Neutral Citation Number: [2021] EWHC 83 (QB)

Case No: QB 2019-001115

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 20th January 2021

**Before** :

**THE HONOURABLE MR JUSTICE BOURNE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**GABRIELLE ALLI-BALOGUN (suing by her mother and litigation friend**

**OBIAGELI ALLI-BALOGUN** **Claimant**

**and**

**(1) ON THE BEACH LIMITED**

**(2) ZURICH INSURANCE PLC SUCURSAL EN ESPANA**

**(3) HOSA HOTELS SA**

**(4) INSTITUT DE BALEAR D'EMERGEMCIES SL**

**(5) MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUROS**

**Defendants**

**and**

**MEETING POINT YOUTRAVEL TOURISM LLC**

**Additional Party**

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- - - - - - - - - - - - - - - - - - - - -

**Sarah Prager** (instructed by Travlaw LLP**) for the <u>First Defendant</u>**

**Howard Stevens QC** (instructed by MB Law**) for the <u>Additional Party</u>**

Hearing dates: 9 December 2020

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# Approved Judgment

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

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THE HONOURABLE MR JUSTICE BOURNE

**The Honourable Mr Justice Bourne:**

*Introduction*

1. On 4 December 2019 the First Defendant ("OTB") sought to serve an additional claim under CPR Part 20 on the Part 20 Defendant, Meeting Point Youtravel Tourism LLC ("Meeting Point") at an address in London. Meeting Point now applies for an order setting aside the purported service and declaring that the Court has no jurisdiction to try the Part 20 claim, or in the alternative an order deciding that the Court will not exercise its jurisdiction. In the event that Meeting Point succeeds, OTB makes a cross-application for permission to effect service by one of the methods specified under CPR 6.12 or 6.15 or 6.36 and 6.37, or an order dispensing with service under CPR 6.16.

*Factual background*

2. OTB is a company registered in England and Wales and trades as a travel agent. The underlying litigation arises from a tragic accident on 15 August 2015 in which a child suffered catastrophic injuries while on a holiday in Spain which had been booked through OTB. Proceedings were issued on behalf of the victim on 10 April 2019 against OTB and four Spanish companies (the hotel, the lifeguard's employer and their insurers), and are ongoing.

3. The additional claim was issued on 28 November 2019 against Meeting Point, a company registered in Dubai which supplies overseas holiday accommodation to OTB.

4. Meeting Point supplied accommodation under the terms of a contract which was renewed each year. The relevant contract was dated 1 November 2014 ("the main contract"). It was made on Meeting Point's standard terms and conditions. By clause 15 it provided:

> "This agreement is governed by the laws of England and Wales and both parties hereby agree to submit to the exclusive jurisdiction of the courts of England and Wales."

5. OTB and Meeting Point also entered into a separate Deed of Indemnity dated 1 November 2014. This too was on Meeting Point's standard terms. Clause 1 provided that Meeting Point would indemnify OTB against claims relating to the holiday accommodation. That provision is the basis for the additional claim under CPR Part 20. The Deed of Indemnity also provided in particular:

> "5) CONFLICT WITH THE AGREEMENT.
>
> [Meeting Point] and [OTB] agree that this DEED amends the terms of [the main contract], which shall remain effective, to the extent that it has not been amended by this DEED. In the event that there is a conflict between the terms of [the main contract] and the terms of this DEED, the terms of this DEED shall prevail. The terms of this DEED shall survive the termination of

> [the main contract], but only in respect of bookings made pursuant to [the main contract].
>
> …
>
> 7) GOVERNING LAW AND JURISDICTION.
>
> This DEED OF INDEMNITY and any disputes arising out of or in conjunction with its terms shall be governed by and construed in accordance with the laws of England and Wales."

6. On 4 December 2019 OTB's solicitor personally served the additional claim at 55 Strand, London WC2, which is the registered office of Youtravel.com Ltd, a company registered in England and Wales ("Youtravel").

