

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2013/00160

BETWEEN:

By way of Claim:

[1]	RENOVA INDUSTRIES LIMITED	
[2]	WEDGWOOD MANAGEMENT LIMITED	
[3]	ZAPANCO LIMITED	
[4]	LAMESA HOLDING SA	
		Claimants
	and	
[1]	EMMERSON INTERNATIONAL CORPORATION	
		Respondent/Applicant
[2]	TOMSA HOLDINGS LIMITED	
[3]	ALABASTER ASSOCIATES LIMITED	
[4]	GARDENDALE INVESTMENTS LIMITED	
[5]	MIKHAIL ABYZOV	
[6]	ROMOS LIMITED	
[7]	FRESKO FINANCIAL LIMITED	
		Defendants

And by way of Counterclaim:

[1]	EMMERSON INTERNATIONAL CORPORATION	
		Respondent/Applicant
[2]	TOMSA HOLDINGS LIMITED	
[3]	ALABASTER ASSOCIATES LIMITED	
[4]	GARDENDALE INVESTMENTS LIMITED	
[5]	ANDREY TITARENKO	
		Respondent
		Claimants by way of Counterclaim
	and	
[1]	RENOVA INDUSTRIES LTD	
[2]	WEDGWOOD MANAGEMENT LIMITED	
[3]	ZAPANCO LIMITED	
[4]	LAMESA HOLDING SA	
[5]	VIKTOR VEKSELBERG	
[6]	INTEGRATED ENERGY SYSTEMS LIMITED	

(a company incorporated under the laws of Belize)
 [7] ODVIN FINANCIAL INC
 [8] GOTHELIA MANAGEMENT LIMITED
 [9] RENOVA HOLDING LIMITED
 [10] VLADIMIR KUZNETSOV

[11] ALEXEI MOSKOV

Applicant/Respondent

[12] ALEXANDER KOLYCHEV
 [13] MIKHAIL SLOBODIN
 [14] MAKSIM MAYORETS
 [15] RENOVA MANAGEMENT AG
 [16] PAO T PLUS
 [17] INTEGRATED ENERGY SYSTEMS LIMITED
 (a company incorporated under the laws of Cyprus)
 [18] CLERN HOLDINGS LIMITED
 [19] STARLEX COMPANY LIMITED
 [20] SUNGLET INTERNATIONAL INC
 [21] OOO RENOVA-HOLDING RUS

Defendants by way of Counterclaim

And by way of Ancillary Claim:

[1] MIKHAIL ABYZOV
 [2] ROMOS LIMITED
 [3] FRESKO FINANCIAL LIMITED

[4] ANDREY TITARENKO

Respondent

[5] GOLDFORT LIMITED

Claimants by way of
Ancillary Claim

and

[1] RENOVA INDUSTRIES LTD
 [2] WEDGWOOD MANAGEMENT LIMITED
 [3] ZAPANCO LIMITED
 [4] LAMESA HOLDING SA
 [5] VIKTOR VEKSELBERG
 [6] INTEGRATED ENERGY SYSTEMS LIMITED
 (a company incorporated under the laws of Belize)
 [7] ODVIN FINANCIAL INC
 [8] FLOPSY OVERSEAS LIMITED
 [9] VLADIMIR KUZNETSOV

[10] ALEXEI MOSKOV

Applicant/Respondent

[11] ALEXANDER KOLYCHEV

[12] MIKHAIL SLOBODIN
 [13] RENOVA MANAGEMENT AG
 [14] RENOVA HOLDING LIMITED
 [15] PAO T PLUS
 [16] INTEGRATED ENERGY SYSTEMS LIMITED
 (a company incorporated under the laws of Cyprus)
 [17] CLERN HOLDINGS LIMITED
 [18] MAKSIM MAYORETS

Defendants by way of Ancillary Claim

And by way of Third Ancillary Claim:

[1] EMMERSON INTERNATIONAL CORPORATION

RespondentApplicant

Claimant by way of Third Ancillary Claim

and

[1] VIKTOR VEKSELBERG
 [2] INTEGRATED ENERGY SYSTEMS LIMITED
 [3] VLADIMIR KUZNETSOV
 [4] EVGENY OLKHOVIK
 [5] ANDREY BURENIN
 [6] YAKOV TESIS

[7] ALEXEI MOSKOV

Applicant/Respondent

[8] IGOR CHEREMIKIN
 [9] IRINA MATVEEVA
 [10] PAVLINA TSIRIDES
 [11] IRINA LOUTCHINA SKITTIDES
 [12] PHOTINI PANAYIOTOU
 [13] ARTEMIS ARISTEIDOU
 [14] A.B.C. GRANDESERVUS LIMITED
 [15] STARLEX COMPANY LIMITED
 [16] RENOVA INDUSTRIES LIMITED
 [17] SUNGLET INTERNATIONAL INC.

Applicants

Defendants by way of Third Ancillary Claim

Appearances:

Mr. Stephen Rubin, QC and with him Mr. Andrew Willins and Mr. Fraser Mitchell for Mr. Alexei Moskov

Mr. Phillip Marshall, QC with him Mr. Iain Tucker, Ms. Colleen Farrington, Mr. Ajay Ratan and Mr. Daniel Burgess for Emmerson International Corporation

Mr. Jonathan Crystal and with him Mr. James Walmsley, Mr. Phillip Baldwin and Mr. Jonathan Child for Mr. Andrey Titarenko.

2020: July 15, 16;
2021: March 18; April 15.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** This is the Judgment of the Court in respect of a number of related interlocutory applications which were heard on 15th and 16th July 2020. Whilst these applications are all procedural, their outcome may have serious financial consequences for the parties concerned. In a nutshell, Mr. Moskov seeks to avoid being deemed personally to have admitted a very large multi-million dollar claim, or otherwise even to have to face one, whereas his opponents, Emmerson International Corporation ('Emmerson') and Mr. Andrey Titarenko ('Mr. Titarenko'), seek to fix Mr. Moskov with such liability.

Background

- [2] In the interests of clarity and simplicity it is not necessary to relate Emmerson's, Mr. Titarenko's or Mr. Moskov's exact capacities in relation to these proceedings. They can be ascertained from the heading to this Judgment.
- [3] On 29th June 2017 this Court granted Emmerson an order obtained on an *ex parte* basis to do two things:
- (1) Amend its pleadings in its Third Ancillary Claim ('3AC') against seventeen named Defendants, including Mr. Alexei Moskov ('Mr. Moskov'); and
 - (2) Serve the 3AC outside of the jurisdiction on a number of Defendants, including upon Mr. Moskov.
- [4] The order of 29th June 2017 gave each of the Defendants to the 3AC 35 days from the date of service to file an Acknowledgment of Service and 56 days from the date of service to file a Defence and Counterclaim.
- [5] Further orders were made on 21st February 2018 and 21st June 2018 on an *ex parte* basis. The effect of these was, *inter alia*, to add Mr. Titarenko as a new Claimant by way of Counterclaim and Ancillary Claim and Mr. Moskov and a company called Witel AG, amongst

others, as new Defendants by way of Counterclaim and Ancillary Claim, and to grant Emmerson permission to serve the Counterclaim and Ancillary Claim out of the jurisdiction, including upon Mr. Moskov.

[6] After Mr. Moskov received these papers, he applied to this Court to challenge jurisdiction and forum and/or to set aside or stay the proceedings against him. In particular, he seeks to set aside the order dated 29th June 2017 which granted Emmerson permission to serve the 3AC upon him out of the jurisdiction and the orders made on 21st February 2018 and 21st June 2018.

[7] Mr. Moskov at the same time applied, if it should be considered necessary for him to do so, for an extension of time for the filing of his Acknowledgment of Service and making these applications and for relief against any sanctions.

[8] Mr. Moskov made his application on 23rd October 2019, and amended it on 3rd July 2020. I will refer to this as 'Mr. Moskov's Application'.

[9] Mr. Moskov filed an Acknowledgement of Service on 23rd October 2019 through legal practitioners in this jurisdiction (the 'BVI'). In this, he reserved his rights to challenge jurisdiction. He indicated his intention to defend the claims. He acknowledged an address in Switzerland. So far, the Acknowledgement of Service was in standard form. But it also contained the following somewhat curious response to Question 1:

"1. Have you received the Re-Re-Re-Re-Amended Defence and Counter Claim and Ancillary Claim and Third Ancillary Claim with the above claim number?

Mr Moskov does not dispute that he has been served as a matter of law but we are unable to say what he received as certain papers were received by Mr. Moskov's housekeeper and were returned by the Swiss Postal Service to the BVI Court, and it is not clear what that package contained. However, we are filing this to challenge the jurisdiction but not the service."

[10] In support of Mr. Moskov's application, his legal practitioners filed a Third Affidavit of Ms. Laure-Astrid Wigglesworth, one of that firm's associates.

[11] What now follows is a relation of what Ms. Wigglesworth said. None of this is to be taken as a finding of the Court. Any findings the Court may make will be set out in the **DISCUSSION** section below.

[12] Ms. Wigglesworth began her account as follows:

“I understand that service upon Mr Moskov is said to have occurred on or around 4 March 2019. The circumstances in which that occurred are not entirely clear. I am informed from the statements and letter exhibited hereto...and believe that the following seems to have occurred: ...”

[13] It will be immediately apparent that Ms. Wigglesworth is not a primary witness of fact. She relies entirely upon information supplied by others. She does not display a high level of certainty. Even her belief is qualified as being in relation to what ‘seems to have occurred’.

[14] The ‘statements’ Ms. Wigglesworth refers to comprise the following:

- (1) A rather grainy page and a half statement, in English, apparently signed by Mr. Moskov, but not before a notary or any other witness, undated, with the location where it was made left blank;
- (2) A similar rather grainy one page statement, in English, apparently signed by one Oksana Moskova, but not before a notary or any other witness, undated, with the location where it was made left blank;
- (3) A somewhat clearer one page statement, in English, apparently signed by one Claudia Pisedda, but not before a notary or any other witness, dated 18th October 2019, with the location given as Wädenswil (a municipality in Switzerland). Ms. Pisedda (if it was indeed she) describes herself as ‘a housekeeper to Mr and Mrs Moskov’.
- (4) A similarly somewhat clearer one and a third page statement, in English, apparently signed, in rather uneven and elementary handwriting, by one Ana Sofia Pereira Alves, but not before a notary or any other witness, also dated 18th October 2019, with the location given as Wädenswil (a place in Switzerland). Ms. Pisedda (if it was indeed she) also describes herself as ‘a housekeeper to Mr and Mrs Moskov’.
- (5) A letter from a Swiss law firm, Lalive SA, dated 23rd October 2019, addressed to Mr. Moskov, headed ‘Re: Steps taken, and facts established by LALIVE SA regarding the attempt of serving documents to yours address in Wädenswil on 4 March 2019’ (‘the Lalive Letter’).

[15] From the context, one can assume that Oksana Moskova is Mr. Moskov’s wife, Mrs. Moskova.

[16] Ms. Wigglesworth summarizes the events pertaining to service as follows:

- (1) Documents pertaining to these proceedings were sent from the Swiss Court to Mr. Moskov's personal residence by recorded delivery with Swiss Post. According to the delivery receipt, a package arrived in the early afternoon of 4th March 2019;
- (2) Mr. Moskov was not present at his residence at this time. According to his diary entries, he was at his office in Zurich and he took a flight later that afternoon to Moscow, before returning to Zurich on 6th March 2019.
- (3) 'Unfortunately, for whatever reason' this package allegedly did not come to Mr. Moskov's attention. Enquiries made of the Swiss Court and Swiss Post suggest that a box was signed for by one of the Moskov housekeepers, Ms. Claudia Pisedda. Ms. Pisedda does not recall this specifically but she accepts that she must have done so because her signature is on the Swiss Post delivery confirmation. The Court is told by Ms. Wigglesworth that Ms. Pisedda's usual practice is to leave anything she signs for in a designated place in Mr. Moskov's house for other staff to deal with.
- (4) Another of their housekeepers, Ms. Alves, dealt with the box by speaking to Mrs. Moskov about it. Ms. Alves allegedly says that it did not have Mr. Moskov's name on it, so Ms. Alves thought it had been delivered by mistake. Allegedly neither Ms. Alves nor Mrs. Moskov recognized the addressee on the box. I pause here to observe that nobody on Mr. Moskov's side says what the name on the box in fact was. The box allegedly did not have any details indicating to Ms. Alves that it had come from the Zurich High Court and Mrs. Moskov allegedly does not recall seeing any official marks on the box either.
- (5) Allegedly thinking that the package had been delivered by mistake, Mrs. Moskov asked Ms. Alves to return the box to Swiss Post, which she did on 18th March 2019.
- (6) Allegedly no one in Mr. Moskov's household opened the box before it was returned, so no one can say what it contained. It may have contained court papers, or it may not.
- (7) Mr. Moskov was allegedly told about the box by his wife sometime later, in the context of another conversation. He claims not to have seen the box. He says he did not at that time associate the box with this or any litigation and had no reason to do so based on what his wife told him. As to whether the box was or was not a box of court papers, the information given orally to Lalive SA by the Zurich High Court originally was that the box, addressed to Mr. Moskov, was returned to them by 11th March and sent to the British

Embassy on 18th March 2019, who then sent it to the BVI where it arrived on 21st March 2019. The box delivered to Mr. Moskov's house was not returned by Ms. Alves until 18th March 2019. It reached the Zurich High Court the following day, 19th March 2019.

(8) Only in early August 2019 did Mr. Moskov allegedly realize that the box might be linked to these proceedings when it was brought to his attention by advisers that parties associated with Mr. Mikhail Abyzov in these proceedings ('Abyzov parties') were alleging that Mr. Moskov had been served. This, says, Ms. Wigglesworth, is why Mr. Moskov did not take any steps until August 2019 to investigate the position on service and why he did not file an Acknowledgement of Service or seek to challenge jurisdiction sooner.

(9) Mr. Moskov argues that as the box was never opened and it is not clear what was provided, it is therefore a matter of inference only that the box which was received at Mr. Moskov's address was a box relating to these proceedings. But Mr. Moskov does not dispute that as a matter of Swiss law (which governs the postal rules for service in Switzerland under the Hague Convention) he was served with the papers on 4th March 2019.

[17] Ms. Wigglesworth recounts that Mr. Moskov gathered that he had been served on 4th March 2019 from a Twentieth Affidavit of a Mr. Dodonov dated 29th July 2019 which was filed by the Abyzov parties in respect of part of these proceedings. That affidavit exhibited a certificate of service from the Swiss Court, which recorded that Mr. Moskov had been served 'in person' at his Swiss address. Ms. Wigglesworth attests that '[a]ssuming that service on Mr. Moskov was valid, the deadline under the June 2018 Order for filing an acknowledgement of service and a defence had already expired (on 9 April and 30 April 2019, respectively).'

[18] The problem for Mr. Moskov is that one of the claims served on Mr. Moskov appears to have been an 'ancillary claim', the 3AC. 'Ancillary claims' attract a specific provision in the Eastern Caribbean Supreme Court Rules 2000 ('CPR'). This is CPR Rule 18.12(1) and (2)(a) which provide:

"1. This rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.

...

2. The party against whom the ancillary claim is made –

a. is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim”.

- [19] It can immediately be appreciated why Mr. Moskov is so keen to obtain a retrospective extension of time to file his Acknowledgement of Service and Defence. Without such an extension, unless he can set aside the underlying *ex parte* orders or challenge jurisdiction, he will be liable in respect of the claims made against him in the 3AC. Understandably, that is a most unattractive proposition for Mr. Moskov personally. It is also unattractive for other parties aligned with him (or that he has aligned himself with), because he might eventually have to give evidence as a witness. He would naturally do so for the ‘defence’, if one can put it thus, but he would then at least in theory appear as a compromised witness, because he has already been deemed to admit facts with which he may disagree.
- [20] Returning to Ms. Wigglesworth’s narrative, she says Mr. Moskov discovered for the first time on around 2nd August 2019 that he had supposedly been served with these proceedings. This was allegedly a complete surprise to him because he did not associate the delivery of the box or its return with the proceedings. His immediate reaction was allegedly to assume that Mr. Dodonov had made a mistake, particularly as Mr. Dodonov’s evidence was that he had been served personally, but Mr. Moskov had not been at his house at that time, so he was not served ‘in person’. Nevertheless, Mr. Moskov instructed lawyers to investigate the position before then engaging BVI legal practitioners who now represent him.
- [21] Ms. Wigglesworth attests further that those investigations were not without complications. Initially, Mr. Moskov allegedly believed that he had not been validly served. He sought legal advice from Swiss lawyers as to his position under Swiss law. That law firm made inquiries with the Zurich High Court and established that a box had been supposedly signed for, but returned. The Zurich High Court provided information orally but was not prepared to provide copies of any documents on their file, which made investigating the position more difficult. This in turn made it more difficult to investigate the position with Mr. Moskov’s own household staff. Inquiries were made with Swiss Post, but their postman was on holiday and Swiss Post indicated that no progress could be made until his return. The box itself had by then been returned to the BVI, so it was not possible for Mr. Moskov to establish what it contained, except through inference.

[22] Mr. Moskov engaged his BVI legal practitioners on or around Monday 7th October 2019. Upon their face, the statements of the Moskov housekeepers were signed on 18th October 2019. On 23rd October 2019 Mr. Moskov's BVI legal practitioners filed his Acknowledgement of Service and a first iteration of Mr. Moskov's Application.

[23] Thus far, this has been a high level account of what Mr. Moskov maintains happened. We also need to descend to the next level of detail.

[24] First, it is appropriate to consider what else was said in the 'statements'.

[25] Mr. Moskov states that on 4th March 2019 he went to his office in Zurich as usual in the morning and stayed there until 2.45 p.m. when a limousine picked him up to take him directly to Zurich airport to catch a private charter flight to Moscow at 4 p.m. He returned to Zurich on a regular scheduled flight on 6th March 2019. He says he did not remember anyone discussing a box with him at the time and he 'most certainly did not see it'. He continued:

"Sometime after that, my wife mentioned that some box was delivered by mistake and that they returned it to the post office. I did not grant much attention to that fact and could not even imagine that the box could have been from the court or somehow connected with BVI proceedings.

Only after my lawyers told me that Mr. Dodonov in his affidavit said that I had been validly served, I remembered about those events with the box."

[26] The only other information he could give was that the housekeeper had returned the box to the Post Office and had provided the receipt, which Mr. Moskov found in his family's files when his lawyers had asked him to search for it.

[27] This 'statement' took the form of questions and answers. It did not say who posed the questions and whether English was the original language. Nor did it contain any certificate of truth.

[28] Mrs. Moskov's 'statement' took a similar form – as did those of the two housekeepers.

[29] Mrs. Moskov added that Ms. Alves discussed the box with her as she did not recognize the addressee family name and wanted to know what she should do with it. Mrs. Moskov and Ms. Alves allegedly agreed that she should return the box to the Post Office.

- [30] In answer to a question 'to who was the box addressed?' Mrs. Moskov allegedly replied 'I do not recall the details, but it was not addressed to anyone in our family. I remember that I could not understand who the sender was as well.'
- [31] Mrs. Moskov also stated that she did not recall seeing any official marks on the box or details of the sender, and that she did not open it.
- [32] Ms. Pisedda allegedly stated that she has no recollection of signing for delivery of the box but accepted that she must have done because her signature was on the delivery receipt. She said that she presumed she then placed it in a designated place for other staff members to deal with. She allegedly said that she had no recollection of the addressee of the box, of any stamps or distinguishing marks or anything indicating it came from the Zurich High Court, and said that she did not open it.
- [33] Ms. Alves added that she returned the box to the Post Office on 18th March 2019, as shown by a receipt. She allegedly said that box was 'normal but heavy, medium size, without any special signs or seals'. She allegedly said it did not have the Moskov family name on it but that she did not recall to whom it was addressed. She allegedly stated that she did not recall seeing any stamps or marks or anything indicating it came from the Zurich High Court. She allegedly said it was delivered by a regular Swiss Postman, according to the delivery confirmation. She allegedly claims not to have opened it either.
- [34] The Lalive Letter set out what Lalive SA called 'a chronological overview of the steps we took in Switzerland to investigate the attempt of service documents to your address in Wädenswil on 4 March 2019, including the facts we have been able to establish to date'. It was written in good professional English.
- [35] Lalive SA related that Mr. Moskov instructed them on **8th August 2019** to prepare a written opinion on the position under Swiss law on service of foreign judicial documents in Switzerland and on 'certain issues' (which are not identified in the Lalive Letter) relating to the service the Court is concerned with presently.
- [36] On Monday **12th August 2019** Lalive SA wrote to the Zurich High Court ('ZHC') to inquire if the alleged service had taken place, in what form, to whom and at what time, with a request for documents.
- [37] The next day, **13th August 2019**, the ZHC telephoned Lalive SA to inform it that:

- (1) A package weighing 17.5kg, addressed to Mr. Moskov, was delivered on **4th March 2019** by registered mail of Swiss Post to Mr. Moskov's address in Wädenswil;
- (2) Swiss Post provided the ZHC with a signed delivery confirmation;
- (3) On **11th March 2019** the package was returned to the ZHC by regular mail;
- (4) On **18th March 2019** the ZHC sent the package to the British Embassy in Berne, which confirmed receipt of the same on 21st March 2019 'before apparently forwarding it to the registrar in the BVI';
- (5) The ZHC confirmed orally that the signature on the delivery confirmation did not match Mr. Moskov's signature as provided by Lalive SA to the ZHC with its letter of 12th August 2019. The ZHC undertook to investigate further the details of the service with Swiss Post.

[38] On Monday **19th August 2019** Lalive SA had a further telephone conversation with the ZHC. The ZHC took the position that it could not provide a copy of the delivery confirmation, as this would require a mutual legal assistance application. Furthermore, the ZHC informed Lalive SA that the Postman who conducted the delivery was on holiday, and, moreover, Swiss Post stressed the difficulty of providing details on a service which had been effected in March 2019.

[39] Also on **19th August 2019**, Lalive SA invited Mr. Moskov to provide a list of specimen signatures of himself and any adult who might have been at his house at the time of the delivery, so that Lalive SA could confirm with the ZHC if any of these matched the signature on the delivery confirmation.

[40] Such a list was provided to Lalive SA on **2nd October 2019**.

[41] On Monday **7th October 2019**, Lalive SA were provided with a package return receipt dated 18th March 2019 and corresponding tracking number. Lalive SA established from this that the package had in fact been sent to the ZHC on 18th March 2019 and received by the ZHC only on 19th March 2019.

[42] On **8th October 2019** Lalive SA wrote to the ZHC to confirm whether any of the signatures provided by or on behalf of Mr. Moskov matched the signature on the delivery confirmation.

- [43] The same day, **8th October 2019**, Lalive SA telephoned Swiss Post and were provided with a copy of the delivery confirmation. This showed that the signature was that of Ms. Pisedda. Swiss Post also provided Lalive SA with its record of the addressee details. This appeared to show that the package was addressed to Mr. Moskov at his address.
- [44] On **10th October 2019**, during a further telephone conversation between Lalive SA and the ZHC, the ZHC confirmed its refusal to say whether any of the specimen signature matched the one on the delivery confirmation, but informed Lalive SA that Swiss Post had been able to speak to the Postman, who confirmed his recollection that he had handed a box of documents over to a woman at his address.
- [45] On **22nd October 2019**, the day before Mr. Moskov acknowledged service in these proceedings, Lalive SA spoke again with the ZHC by telephone; the ZHC confirmed on this occasion that the package had been sent back to the ZHC on 18th March 2019 and received on 19th March 2019, after which the ZHC forwarded the package to the British Embassy in Berne.
- [46] Two further pieces in the jigsaw puzzle of information can be put down here:
- (1) The delivery confirmation signed by Ms. Pisedda showed Mr. Moskov's name as the recipient of the package;
 - (2) Secondly, when the package was returned to the Post Office by someone from Mr. Moskov's household, the package was not simply handed over and left there, or, if the Post Office were to refuse it as having no return address, discarded or handed to the police. Whoever took it to the Post Office paid the Post Office CHF 23 to return it to the sender using a priority parcel service, as shown by the receipt.

Emmerson's Deemed Admission Application

- [47] On 31st October 2019 (going by the date in the amended version dated 8th November 2019), Emmerson made an application for orders that Mr. Moskov had been properly served with proceedings and that he is deemed to have admitted the Amended Ancillary Claim and the 3AC pursuant to CPR 18.12(2)(a). The grounds for this application were stated to be that Mr. Moskov had been served with both those proceedings on 4th March 2019 and that he had failed to file any acknowledgement of service or defence within the prescribed time or at all.

[48] As I have mentioned, that application was amended on 8th November 2019, to delete reference to acknowledgement of service. Emmerson maintains its application on the basis that Mr. Moskov had not filed a Defence within the prescribed time or at all.

[49] To support this application Emmerson filed a Twenty Seventh Affidavit of a Mr. Konstantin Dodonov dated 11th November 2019. This was a largely pro-forma document which updated the Court on some aspects, such as Mr. Moskov's Acknowledgement of Service.

Emmerson's Strike Out Application

[50] Emmerson also made an application on 8th November 2019 to seek orders that pertinent parts of Ms. Wigglesworth's Third Affidavit should be struck out as inadmissible hearsay, in that the source of her information had not been provided, in breach of the requirements of CPR 30.3(2)(b)(ii). The result would be to exclude the 'statements' of Mr. and Mrs. Moskov, Ms. Pisedda and Ms. Alves and to emasculate other details from Mr. Moskov's account as proffered by Ms. Wigglesworth. This Application was later amended on 11th June 2020.

[51] In support of this application, Emmerson adduced a Twenty Sixth Affidavit of Mr. Dodonov.

[52] Mr. Dodonov pointed out the following.

[53] Mr. Moskov is a senior manager in the Renova Group. (I can add, without being controversial, that various persons and/or entities connected with or part of the Renova Group are parties to this litigation.) Mr. Moskov is the sole director of a company called Witel AG, a company incorporated in Switzerland. Witel AG used to be called Renova Management AG. Mr. Moskov is also publicized on Witel AG's website as being its Chief Operations Officer and Chairman.

[54] On 4th March 2019 it was not just Mr. Moskov who had been served. So was Witel AG. Mr. Dodonov says Witel AG was served with those proceedings known to the parties as the Counterclaim and the Ancillary Claim. Mr. Moskov was served with these, together with the 3AC.

[55] But, observes Mr. Dodonov, Mr. Moskov makes no mention of Witel AG in his account. Mr. Dodonov suggests that Mr. Moskov most probably did know of the service on him, because he would, and as Witel AG's sole director should, in all likelihood, have known about the service on Witel AG and what Witel AG then did about it.

- [56] Witel AG instructed the same firm of BVI legal practitioners as now represent him also. Witel AG caused them to file an Acknowledgement of Service on 28th March 2019 and on 29th April 2019 Witel AG filed an application to dispute the Court's jurisdiction. On 18th October 2019 Witel AG filed further evidence in support of its jurisdiction challenge. Finally, on 23rd October 2019, Mr. Moskov filed an application seeking to dispute the Court's jurisdiction over him. This was more than six months after time expired for him to file an acknowledgement of service (which is required as a necessary precondition under CPR 9.7 for a jurisdiction challenge).
- [57] Mr. Dodonov makes other allegations, to the effect that Mr. Moskov's conduct in apparently deliberately not engaging with the proceedings is of a piece with other Renova senior managers who have likewise been sued and who are seeking to frustrate or avoid the claims against them and also that Mr. Moskov's conduct is likely to have been a coordinated plan devised by the Renova Group's legal team.
- [58] Mr. Moskov responded to the Emmerson deemed admission and strike out applications with a First Affidavit dated 6th December 2019. In this, Mr. Moskov:
- (1) Confirmed that his instructions had been the source of Ms. Wigglesworth's information and belief for her Third Affidavit;
 - (2) Reiterated the account given in Ms. Wigglesworth's Third Affidavit concerning delivery of the package and his ignorance of it;
 - (3) Says he instructed his BVI legal practitioners on 7th October 2019;
 - (4) Confirmed he is the sole director of Witel AG. He claimed that he was aware of the circumstances surrounding Witel AG's jurisdiction challenge and that he saw that he himself had been named as a party in the cover pages to the papers. He was therefore waiting for the Abyzov parties to serve him with the proceedings;
 - (5) Denied that his conduct was similar to other Renova Group senior managers, drawing some distinctions; and
 - (6) Denied that he was involved in a coordinated plan not to participate in or engage with the proceedings.

- [59] Emmerson responded with a Second Affidavit of a Ms. Catharine Barbour, a BVI legal practitioner working for Emmerson's BVI legal representatives. This affidavit was the vehicle for putting into evidence a letter from a Swiss law firm, Messrs. Froriep dated 20th January 2020 (the 'Froriep Letter'). Like Lalive SA for Mr. Moskov, Emmerson had engaged Messrs. Froriep to investigate the circumstances of the delivery to Mr. Moskov on 4th March 2019.
- [60] Messrs. Froriep wrote to the ZHC on 9th January 2020 posing questions *inter alia* concerning any markings on the package. They reported that a clerk of the ZHC telephoned them on 13th January 2020 and that in this call the clerk explained that envelopes sent by the ZHC always show the sender and in the case of parcels an adhesive label is printed out. Such a label indicates the sender, being here the ZHC, and the address of the addressee. The clerk explained further that the parcel in question was delivered to Mr. Moskov's address and handed over at his place of residence. It weighed 17 kg. It had been sent as registered mail and not as a court document as would be the case with letters. The content of the label that had been stuck on the parcel containing the address of the recipient was still stored in the ZHC's electronic record system. The clerk explained that the ZHC also had access to the Swiss Post delivery confirmation records, which showed that the package had been accepted by a woman. Messrs. Froriep reported that the postman had inadvertently entered 'recipient in person' into the electronic system, which was a mistake. Messrs. Froriep were informed by the clerk that when the package was returned to the ZHC, the parcel had been opened because it had been taped up with a different tape. The ZHC had not checked whether the content had been returned in full.
- [61] Mr. Moskov applied for permission to file a Second Affidavit on 14th May 2020. He supplied a draft. In this, apart from raising pro forma matters and making submissions (which is improper in an Affidavit), Mr. Moskov:
- (1) Asserted he was still uncertain what in fact had been served on him;
 - (2) Stated that Mrs. Moskov, Ms. Piscedda and Ms. Alves would not be providing further evidence: that was because since Mr. Moskov has become 'embroiled in' the proceedings, he and his family and household had become the subject of surveillance and intimidation by an unidentified group. Mr. Moskov says he has reported this to the Police and it was the subject of a confidential investigation by the Moscow Investigation

Committee. Mr. Moskov states that he does not believe it is safe for others apart from himself to give evidence;

- (3) Highlights weaknesses in the Froriep Letter in a clear effort to discredit it. He notes no formal or verbatim notes of the telephone conversation with the clerk were disclosed. He states also that the 'Froriep Letter also does not confirm whether or not the relevant adhesive label detailing that the documents were from the High Court was fixed to the outer box or the inner parcel'. It is hereby that Mr. Moskov introduces a hypothesis (otherwise not borne out by other evidence) that there had been an inner parcel and an outer box. As Mr. Moskov's learned Counsel submitted at the hearing, Mr. Moskov contends that because the package was not suitable to be sent by the ZHC's normal court document delivery service, it had to be repacked for registered mail and that is where the mistake with the labelling may have happened, i.e. that the ZHC's label became hidden and covered by an outer box packaging. Mr. Moskov's skeleton argument for the hearing stated that the Froriep Letter reported that because the package weighed 17kgs it had to be placed in a further box. That was not accurate; the Froriep Letter mentioned no further box. I asked Mr. Moskov's learned Counsel how the package had then found its way to Mr. Moskov's house. His reply was that the address on the outer box was obviously correct.
- (4) Sought to discredit any idea that the different tape on the box meant that it had been opened. He asserted that no one of his household had opened the box;
- (5) Stressed that the delivery process records cannot be relied upon, because, for example, the Postman had erroneously recorded the package to have been delivered to him in person.
- (6) Says that 'it is unclear what reliance Emmerson can sensibly place on the Froriep Letter'.

The Issues for Determination Now

[62] As Mr. Moskov's learned Counsel observed, the only issues requiring determination upon this occasion are the following:

- (1) Whether Mr. Moskov needs an extension of time for filing an Acknowledgement of Service and/or a Defence before he can continue with his application challenging jurisdiction and forum.

- (2) Whether Emmerson is entitled to an order that Mr. Moskov is deemed to have admitted the claims against him.
- (3) If an extension of time is needed, whether Mr. Moskov needs relief from sanctions before an extension can be granted and if so whether he should be granted it.
- (4) Whether Mr. Moskov is to be granted an extension of time (if needed).
- (5) Whether certain affidavit evidence should be admitted.

Mr. Moskov's Submissions

1. No Extension of Time required

1.1 Absence of a CPR11.16(3) notice

[63] Mr. Moskov argues that he does not need an extension of time for filing an Acknowledgement of Service and/or a Defence before he can continue with his application challenging jurisdiction and forum.

[64] He argues that time never began to run against him for these purposes, because the Abyzov Parties failed to include on the *ex parte* orders of 29th June, 21st February 2018 and 21st June 2018 a mandatory notice prescribed by CPR 11.16(3). This provides:

"An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule."

[65] CPR 11.16(1) provides:

"A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again."

[66] CPR 11.16(2) provides:

"A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent."

[67] Mr. Moskov argues that as the prescribed 14-day notice was not included, time under CPR 11.16(2) should not be held to have begun to run against him as an order in mandatory form was never served on him.

[68] Mr. Moskov calls in aid, in order to support this argument, *dicta* of Jack J in **ABC Grandeservus Limited v Emmerson International Corporation**:¹

“I should add that ... there is a different procedural route by which ABC can seek to have the grant of permission to serve the amended pleading sets aside. Because this was an order obtained ex parte, it should have contained a warning that the absent party against whom the order was made could apply within 14 days of service of the order on him to vary or discharge it: see CPR rule 11.16(3). The original freezing order does not contain such a warning. Instead, it contains a general right to apply on 48 hours’ notice.”

1.2 CPR 9.7A – application to challenge jurisdiction may be made ‘at any time’

[69] Mr. Moskov contends, moreover, that pursuant to CPR 9.7A and/or the Court’s inherent jurisdiction (as recognized in **Addari v Addari**²) a Defendant such as Mr. Moskov may apply for a stay on forum grounds at any time, such that he does not need an extension of time. Mr. Moskov acknowledged service on 23rd October 2019 and applied for a stay on forum grounds.

[70] CPR 9.7A materially provides:

“9.7A

1. A defendant who contends that the court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a stay and a declaration to that effect.
2. A defendant who wishes to make an application under this paragraph 1 must first file an acknowledgment of service if he has not previously done so.
3. An application under paragraph (1) of this Rule may be made at any time.
- ...
6. Where a defendant makes an application under this Rule, the period for filing a defence (where none has yet been filed) is extended until the time specified by the court under paragraph (5)(b) and such period may be extended only by an order of the court.”

¹ BVIHCM2013/0160 (unreported, delivered 27th May 2019) at paragraph 72 (Jack J (Ag.)).

² BVI Civil Appeal No. 21 of 2005 (unreported, delivered 23rd September 2005).

[71] Mr. Moskov argues that the effect of this provision is that he can simply apply to challenge jurisdiction and the Court should exercise its discretion whether or not that application should be granted. He says that no relief from sanctions is required to relieve him from the consequence of CPR 18.12. He contends that an ancillary claim should be treated as no different from an ordinary action, and a deemed admission under CPR 18.12 as no different from a judgment in default of a defence. In an ordinary action no relief from sanctions is needed to set aside a default judgment or to apply for further time to file a defence, following the Privy Council decision in **The Attorney General v Matthews**.³

2. 'Extensions of time can be granted at any time'

[72] Mr. Moskov argues that if he is wrong that he does not need an extension of time, he can apply for one retrospectively. He argues that there is an unrestricted power in the Court to extend time for making an application to stay a set of proceedings on *forum conveniens* grounds at any time, unless the Rules positively direct the opposite, which they do not. The Court's power to do so derives from CPR 26(2)(k) or otherwise from its inherent jurisdiction. Mr. Moskov relies in this regard upon the Privy Council decision in **Texan Management Limited et al. v Pacific Electric Wire & Cable Company Limited**.⁴

[73] Mr. Moskov argues that neither CPR 18.12 nor CPR 9.7 preclude an application for an extension of time being given retrospectively, nor does any other rule. CPR 9.7(3) even envisages that a defendant can apply to dispute jurisdiction within the time for filing a defence as 'extended' by the Court. Thus, says Mr. Moskov, he can simply apply for a retrospective extension of time to file a defence without obtaining relief from sanctions first.

3. CPR 18.12 'deemed admission is not a sanction'

[74] Mr. Moskov argues that a deemed admission under CPR 18.12 is not a 'sanction for non-compliance' as that phrase is meant in CPR 26.7. Mr. Moskov had merely been afforded an opportunity to file an Acknowledgement of Service and a Defence within certain time limits. He was not ordered to do so. Mr. Moskov argues that sanctions are provisions punishing a party for failing to comply with a rule or an order. A deemed admission under CPR 18.12 is not seeking to 'punish' a defendant to an ancillary claim. It merely recognizes the fact that where no defence has been filed the allegations are taken as admitted in the same way as if a

³ [2011] UKPC 38.

⁴ [2009] UKPC 46.

defence admitting the claims had been filed. If a deemed admission were to be regarded as a sanction or somehow equivalent to a default judgment there would be an express provision allowing for 'deemed admissions' to be set aside. Deemed admissions describe a consequence of not filing a defence when given the opportunity to do so, how the action then proceeds and in that regard what is not in issue in the action. They are not a punishment or 'sanction'. Mr. Moskov argued that a deemed admission can be withdrawn like any other admission.

[75] Mr. Moskov recognized that he faces contrary authority from this Court in this matter,⁵ in which the Court held that a CPR 18.12 deemed admission was a sanction. Mr. Moskov observes and accepts that upon appeal from that decision the Court of Appeal appears not to have heard argument on this point, but tacitly assumed a deemed admission was a sanction.

[76] Mr. Moskov argued that it is inherently contradictory to construe CPR 18.12 as applicable to a challenge to the jurisdiction, because a defendant planning to challenge jurisdiction cannot file a defence – if he did so he would thereby be submitting to the jurisdiction.

[77] Learned Counsel for Mr. Moskov, Mr. Rubin, QC, submitted that there is no justification for the deemed admission rule, and there is 'obviously a mistake in the way it is expressed'. He urged that it cannot have been intended to impose such a regime upon an ancillary defendant at all, as the idea that it was intended to impose liability upon a foreigner who is served with proceedings who has to come and challenge jurisdiction is an extraordinary idea. Mr. Rubin, QC, accepted that upon its face a deemed admission under CPR 18.12 means that a Defendant can no longer take part in defending the proceedings. Mr. Rubin, QC's answer to this is that such a Defendant would have to come back into the case, as where a default judgment had been entered against him. He would then get permission to set aside the judgment, whereupon he could then either challenge jurisdiction or serve a defence. Mr. Rubin accepted that the same conditions for setting aside a default judgment would not apply, but the Court could nonetheless set aside the deemed admission on the basis that there are exceptional circumstances.

[78] Mr. Moskov contends that this is a case where the sanctions regime does not apply and an extension is a simple discretionary matter.

⁵ BVIHCM2013/0160 Renova Industries Limited et al v Emmerson International Corporation et al. (unreported, oral judgment delivered 15th June 2018 (Wallbank J (Ag.)).

[79] Mr. Moskov recognizes that his explanations for his alleged delay in acknowledging service are central to the exercise of the Court's discretion to grant an extension (if one is required) or relief from sanctions (also if required).

[80] Mr. Moskov submits that the circumstances leading to the alleged delay are 'complicated'. He says he only realized in August 2019 that Emmerson was alleging that he had been served with these proceedings in March 2019. He then investigated the circumstances himself and instructed Lalive SA to do so as well before engaging BVI legal practitioners. Those investigations were also complicated. The delivery process records themselves cannot be relied upon and no reliance should be placed upon the Forriep Letter. He gradually started to understand events. These applications were, he argues, filed promptly given the complexities of fact and law involved. He says he has a 'very good, credible explanation' for the delay in acknowledging service. His learned Counsel submits that Mr. Moskov's explanation is sound, not contradicted by any sufficient evidence to reject it and is a good one.

Principles for grant of extension

[81] Mr. Moskov's learned Counsel adverted to the principles by which the Court should be guided when exercising its discretion for the grant of an extension. He referred to the headnote in the Court of Appeal decision in **C. O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.** at 8:⁶

"The Court has a very broad discretionary power under CPR 26.9 which cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well-established principles. Overall, in the exercise of this discretion, the court must seek to give effect to the overriding objective which is to ensure that justice is done as between the parties. On applications for extension of time generally, where no sanction is specified for failure to comply with the rule which prescribes the relevant time limit, the court, in the exercise of its discretion, will consider: (1) the length of the delay; (2) the reasons for delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice if the application is granted."

[82] Mr. Moskov submits that these are highly complex proceedings. For him, this position is compounded by the fact that the proceedings had been commenced in a foreign jurisdiction. Even now it is still not obvious, except through inference, what had been served.

[83] Mr. Moskov says he acted to take relevant steps as promptly as could reasonably be possible.

⁶ SLUHCVP2011/017 (unreported, delivered 19th March 2012).

- [84] He submits that no prejudice would be occasioned by an extension of time as neither the 3AC nor the Schedule 4 claim have advanced procedurally in any meaningful way.
- [85] Mr. Moskov observes that his jurisdiction challenge is based on the same grounds as advanced by other Defendants, there being a substantial overlap between these challenges. His challenge would not hold the others up.
- [86] Mr. Moskov urges that in light of the substantial and complex litigation and serious allegations made against him, his involvement is preferable to his exclusion.
- [87] He contends that refusing an extension would be contrary to the interests of justice and would make conducting a fair trial more difficult. He is mentioned several times in the pleadings and may be asked to give evidence by other parties. Deemed admissions would then cause considerable legal and procedural difficulties for the Court hearing the trial, as well as compromising the fairness of the trial process.

Relief from sanctions

- [88] Mr. Moskov contended that his application for relief from sanctions satisfied the requirements laid down by CPR 26.8. Mr. Moskov contends that:
- (1) His application was prompt, in circumstances where the proceedings had first been issued some five years earlier, over a year after the order of 29th June 2017 was made, and over nine months after the order of 21st June 2018 was made. Mr. Moskov maintains that he only learned of the possibility that there had been service in August 2019, with his application being filed only some two months later.
 - (2) The application was supported by affidavit evidence, in the shape of the Third Affidavit of Ms. Wigglesworth and two from himself (one in draft pending the Court's approval).
 - (3) He has a good explanation for the delay, in that it was, he submitted, clearly a result of a series of highly unusual unfortunate events and coincidences and not intentional.
 - (4) He has provided a full, detailed and plainly good explanation for the delay and there is no proper basis for rejecting it as untrue. This is not a trial but an interlocutory hearing. He should be given the benefit of any uncertainties or doubt that there may be.

- (5) Granting relief from sanctions would not have an adverse effect on any other party given the relatively early stage of the proceedings. No timetable risks prejudice by Mr. Moskov's involvement now.
- (6) The failure to file an acknowledgement of service has already been remedied. If Mr. Moskov is allowed to proceed, his jurisdiction challenge can join the other Defendants' similar applications.
- (7) Mr. Moskov would suffer immense prejudice if shut out from challenging jurisdiction or from offering his defence, which would plainly have a reasonable prospect of success. The claims he faces have a value of several hundred million United States Dollars. Mr. Moskov contends the interests of the administration of justice come down in favour of relief from sanctions and a retrospective extension.

Emmerson's Submissions

- [89] Emmerson contends that Mr. Moskov is mistaken that absence of a CPR 11.16(3) notice gives him an unlimited period of time within which to apply to set aside the *ex parte* orders pursuant to which he was served and joined to the proceedings or within which to file his Defence. Emmerson advert to the principle that an omission of a prescribed notice does not invalidate the underlying legal act, with reference to six authorities supporting this proposition.⁷
- [90] Emmerson urges that the absence of such a notice would be a technical irregularity that would fall to be taken into account by the Court in exercising its discretion on relief from sanctions. Even then, says Emmerson, Mr. Moskov advances no case that the absence of such a notice had had any effect upon his mind or his conduct.
- [91] Moreover, observed Emmerson, the regime under which a Defendant can apply to challenge an order granting permission to serve out and to challenge jurisdiction is not pursuant to CPR 11 ('General Rules about Applications for Court Orders') – it is pursuant to CPR 9 ('Acknowledgement of Service and Notice of Intention to Defend'), and more specifically CPR 9.6 and 9.7.

⁷ *Anselm v Balthazar* DOMHCV2013/201; *Herbert v Spencer* ANUHCv2014/0391; *Lindsay v Fleming* AXAHCV2015/0002; *Asia Pacific (HK) Ltd v Hanjin Shipping Co Ltd* [2005] EWHC; *Strachan v The Gleaner Co Ltd* [2005] 1 WLR 3204; *Rajval Construction Ltd v Bestville Properties Limited* [2010] EWCA Civ 1621.

- [92] CPR 9.6 provides that a defendant who files an acknowledgment of service does not by doing so lose any right to dispute the Court's jurisdiction.
- [93] CPR 9.7 sets out the procedure for disputing the Court's jurisdiction. CPR 9.7(2) provides that a defendant who wishes to make an application to dispute the Court's jurisdiction must first file an acknowledgement of service. CPR 9.7(3) provides that such an application must be made within the period for filing a defence, including any extension thereof. CPR 9.7(6) makes it clear that
- "An order under this rule may also discharge an order made before the claim was commenced or the claim form served."
- [94] CPR 9.7(8) provides that the period for filing a defence is then automatically extended when a Defendant makes an application challenging jurisdiction.
- [95] It is clear, says Emmerson, that CPR 9.7(6) covers *ex parte* orders made granting permission to serve a claim out of the jurisdiction and for joinder. Emmerson says the rule under CPR 11 by which a party can apply within fourteen days of service to set aside an *ex parte* order cannot sensibly apply to Defendants who are given far longer in which to acknowledge service and serve a defence; such additional time is accorded to persons based in other jurisdictions so that they can seek legal advice and organize their response. It would not be fair to require them at the same time to file an application to discharge the order, effectively immediately, within the much shorter fourteen day period. The latter can only sensibly apply to parties who are already before the Court.
- [96] CPR 9.7A provides the procedure for applying for a stay where a Defendant, such as Mr. Moskov, is served out of the jurisdiction and disputes the Court's jurisdiction. This procedure is very similar to that laid down by 9.7, save that CPR 9.7A(3) provides that an application under this Rule may be made at any time, including, by necessary implication, after the time for filing a defence has expired.
- [97] Emmerson argues that in light of these provisions of the CPR that are tailored to precisely the types of application Mr. Moskov is making, the general provisions specified by CPR 11 have no relevance.
- [98] Emmerson argues that it is clear that CPR 18.12 imposes a sanction, because – and they say this is the test – this is a provision which itself imposes or specifies the consequences of a failure to comply. Thus, following the Privy Council decision in **Attorney General of Trinidad**

and Tobago v Matthews⁸ the relief from sanctions regime applies. Such a provision is to be distinguished from provisions which merely specify 'what the parties may do if the defendant fails to file a defence within the prescribed period'.⁹ Emmerson also advert to a decision of the High Court of Belize, **Palacio v Football Federation of Belize**,¹⁰ in which the Belize identical equivalent of our CPR 18.12 was also treated as applying a sanction where (in that jurisdiction) a defendant to a counterclaim fails to file a defence to counterclaim in time.

- [99] As such, contends Emmerson, it is not open to Mr. Moskov to argue that his situation is essentially the same as where a default judgment has been obtained. He must satisfy the different set of conditions applicable to obtaining relief from sanctions.
- [100] Nor, urges Emmerson, can a deemed admission under CPR 18.12 be treated in the same way as a voluntary admission by a party, because a voluntary admission is not imposed by a Rule or order. A voluntary admission can simply be withdrawn. A party is not at liberty himself to disapply a deemed admission imposed by a Rule as that would make a nonsense of the imposition.
- [101] Emmerson also submits that CPR 9.7A should not be interpreted as allowing a Defendant to apply for a stay whenever he wants to. Emmerson explains that the Court indeed has jurisdiction to grant a stay at any time, but it is one thing for the Court to consider and grant an application for a stay if circumstances have changed during legal proceedings and quite another where the circumstances warranting a stay have been present from the start and the party concerned has not availed himself of the opportunity and other procedures provided by the Rules to apply for one.
- [102] Emmerson contends that this is not a case where the Court can simply exercise its discretion to grant an extension.
- [103] Instead, says Emmerson, Mr. Moskov needs to apply for relief from sanctions pursuant to CPR 26.8 in order to have the CPR 18.12 deemed admission against him lifted. Only then can he proceed to apply for a stay of the proceedings or have the *ex parte* orders set aside. To pursue those applications, he needs to be allowed to take part in the proceedings.

⁸ [2011] UKPC 38 at paragraph [15] (Dyson LJ).

⁹ [2011] UKPC 38 at paragraph [16] (Dyson LJ).

¹⁰ Supreme Court of Belize Claim No. 546 of 2017, date of hearing 18th December 2017.

[104] Emmerson refers the Court to the authority from our Court of Appeal, **Bilzerian v Weiner & Anor.**,¹¹ as to the manner in which the criteria for a grant of relief from sanctions are to be applied. Paragraph [15] warrants repeating in full as it is instructive of the approach to be adopted by a litigant who seeks relief from sanctions, together with the equally instructive paragraph [16]. I will emphasize that part upon which Emmerson particularly relies:

“[15] **The onus was on the appellant to show by credible and particularised evidence that he had met the threshold warranting consideration for the grant of relief. He was required to clearly demonstrate to the court that his failure to file his witness statements was not intentional – in essence that he had taken all reasonable steps to meet the timeline and then to show why notwithstanding taking such reasonable steps, that he was unable to meet it.** I agree with the learned judge that the information that the appellant chose to put forward for the judge’s consideration was woefully inadequate. He ought to have detailed what inquiries he made of his prior counsel, and what steps he took upon becoming aware of his prior counsel’s move to a new place of employment to seek to comply with the timeline. He ought to have explained when he retained new counsel, and the steps he took in seeking to comply and the time involved. The court must be given a clear, detailed and accurate picture of what occasioned the failure and what was done in seeking to remedy it. Up to the time of the hearing, there was no evidence produced that the witness statements had been signed and were ready for exchange far less exhibited in an effort to demonstrate diligence. It has not been explained why application for further time was not made before the deadline expired, which resulted in the sanction taking effect even though the appellant was aware of his deadline. He seemed content to treat his default and its remedy as mere ‘run of the mill’. This approach was a most unfortunate one.

[16] Further, he was also required to show that he had generally complied with all other rules, orders and or directions. No attempt whatsoever was made to address this. A litigant would do well to appreciate that making a bald statement that the failure to comply ‘was not intentional’ does not advance their case in persuading a court on this question. Rather, sufficient and cogent evidence must be placed before it from which it can conclude that the failure was not intentional.” (Emphasis added.)

[105] In relation to the criteria themselves, as laid down in CPR 26.8, Emmerson reminded the Court that these are to be applied cumulatively, applying **Bilzerian**. Paragraphs [11] and [12] of that decision are instructive:

“[11] CPR 26.8(1) says that such an application must be made promptly and be supported by evidence on affidavit. CPR 26.8(2) outlines that the court may grant relief from a sanction imposed only if it is satisfied that

¹¹ SKBHC VAP2015/0015 (unreported, delivered 27th January 2016) (Pereira CJ).

- (a) the failure to comply was not intentional;
- (b) there is a good explanation for the failure; and
- (c) the party in default has generally complied with all other relevant rules, orders and directions.

[12] The conditions under CPR 26.8(2) must be cumulatively observed in order to warrant the exercise of the discretion. ...”

[106] Emmerson sought to address the criteria with reference to the present case as follows:

- (1) Mr. Moskov’s application for relief from sanctions was not made ‘promptly’. In **Bilzerian**, the extension application had been made some six weeks after the deadline had expired and in the circumstances of that case the Court considered that this could not be considered as having been prompt. In the present case Mr. Moskov’s delay was far longer. Even if one were to give him the benefit of doubt concerning the period of some five months from March to August 2019, Mr. Moskov’s unexplained delay from 19th August to 2nd October 2019 (some one and a half months) in supplying Lalive SA with a list of signatures for comparison purposes scotches any suggestions of promptness.
- (2) Concerning Mr. Moskov’s evidence, learned Counsel for Emmerson submitted that it would be astonishing if it were true that Mr. Moskov lived with the 17 kg package for some nine days in his house without looking at it. Also, learned Counsel for Emmerson submitted that Mr. Moskov’s story that the package bore a different, unrecalled, addressee name, for his own address, does not make any sense when it is apparent from the Swiss Post delivery confirmation that Swiss Post had Mr. Moskov as the addressee. Moreover, Mr. Moskov’s story does not fit well with what the ZHC had told Messrs. Froriep about the ZHC’s usual practices, which included marking packages with the addressee’s and senders’ details. In short, Mr. Moskov’s evidence is not credible. It is, on the other hand, commensurate with Mr. Moskov having decided not to engage with the documents that were served on him but to send them back and then changing his mind later when he realized that he had no proper grounds for challenging validity of the service. That, says Emmerson, is fatal not just for an application for relief from sanctions but also for any discretion the Court might otherwise be minded to exercise in order to extend time outside the relief from sanctions regime.

- (3) Emmerson further seeks to argue that Mr. Moskov's evidence should not be treated as admissible evidence on affidavit. Emmerson recognizes that affidavits may, in interlocutory applications, include hearsay evidence where the source of the affiant's information and belief is given, but its learned Counsel argued that where that source consists of statements which do not qualify as admissible evidence, then the whole becomes inadmissible. It is the 'statements' made by Mr. and Mrs. Moskov and their two housekeepers which Emmerson objects to. Those are not affidavits and, what is more, Mrs. Moskov and the two housekeepers are apparently not prepared to produce any.

[107] Thus, argues Emmerson, Mr. Moskov does not even get past the two preliminary criteria of promptness and credible affidavit evidence.

Mr. Titarenko's Submissions

[108] Mr. Titarenko, through learned Counsel Mr. Crystal, supported Emmerson's arguments and added contentions of his own. In essence, he submitted that Mr. Moskov had committed three abuses of process, each of which were independently sufficient to deny Mr. Moskov the relief he sought.

[109] The first alleged abuse of process was Mr. Moskov's use of Ms. Wigglesworth as his mouthpiece on factually contentious matters, thereby circumventing and 'profaning' the intention of the Rules that a witness with primary knowledge of the facts, amenable to cross-examination, should ordinarily make the affidavit. Mr. Titarenko relies upon Rule 30(1) of Part A of schedule 4 (the Code of Ethics) enacted by the Legal Profession Act 2015, which provides that:

"A legal practitioner should not appear as a witness for his or her own client except as to merely formal matters or where such appearance is essential to the ends of justice."

[110] Ms. Wigglesworth's Third Affidavit infringes that principle, submits Mr. Titarenko, because it went beyond merely formal matters to address central factual matters in this application, on which she could have no personal knowledge. Moreover, Mr. Titarenko submits that it cannot conceivably have been essential to the ends of justice for Ms. Wigglesworth to give the evidence Mr. Moskov seeks to rely upon.

[111] The second alleged abuse concerns in particular the fact that the 'statements' of Mr. and Mrs. Moskov and their housekeepers on which Mr. Moskov relies were not affidavits, and in

circumstances were Mr. Moskov had not obtained an order dispensing with the need for affidavits or witness statements pursuant to CPR 26.1(6).

[112] The third alleged abuse of process concerns the manner in which Mr. Moskov gave his version of events. The evidence he gave in this regard was not clear, cogent, compelling, complete and compliant evidence and this failure, says Mr. Titarenko, also amounts to an abuse of process. Mr. Crystal devoted considerable time under this rubric in endeavouring to demonstrate that Mr. Moskov's account was not credible.

[113] Mr. Titarenko submits also that 'plainly and obviously, Mr. Moskov cannot challenge the jurisdiction of the Court in respect of claims he is deemed to admit'. He thus first needs relief from sanctions, says Mr. Titarenko.

[114] Mr. Titarenko submits that Mr. Moskov's delay in making his application was intentional, in that until 9th October 2019 he was exploring the strength of possible arguments that even though the documents had been delivered to his residence he might argue that he had not been served.

DISCUSSION

[115] It is apparent to me that Mr. Moskov's strategy is to proffer various means whereby the Court could grant him an extension of time for the filing of an acknowledgement of service and defence without the Court needing to apply the criteria for relief from sanctions. In my respectful judgment this is not correct. Mr. Moskov needs to displace the deemed admission that CPR 18.12 imposes before he can pursue his applications for a stay on jurisdiction grounds and to set aside the *ex parte* orders by which Emmerson obtained permission to serve him out of the jurisdiction and to join him to the proceedings. In my respectful judgment the deemed admission is a sanction. Mr. Moskov needs relief from that sanction. I agree with both Emmerson and Mr. Titarenko on this point.

[116] It is convenient to deal with first with the arguments Mr. Moskov advances in respect of the matters he urges upon the Court before it should, in his view, consider his application for relief from sanctions.

- [117] First, the absence from the *ex parte* orders of a CPR 11.16(3) notice is not the fatal defect that Mr. Moskov submits it is. Emmerson has demonstrated on the basis of numerous authorities that the absence of even a mandatory procedural element does not disapply other requirements, including time limits, stipulated by the Rules or by orders of the Court. Close consideration of the decision of this Court in **ABC Grandeservus Limited v Emmerson International Corporation**¹² by Justice Jack shows that this Court was not treating absence of such a notice as an *automatic* vitiating consequence. The language used by Justice Jack was that an applicant ‘may seek’ to have an order set aside on this basis. There may indeed be circumstances where the absence of such a notice could, in the totality of the circumstances, entail such an order being set aside, in furtherance of the overriding objective of the CPR.¹³ It is however a trite principle that substance is not the slave to procedure.
- [118] Moreover, it would be superficial simply to take a previous decision of this Court and urge the Court mechanically to apply the approach adopted there, in different factual circumstances. That is all the more so since it is unclear from that decision whether Justice Jack had been referred to any authority for the manner of proceeding he there adopted, whether he had heard argument on the question or whether, as appears may have been the case, the learned Judge adopted that course of his own motion. These questions and uncertainties warrant a degree of caution and restraint in seeing that decision as a doctrinal basis that the absence of a mandatory notice automatically disapplies rules and timelines that would otherwise apply.
- [119] The hollowness of Mr. Moskov’s argument is conclusively demonstrated, in my respectful judgment, by the fact that there is no evidence that the absence of such a notice influenced his mind in acting, or omitting to act, as he did. The omission was of no moment.
- [120] I also accept Emmerson’s argument that CPR 11 is not intended to apply to litigants in Mr. Moskov’s position, since CPR 9.7A provides the regime that applies to him.
- [121] I do accept Mr. Moskov’s submission that the Court has jurisdiction to grant a stay of proceedings at any time. Whether such a jurisdiction is expressed to be under the Rules (CPR 26(2)(k) or otherwise) in order to further the Overriding Objective in CPR 1.1 or as part of the Court’s inherent jurisdiction to further the interests of justice is, in practical terms, a distinction without a difference.

¹² BVIHCM2013/0160 (unreported, delivered 27th May 2019) at paragraph 72 (Jack J (Ag.)).

¹³ CPR1.1.

- [122] But it must, I think, be clear that this general jurisdiction does not provide a party with an easy short cut to the same goal. If that were the case, any requirement to obtain relief from sanctions would be otiose. No sane litigant would climb a legal mountain simply 'because it is there'. I accept Emmerson's submission that the purpose of the general jurisdiction is to empower the Court to order a stay if circumstances arise during the life of a matter which sensibly warrant one. It is not intended to avail a party who otherwise has a clearly defined regime supplied by the Rules through which he can seek relief.
- [123] I do not accept Mr. Moskov's submission that the Court can use that general jurisdiction because the present circumstances are exceptional. There is nothing in the circumstances of the case which indicate that Mr. Moskov cannot fairly avail himself of the procedures supplied by the Rules in order to obtain an extension. Mr. Moskov indeed has not identified any features which make it exceptional.
- [124] It is equally clear, in my respectful judgment, that Mr. Moskov has no choice but to displace the CPR 18.12 deemed admission if he wants to pursue his applications. That is because the effect of the deemed admission is to determine the claim against him. It is substantively finished, leaving only consequential matters for the Court to rule on further. CPR 18.12 materially provides:

"18.12

1. This rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.
 - Rule 18.9(2) deals with the time for filing a defence to an ancillary claim.
2. The party against whom the ancillary claim is made –
 - a. is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim ..."

- [125] I do not accept that a Defendant can 'withdraw' a deemed admission. That is because a deemed admission is imposed by the Rule. If a litigant could simply brush aside that which the Rules impose it would make a nonsense of the Rule.
- [126] Mr. Moskov invests considerable effort in seeking to show that the CPR 18.12 deemed admission is not a sanction.

[127] The Privy Council decision in **Attorney General v Matthews** is direct and binding authority to the contrary: it is a sanction. Construing a very similar provision in the Civil Procedure Rules of Trinidad and Tobago, the Board pronounced:¹⁴

“...rules 26.6 and 26.7 must be read together. Rule 26.7 provides for applications for relief from any sanction *imposed* for a failure to comply inter alia with any rule. Rule 26.6(2) provides that where a party has failed inter alia to comply with any rule, “any sanction for non-compliance *imposed* by the rule...has effect unless the party in default applied for and obtains relief from the sanction”(emphasis added). **In the view of the Board, this is aiming at rules which themselves impose or specify the consequences of a failure to comply.** Examples of such rules are to be found in rule 29.13(1) (which provides that if a witness statement or witness summary is not served within the time specified by the court, then the witness may not be called unless the court permits); rule 28.13(1) (consequence of failure to disclose documents under an order for disclosure); and rule 33.12(1) (consequence of failure to comply with a direction to disclose an expert's report).” (Emphasis added.)

[128] The reference there to rules 26.6 and 26.7 can be substituted with our own CPR 26.7 and 26.8 respectively. CPR 26.7 provides:

“26.7

1. If the court makes an order or gives directions, the court must whenever practicable also **specify the consequences of failure to comply**.
2. If a party has failed to comply with any of these rules, a direction or any order, **any sanction for non-compliance imposed** by the rule, direction or the order has effect **unless the party in default applies for and obtains relief from the sanction**, and rule 26.9 does not apply.
3. If a rule, practice direction or order –
 - a. requires a party to do something by a specified date; and
 - b. **specifies the consequences of failure to comply**; the time for doing the act in question may not be extended by agreement between the parties.” (Emphasis added.)

[129] CPR 26.8 provides:

“26.8

1. An application for relief from any sanction imposed for a **failure to comply** with any rule, order or direction must be –
 - a. made promptly; and
 - b. supported by evidence on affidavit.

¹⁴ [2011] UKPC 38 at [15] (Dyson LJ).

2. The court may grant relief only if it is satisfied that –
 - a. the failure to comply was not intentional;
 - b. there is a good explanation for the failure; and
 - c. the party in default has generally complied with all other relevant rules, practice directions, orders and directions.
3. In considering whether to grant relief, the court must have regard to –
 - a. the effect which the granting of relief or not would have on each party;
 - b. the interests of the administration of justice;
 - c. whether the failure to comply has been or can be remedied within a reasonable time;
 - d. whether the failure to comply was due to the party or the party's legal practitioner; and
 - e. whether the trial date or any likely trial date can still be met if relief is granted.
4. The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown." (Emphasis added).

[130] 'Sanctions', then, are consequences that are specified by a Rule, Practice Direction or order for failing to comply with some requirement. Such failure, or 'default', is cured by applying for and obtaining 'relief from sanctions'. The meaning of the term 'sanction' is to be found in these two sub-parts to rule 26, not in some conceptual analysis of punishment or penalty.

[131] Mr. Moskov's contention that a Defendant has an opportunity to file a Defence but does not have to do so, and thus should not be punished or penalized if he does not, misses the point. CPR 18.12 simply states what the consequences will be for the Defendant if he does not file his Defence on time. If he does not, CPR 26.7(2) requires that he apply for and obtain relief from this consequence. If he does not, the consequence continues to apply.

[132] Learned Counsel for Mr. Moskov suggests that there is an error in the drafting of the Rules, in that this interpretation would mean that a Defendant to an ancillary claim is treated differently from an ordinary Defendant. This submission finds no favour with the Court. Indeed, the different treatments of such Defendants makes sense when it is borne in mind that an 'ancillary claim' is ancillary to a set of 'main proceedings'. One is subsidiary to the other. They are not parallel proceedings. Ancillary claims are satellite proceedings. The Rules are framed in such a way to prevent satellite proceedings derailing or stalling main proceedings.

- [133] The question then becomes whether Mr. Moskov satisfies the criteria for relief from sanctions. In my respectful judgment Mr. Moskov does not.
- [134] First, it cannot sensibly be said that Mr. Moskov acted promptly in applying for relief from sanctions. Even if one accepts (which I do not) that Mr. Moskov could not reasonably have known before August 2019 that he had been served, he did not make his application promptly. In particular, there is no explanation from Mr. Moskov why or how it is that it took him over six weeks to provide Lalive SA with the list of signatories that they had requested, even assuming that such a list of signatories was reasonably required for Mr. Moskov to work out whether he had validly been served. There was no alacrity on the part of Mr. Moskov to preserve his position here in the BVI. I bear in mind that the proceedings themselves are complicated, but also that Mr. Moskov already had an opportunity to gain sufficient familiarity with them in his capacity as director of Witel AG, which was served on the same day and which, under Mr. Moskov's direction, acted promptly within this jurisdiction. Mr. Moskov himself says he was expecting and waiting to be served. Mr. Moskov could have engaged lawyers in the BVI to advise and initiate his protection within August (and indeed earlier), but he let the time slip into October.
- [135] Although Mr. Moskov delayed, his delay should however not be taken in isolation. It must be seen in its context. It is relevant to bear in mind that the proceedings were not moving forward appreciably. It would be unfair to exclude Mr. Moskov merely on grounds of his delay, if that has no adverse impact upon the progress of the matter as a whole. In the circumstances of this case, Mr. Moskov's delay is not fatal to his application.
- [136] However, Mr. Moskov also needs to persuade the Court that his failure to file a Defence on time is not intentional and that he has a good explanation for his failure. As I will explain below, Mr. Moskov's case falls down in these respects.
- [137] But before we consider Mr. Moskov's account, there is a particular way in which an applicant for relief from sanctions must present his facts.
- [138] An applicant for relief from sanctions must give evidence by way of an affidavit in support of his application. The short answer is that Mr. Moskov did so. Technically at least, Mr. Moskov has satisfied this requirement. Mr. Moskov eventually filed his own affidavit, after initially relying upon Ms. Wigglesworth's Third Affidavit. As an Affiant in civil proceedings, Ms. Wigglesworth

was entitled to give hearsay evidence, as long as she disclosed the source of her information and belief.

[139] It was argued that Ms. Wigglesworth's evidence should be struck out as an abuse of process because it was said to constitute a breach of the Code of Ethics for a Legal Practitioner to give evidence on behalf of a client. As a matter of procedural fairness, in the present case the Legal Practitioner(s) and their employer(s) potentially concerned were not separately represented to defend themselves in respect of this allegation. In the present case, there are other, more fundamental deficiencies with Mr. Moskov's case. It is not necessary for the Court to decide this point in the context of these applications. This is not a matter where the success or failure of Mr. Moskov's application turns on whether or not the Court comes down in favour of excluding the evidence on grounds of an alleged abuse of process.

[140] In relation to the use of hearsay evidence, Mr. Moskov's learned Counsel gave Emmerson's and Mr. Titarenko's arguments short shrift by observing that no complaints about the admissibility of Ms. Wigglesworth's affidavit could have been made if she had simply related what she had been told, and by whom, only for such complaints suddenly to become valid by exhibiting the documents that were the source of her information and belief. I also accept that argument by Mr. Moskov. Whilst I agree that ideally evidence in support of interlocutory applications, and especially ones to which stringent tests apply, should be given by persons with first-hand knowledge of the matters attested to, not least so that they might eventually be subjected to cross-examination, the reality of international commercial litigation is different. In such litigation, affidavit evidence is invariably prepared by lawyers, upon instructions of course, and it is they who put the 'right' words into the affiant's mouth. Like it or not, we all know that. I accept that this degrades the processes of the Court, but this does not mean that the Court should take a rigid approach and reject all evidence that has been prepared in this way. Ultimately, whether the Court should reject evidence as an abuse of process entails a value judgment. Factors that require to be balanced are the nature and gravity of the abuse and whether or not it was intentional. The latter can often be difficult to ascertain on the documents alone at an interlocutory hearing, although the alleged abuser's opponent will generally not be slow to ascribe a nefarious intent to his conduct.

[141] I accept that arguments disputing admissibility and alleging abuse of process can sometimes be appropriately advanced, but it is abundantly clear to me in this case that they are being deployed to act as additional strands to Emmerson's and Mr. Titarenko's bows: if they can

succeed in removing a piece from Mr. Moskov's factual jigsaw they improve their chances of ensuring he fails to satisfy the criteria for relief from sanctions.

[142] Since substance is not the slave of procedure, I am hesitant to exclude one of Mr. Moskov's narrational vehicles: substance is more important than form. Mr. Moskov has filed affidavit evidence to support his application for relief from sanctions, so he fulfills that criterion.

[143] But the quality of that evidence, and the weight that the Court should ascribe to it, is another matter entirely. Although both sides alleged that the Lalive SA and Froriep letters respectively were inadmissible, as containing hearsay evidence and not being on oath, both sides in the end laid their criticisms to one side on the basis that better evidence could not be obtained due to evidence gathering restrictions under Swiss law and that it would be fair either to allow both letters in or to exclude both. That is a commendable and anti-technical approach. I am content that both those letters should be allowed to stand in evidence, whilst reminding myself that not everything they say can necessarily be taken as dependable evidence.

[144] The greater objection to Mr. Moskov's evidence revolves around the 'statements' proffered by Mr. and Mrs. Moskov and their two housekeepers. These took the form of questionnaires. If Emmerson or Mr. Titarenko were nervous that the Bench of this Court might take these at face value then their anxiety would be misplaced. It is obvious from their face that the questions were devised by an unidentified person, with no statement as to the circumstances in which the statements were made, whether or not with the benefit of translations, and not under oath. It is equally obvious that the answers to the questions might well have been prepared by somebody other than the individuals who signed them and simply presented to them to sign. We cannot tell whether those who signed the statements even understood what they were putting their name to. In short, very little weight warrants to be attributed to these statements. The Court should be – and is – extremely wary about accepting these statements as reliable evidence of anything.

[145] Without needing to make any findings of fact in this regard, and without doing so, these statements are more commensurate with a crude, heavy handed attempt to create a narrative of mystery, unclarity and confusion rather than to be a genuine attempt to try and explain what happened. If that is right (on which I make no finding), whilst Mr. Moskov or his advisers probably thought they were doing a good job creating the impression of uncertainty with these statements, it appears that they did not realize, or forgot, that with every delivery there is a

deliveror, and that deliveror can make his own inquiries about what happened and produce his own evidence – as Emmerson did with the Froriep Letter.

[146] I need go no further however than to consider whether Mr. Moskov's evidence is credible, particularized, sufficient and cogent, to apply the requirements identified in **Bilzerian** at paragraphs [15] and [16]. In my respectful judgment Mr. Moskov's evidence is none of these. There are at least two factors which render Mr. Moskov's narrative incredible. By 'incredible' I mean not reasonably capable of belief. The two factors are as follows:

- (1) It does not make sense that Swiss Post should have Mr. Moskov's name as the addressee, and to have delivered the parcel to his address, but that the parcel should have borne the name of a different addressee, as claimed by Mr. Moskov's side; and
- (2) It does not make sense that Mr. Moskov's entourage should have had no idea who or what had sent them the parcel, or wherefrom, and yet they were able to send it back to its sender. They did not bring it back to the Post Office, abandoning the package to the Post Office to dispose of, with the Post Office then taking it upon itself to send the parcel back to the ZHC. No. Mr. Moskov's housekeeper paid money to have the parcel returned to its sender, using a specific Swiss postal priority parcel service. This very strongly suggests that the sender's identity and location were readily ascertainable both to Mr. Moskov's housekeeper (and by extension Mr. Moskov) and to Swiss Post. It is difficult to imagine that the Swiss Post Office would accept and charge for transmission of a parcel with no address on it.

[147] It will not have escaped the reader that the incredible nature of Mr. Moskov's narrative is apparent even without referring to the Lalive SA or Froriep letters. When one does, both support the very likely proposition that the ZHC addressed the parcel to Mr. Moskov. The Froriep Letter supports the unsurprising proposition that the sender's details were marked on the parcel. The Froriep Letter does not support Mr. Moskov's hypothesis that the package from the ZHC was packed inside another box which hid the labels. Mr. Moskov's written submissions stated that, but this was an error.

[148] The Lalive SA Letter, disclosed and relied on by Mr. Moskov, states that the parcel was sent back to sender on 18th March 2019 and that it reached back to the ZHC the following day on 19th March 2019. Clearly no difficult inquiries were needed for Swiss Post to know where to

send it. This supports the idea that there was no mystery about the identity and location of the sender, contrary to the impression fostered by Mr. Moskov.

[149] Mr. Moskov's narrative also fails for want of particularity. Two crucial details that had been omitted from his initial account were:

- (1) The different addressee name his wife and housekeepers say they saw on the package; and
- (2) The fact that his entourage did more than return the package to the Post Office, namely that they sent it back to the sender at their own expense.

[150] This second detail emerged later. Even then, Mr. Moskov offered no explanation how it had been possible to send the package back without ostensibly knowing who the sender was.

[151] The first detail never did emerge. Mr. Moskov's entourage say they forgot the name. That might be fair enough, but how likely is that story? It is unlikely. There is no documentary evidence whatsoever, other than the 'statements', that the ZHC and Swiss Post had any other addressee name than Mr. Moskov. The documentary evidence rather shows that Swiss Post had Mr. Moskov as the addressee. Mr. Moskov's omission to give of the alleged name on the package means there is no positive information, let alone primary documentary evidence, that supports Mr. Moskov's 'unknown addressee' narrative.

[152] Mr. Moskov's narrative does not recommend itself to the Court's belief. It is inherently unlikely. It missed at least one key detail. It is thus not sufficient, nor cogent. The elements do not combine to produce a good explanation for Mr. Moskov's failure to make a prompt application for relief from sanctions. On these grounds alone Mr. Moskov fails to satisfy the requirements for relief from sanctions.

[153] Concerning whether Mr. Moskov's delay was or was not intentional, I do not think that Mr. Moskov deliberately, with full knowledge of the consequences, decided to allow the period for filing a Defence to pass. However, I am persuaded that Mr. Moskov took an unfortunate initial decision in March 2019 not to engage with the proceedings and to reject the package, only to discover in early August that this did not solve anything. Mr. Moskov then concentrated his efforts upon trying to find reasons for arguing that he had not been validly served. It was only when he had exhausted that line of inquiry that he acted in this jurisdiction in an effort to protect

and remedy his position. In the sense of a deliberate decision not to engage with the proceedings until there appeared to be no other way out, Mr. Moskov's delay was intentional.

[154] Intentional delay is usually fatal to an application for relief from sanctions. But consideration of an application for relief from sanctions is a highly context specific inquiry. CPR 26.8(3)(d) directs the Court to consider whether the failure to comply was due to the party or the party's legal practitioner. Here, it was Mr. Moskov's failure, it would seem. Mr. Moskov is not a BVI, nor indeed Common Law, lawyer. He is from a jurisdiction (Switzerland and Russia) where a completely different litigation mind-set applies. Whatever his experience and competence may be in running Witel AG's corporate affairs and managing its legal problems, as a private individual it is all too understandable that he might not think straight when personally faced with a ruinously large potential lawsuit. He can be forgiven for reacting in the way he did. It is human to err.

[155] Had Mr. Moskov simply come clean with a full and candid explanation for his mistaken approach, he would have found that there is plentiful redemption with the Court: nothing earns respect more than an honest confession of past mistakes and the Court strives for proportionate outcomes. That is all the more so here where it was not too late, nor unduly disruptive of the proceedings, for Mr. Moskov to take part in the proceedings in the way he now wishes to do. His earlier course of action might have been ill-considered and even ill-advised, but it would not necessarily have been fatal. Instead, the Court is regretfully and reluctantly persuaded by Emmerson and Mr. Titarenko that Mr. Moskov dissimulated the true position, proffering a story that is not credible. The ends of justice would not be served by granting relief from sanctions in such circumstances.

[156] Mr. Moskov submitted that he should have the benefit of any doubt arising in relation to his narrative, because the Court does not have the benefit of hearing full evidence at this interlocutory stage. In my respectful judgment, this is not a case where credibility of Mr. Moskov's narrative is finely balanced, such that the balance can appropriately be tipped by giving him the benefit of doubt. It was incumbent upon him to adduce evidence that is credible upon its face. Unfortunately, the Court has reached the view that his was not.

[157] It follows that Mr. Moskov's Application fails.

[158] The Court has been informed by the legal representatives of Mr. Moskov through correspondence dated 26th April 2021 that PAO T Plus and Mr. Moskov have filed applications

in which they seek a declaration that the Amended Ancillary Claim which, in Mr. Moskov's case, was served upon him on 4th March 2019, is a nullity, as well as orders setting aside the extension of the life of the Amended Ancillary Claim. Mr. Burenin and Mr. Moskov have also applied to set aside orders extending time to serve the 3AC. Subject to the outcome of these applications, which have yet to be heard, Emmerson is entitled to the orders it seeks that Mr. Moskov had been properly served with proceedings and that he is deemed to have admitted the Amended Ancillary Claim and the 3AC pursuant to CPR 18.12(2)(a). That application of Emmerson succeeds.

[159] For the reasons explained above, Emmerson's strike out application fails.

[160] The Court will hear the parties further in relation to costs.

[161] For the sake of clarity and good order, only the sealed Judgment herein is to be treated as containing and setting forth the Court's findings and reasons. The draft judgments previously circulated for review shall be treated as entirely superseded by the sealed Judgment herein. I have considered submissions made in correspondence by legal representatives acting for Mr. Moskov and by Mr. Titarenko in relation to the draft judgments, that is, after the hearing of the matter. Where those submissions included what appear to me to have been substantive rather than going to procedural fairness, I have, with the greatest of respect for those making the submissions, expressly not determined them (a) since they do not appear to me to be necessary for a fair determination of the applications presently before the Court; (b) in the interests of finality and (c) they raised matters that are not suitable for summary disposal without a hearing. If it is that I have fallen into error with the analysis set forth in this Judgment, the parties concerned will have an opportunity to have such errors corrected upon appeal.

[162] In light of certain exchanges during a hearing pertaining to this judgment on 15th April 2021, a second version of this judgment was circulated in draft for review by Counsel and Mr. Titarenko. In addition to any further non-substantive corrections they might wish to point out, and any obvious errors and omissions in relation to matters raised at the hearing in July 2020 (such as authorities that would change the outcome of the Moskov and Emmerson Applications that the parties had omitted to bring to the Court's attention), the parties may wish to propose more refined terms for the order to be made as a consequence of the judgment. This second version has also been circulated on the basis that it is confidential and not for publication or communication to others. Those parties that are legally represented may be informed of the

gist of it but shall not receive the further draft itself. Mr. Titarenko as a litigant in person shall be entitled to receive the draft but must keep it confidential. Mr. Titarenko has (if I have understood him correctly) construed the requirement as to confidentiality in terms of an offer on the part of the Court to release the judgment in draft for review conditional upon its confidentiality. Mr. Titarenko submits that he did not accept what he considers to have been the Court's offer of confidentiality, and he contends, furthermore, that the CPR makes no provision for the imposition of confidentiality. Mr. Titarenko stresses that he has no intention of breaching confidentiality and has not done so. Whilst the Court accepts this assurance by Mr. Titarenko, I respectfully disagree with Mr. Titarenko's interpretation of the confidentiality mechanism. A contractual analysis of offer and acceptance does not lend itself to the juridical relationship between the Court and a party. That relationship is not analogous to an arbitration. A requirement of confidentiality imposed by the Court is to be treated as a direction of the Court pursuant to CPR 26.1(2)(w), intended to protect the Court's processes and to enable Counsel and any litigant in person to assist the Court in finalizing a judgment without being prejudiced by publication or dissemination of draft findings that are not reflected in the finalized sealed version of the judgment. Whilst the requirement of confidentiality would not prevent a party initiating an application in some way pertaining to the draft judgment within the same Court system in order to obtain further or other relief, a breach of the requirement of confidentiality would in principle constitute a contempt of Court.

[163] I take this opportunity to thank learned Counsel and the parties for their assistance during this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar