In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2017: No. 63

BETWEEN:

THE SEVENTH SENSE STAR LIMITED

Plaintiff

- and -

AZZAM FAISAL KHOUJ

First Defendant

- and -

AMEEN AHMED A. MANSOURI

Second Defendant

RULING

Application to Set Aside Service of Concurrent Writ of Summons and Default Judgment, Service of Bermuda Writ in Saudi Arabia, Whether Affidavit of Service meets the test per RSC, Whether method of service was permissible under Saudi Law, Plaintiff with no standing, Whether amendment allowed to replace Plaintiff – mistake and misnomer

Date of Hearing: **17, 18 November 2021**

Date of Ruling: **23 March 2022**

Appearances: **Steven White and John McSweeney, Appleby (Bermuda) Limited for the Plaintiff**

Sam Stevens, Carey Olsen Bermuda Limited for the Defendants

RULING of Mussenden J

Introduction

1. This matter came before me by two summonses.

2. The Defendants' Summons dated 3 July 2019 sought the following:

    a. An Order pursuant to RSC Order 12, rule 8(1) that service of the Concurrent Notice of Amended Writ of Summons dated 29 June 2017 (the "**Concurrent Notice**) to be served out of the Jurisdiction dated 1 December 2017 be set aside (the **"Service Application**"); and
    b. An Order pursuant to RSC Order 13, rule 9 that the Default Judgment in this matter dated 22 February 2018 in the sum of $17,100,000 (the **"Default Judgment**") be set aside (the **"Default Judgment Application"**: together the "**Set-aside Applications**").

3. The Defendants' Summons was supported by the affidavit evidence of Defendants, Azzam Khouj (**"Mr. Khouj"**) and Ameen Mansouri (**"Mr. Mansouri"**).

4. The Plaintiff's Summons dated 17 August 2020 sought:
    a. In the alternative or if so required, the exercise of the Court's discretion to decline to set aside the service for irregularity pursuant to RSC order 2, rule 1(1) ("**Deeming Application**"); and

b. Leave to amend the Specifically Endorsed Writ of Summons (the "**Writ**") to substitute Dr. Ahmed Hafiz (**"Dr. Hafiz**") as plaintiff in place of the Seventh Sense Star Limited (the **"Company**") pursuant to RSC Order 20 rule 5(3) (the **"Amendment Application**")

5. The Plaintiff's Summons was supported by the affidavit evidence of Dr. Hafiz, Mrs. Robin Mayor and Mr. John Thomas McSweeney, and the affirmation evidence of the process server in the Kingdom of Saudi Arabia (**"KSA**") attorney Mr. Mamdouh Attar (**"Mr. Attar"**).

6. The parties were granted leave to call expert evidence on the issue of proper service in the KSA. The experts who gave evidence by Zoom from the KSA were:
   a. For the Plaintiff – Mr. Wael A. Alissa, expert report dated 21 April 2020; and
   b. For the Defendants – Mr. Amer AlAmr, expert report dated 5 August 2020.

The Parties

7. The Plaintiff is a Bermuda exempted company incorporated on 1 December 2006. The purpose of the Company was to purchase and own a Gulfstream V jet (the **"Jet"**). It entered liquidation on 27 December 2011.

8. Dr. Ahmed Hafiz is one of three Directors of the Company and is its minority shareholder. He holds 500 of the 11,500 shares which were given to him by the late Sheikh Abdulrahaman Mansouri (the **"Sheikh"**) of the KSA as a reward for service.

9. The Defendants, Mr. Khouj and Mr. Mansouri, are the other two former directors of the Company. They are both Saudi nationals. Mr. Mansouri is also a shareholder of the Company, and, together with his cousins Mohammed and Fareda, constitute the majority shareholders (the **"Majority Shareholders"**). Mr. Khouj became executor of the Sheikh's estate following his death in June 2010.

Background

10. The Plaintiff's documents provide background as follows. Mr. Khouj and Mr. Mansouri were appointed as directors following the Sheikh's death. This was at a board meeting on 8 February 2011 to which Dr. Hafiz was not invited. The Sheikh's shares were transferred temporarily into Mr. Khouj's name and then to the Majority Shareholders. They subsequently held a board meeting on 27 March 2011, resolving to sell the Jet for $17.1 million, to which Dr. Hafiz was again not invited.

11. The proceeds of sale did not pass through the Company's account but were instead transferred to an escrow account and distributed by Mr. Khouj and Mr. Mansouri to the Majority Shareholders, including Mr. Mansouri, who did not make a declaration of his direct or indirect interest at the board meeting.

12. Having disposed of the Company's sole asset the Jet, Mr. Khouj and Mr. Mansouri appointed Mrs. Mayor as liquidator (the "Liquidator") on 5 December 2011. The resolution to wind up was ratified at a members' meeting on 21 December 2011. Dr. Hafiz was not invited to or made aware of any of these meetings. He first became aware that something had happened when he received notice of the final general meeting on 16 January 2012 and he contacted the Liquidator to find out what was going on.

13. The Liquidator contacted Mr. Khouj and Mr. Mansouri through their legal counsel, and demanded they return the proceeds of sale of the Jet. Their response was that they would *"deal"* with Dr. Hafiz's share. Mrs. Mayor confirms in her affidavit that the Majority Shareholders in fact made no effort to return the proceeds of sale to the Company, or to pay Dr. Hafiz; further that they *"refuse to acknowledge that they must return the proceeds of sale*".

14. As a result, and given the lack of funds to pursue recovery proceedings, Mrs. Mayor concluded that her position as the Liquidator was *"untenable"* and pursuant to a deed of assignment dated 13 August 2012 (the **"Assignment"**) assigned the claims to Dr. Hafiz. She also granted him a power of attorney to *"commence"* proceedings on the Company's

behalf (the **"Power of Attorney**"). The Court approved the Assignment and Power of Attorney by order dated 29 June 2012.

15. These proceedings were commenced by the Plaintiff by way of the Writ dated 22 February 2016. In the Writ the Plaintiff alleges multiple breaches of duty on the part of the Defendants as directors of the Plaintiff, specifically in relation to the part they played in the sale of the Jet (the **"Claim"**).

16. The Concurrent Notice was issued on 29 June 2017. The Plaintiff maintains that the Concurrent Notice was personally served by Mr. Attar on Mr. Khouj at the court in Jeddah on 14 December 2017 and on Mr. Mansouri at his home address in Jeddah on 20 December 2017. Mr Attar subsequently swore two affidavits of service. The Defendants dispute that service occurred and label the affidavits as a *"fabrication*".

17. No Memorandum of Appearance was entered by the Defendants. As a consequence, Default Judgment was entered by the Acting Registrar on 22 February 2018. This was in the sum of US$17.1 million plus statutory interest.

18. On 15 May 2019, 17 months after service of the Writ, and 7 months after the (undisputed) service of the Default Judgment on them, the Defendants filed the Set-aside Applications.

19. On 16 October 2019, 12 months after having filed the applications, and 2 years after service of the Writ, the Defendants raised for the first time the issue of the Plaintiff's standing to bring the proceedings in their written submissions.

The Defendants' Position

20. First, the Defendants' position is that service of the Notice out of the jurisdiction should be set aside pursuant to RSC Order 12, rule 8(1) because:
    a. the Concurrent Notice was not in fact served personally on the Defendants (or at all); or in the alternative

b. even if (which is denied) the Concurrent Notice was served personally on the Defendants, the method of service said to have been employed by the Plaintiff is not permitted under the law of KSA and was therefore contrary to RSC Order 11, rule 5(3)(a).

(and in either case the Default Judgment is consequently irregular).

21. Second, the Defendants' position is that the Default Judgment in this matter should be set aside pursuant to RSC Order 13, rule 9 because:
    a. At all material times the Plaintiff had (and continues to have) no *locus standi*. Acting through its Liquidator, almost four years prior to commencing this action in February 2016, the Plaintiff legally assigned (*inter alia*) the Claim to Dr. Hafiz pursuant to the Deed of Assignment. No cause of action thus vests in the Plaintiff. This fact would have resulted in the Claim as pleaded being struck out for failing to disclose a reasonable cause of action and/or being an abuse of the court's process. The Default Judgment is consequently a nullity and should be set aside *ex debito justitiae*; and
    b. Alternatively, the Court should exercise its broad discretion under RSC Order 13, rule 9 to set aside the Default Judgment and allow the Defendants to enter a Defence in this action. The Defendants have a meritorious defence which ought to be tried:
        i. the Plaintiff has no standing to bring the Claim; and
        ii. alternatively as directors of the Plaintiff, the Defendants are entitled to the benefit of Article 53.1 of the Plaintiff's Bye-Laws (the "**Bye-Law Indemnity**") and consequently even if the named Plaintiff has standing to bring the claim there is no sustainable cause of action against the Defendants.

The Plaintiff's Position

22. The Plaintiff's position is as follows:
    a. The Concurrent Notices were personally served on the Defendants and the Defendants' bare assertions of fabrication should be rejected;

b. Personal service of the Writ in the KSA is not contrary to the law of Saudi Arabia and the Defendants' Service Application should be dismissed;
c. The Defendants having received the Writ, there are strong grounds on which the Court should, in the exercise of its discretion under RSC Order 2, rule 1(1) decline to set aside service;
d. The Defendants have not established a defence with a reasonable prospect of success and they have not set out a positive case on the facts. The Defendants reliance on the Bye-Law Indemnity is hopeless in the face of the Writ pleaded on the basis of a dishonest breach of duty, return of company property held on trust by its directors and wrongful conversion of that property;
e. The Defendants argument on standing has been brought late and not in the proper manner and therefore fails to be considered as an attack on a regular judgment; and
f. The commencement of proceedings in the name of the company was a genuine mistake and did not mislead the Defendants as to the identity of the party pursuing the action. It would be just to amend the Writ pursuant to RSC Order 20, rule 5(3) to substitute Dr. Hafiz pursuing the proceedings in his own name.

