application under CPR Pt 11, the Claimant submits that challenge was significantly out of time. Further the Defendant's Acknowledgment of Service on 1 February 2023 was also out of time.

5.5 Because the 29 July 2021 permitted the Defendant to 'apply within 28 days of service of a copy of the sealed Order to suspend, vary or revoke the same', the Claimant argues that the Application should have been made by 22 September 2022. The feature of the 14 February 2023 Application reserving its position owing to missing information was not an obvious justification for it still being late.

5.6 The Claimant further submits that, on a strict interpretation of the rules, the time period provided by the 29 July 2021 Order in fact was generous. CPR 11.2 mandates that a Defendant 'who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10'. The general rule in Pt 10, at CPR 10.3(1)(b), is that the period for filing an acknowledgement of service is 14 days after the service of the claim form. This is, however, subject to CPR 10.3(2)(c) which provides guidance on the relevant period where the Order grants permission to serve a claim form out of the jurisdiction. CPR 10.3(2)(c) guides the parties to CPR 6.37(5) which states that the period for filing an Acknowledgment of Service is specified in PD6B. Pursuant to the table at Direction 7.1. in PD6B, 'the period for responding is 7 days less than the number of days listed in the Table'. The number of days listed in the Table for South Africa is 22 which, minus the 7 days, meant the Defendant had 15 days from receiving the Court Order and accompanying documents in which to file an acknowledgement of service.

5.7 On this analysis, the Defendant was required to file an Acknowledgement by 8 September 2022 aside of the slightly longer period afforded to challenge the Order.

5.8 The strict consequences of a failure of a defendant to challenge jurisdiction in time are set out in CPR Part 11, the relevant parts of which provide:

> 'Procedure for disputing the court's jurisdiction
> 11
> (1) A defendant who wishes to –
> (a) dispute the court's jurisdiction to try the claim; or
> (b) argue that the court should not exercise its jurisdiction
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
> (4) An application under this rule must –
> (a) be made within 14 days after filing an acknowledgment of service; and
> (b) be supported by evidence.
> (5) If the defendant –
> (a) files an acknowledgment of service; and
> (b) does not make such an application within the period specified in paragraph (4),
> he is to be treated as having accepted that the court has jurisdiction to try the claim.'

5.9 The Claimant relies upon *Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 W.L.R. 806 where the Court of Appeal held that a defendant is treated as having accepted that the court should deal with this claim, even if the time for service of the claim form should not have been extended, if the defendant had not complied with the requirements of CPR Part 11. Whilst I note

that the failure in *Hoddinott* was to comply with CPR 11(4), the following part of the judgment of Dyson LJ obviously applies where there is a failure to comply with CPR 11(2):

> '26. … the language of CPR r 11 is clear. Paragraph (1) permits a defendant to apply to the court for an order declaring that the court has no jurisdiction to try the claim or that the jurisdiction should not be exercised. Paragraph (2) provides that a defendant who wishes to make such an application "*must* first file an acknowledgment of service in accordance with Part 10 " (emphasis added). Paragraph (4) provides that an application under CPR r 11 must be made "within 14 days *after* filing an acknowledgement of service" (again, emphasis added). Paragraph (5) provides that if the defendant files an acknowledgement of service and does not make an application within the period specified in paragraph (4), "he is to be treated as having accepted that the court has jurisdiction".
>
> 27. In our judgment, the meaning of paragraph (5) is clear and unqualified. If the conditions stated in sub-paragraphs (a) and (b) are satisfied, then the defendant is treated as having accepted that "the court has jurisdiction to try the claim". The conditions include that the defendant does not make an application for an order pursuant to CPR r 11(1) within 14 days after filing an acknowledgment of service. An application to set aside an order extending the time for service made before the filing of an acknowledgement of service is not an application under CPR r 11(1) nor is it an application made within 14 days after the filing of the acknowledgment of service….
>
> 28. In our view, a defendant is fixed with the consequences stated in paragraph (5) if the two stated conditions are satisfied….'

The Court of Appeal concluded at [Para 60] that if the conditions of CPR 11(5) are satisfied, a defendant is treated as having accepted that the court should deal with this claim even if the time for service of the claim form should not have been extended.

6 As well as pointing out that the Claimant had not taken this point before the opportunity to submit written submissions on the "Not for service out" point, the Defendant argues that none of the above analysis has any application if the procedure for service of a Claim Form to be served out of the jurisdiction have not correctly been followed by a claimant. The CPR does not provide a default date for filing an acknowledgement of service in service out cases but instead prescribes at CPR 6.37(5) a mandatory direction that the court will specify the time periods for response. In the absence of that direction, there can be no breach of the rules as to acknowledgment or jurisdictional challenge. There is accordingly no basis for asserting delay by the Defendant in its CPR Part 11 application if the Claimant had not correctly followed the provisions for service in the first place.

6.1 The Defendant here repeats its position set out in the 14 February 2023 Application that both the form and sufficiency of the materials provided upon service of the 03 August 2021 Order was insufficient and so undermines the proposition that was a straightforward responsibility passed to the Defendant to respond within time if wishing to object to jurisdiction. The witness statements of the Claimant and Mr Barrett in support of the Claimant's application for permission to serve the claim form outside the jurisdiction and associated extension of time were not served on the Defendant. None of the materials relating to the 15 July 2021 Application were served and indeed, as stated, the Defendant remained until shortly before the hearing without a copy of that Application or its supporting evidence. The wording of the 3 August 2021 Order was wrong. The Defendant says such omissions or errors either absolutely entitle the Defendant to challenge without procedural restriction of time or at least should be taken into account to the extent the court has a discretion.

The Defendant also goes on to observe that, once eventually provided, Mr Barrett's first Witness Statement contains several material factual omissions or errors. These points are, however, more relevant to the question of jurisdiction than the procedural facility to challenge jurisdiction.

6.2 CPR 6.37(5) provides that:

> (5) Where the court gives permission to serve a claim form out of the jurisdiction –
>
> (a) it will specify the periods within which the defendant may –
>
> (i) file an acknowledgment of service;
>
> (ii) file or serve an admission;
>
> (iii) file a defence; or
>
> (iv) file any other response or document required by a rule in another Part, any other enactment or a practice direction; and
>
> (b) it may give directions about the method of service-
>
> (i) give directions about the method of service; and
>
> (ii) give permission for other documents in the proceedings to be served out of the jurisdiction.
>
> (The periods referred to in paragraphs (5)(a)(i), (ii) and (iii) are those specified in the Table in Practice Direction 6B.)

6.3 Having regard to the provision of r.6.37(5), I agree and am satisfied that the 03 August 2021 Order was defective. It did not provide for the Defendant to file an acknowledgement of service, nor any date by which it needed to be done. I agree with the Defendant's submission that, it follows, it is not for the Claimant to argue that the Defendant should have interpreted this defective order having regard to the Practice Direction 6B table. The sentence in brackets at the end of r.6.37 plainly defines what periods are to be specified by the court in the order. If no periods are provided, then the order is deficient and it cannot be for the respondent defendant to make assumptions.

6.4 I agree with and accept the Defendant's submission that, owing to the very stringency of the CPR 11 provisions for challenging jurisdiction and their consequence, as emphasised by the Claimant in referring to *Hoddinott v Persimmon*, it is not possible for the Claimant to seek to supplant his own omission under CPR 6.75 by instead drawing upon the more general provisions under CPR 23.9 and 23.10, as facilitate a party to respond to an Order made without notice to them. With respect, if it was thought that Paragraph 3 in the 03 August 2021 Order was sufficient to displace the requirements under r.6.37(5) then this is wrong.

6.4 Miss Crowther adds that even if CPR 23.9 can somehow apply in principle, the Claimant's failure to serve "a copy of the application, notice, and any evidence in support, unless the court orders otherwise" of the order made without notice [r.23.9(2)] fundamentally undermines reliance upon CPR 23.9 and the submission that the Defendant is out of time and so should not be permitted to proceed.

6.5 I agree. If in the alternative the analysis is appropriately to be seen in the context of r.23.10, the Defendant's lateness has to be balanced with the reasons for it. The failure of the Claimant to provide all required materials, or materials in correct form, does not seem to be denied. I find the Defendant's explanation as to lateness (in this context, if relevant) a complete and persuasive

explanation. I note and accept the Defendant's submission here that the Claimant has not sought to suggest any prejudice has been sustained because of the timing of the Defendant's Application beyond, of course, fundamentally challenging the Defendant's procedural right to object. Further, the Defendant raises a pertinent point that the Claimant's procedural omissions should have been brought to the attention of the court rather than the Defendant doing so. I agree and add it is more appropriate to prescribe the requirement for such correction and clarification by the Claimant to the period the Claimant obtained the 03 August 2021 Order, or at least by the time he was serving the Claim Form, rather than in the context of hearing the Defendant's Application. These would also be reasons for permitting the Defendant to proceed if under r.23.

7 *Conclusion*

In procedural terms, the Defendant has appropriately acknowledged service of the Claim Form and challenges jurisdiction. Further, if I am wrong on this as a point of procedure, I consider it appropriate in all the circumstances to permit the Defendant to pursue its arguments on jurisdiction.

8 *The Defendant's 06 October 2023 Application for permission to rely upon the Witness Statement of Mirella Kruger*

8.1 Although presented as a request for relief from sanction, in serving the Witness Statement of Mirella Kruger on 15 June 2023 the perhaps more correct analysis is that the Defendant was in breach of the inter-parties agreed extension for service by 15 May 2023. However, the Defendant was not in direct breach of a sealed Order.

8.2 As described in the Witness Statement of Salvatore Puglia dated 6 October 2023, as at 15 May 2023 Ms Kruger was unwell and in hospital. Mr Puglia explains "The late filing was a direct consequence of the age and frailty of the witness. Mirella is 70 years, old born on the 4 October 1953. She is suffering from severe Syringomyelia and is currently in a wheelchair. Syringomyelia is normally associated with a cyst within the spinal cord. She is further restricted due to Emiplegia which has affected here left side of her body" [27]. "On 15 May 2023 she had to attend hospital for a medical procedure and has been unwell for some time" [31]. "Mirella was suffering from a debilitating illness described above. Such illness was considered a 'good reason' by Master of The Rolls Lord Justice Richards (as he then was) in *Mitchell v NGN* [2013] EWCA Civ 1537 para 41" [34].

8.3The Claimant's solicitors were informed on 13 June 2023 and the statement CE Filed and served on 15 June 2023. At that stage, the Defendant's Application had yet to be listed; it was listed for 18 October 2023 by Notice dated 19 July 2023. Despite the interval of time afforded between service of the Kruger statement and hearing, the Claimant's solicitors advised on 21 July 2023 that, and have since maintained, they take the view the Defendant is not entitled to rely upon the statement.

8.4 The Claimant makes the further point that irrespective of the provision of the Kruger statement a month later, the 06 October 2023 Application for permission to rely upon it is considerably later. The Claimant observes that there is no explanation why the Application has followed so much later or why Ms Kruger's statement only dated 15 June 2023, when the medical certificate relied upon states that she was expected to return to work on 16 May 2023. Mr Puglia does not state that the doctor's expectation as to when Ms Kruger was to be capable of returning to work was proved wrong. Further, Ms Kruger's own statement is silent on the whole issue of her being apparently unwell. Mr Loxton's skeleton argument reminds me of the analysis directed in *Denton and Others v T H White Limited* [2014] 1 WLR 392 where there has been a breach of CPR 3.9.

8.5 My conclusion is that permission should be granted to the Defendant to rely upon the statement from Ms Kruger.

8.6 Plainly, the court expects parties to comply with agree time limits, even if not as endorsed with the authority of a court Order, and will endeavour to enforce compliance in default. To suggest something less applies in these circumstances would be to undermine both the expectation and encouragement of parties to conduct litigation efficiently and therefore to agree extensions of time, providing such agreement is both reasonable and such as can be agreed without the need for permission from the court. I am satisfied, however, that a distinction exists between a breach of an agreement between legal representatives and a breach of a sealed court order, even without one having to engage the much-vexed question whether the specified breach of *an Order* involves an implied sanction. Such distinction distinguishes a relief from sanctions application to which *Denton* applies, from a different application governed by the overriding objective.

8.7 Even if I am wrong that such a distinction exists on these facts, I am satisfied that a *Denton* process of scrutiny would reach the same conclusion as applying factors relevant to the overriding objective.

8.8 In the context of a timetable wherein consideration of the late served Ms Kruger statement still afforded the Claimant four months to consider and respond, I do not consider the breach as significant or serious. No point has been relied upon by the Claimant, for example, to the effect that service of this statement in June hampered the Claimant's reply at a hearing months later on 18 October 2023.

8.9 The Defendant's explanation for the failure to serve the statement in time seems entirely reasonable and plausible. The Claimant's invitation to apply a strict interpretation to the supporting medical and so for the court to conclude that Ms Kruger was unequivocally capable of providing the statement sooner seems artificially narrow, having regard to the broader points deposed by Mr Puglia about her health at this time.

8.10 Following an analysis close to *Denton* reasoning, looking at the facts of the case overall, neither am I persuaded it would be reasonable and proportionate to deprive the Defendant of central evidence upon which it relies to support an Application of which the Claimant has been aware since February 2023. For the reasons expressed above, it is clear that the Defendant's entitlement to challenge jurisdiction appropriately proceeds. To inverse that entitlement by nonetheless refusing the Defendant to rely upon fundamental evidence in support would, I am satisfied, be unreasonably to provide the Claimant with a windfall.

9 *Permission for the Defendant to rely upon the Witness Statement and accompanying exhibit of Mr Mark Stiebel dated 13/10/23*

9.1 Mr Stiebel is the Defendant's solicitor. This statement provides no factual commentary or opinion but is instead chosen as the means by which the Defendant puts before the court (a) relevant solicitor/attorney correspondence between 9 December 2019 and 5 July 2021 (b) the Russian Environmental Impact Assessment 2001, from the Antarctic Treaty Website (c) the Current South African Practice Direction applicable from 2 October 2023 (d) a copy Email to Claimant Solicitors dated 13 October 2023.

9.2 The Defendant's 06 October 2023 Application does not seek permission to rely upon this statement, as served only two business days before the hearing. The Claimant submits permission should be refused for at least the same reasons as expressed in respect of Mr Puglia's statement.

9.3 Service of potentially significant further evidence on jurisdiction only a few days' before a hearing is not helpful. The Claimant is right to question why this material could not have been provided far earlier.

9.4 I disagree, however, with the proposition that this "statement" engages questions of relief from sanction and am not necessarily persuaded it constitutes a breach of procedure rather than preferred practice in this case. The adducing of copy correspondence or external materials by way of a supporting Witness Statement has always been good practice, not least so as to explain (if not satisfy) the progeny of the material. However, the Claimant can hardly suggest that the annexed material is itself inadmissible or at least not without the support of its (late) introduction by way of Mr Stiebel's supporting statement. Such a suggestion would certainly seem nonsensical in the case of copy correspondence. To the extent that the Claimant might more realistically argue that his consideration of the Russian Environmental Impact Assessment and the Current South African Practice Direction has been hindered by a late provision from the Defendant, a similar practical question arises as it had in the context of Ms Kruger's statement: is it reasonable and proportionate to deny the Defendant from relying upon this material given (for whatever reason or reasons) the jurisdiction question has been adjourned off owing to the necessary exploration of the above preliminary points? I am quite satisfied that that the response to that question should be negative. The Defendant should and is permitted to rely upon this statement.

10 *Further steps*

A draft order needs to be submitted to reflect the above decisions and as lists the case to return on the question of jurisdiction. The parties need to decide whether the costs of the written submissions and consideration of this interim judgment are appropriate to decide at this stage or instead upon conclusion of the Defendant's Application. If they are agreed they are then this too can feature in the draft order.