7. Meeting Point and Youtravel are both part of the FTI Touristik Gmbh Group, a company registered in Germany ("FTI"). The corporate structure is explained in more detail in a witness statement by FTI's Head of Legal Affairs Auxiliary Travel Services, a German lawyer by the name of Yvonne Baumann Ximenes. Essentially:

   i) Youtravel was incorporated in 2006. It has always been wholly owned by an English company known as Stelow Ltd. Stelow is a subsidiary of FTI, which acquired the majority shares in Stelow in May 2012. Youtravel traded as a supplier of holiday accommodation.

   ii) In 2014 there was a restructure. The business activities of Youtravel were transferred to a newly formed company incorporated in Dubai, namely Meeting Point.

   iii) Youtravel, according to Ms Baumann Ximenes, thereupon changed its activities to those of a service company.

   iv) According to Ms Baumann Ximenes, the shares in Meeting Point are held by individuals on trust for another German company, Meeting Point International GmbH, which in turn is a wholly owned subsidiary of FTI.

   v) I note also that a Mr Dietmar Gunz is described by Ms Baumann Ximenes as the sole director of Youtravel, the sole director of Stelow and the CEO of FTI.

*The applications and the CPR*

8. Service of a claim form is dealt with by CPR rule 6.3, which provides:

> "(1) A claim form may…be served by any of the following methods –
>
> …
>
> (c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10; …

> …
>
> (e) any method authorised by the court under rule 6.15.
>
> (2) A company may be served –
>
> (a) by any method permitted under this Part; …"

9. OTB's primary case is that, in reliance on rule 6.3(1)(c), it left the claim form at a place specified in rule 6.9, namely "any place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction" (CPR 6.9(2)). By its application, Meeting Point contends that 55 Strand was not a place of business of that company and therefore that there has not been valid service under rule 6.3(1)(c).

10. In the alternative, OTB by its cross-application seeks permission to serve the claim form (either retrospectively, effectively validating what has already occurred, or prospectively) under CPR 6.12, which provides:

> "(1) The court may, on application, permit a claim form relating to a contract to be served on the defendant's agent where –
>
> (a) the defendant is out of the jurisdiction;
>
> (b) the contract to which the claim relates was entered into within the jurisdiction with or through the defendant's agent; and
>
> (c) at the time of the application either the agent's authority has not been terminated or the agent is still in business relations with the defendant.
>
> …
>
> (5) This rule does not exclude the court's power under rule 6.15 (service by an alternative method or at an alternative place)."

11. In the further alternative, OTB seeks permission (retrospective or prospective) pursuant to CPR 6.15, which provides:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service…"

12. As a further alternative, OTB seeks permission to serve Meeting Point out of the jurisdiction pursuant to CPR 6.36, which provides:

> "In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply."

And paragraph 3.1 of Practice Direction 6B provides:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> **General Grounds**
>
> ….
>
> (4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim….
>
> **Claims in relation to contracts**
>
> (6) A claim is made in respect of a contract where the contract –
>
> (a) was made within the jurisdiction;
>
> (b) was made by or through an agent trading or residing within the jurisdiction;
>
> (c) is governed by English law; or
>
> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract…".

13. As a final alternative, OTB seeks an order under CPR 6.16 which provides:

> "(1) The court may dispense with service of a claim form in exceptional circumstances.
>
> (2) An application for an order to dispense with service may be made at any time and –
>
> (a) must be supported by evidence;
>
> (b) may be made without notice."

*Legal principles*

14. It is common ground that relevant and authoritative guidance on the question of when a company incorporated in one country is "present" in another, for jurisdictional purposes, is to be found in *Adams & Others v Cape Industries PLC and Another* [1990] 1 Ch 433, though that was a pre-CPR case not directly involving presence in the UK.

A lengthy quotation from the judgment of the Court of Appeal given by Slade LJ at 530ff summarises the key principles:

> "In relation to trading corporations, we derive the three following propositions from consideration of the many authorities cited to us relating to the "presence" of an overseas corporation:—
>
> (1) The English court will he likely to treat a trading corporation incorporated under the law of one country ("an overseas corporation") as present within the jurisdiction of the courts of another country only if either
>
> (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), OR
>
> (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.
>
> (2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation^ business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.
>
> (3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation:
>
> (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the seas corporation;
>
> (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff;
>
> (c) what other contributions (if any) the overseas corporation makes to the financing of the business carried on by the representative;

(d) whether the representative is remunerated by reference to transactions (e.g. by commission) or by fixed regular payments or in some other way;

(e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative ;

(f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation;

(g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation;

(h) what business (if any) the representative transacts as principal exclusively on his own behalf;

(i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it;

(j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. If the learned judge (at p. 65G—H of his judgment) was intending to say that in any case, other than a branch office case, the presence of the overseas company can never be established unless the representative has authority to contract on behalf of and bind the principal, we would regard this proposition as too widely stated … Every case of this character is likely to involve "a nice examination of all the facts and inferences must be drawn from a number of facts adjusted together and contrasted" …

Nevertheless, we agree with the general principle stated thus by Pearson J,. in *F. & K. Jabbur v. Custodian of Absentee Property for the State of Israel* (1953) 2 L. Rep. 760 at p. 776:

> 'A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval.'

On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other, A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation or otherwise in such manner

> as to bind it must be a powerful factor pointing against the presence of the overseas corporation."

*Meeting Point's application*

15. Mr Stevens QC, on behalf of Meeting Point, emphasizes that Youtravel is not a subsidiary of Meeting Point. They are instead distinct entities within the same corporate group, as Ms Baumann Ximenes explained. Mr Stevens QC relies in particular on the following further points of distinction.

16. By reference to the witness statement of Mr Ranjeev Kundi, Meeting Point's Chief Commercial Officer, and Matthew Carpenter, Youtravel's General Manager, Mr Stevens QC points out that Meeting Point is both incorporated and managed in Dubai whilst Youtravel is both incorporated and managed in the UK. They trade in their own right and are independently audited.

17. Looking at the relationship in more detail, that evidence explains that Meeting Point outsources services to Youtravel in the areas of sales and marketing, customer services support and invoice processing. Mr Carpenter's statement explains that these services are provided, under his direction, by Youtravel's staff. Mr Kundi confirms that Meeting Point's senior management do not exercise control over Youtravel's staff.

18. The services are supplied pursuant to a contract dated 31 October 2014.

19. Article 2 of that contract provides for sales and marketing services, consisting of advising Meeting Point on market developments, helping it with maintaining its business and agent relationships and helping it to expand by acquiring new travel agents or exploring new sales channel opportunities. In particular:

> "2.3 All agent and commission agreements, including amendments of the same, shall be negotiated and concluded exclusively by MPYT in Dubai. The Parties agree that Youtravel UK shall have no authority whatsoever to enter into or conclude any agreements on behalf of MPYT.
>
> 2.4 Without prejudice to clause 2.3 above, MPYT may request from time to time that Youtravel UK conducts discussions with local travel agents on commission rates and overrides. When conducting such discussions, Youtravel UK shall closely coordinate with MPYT who shall provide Youtravel UK with clear instructions and pricing guidelines in this regard and shall make the final decision in accordance with clause 2.3 above."

20. Article 3 provides for Customer Service Support, including dealing with complaints and claims. In particular:

> "3.3 Any significant customer complaints (i.e. those which could have a significant financial impact) shall be escalated to

> the COO of MPYT who will be responsible for deciding how to deal with the complaint.
>
> …
>
> 3.7 YouTravel UK shall be authorized to settle complaints and personal injury cases on behalf of MPYT, however subject to Youtravel UK seeking MPYT's guidance and approval in relation to:
>
> (a) all complaint cases which Youtravel UK is unable to settle by way of granting a [redacted in the hearing bundle]
>
> (b) all personal injury cases which Youtravel UK is unable to settle within the financial limits defined by the deductibles pursuant to MPYT's liability insurance policy from time to time;
>
> (c) any claims made by lawyers representing travel clients;
>
> (d) a significant number of claims, i.e. claims pertaining to [redacted] ;
>
> (e) claims related to the same reason which re-appear over a period of more than [redacted] ;
>
> (f) any other significant (i.e. costly) or more complex issues"

21. Article 4 provides for invoice processing and credit control services.

22. Mr Stevens QC emphasizes the limited nature of the authority to contract on Meeting Point's behalf given to Youtravel under Article 3.

23. Mr Carpenter's evidence also explains that the premises at 55 Strand were acquired by Youtravel for Youtravel's use and are paid for by that company and not by Meeting Point. They are occupied by staff of Youtravel and not by any staff of Meeting Point.

24. Youtravel charges Meeting Point for its services in varying amounts, as is demonstrated by invoices which I have seen. Meeting Point does not contribute towards the financing of Youtravel's business.

25. Mr Stevens QC also relies on the fact that Youtravel is free to contract with parties other than Meeting Point. He says that it does on occasion trade with other members of the FTB Group (but not with anyone outside the Group), although Meeting Point is its main client.

26. Ms Prager, representing OTB, contends that Youtravel's offices at 55 Strand are in reality a place of business of Meeting Point. She relies on the close relationship between the two companies and the fact that Youtravel was the entity which previously carried on the activities taken over by Meeting Point when the latter company was created.

27. Meeting Point, indeed, uses the brand "Youtravel" or "Youtravel.com", the latter being a trademark which it owns. Most obviously, the word "Youtravel" is part of Meeting

Point's full name. Witness evidence from OTB's Chief Supply Officer, Bill Allen, identifies trading literature referring to, for example, "Youtravel Dubai" and "Youtravel London". He notes the Youtravel website giving postal addresses in both places, and social media pages showing "Youtravel.com" trading from the London base.

28. Mr Allen states that when Meeting Point was incorporated, the "commercial decision makers" moved to Dubai but the "operations team and day-to-day office staff" remained in London, so that "the London office is both a sales arm and an operational arm to MPYTT". He asserts that Matthew Carpenter is based in London and deals with "commercial matters" there. By way of example, he attended a meeting at 55 Strand on 19 October 2018 where a new main contract and Deed of Indemnity between OTB and Meeting Point were concluded. Mr Carpenter was there with him while Mr Kundi dialled in from Dubai, and Mr Kundi "signed the agreements on behalf of YT before scanning and sending them back to the UK office".

29. Mr Allen has also referred to the website of the FTI Group where there is or was a page stating that "YouTravel is a subsidiary of MPYT based in Dubai". Having read the statement of Ms Baumann Ximenes, I do not think that this affords any assistance, save as an example of how the use of the brand "Youtravel" is potentially ambiguous or confusing.

30. Ms Prager places particular weight on the fact that Youtravel appears to have had only one client, namely Meeting Point. Although Meeting Point's witnesses referred to it being free to act, and acting in practice, for other members of the Group, I have not been given any example of an actual transaction for any client other than Meeting Point. On this basis Ms Prager suggests that Youtravel is a "mere puppet" of Meeting Point.

31. Finally Ms Prager relies on the fact that Youtravel had <u>some</u> authority to contract on behalf of Meeting Point. This is not a case where the UK agent "never makes contracts in the name of the overseas corporation" as contemplated at the end of the quoted passage in *Adams* above.

32. In addition to *Adams,* I note the way in which the test has been applied in cases such as *Noble Caledonia Ltd v Air Niugini Ltd* [2017] EWHC 1095 (QB), a rule 6.9 case which bears some similarities to the present one. There a claimant sought to serve a claim on an airline company incorporated in Papua New Guinea, at the premises of an English company based near Gatwick Airport through whom a flight had been arranged. The English company operated as a sales agent for the airline and also for other airlines. It gave evidence that its business involved earning commissions by making sales as an agent. It had no authority to vary the airline's terms when making bookings. As in the present case, there was common branding between the foreign principal and the English agent. For example, the agent used an online domain "airniugini.co.uk" and promoted the principal through social media.

33. Gilbart J in *Noble Caledonia* focused on the question of whether the place of service was "a place at which [the foreign company] carried on its activities", rather than whether it was a "place of business" of that company. The relevant words in CPR 6.9(2) enable service at either such place, and it seems to me that service in the present case was valid if either phrase applies.

34. Gilbart J therefore defined the critical issue as "whether [the agent] has been a representative of [the principal], carrying on its business for more than a minimal period, from [the agent's] offices, or have the activities of [the agent] been those of its own business".

35. In *Noble Caledonia* Gilbart J gained assistance from evidence of "the practice in the airline and general service agency world", and evidence that the agent had entered into similar arrangements with various airlines. I have no such assistance, and a difference between *Noble Caledonia* and the present case is that there is minimal if any evidence of Youtravel acting as agent for any client other than Meeting Point.

36. Reviewing the relevant facts, Gilbart J found most of them to support the suggestion that the agent was carrying on its own business as agent, rather than carrying on the principal's business. Ownership of the premises, employment of staff, financing, payment and lack of independent authority to contract all pointed in that direction. Only the branding evidence leaned the other way. Although Gilbart J accepted that a "lay visitor" might think that the agent's employee was "the personification of [the airline] in the UK", the agent itself was fully aware of its own separate role.

37. The present case is less clear-cut. As I have said, I have seen no actual example of Youtravel entering a transaction with any client other than Meeting Point. Youtravel has some authority to contract, albeit in limited categories of case. From branding and online promotion and the generally close connection between the two companies, an outside observer could readily conclude that "Youtravel.com" is a business which trades in both Dubai and London.

38. Nevertheless, my conclusion is that the activities of Youtravel are activities of an agent, carrying on the business of working as an agent. Properly analysed, they are not the activities of Meeting Point.

39. The FTI Group was legally entitled to arrange its affairs as it did in 2014. It could, and did, cause a company to be incorporated in Dubai and transfer what had been Youtravel's business to the new company. The new company could, and did, outsource services to an agent in London, namely Youtravel. The two corporate entities genuinely, and lawfully, had and have separate identities.

40. That legal reality is reflected in the fact that the two companies have separate finances and different employees, and in the fact that the premises at 55 Strand are occupied and paid for by Youtravel, not Meeting Point. Mr Allen's evidence does not change that conclusion. It seems to me that in the commercial activities which Mr Allen describes, Mr Carpenter was working for the agent Youtravel whilst Mr Kundi was transacting Meeting Point's business.

41. Meeting Point's application is therefore well founded. Service of the claim has not been effected under CPR 6.3(1)(c) and 6(9).

*OTB's application*

42. OTB cross-applies for permission to effect service by one of the methods specified under CPR 6.12 or 6.15 or 6.36 and 6.37, or an order dispensing with service under CPR 6.16.

43. OTB's first preference is to rely on rule 6.12, which provides inter alia:

> **"(1)** The court may, on application, permit a claim form relating to a contract to be served on the defendant's agent where—
>
> **(a)** the defendant is out of the jurisdiction;
>
> **(b)** the contract to which the claim relates was entered into within the jurisdiction with or through the defendant's agent; and
>
> **(c)** at the time of the application either the agent's authority has not been terminated or the agent is still in business relations with the defendant.
>
> **(2)** An application under this rule—
>
> **(a)** must be supported by evidence setting out—
>
> **(i)** details of the contract and that it was entered into within the jurisdiction or through an agent who is within the jurisdiction;
>
> **(ii)** that the principal for whom the agent is acting was, at the time the contract was entered into and is at the time of the application, out of the jurisdiction; and
>
> **(iii)** why service out of the jurisdiction cannot be effected; and
>
> **(b)** may be made without notice."

44. It seems to me that, as Mr Stevens QC submitted on behalf of Meeting Point, paragraph 6.12(2)(c)(iii) implicitly requires an applicant under this rule to show that "service out of the jurisdiction cannot be effected". I take that to mean that there is some real impediment to service, going beyond mere inconvenience.

45. In that regard, OTB's solicitor Ms Bousfield gives evidence of having obtained independent legal advice about service of legal proceedings in Dubai. That advice is contained in a letter dated 6 February 2020 from the Dubai office of the law firm Clyde & Co. It explains that there are no rules of court in the United Arab Emirates which govern service in that country of proceedings issued in other countries. There is therefore no certainty as to the validity of any such service. The author of the letter (who is not identified) considers it arguable that such inward service can by analogy be effected in the same way as outward service (i.e. of UAE proceedings in other countries) under the UAE's rules "i.e. by email, through private companies or by any means agreed between the parties and not necessarily by diplomatic channels". In practice, the letter meanwhile states that "the standard process of diplomatic channels would take 3-6 months on average until it reaches the Court which would then instruct a court bailiff to serve the documents on the defendant". The letter advises that service be attempted "by way of service agent …and/or email" and, in parallel, by diplomatic channels as a backup. The letter discusses the further alternative of delivering the claim by hand to a director or manager of Meeting Point in Dubai, if that could be arranged.

46. Ms Bousfield's conclusion is expressed at paragraph 25 of her witness statement:

> "It is evident from the advice that service of the proceedings at MPYTT's registered office address in Dubai would be disproportionately expensive and extremely time-consuming. The timetabling of the main claim will undoubtedly be affected, prejudicing the Claimant (a child who has suffered significant injuries). It is in the interests of all parties involved that any delay is kept to a minimum and avoided entirely if at all possible."

47. It does sound as if service in Dubai may be expensive and time-consuming. I do not disagree with what is said about the desirability of avoiding delay in these proceedings. Nevertheless, it seems to me that OTB has not shown that "service out of the jurisdiction cannot be effected". I therefore conclude that I cannot make an order under CPR 6.12.

48. If I am wrong in my interpretation of CPR 6.12 and I do have discretion to make an order, then I record that I would have been willing to make an order. It has not been disputed that the other threshold conditions for such an order are satisfied. I am not convinced that such orders can only be made prospectively as Mr Stevens QC contends (having regard to the Court's powers, for example, to extend time after expiry of a deadline under CPR 3.1(2)(a)), but if necessary a prospective order could be made. Meeting Point is fully aware of the proceedings. As Ms Bousfield says, it would be desirable for the proceedings not to be further delayed. Whilst delay has been caused by OTB's choice of the wrong route under CPR 6.9, it made its cross-application within a reasonable time of receiving Meeting Point's application. In my view it would be in accordance with the overriding objective to allow service, if the case otherwise fell within CPR 6.12.

49. OTB's next preference would be to permit service under CPR 6.15 "at an alternative place" i.e. 55 Strand. The parties agree that the power under that rule cannot be used to circumvent the ordinary requirement to obtain permission to serve proceedings out of the jurisdiction. In other words, an applicant must show, first, that service out of the jurisdiction would be permissible, and second, that service nevertheless should be permitted at the alternative place.

50. That first question also applies to OTB's suggested further alternative of permitting service out of the jurisdiction under CPR 6.36 and 6.37, and so I will consider that question first.

51. CPR 6.36 provides that a claim can be served out of the jurisdiction with the permission of the Court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.

52. Ms Prager relies on two grounds in the alternative:

> "*General grounds*
>
> (4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim….
>
> …

> *Claims in relation to contracts*
>
> (6) A claim is made in respect of a contract where the contract –
>
> (a) was made within the jurisdiction;
>
> (b) was made by or through an agent trading or residing within the jurisdiction;
>
> (c) is governed by English law; or
>
> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract…"

53. It seems to me that ground (4) is applicable because Meeting Point is a proper party to the Part 20 claim.

54. It also seems to me that ground (6)(c) is applicable because the additional claim under Part 20 is based on the Deed of Indemnity which contains an English law clause.

55. CPR 6.37 provides, so far as material:

> **"(1)** An application for permission under rule 6.36 must set out—
>
> **(a)** which ground in paragraph 3.1 of Practice Direction 6B is relied on;
>
> **(b)** that the claimant believes that the claim has a reasonable prospect of success; and
>
> **(c)** the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.
>
> **…**
>
> **(3)** The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.
>
> **…**
>
> **(5)** Where the court gives permission to serve a claim form out of the jurisdiction—
>
> **…**
>
> **(b)** it may—
>
> **(i)** give directions about the method of service; …"

56. It is therefore for OTB to satisfy the Court that England and Wales is the proper place in which to bring the Part 20 claim. It has been noted that the inquiry into this question should not be disproportionate. So in *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337, Lord Neuberger said:

> "The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial."

57. Significant factors in favour of England and Wales as the appropriate forum in this case are the underlying English claim to which OTB is a defendant and the choice of law clause in the Deed of Indemnity. That is on the assumption that the exclusive jurisdiction clause in the main contract is not applicable to this dispute. If it were, it too would identify England and Wales as the appropriate forum. There is also an issue between the parties as to where the relevant contract(s) between them were concluded. For present purposes I have not assumed that this occurred in London.

58. Mr Stevens QC essentially questioned whether any of the grounds relied on by Ms Prager could carry much weight. However, and bearing in mind that his client bears no burden on this question, he did not identify any factors significantly weighing in favour of any other forum, though he told me that English is one of the official languages of the Courts of Abu Dhabi and that the Dubai financial centre is a common law jurisdiction.

59. From the information before me, I conclude that England and Wales is "the proper place in which to bring the claim" for the reasons set out at [57] above.

60. Mr Stevens QC however makes a further objection to the applicability of CPR 6.36 and 6.37. Paragraph 5.4.3 of the Queen's Bench Guide states:

> "It should be noted that a claimant may issue a claim form against a defendant who appears to be out of the jurisdiction, without first having obtained permission for service, provided that, if the case is not one where service may be effected without permission, the claim form is endorsed by the court "Not for service out of the Jurisdiction"."

61. The notes to *Civil Procedure* (the White Book) explain this requirement as being "that it ensures that the claim form issued by the court is not valid for service out of the jurisdiction in circumstances where permission to serve out is required".

62. The Part 20 claim in the present case was not so endorsed and therefore, Mr Stevens submits, is defective. This appears to have occurred because the Part 20 claim form gave the Strand address for Meeting Point, so Meeting Point did not obviously "appear to be out of the jurisdiction".

63. In my judgment this did not affect the validity of the Part 20 claim form. If paragraph 5.4.3 had that effect, it would be very strange for it to be found only in the Queen's Bench Guide and not in any rule or practice direction. And since no attempt has been made to serve the additional claim outside the jurisdiction, the lack of the required wording does not appear to have had any practical effect.

64. For the foregoing reasons, the additional claim under CPR Part 20 is suitable for service out of the jurisdiction and permission for such service should also be granted, with any necessary extension of time.

65. I therefore return to CPR 6.15. Should there be an order permitting service (retrospectively or prospectively) "at an alternative place" i.e. 55 Strand? If so, then it is necessary to make orders permitting both service out of the jurisdiction and service at the alternative place*: Marashen Ltd v Kenvett Ltd (Ivanchenko, third party)* [2017] EWHC 1706 (Ch); [2018] 1 WLR 288 per David Foxton QC (as he then was) at [17].

66. The test under CPR 6.15 is whether there is "good reason" to make the order. It is not a test of exceptionality, by contrast with CPR 6.16. See *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 per Lord Clarke at [33].

67. The Supreme Court in *Abela* also decided (per Lord Clarke at [36]):

> "The mere fact that the defendant learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2). On the other hand, the wording of the rule shows that it is a critical factor. As the editors of the 2013 edition of the White Book note (vol 1, para 6.15.5), rule 6.15(2) was designed to remedy what were thought to be defects as matters stood before 1 October 2008. The Court of Appeal had held in Elmes v Hygrade Food Products plc [2001] EWCA Civ 121 that the court had no jurisdiction to order retrospectively that an erroneous method of service already adopted should be allowed to stand as service by an alternative method permitted by the court. The editors of the White Book add that the particular significance of rule 6.15(2) is that it may enable a claimant to escape the serious consequences that would normally ensue where there has been mis-service and, not only has the period for service of the claim form fixed by CPR 7.5 run, but also the relevant limitation period has expired."

68. In this case that "critical factor" is present. In addition, there is the question of delay. The incident giving rise to the claims occurred in 2015. The underlying claim has made little progress in the last year. The additional claim was issued nearly 13 months ago and is becalmed while the service issue is resolved. Meanwhile, I have not been told of any prejudice which would be caused to Meeting Point by making an order under CPR 6.15. CPR 6.15(4) requires such an order to specify the period in which the other party is to respond.

69. Mr Stevens QC is right to note that, so far as one can discern from the available evidence, it is possible to serve proceedings in Dubai via diplomatic channels and this

may take a few months. This is therefore a more borderline case than *Abela*, where service overseas by diplomatic channels had proved impractical.

70. Nevertheless, it seems to me that on balance, there is "good reason" to permit service on Meeting Point at the offices of its agent Youtravel.com Ltd at 55 Strand, and to validate the steps already taken to effect that service under CPR 6.15(2). As the Supreme Court explained in *Abela*, the most important purpose of service is to ensure that the contents of the claim form are brought to a defendant's attention, and that has happened. Making the order will avoid significant delay and expense in the additional claim. It may also assist in avoiding further delay in the resolution of the underlying claim by the child. In my judgment, further litigation on the subject of whether the additional claim has been served is not in the interests of justice.

71. In arriving at that decision, I have had regard to the fact that OTB's original reliance on CPR 6.9 was misplaced. Mr Stevens QC further submits that OTB has been guilty of significant delay in seeking to regularise the position. However, as Ms Prager points out, OTB sought an extension of time for service of proceedings in its cross-application on 24 February 2020, well within the lifetime of the Part 20 claim form. In my judgment, any delay by OTB is less important than the need to progress the litigation now.

72. It is therefore not necessary to decide whether to dispense with service altogether under CPR 6.16. If it had been necessary to make that decision, I would have held that there are not sufficient "exceptional circumstances" to justify making the order, there being at least one avenue by which service could still be effected even if it had not already been effected.

*Conclusion*

73. For those reasons, both application and cross-application succeed to the extent set out above.