The Experts' Evidence

Plaintiff's Expert Evidence

23. Mr. Alissa produced an expert report dated 21 April 2020 which stood as his evidence in chief. He has 30 years of cumulative experience as a Public Prosecutor and attorney holding a bachelor's and master's degree, both in law, from esteemed Saudi Arabian institutions. He stated that he was instructed to answer two questions and stated that he had relied on his extensive experience and research of various legal resources in formulating his answers.

24. The first question was "*Whether personal service of foreign originating process, effected on a party resident in the Saudi Arabia, as occurred in the Case, is contrary to the laws of the Kingdom of Saudi Arabia?"*

25. Mr. Alissa answered that question as follows: "*I can confirm that as a matter of Saudi Arabian Law, the service of the Writ as occurred in the Facts does not contradict or violate any Saudi Arabian Law."*

26. Mr. Alissa went on to state that *"Saudi Arabian Law of Civil Procedures ("**CPL**") expressly permits personal service of judicial writs, and in general adopts a more tolerant approach toward the methods of service as follows:*
    a. *Article 1(1) of the CPL allows a judicial process to be served by the plaintiff.*
    b. *Article 5[1] of the CPL does not automatically invalidate a certain proceeding, even if it is declared invalid by law, if it is established that the purpose of such proceeding is served."*

27. He added "*I am not aware of any Saudi Arabian Law that contradicts with the personal service of the Writ to an individual in Saudi Arabia, as described in the facts above. Further, I confirm that the concept of personal service in Saudi Arabia is in principle allowed under equivalent local regulations."*

28. The second question was "*Are you aware of any specific requirements for service of foreign originating process on an individual resident in the Kingdom of Saudi Arabia as a matter of public policy or law?*"

29. Mr. Alissa answered as follows: "*I can confirm that as a matter of Saudi Arabian Law that there is no universal legislation or a public policy that mandates any kind of specific requirement or exclusive mechanism for personal service of foreign originating process on an individual resident in Saudi Arabia, other than those specifically set out between Saudi Arabia and some Arab and GCC [Gulf Cooperation Council] countries as a result of regional multilateral treaties."*

30. Mr. Alissa was cross-examined by Mr. Stevens.

[1] Mr. Alissa provided Article 5 in Schedule 2 of his expert report as follows "A proceeding shall be invalid if so declared by the law or if it suffers from a defect causing it to fail its purpose. It shall not be ruled invalid, notwithstanding a provision stating so, if it is established that the purpose of the proceeding is served."

a. He agreed that the English translation of Article 11 in his Schedule 2 was the same as the English translation of Article 11 in Mr. AlAmr's Appendix 2.
b. He agreed that Article 11 provided for service of domestic proceedings by process servers at the order of the Judge or the plaintiff. Further, personal service of domestic proceedings can be conducted by the plaintiff if he so petitions. He agreed that this was a clear statement of the law.
c. He stated that Article 5 exists to forgive a party who has failed to comply with domestic Saudi Law. He explained that by "forgive" he meant that a party who does not comply strictly with the law, the court in its discretion can allow the matter to continue.
d. He agreed the court has a discretion under Article 5 to forgive a party when they have not strictly complied with the Saudi Law or Rules. However, he added that if the party fails to appear in court, then the court may dismiss the case.

Defendants' Expert Evidence

31. Mr. AlAmr produced an expert report dated 5 August 2020 which stood as his evidence in chief. He is the Managing Partner of Amer AlAmr law firm in Saudi Arabia with 21 years of experience handling a broad range of litigation and arbitration matters in the KSA including insurance and re-insurance matters, assisting local and international clients as well as corporate and commercial matters.

32. Mr. Alamr stated that the court summoning process in the KSA is governed mainly by the CPL containing "Articles" which provides several provisions from Article 11 to 20 and its Regulations/Rules. Further he stated:
    a. The main method to serve a summons is by court order. However, the Rules provide personal and direct service of documents as an acceptable option but it will not be accepted nor considered valid in Saudi courts unless there is obtained at the time of service a proper signature of the person being served in compliance with the Rules.
    b. The law imposes several and complex requirements, conditions, and methods to verify that the service is conducted in a very documented, evidenced and fair

manner. Per the Rules, the service must meet several requirements in terms of address verification, timing, documents to be served, the type of information of the documents to be served, the method to be observed to confirm the service, the method to be observed if the service of the process is not completed, the legal implications of the results of the service either served or not, and many other provisions to confirm the validity and accuracy of service to the extent that renders any direct and personal service which were not properly signed by the person required to be served – an unacceptable form of service before Saudi courts.

c. The rules do not clearly nor expressly address the question of the method to be conducted to complete the service of process required by foreign courts on persons residing in the KSA. For service of persons residing outside the KSA, service is carried out by diplomatic channels.

d. The Rules also confirm that treaties in relation to judicial cooperation shall be observed such as for the KSA and other GCC and Arabian states where court to court mechanisms are used without need to resort to diplomatic channels.

e. The KSA has in recent years adopted new technological methods to complete service through the Minister of the Interior where Courts electronically submit through a national data center using official text messages to summons defendants to attend to court given that all mobile numbers in the KSA are now linked with the IDs of their owners. Such method of service is now the official and prevailing way to complete service given its efficiency and speed.

33. Mr. AlAmr concluded that in his opinion the service of process personally and directly by claimants without obtaining a proper signing from the person required to be served in light of the Rules is not a valid service under Saudi Law.

34. Mr. AlAmr was cross-examined by Mr. White.

a. He confirmed that Bermuda was not a signatory to a treaty and was not a part of the GCC or any other regional multilateral group and as such they did not apply to Bermuda.

b. He stated that at the time of the purported service in this matter, the electronic technology was not available.
c. When presented with several scenarios of service with or without obtaining a signature, with the person appearing in Court or not, he maintained that for personal service in the KSA a signature must be obtained whether served personally or by the Court.
d. He agreed that Article 5 provides a court with a discretion on service and is a broad saving clause that was very wide and general. However, in his opinion, Article 5 would not be applied in the absence of a signature by the person purportedly served.
e. He agreed with Mr. Alissa's report that there was a complete absence of Saudi Law and Rules in respect of service of foreign proceedings, including Bermuda, on residents of the KSA.

Plaintiff's failure to prove due service of the Concurrent Notice on the Defendants

Defendants' Submissions

35. Mr. Stevens argued that in its application for Default Judgment the Plaintiff was required pursuant to RSC Order 13 rule 7 to prove to the Acting Registrar that there had been "due service" of the Concurrent Notice on the Defendants. However, in support of its application for Default Judgment, the Plaintiff produced two affidavits dated 27 December 2017 from Mr. Attar - both of which purport to confirm that he effected valid personal service of the Concurrent Notice on Mr. Khouj and Mr. Mansouri on the 14th and the 20th of December 2017 respectively (the **"Service Affidavits"**). The Service Affidavits make no mention of whether:
    a. Mr. Khouj and Mr. Mansouri accepted service of the Concurrent Notice or, if they did not, whether Mr. Attar informed them of what was contained in the Concurrent Notice at the time he allegedly tried to effect personal service; and
    b. the method of service purportedly employed by Mr. Attar is valid under the laws of Saudi Arabia.

36. Mr. Stevens submitted that this evidence is also not contained in Mr. Attar's subsequent Affirmation dated 26 August 2019. The Defendants' primary position, as set out in Mr. Khouj's and Mr. Mansouri's First Affidavits dated 29 May 2019, as well as their Second Affidavits sworn on 16 September 2019 is that the delivery of the Concurrent Notice described in the Service Affidavits did not occur. In fact, the Defendants submit that neither of them had any knowledge of these proceedings until November 2018, when a copy of the Default Judgment was left at the reception desk of Mr. Khouj's law firm in the city of Jeddah by an individual who (i) did not identify himself to any member of staff and (ii) did not ask for any document to be stamped or signed as evidence of receipt.

Defendants' Submissions on the Applicable Law

37. Mr. Stevens referred to RSC Order 13 rule 7(1)(a):

"*Judgment shall not be entered against a defendant under this Order unless –*

"(a) an affidavit is filed by or on behalf of the plaintiff proving due service of the writ or notice of the writ on the defendant …" [emphasis added]

38. Mr. Stevens cited *Crane & Sons Ltd v Wallis* [1915] IR 411 for the proposition that it is an essential condition that a Plaintiff must prove due service before a judgment in default can be entered, and a failure to comply with this condition renders the default judgment (and all subsequent proceedings) irregular.

39. Mr. Stevens referred to RSC Order 65, rule 8.

"An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, where it was served and how."

40. Mr. Stevens referred to RSC Order 65, rule 2.

"Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him— …"

41. Mr. Stevens submitted that personal service was the method purportedly employed by the Plaintiff in this case. He cited the case of *Kenneth Allison Ltd v A.E. Limehouse & Co* [1992] 2 AC 105 where the English House of Lords adopted a two-limbed test for the meaning of the words "*left with the person to be served*":

    (a) the relevant document is either handed to the person to be served (*First Limb*); or alternatively if he refuses to accept service
    (b) the person to be served is told what the relevant document contains and the document is left with or near him (*Second Limb*).

42. Mr. Stevens referred to several passages in the judgment as follows:
    a. Lord Bridge of Harwich at p. 113E - *"There is abundant authority for the proposition that personal service requires that the document be handed to the person to be served or, if he will not accept it, that he be told what the document contains and the document be left with or near him."*
    b. Lord Goff of Chieveley at p. 124 C "*Prima facie, the process server must hand the relevant document to the person upon whom it is to be served. The only concession to practicality is that, if that person will not accept the document, the process server may tell him what the document contains and leave it with him or near him."*

43. Mr. Stevens submitted that even if the First Limb of *Kenneth Allison Ltd* is shown to be satisfied (i.e. the relevant document was handed to the person to be served and they accepted service) personal service is only validly effected where the nature of the document is immediately and readily apparent on its face to the recipient. If the nature of the document is not immediately and readily apparent on its face to the recipient, then the process server is required to provide an explanation of the same per the analysis of Phillips J in *Tseitline v Mikhelson and ors* [2015] EWHC 3065 (Comm) at paragraphs 17 to 24.

44. Mr. Stevens submitted that where there is a dispute on the facts between the parties, in responding to any application to set aside service under RSC Order 12 it is the Plaintiff's burden to show a "*good arguable case*" that service was validly effected. This is a lower standard than "*the balance of probabilities*", but nevertheless the test does require the

Plaintiff to satisfy the Court that it has the better of the argument - per paragraphs 35 and 36 of *Tseitline*. In deciding whether the Plaintiff has discharged this burden, the Court is generally confined to considering the evidence before it that is contained in the parties' affidavit evidence per the Supreme Court Practice 1999 (White Book) at 12/8/3.

The Factual Basis

45. Mr. Stevens submitted that the Plaintiff has not proved due service of the Concurrent Notice for several reasons. First, he argues that neither of Mr. Attar's Service Affidavits detail how the Concurrent Notice was served on the Defendants as they simply contain bare assertions that the Defendants were personally served. Further, there are no other details such as whether the Defendants accepted service, whether Mr. Attar explained the contents of the Concurrent Notice to them, that it related to legal proceedings commenced against them in in Bermuda, whether copies of the Concurrent Notice were left with or near the Defendants. Additionally, there is no document signed by Mr. Khouj or Mr. Mansouri confirming that they accepted service, or from anyone saying that they took receipt of the Concurrent Notice, there is no independent evidence from a third-party witnessing service and there is no audio/video evidence showing what happened.

46. Second, Mr. Stevens submits that even if the Defendants hypothetically conceded that they accepted service of the Concurrent Notice, there is no evidence from Mr. Attar that he explained to them the nature of the document. As the Defendants are Saudi nationals for which English is not their first language, there is no evidence from Mr. Attar whether he served them with a copy of the Concurrent Notice translated in Arabic. He referred to their affidavit evidence that neither Defendant had any familiarity or previous experience with Bermuda and its legal system. Thus, the Court cannot infer that the Defendants had pre-existing knowledge that would make it apparent to them that the Concurrent Notice was a legal document requiring their immediate attention. Mr. Stevens argued that the Court must place itself in the shoes of a citizen of Saudi Arabia, a country whose social, cultural and legal practices are vastly different to Bermuda's. Thus, if the Court finds that the nature of the Concurrent Notice would not have been immediately and readily apparent to either

Defendant, then in the absence of evidence from Mr. Attar as set out above, it means that the Service Affidavits by Mr. Attar failed to prove that personal service was effected.

47. Third, Mr. Stevens submits that Mr. Attar again fails to explain proper service of the Concurrent Notice in his affirmation dated 26 August 2019. There, Mr. Attar states that he was in the same location as Mr. Khouj on the date that service was purportedly effected but does not state how service was effected. In respect of Mr. Mansouri, Mr. Attar does state that he handed the Concurrent Notice to him but he does not state whether Mr. Mansouri accepted or rejected service and he does not state whether he explained the nature of the document to Mr. Mansouri. Thus, this Affirmation does not assist the Plaintiff in proving due personal service.

48. Fourth, Mr. Stevens submits that in assessing the reliability and sufficiency of Mr. Attar's evidence, the Court should consider that Mr. Attar is not an independent, professional process server, rather he is a practicing advocate and litigation attorney, who is acting for the wife of a party in a Saudi court case involving the estate of the Sheikh. Thus, he is not independent and the contents of his affirmations are more akin to submissions rather than evidence of fact. On that basis, Mr. Stevens submits that Mr. Attar is not a reliable witness.

Plaintiff's Submissions

49. Mr. White submitted that the Court has the power to set aside service of a writ pursuant to RSC Order 12, rule 8(1) which provides as follows:

> "*A defendant to an action may at any time before entering an appearance therein, or if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the Court for an order setting aside the writ of service or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction."*

50. Mr. White referred to RSC Order 13, rule 7 as set out above which refers to the requirement of the plaintiff to provide an affidavit proving due service of the writ. He submitted that where the fact of service is disputed, the test is whether the plaintiff has a 'good arguable case' that the writ has been served per Philips J in *Alexandre Tseitline v Leonid Mikhelson & Ors* [2015] EWHC 3065 (Comm) at [35]. He submitted that this test is a lower standard than the balance of probabilities and the plaintiff is simply required to have "*the better argument on the material available*".

51. Mr. White submitted that when personal service is required, this occurs where a copy of the document is left with the person to be served. He also cited the case of *Kenneth Allison Ltd v AE Limehouse & Co* and Lord Bridge's statement of what is meant by "*leaving a document with the person to be served."*

Fabrication

52. Mr. White submitted that the Defendants case relies upon the bare and entirely unsupported assertion that Mr. Attar, a senior Saudi lawyer, has lied on oath about service, such that the Defendants have accused him of fabricating his evidence. Further, he notes that although the Defendants deny service, they fail to advance a positive case as to where they were when Mr. Attar very precisely says they were at the time of service. He submits that Mr. Khouj as a practising lawyer could easily check and exhibit his diary but does not do so. However, the reply affirmation of Mr. Attar exhibits the court minutes that places Mr. Khouj where Mr. Attar says he was and counters Mr. Khouj's assertion that he did not know Mr. Attar as they were both working on a legal case involving the heirs of the estate. In respect of Mr. Mansouri, he suggested that the evidence seemed to indicate he was served in the street when in fact he later conceded that the street address is his home address. Mr. White submits that this evidence fatally undermines the Defendants' case on service.

53. Mr. White also submitted that Mr. Attar had given evidence that he had performed an improper service on the Defendants before by leaving the Writ with Mr. Khouj's secretary Mohammed Saif and Mr. Mansouri's house guard, Abu Alkalam. However, he had been

advised that personal service was required so he performed personal service. Mr. White noted that that the Defendants say that the earlier improper service was also a fabrication. However, Mr. White argues that these allegations of fabrication stretch the bounds of credulity to breaking point as they seem to assert that Mr. Attar had opportunities to serve the Defendants but did not do so and he would go to the trouble of finding out the names of the staff just in order to lie. Also, Mr. White noted that there is no affidavit evidence from Mr. Saif or from Mr. Alkalam.

54. Mr. White submitted that the Defendants case on service was unsustainable as their evidence is based on hearsay, is materially misleading and inherently implausible. Further, the Court has no reason to doubt Mr. Attar's evidence and there is no reason to lie. Thus, the Plaintiff has a demonstrably strong case that personal service was effected on the Defendants and to the standard required of a good arguable case.

Court's Analysis

55. In my view, on the evidence I am not satisfied that the Plaintiff has met the test that service was effected on the Defendants for several reasons. First, the affidavit evidence dated 27 December 2017 states that he personally served the Defendants and where. I note that Mr. Attar does not state whether he handed the Concurrent Notice to the Defendants, or whether he left it with them and told them what it contains. He does not state whether service was accepted or not, and if it was not, what he then did to effect personal service. He makes no mention of trying to obtain or obtaining the signatures of the Defendants and there is no evidence to show that their signatures were obtained. He does not state if they refused to give their signature.

56. Second, in respect of Mr. Mansouri the affidavit refers to a street address behind the Iran Consulate. In his later affidavit dated 26 August 2019, Mr. Attar then explains that that street address is actually the home residence of Mr. Mansouri at the cross of Al Qazaz Street and Sau ibn Abdul Muhsin Street. I query why this particular information was not stated in the first affidavit of service as being Mr. Mansouri's home address.

57. Third, Mr. Attar's second affidavit of service dated 26 August 2019 also fails to provide specific information to assist the court of effective personal service. At the time of swearing this affidavit, Mr. Attar was fully aware that service was disputed. However, again, Mr. Attar does not state whether in the court, he handed the Concurrent Notice to Mr. Khouj or whether he left it with them and told him what it contains. In respect of Mr. Mansouri, he says that he handed the Concurrent Notice to him at the street address. In respect of both Defendants, Mr. Attar does not state whether service was accepted or not, and if it was not, what he then did to effect personal service or to inform them what the document contained. He does not address whether he requested a signature, although it is clear that no signature was obtained.

58. Third, in my view the evidence fails to satisfy me that the Plaintiff has met the requirements of RSC Order 65, rule 2 and rule 8. Further, the evidence fails to satisfy me that the test as set out in *Kenneth Allison Ltd* has been met as there is no evidence whether the Concurrent Notice was accepted or refused by the Defendants, and if they refused to accept it, whether they were told what the document contains or whether the document was left with or near them. I make no finding as to the Defendants' claim that Mr. Attar fabricated the facts of the personal service as I have focused on the contents of the affidavits of service and whether they meet the legal requirements.

59. Fourth, in my view, for the reasons set out above the Plaintiff has failed to show that it has a good arguable case that service was validly effected. Per *Tseitline*, I am not satisfied that the Plaintiff has the better argument on personal service.

60. In light of these reasons, I find that service of the Concurrent Notice should be set aside pursuant to RSC Order 12, rule 8(1) as in my view the Concurrent Notice was not in fact served personally on the Defendants in accordance with the requirements.

Method of purported service was in any event impermissible under Saudi Law

Defendants' Submissions

61. Mr. Stevens submitted that the method of service purportedly used did not comply with RSC order 11 Rule 5(3)(a) and therefore service must be set aside on that basis. The Rule states:

"*A writ which is to be served out of the jurisdiction –*

"(a) need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected…"

62. Mr. Stevens submitted that the rule concerning service out of the jurisdiction is subject to an overarching prohibition contained in RSC Order 11 rule 5(2):

"*Nothing in this rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.*"

63. Mr. Stevens submitted that English Civil Procedure Rules Part 6.40(3)(c) and 6.40(4) as pertains to service of documents out of the jurisdiction were similar to Bermuda's Order 11 rules 5(3)(a) and rule 5(2) respectively. He referred to the case of *Strategic Technologies Pte Ltd v Procurement Bureau of the Republic of China Ministry of National Defence* [2020] 1 WLR, the Queen's Bench Division of the English High Court, where a claimant had sought to serve documents in English proceedings in Taiwan on a Taiwanese defendant by registered post. The agreed Taiwanese law evidence was that in domestic proceedings in Taiwan, originating process is served by the Court. Carr J, in holding that service by registered post ought to be set aside as being in contravention of CPR 6.40(3)(c), stated:

"54 *[The Defendant] submits that CPR r 6.40(3) and (4) imposes two separate requirements. There is a general permissive ability under CPR r 6.40(3)(c) to serve in a manner permitted abroad with an overarching prohibition under CPR r 6.40(4) on the taking of steps that are prohibited by the law of the jurisdiction where service is to take place. Although the two are often elided, the requirements are not the reverse of each other: a method of service may not be prohibited but it nevertheless may not be permitted for the purpose of CPR r 6.40* …

57 *I accept [the Defendant's] case that, for the purpose of assessing whether service has been made effectively under CPR r 6.40(3), the question is what constitutes good service in the foreign country, not whether what was done was illegal or forbidden …" [emphasis added]*

64. Mr. Stevens also referred to Carr J's reference in *Strategic Technologies* to the case of *Arros Invest Ltd v Nishanov* [2004] 2 All ER (Comm) at paragraphs 55 and 56 involving service of a claim form on a Russian national in Russia by registered post. The question the Court was primarily called on to address was which of the two separate Russian civil procedure codes for domestic proceedings was applicable on the facts of the case. However, and as stated by Carr J:

"*It appears to have been common ground in between the parties in Arros, and accepted without comment by the court, that service [of the English claim form] was required to be effected in accordance with domestic Russian rules on service to commence proceedings … As* [the Defendant] *pointed out, if all that was necessary was service by a method that was not prohibited under Russian law, the debate as to which Russian Code applied would have been entirely unnecessary.*" [emphasis added]

65. Mr. Stevens submitted that proper service of a foreign national was more than an administrative step as it involved important principles of public international law. It was fundamental as it goes directly to issues of the originating court's jurisdiction over the defendant and the "invasion" of the sovereignty of a country in which service of a foreign process is sought to be carried out. He referred to *Dicey, Morris & Collins on the Conflict of Laws (15th Ed)* at 8-049:

"Service of process also seeks to subject the defendant to the power of the court, as an organ of the State. As such, it is an exercise of sovereignty. Thus, in Cookney v Anderson, Lord Westbury L.C. observed:

'*The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served in the territory*

of another, and summons a foreign subject to his Court of Justice, it is in fact an invasion of sovereignty, and would be unjustifiable, unless done with consent.'

This basic premise underpins the specific international arrangements for the service of process abroad … it has tended to be obscured in England by the fact that, in the common law tradition, whilst the writ was the command of the sovereign, the responsibility for actual service of the writ rested on the party, and not on the court. Thus, traditionally, the court took no part in effecting service of the proceedings. It followed, therefore, that, when the court did permit service of process outside its jurisdiction, it was left to the claimant to effect service. Therefore, the court did not of necessity become involved in seeking the assistance of foreign authorities, unless so moved by the claimant in cases where official intervention was required in the country where service was to be effected. Other countries in the common law tradition, both in the Commonwealth and in the United States, took the same approach. By the same token, common law countries traditionally had no objection to the direct service of foreign process on their territory by the claimant or his agent. By contrast, in the civil law tradition, service of process is of its nature a public judicial act. Thus, when executed abroad, it, by definition, requires the co-operation of the official authorities in the foreign country. For this reason, the conclusion of international arrangements for service of process has achieved greater importance in dealings with civil law countries." *[emphasis added]*

66. Mr. Stevens submitted that it was common ground between the Saudi Law experts that Saudi Law is silent on the correct procedure for the service of foreign process on an individual resident in the KSA. However, it also appears to be common ground that under the CPL (specifically Article 11(1)) service of process in domestic Saudi proceedings must be effected by the court through its agents "*unless the plaintiff has asked the Court's permission to effect personal service himself*." Mr. Stevens submitted that the unofficial English translation of Article 11(1) that has been provided by both experts is unequivocal on this point:

"*Processes shall be served by process servers at the order of the judge or the request of the litigant or court administration. Litigants or their agents shall continue the proceedings and submit papers to process servers for service. Service may be carried out by the plaintiff if he so petitions.*"

67. Mr. Stevens submitted that the evidence showed that Article 5 is a savings provision, like the Order 2 slip rule provision for non-compliance. However, he submitted that Article 5 in Saudi Law cannot be relied upon if the service was not in compliance as it would be non-sensical to suggest that you have proceeded in accordance with a set of procedural rules because those rules give the court a discretion to waive your non-compliance.

68. Mr. Stevens submits that there is no evidence before the Court that the Plaintiff applied to the domestic court for leave to personally serve the Concurrent Notice on them. He also submits that other formal requirements of the CPL when serving process in the KSA were also not complied with by the Plaintiff, including where Article 13 of the CPL required:
    a. An original and a copy of the relevant document to be served on the recipient; and
    b. The signature of the recipient to be entered on the original document or, if he refuses service, a written annotation of his refusal and the reasons for so refusing.

69. Mr. Stevens submitted that there were two options available to the Plaintiff for service under RSC Order 11 to validly serve the Defendants in Saudi Arabia.
    a. The first was to seek to personally serve the Concurrent Notice in accordance with the CPL which could have included asking the relevant domestic court to effect service via its agents or alternatively petitioning the domestic court for leave to carry out personal service through its own agents.
    b. The second was to pursue service on the Defendants via diplomatic channels in accordance with RSC Order 11 rule 6.

70. Another option was under RSC Order 63 rule 4 to persuade the Bermuda Court that the circumstances were appropriate to grant an order for substituted service.

71. Mr. Stevens submits that as none of these options were pursued by the Plaintiff, then the Plaintiff is unable to prove due service of the Concurrent Notice on the Defendants and therefore the Defendants' application ought to be granted. He added that to grant the Plaintiff's application to confirm service would be an abuse, and would lead to abuse as parties to an action may avoid strict compliance with the rules of service on the basis that the Court will apply the slip rule.

72. Mr. Stevens submitted in essence that service of the Writ should be set aside as the evidence does not support due service and even if the Court found that there was service, it fell foul of the requirement to serve foreign process in a manner that accords with Saudi Law.

Plaintiff's Submissions

73. Mr. White referred to Order 11, rules 5(2) and 5(3) as set out above in respect of service out of the jurisdiction. He also referred to RSC Order 11, rule 6 for service via diplomatic channels or through the government of the country in which service was to be effected. He submitted that in the case of *The Sky One* [1988] 1 Lloyds Rep 238 the English Court of Appeal considered the question of personal service in a foreign country and the meaning of *'contrary to the law of that country.'* In that case, a High Court writ had been personally served on the defendant in Switzerland. The defendant applied to set-aside service on the basis that it was improper under Swiss law as it was considered to be 'an act of a foreign state' and thereby prohibited by art. 271 of the Swiss Penal Code. Staughton J accepted that this was the effect of Swiss law and therefore that personal service of the writ was contrary to the laws of Switzerland. His decision was upheld on appeal. In giving judgment, the Court provided guidance on the application of Order 11. Staughton J (at p 240) stated that:

> *"It is common ground that the methods of service provided in the sub-rule* [Order 11 rule 6(3) as read with rule 5(2)] *are not exclusive.* *Service may be effected by private means* *rather than through the Master's Secretary's Department, the Foreign and Commonwealth Office and diplomatic channels, provided always that nothing is done*

in the country where service is to be effected which is contrary to the law of that country. So the question is whether service by private means in Switzerland is contrary to the law of Switzerland." [emphasis added]

74. Mr. White submitted that as a result of the various rules, there are four potentially permissible but not exclusive methods for service of a Bermuda writ in the KSA:
    a. Personal service in accordance with RSC Order 65, rule 8 provided that personal service of a Bermuda writ is not contrary to the laws of the Kingdom of Saudi Arabia[2];
    b. Service need not be effected personally where it is effected in accordance with the domestic law of Saudi Arabia[3];
    c. Service by diplomatic means provided that Saudi Arabia is willing to effect service[4]; or
    d. Service through a British consular authority in Saudi Arabia provided that service through such authority is not contrary to the law of Saudi Arabia[5].

75. Mr. White submitted that the Defendants' expert report concedes that there are no express procedural rules dealing with foreign process and that personal service is permissible where the signature of the party being served is obtained. Mr. White submitted that the second part of the concession was wrong in any event.

76. Mr. White submitted that there was a high degree of commonality in the expert reports:
    a. Both experts agree that there are no express mandatory provisions in Saudi Arabian law governing the service of foreign process on an individual in Saudi Arabia or stipulating that it must be through a particular channel.
    b. The exception is where there are judicial cooperation treaties in place between the KSA and other countries;

[2] RSC Order 11, rules 5(2) and (3)
[3] RSC Order 11, rule 5(3)
[4] RSC Order 11, rule 6(3)(a)
[5] RSC Order 11, rule 6(3)(b)

c. Where specific requirements relating to service are set out in judicial treaties, the experts agree that these requirements should be observed; and
d. The experts agree that Bermuda is not party to any of these regional multilateral or bilateral treaties.

77. Mr. White submitted that where the experts disagree is the contention by Mr. AlAmr that judicial treaties apply to Bermuda indirectly, without saying how, and therefore that local Saudi rules on service, including the Article 11 requirement for a signature, should have been followed. However, he submits that in contrast Mr. Alissa is clear that there are no Saudi laws which govern the service of a Bermuda writ, and personal service, as is said to have occurred here, is not contrary to any Saudi Law, whether criminal or civil.

78. Mr. White submits that the reason for the disagreement is likely that the expert Mr. AlAmr has been asked the wrong question by his instructing attorneys. He argued that the question is not whether service has been carried out in accordance with local law, but whether personal service is contrary to the law of the KSA. He referred to the RSC Order 11, rule 5(2) which permits personal service provided that nothing is done contrary to the laws of the foreign country, and that the methods of service are not exclusive. Mr. White submitted that the Defendants have failed to identify any Saudi law that personal service is contrary to, and the evidence of Mr. Alissa that there are no such laws should be preferred, and that accordingly this part of the Summons should be dismissed.

Court's Analysis

79. In light of my decision above that there was not effective service, I need not proceed to determine this point. However, if I were wrong on the issue of effective service, I would now find that the method of purported service was impermissible under Saudi Law for several reasons.

80. First, I accept that the English Civil Procedure Rules Part 6.40(3)(c) and 6.40(4) as pertains to service of documents out of the jurisdiction are similar to Bermuda's Order 11 rules 5(3)(a) and rule 5(2) respectively. In applying *Strategic Technologies Pte Ltd* I am of the

view that I must ask myself what constitutes good service in the foreign country, not whether what was done was illegal or forbidden. I am guided by *Dicey, Morris & Collins* on the Conflict of Laws where it states that service of process is an exercise of sovereignty and I am also guided by Lord Westbury L.C. in *Cookney v Anderson* where he observed that in the civil law tradition, service of process is of its nature a public judicial act and thus when executed abroad, it requires the co-operation of the official authorities in the foreign country.

81. Second, I have considered the evidence of the experts. I accept their evidence that Saudi Law is silent on the correct procedure for the service of foreign process on an individual in the KSA. Thus, in my view, in answering the question posed in the preceding paragraph, what constitutes good service in the KSA must be service in accordance with its domestic CPL. To this point, I accept that under the CPL, Article 11(1) provides that service of process in domestic Saudi proceedings must be effected through the Courts unless the plaintiff has asked the Court's permission to effect personal service himself. In this case, the Plaintiff maintained that the method of service was the personal service by Mr. Attar. I agree with Mr. Stevens that there is no evidence before the Court that Mr. Attar sought the permission of the Court to serve the Concurrent Notice personally on the Defendants.

82. Third, I have considered Mr. White's submissions in respect of the Court of Appeal in *The Sky One*. I agree with him that there is no evidence that the purported service was contrary to any Saudi Law, whether criminal or civil. This was the view of expert Mr. Alissa. However, I am not satisfied that this is the only consideration in respect of service as outlined in the immediate preceding paragraphs. As stated in *Strategic Technologies Pte Ltd* there is a permissive ability to serve in a manner permitted abroad with an overarching prohibition on the taking of steps that are prohibited by the law of the jurisdiction.

83. Fourth, in my view Article 5 provides a wide discretion with a "slip rule" effect. However, in this case, the Defendants' position is that there was never any service at all. In such circumstances, in my view the application of the Article 5 provision would be inappropriate. It may have been appropriate if there was actual service but with some other minor defects.

84. Fifth, in my view, Mr. Attar failed to comply with Article 13 of the CPL which required signatures of the recipient on the original document or if service was refused, a written annotation of his refusal and the reasons for so refusing.

85. In light of the above reasons I find that service of the Concurrent Notice should be set aside pursuant to RSC Order 12, rule 8(1) as the purported service of the Concurrent Notice was not permissible under Saudi Law.

Deemed Service

86. Mr. White submitted that in the event that service is defective, RSC Order 2, rule 1 provides that *"the failure shall be treated as an irregularity and shall not nullify the proceedings"*. He further submitted that in the case of defective service of proceedings, however gross the defect even including a failure to serve, where the existence of proceedings is nevertheless known to the defendants, the defect is an irregularity that can and should be cured by the Court's exercise of its discretion under RSC Order 2, rule 1 to decline to set-aside service per the White Book at 2/1/3. He cited the case of *The Golden Mariner* [1990] 2 Lloyds Rep 215[6], where the writ had been served on the defendants at the wrong address in New York but had been passed along to them. Lord McGowan, with whom Sir John Megaw agreed, held that the rule had *"been framed so as to give the court the widest possible power to do justice"*, and as the defendants were aware of the writ, and had not been prejudiced by the defective service, it would not be set-aside. Sir John Megaw, at p.225, said the court must take a view of *"what is just and expedient in the particular circumstances"*

87. Mr. White submitted that if the Court were to disagree with his arguments about service under Saudi Law as set out above, the defect would make service irregular and the court would have a discretion whether to set-aside service. He argued that in the present circumstances it would plainly not be "just and expedient" to set-aside service as the facts

[6] *Golden Ocean Assurance Ltd & World Mariner Shipping SA v Martin*

are similar to those in *The Golden Mariner*. He highlighted that where fabrication has been rejected, the Defendants have both been handed the Writ and are aware of the proceedings, the fact that no signature has been obtained does not prejudice them and it would be contrary to the overriding objective to deal with cases fairly, efficiently and cost effectively to set aside service where a new writ would have to be filed and served.

Analysis

88. I disagree with Mr. White that I should exercise my discretion pursuant to RSC Order 2, rule 1 to decline to set aside service. In *The Golden Mariner* the discretion was exercised in respect of several defendants of many who had been served with a copy of the writ which correctly named them as defendants but which copy was intended for different defendants, and in that respect failed to comply with the requirements of the rules. McCowan LJ stated that none of the defendants were in the dark about the proceedings and along with Megaw LJ they were of the view that none of the defendants had suffered any prejudice. However, in the present case, the Defendants have suffered the prejudice of Default Judgment being entered against them. Further, the Defendants allege that they knew nothing about the matter until Default Judgment was served on them although the Plaintiff maintains through Mr. Attar that the Defendants have known about the proceedings since the original defective service on their employees. As the knowledge of the Defendants about the Concurrent Notices is in issue, I will consider this a factor to cause me to decline to exercise the discretion.

89. In light of the above reasons, I decline the Plaintiff's Deeming Application.

The Plaintiff has no standing to bring the claim

Defendants' Submissions

90. Mr. Stevens submitted that the Plaintiff had no legal interest in the claim at the relevant time, including when it filed the Writ and applied for leave to serve out, purportedly served the Concurrent Notice on the Defendants in the KSA and when the Default Judgment was

applied for and entered. This was on the basis that, as stated in the Statement of Claim, the Liquidator entered into the Assignment with Dr. Hafiz, the owner of 4.17% of the Plaintiff's shares in respect of all and any rights or causes of actions, claims, etc, which the Plaintiff had in respect of the Jet, the sale or the proceeds and any other assets. The Assignment contained various terms.

91. Mr. Stevens submitted that further to clause 5.2 of the Assignment, Mrs. Mayor executed a Power of Attorney (the "**POA**") in September 2012 which appointed Dr. Hafiz to represent and to act in relation to the claims. The Defendants were formally notified of the Assignment and the POA on 25 April 2017. In light of the terms of the Assignment and the POA the Defendants submitted as follows:
    a. The Plaintiff has no *locus standi* to bring the Claim as prior to the filing of the Writ of Summons the Plaintiff has assigned away by contract all of its rights, title and interest in the Claim against the Defendants.
    b. The Assignment clearly envisaged that Dr. Hafiz would prosecute any Claims personally as assignee and any sums recovered by him would be returned to the Plaintiff for distribution.
    c. The Assignment, which is governed by Bermuda law, was a legal assignment of the Plaintiff's rights to bring the Claim against the Defendants. Mr. Stevens submitted that a legal assignment is one that satisfies the requirements of section 19(d) of the Supreme Court Act 1905 which relevant part states:

        "*any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from who the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…*"

d. The Assignment is a legal assignment under Bermuda law because it was unconditional, it is in writing and the Defendants were given notice of it prior to the date on which the Writ was filed. Further, following a valid legal assignment of a cause of action to the counterparty, the assignor ceases to have any legal interest in the cause of action and the assignee is the party with the sole right to bring the claim. Mr. Stevens cited *Snell's Equity (33rd Edition)* at 3-010:

> *"Thus the assignee becomes the owner of the chose at law, and can sue the debtor in his own name without joining the original creditor, who has no further right to the chose."*

e. Mr. Stevens also cited *The Law of Assignment (3rd Edition, Chapter 26: "Consequences and Effects of an Assignment")* where Mr. Justice Marcus Smith confirmed the position stating:

> "*Where there is a legal assignment of legal intangible property, the entire interest in the property passes from the assignor to the assignee, leaving no interest in the assignor.*" *(at 26.05*).

92. Mr. Stevens submitted that the effect of the Assignment was fatal to the Plaintiff's case. He cited the case of *East Bank Consultants v Livio Ferigo* [2016] Bda LR 100 where in the context of an application to strike out a plaintiff's claim under RSC Order 18, rule 19, Kawaley CJ stated that if a plaintiff does not have standing to bring a claim when it filed its writ then this can only be regarded as a "fatal flaw" to the validity of the entire claim. Further, Mr. Stevens argued that the former Chief Justice Kawaley was clear that this was "*not the sought of technical point which, if made out, can be cured by the Court on a discretionary basis" (paragraphs 11 and 16).*

93. Mr. Stevens in his oral arguments referred to Order 20, rule 5(3) in respect of an amendment to correct the name of the party.

> *"An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a*

genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued."

94. Mr. Stevens submitted that the Plaintiff has failed to meet the test in Order 20, rule 5(3) as if the only issue was a misnomer case, that is, that the name was wrong, then Order 20, rule 5(3) could be engaged. However, it would not be engaged where the correct entity was known but another entity was named as the Plaintiff. He argued that Dr. Hafiz had always intended for the Company to bring the claim, not for him to bring the claim as he thought he had the Liquidator's powers and that he was authorized to sue the Defendants in the name of the Company. Mr. Stevens relied on *International Bulk Shipping and Services Ltd. v Minerals and Metals Trading Corporation of India et al* [1996] Vol 2 474 at 479 which stated:

"These authorities have established that a distinction must be made, in accordance with the wording of the rule, between "the identity of the person intending to sue" and the name of the party. A mistake as to the latter can be corrected, but as to the former not. In the Sardinia Sulcis, Lord Justice Lloyd with whom Lord Justice Stocker expressly agreed suggested that the test is:

.. can the intending plaintiff or defendant be identified by reference to a description which is specific to the particular case – e.g. landlord, employer, owners or shipowners?

If the answer is "yes", then an amendment can be allowed even where the correction –

... involves substituting a different name altogether, and the name of a separate legal entity ...

even though this maybe equivalent to substituting a new party.

It was also established in The Aiolos that, as the learned Judge put it:

Where there is no mistake either as to the name of the Plaintiff or as to the identity of the party intending to sue but only an error as to the rights of the correctly identified party…

the rule does not apply.

…

The rule envisages that the writ was issued with the intention that a specific person should be the plaintiff. That person can often but not invariably be identified by reference to a relevant description. The choice of identity is made by the persons who bring the proceedings. If having made that choice they use the wrong name even though the name they use may be that of a different legal entity, then their mistake as to the name can be corrected. But they cannot reverse their original identification of the party who is to sue. This interpretation of the rules derives not only from the phrase "correct the name of the party" but also from the requirement that the mistake must not have been such as to cause any reasonable doubt as to the identity of the person intending to sue."

95. Mr. Stevens argued that in respect of the Plaintiff's request to engage the inherent jurisdiction of the Court to allow an amendment, this was not a misnomer case as Dr. Hafiz had identified the Company and intended for it to be the Plaintiff. He argued that the Plaintiff's reliance on the case of *Singh v Atombrook Ltd.* (C.A.) 1 WLR 810 did not assist as that case was a misnomer case as the Court found that the plaintiff had intended to sue the right entity. Also, he argued that the Plaintiff's reliance on *Thistle Hotels Ltd v Sir Robert Mc Aphine & Sons Ltd* The Times 11 April 1989 did not assist with the inherent jurisdiction either as Dillon J stated that Order 20, "… *rule 5 regulates afresh the practice which the court may follow in exercising its unfettered discretion under rule 8 to amend any document in the proceedings*".

96. In essence, Mr. Stevens argued that Order 20, rule 5(3) cannot be used to amend the plaintiff, thus the Plaintiff's Amendment Application must be dismissed and the Defendants' Default Judgment Application must be granted, thus the Default Judgment is a nullity which is a complete and unimpeachable defence.

<u>Plaintiff's Submissions</u>

97. Mr. White submitted that where a defendant argues that the judgment is irregular because of a defect, the irregularity must be specified in the summons per RSC Order 2, rule 2 and set out in the affidavit. He referred to the Whitebook at 13/9/9. Further, if the application to set-aside is not made promptly and "within a reasonable time" the judgment may only be set-aside under RSC Order 13, rule 9, namely on the merits, in the same way as a regular judgment. He cited *Singh v Atombrook Ltd* [1989] 1 WLR 810, where the plaintiff applied to set-aside a default judgment for irregularity three months after becoming aware of its terms. The Court of Appeal dismissed the application and held that the delay meant that the application had to be considered on the merits of the defence.

98. Mr. White submitted that the line of authority that where a judgment had been obtained irregularly the defendant was entitled to have it set aside *ex debito justitiae* was overridden by the Court of Appeal's decision in *Faircharm Investments Limited v Citibank International plc* [1998] Lexis Citation 3730 as referenced in the *Whitebook* at 13/9/18. In *Faircharm*, where judgment had been entered prematurely, Sir Christopher Staughton, with whom the rest of the Court of Appeal agreed (at p 9) dismissed the appeal and held:

> *"…if Citibank are bound to lose on a subsequent application for summary judgment, it would be pointless to set-aside the existing judgment…. I would not go so far as to say that that no irregularity could be so fundamental that the judgment in such a case would have to be set aside, whatever the other circumstances. But if indeed Citibank would be bound to lose, I do not, in the circumstances of this case, consider that there such a degree of fundamental error to require that the judgment be set aside." [emphasis added]*

Standing and nullity

99. Mr. White submitted that there was a substantial body of authority that recognises that proceedings commenced by a claimant without title to sue are not necessarily a nullity where they are capable of cure. He cited several cases in support of this proposition including *Hendry v Chartsearch Ltd* [1998] CLC 1382, *Pickthall v Hill Dickinson LLP* [2009] EWCA 543 and *Smith v Henniker-Major & Co* [2002] EWCA Civ 762 at paras 92

to 93, which concerned proceedings brought by a purported assignee pursuant to an invalid assignment. Robert Walker LJ (in the lead judgment on this point) considered that the judge had been right to reject the argument that the claim form was a "*nullity, or of no effect, and could not be cured by amendment*. Further, in *Munday v Hilburn* [2014] EWHC 4496 (Ch), Nugee J set aside an order striking out a claim on the basis that it had not been vested in the plaintiff (an undischarged bankrupt) when proceedings were issued. As to an argument that the proceedings were therefore a nullity, he commented (at para 47):

> "*…it is not I think suggested that the fact the cause of action was not vested in both claimants at the outset makes the proceedings incurably bad. There was some ancient authority to that effect but the modern law is that even if there is a defect in the proceedings when issued in that either the claimant's cause of action is not then complete, or that the claimant's cause of action is not then vested in the claimant, it is open to the Court to cure the defect. That sufficiently appears from the decision of the Court of Appeal in Hendry v Chartsearch Ltd* [1998] CLC 1382." (emphasis added).

100. Mr. White noted that it was common ground that the Assignment was a valid legal assignment where the Company assigned its rights, title and interest in the causes of action against Mr. Khouj and Mr. Mansouri to Dr. Hafiz. However, he rejected the Defendants' argument that the Default Judgment should be set-aside 'as of right' on the grounds that the causes of action could only be pursued by Dr. Hafiz as the Company lacked the standing to sue, the result being that the Default Judgment was irregular and a nullity. The reason for such rejection were as follows:

a. the irregularity does not entitle the Defendants to have the judgment set-aside *ex debito justitiae* following the Court of Appeal's decision in *Faircharm Investments Limited v Citibank International plc*;
b. nor is the Writ a nullity as should be clear from the weight of authority set out above (including various decisions of the Court of Appeal); and further
c. the Court is entitled to take into account that the Defendants' application based upon standing has (i) not been specified in the Defendants' summons, (ii) is unsupported by evidence, and (iii) has not been made *"within a reasonable time"*.

As in *Singh v Atombrook*, where a delay of three months caused the court to reject an argument based on irregularity, there has been a twelve month delay in this case in raising this argument.

101. In relation to the Defendants' reliance on *East Bank Consultants v Livio Ferigo* as a fatal flaw to the Plaintiff's case, Mr. White submitted that when properly understood, the context of that case is not applicable to the present case. In that case the claim was struck out as the plaintiff had wrongly sued in a trading name (without legal personality) and with respect to an equitable assignment where the legal rights were still held by the assignor. Kawaley CJ held that in respect of the first defect he would have been minded to allow the Plaintiff to correct his mistake by amending the writ to insert his own name. However, he found that the proceedings were a nullity as, even if the writ were amended, Mr. Peniston would not have the right to sue due to his failure to give notice of the assignment. It was this second defect which was described as fatal. In the present case, Dr. Hafiz did have the right to sue in his own name at the date of issue.

Amendment

102. Mr. White submitted that the starting point for an amendment is RSC Order 20, rule 5(3):

> *"An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the party intending to sue, or as the case may be, intended to be sued."* [emphasis added]

103. Mr. White cited the Whitebook at 20/8/6 as the guiding principle on the question of amendment is that all amendments ought to be made for the purpose of correcting any defect or error in the proceedings. This is reflected in the comments of Jenkins LJ in *G.L. Baker Ltd v Medway Building & Supplies Ltd* [1958] 3 All E.R 540 (at 546) that:

"It is a well-established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise in accordance with their rights… I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."

104. Mr. White cited the case of *Evans Construction Co Ltd v Charrington & Co Ltd* [1983] 1 All ER 310, where the English Court of Appeal considered the scope of the court's power to allow an amendment of a party's name where the wrong defendants had been named. There Griffiths LJ stated "*I see no reason why it should not include a case where entirely the wrong name has been used, provided it was not misleading, or such as to cause any reasonable doubt as to the identity of the person intended to be sued."*

105. Mr. White submitted that court has a broad power to amend pleadings and proceedings even after final judgment provided it is satisfied that it is just to do so. In *Singh v Atombrook Ltd*, the claimant had obtained default judgment in an incorrect name. At page 821A-B, Kerr LJ (with whom Sir John Megaw agreed) set out that, notwithstanding that the judgment had been obtained irregularly (in that case proceedings had not been validly served and the defendant had been incorrectly named) "… *it could still be amended, although it was a final judgment, both under Order.2, r.1(2) and Order 20, r.5."*. Similarly, the Court of Appeal in *Pathania v Adedeji* [2014] EWCA Civ 681 stated that it would not have disturbed a judgment granted in favour of the wrong claimant, unless it was satisfied that the claimant actually knew it had no title to sue. I note here that Mr. Stevens argued that this case did not concern Order 20, rule 5(3) and is of no assistance to the Court.

106. Mr. White referred to the case *Thistle Hotels Ltd.* highlighting that the "identity" of the entity was the key issue. In that case there was a genuine mistake that was accepted. Mr. White referred to the *Sardinia Sulcis* case as the leading case on this issue which stated:

"… (1) the Plaintiff must show a genuine mistake, (2) that the mistake was not misleading, (3) that the mistake was not such as to cause reasonable doubt as to the

identity of the person intending to sue, and (4) that it would be just to allow the amendment.

…

It is thus established by three or more decisions of the Court of Appeal that a name may be "corrected" within the meaning of Order 20, rule 5(3), even though it involves substituting a different name altogether, and the name of a separate legal entity, and even though it is objected that the effect of the substituting the new name will be to substitute a new party. But the amendment will not be allowed where there is reasonable doubt as to the identity of the person intending to sue or intending to be sued.

…

Returning to the facts of the present case, there could be no reasonable doubt as to the identity of the person intending to sue, namely, the person in whom the rights of ownership were vested at the date when the writ was issued.

…

As to (4) there is no difficulty. It is clearly just to allow the amendment. Indeed, having regard to the history of the case, it would be the height of injustice to allow such an unmeritorious objection to prevail at this stage. I would therefore allow the plaintiffs' application to amend the name of the plaintiffs …"

107. Thus, Mr. White argued that the case was on all fours with the present case as the Company had the right to sue, the rights were assigned to Dr. Hafiz (and approved by an order of this Court), Dr. Hafiz had the rights vested in him and a mistake was made in the belief that the right to sue had remained with the Company. Thus only the right to sue was assigned, not the Jet itself or the proceeds of the sale of the Jet. Therefore, the "identity" is the owner of the cause of action. To recover the proceeds of the sale of the Jet. This was always clear to the Defendants as set out in the Writ.

108. Mr. White submitted that under the Power of Attorney, Dr. Hafiz was authorized in the name of the Company:

a. *"To follow up or to submit any claim or pleading or any other application against any shareholder of the Company, VP-BSJ."* (Clause 1);
b. *"To represent and act for all applicable required action and proceedings in sake for collecting the amount due by any Majority Shareholder of the Company, or any other person who may have received any part of the income from any assets of the Company, including the Aircraft, and any matter arising and relating to the issue."* (Clause 2); and
c. *"To institute the claim, defend, submit and compromise all suits which arise in relation to all mentioned issues and matters in the Power of Attorney before any competent judicial or governmental body…"* (Clause 3)

109. Mr. White submitted that the evidence supporting that the Plaintiff genuinely did not appreciate that the causes of action had vested in him despite the Power of Attorney was overwhelming as set out below. There was no basis for the Defendants to assert the contrary in the absence of any evidence as the mistake was genuine and it was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue:
a. Dr. Hafiz believed the Assignment carried with it the right to bring proceedings and "stand in the shoes of the Liquidator";
b. Mrs. Mayor had authorized Dr. Hafiz to pursue the "Claims" against the Defendants in the name of the Company; and
c. The Assignment and Power of Attorney were fully pleaded in the Writ, thus at no time would the Defendants have had any doubt as to who was pursuing them.

110. Mr. White submitted that in all the circumstances it would be just to grant the amendment as naming the Company as Plaintiff was a genuine mistake, it was not misleading, it would be a great injustice to Dr. Hafiz, the application to set-aside was filed seven months after Default Judgment and two years had passed before the Defendants had raised the defence of the assignment. Further, he noted that when considering whether it is just to allow such the Court must be mindful of the cardinal purpose of the Court as explained in *Cropper v Smith* [1883] 26 CHD 700 by Bowen LJ:

"…. the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise in accordance with their rights."

Analysis

111. In my view, the Plaintiff should be permitted to amend the Writ to add Dr. Hafiz as a party to these proceedings for several reasons. First, I agree with the reasons submitted by Mr. White that the Defendants' application to set aside the Default Judgment should be rejected on the ground that the causes of action could only be pursued by Dr. Hafiz as a result of the Assignment. I rely on *Munday v Hilburn* to form the view that the modern law is that even a defect in the proceedings such as this one it is open to the Court to cure the defect. Thus, the proceedings are not a nullity.

112. Second, I am of the view that an amendment should be allowed to cure the defect. My start point is based on the comments by Jenkins LJ in *G.L. Baker Ltd* that it is a well-established principle that the object of the Court is to decide the rights of the parties and not to punish them for mistakes. Also, in applying *Evans Construction Co. Ltd.* I see no reason why I should not allow an amendment as the use of the Company name was not misleading and could not have had the effect of causing reasonable doubt to the Defendants as to who was bringing the action. I have considered the evidence on this point and I am satisfied that the Plaintiff has met the test set out in *Sardinia Sulcis*. I accept:

a. That the Plaintiff has shown in the evidence that there was a genuine mistake;
b. It was not misleading as in my view the "identity" is the owner of the cause of action to recover the proceeds of the sale of the Jet. I agree with Mr. White that this was always clear to the Defendants as set out in the Writ.
c. The mistake could not have caused the Defendants reasonable doubt as to the identity of the person intending to sue. The entities were either the Company or Dr. Hafiz and the Defendants had been requested by the Liquidator to return the proceeds of the sale but their response was that they would "deal" with Dr. Hafiz's share.

d. In my view it is just to allow the amendment based on the history of this case, including that the Liquidator had asked for the proceeds of sale to be returned to the Company, the application to set-aside was filed seven months after Default Judgment and two years had passed before the Defendants had raised the defence of assignment.

113. Third, I reject Mr. Stevens' arguments that Dr. Hafiz had always intended for the Company to bring the claim for the reason that it appears to me that Dr. Hafiz always intended for the holder of the cause of action to bring the claim. In reference to the suggested test stated by Stocker LJ in *Sardinia Sulcis*, in my view, the intending plaintiff can be identified by reference to a description which is specific to the particular case – namely the holder of the cause of action in the context of the Assignment and the Power of Attorney created in circumstances where the Defendants refused to return the proceeds of the sale of the Jet to the Liquidator.

114. In light of the above reasons, I grant the Plaintiff's Amendment Application.

Alternatively, the Defendants have a meritorious defence to the Claim

Defendants' Submissions

115. Mr. Stevens submitted that the basic principles underlying the Court's broad discretion to set aside or vary a default judgment is that "*unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power…*" (per Lord Atkin in *Evans v Bartlam* [1937] A.C. 473 at 480).

116. Mr. Stevens referred to the 1999 White Book commentary at 13/9/18:

"*The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed,*

not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

117. Mr. Stevens submitted that the Defendants' defences, as set out below, meet the test to be applied by the Court in exercising its discretion, in that they are not just merely arguable but stand a real prospect of success. He cited the line of authorities of *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc., The Saudi Eagle* and *Allen v Taylor* [1880] 16 Ch. D 355, followed in Bermuda in *Adam John Gibbons and Ryan Heyrana v Sean DeSilva* [2020] SC Bda 43 Civ and *A,B,C and D v Jonathan Jon Cumberbatch* [2020] Bda LR 67.

118. First, the Defendants relied on the defence that the Plaintiff had no standing to bring the claim as set out above arising from the Assignment.

119. Second, the Defendants were directors of the Plaintiff and accepted their appointments "on the footing of the Bye-Laws". Thus, the Defendants had a contractual entitlement to rely on the Bye-Law Indemnity. Mr. Stevens submitted that section 98 of the Companies Act 1981 ("**CA 1981**") permits a Bermuda company to exempt and indemnify its directors and officers from liability for any act carried out in their capacity as directors (including, *inter alia*, for negligence or breach of trust) save for any liability attaching to a director for fraudulent or dishonest acts.

120. Mr. Stevens submitted that it is accepted as a matter of principle that a company has no cause of action at all against a director in respect of a matter which the company has agreed to indemnify him (per the statement of Lord Brightman in the Privy Council decision in *The Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985 at 991F).

121. Mr. Stevens submitted that the Defendants have averred in their affidavit evidence that none of their actions were carried out with a fraudulent or dishonest intention. Mr.

Khouj has also averred that, contrary to the Plaintiff's pleaded case, he did not personally receive any of the proceeds from the sale of the Aircraft. Further, he argues that it is for the Plaintiff to plead and prove that the conduct complained of amounted in law to fraud and/or dishonesty. He cited the Bermuda Court of Appeal case of *Intercontinental Natural Resources Limited (In Liquidation) v Conyers Dill & Pearman* [1982] Bda LR 1 where DaCosta JA stated at paragraph 124:

> *"Although not amounting to a contract between the company and the director, the articles of a company are regarded as showing the terms upon which the director has agreed to serve. It must follow therefore that if the articles confer immunity from liability for any loss or damage which may occur in the execution of his duties unless there was willful default or dishonesty then the burden must be on the company to establish the requisites of liability." [emphasis added]*

122. Mr. Stevens submitted that there is no express pleading in the Plaintiff's Statement of Claim and thus on that basis alone the Defendants' defence under the Bye-Law Indemnity clearly satisfies the applicable test on the basis of the Plaintiff's claim as pleaded, in that it stands a real prospect of success or carries some degree of conviction. Further, Mr. Stevens submits that even if the Plaintiff were to plead that the Defendants were fraudulent or dishonest:

a. The Plaintiff would be required to prove that the Defendants acted with a dishonest state of mind when engaging in the conduct complained of per *Derry v Peek* [1889] 14 App. Cas. 337 for the elements making up the tort of deceit, and the Privy Council decision in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2003-04] 6 ITELR 167 for the applicable test for dishonesty – which test was recently endorsed by the Supreme Court of the United Kingdom in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] 3 W.L.R. 1212); and
b. The Court ought not, in the exercise of its discretion to set aside judgments in default, to allow arguably the most serious claims that can be made in civil litigation to pass without being thoroughly tested at trial.

Plaintiff's Submissions

123. Mr. White submitted that the Court has a discretionary power to set aside default judgment per RSC Order 13, rule 9:

> *"The Court may on such terms as it thinks just set aside or vary any judgment entered in pursuance of this Order".*

124. Mr. White submitted that the application may succeed where the defendant can establish a defence with a real prospect of success or some other good reason why judgment should be set aside per the Whitebook at 13/9/7. He also cited *The Saudi Eagle* and *Adam Gibbons & Ryan Heyrana* per Hargun CJ at paras 17-20. The burden is on the defendant and a realistic prospect of success is one that *"carries some degree of conviction"* and *"is more than merely arguable*". The burden is discharged by the defendant filing *"credible affidavit evidence"* or by exhibiting a draft defence.

125. Mr. White submitted that an application to set aside must be made promptly. Any failure to do so must be explained and this a significant factor that the Court can consider in the exercise of its discretion per the Whitebook *at* 13/9/12. This to the extent that an application that has been made tardily will be dismissed, notwithstanding its merits. Moore-Bick LJ (as he then was) in *Standard Chartered Bank plc & Anor v Agrinvest International Ltd & Ors* [2010] EWCA Civ 1400 (at para 23) stated that:

> *"…promptness will always be a factor of considerable significance…and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant may succeed at trial."*

126. In *Standard Chartered*, the Court of Appeal upheld the judge's decision not to set-aside default judgment where the application was not made until nearly a year after judgment and the defence was said to be *"far from overwhelming"*.

127. Mr. White submitted that the Defendants have failed to demonstrate a real prospect of success, they have not exhibited a draft defence to their application and they have not even laid out the bones of a defence on the facts in their affidavit evidence noting that Mr.

Khouj had expressly asserted that he would not be responding to the claims but reserved the right to do so. Further, Mr. White submits that the Defendants have only given a bare denial, but no factual basis, that they have acted dishonestly and in bad faith as directors and Mr. Khouj as executor. He argued that the Defendants do not answer the Plaintiff's central charge that a direct payment to the heirs, including to Mr. Mansouri, without the proceeds of sale passing through the Company and with no distribution to him as a minority shareholder cannot be remotely compatible with their fiduciary duties as directors to act honestly and in good faith in the best interest of the Company. Further, the Defendants remain silent in the face of the assertions they failed to follow Mrs. Mayor's repeated instructions to return the proceeds of sale. Therefore, there is no substantive defence as the Defendants' conduct is indefensible.

128. Mr. White submitted that the Defendants rely on two highly technical arguments. First, a defence based on the Bye-Law Indemnity. He stated that this argument was based on a false characterization of the Statement of Claim as fraud or dishonesty are not actions per se but may form the constituent ingredients of other causes of actions such as fraudulent misrepresentation, the tort of deceit, breach of fiduciary duty, breach of trust and dishonest assistance. Therefore, there is no need for the words "fraud" or "dishonesty" to be pleaded expressly if the facts which make the conduct complained of fraudulent or dishonest are pleaded and the facts are inconsistent with innocence as stated by Millett LJ in *Armitage v Nurse* [1998] Ch 241. He also cited *Barbara Blades Lines (Beneficiary of Barbara Blades Liens Non-exempt Trust) v Pricewaterhousecoopers* [2021] SC (Bda) 42 Civ, where Subair Williams J at 55 made reference to *Robert Sofer v Swissindependent Trustees SA* [2020] EWCA which set out the undisputed principles of governing the pleading of dishonesty and which made reference to the correct test being whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence: *JSC Bank of Moscow v Keklman* [2015] EWHC 3073 (Comm) at 20 – 23.

129. Mr. White submitted that in the present case, the claims against the Defendants are set out in the Writ and actually described by the Defendants as "*allegations of improper conduct contained in the Writ*" per paragraph 14 of Mr. Khouj's first affidavit. Mr. White

noted that the Writ pleaded certain facts: (a) the directors were under a duty to act honestly and in good faith; (b) the Defendants deliberately excluded Dr. Hafiz from board and general meetings so that the sale of the Jet could occur without his knowledge; (c) the Defendants sent the proceeds of the sale of the Jet to a separate escrow account controlled by the Defendants and was then paid to the Majority Shareholders; (d) the Defendants put the Company into liquidation; (e) the Defendants refused the Liquidator's request to return the sale proceeds forcing her to conclude that her position was untenable; (f) that it was inconceivable that the payment of the full sale proceeds directly to the Majority Shareholders, without any payment to Dr. Hafiz could be considered to be in the best interest of the Company and undertaken by directors acing honestly and in good faith; and (g) payment was made to the personal benefit of Mr. Mansouri which he conceded who was under a duty to declare his interest in the contract to sell the Jet and distribute the proceeds to himself but failed to do so. The effect of this breach will be deemed to be acting dishonestly and in bad faith by section 97(4)(b) of the CA 1981.

130. Mr. White submitted that these pleadings set out a basis of fraud and dishonesty for which the Defendants have not raised any form of defence, let alone one with a real prospect of success. Further, the Defendants have not relied upon "some other good reason" why Default Judgment should be set-aside, plainly because no such argument could reasonable be advanced.

131. Mr. White submitted that the Default Judgment Application should be dismissed. Also, he argued that the Court was entitled to consider and attach great weight that the application had not been brought promptly and within a reasonable time. The Defendants were aware of the Default Judgment by November 2018 and they did not apply for set-aside for seven months until May 2019. Further, the explanation of Mr. Khouj in his second affidavit is weak and failed to address the issue of delay. He submitted that the Defendants are wealthy men who had engaged in two actions against Dr. Hafiz already and would be familiar with instructing attorneys. To compound the issue, the Defendants chose to avoid engaging the issue of delay until forced to do so by the rebuttal evidence of Mr. Attar.

Effect on the Default Judgment

132. Mr. White submitted that that the consequences of the amendment would be to cure any defect in the Default Judgment, such that it would be inappropriate and inconsistent with the overriding objective to deal with cases fairly, efficiently and cost effectively for the judgment to be set-aside, as the procedural steps necessary for default judgment were all taken by the Plaintiff. Further, the default judgment should not be set aside in circumstances where the Plaintiff did not know it was the wrong plaintiff. On that basis the defence of lack of standing would fall away. Additionally, it would serve no useful purpose and would be inconsistent with *Faircharm* where the defence is hopeless and bound to fail.

Analysis

133. In my view, I would grant the application to set aside the Default Judgment on the basis that the Defendants have a meritorious defence for several reasons.

134. First, I note that I have already decided that I would grant the Plaintiff's Amendment Application. Thus, the defence that the Plaintiff has no standing would fall away and I do not consider that here further.

135. Second, in respect of the Bye-Law Indemnity, I rely on *The Saudi Eagle* in finding that the Defendants have discharged their burden to establish a defence with a real prospect of success. I rely further on the Privy Council case of *Shelton* where it states the Company has no cause of action at all against a Director where the Company has agreed to indemnify him. This is significant support for the Defence. In my view, the Bye-Law Indemnity case is a battleground issue between the parties where the Defendants aver that their actions were not conducted with a fraudulent or dishonest intention but where the Plaintiff's case is that their conduct was exactly that.

136. Third, I accept Mr. Stevens' submission that it is the Plaintiff's burden to prove that the conduct complained of amounted to fraud and dishonesty per *Intercontinental Natural Resources Limited* and in the context of the Supreme Court case of *Ivey v Genting Casinos*

UK Ltd on the issue of dishonesty which also gives the Defence the requisite traction to meet the test in *The Saudi Eagle*.

137. Fourth, I should note that I reject Mr. Stevens' submission that the Plaintiff has not pleaded fraud and dishonesty. On the contrary, I accept Mr. White's submission and rely on Millett J in *Armitage v Nurse* that there is no need for the words "fraud" and "dishonesty" to be pleaded expressly if the facts which make the conduct fraudulent or dishonest are pleaded and inconsistent with innocence. In my view, the relevant facts have been set out in sufficient detail from which fraudulent conduct and dishonesty can be fleshed out and determined at trial. For clarity, in my view, this point does not undermine my finding that the Defendants have met the test of establishing a defence with a real prospect of success.

138. In light of the above reasons, I find that the Defendants have a meritorious defence to the claim.

139. I have considered the delay of the Defendants in bringing the Set-aside Applications and I accept that it is to be frowned upon. However, in balancing the factors whether to set aside the Default Judgment, in my view, it is just that this matter proceed to trial on the grounds of the ineffective service that I have found and that the Defendants have established a defence with a reasonable prospect of success. Allegations of fraud and dishonesty are some of the most serious allegations in civil litigation which should be tested at trial. Therefore, I grant the Default Judgment Application in that the Default Judgment dated 22 February 2018 be set aside pursuant to RSC Order 13, rule 9.

Terms

140. Mr. White submitted that if the Court should decide to set-aside Default Judgment, then terms should be imposed, per RSC Order 13, rule 9, such terms which could include:

a. Payment of the full sum into court as a condition of judgment being set-aside. He cited *Singh v Atombrook* where the Judge considered the defence "shadowy" and which was upheld on appeal.

b. If the defendant argued for a lesser sum, the onus would be on him to prove any alleged hardship caused by the conditions per *MV. Yorke Motors v Edwards* [1982] 1 WLR 444 where Lord Diplock set out two key tests:
    i. A defendant seeking to limit a financial condition must make full and frank disclosure and must set out sufficient and proper evidence of his alleged impecuniosity before the court; and
    ii. The test of the appropriateness or otherwise of a condition is whether it will be "*impossible"* for a defendant to fulfil. However, merely finding a condition difficult to fulfil is no ground for compliant.

Conclusion

141. In light of the above reasons I make the following orders:

a. Service of the Concurrent Notice should be set aside pursuant to RSC Order 12, rule 8(1) as the Concurrent Notice was not in fact served personally on the Defendants.
b. Service of the Concurrent Notice should be set aside pursuant to RSC Order 12, rule 8(1) as the purported service of the Concurrent Notice was not permissible under Saudi Law.
c. I decline the Plaintiff's Deeming Application.
d. I grant the Plaintiff's Amendment Application pursuant to RCS Order 20, rule 5(3).
e. I grant the Default Judgment Application in that the Default Judgment dated 22 February 2018 be set aside pursuant to RSC Order 13, rule 9.
f. I grant the Plaintiff's application to extend the validity of the Writ pursuant to RSC Order 6, rule 8 for it to be re-served on the First and Second Defendants. In light of these proceedings, it is clear that the Defendants are fully aware of the Concurrent Notice. In my view, it is not necessary or efficient to incur effort and expense in re-serving the Concurrent Notice personally. I grant leave to hear counsel on this point if necessary.
g. Leave is granted to the Defendants to file a Defence in this matter within 21 days, subject to the views of counsel as to the time period.

142. In respect of the way forward for this case, pursuant to Order 13, rule 9, in my view and subject to any submissions of counsel, I am minded to impose the following term:

> "The Defendants shall pay into Court, as a condition of the Default Judgment being set-aside, the value of Dr. Hafiz's share of the proceeds of the sale of the Jet at the time that it was sold."

143. I am minded to decline to order the full amount of the proceeds of the sale of the Jet to be paid into Court as in the Writ, the Plaintiff claims for the $17,100,000 being the proceeds of the sale of the Jet which shall be distributed by its liquidator in accordance with the CA 1981. If the Plaintiff is successful at trial, it seems that the bulk of the $17,100,000 is likely to have to be distributed to the members who have already received it and Dr. Hafiz is likely to receive the value due to him. On that basis, it appears practical to order the payment into Court of the sum due to Dr. Hafiz if he is successful at trial.

144. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendants, on a standard basis, to be taxed by the Registrar if not agreed.

Dated 23 March 2022

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT