THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0025

BETWEEN:

FLAVIO MALUF

Appellant

and

[1] DURANT INTERNATIONAL CORP
[2] MATTHEW RICHARDSON (as Liquidator of Durant International Corp)
[3] KEVIN HELLARD (as Liquidator of Durant International Corp)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Gerard St. C Farara	Justice of Appeal [Ag.]

Appearances:

Mr. John Machell, QC and Mr. Timothy de Swardt for the Appellant
Mr. Adrian Francis for the Respondents

2021: November 23;
2022: January 13.

Interlocutory appeal – Preliminary issue – Whether leave was required to appeal order dispensing with service – Fresh evidence – Ladd v Marshall principles – Service Out of the Jurisdiction – Part 7 of Civil Procedure Rules – Whether service had been effected on the appellant in accordance with Brazilian law – Whether service on appellant had been effected in accordance with Hague Service Convention – Whether service on the appellant in Brazil by sending Letters Rogatory directly to the Brazil courts was contrary to the Reservation by the Federal Republic of Brazil to Article 10 of the Hague Convention – Whether good service had been effected on the appellant in accordance with the Service Out Order – Rules 13.3 and 13.4 of the E-litigation Portal Rules – Whether the purported service was ineffective under rule 13.4 of the E-Litigation portal rules – Judicial discretion – Test for dispensing with service – Exceptional circumstances – Whether the judge erred in making an order dispensing with service of the BVI Court Documents on the

appellant pursuant to CPR 7.8B – Whether the judge erred in failing to discharge the freezing order on the basis that the validity of the claim form had expired

This interlocutory appeal concerns two separate proceedings commenced in the Commercial Court in the Territory of the Virgin Islands ("BVI"). On 6th November 2017, Durant International Corp ("Durant"), a company incorporated in the BVI, was put into liquidation by order of the Commercial Court in Claim No. 134 of 2017 and the second and third respondents appointed joint liquidators ("the Liquidation Proceedings"). It is alleged that the appellant, Mr. Flavio Maluf, a resident of the Federal Republic of Brazil and his father, the then mayor of São Paulo, between 1993 and 1996, committed fraud against the municipality of São Paulo in the Federal Republic of Brazil involving massive kickbacks and bribes. The moneys arising from the said fraud have allegedly been laundered through numerous companies, including the first-named respondent, Durant. The appellant was at all material times a director of Durant. The alleged fraud has been the subject of civil and criminal proceedings brought by the municipality and the Federal Republic of Brazil. These include civil proceedings before the Royal Court of Jersey resulting in a money judgment against Durant and another BVI company, and criminal proceedings in Brazil and in France resulting in convictions against the appellant and his father in Brazil and the appellant in France.

On 22nd April 2020, the learned judge granted *ex parte* in the Liquidation Proceedings a world-wide freezing order against the appellant up to the value of US$45 million ("the Freezing Order") on the undertaking of the liquidators to issue and serve a claim form against the appellant for appropriate relief. On the same day, the judge also granted permission to Durant, on an *ex parte* application in the Liquidation Proceedings, to serve the claim form, statement of claim and other documents ("the BVI Court Documents") on the appellant out of the jurisdiction, in Brazil ("the Service Out Order").

The Service Out Order provided for Durant to serve the BVI Court Documents and all further documents required to be served out of the jurisdiction on the appellant at his address in Brazil or other address for service in Brazil. It also provided for the BVI court to issue a Letter Rogatory to the relevant court in Brazil in the form exhibited to the Service Out Order. Pursuant to the Service Out Order, the learned judge issued a Letter Rogatory dated 22nd April 2020 addressed to the President of the Superior Court of Justice ("SCJ") in Brazil, in each claim, seeking assistance from the Brazilian Court by granting *exequatur* to: (i) without notice to the appellant, enforce the Freezing Order in Brazil; and (ii) serve the appellant with the claim form in the Debt Claim (then to be filed by Durant) and the Freezing Order at his address in Brazil stated in the Letter Rogatory. By order dated 4th May 2020, the judge varied paragraph 1 of the Service Out Order to permit service of the revised claim form and revised statement of claim.

Following this, on 7th May 2020 Durant by its liquidators brought an action (No. 62 of 2020) against the appellant seeking repayment of outstanding loan debts owed to Durant by the appellant ("the Debt Claim" or "the substantive proceedings"). In

the alternative, they sought compensation in equity for alleged breaches of fiduciary duty, knowing receipt and dishonest assistance in relation to the loan.

By application dated 27th November 2020 ("the Application"), the appellant challenged the jurisdiction of the BVI Court in both the Debt Claim and the Liquidation Proceedings on the basis that service had not been validly effected on him in Brazil; and for an order discharging the Freezing Order. In a judgment delivered 23rd August 2021 after a hearing, the learned judge dismissed the appellant's application, made an order dispensing with service of the BVI Court Documents on the appellant ("the Dispensation Order"), continued the Freezing Order and awarded costs of the Freezing Order and the appellant's Application to Durant (in liquidation).

The appellant has appealed to this Court against the judgment and orders made by the learned judge on 23rd and 24th August 2021. The following issues arose for this Court's determination: (i) whether good service had been effected on the appellant in Brazil pursuant to the Service Out Order; (ii) whether the judge erred in concluding that good service had been effected on the appellant in accordance with Brazilian law; (iii) whether the appellant had been served personally in Brazil with the BVI Court Documents; (iv) whether the judge erred in not considering the provisions of CPR 7.10(3) in circumstances where the BVI Court Documents were sent or delivered, not through diplomatic channels, but directly to the judicial authorities in Brazil; (v) whether the purported service was ineffective under rule 13.4 of the E-Litigation portal rules; (vi) whether the judge erred in making an order dispensing with service of the BVI Court Documents on the appellant pursuant to CPR 7.8B; and (vii) whether the judge erred in failing to discharge the Freezing Order on the basis that the validity of the claim form in the substantive proceedings had expired.

The respondents, in their skeleton arguments, raised the preliminary issue of whether the appellant was required to apply for and obtain leave to appeal the Dispensation Order. Further, the appellant, after the hearing of the appeal, applied to this Court for an order that the written opinion of the Deputy Federal Attorney General of Brazil dated 8th November 2021 issued in proceedings in Brazil be admitted as fresh evidence in the appeal proceedings.

Held: dismissing the appeal, affirming the orders of the judge in the court below dated 23rd and 24th August 2021 dispensing with service and continuing the Freezing Order; setting aside the order awarding costs to the respondents in the court below and ordering that each party bear their own costs of this appeal and in the court below, that:

1. Section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) Act provides that, subject to the exceptions stated therein (none of which are applicable to the instant matter) no appeal shall lie without the leave of the Court of Appeal from any interlocutory order or interlocutory judgment made by a judge of the High Court. In this case, it is pellucid that the learned judge considered and, for the reasons foreshadowed in his unsealed judgment

circulated to counsel for the parties, granted the appellant's application filed subsequently to dispense with service. It follows therefore that the order of a single judge of this Court granting leave to appeal the judgment "in so far as it concerns issues of service", clearly incorporates an appeal challenging the Dispensation Order of the court below. Accordingly, the respondents' preliminary point is without merit and is dismissed.

Section 30(4) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap. 80 of the Revised Laws of the Virgin Islands, 1991.

2. The three step test in **Ladd v Marshall** to be applied by an appellate court when considering whether to grant to a litigant permission to adduce fresh evidence on the hearing of an appeal, is intended to ensure that the important requirement of bringing finality to litigation and the overriding objective and duty of a court to manage litigation justly and proportionately are complied with, and permission to adduce fresh evidence is only granted in circumstances where the application satisfies all three requirements of the test. In the instant matter, the appellant's application, made after the hearing of the appeal, for an order that the written opinion of the Deputy Federal Attorney General of the Republic of Brazil dated 8th November 2021 issued in proceedings before the courts in Brazil, satisfies all three limbs of the test and should granted. Specifically, had the November 2021 opinion been before the judge below it would probably have had an important influence on the judge's determination of the issue of service of the BVI Court Documents in accordance with Brazilian law, and the said document, albeit a non-binding legal opinion issued in proceedings before the Brazilian courts, is apparently credible. Moreover, the opinion focuses on the legal issue of Durant's standing under Brazilian law to send the Letter Rogatory from the BVI Court directly to the courts in Brazil and is material to any determination of whether the appellant was properly served with the BVI Court Documents in accordance with Brazilian law, and in accordance with the process for effecting service on a defendant in Brazil under the Hague Service Convention.

   Ladd v Marshall [1954] EWCA Civ 1 applied; **Emmerson International Corporation and another v Viktor Vekselberg** [2021] ECSCJ No. 718 (delivered 8th October 2021) considered.

3. The learned judge erred in coming to the conclusion that the evidence before him favoured good service having taken place on the appellant in accordance with Brazilian law. This is so because it is questionable so as to be unclear whether the exequatur decision of the President of the STJ also authorised the service of the BVI Court Documents on the appellant. Further, the First dos Santos decision, properly construed, falls short of deeming access to the file and documents by the appellant's lawyers as 'service' or as 'good service' in accordance with Brazilian law. Service on the appellant has not been shown or established by the First dos Santos Decision to have been effected under Brazilian law, and the learned judge erred in so concluding. It follows therefore

that the judge erred in finding that service had been effected on the appellant pursuant to the avenue permitted under CPR 7.8(1)(b), in accordance with the law of the country in which it is to be served. It was for Durant to satisfy the court that service on the appellant had in fact been effected under Brazilian law and in accordance with the Hague Service Convention and the Service Out Order. However, the evidence led was unsatisfactory and inconclusive as to good service on the appellant in Brazil.

Rule 7.8(1)(b) of the **Civil Procedure Rules 2000** considered.

4. Where an order permitting service out requires personal service to be made at a specified address, a claimant cannot serve at an alternative address and rely on CPR 7.8(1)(b). In the case at bar, permission was granted to serve the appellant at a specified address in São Paulo, Brazil or at any other address for service in Brazil. However, it is clear that the appellant had not in fact been served "personally" with the said documents in accordance with the Service Out Order which specified service in accordance with the Hague Service Convention. The Service Out Order did not authorize service in accordance with the laws of Brazil pursuant to CPR 7.8(1)(b). It follows therefore that such service in accordance with CPR 7.8(1)(b), as found by the learned judge, was not service in compliance with the Service Out Order.

   YA II PN Ltd v Frontera Resources Corporation [2021] EWHC 1380 (Comm) distinguished.

5. CPR 7.10 provides that service through the judicial authorities of another state must take place through diplomatic channels and not directly to the judicial authorities of that state. In the instant matter, the Letters Rogatory were not addressed or sent to the minister with responsibility for foreign affairs but directly to the Brazilian Court in clear breach of CPR 7.10(3). Further, this breach of BVI procedural law, was compounded by the resulting breach of Brazilian law by utilising a method of transmission of the request which was clearly not in compliance with that country's law in light of its 2018 Reservation to the methods stipulated in Article 10 of the Hague Service Convention. Accordingly, it cannot be said that service was effected on the appellant in accordance with the laws of Brazil when his lawyers there were permitted access to the court file which also contained the BVI Court Documents required to be served on the appellant as requested by the Letters Rogatory. The learned judge therefore erred in finding that good service had been effected on the appellant in accordance with Brazilian law or pursuant to CPR 7.8(1)(b), which was not the chosen method of service or one of the chosen methods.

   Rules 7.8 and 7.10 of the **Civil Procedure Rules 2000** applied; **YA II PN Ltd v Frontera Resources Corporation** [2021] EWHC 1380 (Comm) distinguished.

6. Pursuant to rules 13.3 and 13.4 of the E-Litigation Portal Rules a party to civil litigation must serve the claim form and other documents in accordance with the

applicable rules of court relating to service and the authorisation code generated by the Electronic Litigation Portal must also be served on the other party at the same time. Rule 13.4 specifies that a failure to serve the authorisation code at the same time with the documents has the consequence that service is deemed not to have been effected. However, the failure to serve the authorisation code at the same time as the court documents is a mere procedural misstep and is not fatal and may be remedied by re-serving the court documents with the authorisation code. In the instant matter, the respondents did not have the appellant served in Brazil with the BVI Court Documents and the authorisation code. Instead, they relied on service of the BVI Court Documents being deemed to have been effected under Brazilian law and in accordance with CPR 7.8(1)(b), albeit without service of the authorisation code. Accordingly, the judge's conclusion that service was effected and complete when the authorisation code was provided subsequently to the appellant's BVI lawyers, does not accord with rules 13.3 and 13.4 of the E-Litigation Portal Rules and is flawed.

Rules 13.3 and 13.4 of the **Eastern Caribbean Supreme Court Electronic Litigation Filing And Service Procedure Rules 2018** applied.

7. It is trite that the purpose of service of documents in civil proceedings is to bring the claim form and other documents setting out the allegations of fact and the legal basis for the claim to the attention of the defendant. The significance of this requirement for service of originating process, is a fundamental pillar in ensuring open litigation in a free and democratic society, and to give meaning to the imperative for justice to be dispensed openly and according to law, buttressed and circumscribed by applicable rules of court which have, as their overriding objective, courts dealing with cases justly and ensuring that the parties are, as far as it is practicable, on an equal footing.

   Abela and others v Baadarani [2013] UKSC 44, [2013] 1 WLR 2043 considered.

8. CPR 8.13 expressly provides that an application to extend the time for service of a claim form must be made prospectively, that is, prior to expiration of the stipulated period of validity for service of the claim form or any extended period granted by the court upon application. There is no provision to apply retrospectively to extend the time for service of a claim form.

   Rules 8.13 and 26.1(2)(k) of the **Civil Procedure Rules 2000** considered.

9. The court's general case management power and discretion under CPR 26.1(2)(k) to extend time to comply with a rule, practice direction or order and to do so even after the time for compliance had expired, is not applicable to extend the time for service of a claim form, since the power to extend time for service of a claim form is circumscribed by CPR 8.13. However, where special circumstances were shown to exist, a court has the power under CPR 26.1(6)

to wholly disapply the times lines established by CPR 8.13 for obtaining an extension of time for service of a claim form. This notwithstanding, Durant made no application to disapply the timelines in CPR 8.13. It is clear that the judge in coming to his conclusion and granting the application to dispense with service, did not consider or address the invalidity of the claim form in his reasons for decision. This he ought properly to have done and his failure to do so was a grave omission and an error of principle in the proper exercise of his discretion, thus entitling this Court to exercise its discretion afresh.

JSC VTB Bank v Alexander Katunin and another (BVIHCMAP2016/0047 delivered 18th April 2018, unreported) considered.

10. Where the evidence before the judge establishes that a defendant has not disputed that the claim form and other court documents were received by his legal advisers and were brought to his attention by a permitted method of service within the requisite period of the validity of the claim form, a court may retrospectively dispense with service notwithstanding the subsequent expiration of the validity of the claim form ("Anderton Category 2"). In the instant matter, Durant obtained a Service Out Order providing for service of the claim form and other documents on the appellant under the Hague Service Convention in Brazil and the BVI Court issued Letters Rogatory addressed directly to the court in Brazil. This was a clear attempt to serve the claim form and other documents on the appellant in Brazil through one of the modes of service permitted under CPR 7.8. In the circumstances, it can be said that an Anderton Category 2 case arises here. It follows therefore that the judge was correct to consider whether to exercise his discretion to dispense with service on the appellant.

Rhiannan Anderton v Clwyd County Council [2002] EWCA Civ 933 applied.

11. CPR 7.8B empowers a court, in the exercise of its discretion, to dispense with service on a defendant of the claim form and statement of case where it is satisfied, on application, that exceptional circumstances have been made out. It follows therefore that a court is empowered to consider and to make an order dispensing with service on a defendant, in circumstances where, as here, there has been a clear attempt by the claimant to serve the claim form and other documents on the defendant. In the instant matter, service on the appellant in Brazil pursuant to the Hague Service Convention was being effected during the current prevailing world-wide COVID-19 pandemic, making it difficult, if not impossible, to utilise the normal diplomatic channels to effect service on the appellant in Brazil in accordance with the Hague Service Convention. Further, it is clear that the evidence before the learned judge discloses conclusively, and the appellant has not disputed, that the BVI Court Documents were received by his lawyers in Brazil and have been brought to his attention since August 2020, well before the validity of the claim form would have expired under CPR 8.12. Accordingly, the fundamental requirement of service of court process on a defendant has been satisfied in this matter and the appellant is fully aware of the claim brought against him in the BVI proceedings in Claim No. 62 of 2020.

In the circumstances, this Court concludes that the decision by the learned judge to dispense with service of the BVI Court Documents on the appellant was the correct decision and must be upheld.

Rule 7.8B of the **Civil Procedure Rules 2000** considered; **Commercial Bank of Dubai v 18 Elvaston Place Ltd** 2020] ECSCJ No. 202 (delivered 16th June 2020) considered; **Michel Dufour and others v Helenair Corporation Ltd** (1996) 52 WIR 188 applied; **Olafsson v Gissurarson (No.2)** [2008] EWCA Civ 152 considered; **Lonestar Communications Corp LLC v Kaye** [2019] EWHC 3008 (Comm) considered.

12. Having found that the court was entitled to dispense with service and that the judge was correct to conclude that the test of exceptional circumstances had been met by Durant, it follows that the judge was correct not to have discharged the Freezing Order on the basis that the validity of the claim form in the substantive proceedings had expired.

JUDGMENT

[1] **FARARA JA [AG.]**: This is an appeal against the orders of a judge (Jack J [Ag.]) of the Commercial Division of the High Court of Justice in the Territory of the Virgin Islands dated 23rd and 24th August 2021.[1] The orders were made consequent upon a written judgment delivered by the learned judge on 23rd August 2021 ("the judgment").[2] By the judgment, the learned judge dismissed the appellant's application dated 27th November 2020 ("the Application") challenging the jurisdiction of the BVI Court in relation to the appellant, Mr. Flavio Maluf, on the basis that service on him had not been validly effected in the Federal Republic of Brazil; and for an order discharging the world-wide freezing order made *ex parte* on 22nd April 2020 ("the Freezing Order"). The judge continued the Freezing Order and awarded costs to the respondents.

Overview

[2] The relevant factual background to the two sets of proceedings before the Commercial Court, Claim No. 134 of 2017 ("the Liquidation Proceedings") by which

[1] See Combined Hearing Bundle, Bundle A, Tab 6, e-pages 80-82.
[2] See Combined Hearing Bundle, Bundle A, Tab 4, e-pages 58-76.

the first named respondent, Durant International Corp ("Durant"), a company incorporated in the Territory of the Virgin Islands ("BVI") was put into liquidation, and Claim No. 62 of 2020 ("the Debt Claim" or "the substantive proceedings") brought by Durant against the appellant, was summarised by the learned judge at paragraphs [3] to [6] of the judgment. No issue has been taken with that summary by either party to this appeal. Accordingly, I need only provide a skeletal summary for the purposes of giving some background to this judgment.

[3] The proceedings in Claim No. 62 of 2020 concern a fraud said to have been carried out by the appellant's father, Paulo Salim Maluf, the then mayor of São Paulo, and the appellant, between 1993 and 1996, involving massive kick-backs and bribes at the expense of that municipality in Brazil. These moneys are said to have been laundered through a number of companies, including the first respondent, Durant, which was subsequently placed into liquidation by order of the Commercial Court on 6th November 2017. The second and third-named respondents are the current court appointed liquidators of Durant ("the liquidators"). The appellant, who was at all material times a director of Durant, is not resident in the jurisdiction and is said to be residing in Brazil.

[4] Subsequent to Durant being put into liquidation, the liquidators brought the substantive action (Claim No. 62 of 2020) in the name of Durant against the appellant seeking repayment of the sum of US$44.3 million, said to be the sum outstanding on a loan of US$67.3 million allegedly made by Durant to the appellant on 27th May 1998 ("the loan") or, alternatively, compensation in equity in a like sum for alleged breach of fiduciary duty, knowing receipt and dishonest assistance in relation to the loan.

[5] The fraud alleged to have been committed by the appellant and his father against the municipality of São Paulo, has been the subject of civil and criminal proceedings brought by the municipality and the Federal Republic of Brazil. Civil proceedings were bought before the Royal Court of Jersey. This action resulted in judgment

against Durant and Kildare Finance Ltd ("Kildare"), another BVI company and a wholly owned subsidiary of Durant. The Privy Council (in **The Federal Republic of Brazil and another v Durant international Corporation and another**[3]) dismissed Durant's appeal, holding that the equitable remedy of tracing was available in respect of the moneys misappropriated. Also, the appellant and his father were convicted in Brazil on criminal charges relating to the fraud on the municipality, and the appellant was also convicted in France of aggravated money laundering.

[6] In relation to Claim No. 62 of 2020, the appellant has not submitted to the jurisdiction of the BVI, but has denied the allegations of fraud and money laundering. However, as noted in the judgment, the appellant conceded, for the purposes of the Application, that 'there is a serious issue to be tried as to whether the loan was made from the proceeds of the alleged fraud'.[4]

[7] On 22nd April 2020, the learned judge granted an *ex parte* world-wide freezing order against the appellant in the Liquidation Proceedings. On the same day, the judge made (on the *ex parte* application of Durant)[5] two service out orders, one in each of No. 134 of 2017 and No. 62 of 2020 (collectively "the Service Out Order") granting permission to serve the claim form, statement of claim and other documents ("the BVI Court Documents") required to be served in both actions on the appellant out of the jurisdiction at Rua Camargo Cabral, n. 30, apartamento 191, São Paulo (SP) Brasil, CEP 01437-010 'or other address for service in Brazil'.[6] The Service Out Order required the appellant (as defendant) to file an acknowledgement of service within 35 days and a defence within 56 days from the date of service. It also provided for the court to issue a Letter Rogatory to the relevant court in Brazil.

[8] Pursuant to the Service Out Order, Jack J [Ag.] issued a Letter Rogatory in each of the two claims dated 22nd April 2020 and addressed to the President of the Superior

[3] [2015] JCPC 297.
[4] See para. [6] of the judgment.
[5] See Combined Hearing Bundle, Bundle A, Tab 17, e-pages 376-378.
[6] Record of appeal, Bundle A, Tab 21, e-pages 308-311.

Court of Justice in Brazil (collectively "the Letters Rogatory"). By the Letters Rogatory, the BVI Court requested the assistance to the Brazilian Court by granting *exequatur* to: (i) without notice to the [appellant], enforce the Freezing Order in Brazil; and (ii) serve the appellant at the said address, and who can also be found at Avenida Presidente Juscelino Kubitschek 1830, Torre 1, 11° andar, Itaim Bibi, São Paulo (SP), Brasil, CEP 04543-900, and is enrolled with CPF/MF under No. 064.335.778-57.[7] The Service Out Order was, by order of the court below dated 4th May 2020, amended in paragraph 1 to permit service of the revised claim form and revised statement of claim in No. 134 of 2017, and not the original version of these documents put before the court on 22nd April 2020.[8]

[9] By the Application,[9] the appellant challenged the jurisdiction of the BVI Court in Claims Nos. 134 of 2017 (the Liquidation Proceedings) and 62 of 2020 (the substantive proceedings) over the appellant, on the basis that service had not been validly effected on him in Brazil. Alternatively, if service had been validly effected, the appellant sought an order setting aside the service and Service Out Order[10] or, in the further alternative, that the BVI Court ought not to exercise jurisdiction and should stay both Claim No. 62 of 2020 and (in so far as the appellant was concerned) Claim No. 134 of 2017. The appellant also sought to set aside the Freezing Order.[11]

[10] The Application was supported by the Second Affidavit of the appellant with exhibits,[12] the First Affidavit of Cecilia Mello,[13] and the First Affidavit of Kandy James with exhibit.[14] In opposition, the respondents filed the Third Affidavit of Mathew Richardson (one of the liquidators of Durant) with exhibits.[15] The appellant

[7] Combined Hearing Bundle, Bundle A, Tab 22, e-pages 407-409.
[8] Combined Hearing Bundle, Bundle A, Tab 26, e-pages 430-431.
[9] Combined Hearing Bundle, Bundle B1, Tab 1, e-pages433-438.
[10]Combined Hearing Bundle, Bundle A, Tab 21 e-pages 403-406.
[11] Combined Hearing Bundle, Bundle A, Tab 15, e-pages 348-359.
[12] Combined Hearing Bundle, Bundle B1, Tabs 3 & 4, e-pages 442-639.
[13] Combined Hearing Bundle, Bundle B1, Tab 7, e-pages 925-933.
[14] Combined Hearing Bundle, Bundle B1, Tabs 8 & 9, e-pages 934-1129.
[15] Combined Hearing Bundle, Bundle B2, Tabs 10 & 11, e-pages 1130-1961.

responded with the Second Affidavit of Marcelo Lucidi with exhibit,[16] the Third Affidavit of the appellant with exhibit,[17] the Fifth Affidavit of Eduardo Diamantino Bonfirm e Silva with exhibit,[18] the First Affidavit of Mateus Lopes Da Silva Leite,[19] and the Second Witness Statement of Marcelo Lucidi with exhibit.[20]

The Appeal

[11] By notice of appeal filed on 7th September 2021, the appellant challenges: (i) the decision of the court below that good service had been effected on the appellant in Brazil ("the Service Issue"); and (ii) the order made under CPR 7.8B(1) dispensing with service ("the Waiver of Service Issue"). The appellant relied on 7 grounds of appeal, the first four concern the Service Issue, the fifth and sixth concern the Waiver of Service Issue, and the seventh concerns the failure to discharge the Freezing Order.

[12] In relation to the Service Issue, the appellant challenged the judge's decision that service had been validly effected on the appellant in Brazil on four grounds. The first is that service of the claim form and other documents had not been effected on the appellant as a matter of Brazilian law because: (i) service on the appellant had not in fact taken place, and (ii) the transmission of the BVI Court Documents by Letters Rogatory for service on the appellant under the Hague Service Convention directly to the Brazilian Court (the judiciary), was contrary to the express reservation dated 29th November 2018 ("the Reservation")[21] by Brazil to the application of the provisions of Article 10 of the Hague Service Convention[22] relating to the transmission of judicial and extrajudicial documents. The second, is that the purported service was not in compliance with the Service Out Order. Third, the

[16] Combined Hearing Bundle, Bundle B3, Tabs 12 & 13, e-pages 1962-2139
[17] Combined Hearing Bundle, Bundle B3, Tabs 14 & 15, e-pages 2140-2173.
[18] Combined Hearing Bundle, Bundle B3, Tabs 16 & 17, e-pages 2174-2192.
[19] Combined Hearing Bundle, Bundle B3, Tab 18, e-pages 2193-2198.
[20] Combined Hearing Bundle, Bundle B3, Tabs 19 & 20, e-pages 2199-2244.
[21] See Article 1 of Decree No. 9.734 of March 20th 2019, see appellant's updated authorities bundle, Tab 10, e-page 96.
[22] Convention of 15th November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; Ratified by Brazil 29th November 2018 and which came into force on 1st June 2019 pursuant to Decree 9. 734 see the appellant's updated authorities bundle, Tab 10, e-page 96.

transmission of the BVI Court Documents directly to the Brazilian court for service, and not through diplomatic channels, was in breach of rule 7.10(2) of the **Civil Procedure Rules 2000** ("the CPR"). Fourth, is that the purported service of the BVI Court Documents was ineffective under Rule 13.4 of the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) (Amendment) Rules 2019** ("the E-Portal Rules"),[23] because of the admitted failure by Durant to comply with the mandatory requirement for the authorisation code generated by the E-Litigation Portal to be served on the appellant at the same time as the documents for which service is sought to be effected. I will consider each of these four grounds in turn, but first the respondents' preliminary point.

Respondents' Preliminary Point - No leave to appeal 24th August 2021 order dispensing with service

[13] This preliminary point was raised by the respondents in their skeleton argument filed for the substantive appeal on 10th November 2021. While not abandoning the point during his oral submissions, Mr. Adrian Francis, learned counsel for the respondents, did not place heavy reliance upon it. In brief, the respondents submit that while, by order of a single judge of this Court (Michel JA) made on 26th October 2021, the appellant obtained leave to appeal the judgment of Jack J [Ag.] dated 23rd August 2021 'in so far as it concerns issues of service', the said judgment did not make the order dispensing with service on the appellant.[24]

[14] The respondents contend that the order dispensing with service on the appellant was made by Jack J [Ag.] the next day, on 24th August 2021 ("the Dispensation Order"), on the application by the respondents, the judge abridging the time stipulated in CPR for service of the said application. Accordingly, as the argument for the respondents goes, the appellant was required to apply for an order to obtain leave to appeal the Dispensation Order, but had failed to do so, and ought not to be permitted to argue grounds 5 and 6 of his grounds of appeal. Moreover, even if this

[23] See the appellant's updated authorities bundle, Tabs 1 & 3, e-pages 3-13.
[24] See the respondents' skeleton at paras. 11-14.

Court were to overturn the judgment in full it could not overturn the Dispensation Order. The respondents also submit, that an appeal is usually against orders made in civil proceedings and not against the judgment of the court which give rise to such orders.

[15] Mr. Machell QC, learned counsel for the appellant, dealt with this preliminary point head on in his oral submissions. He submitted that the learned judge did deal with the issue of the appropriateness of making an order dispensing with service on the appellant at paragraph [24] of the judgment. Further, at paragraph [25], the judge posited that in this case the circumstances are 'exceptional', giving his reasons for being so satisfied, which is the accepted test to be applied when deciding whether to dispense with service of a claim form and other documents under CPR 7.8B(1). At paragraph [27], the judge mused that 'Durant should be able to issue a *pro forma* application with affidavit in support to support such an order. If Durant does so, I will make such an order [dispensing with service]'. The judge also records at paragraph [53] that following distribution of his judgment in draft, Durant issued an application to dispense with service and '[s]ince the matter was fully canvassed in June, there is no injustice to [the appellant] in determining that application on paper which I shall now do. For the reasons given in this judgment, I abridge time of my own motion and grant the application'.

[16] In my judgment, it is pellucid that the learned judge considered, and for the reasons he had already foreshadowed in his judgment circulated to counsel for the parties in draft, granted the appellant's application filed subsequently to dispense with service. Accordingly, there is no sound basis upon which to contend that the judgment appealed from does not address and determine the dispensation application, giving rise to the order dated 24th August 2021.

[17] As counsel for the appellant correctly argued, by section 30(4) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,[25] no appeal shall lie without the

[25] Cap. 80 of the Revised Laws of the Virgin Islands, 1991.

leave of the Court of Appeal from any interlocutory order or interlocutory judgment made by a judge of the High Court, except in the cases listed therein, none of which are applicable to the instant matter. Accordingly, there is nothing to the point made by the respondents that appeals are from orders only and not judgments. Finally on this preliminary point, in my judgment, paragraph 1 of the order made by Michel JA on 26th October 2021 granting leave to appeal the judgment "in so far as it concerns issues of service", clearly incorporates an appeal challenging the Dispensation Order which is obviously an issue of service. With respect, there is no sound basis to the respondents' preliminary point which is without merit and is, for the reasons set out above, rejected. Accordingly, I rule that grounds 5 and 6 of the appellant's notice of appeal challenging the propriety of the Dispensation Order, are properly before this Court for its full consideration and determination. I now move to consider the first ground of appeal.

Appellant's Fresh Evidence Application

[18] By notice of application filed 4th January 2022, some 42 days after the hearing of this appeal, the appellant applied for an order that the opinion of Mr. Jacques Humberto de Medeiros, the Interim Federal Attorney General of Brazil, dated 8th November 2021 (some 15 days prior to the hearing of the appeal) be admitted as fresh evidence in the appeal proceedings. The Fresh Evidence Application is supported by the First Affidavit of Eduardo Diamantino Bonfim e Silva dated 2nd December 2021 which exhibited a translated version of the said opinion. The Fresh Evidence Application is opposed by the respondents who filed in opposition the First Affidavit of Marcelo Lucidi, an attorney with the Brazilian counsel to the respondents, dated 22nd December 2021.

[19] Mr. de Medeiros, as Deputy Federal Attorney General of Brazil, had issued an opinion dated 18th January 2021 from which the learned judge quoted extensively at paragraph [11] and preferred evidentially at paragraph [12] of the judgment in the court below. The learned judge relied on Mr. de Medeiros' January 2021 opinion as independent evidence that there had been good service of the BVI Court Documents

on the appellant in accordance with Brazilian law. At paragraph [14] of the judgment, the judge put it this way: 'The evidence at present is in my judgment in favour of good service having taken place in accordance with Brazilian law'.

[20] In his 8th November 2021 Opinion ("the November Opinion") addressed to the Superior Court of Justice ("STJ") of Brazil, Mr. de Medeiros refers to a motion for clarification filed by Durant, pursuant to Article 216-V, paragraphs 1 and 2 of the Internal Regulations of the Superior Court of Justice on 12th August 2021 'against a decision rendered by the 9th Civil Court of the Federal Justice of the São Paulo Subsection' seeking an amendment of the latter decision to ratify the previous decision ordering that the appellant disclose all his assets worldwide in accordance with the Letter Rogatory issued by the BVI Court and requiring the freezing of his assets. The November Opinion records that on 1st September 2021 the appellant (as the concerned party) challenged the said clarification motion on the ground, *inter alia*, that Durant's standing to submit the Letter Rogatory was not officially reviewed and Durant had submitted the Letter Rogatory as a private entity existing in the BVI and its submission had omitted to state Durant's 'standing to submit this Letter Rogatory directly to the Superior Court of Justice'.

[21] The Interim Federal Attorney General observed in the November Opinion that 'the existence of an omission in the appealed decision should be acknowledged, as it failed to review the standing of Durant International Corporation to submit a letter rogatory before the Superior Court of Justice, considering that it is a foreign legal entity'. He concluded:

> "Thus, the motion for clarification filed by [the appellant] should be (sic) [recognized] and granted in part, so that the omission found may be remedied, upon the consequent review of the standing of Durant International Corporation to submit this Letter Rogatory before the Superior Court of Justice."

[22] In the November Opinion, the Interim Federal Attorney-General opined:

> "Considering the information provided by the Ministry of Justice and Public Security, it can be concluded that Durant International Corporation does not have standing to submit this Letter Rogatory directly to the Superior Court

> of Justice, since the summons request was not processed through the respective central authorities, and also because there is no specific treaty on the freezing of assets, or any agreement of reciprocity expressed through diplomatic channels."

[23] In support of the Fresh Evidence Application, the appellant argues that it satisfies the three-part test set out in **Ladd v Marshall**.[26] He contends that the November Opinion is new evidence that was not available at the hearing before the court below or this appeal on 23rd November 2021. That the said Opinion would likely have an important influence on the result of the appeal as it goes directly to the central issue of service in accordance with Brazilian law as found by the judge, the November Opinion concluding that such service was 'illegitimate' and postdates the January 2021 opinion of Mr. de Medeiros relied on by the learned judge. The appellant also contends that the November Opinion coming from the Interim Federal Attorney General of Brazil is "clearly credible".

[24] On the other hand, the respondents argue that the Fresh Evidence Application ought to be dismissed. In his affidavit in opposition, Mr. Lucidi makes the point that the opinions of the Interim (or Deputy) Federal Attorney General Mr. de Medeiros are not binding and the Brazilian courts are under no obligation to attach any weight to them. In my view, this position cannot be disputed. However, the learned judge did consider Mr. de Medeiros to be an "independent lawyer" and relied, upon other evidence of Brazilian law, in finding that there had been good service on the appellant in accordance with Brazilian law.

[25] Mr. Lucidi also opined that the November Opinion does not, as Mr. e Silva suggests, find that Durant did not have the right to transmit the Letter Rogatory directly to the STJ. Instead, it recommends that the issue, which Mr. de Medeiros acknowledges as being a live one by virtue of the Motion for Clarification, should be considered and determined by the STJ. Mr. de Medeiros errs in his opinion by treating the Motion for Clarification as being a live issue before the Brazilian courts, which it is

[26] [1954] EWCA Civ 1.

not. As mentioned above the legal opinion of the Deputy Federal Attorney-General is just that, an opinion and is in no way conclusive on the issue of whether Durant did not have the right or the standing under Brazilian law to submit the Letter Rogatory from the BVI Court directly to the Brazilian Court and not through the established diplomatic channels. This clearly remains a live issue for determination by the Brazilian court.

[26] The relevant question for determination of the Fresh Evidence application is whether it satisfies the three principles or tests in **Ladd v Marshall**. The respondents submit it does not. They submit that there must be finality to litigation and even where an application to adduce fresh evidence does satisfy all three limbs of the **Ladd v Marshall** test that is not necessarily sufficient and the appellate court should determine 'the effect of the fresh evidence before permitting a party to rely upon it on appeal'. For this latter principle they rely on this court's decision in **Yao Juan v Kwok Kin Kwok and another**.[27] It is an important principle of our judicial system that there must be finality to litigation and parties must treat with their case in a manner which best utilises the court's resources. This requires a party to litigation to present all the evidence upon which it relies at the proper time and not in two stages, one at first instance and the other upon appeal. Accordingly, the courts have a duty consistent with the overriding objective to manage litigation justly and proportionately including as to costs. Accordingly, the **Ladd v Marshall** three step test which has been consistently applied by this Court, is intended to ensure that the important requirements of finality to litigation and a court managing litigation justly and proportionately are adhered to and are only to be derogated from in circumstances where the application to adduce fresh evidence satisfies all three requirements for admission.[28]

[27] The respondents accept that the November Opinion could not have been obtained by the appellant for the hearing before Jack J, it coming some months thereafter.[29]

[27] [2021] ECSCJ No. 577 (delivered 1st June 2021).
[28] See Hamid v Francis Bradshaw Partnership [2013] EWCA Civ 470, per Lord Justice Jackson at para. 41.
[29] See para. 4.9 of the respondents' written submissions.

Their submissions in opposition focus on the second and third limbs of the **Ladd v Marshall** test. As to the second, they submit that the November Opinion is not significantly or highly relevant whether it was admitted in the court below or on the appeal and it 'traverses ground already canvassed and determined by both the court below, and the Brazilian courts', the latter having already considered and pronounced upon the issues to which the November Opinion is said to speak. In this regard, the respondents rely on the dicta of Blenman JA in **Emmerson International Corporation and another v Viktor Vekselberg**.[30]

[28] In that case, this Court came to the conclusion, based upon its analysis of the new evidence sought to be admitted, that it would not have an important influence on the result of the appeal. This **Emmerson International** case dealt with a situation where:

> "… the new evidence consists largely of elaborations of the evidence that was before the Judge in the lower court in the application for the Cyprus antisuit injunction and by this Court in the Cyprus appeal and was dealt with in those proceedings. …These matters have already been considered and pronounced upon by this Court and a reconsideration based on the new evidence has the appearance of a second challenge to the Court's findings in the Cyprus claim. Dealing with the new evidence also runs the risk of inconsistent decisions on decided issues".[31]

[29] In my view, in the instant matter, the November Opinion sought to be admitted by the appellant as fresh evidence in the appeal does not traverse ground already covered by the Brazilian courts nor does it amount to an elaboration of the evidence before the judge below, as in the **Emmerson International** case. The November Opinion was issued in accordance with a review or clarification procedure under Brazilian law whereby previously rendered decisions of the STJ can be reviewed and, if appropriate, changed or amended. Furthermore, the November Opinion focuses on a new issue of standing on the part of Durant to submit the Letter Rogatory directly to the Brazilian court and not through the established diplomatic

[30] [2021] ECSCJ No. 718 (delivered 8th October 2021) at para. 19.
[31] Ibid para 19.

channels under the Hague Service Convention. This issue had not been previously canvassed or, apparently, addressed by the Brazilian courts.

[30] Likewise, I am also of the view that it cannot be seriously argued that the November Opinion would or could lead to inconsistent decisions either of the Brazilian courts or the BVI court, especially in light of the established procedure for review and for making changes to decisions of the Brazilian courts. Moreover, the November Opinion focuses on a legal issue which concerns and is material to any determination of whether the appellant was properly served with the BVI Court Documents in these proceedings in accordance with Brazilian law, more specifically in accordance with the process for effecting service on a defendant in a foreign jurisdiction under the Hague Service Convention. This was a live issue before the learned judge and remains a live issue on appeal.

[31] Accordingly, in my judgment the November Opinion, albeit a legal opinion not binding upon the Brazilian courts, having been issued in accordance with the established procedure in Brazil, is one which, had it been before the judge below would probably have had an important influence on the judge's determination of the issue of service of the BVI Court Documents in accordance with Brazilian law. Like the previous January Opinion of Mr. de Medeiros which the judge clearly considered to be relevant to his determination of that issue, the November Opinion of Mr. de Medeiros on the issue of standing of Durant, the application for the Service Out Order, is significant if not highly relevant. I also conclude for the same reasons that the November Opinion is relevant to this Court's determination of the challenge to the judge's finding of proper service in accordance with Brazilian law.

[32] As to the third limb of the **Ladd v Marshall** principles, the respondents submit that the November Opinion 'is not reliable or to be trusted for reasons including its procedural irregularity, even though it is made by the same person who had given an earlier opinion which is both believable and reliable'.[32] The respondents argue

[32] Para. 4.16 of the respondents' written submissions.

that while the November Opinion of Mr. de Medeiros was issued at the invitation of the President of the STJ dealing with the merits of a separate motion in response to Durant's appeal, it is in fact not addressing Durant's appeal but 'deals with a motion filed by [the appellant] at an earlier stage in the Brazilian proceedings. It constitutes an irregularity in Brazil (which irregularity appears, from their correspondence with this Honourable Court, to be accepted by [the appellant's] lawyers). It also contains errors and omissions. Consequently, it is unlikely it will be of any relevance to, or afforded any weight by, the Brazilian courts, going forward'.[33] They also assert in submissions that Mr. de Medeiros' January and November opinions are inconsistent with each other, the November Opinion is the product of a procedural error or mistake, and the January Opinion is not.[34] Accordingly, they submit that for these, and the other reasons alluded to in their written submissions, the November opinion is unreliable for the purposes of the **Ladd v Marshall** test as it cannot be said to have 'clearly' satisfied the second and third limbs of that test.[35]

[33] In my considered view, the issue of whether the November Opinion is a mistake or procedural error is a matter for the Brazilian courts to assess and determine. It is also a matter for the Brazilian court in those proceedings to determine what if any weight to give to the November opinion in relation to the Motion for Clarification before it and the challenge by the appellant to Durant's motion. That said, while the issues raised by the respondent in submitting that the third limb of the **Ladd v Marshall** test had not been met by the appellant/applicant are legitimate considerations, they do not in my judgment render the November Opinion unreliable or lead to the conclusion that it is not credible. As is clearly established by the authorities, the fresh evidence while it must be credible or presumably to be believed, it need not be incontrovertible, inarguable or indisputable. In my view, this is not a situation as presented itself to the English Court of Appeal in **Jogo Associates Ltd and others v Internacionale Retail Ltd**[36] where an application to

[33] Para. 5.7 of the respondents' written submissions.
[34] Para. 5.8 of the respondents' written submissions.
[35] Paras. 5.9 and 5.10 of the respondents' written submissions.
[36] [2011] EWCA Civ 384.

adduce fresh evidence was refused by Thomas LJ on the basis that the new evidence was not credible as it contained assertions which contradicted previous evidence given by the same witness and was irreconcilable with it. The November Opinion addresses an issue not canvassed in the January Opinion of Mr. de Medeiros, that is, the standing of Durant under Brazilian law to submit the Letter Rogatory issued by the BVI Court directly to the Brazilian courts and not through the established diplomatic channels under the Hague Service Convention, an issue which falls to be addressed particularly in light of the express Reservation by Brazil to the application of Article 10, a matter to which I shall return under ground 1.

[34] In the premises, I find that the appellant has satisfied all three limbs of the test in **Ladd v Marshall** for the admissibility of the 8th November 2021 Opinion of Mr. Humberto Jacques de Medeiros. Accordingly, the appellant's application by notice dated and filed 2nd December 2021 is granted and the said document admitted as fresh evidence in this appeal.

Ground 1 – No service under Brazilian Law
Appellant's Submissions

[35] The gravamen of this ground of appeal is that the learned judge erred in finding that service of the BVI proceedings on the appellant had been effected in Brazil in accordance with Brazilian law when the evidence is clear that this was not the case. The appellant submits that the judge erroneously grounded this finding on the decision of the 9th Federal Lower Civil Court of São Paulo (in short form, the Federal Court of São Paulo) dated 21st September 2020 ("the First dos Santos Decision")[37] when, in fact, that decision did not provide for service of the BVI proceedings on the appellant. Moreover, the judge's mistaken notion was dispelled and put beyond any doubt by the Second dos Santos Decision dated 5th April 2021[38] and, especially, by the Third dos Santos Decision dated 26th July 2021.[39] The appellant submits, further, that this conclusion reached by the learned judge was unsupported by the

[37] Combined Hearing Bundle, Bundle C, Tab 27, e-pages 2434.
[38] Record of Appeal, Bundle B3, Tab 20, e-page 263.
[39] Record of Appeal, Bundle E, Tab 5, e-page 2906.

evidence and is one which no reasonable judge could have reached.[40] It is submitted that the judge erred in finding that in the First dos Santos Decision 'the Federal Court in São Paulo … held that, because the lawyers had had access to the Court file, there was deemed service of the substantive proceedings by way of a voluntary appearance'.[41]

[36] In relation to this first ground, the appellant makes a number of telling points. The first is that service has simply not taken place in Brazil on the appellant. While the Brazilian judicial authorities to whom the Letters Rogatory of the BVI Court was addressed (the appellant says in clear breach of the CPR and Brazilian law), have implemented the requested *exequatur* of the Freezing Order and have frozen or seised assets of the appellant in Brazil in compliance therewith, to date they have not implemented the second limb of the Letters Rogatory, which is to serve the BVI proceedings on the appellant.

[37] In support of this contention, the appellant submits that the judge, in reaching the erroneous conclusion that service had in fact been effected on the appellant in Brazil, mistakenly relied on the order made in the First dos Santos Decision, which order only provided for the freezing or seising the assets of the appellant (to the required monetary limit), but did make any order that the appellant be served with the BVI proceedings, nor does it record that service on him had taken place, or even mention the words "serve" or "service" or any derivative thereof. On the contrary, it simply states 'Id38891362: voluntary attendance of Flavio Maluf, pursuant to Article 239, paragraph 1 of the Code of Civil Procedure (CPC). Take note of the lawyers names … who will be entitled to examine the case records'.[42] The appellants argue that, in any event, Article 239 paragraph 1 is not concerned with the method of service of Brazilian or foreign process, but provides an exception to the necessity

[40] Para. 25 of the appellant's updated written submissions.
[41] See para. [9] of the judgment and para. 26 of the appellant's updated written submissions.
[42] See Combined Hearing Bundle, Bundle C, Tab 26, e-page 2434 and the appellant's updated written submissions at para. 15.

for service in circumstances where there has been the 'spontaneous appearance of the defendant'.[43]

[38] The appellants also submit that the First dos Santos Decision, in so far as it relates to Article 239 paragraph 1, does not concern service of the BVI proceedings, but is concerned with the appellant's appearance in domestic Brazilian proceedings before the Federal Supreme Court. Furthermore, the appellant contends that the First dos Santos Decision 'proceeds on the basis that there has been no service [on the appellant] and its effect is to record that the exception applies i.e. that [the appellant] has voluntarily appeared through his lawyers i.e. waived the need for service of the Brazilian proceedings before the Federal Court. It is submitted that to date the STJ, which is the Brazilian court competent to deal with the Letters Rogatory,[44] has not made any order or decision that the appellant has been served.[45]

[39] Accordingly, the appellant submits that the learned judge committed a grave error in finding that the appellant had been served in Brazil in reliance upon the First dos Santos Decision. This incorrect notion was clarified by judge dos Santos in her two subsequent written decisions, both of which the learned judge had before him before finalising his judgment. The Second dos Santos Decision was rendered before the judgment under appeal in this matter, and the Third dos Santos Decision was rendered after the hearing on 28th and 29th June 2021, but was brought to the judge's attention by lawyers acting for the appellant prior to his written judgment being finalised and issued on 23rd August 2021.

[40] In particular, the appellant relies on this extract from the Third dos Santos Decision, which they contend, puts the matter beyond doubt as judge dos Santos expressly

[43] See Combined Hearing Bundle, Bundle B3, Tab 12, the Second Affidavit of Marcelo Lucidi at para. 24 to 25, e-page 1967.
[44] See Combined Hearing Bundle, Bundle B1, Tab 5, the First Affidavit of Eduardo Silva, e-page 640.
[45] Para. 17 appellant's updated written submissions.

rejected the notion that she had implemented the Letters Rogatory in full by her First dos Santos Decision:

> "However, the appellant is not right.
> ….
> It is not necessary to repeat that the order, as rendered by the President of the Superior Court of Justice was to (…) "send the case records to the Judiciary Subsection of São Paulo (SP) to implement the inalienability of assets of the interested party up to the limit of two hundred and sixty-three million seven hundred thousand Reais (R$263,700,000.00) and that 'after presentation of the defence or certification of lapse of the term without pronouncement, the case records shall be sent to the country of origin by means of the competent central authority", noting the right to the adversary proceeding, which is incumbent upon that Court as provided in the regulations."[46]

[41] The appellant also relied on the Reservation to Article 10 of the Hague Service Convention. Article 10 states:

> "Provided the State of destination does not object, the present Convention shall not interfere with –
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through judicial officers, officials or other competent persons of the State of destination."[47]

[42] The November 2018 Reservation by Brazil to Article 10, which Reservation is also part of Brazilian domestic law, states: 'Reservation to Article 10: Brazil is opposed to the methods of transmission of judicial and extrajudicial documents provided for in Article 10 of the Convention'. [48]

[43] The appellant submits, and it cannot, in my judgment, be gainsaid, that pursuant to the November 2018 Reservation, Brazilian law expressly does not permit service

[46] Combined Hearing Bundle, Bundle E, Tab 5, e-page 2916-2917.
[47] See appellants' updated authorities bundle, Tab 8, e-pages 90-91.
[48] See appellants' Updated Authorities Bundle, Tab 9, e-page 95.

through direct transmission of the court or judicial documents of the State of origin to the courts or judicial officers of Brazil, as the State of destination.[49] It is also correct, as the appellant points out, that the learned judge did not consider Article 10 of the Hague Service Convention and or the November 2018 Reservation by Brazil, when reasoning to his conclusion that the appellant had been served with the BVI Court Documents in Brazil in accordance with Brazilian law. The upshot of the appellant's first ground of appeal is that the method of service of the BVI Court Documents provided for in the Service Order, that is, by the Hague Service Convention, was not in compliance with, or put differently, was not one of the methods permitted under CPR 7.10 or under Brazilian law, and was therefore invalid *ab initio*.

Respondents' Submissions

[44] In response to the points and submissions of the appellant on this ground of appeal, the respondents refer, firstly, to the judge's findings on service at paragraphs [8] and [9] of the judgment. In paragraph [8] the learned judge records the fact that the Letters Rogatory had been accepted by Brazil's highest ordinary civil court, the Superior Tribunal de Justica ("STJ") which authorised the execution of the freezing order against the appellant ("the Exequatur Decision"), which was sent to the Federal Court of São Paulo for enforcement. The judge also noted the fact, which is undisputed, that the appellant learnt of the BVI Court Documents to be served on him and of the Exequatur Decision, on 6th August 2020 and on 12th August 2020 his lawyers gained access to these documents on the Brazilian court file. At paragraph [9] of the judgment, the learned judge noted that the Federal Court in São Paulo on 21st September 2020 (a reference to the First dos Santos Decision): 'held that, because the lawyers had had access to the Court file, there was deemed service of the substantive proceedings by way of a voluntary appearance. This I shall call "the service decision"'.

[49] See Dicey, Morris & Collins on the Conflict of Laws (15th Edn.) at para. 8-061; See Appellant's Authorities Bundle, Tab 18, e-pages 233-234.

[45] Next the respondents point out that in the Application, the appellant did not challenge that service on him had not taken place in Brazil. They refer to the Application (which was filed some 2 months after the First dos Santos Decision) and to the seventh Affidavit of Matthew Richardson in which he averred, *inter alia*, that by the First dos Santos Decision (what he referred to as the "Service Order"): 'the Federal Court of São Paulo rendered its decision confirming that the BVI claim had been duly served upon [the appellant] in Brazil, and granting him access to all documents filed within the Brazilian proceedings…'. The respondents also avert to the fact that in the hearing below Mr. Eduardo Diamantino Bonfim e Silva, who addressed the service issue for the appellant, did not correct Mr. Richardson's understanding of the First dos Santos Decision as stated in his Seventh Affidavit but, instead, in his affidavit in support of the Application, averred as follows: "I note that the decision of the Federal Court on 21 September 2020 granting the Letter Rogatory is a provisional decision, which is currently under appeal, and it pre-dates the Ministry of Justice Opinion and the Velloso Opinion."[50]

[46] The respondents, in their skeleton argument, also alluded to statements by Mr. Lucidi in response stating that the First dos Santos decision 'makes clear that Mr. Maluf has been duly served with the Claim in Brazil'.[51] In summary, they contend that the evidence of the appellant 'did little more than assert that the [First dos Santos Decision] was being appealed'. They submit that this Court ought not to interfere with the judge's finding of fact that service of the BVI proceedings was effected in Brazil on the appellant as a matter of Brazilian law.[52]

[47] As to the appellant's contention that the Brazil's November 2018 Reservation to Article 10 of the Hague Service Convention does not permit service of foreign court documents directly to the Brazilian court or judicial officers, the respondents rely on

[50] See Combined Hearing Bundle, Bundle B1, Tab 5, the First Affidavit of Eduardo Silva at para. 17, e-page 643.
[51] See Combined Hearing Bundle, Bundle B3, Tab 12, the Second Affidavit of Marcelo Lucidi at para. 29, e-page 1968.
[52] Para. 38 of the respondents' skeleton argument.

the judge's findings at paragraph [14] of the judgment to the effect that the evidence is 'in favour of good service'. They submit that the appellant's point 'simply ignores the findings of the STJ, Brazil's highest civil court, the São Paulo Federal Court, and the opinion of the Deputy Federal Attorney-General of Brazil.[53] The respondents argued that the judge's finding dispels the appellant's submission that, under Brazilian law, service in accordance with the Hague Service Convention (as circumscribed by the 2018 Reservation) was mandatory, which submission was rejected by the judge below 'on the basis that it has not found favour with the Brazilian Courts nor the Deputy Federal Attorney-General of Brazil'.[54]

[48] In his oral submissions before this Court, Mr. Francis, learned counsel for the respondents, asserted that the judge was fully aware of the Article 10 point. He took the view that the BVI proceedings had been served on the appellant in accordance with Brazilian law, having reached this conclusion on the evidence of the First dos Santos Decision and the expert opinion of the Deputy Federal Attorney-General of Brazil. Accordingly, it is the respondents' submission that there was evidence upon which the judge could properly reach his decision on the service issue and this court ought not to set that finding or conclusion aside.

[49] While I do not propose to replicate here in full the extract from the Deputy Federal Attorney-General of Brazil, however, the last two paragraphs are germane:

> "Finally, it appears that, given the **impossibility of processing the request through diplomatic channels**, the claimant requested:
>
> Thus, and considering that the authenticity of the attached documentation has been certified by a notary public and apostilled under the terms of the Hague Convention, he respectfully requests waiver of processing through the Ministry of Foreign Affairs; or, successively, requests a period of ninety (90) days (to be extendable, depending on the isolation measures) to re-submit the letter rogatory with the stamp of the foreign consular authority – without prejudice to urgent review of the requests made below.

[53] Para. 41 of the respondents' skeleton argument.
[54] Para. 41 of the respondents' skeleton argument.

> Therefore, it must be recognized that the request for assistance from the British Virgin Islands courts was duly carried out, as it was based on the promise of reciprocity, **which was not expressed through diplomatic channels due to the difficulties imposed by the COVID-19 pandemic**.
>
> In addition, it appears that the concerned party expressly requested in the complaint waiver of [sic] processing through the Ministry of Foreign Affairs, with the Honorable Rapporteur Justice having ordered to continue with the case by granting the exequatur.
>
> In view of the above, the FEDERAL ATTORNEY GENERAL OFFICE confirms the opinion on [the Court file number], and hereby decides for referral of the records to the requesting court, through the central authority."[55] (my emphasis)

[50] I observe at this juncture that the evidence of Brazilian law put before the judge below in the BVI proceedings was not expert evidence permitted in the proceedings by way of an order of the court pursuant to Part 32 of the CPR. They were documents filed in the Brazilian proceedings and then exhibited or put before the judge in the BVI proceedings. I would also observe that the extract from the 'advise' of the Deputy Federal Attorney-General, on which the learned judge relied to come to the conclusion that the appellant had been served or is deemed served in Brazil in accordance with Brazilian law, does not opine that the appellant was in fact served or is deemed to have been served by virtue of his lawyers having access to the file in the Brazilian proceedings on which the BVI documents were kept. What the 'advice' addresses is the question of the validity of the Letters Rogatory, having regard to them not having been submitted through the usual diplomatic channels as required by the Hague Service Convention. The advice states:

> "The concerned party' [the appellant] "was granted full access to the case records and the service of process from the Ministry of Justice and Public Security, so that within a period of 10 days, he could request whatever he deemed appropriate, in accordance with the provisions of The Hague Convention on Service and Notice Abroad.

[55] Combined Hearing Bundle, Bundle B3, Tab 20, e-page 2207.

> The Federal ATTORNEY GENERAL Office issued an opinion on the **validity of this letter rogatory** and return of this letter rogatory to the requesting court, so that the purpose thereof be complied with.
>
> The concerned party [the appellant] filed a statement claiming, in sum, undue processing of this letter rogatory, **as it was submitted by initiative of the party, not through diplomatic channels or through the central authority, as set forth in the Hague Convention**….".[56] (my emphasis)

Analysis and Conclusion on Ground 1

[51] Having noted the expert reports put before him by both sides dealing with service under Brazilian law, the learned judge, at paragraph [14], found that good service had taken place on the appellant in accordance with Brazilian law and under CPR 7.8(1)(b). He reasoned:

> "[14] The evidence at present is in my judgment in favour of good service having taken place in accordance with Brazilian law. The STJ says the letter rogatory is valid; the Federal Court of São Paulo says there has been good service; the Deputy Federal Attorney-General, a completely independent lawyer, says there has been good service. Without intending any disrespect to the experts, it is not appropriate that I examine the differing expert opinions and reach my own conclusion, when the Courts of Brazil and one of the Brazilian state's most senior legal representatives have spoken. I accept that both the exequatur decision and the service decision are subject to review and appeal, but unless and until the review or the appeal is allowed, the weight of the evidence is such that I must in my judgment accept that there has been good service as a matter of Brazilian law. Accordingly, I find that service has been effected under CPR 7.8(1)(b)."

[52] This finding by the learned judge as to service of the BVI Court Documents on the appellant, is not that service had been effected in accordance with the Hague Service Convention or through foreign governments or even personal service, which are also methods of service of a claim form out of the jurisdiction pursuant to CPR 7.8(1), but in accordance with 'the law of the country in which it is to be served' – subparagraph (b) of CPR 7.8(1). However, this is not the method of service of the BVI Court Documents on the appellant authorised by the Service Out Order which, it is accepted by both sides, provided for service on the appellant by Letters Rogatory pursuant to the Hague Service Convention.

[56] Combined Hearing Bundle, Bundle B3, Tab 20, e-page 2206.

[53] At paragraph [15], the learned judge, alluded to the submission by leading counsel for the appellant (defendant) that, pursuant to the terms of the Service Out Order, service was to be effected "on the respondent" at a specific address in São Paulo or other address for service in Brazil, and the form of service by the voluntary appearance of the appellant's lawyers having been granted access to the court file in Brazil, does not fall within this description and is not service on the appellant, reasoned: 'If the form of service accepted by the Brazilian Court as having occurred was good service, then it follows that it was good service "on the respondent". (It could be on no one else.) That service would be the place where the lawyers did the acts constituting the voluntary appearance'.

[54] The reasons relied on by the learned judge in the passages above for reaching a finding of good service, gives rise to a number of questions for consideration in this appeal as argued by the appellant. Did the STJ authorise execution of the Letters Rogatory for service by the Federal Court of São Paulo on the appellant, as the judge concluded? Did the First dos Santos Decision conclude that service of the BVI Court Documents had been effected on the appellant under Brazilian law, by virtue of his lawyers in Brazil having access to the documents on the court file in Brazil? Even if the First dos Santos Decision is to be so construed, (a matter which is stoutly disputed by the appellant), was that service in accordance with the Service Out Order, accepting, as mentioned above, that the said method of service was not one sanctioned by the Service Order made in the BVI proceedings? And was the judge correct when he accepted that the said method of service, that is, by which access to the court file in Brazil by the appellant's lawyers is 'deemed' service on the appellant himself, as good service' on the appellant for the purposes of the BVI proceedings?

[55] The Letters Rogatory were presented by the respondents' lawyers directly to the STJ in Brazil. It was, apparently, accompanied by the claim form and 22 other documents, but not the E-Portal Code as mandated by rule 13(3) and (4) of the E-Litigation Portal Rules. The President of the STJ issued, on 27th July 2020, the

Exequatur Decision. The decision (as translated from Portuguese to English) does not speak to the request in the Letters Rogatory for service of the BVI Court Documents on the appellant. It only addresses the second request for assistance, that is, for the seizure of assets of the appellant in execution of the Freezing Order, as provisional relief. The essence of the order of the STJ was to authorise the execution of the foreign judgment by sending the records (the BVI Court Documents) to the Federal Court of São Paulo to effect seizure of the assets of the appellant. In his decision, the President of the STJ ordered:

> "Thus, the subject of this letter rogatory does not harm national sovereignty nor public order, which is why, based on art. 216-O, head provision, of the Superior Court of Justice Internal Rules (RISTJ), I **grant the authorization for execution of the foreign judgment (exequatur).**
>
> **Send the records to the São Paulo Judicial Subsection (SP) so that the interested party's assets be seized up to the limit of two hundred and sixty-three million and seven hundred thousand Reais (R$263,700,000.00)**
>
> **After the submission of the defense or certification of the lapse of the term without a submission, the records must be forwarded to the country of origin through the competent central authority".**[57] (emphasis added)

[56] By the First dos Santos Decision, the Federal Court of São Paulo, having received the record from the STJ, made the following order:

> "Id37013304: (a) the case is under seal; (b) researches via BACENJUD (now SISBAJUD) system were carried out in checking accounts, investment accounts, savings accounts, financial investments and term deposits held by the Defendant in the financial institutions and the Brazilian stock market (B3 - Brasil, Bolsa e Balcao**), with the freezing in the total amount of R$324,988.72**; (c) **the assets freezing order was filed with seizure of the real property** under Registration No. 179264 with the 4th Real Estate Registry of the Capital of São Paulo.
>
> **Id38891362: voluntary attendance of Flavio Maluf, pursuant to article 239, paragraph 1 of the Code of Civil Procedure (CPC). Take note of the lawyers names, JOSE MANOEL DE ARRUDA ALVIM NETTO, Brazilian Bar Association/São Paulo Chapter (OAB/SP) 12.363 and**

[57] Combined Hearing Bundle, Bundle C, Tab 20, at e-page 2361.

> **EDUARDO PELLEGRINI DE ARRUDA ALVIM, OAB/SP 118.685, who will be entitled to examine the case records**.
>
> The Defendant shall comply with the decisions of the Eastern Caribbean Supreme Court, bringing to the **records information on the existence of assets in his name**".[58] (emphasis added)"

[57] It is the second cited paragraph above dealing with the "voluntary attendance" of the appellant by his lawyers, which was relied on by the respondents before the judge below to say that under Brazilian law the appellant had been deemed served with the BVI Court Documents. I merely observe that from a simple reading of the words used in that portion of the First dos Santos Decision, there is no clear finding or conclusion that, once the appellant's lawyers had availed themselves of access to the court file in Brazil and had access to the BVI Court Documents, to be served pursuant to the Letters Rogatory, personal service on the appellant under and pursuant to Brazilian law is to be deemed to have been effected. This passage speaks, on its face, to the voluntary attendance by the appellant by virtue of his lawyers having access to the documents on the court file in Brazil.

[58] The Second dos Santos Decision, dealt with certain objections made by the appellant, in proceedings brought in Brazil, to the execution and implementation of the Letters Rogatory from the BVI Court. This is part of the 'review' process which is permitted under Brazilian procedural law in relation to the prior decision of the Federal Court of São Paulo. The question of service of the BVI Court Documents on the appellant was not one of the issues raised or relied on by the appellant in the Brazil Court review proceedings. At page 8 of this decision, judge dos Santos records:

> "In fact, even though [the] claimant DURANT INTERNATIONAL CORP has made such claim in the Letter Rogatory, already in the Court of destination, as a matter of fact the scope of the decision of order rendered by the President of the STJ is smaller than claimed, since only the blocking of assets **and the service of process upon FLAVIO MALUF** have been ordered by way of provisional measure and *in audita altera pars*, and the

[58] Combined Hearing Bundle, Bundle D, Tab 2, at e-page 2572.

> defendant has not been ordered to provide information on the existence of assets in his name."[59] (emphasis added)

[59] The Second dos Santos Decision confirms that the Exequatur Decision had dealt with both limbs of the request in the Letters Rogatory, that is, enforcement of the Freezing Order and the service of the BVI Court Documents on the appellant.

[60] The Third dos Santos Decision concerned two motions for clarification of a previous 'appeal' decision of the Federal Court, one brought by the appellant and the other by Durant. It speaks only to enforcement of the Freezing Order by seizure of the appellant's assets. In this decision, the Federal Court stated:

> "We immediately confirm that the Order determined by the President of the Superior Court of Justice to the Court [Federal Court of São Paulo] was to "implement the inalienability of assets of the interested party up to the limit of ….(R$263,700,000.00)".[60]

[61] The extract cited in the paragraph immediately above, was not one of the issues raised by the clarification motions before the court. Hence it was not part of the *ratio decidendi* of the Third dos Santos Decision. However, the appellant has relied on that passage to submit that the Third dos Santos Decision conclusively debunked any notion that the Exequatur Decision had authorised the Federal Court of São Paulo to implement and to effectuate the service of the BVI Court Documents on the appellant in Brazil.

[62] In my view, it would be going too far to say that the Third dos Santos Decision determined conclusively that the Exequatur Decision of the STJ did not order the service of the BVI Court Documents on the appellant. That is not to say that it did, as some lingering uncertainty has been created by these various decisions, which in my opinion, has not been fully clarified by the documentary and other evidence before the court below. Not surprisingly, there has been no expert evidence put before either the judge below or this Court as to the meaning of the Third dos Santos

[59] Combined Hearing Bundle, Bundle C, Tab 20, at e-page 2230.
[60] Combined Hearing Bundle, Bundle E, Tab 5, at e-page 2915.

Decision with regard to the authorisation by the Exequatur Decision of the STJ, and the said decision does not make clear that the Exequatur Decision or the First dos Santos Decision did not order or provide for service of the BVI Court Documents on the appellant.

[63] The first question is, therefore, what did the STJ *Exequatur* Decision in fact authorise the Federal Court of São Paulo to implement or effectuate in relation to the Letters Rogatory. The respondents assert that it would be passing strange that the STJ, having received the Letters Rogatory for judicial assistance with the two requests for assistance, one for service on the appellant and the other for seizure of his assets in response to the Freezing Order, would issue an *exequatur* addressing or only authorising one of these two requests, that is, the seizure of his assets, without addressing in said decision and authorising the service of the BVI Court Documents on the appellant, and without addressing in the Exequatur Decision any reason or basis why the request for service of the documents was not to be acted upon or was not being authorised. In my view, there is some force in this point made by the respondents, as the contrary position, would not in my view, make practical or legal sense. However, that view must be counterbalanced by the position that, in similar situations, mistakes or oversights can and have been made and even by the most competent of authorities or functionaries.

[64] The second question, which is also of much significance to the determination of this ground of appeal, is whether the First dos Santos Decision deemed service of the BVI Court Documents to be effected on the appellant when his lawyers were given access to the court file in Brazil and took copies of the said documents on or about 13th August 2020 and, if so, whether the judge was correct to find that there was good service of the said documents on the appellant in Brazil in accordance with Brazilian law and in accord with CPR 7.8(1)(b)? It is clear on the facts of this matter, that personal service of the said documents on the appellant himself had not been attempted or effected at any of the two physical or residential addresses for him given in the Letters Rogatory. Also, as the respondents' submit, was the service on

his lawyers personal service on the appellant and was that in compliance with the term of the Service Out Order for service of the claim form and documents 'on the Respondent [appellant]'.

[65] In my judgment, the learned judge erred in coming to the conclusion that the evidence before him favoured good service having taken place on the appellant in accordance with Brazilian law. Firstly, it is questionable whether the Exequatur Decision also authorised the service of the BVI Court Documents on the appellant. It would seem to me that the better view is that while service was not specifically or clearly authorised by that decision, it proceeded on the assumption that, as part of the authorisation by the *exequatur* to the Federal Civil Court of São Paulo to seise the appellant's assets in execution of the Freezing Order, service of the BVI Court Documents, including the Freezing Order, would be effected on the appellant. I so opine because what was authorised by the STJ pursuant to the Letters Rogatory (putting aside for now the issue as to whether they were invalid having been addressed to the Brazilian court directly and not through the usual diplomatic channels) is of fundamental importance to the validity of the process implemented in Brazil and secondly, the language of the Exequatur Decision leaves much to be desired in terms of bringing the level of clarity and certainty to this question which is necessary.

[66] I am also of the view, that the judge erred in placing much reliance upon the First dos Santos Decision as conclusive evidence that service of the BVI Court Documents had been effected on the appellant by him being deemed to have been served under Brazilian law by virtue of his lawyers in Brazil being granted, by that decision, access to the court file. The First dos Santos decision falls short of deeming access to the file and documents by the appellant's lawyers as 'service' or as 'good service' in accordance with Brazilian law. The effect of this is that service on the appellant has not been shown or established by the First dos Santos Decision to have been effected under Brazilian law, and the learned judge erred in so concluding. It also follows that the judge erred in finding that service had been

effected on the appellant pursuant to the avenue permitted under CPR7.8(1)(b) – in accordance with the law of the country in which it is to be served.

[67] While the Second dos Santos Decision records that the Exequatur Decision addressed both the seizure of assets and service on the appellant, entitling the learned judge to place some reliance upon that statement by a court in Brazil, the correctness of that statement is not borne out by the wording of the *exequatur* itself or the First dos Santos Decision, as the respondents contend. Also, the Third dos Santos Decision does not, in my view, clear up the underlying uncertainty created by the First dos Santos Decision on the matter of service, nor does it clear up the initial question as to what the *exequatur* issued by the STJ does authorise, apart from the implementation of the request to seise assets of the appellant in Brazil in execution of the Freezing Order. The latter decision merely recites that the *exequatur* authorised the seizure of the appellant's assets, without stating that it did or did not similarly authorise the Federal Court of São Paulo to serve the BVI Court Documents on the appellant.

[68] I am also in agreement with the appellant that the Reservation to Article 10 of the Hague Service Convention, which Reservation was made part of the domestic law of Brazil, does not permit the transmission of documents by the requesting state directly to the courts or judicial authorities in Brazil for consideration and implementation of Letters Rogatory, as was done in the instant matter. The legal significance of this Reservation was not a matter which the learned judge considered when reasoning to his conclusion that good service had been effected on the appellant in accordance with Brazilian law. While the judge may have noted from the 'experts' their opinion on the effect of this Reservation to Article 10, he did not allude to such evidence or opinion at all in his reasoning or as an important consideration as to whether service had been effected in accordance with Brazilian law. In fact, the judge did not consider it appropriate or necessary for him to examine the differing expert opinions and to reach his own conclusion on the issue of good service under Brazilian law. He accepted that the Exequatur Decision had said that

the Letters Rogatory were valid, the Federal Court of São Paulo had said there was good service in the First dos Santos Decision, and the Deputy Federal Attorney-General of Brazil had opined that there had been good service.[61]

[69] In this aspect, the judge did not address the scope of the authorisation in the Exequatur Decision or whether it authorised the service of the BVI Court Documents on the appellant. Also, the judge was incorrect in his interpretation of the First dos Santos Decision in accepting that it confirmed that service had been effected on the appellant by virtue of a 'deeming' provision, when the said decision does not say so. Further, in my respectful view, the learned judge erred in completely discarding the Third dos Santos Decision, albeit I have agreed with him that it was not conclusive as to the scope of the *exequatur* authorisation or the effect of the First dos Santos Decision. It was for Durant to satisfy the court that service on the appellant had in fact been effected under Brazilian law and in accordance with the Hague Service Convention and the Service Out Order. The evidence led was at best, in my judgment, unsatisfactory and inconclusive as to good service on the appellant in Brazil.

[70] These flaws in the learned judge's reasoning serve to undermine the soundness and correctness of his conclusion on this issue of service. They must also be viewed in the context of a legal framework in Brazil which did not permit the transmission by the requesting state of documents for service other than through diplomatic channels. This is of significance to the validity of the service on the appellant under Brazilian law where it is expected that there must be compliance with the laws of the accepting country. It is also true for CPR 7.9(3) when service is being effected under the Hague Service Convention, albeit by rule 7.9(2) the methods of service permitted by Rule 7.9 'are in addition to any method of service permitted under rule 7.8(1) (b) and (c)'. In my judgment, the evidence before the judge did not establish to the requisite standard that service had been effected on the appellant in

[61] Para.[14] of the judgment.

accordance with Brazilian law and the judge erred in finding that good service had been effected. Accordingly, ground 1 of the appellant's notice of appeal succeeds.

[71] That said, it is clear on the evidence, and accepted by both sides, that by 13th August 2020 the appellant had, in fact, had access to and received copies of the BVI Court Documents from the court file in Brazil. In other words, as of the said date, the claim form and other court documents had been received by the appellant and he knew of the claims and allegations being made against him by the respondents in the BVI proceedings before the Commercial Court.

Ground 2 – The purported service on the appellant was not in compliance with the Service Out Order

[72] This ground of appeal can be taken shortly. The appellant's point of contention is that the Service Out Order required service "on the Respondent" and, at best, the alleged service in Brazil was in fact not on him but on his lawyers, and not in compliance with the Service Out Order. Accordingly, personal service on the appellant had not been carried out and the Service Out Order not complied with. The appellant also submits that the learned judge erred when he considered and accepted that service on the appellant could be effected otherwise than in strict compliance with the method of service required by the Service Out Order.

[73] In support of this submission, the appellant relies, as he did in the court below, on the very recent judgment of Butcher J in **YA II PN Ltd v Frontera Resources Corporation**.[62] In that case, the judge held at first instance that where an order permitting service out required personal service to be made at a specified address, a claimant could not serve at an alternative address and rely on the English CPR 6.4(3)(c), (the equivalent to the Eastern Caribbean Supreme Court (ECSC) CPR 7.8(1)(b)). Accordingly, the appellant submits that service must be effected "in accordance with the [Service Out Order]" and must be "effected in accordance with

[62] [2021] EWHC 1380 (Comm).

the permission granted".[63] This the appellant submits did not happen in the instant matter as the judge found that service had been effected in accordance with Brazilian law and in compliance with CPR 7.8(1)(b), and not in accordance with the Hague Service Convention, the mode of service specified in and authorised by the Service Out Order.

[74] Accordingly, the appellant contends that the learned judge was wrong when, at paragraph [15] of his judgment, he focused his reasoning on the service being good service if the form of service is one accepted by the Brazilian court, and finding that service on the appellant 'was at the place where the lawyers did the acts constituting the voluntary appearance'. This they say was plainly wrong for the reasons set out at paragraphs 36.1 to 36.4 of the appellant's written submissions, the first of which is that the Brazilian courts did not find that there was good service of the BVI Court Documents on the appellant, but to the contrary, said nothing about service of them.

[75] In response to this ground of appeal, the respondents rely on the reasoning of the learned judge at paragraph [15] of the judgment. They argue that Mr. Machell QC's reliance in this appeal on the **YA II** decision of Butcher J for the proposition being asserted, is misplaced. They point out that the order for service out in the **YA II** case, is materially different from the Service Out Order in the instant matter. The order in the former specified that service was to be effected on the defendant at a specific business address in Houston, Texas, and at its registered office in Cayman Islands. However, the claimant served or purported to serve the documents on the defendant at an address different from that in Houston specified in the service order. This was done in circumstances where the service out order did not contain the words 'or elsewhere in …' or any equivalent thereof. The judge in that case held that where a service out order specifies an address but does not contain these or similar general words, service cannot be effected other than at the address specified in the order.

[63] See para. 16 and 17 of the appellant's written submissions.

[76] In the instant matter, the Service Out Order, apart from specifying a physical address at which service on the appellant was to be effected at São Paulo in Brazil, went on to use the general words 'or other address for service in Brazil'. Accordingly, the respondents submit that the learned judge was correct in concluding that the appellant's point on this issue was a bad one.[64]

[77] In my view, there is merit in the respondents' counter-argument on this particular issue. The terms of the service out order in **YA II** are materially different to the terms of the Service Out Order here. In the latter, permission was granted to serve the appellant at a specified address in São Paulo, Brazil or at any other address for service in Brazil. It follows ineluctably that the Service Out Order did not suffer from the specificity or limitations of the **YA II** service out order, and permitted service on the appellant in Brazil at an address different from the one specified in the Service Out Order, which service could constitute good service on the appellant.

[78] However, the real issue here is not whether the appellant could properly and in compliance with the Service Out Order, be served with the BVI Court Documents at any address for service in Brazil, but whether he had in fact been served "personally" with the said document, and was that service in accordance with the Service Out Order which specified service in accordance with the Hague Service Convention and whether such service which, it is argued, accorded with CPR 7.8(1)(b) and was good service pursuant to the Service Out Order. I have already found that the judge erred in concluding that good service had been effected on the appellant because his lawyers in Brazil were given access to the court file there, on which the said documents were located, and were thereby able to obtain copies of the said documents.

[79] In my view, the short but clear answer to these questions is that the only mode of service asked for by Durant in its *ex parte* application for a service out order, and the only method authorised or sanctioned by the Service Out Order made by the

[64] Para. [15] of the Respondents' skeleton argument.

learned judge was, as both parties accepted, was in accordance with the Hague Service Convention. The Service Out Order did not authorise service in accordance with the laws of Brazil pursuant to CPR 7.8(1)(b). Such service in accordance with CPR 7.8(1)(b), as found by the learned judge, was not service in compliance with the Service Out Order. Accordingly, ground 2 succeeds.

Ground 3 – Claim form transmitted directly to the Brazilian court for service in breach of CPR 7.10

[80] This is a short point. The appellant submits that CPR 7.10 requires that service through the judicial authorities of another state must take place through diplomatic channels and not directly to the judicial authorities of that state. The judge therefore erred in not considering the provisions of CPR 7.10 in circumstances where, as is uncontroverted, the claim form and other documents were sent or delivered directly to the judicial authorities in Brazil in clear breach of CPR 7.10. This offended both BVI law and Brazilian law. Consequently, valid service was not effected.[65]

[81] CPR 7.10(3) (in so far as relevant) states:

> "(3) When the claimant files the documents specified in paragraph (2) the court office must –
> (a) seal the copy of the claim form; and
> (b) **send the documents filed to the minister with responsibility for foreign affairs with a request that the minister arrange for the claim form to be served** –
> (i) by the method indicated in the request for service filed under paragraph (2); or
> (ii) if the request indicates alternative methods – by the most convenient method. (emphasis added)

[82] It cannot be disputed, in the instant matter, that the request (Letters Rogatory) was addressed and sent to the Brazilian Court directly. They were not addressed or sent to the minister with responsibility for foreign affairs in Brazil. This was in clear breach of CPR 7.10(3). Accordingly, the non-compliance with and breach of the provisions of CPR 7.10(3) is patent in the instant matter. It is not a legitimate excuse to say

[65] Para. 37 of the appellant's updated written submissions.

that compliance with this rule could not have been had during the COVID-19 pandemic because access through diplomatic channels was not possible, albeit it was open to a judge under CPR 26.1(6), upon application and upon special circumstances being shown, to dispense with compliance with CPR 7.10(3). In my opinion, a court would be hesitant to make a dispensing order where the core of the mode of service out of the jurisdiction is an international convention, aspects of which have been incorporated into the domestic law of the State. This breach of BVI procedural law, was compounded by the resulting breach of Brazilian law by utilising a method of transmission of the request which was clearly not in compliance with their law in light of Brazil's 2018 Reservation to the methods stipulated in Article 10 of the Hague Service Convention.

[83] In my judgment, it also sounds hollow to conclude, as the learned judge did, that service was effected on the appellant in accordance with the laws of Brazil, when his lawyers there were permitted access to the court file which also contained the BVI Court Documents required to be served on the appellant as per the Letters Rogatory. Apart from no finding of such 'deemed' service being made by the Brazilian courts, service in accordance with the laws of Brazil was not the method of service chosen by the respondents, as they were required to do by CPR 7.10(2)(c), or as ordered by the court. The method chosen by the respondents, and authorised by the Service Out Order, was service in accordance with the Hague Service Convention. The learned judge therefore erred in finding that good service had been effected pursuant to CPR 7.8(1)(b), which was not the chosen method of service or one of the chosen methods. In this respect, the principle underscored in the **YA II** decision is apposite. Accordingly, this ground of appeal succeeds.

Ground 4 – The purported service was ineffective under rule 13.4 of the E-Litigation Portal Rules

[84] Rule 13.3 of the **Eastern Caribbean Supreme Court Electronic Litigation Filing And Service Procedure Rules 2018**[66] (E-Litigation Portal Rules) requires a party, when serving proceedings, to do two primary things. First, they must serve the documents in accordance with the applicable rules of court. Based on my finding above, the respondents clearly effected service in breach of the applicable rules under the CPR. Second, the serving party must 'at the same time serve the authorisation code generated by the Electronic Litigation Portal in the Form in Schedule 2'. It is beyond any doubt that, even if the appellant was to have been deemed served with the documents when his lawyers in Brazil were granted access to the court file and took copies of the documents, which contention has not been substantiated on the evidence, the authorisation code was not served at the same time as the deemed service is said to have been effected. It was some time thereafter provided by the respondents' lawyers in BVI to the appellant's lawyers in the said Territory. The consequence of a failure to provide the authorisation code at the same time as when the documents are served, is that 'service is deemed not to have been effected'.[67]

[85] The learned judge characterised Mr. Machell QC's submission that this constituted bad service and was fatal to Durant's attempt to serve the appellant, as 'a surprising submission'.[68] The judge reasoned that the E-Litigation Portal Rules are part of the general Civil Procedure Rules and, accordingly, it is legitimate to apply the overriding objective in CPR 1.1 when considering or interpreting the 2018 Rules. This is no doubt sound in principle. The judge also made reference to the court's power under CPR 26.9(3) to rectify procedural errors, and reasoned that this would apply equally to 'missteps under the 2018 Rules'. In my considered view, the learned judge was not correct in this deduction. CPR 26.9 'applies only where the

[66] As amended by the Eastern Caribbean Supreme Court (Electronic Litigation Filing And Service Procedure) (Amendment) Rules, 2019.
[67] Rule 13.4 of the Electronic Litigation Filing And Service Procedure Rules .
[68] Para. [19] of the judgment.

consequence of the failure to comply with a rule, practice direction or court order has not been specified'. Rule 13.4 of the E-Litigation Portal Rules specifies the consequence of not serving the authorisation code at the same time as when the court documents are being served. However, this failure is a procedural misstep nevertheless and is not fatal. The remedy lies squarely in the hands of the party attempting service of the documents, in this instance, Durant. That remedy is to re-serve the court documents accompanied by the authorisation code.

[86] The judge did not consider it necessary to have resort to what he saw as his powers under CPR 26.9(3). He posited that a 'perfectly sensible interpretation of rule 13(4) of the E-Litigation Portal Rules is to interpret the paragraph as deeming service not to have been effected 'until the authorization code is served'.[69] With respect, the learned judge erred in so concluding. Rule 13(4) does not permit of that interpretation, regardless of how desirable the outcome may seem in practical terms, as the learned judge sought to illustrate by positing that the purpose of rule 13(4) is 'to ensure that judgment by default cannot be entered until the defendant has the code'. While I accept that rule 13(4) does not create some 'irremediable bar' to service, as that would make a complete nonsense of the provision, in my opinion the remedy available to a serving party where they had failed in a first attempt at serving the documents on the defendant by not, at the same time, serving the authorisation code, is to re-serve the documents with the code. This, of course, is without prejudice to the court's power to dispense with service in appropriate circumstances.

[87] I would add for completeness, that I do not accept that rule 13(4) provides the kind of sanction requiring an application to the court for relief from sanction under CPR 26.8. I so conclude because rule 13(4) provides a consequence of not serving the code with the documents, which is proper service has not been effected. Unless the time for serving the documents has lapsed, as where the validity of the claim form

[69] Para. [20] of the judgment below.

has expired, the claimant is still free to effect service properly and in full compliance with rule 13(4).

[88] In the instant matter, the respondents did not have the authorities in Brazil serve the BVI Court Documents on the appellant with the authorisation code. Instead, they sought, erroneously, to rely on service being deemed to have been effected under Brazilian law and in accordance with CPR 7.8(1)(b), albeit without service of the authorisation code. The subsequent provision of the authorisation code to the appellant's BVI lawyers, does not in my judgment cure this defect, even if the deemed service argument was correct. This is separate from service of the documents on the appellant not having been effected under either Brazilian law or BVI law. It follows that the judge's conclusion that service was effected and complete when the authorisation code was provided subsequently, does not accord with rules 13(3) and 13(4) of the E-Litigation Portal Rules. Accordingly, this ground of appeal has also been made out by the appellant.

Grounds 5 and 6 – Ought the judge to have dispensed with service after the claim form had expired; and did he exercise his discretion correctly in making the Dispensation Order?

[89] These two grounds of appeal are interrelated and may conveniently be disposed of together. In the judgment under appeal, the learned judge made an order dispensing with service of the BVI Court Documents on the appellant pursuant to CPR 7.8B.[70] The Dispensation Order was made after an advance copy of the unsealed judgment had been sent by the judge to counsel for the parties. The unsealed version had the effect of propelling Durant to, shortly thereafter, file an application to dispense with service on the appellant. The judge did this having satisfied himself that this was the more preferred course of action. The judge, as is noted in the final version of the judgment, then abridged time of his own motion and granted the application, without hearing from the appellant in relation thereto.

[70] Para. 53 of the judgment.

[90] The outcome of an application to dispense with service had been foreshadowed by the judge in the unsealed version of the judgment sent to counsel. At paragraph [27] of the judgment the learned judge stated: 'Durant should be able to issue a *pro forma* application [to dispense with service] with affidavit in support to support such an order. If Durant does so, I will make such an order'. This 'invitation' to Durant to make an application to dispense with service, and the judge's advance declaration of his determination to grant it, came after the learned judge had set out in full what he had said jurisprudentially in **Commercial Bank of Dubai v 18 Elvaston Place Ltd**[71] with regard to the modern approach to service and dispensing with service.

[91] It is not necessary for me to regurgitate all of these passages (which are set out *verbatim* at paragraph [22] of the judgment). Suffice it to be said, however, that in these extracts, the learned judge traced the jurisprudential development of the principles applicable to service and service out, from the 'old approach' to the 'modern approach'. The more 'modern approach' has been influenced significantly by the adoption in England of the doctrine of *forum non conveniens*, and by the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts. This development of the jurisprudence in relation to service of claim forms and other court documents on a party to litigation, was reviewed by Lord Sumption JSC in **Abela and others v Baadarani**.[72] The **Abela** case concerned whether delivery of the documents to be served out to the defendant's Lebanese lawyer in Lebanon was to be treated as good service, such as to dispense with service on the defendant. Instructively, at paragraph 33, Lord Neuberger, having alluded to the test of 'exceptional circumstances' in the English CPR 6.16, opined (in part):

> "It seems to me that in the future, under rule 6.15(2), **in a case not involving The Hague Service Convention or a bilateral service treaty**, the court should simply ask whether, in all the circumstances, there is good reason to order that steps taken to bring the claim form to the attention of the defendant is good service". (emphasis added)

[71] [2020] ECSCJ No. 202 (delivered 16th June 2020) at paras. 25, 27, 28, 30 and 31.
[72] [2013] UKSC 44, [2013] 1 WLR 2043.

[92] Of much significance is the principal 'objective' or purpose of service in civil litigation. Again, Lord Neuberger put it succinctly, at paragraph 37: '[s]ervice has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to the defendant'.

[93] It is so well-established so as to be trite, that the purpose of service of documents in civil proceedings is to bring the claim form and other statements of case setting out the allegations of fact and the legal basis for the claim brought by a claimant, to the attention of the defendant. The significance of this requirement for service of originating process, is a fundamental pillar in ensuring open litigation in a free and democratic society, and to give meaning to the imperative for justice to be dispensed openly and according to law, buttressed and circumscribed by applicable rules of court which have, as their overriding objective, courts dealing with cases justly and ensuring that the parties are, as far as it is practicable, on an equal footing.

[94] The power of the Court to dispense with service of a claim form is provided for and circumscribed by CPR 7.8B, which states:

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

[95] CPR 7.8B therefore empowers a court, in the exercise of its discretion, to dispense with service on a defendant of the claim form and statement of case where it is satisfied, on application, that exceptional circumstances have been made out. At paragraphs [24] and [25] of the judgment, the learned judge made certain poignant observations, and took account of certain factors, in arriving at his conclusion that:

> "[T]he effect of deciding this case on [the basis that there has been good service on the appellant in Brazil] is simply to generate more litigation. An appeal is inevitable. This case is likely to be delayed whilst the Brazilian

> Courts determine the review and the appeal. The pragmatic approach in my judgment is to apply the overriding objective and dispense with service under CPR 7.8B(1). Mr. Maluf knows full well about the current proceedings. Absolutely no injustice is done to him by putting an end to his wholly technical and unmeritorious arguments about whether or not service has technically been affected or not".[73]

[96] The judge concluded that the circumstances in the instant matter were exceptional. He was satisfied, for the reasons espoused by him, that the threshold test under CPR 7.8B(1) had been met. In reaching this conclusion, the learned judge placed much emphasis on the effect of the COVID-19 world-wide pandemic on Durant's ability to serve the claim form and other documents through 'ordinary' diplomatic channels which had been suspended, and on the wrangling by the parties in the Brazilian courts, yet unresolved, about the suspension of normal diplomatic channels as a means of effecting service of foreign court process under the Hague Service Convention. At paragraphs [25] and [52] the judge states:

> "[25] In the current case, the circumstances are in my judgment exceptional. Durant have attempted to serve, but due to the pandemic the ordinary means of service through diplomatic channels were suspended. There is wrangling in the Brazilian Courts about the effect of the suspension of the diplomatic channels which has not yet been resolved. There is no indication when a final decision will be forthcoming in Brazil. In the meantime, Durant's claims will make no progress.
>
> [52] All of these matters reinforce the view I express at paras [24] and [25] above. The wrangling in the Brazilian courts is likely to be ongoing for an indeterminate period of time. In the exceptional circumstances of this case, it is right to dispense with service. In Leoncavallo's words at the end of *Pagliacci: "E finite la commedia."*

[97] Upon Durant's application dated 20th August 2021 to dispense with service ("Durant's Dispensation Application"), the judge added to the unsealed version of the judgment, as he was perfectly entitled to do, a number of paragraphs addressing that and certain other issues brought to his attention since the unsealed judgment had been circulated to counsel. One such new paragraph conveyed his determination of Durant's Dispensation Application: '[f]or the reasons given in this

[73] Para. [24] of the judgment.

judgment, I abridge time of my own motion and grant the application'.[74] The formal order dispensing with service is dated the day after (24th August 2021) and records that the judge had determined the application 'on paper without hearing from counsel'.[75]

[98] Pursuant to CPR 7.8B(2), an application to dispense with service may be made at any time and without notice. During oral argument, learned Queen's Counsel for the appellant, Mr. Machell, in response to a question from the Court, stated that the appellant was no longer relying, as a free-standing ground of appeal, on the judge's failure to permit the appellant to respond to Durant's application to dispense with service before determining the said application. However, he invited the Court to take factors into account when considering whether the judge had exercised his discretion wrongly in granting the application, and making the order dispensing with service on the appellant.

Appellant's Submissions

[99] The appellant submits that the application to dispense with service was made too late for the reasons that: (i) the time for serving the claim form had expired on 21st April 2021, prior to delivery of the judgment and the making of the said order; (ii) Durant had not and has not made any application for an order to prospectively or retrospectively extend the time for service of the claim form; and (iii) there was no possibility to effect service on the appellant at the time the Dispensation Application was made by Durant and, on established principles, the judge ought to have refused to grant it. The appellant cites in support an extract from the **UK Supreme Court Practice (White Book)**.[76] There it states, in part:

> "The court should only dispense with service where there is a possibility of effective service, which is capable of being dispensed with. There was no such possibility of effective service where the time for service of the claim form had already expired".

[74] See para. [53] of the judgment.
[75] See the Core Appeal Bundle, Tab 6, pg. 81.
[76] See the appellants' authorities bundle Tab 17, pg. 229 at para. 6.16.3.

[100] The appellant's central point under these two grounds of appeal challenging the judge's exercise of discretion to dispense with service of the claim form and other documents on the appellant, is that, as a matter of principle, a court ought not to extend time to serve a claim form whose validity has expired, making service of it under the CPR nugatory or impossible. In short, a court does not act in vain. The fact that the validity of the claim form in No. 62 of 2020 for service on the appellant had expired was not a matter to which the judge alluded to in reasoning to his determination that the application to dispense with service ought to be granted. Accordingly, this patent issue going to the validity of the claim form had not been addressed by the judge in the court below, underscoring why prudently he ought not to have determined the said application before first hearing from the appellant. The judge had not invited the appellant to file written submissions on the merits of Durant's Dispensation Application, but simply decided the matter *ex parte* on paper on the basis of Durant's notice of application and supporting documents. In doing so, the judge fell into grave error, the appellant submits.

[101] There is some merit in this point made by the appellant. Under CPR 8.12, a claim form to be served out of the jurisdiction must be served on a defendant within 12 months after its date of issuance unless the claimant has applied for and obtained an extension of that period (for no more than 6 months in each instance). By CPR 8.13(3), an application to extend time to serve a claim form must be made within the period for service, or within any extended period granted by the court upon application under CPR 8.13. In the instant matter, the claim form to be served on the appellant out of the jurisdiction in Claim No. 62 of 2020 was issued on 7th May 2020,[77] and the 12-month period of its validity for service on the defendant would have expired on 6th May 2021. The application by Durant to dispense with service was filed on 20th August 2021 and granted by the learned judge on 23rd August 2021, but the order was formally dated 24th August 2021.[78]

[77] See Combined Hearing Bundle pgs. 2466-2469.
[78] See Combined Hearing Bundle pg. 81.

[102] Accordingly, absent any order extending time for service (made prospectively or retrospectively), the claim form in No. 62 of 2020 could not be validly served, either at the time of the application or at the date of the order dispensing with service. This is so unless the claim form and other documents had previously been validly served on the appellant in Brazil, as the learned judge held in his judgment. The operative date of service according to that finding would have been 13th August 2020 when the appellant's Brazilian lawyers gained access to the court file in Brazil and received copies of the claim form in Claim No. 62 of 2020 and other documents. If the judge's ruling of good service was sustained, it would mean that the appellant had been served within the 12- month period for service out of the jurisdiction under CPR 8.12. However, I have already reached the conclusion in this judgment that the learned judge was wrong to find that actual or good service had been effected on the appellant in Brazil, either in accordance with Brazilian law or CPR 7.8 (1)(b) or the Service Out Order.

[103] The appellant relies on the decision of this Court in **JSC VTB Bank v Alexander Katunin and another**.[79] In that decision, it was held that the court's general case management power and discretion under CPR 26.1(2)(k) to extend time to comply with a rule, practice direction or order and to do so even after the time for compliance had expired, was not applicable to extend the time for service of a claim form, since the power to extend time for service of a claim form is circumscribed by CPR 8.13. However, where special circumstances were shown to exist, a court had the power under CPR 26.1(6) to wholly disapply the times lines established by CPR 8.13 for obtaining an extension of time for service of a claim form. The appellant submits that this avenue was available to Durant to disapply CPR 8.13, but it had failed to avail itself of it. The consequence of that failure is that there was no possibility of effective service at the time Durant applied on 20th August 2021 to dispense with service, or when the Dispensation Order was made on 23rd August (perfected 24th August) 2021. The upshot of this is that at the time the judge made the Dispensation Order, the validity of the claim form

[79] BVIHCMAP2016/0047 delivered 18th April 2018, unreported).

in Claim No.62 of 2020 had lapsed with no application to extend the time, either before or after, having been made.

[104] The appellant submits that, in any event, no 'special circumstances' have been shown to exist which could have led a court to disapply the timelines in CPR 8.13. It was Durant's own fault in not applying within the specified period for a protective order extending the validity of the claim form for service on the appellant. It is also Durant's fault for not applying under CPR 26.1(6) after the period had expired, to disapply the timelines in CPR 8.13. Furthermore, it is Durant's fault for failing to serve the claim form on the appellant by any of the methods permitted by CPR 7.8, and in failing to comply with the rules generally, including failing to serve the authorisation code.[80]

[105] The appellant also submits that this is not an appropriate 'Anderton Category 2' case where the appellant has not disputed that the claim form and other court documents were received by his legal advisers, and it was brought to his attention by a permitted method of service within the requisite period. In such cases, a court may retrospectively dispense with service notwithstanding the expiration of the claim form. Authority for this proposition is found in **Rhiannan Anderton v Clwyd County Council**. [81] They argue that this is not such a case because Durant and its lawyers have plainly not attempted to use a 'permitted method of service' under CPR 7.8 nor has there been a minor departure from a permitted method of service.[82] No attempt was made to serve the appellant under the Hague Service Convention or personally in Brazil, and Durant failed to serve him under the method of service permitted by the Service Out Order. Accordingly, this is a Category 1 and not a Category 2 case.

[80] Para. 48.2 of the appellant's written submissions.
[81] Rhiannan Anderton v Clwyd County Council [2002] EWCA Civ 933 at [58]; and see the White Book at 6.16.3.
[82] Para. 48.3 of the appellant's written submissions.

Respondents' Submissions

[106] The respondents set out to counter the appellant's arguments under these two grounds of appeal. First, they assert that the appellant's submission that because the claim form in Claim No. 62 of 2020 had already expired there was no possibility of effective service and, accordingly, no order dispensing with service should have been made by the judge, 'does not lend itself to a consistent and coherent interpretation of the CPR'.[83] They submit that since a judge has the power under CPR 26.1(6) to disapply or to circumvent rule 8.13 where special circumstances are found to exist, the judge should also have the power to circumvent CPR 8.13 in exceptional circumstances under CPR 7.8B by dispensing with service.

[107] In my respectful view, the respondents' argument on this point is circular. More importantly, it omits one important factor which is that Durant never applied for and the judge did not have before him, nor did he consider in giving his reasons for decision, that he ought to disapply CPR 8.13. The simple point is that where the time for service of the claim form has lapsed without it being served on the defendant, and without the period for service to be effected being extended by the court upon a prospective application, the claim form is no longer valid and cannot be served, unless the court makes an order retrospectively to disapply the timelines in CPR 8.13 pursuant to its discretionary power under CPR 26.1(6). This invalidity in the claim form cannot, in my view, be cured simply by an order dispensing with service being made subsequent to the expiration of the time for service of the claim form, as a court cannot dispense with the service of something which, at the time of the making of the order, cannot possibly be achieved, absent an order to disapply the provisions of CPR 8.13. However, the invalidity of the claim form is not incurable. One may apply under CPR 26.1(6), on the basis of special circumstances, to dispense with compliance with the timelines stipulated by rule 8.13(a)(i), that is, to wholly disapply the timelines specified therein within which to apply to obtain an extension of time for service of a claim form. Secondly, on the basis of exceptional circumstances having been made out, that application may

[83] Para. 73 respondents' skeleton arguments.

include an application pursuant to CPR 7.8B for the court to dispense with service of the then revalidated claim form on the defendant.[84]

[108] In their submissions, the respondents seek to make good a distinction between the provisions of the English CPR 7.6(3) which expressly permits a claimant to retrospectively apply for an extension of time to serve the claim form, and the ECSC CPR 8.13 which does not. As their argument goes, the power to extend time for service retrospectively under the English CPR 7.6(3), has led to the English courts placing a restriction on the exercise of the discretion to dispense with service, in circumstances where the claimant would not meet the test for extension of time for serving the claim under the English CPR 7.6(3).[85] The respondents' cite an extract from the **White Book** at para 6.16.3:

> "In *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478 … the Court of Appeal held that the discretionary power to dispense with service under the former rule (i.e. r.6.9) should not be used as a means of circumventing and rendering nugatory the statutory limitation provisions and to do what is forbidden by the clear provisions of r.7.6(3). The court should only dispense with service where there is a possibility of effective service, which is capable of being dispensed with. There was no such possibility of effective service where the time for service of the claim form had already expired".

[109] The respondents submit that since there is no equivalent in the ECSC CPR to the English rule 7.6(3), and the BVI court does not have the power to retrospectively extend the validity of a claim form, the reasoning underlying the guidance in **Godwin v Swindon Borough Council**[86] does not apply, as the need for such guidance has been removed. Instead, in this jurisdiction, the court may disapply CPR 8.13 if special circumstances are found to exist in order to allow service of an expired claim form.[87]

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[84] See JSC VTB Bank v Alexander Katunin and another BVIHCMAP2016/0047 (delivered 18th April 2018, unreported).
[85] Para. 75 of the respondent's skeleton arguments.
[86] [2001] EWCA Civ 1478.
[87] JSC VTB Bank v Alexander Katunin.

[110] ECSC CPR 8.13 expressly provides that an application to extend the time for service of a claim form must be made prospectively, that is, prior to expiration of the original period of validity for service of the claim form or any extended period granted by the court upon application. There is no provision to apply retrospectively to extend the time for service of a claim form, and it has been held that the court cannot utilise its discretion under CPR 26.1(2)(k) to extend time retrospectively. Furthermore, a court can only extend the time under CPR 8.13 if it is satisfied that the claimant has taken all reasonable steps to trace the defendant and serve the claim form.

[111] In my view, the provisions of CPR 8.13, limiting applications to prospective ones and providing for the invalidity of a claim form whose time for service has expired, is more stringent than the English CPR 7.6(3), which permits of retrospective applications to extend the validity of a claim form. The stringency of the limitation provisions in CPR 8.13 must be taken into account by a court when exercising its discretionary powers under CPR 26.1(6) to disapply those limitations in special circumstances. Accordingly, the limitation on the exercise of discretion set out in **Godwin v Swindon** to dispense with service in circumstances where the validity of the claim form has expired, is of even greater force and significance to the court's exercise of discretion under CPR 26.1(6) where special circumstances must be shown to disapply those timelines in CPR 8.13. The simple point is that, where the validity of a claim form has expired, unless the court, upon application, exercises its powers and discretion under CPR 26.1(6) to dispense with the timelines in CPR 8.13 relating to an extension of time for service of a claim, the invalidity of the claim form continues unless and until validated by such an order.

Analysis and Conclusion on Grounds 5 and 6

[112] In this matter, Durant made no application to disapply the timelines in CPR 8.13. Its application filed 20th August 2021, at the behest of the judge, was not such an application. It was simpliciter an application to dispense with service, and to do so at the time when (if the claim form had not been validly served on the appellant in Brazil during its validity) the validity of the claim form had expired. Furthermore, the judge

in granting the application, did not appreciate that he was dealing with a claim form which, if his finding of good service was not correct, had indeed expired; and in circumstances where there was no application before him to disapply CPR 8.13. None of this had been put before him by Durant in its Dispensation Application. Moreover, the judge did not consider or address the invalidity of the claim form in his reasons for decision on the application to dispense with service. This he ought properly to have done and his failure to do so was a grave omission and an error of principle in the proper exercise of his discretion, thus entitling this Court to exercise its discretion afresh.

[113] There can be no question that the court has the power and discretion under CPR 7.8B to dispense with service of a claim form if the circumstances are exceptional. The judge was satisfied that the circumstances in the instant matter were exceptional.[88] The appellant submits that this is an Anderton Category 1 and not a Category 2 case. On the other hand, the respondents submit that this is an Anderton Category 2 case. They rely on the dicta at paragraph [16] in the decision of **Stichting Adminsitratiekantoor Nems v Anna Radchenko and another**[89] to the effect that the judge there had erred in concluding that service could only have been effected in accordance with the Hague Service Convention since the modes of service under CPR 7.8 were disjunctive. They also rely on the dicta of Leon J at paragraphs [20] and [21] of his decision at first instance in **Storca Intertrans Corp et al v Minco Enterprises Limited et al**.[90]

[114] As stated earlier, it is apparent that the Service Out Order provided for only one mode of service of the claim form and other documents on the appellant. That was service under the Hague Service Convention. It did not provide for or stipulate another or any other mode of service under CPR 7.8. Specifically, the Service Out Order did not permit service in accordance with the laws of Brazil as an alternative mode of effecting service on the appellant. While it is correct that the modes of service

[88] Para.[25] of the judgment.
[89] [2019] ECSCJ No. 186 (delivered 29th March 2019).
[90] BVIHC(COM)2015/0096 (delivered 3rd September 2015, unreported).

specified in CPR 7.8 are disjunctive, this entitled an applicant for a service out order to elect which of the specified modes for effecting service they wish the court to order. In doing so, an applicant may select more than one such specified mode. In the instant matter, the Service Out Order provided for only one of those modes and did not permit service by any of the other modes.

[115] In my judgment, the instant matter is an Anderton Category 2 case, that is one where 'the ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service' within the period of the validity of the claim form.[91] It is accepted that in such cases the court can retrospectively dispense with service notwithstanding the expiration of the claim form.[92] This is clearly a matter in which Durant obtained a Service Out Order providing for service of the claim form and other documents on the appellant under the Hague Service Convention in Brazil and the BVI Court issued Letters Rogatory addressed directly to the court in Brazil. This was a clear attempt to serve the claim form and other documents on the appellant in Brazil through one of the modes of service permitted under CPR 7.8.

[116] The upshot was that the BVI Court Documents to be served on him came to the attention of the appellant when his lawyers in Brazil were granted access to the court file there and received copies of the claim form and other documents. This much is not in dispute. There is no assertion by the appellant that the claim form and other documents have not come to his attention through his lawyers or that he is unaware of the proceedings brought against him in the BVI by Durant and the liquidators or the nature of the claims and allegations made against him therein and to which he would be entitled, within the time specified in the Service Out Order, to file a defence. Also, no assertion has been made, and there is no evidence, that the appellant is or will be in any way prejudiced by the manner or method by which the claim form and other documents came to his attention. Indeed, quite to the contrary, the appellant's

[91] Rhiannan Anderson v Clwyd County Council.
[92] White Book at 6.16.3.

lawyers have been given full access to the E-litigation file on the portal in this matter (albeit without prejudice to his assertion that he has not been properly served with the claim form and other documents); and his lawyers were subsequently provided with the authorisation code, albeit not in a manner which complied with the requirements of rule 13.4 of the E-Litigation Portal Rules.

[117] The respondents submit that the appellant's submission that in an Anderton Category 2 case, the circumstances would need to be "truly exceptional", is incorrect. In my view, the respondents are correct that CPR 7.8B proscribes the test for a judge to dispense with service of a claim form, that is, in "exceptional circumstances". The real issue is whether the judge was correct in finding that this standard had been met by Durant. The appellant submitted that the learned judge exercised his discretion to dispense with service based upon a misunderstanding of both the law and the facts.[93] On the other hand, the respondents submit that the judge properly exercised his discretion and his decision ought not to be set aside by this Court. In this regard they rely on the oft cited passage from the judgment of Sir Vincent Floissac CJ in **Michel Dufour and others v Helenair Corporation Ltd**.[94] They contend that the decision of the judge was wholly within the generous ambit within which disagreement is possible. As to exceptional circumstances being established, the respondents set out a number of factors at paragraph 91 of their skeleton arguments. I do not propose to address each of them here.

[118] In my judgment, the learned judge's decision to dispense with service of the claim form and other documents must be upheld. As stated earlier, this is squarely an Anderton Category 2 case. Notwithstanding the expiration of the claim form at the time when the application to dispense with its service was made and the judge made the Dispensation Order, a court is nevertheless empowered to consider and to make an order dispensing with its service on a defendant, in circumstances where, as here, there has been a clear attempt by Durant to serve the claim form and other

[93] See paras. 49, 50 and 51 appellant's skeleton argument.
[94] (1996) 52 WIR 188.

documents on the appellant in Brazil pursuant to the Hague Service Convention. As matters turned out, and through no fault of Durant, service via this court approved mode of service was being effected during the current prevailing world-wide COVID-19 pandemic, making it difficult, if not impossible, to utilise the normal diplomatic channels to effect service on the appellant in Brazil in accordance with Brazilian law, as the Deputy Federal Attorney General of Brazil alluded to in his advice, an extract of which the judge relied upon in his reasoning. The Deputy Federal Attorney General stated (in part):

> "As a public and notorious matter, the pandemic that currently affects the population of virtually all countries in the world, including the British Virgin Islands, which are on lockdown, the unusual procedure for a motion like this through diplomatic channels remains absolutely impaired, making it impossible to timely assess urgent cases filed here, thus making it impossible to meet the deadlines set by the requesting court, the Eastern Caribbean Supreme Court."

[119] The most telling factor in the exercise of the court's discretion is that the claim form and accompanying documents have, indisputably, come to the attention of the appellant in Brazil. Accordingly, the appellant's the primary objective of service of documents, whether within or outside the jurisdiction, has been satisfied. Furthermore, the appellant has not by receiving the BVI Court Documents to be served on him, in this way, suffered any discernable prejudice, and none has been alleged in these proceedings. Likewise, there is no injustice to the appellant who has not in any way been disadvantaged or not put on an equal footing in the said BVI proceedings.

[120] In **Olafsson v Gissurarson (No.2)**[95] where the claimant's attempt to effect service on the defendant during the time limits to serve the claim form out of the jurisdiction by a mode of service allowed under the English CPR, the English Court of Appeal held that: (i) the court's power to dispense with service retroactively under r. 6.16 should be limited to truly exceptional circumstances; and (ii) there is no reason why the general principles identified in the domestic law cases on rule 6.16 should not be applied to the exercise of the court's discretion to dispense with service, whether the

[95] [2008] EWCA Civ 152.

purported service is invalid in England or elsewhere. In my view, the reference there is "truly' exceptional circumstances, is not an attempt to set a new or higher test or threshold for determination of an application to dispense with service whether under the English r. 6.16 or the ECSC CPR 7.8B. The test remains that the circumstances as shown by evidence must be "exceptional", and not a mere assertion of exceptionality without more or where the evidence points to some standard lower than exceptional.

[121] In **Lonestar Communications Corp LLC v Kaye**,[96] where attempts to serve the defendant in Israel under the Hague Service Convention had failed and thereafter the claimant had made numerous other attempts to inform the defendant of the proceedings, via the defendant's former solicitors and various social media and websites connected with him, the court (Teare J) concluded that there was no prejudice to the defendant in making the order dispensing with service.

[122] In my judgment, the circumstances in the instant matter were exceptional within the meaning of that term in CPR 7.8B and the learned judge was correct to so find. The judge was correct to adopt a pragmatic approach in this matter on the basis that service under the Hague Service Convention was sought to be effected during a world-wide pandemic which has propelled States and courts to implement measures necessary to ensure the continued functioning and delivery of vital services by various arms of government, including the judiciary. A simple example of this has been the E-Litigation Portal which has truly been remarkable in providing for a relatively easy and virtual filing of court documents thereby facilitating the proper functioning of our court systems during the uncertain and difficult times and circumstances created by this pandemic.

[123] The judge was in my opinion on sound ground when he stated that 'the appellant knows full well about the current proceedings'. There is absolutely no injustice to the appellant in the court below in making the order dispensing with service of the claim

[96] [2019] EWHC 3008 (Comm).

form and other documents on him in the prevailing circumstances of and surrounding this matter. The fact, as I have found, that service on the appellant had not been effected in Brazil in accordance with Brazilian law, in that the Letters Rogatory have not been sent through the 'normal' diplomatic channels, but had been sent directly to the Brazilian court in contravention of Brazil's Reservation to Article 10 of the Hague Service Convention, does not, in my view, detract from the simple fact that the appellant received the claim form and other documents through his lawyers and within the period for service of the claim form. He is aware and has been aware since August 2020 of these proceedings and of the allegations and claims being made against him.

[124] For the reasons given above, I would dismiss grounds 5 and 6 of the appeal and uphold the judge's order made 24th August 2021, dispensing with service of the claim form and other documents on the appellant.

Ground 7 – Should the Freezing Order have been discharged because the claim form had expired

[125] Having upheld the judge's order dispensing with service of the claim form and other documents on the appellant on the basis that this is an Anderton Category 2 case thus entitling the court to dispense with service and that the judge was correct to conclude that the test of exceptional circumstances had been met by Durant in its Dispensation Application, it follows that the judge was correct not to have discharged the Freezing Order on the basis that the validity of the claim form in Claim No. 62 of 2020 had expired. Accordingly, this ground of appeal also fails.

Disposition

[126] The appellant has succeeded on all of his grounds of appeal, except grounds 5, 6 and 7. He has not been successful in setting aside the judge's order dispensing with service of the claim form and other documents on him. In my judgment, the justice of this matter requires that each party ought to bear their own costs of the appeal and in the court below.

[127] In the premises and for the reasons stated, I would dismiss the appeal, affirm the order of the judge in the court below dated 23rd and 24th August 2021 dispensing with service of the claim form and other documents on the appellant and continuing the Freezing Order dated 22nd April 2020 made in Claim No. 134 of 2017 and in Claim No. 62 of 2020 until the conclusion of the trial of Claim No. 62 of 2020, and set aside the order awarding costs to the respondents in the court below. I would order that each party bear their own costs of this appeal and in the court below.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar