

**EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS**

**BVIHCMAP2022/0030**

**BETWEEN:**

**NASER TAHER**

**Applicant/Appellant/ Ancillary Defendant**

**and**

**MEX CLEARING LIMITED**

**Claimant/Ancillary Defendant**

**MEX SECURITIES S.A.R.L.**

**First Defendant/Ancillary Defendant**

**MULTIBANK FX INTERNATIONAL CORPORATION**

**Second Defendant/ Ancillary Defendant**

**VON DER HEYDT INVEST S.A.**

**Third Defendant/ Ancillary Claimant/ Respondent**

**Before:**

The Hon. Mr. Mario Michel  
The Hon. Mr. Paul Webster  
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal  
Justice of Appeal [Ag.]  
Justice of Appeal [Ag.]

**Appearances:**

Mr. Hodge Malek, KC and Mr. Hefin Rees KC with them Mr. Philip Hinks for the Appellant  
Mr. Tim Penny, KC with him Mr. Alexander Cook and Mr. Simon Hall for the Respondent

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2022: April 25,26,27,28 & 29;  
2023: February 21.

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*Commercial appeal – Service outside jurisdiction by alternative method – Civil Procedure Rules 2000 (“CPR”) – Rule 7.8A – Whether service under rule 7.8 was impracticable - Test of impracticability - Whether the judge failed to consider or give sufficient weight to the principle in Abela and others v Baadarani - Whether the judge was wrong to make the order for service out by alternative means at paragraph 1 of the CMC Order - Whether the sole reason for making the order was to allow VDHI to effect expeditious or speedy service - Whether the learned judge was wrong to find that service of the Amended Statement of Ancillary Claim and other documents on Mr. Taher was impracticable in circumstances*

Three different claims, No. 215 of 2020, No. 3 of 2021 and No. 73 of 2021 were filed before the Commercial Court, involving Von Der Heydt Invest SA (“VDHI”), Mex Securities S.A.R.L. (“Mex Securities”), Mex Clearing Limited (“Mex Clearing”) and Multibank FX International Corporation (“MBFX”). In No. 215 of 2020, Mex Clearing claimed against Mex Securities and MBFX for the sum of 36.4 million euros as sums advanced as loans by Mex Clearing to VDHI and held by MBFX in two accounts to the order of Mex Securities. In No. 215 of 2020 a Tomlin (Consent) Order was entered on 14<sup>th</sup> December 2020 (“Consent Order”). The Consent Order included a schedule signed by or on behalf of Mex Clearing, Mex Securities and MBFX. It embodies a settlement agreement between the said parties which provided, inter alia, for the payment out by MBFX of the sum of 36.4 million euros from the two Mex Securities’ accounts to Mex Clearing.

In No. 3 of 2021, Mex Clearing commenced a claim against MBFX seeking a freezing injunction over the remaining monies held by MBFX in favour of Mex Securities on the basis that Mex Securities had repudiated the settlement agreement embodied in the Consent Order. In No. 73 of 2021, VDHI commenced a claim against Mex Securities, Mex Clearing and MBFX to set aside, on the grounds of fraudulent collusion and abuse of the process of the BVI court, the Consent Order and to recover the sum of 36.4 million euros transferred from the accounts of Mex Securities at MBFX to Mex Clearing following the entry of the Consent Order.

On 12<sup>th</sup> October 2021 the learned judge made an order that these three claims be consolidated for hearing before a single judge of the Commercial Court. Further, by order dated 25<sup>th</sup> October 2021, the learned judge ordered that the trial of the consolidated claims ‘shall be expedited and listed to commence on Monday 11<sup>th</sup> July 2022 with a time estimate of 12 to 15 days.’ On 26<sup>th</sup> October 2022, VDHI filed a Statement of Ancillary Claim (“SAC”) against Mex Securities, Mex Clearing and MBFX as ancillary defendants in No. 215 of 2020. On 11<sup>th</sup> February 2022, MBFX filed its statement of defence denying all claims against it, including the claim to set aside the Consent Order. On 21<sup>st</sup> February 2022, VDHI applied in all three claims for an order for permission to amend its SAC to join Mr. Naser Taher (“Mr. Taher”) personally and Mex Atlantic Corporation (a Cayman Islands company) to the proceedings as ancillary defendants; for permission to serve the Amended Statement of Ancillary Claim (“ASAC”) on these two new defendants out of the jurisdiction; and to permit alternative service or, alternatively, to dispense with service in respect of Mr. Taher.

At a case management conference on 18<sup>th</sup> March 2022, the learned judge made a case management order (“Substituted Service Order”) which: (i) granted permission to VDHI, the ancillary claimant, to serve Mr. Taher with the ASAC filed by VDHI by email to Walkers (BVI); (ii) deemed the ASAC served on Mr. Taher on the day following the sending of the said email; and (iii) dispensed with the need for Mr. Taher to file an acknowledgement of service. The said orders were made pursuant to rule 7.8A of the **Civil Procedure Rules 2000** (“CPR”). On 23<sup>rd</sup> March 2022, the ASAC was served on Mr. Taher in compliance with the Substituted Service Order. On 24<sup>th</sup> April 2022, Mr. Taher filed and served his defence to the ASAC.

Dissatisfied with the Substituted Service Order, Mr. Taher applied to the Court for permission to appeal paragraphs 1, 2 and 3 of the CMC Order. Mr. Taher requested that, if leave is granted, the Court should proceed to hear and determine the substantive appeal. Mr. Taher also seeks a stay of all directions relating to him in the rest of the CMC Order pending determination of his appeal. In Mr. Taher’s draft notice of appeal accompanying the application for permission to appeal, he relies on three grounds. These were distilled into the following issues: (i) whether the judge failed to consider or give sufficient weight to the principle established by the UK Supreme Court in **Abela and others v Baadarani**, that an order for service by alternative method should only be made where service through the usual method has not been successfully adopted; (ii) whether the judge was wrong to make the order for alternative service at paragraph 1 of the CMC Order in circumstances where the sole reason for making the order was to allow VDHI to effect expeditious service, as opposed to overcoming an impracticability of service through one of the usual methods; and (iii) whether the learned judge was wrong to find, contrary to the weight of evidence, that service of the ASAC and other documents on Mr. Taher was impracticable in the circumstances.

**Held:** granting leave to appeal; dismissing the appeal; and making an order that the applicant/appellant, Mr. Taher, shall pay VDHI’s costs in the appeal, such sum to be assessed by a judge of the Commercial Court if not agreed within 21 days, that:

1. Mr. Taher has satisfied the test of a real (as opposed to a fanciful) prospect of success required for permission to appeal against paragraphs 1 to 3 of the CMC Order dated 18<sup>th</sup> March 2022. Accordingly, leave to appeal is granted and the draft notice of appeal filed with the application for leave to appeal is deemed filed.
2. An appellate court will be slow to overturn decisions of a lower court made in the exercise of a judicial discretion. It may only do so where it has been shown that the judge below committed an error in principle in that the judge failed to take into account or gave too little weight to relevant factors or took into account or was influenced by irrelevant factors or considerations, and where the decision reached is so outside the generous ambit within which reasonable judicial disagreement is possible as to be clearly or blatantly wrong. In relation to appeals from case management decisions, an appellate court is required to exercise even more restraint before deciding to overturn case management orders made by a judge who applied the correct principles, has taken account

of relevant considerations, and not factored into his determination irrelevant factors.

**Dufour et al v Helenair Corporation Limited et al** (1996) 52 WIR 188 applied; **Byers and Others v Chen Ningning** [2021] UKPC 4 applied; **Ming Siu Hung and others v J.F. Ming Inc and another** [2021] 1 BCLC 341 applied; **Employers International and Others v Boston Life and Annuity Company Limited** BVIHCVAP2007/0005 (delivered 4<sup>th</sup> July 2007, unreported) applied; **JTrust Asia Pte Ltd v Mitsuji Konoshita et al** BVIHCMAP2020/0022 (delivered 31<sup>st</sup> May 2023, unreported) applied; **Showa Holdings Co. Ltd v Nicholas James Gronow and John David Ayres (As Receivers)** BVIHCMAP2020/0031 (delivered 31<sup>st</sup> May 2021, unreported) applied.

3. CPR 7.8(1) stipulates the methods by which a claim form may be served out of the jurisdiction on a party to civil proceedings. These methods, which are referred to as the usual or conventional methods of effecting service out of the jurisdiction are: (a) by a method provided by rule 7.9 (service through foreign governments or judicial and consular authorities) or rule 7.11 (service on a State); (b) in accordance with the laws of the country in which it is to be served; or (c) personally by the claimant or the claimant's agent. CPR 7.8A deals with applications for service out by alternative methods of a claim form. An application for an order for alternative service is predicated upon service under CPR 7.8 being 'impracticable'. The court, when considering CPR 7.8A and whether it is impractical to serve the defendant out of the jurisdiction through any of the methods specified in CPR 7.8(1), must consider and apply the overriding objective as set out at CPR 1.1. This requires the court to deal with cases justly, ensuring that all parties are, so far as practicable, on an equal footing, to save expense, and to ensure the particular case is dealt with expeditiously. In considering whether to exercise its discretion under CPR 7.8A, the court must also bear in mind that the fundamental purpose of service of legal proceedings is to ensure that the claim and the allegations made against the party to be served (the defendant), are brought to the attention of the defendant, who is given an opportunity to respond to them in a timely manner, and before they are considered by the trial court. This is a fundamental principle of 'open justice'.

**Rules 1.1, 7.8(1), and 7.8A of the Civil Procedure Rules 2000** applied; **Abela and others v Baadarani** [2013] UKSC 44 applied; **Flavio Maluf v Durant International Corp et al** [BVIHCMAP2021/0025] (delivered 13<sup>th</sup> January 2022, unreported) applied.

4. The term 'impracticable' in CPR 7.8A(1) does not equate with impossible. It means, taking all relevant considerations into account it is 'not practically possible', in the circumstances of the particular case, to effect service of the claim form on a defendant out of the jurisdiction. Whether it is impracticable to effect service on a defendant out of the jurisdiction using one of the modes of

service specified at CPR 7.8(1), is a question of fact to be decided by the judge upon cogent evidence provided by the applicant for an alternative or substituted method of service under CPR 7.8A. Proof of 'impracticability' is not to be established only by proof of prior unsuccessful attempts to serve the defendant by the usual methods or means of service of the claim form. This may take the form of evidence as to unsuccessful attempts to effect service by one or more of the methods stipulated for service under CPR 7.8(1); or by establishing, through expert evidence or otherwise, that none of these methods are lawful or practically possible or available under the laws of the foreign country in which service out on the defendant is sought to be effected; or by other cogent evidence as to the impracticability (which need not raise to the level of impossibility) of effecting service through diplomatic means or by the Hague Convention or by personal service on the defendant in the foreign country.

**JSC VTB Bank v Alexander Katunin et al** BVIHCM2014/0062 & BVIHCM2016/159 (delivered 11<sup>th</sup> October 2018, unreported) applied; **Abela and others v Baadarani** [2013] UKSC 44 distinguished.

5. In this case, VDHI, as the applicant, had the burden of satisfying the judge that service on Mr. Taher through the modes of service proscribed at CPR 7.8(1), was 'impracticable'. The learned judge identified the correct test under CPR 7.8A – whether it was 'impracticable' for VDHI to serve Mr. Taher through any of the usual methods or modes of service of a claim form out of the jurisdiction provided for in CPR 7.8(1). This was common ground between counsel for VDHI and MBFX who appeared at the hearing before the judge on 18<sup>th</sup> March 2022. The learned judge also ascribed the correct meaning of the term 'impracticable' (which is not the same as a 'good reason' under the corresponding rule 6.15 of the English CPR), and in concluding that it was not fatal to the application for substituted service that VDHI had not made any prior attempt to serve Mr. Taher in the UAE through the appropriate diplomatic channels.
6. In considering evidence of impracticability, absent any prior attempt to serve the claim form by any of the usual methods permitted by CPR 7.8(1), a judge must take care to not be influenced solely by considerations of the perceived length of time it would take to effect service through one of these conventional methods, as a basis for concluding that it would be impracticable to effect service out by any such method, warranting consideration of an order for service by a substituted method on the defendant. In this case, the finding by the learned judge that service by the usual methods was 'impracticable', rested on the expert evidence as to speed (or delay) in serving the court documents in the UAE through diplomatic channels, as an available method of service permitted by CPR 7.8(1), and that it would not be possible to effect service by that method before the July 2022 trial date. In reaching his conclusions on 'impracticability' the learned judge was correct to rely, to some extent, on the uncontradicted expert evidence as to the applicable law and available avenues in the UAE for service of foreign process, and to view the period of 4 to 24 months, not as evidence of 'impossibility', but as some evidence that, given the

July 2022 trial dates, it would not be possible to serve Mr. Taher through diplomatic channels before the trial date some 4 months hence.

**JSC VTB Bank v Alexander Katunin et al** BVIHCM2014/0062 & BVIHCM2016/159 (delivered 11<sup>th</sup> October 2018, unreported) applied.

7. However, Mr. Taher having been served in compliance with and through the alternative method ordered by the learned judge, and having filed his defence to the ASAC in the proceedings in compliance with the Substituted Service Order, there is no valid basis upon which to now set aside the order for substituted service. In doing so, Mr. Taher has complied with the very order for substituted service which he now appeals, and has participated in the proceedings below as an ancillary defendant. In those circumstances, it would be pointless to set aside the very order which, to a large extent, he has complied with, in circumstances where he was not only closely connected with Mex Clearing and knowledgeable about the said proceedings, but had filed an affidavit in relation to an aspect of those proceedings before the Court of Appeal.

### **JUDGMENT** **(The Substituted Service Appeal)**

- [1] **FARARA JA [AG]:** This matter concerns an application filed on 31<sup>st</sup> March 2022<sup>1</sup> by the applicant/appellant, Mr. Naser Taher (“Mr. Taher”) for permission to appeal paragraphs 1, 2 and 3 of the order<sup>2</sup> of a learned judge of the Commercial Court (Jack J) made at a case management conference on 18<sup>th</sup> March 2022 (“the CMC Order”). By this CMC Order the learned judge: (i) granted permission to the respondent, Von der Heydt Invest SA (“VDHI”), the ancillary claimant in the court below, to serve Mr. Taher (an ancillary defendant) with the Amended Statement of Ancillary Claim Form (“ASAC”) filed by VDHI in claim No. 73 of 2022 by email to Walkers (BVI); (ii) deemed the ASAC served on Mr. Taher on the day following the sending of the said email; and (iii) dispensing with the need for Mr. Taher to file an acknowledgement of service. The said orders were made pursuant to rule 7.8A of the **Civil Procedure Rules 2000** (“CPR”). The application for permission to appeal, is accompanied by a draft notice of appeal.<sup>3</sup> Mr. Taher requests that, if leave is

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<sup>1</sup> Consolidated Appeals Bundle Volume16 filed on 19<sup>th</sup> April 2022 pages 22-29.

<sup>2</sup> Consolidated Appeals Bundle Volume16 filed on 19<sup>th</sup> April 2022 pages 55-60.

<sup>3</sup> Consolidated Appeals Bundle Volume16 filed on 19<sup>th</sup> April 2022 pages 30-37.

granted, the Court should proceed to hear and determine the substantive appeal. Mr. Taher also seeks a stay of all directions relating to him in the CMC Order pending determination of the appeal.

- [2] The application for permission to appeal and, if granted, the appeal itself, is referred to as ‘the NT Substituted Service Appeal’. It was one of eight applications/appeals involving essentially the same parties which were heard by the Court at a special sitting from 25<sup>th</sup> to 29<sup>th</sup> April 2022. The decision in two of these appeals, the Recusal Appeal and the Adjournment Appeal, were given at the conclusion of the special sitting, with reasons to follow. Both appeals were allowed. The decisions and reasons for decisions in all eight appeals are to be given contemporaneously during a sitting of the Court this term.
- [3] The *dramatis personae* and the salient aspect of the factual and procedural history in relation to this dispute and the various proceedings brought before the Commercial Court in the Virgin Islands, has been given in the judgments in both the Discharge Appeal – an appeal against the refusal to discharge a WFO obtained *ex parte* on 26<sup>th</sup> April 2021, and the Representative Appeal – an appeal from the judge’s refusal to discharge a representative order made 21<sup>st</sup> June 2021 appointing VDHI as the representative claimant of the Noteholders in Claim No. 73 of 2021; which decisions will be given contemporaneously with the decision in all 8 appeals. It is therefore not necessary to recount these matters in detail here.
- [4] Suffice it to be said that three different claims were filed before the Commercial Court involving essentially the same parties – VDHI, Mex Securities, Mex Clearing and Multibank FX International Corporation (“MBFX”). These are: **No. 215 of 2020** commenced by Mex Clearing (as assignee) on 10<sup>th</sup> December 2020 against Mex Securities and MBFX for the sum of 36.4 million euros being sums advanced as loans by Mex Group Worldwide Limited to Von der Heydt & Co., AG<sup>4</sup> and held by MBFX to the order of Mex Securities, in which action a Consent Order (Tomlin

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<sup>4</sup> Consolidated Appeals Bundle Volume 2, page 72.

Order), with agreed schedule, was entered on 14<sup>th</sup> December 2020 staying the said claim on the terms of a confidential schedule to the said order signed for and on behalf of Mex Clearing, Mex Securities and MBFX, and providing, *inter alia*, for the transfer by MBFX, in full and final settlement, of the sum of 36.4 million euros on or before 11<sup>th</sup> December 2020 from Mex Securities accounts (FE1 and FE2) at MBFX to Mex Clearing; **No. 3 of 2021** also commenced by Mex Clearing on 12<sup>th</sup> January 2021 against MBFX seeking a freezing order over the remaining monies held by MBFX in favour of Mex Securities on the basis that Mex Securities had repudiated the settlement agreement embodied in the Consent Order (Tomlin Order) and claiming an entitlement to 'residual claims' amounting to 2,777,007.54 euros.; and **No. 73 of 2021** commenced by VDHI against Mex Securities, Mex Clearing and MBFX to set aside, on the grounds of fraudulent collusion and abuse of the process of the BVI court, the Consent Order (Tomlin Order) entered by the Commercial Court in No.215 of 2020, and to recover the sum of 36.4 million euros transferred from the accounts of Mex Securities (FE1 and FE2) at MBFX to Mex Clearing following the entry of the Consent Order.

- [5] On 26<sup>th</sup> April 2021, Jack J granted *ex parte* a worldwide freezing order ("WFO") in No. 73 of 2021 against Mex Clearing, Mex Securities and MBFX. The refusal of an application by the said defendants to discharge the WFO is the subject of the Discharge Appeal.
- [6] By an order made *ex parte* on 21<sup>st</sup> June 2021, VDHI was appointed as the representative claimant of the Noteholders and claim No. 73 of 2021 was (on the following date, 22<sup>nd</sup> June 2021), commenced by VDHI against Mex Securities, Mex Clearing, and MBFX as named defendants.
- [7] On 12<sup>th</sup> October 2021, Jack J made an order that these three claims be consolidated for hearing before a single judge of the Commercial Court. Further, by order dated 25<sup>th</sup> October 2021, the learned judge ordered that the trial of the consolidated claims 'shall be expedited and listed to commence on Monday 11<sup>th</sup> July 2022 with a time



estimate of 12 to 15 days'. On 26<sup>th</sup> October 2021, VDHI filed a Statement of Ancillary Claim ("SAC")<sup>5</sup> against Mex Securities, Mex Clearing and MBFX. On 11<sup>th</sup> February 2022, MBFX filed its statement of defence denying all claims against it, including the claim to set aside the Consent Order (Tomlin Order).<sup>6</sup>

- [8] On 22<sup>nd</sup> January 2022, after a hearing on 15<sup>th</sup> and 17<sup>th</sup> December 2021, Jack J, in a written judgment, dismissed MBFX's jurisdiction challenge filed 21<sup>st</sup> July 2021 to the court below determining the claims in these three matters. This dismissal is the subject of a separate application for permission to appeal filed by MBFX, which was not considered during the April 2022 Special Sitting, and which is yet to be brought on for hearing before this Court.

#### **VDHI's application for substituted service**

- [9] On 21<sup>st</sup> February 2022, VDHI applied in No. 215 of 2020, No. 3 of 2021 and No. 73 of 2021 for an order for permission to amend its SAC to join Mr. Taher personally and Mex Atlantic Corporation (a Cayman Islands company) to the proceedings as ancillary defendants; for permission to serve the Amended Statement of Ancillary Claim ("ASAC") on these two new defendants out of the jurisdiction; and to permit alternative service or, alternatively, to dispense with service in respect of Mr. Taher. This application was supported by the Ninth Affidavit of Olaf Alexander Priess filed 21<sup>st</sup> February 2022 ("Priess 9"), together with the documents exhibited thereto as "OAP-9".

#### **Decision of the court below**

- [10] At the resumption of the CMC on 18<sup>th</sup> March 2022, the learned judge made the order for service of the ASAC on Mr. Taher by an alternative method pursuant to CPR 7.8A, that is, by email to Walkers (BVI). No order was made dispensing with service on Mr. Taher. It is with respect to the paragraphs 1,2 and 3 of the said CMC Order that Mr. Taher seeks permission to appeal, and, if granted, for the hearing of the

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<sup>5</sup> Consolidated Appeals Bundle Volume 2 filed 7<sup>th</sup> February 2022 pages 75-79 and 80-153.

<sup>6</sup> Consolidated Appeals Bundle Volume 2A filed 19<sup>th</sup> April 2022 pages 2-83.

substantive appeal on an expedited basis. A draft notice of appeal accompanies the application for permission to appeal.<sup>7</sup> On 23<sup>rd</sup> March 2022, the ASAC was served on Mr. Taher in compliance with the CMC Order. On 24<sup>th</sup> April 2022 (the day before the April 2022 Special Sitting commenced), Mr. Taher filed and served his defence to the ASAC in No. 73 of 2021.

### **The Appeal**

[11] In his proposed appeal, Mr. Taher takes issue with the judge's reasoning and conclusion of impracticability. In his draft notice of appeal, Mr. Taher relies on three grounds. They are:

- (1) The judge failed to consider or give sufficient weight to the principle established by the UK Supreme Court in **Abela and others v Baadarani**<sup>8</sup> that an order for service by alternative method should only be made where service through the usual method under CPR 7.8 has not been successfully adopted.
- (2) The judge was wrong to make the order at paragraph 1 of the CMC Order in circumstances where the sole reason for making the order was to allow VDHI to effect expeditious service, as opposed to overcome any impracticability of service pursuant to CPR 7.8.
- (3) The learned judge was wrong to find and/or to make a finding contrary to the weight of evidence, that service of the ASAC and other documents on Mr. Taher was impracticable in circumstances where: (i) it was 'practically possible' for VDHI to serve Mr. Taher in the United Arab Emirates ("UAE"); (ii) there had been no failed attempts to serve Mr. Taher in the UAE; and (iii) there was no proper or cogent evidence that Mr. Taher was evading service.

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<sup>7</sup> Consolidated Appeals Bundle Volume16 filed 19<sup>th</sup> April 2022 pages 30-37.

<sup>8</sup> [2013] UKSC 44.

[12] Having considered the judge's reasons for making the order for substituted service (as set out in a short *ex tempore* decision on 18<sup>th</sup> March 2022), and having heard full argument on the application for leave and on the merits of the grounds of appeal, I conclude that Mr. Taher has satisfied the test of a real prospect of success (as opposed to a fanciful) required for permission to appeal against paragraphs 1 to 3 (inclusive) of the CMC Order dated 18<sup>th</sup> March 2022. Accordingly, leave to appeal is granted and the draft notice of appeal filed with the application for leave to appeal is deemed filed. I turn shortly to consider the substantive grounds of appeal. However, before doing so I remind myself of the salient principles applicable to the exercise of appellate restraint when dealing with appeals from the exercise of discretion and, in particular, from case management decisions. I will also consider the provisions of CPR 7.8A and the applicable principles.

#### **Principles applicable to appellate restraint**

[13] It is well-established that an appellate court will be slow to overturn decisions of a lower court made in the exercise of a judicial discretion. It may only do so where it has been shown that the judge below committed an error in principle in that the judge failed to take into account or gave too little weight to relevant factors or took into account or was influenced by irrelevant factors or considerations, and where the decision reached is so outside the generous ambit within which reasonable judicial disagreement is possible so as to be clearly or blatantly wrong. The oft cited authority for this principle is the passage from the judgment of Sir Vincent Floissac CJ in **Dufour et al v Helenair Corporation Limited and Others**.<sup>9</sup>

[14] These principles have been considered and applied in several decisions of this Court, and in the recent decision of the Judicial Committee of the Privy Council in **Byers and Others v Chen Ningning**.<sup>10</sup> In **Ming Siu Hung and others v J.F. Ming Inc and another**,<sup>11</sup> a recent decision of the Judicial Committee of the Privy Council, the Board cautioned against what is described as 'an over-zealous dissection of the

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<sup>9</sup> (1996) 52 WIR 188 at pages 190 and 191.

<sup>10</sup> [2021] UKPC 4.

<sup>11</sup> [2021] 1 BCLC 341 at [22].

language of a judgment’ in seeking to establish that a judge has failed to take something relevant into account. Specifically, with regard to appeals from case management decisions, an appellate court is required to exercise even more restraint before deciding to overturn case management orders made by a judge who applied the correct principles, has taken account of relevant considerations, and not factored into his determination irrelevant factors. This is settled law in this jurisdiction as 12ecognized in a number of decisions of this Court, including: **Employers International and Others v Boston Life and Annuity Company Limited**,<sup>12</sup> **Jtrust Asia Pte Ltd v Mitsuji Konoshita et al**<sup>13</sup> and **Showa Holdings Co. Ltd v Nicholas James Gronow and John David Ayres (As Receivers)**<sup>14</sup> in which Blenman JA (as she then was) reviewed several of the decisions of this Court.

#### **Alternative methods of service of claim form - CPR 7.8A**

- [15] CPR 7.8(1) stipulates the methods by which a claim form may be served out of the jurisdiction on a party to civil proceedings. These methods, which are referred to as the usual or conventional methods of effecting service out of the jurisdiction are: (a) by a method provided by (i) rule 7.9 (service through foreign governments or judicial and consular authorities), or (ii) rule 7.11 (service on a State); (b) in accordance with the laws of the country in which it is to be served; or (c) personally by the claimant or the claimant’s agent.
- [16] CPR 7.8A deals with applications for service out by alternative methods of service of a claim form. An application for an order for alternative service is predicated upon service under CPR 7.8 being ‘impracticable’. The full text of CPR 7.8A states:
- “(1) Where service under rule 7.8 is **impracticable**, the claimant may apply for an order under this Rule that the claim form be served by a method specified by the court.
- (2) An order under this Rule shall specify the date on which service of the claim form shall be deemed to have been affected (sic).

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<sup>12</sup> BVIHC VAP2007/0005 (delivered 4<sup>th</sup> July 2007, unreported).

<sup>13</sup> BVIHC MAP2020/0022 (delivered 31<sup>st</sup> May 2021, unreported).

<sup>14</sup> BVIHC MAP2020/0031 (delivered 31<sup>st</sup> May 2021, unreported).

(3) Where an order is made under this Rule, service by the method specified in the court's order shall be deemed to be good service.

(4) An application for an order under this Rule may be made without notice but **must** be supported by evidence on affidavit –

(a) specifying the method of service proposed;

(b) providing full details as to why service under rule 7.8 is impracticable;

(c) showing that such method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim; and

(d) certifying that the method of service proposed is not contrary to the law of the country in which the claim form is to be served.

(5) Where any method of service specified in an order made under this rule is subsequently shown to be contrary to the law of the country in which the claim was purportedly served, such service shall be invalid.” (emphasis added)

[17] Incidentally, pursuant to CPR 7.8B, the court has the power to dispense with service of the claim in ‘exceptional circumstances’. An application to dispense with service of a claim form may be made at any time and (a) must be supported by evidence on affidavit; and (b) may be made without notice.

[18] As to what is meant by ‘impracticable’ in CPR 7.8, Adderley J in **JSC VTB Bank v Alexander Katunin et al**<sup>15</sup> (cited approvingly by Jack J in his *ex tempore* decision in this matter) offered the following meaning:

‘...the word “impracticable” is not defined in the Rule, but I take it to mean “not practically possible”, meaning it is more difficult than impractical even though it might not be virtually possible.’

[19] In my opinion, the term ‘impracticable’ does not equate with impossible. It means, taking all relevant considerations into account, it is ‘not practically possible’, in the circumstances of the particular case, to effect service of the claim form on a defendant out of the jurisdiction. When considering CPR 7.8A and whether it is impractical to serve the defendant out of the jurisdiction through any of the methods

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<sup>15</sup> BVIHCM2014/0062 & BVIHCM2016/159 (delivered 11<sup>th</sup> October 2018, unreported).

specified in CPR 7.8(1), the court must consider and apply the overriding objective as set out at CPR 1.1. This requires the court to deal with cases justly, ensuring that all parties are, so far as practicable, on an equal footing, to save expense, and to ensure that the particular case is dealt with expeditiously. However, the overriding objective cannot be used to impose a different or lesser requirement than proof of impracticability.

[20] In relation to service of a claim form (including an ancillary claim form), there is another fundamental principle which must be borne in mind. That is, the purpose of service of legal proceedings is to ensure that the claim and the allegations made against the party to be served (the defendant), are brought to the attention of the defendant, and given an opportunity to respond to them in a timely manner, and before they are considered by the trial court. This is a fundamental principle of 'open justice'. This principle was expounded in **Abela and others v Baadarani** by Lord Neuberger and was considered and applied by this Court in its decision in **Flavio Maluf v Durant International Corp et al.**<sup>16</sup> In that judgment, Farara JA stated at paragraph 93:

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

[21] What is clear (and this was accepted by both sides as uncontroversial) is that whether it is impracticable to effect service on a defendant out of the jurisdiction using one of the modes of service specified at CPR 7.8(1), is a question of fact to be decided by the judge upon evidence provided by the applicant for an alternative

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<sup>16</sup> [BVIHCP2021/0025] (delivered 13<sup>th</sup> January 2022, unreported).

or substituted method of service under CPR 7.8A. The burden of proof lies on the applicant to the civil standard – a balance of probabilities. This is clear from CPR 7.8A(4)(b) whereby an application made under CPR 7.8A (1) may be made *ex parte* but must be supported by evidence on affidavit giving ‘full details as to why service under rule 7.8 is impracticable’. This is a mandatory requirement which must be satisfied by an applicant proceeding without notice to the other side. However, this does not detract from the requirement at CPR 7.8A(1) for any applicant, including an applicant proceeding *inter partes*, must satisfy the judge that service by the methods or modes under CPR 7.8 is ‘impracticable’. Accordingly, VDHI had the burden of satisfying the judge that service on Mr. Taher through the modes of service proscribed at CPR 7.8(1), was ‘impracticable’. In the instant matter, the proceedings on 18<sup>th</sup> March 2022, were *inter partes*. Counsel for both VDHI and Mr. Taher appeared and made submissions, respectively, as to why the application for substituted service on Mr. Taher ought to be granted or dismissed. Both parties proceeded on the basis, as accepted by the learned judge, that in order to succeed in the application the applicant, VDHI, was required to establish that it is ‘impracticable’ to serve Mr. Taher using one of the modes of service under CPR 7.8.

[22] In short, CPR 7.8A(1) requires an applicant for an order for substituted service of a claim form (including an ancillary claim form and statement of ancillary claim) on a defendant out of the jurisdiction, to show that service by any of the methods specified in CPR 7.8(1) is impracticable. This is a pre-requisite to obtaining an order under CPR 7.8A for substituted service or service by some other means or method.<sup>17</sup>

[23] The corresponding provision in the English CPR, rule 6.15, is not on all fours with the EC CPR 7.8A. The requirement to be satisfied by an applicant for substituted service under the English CPR is ‘good reason’ not ‘impracticability’. The leading authority on the test of ‘good reason’ in the English rule 6.15 is **Abela and others v Baadarani**. In considering the different requirements/tests between the EC CPR

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<sup>17</sup> Alexander Katunin et al v JSC VTB Bank [BVIHCPMAP 2015/0004] (delivered 20<sup>th</sup> June 2016, unreported).

and the English CPR, Adderley J in **JSC VTB Bank v Alexander Katunin et al**<sup>18</sup> found the learning in **Abela and others v Baardarini** as to what would constitute a ‘good reason’, instructive as to the kind of matters which could constitute ‘impracticability’ under the EC CPR 7.8A. I shall return to this when dealing with ground 1.

**Ground 1 – Attempted service under CPR 7.8 is the starting point  
Taher’s Submissions**

- [24] Mr. Taher’s main point under this ground is that the learned judge incorrectly made the order at paragraph 1 of the CMC Order for substituted service of the ASAC on him by email to Walkers (BVI), because VDHI had not attempted to serve him by one of the usual or conventional methods specified at CPR 7.8(1). This he submits, was necessary for VDHI to show before the judge could make an order for service on him by alternative means under CPR 7.8A. In support of this primary submission, Mr. Taher cites this extract at paragraph 24 of the opinion of Lord Clarke in the UK Supreme Court’s decision in **Abela and others v Baadarani**:

“24. It is important to note that rule 6.15 applies to 16authorize service “by a method or at a place not otherwise permitted” by CPR Part 6. The starting point is thus that the defendant has not been served by a method or at such a place otherwise so permitted. It therefore applies in cases (and only in cases) where none of the methods provided in rule 6.40(3), including “any other method permitted by the law of the country in which it is to be served” (see rule 6.40(3)©), has been successfully adopted...”

- [25] Mr. Taher points out that the position in **Abela and others v Baadarani** was followed by Bryan J in **Daiwa Capital Markets Europe Limited v Maan Abdul Wahed Al Sansea**<sup>19</sup> at paragraph 49, a first instance decision of the English court not binding or persuasive authority on this Court (or the court below). There the first instance judge found that there was a ‘good reason’ to validate retrospective alternative service after the claimant had attempted all methods of service permitted

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<sup>18</sup> BVIHCM2014/0062 & BVIHCM2016/159 (delivered 11<sup>th</sup> October 2018, unreported).

<sup>19</sup> [2021] EWHC 2937 (Comm).



by the English CPR 6.40(3), and which was possible under Saudi law, all of which had failed.<sup>20</sup>

- [26] It is the opinion of learned counsel, Mr. Malek KC, for Mr. Taher, that “CPR r7.8A is similarly not intended to be a starting point for service”. With this statement of first principles, I am entirely in agreement.

### **VDHI’s Submissions**

- [27] VDHI does not take any issue with the principles set out at paragraphs 13 to 18 of Mr. Taher’s skeleton argument – emphasizing that the core issue is whether service pursuant to CPR 7.8A is ‘impracticable’. It considers that there is common ground that the learned judge applied the correct legal authorities and asked himself the correct question.<sup>21</sup> They rely also on the first instance decision of Henshaw J in **Goshawk Aviation Ltd & Ors v Terra Aviation Network S.A.S and other companies**.<sup>22</sup> In that case, no attempt had been made by the claimant to serve the relevant respondents in Thailand/ Indonesia with the claim, but nonetheless the court made an alternative service order. They also referenced the judgment of Rix LJ in **Cecil v Bayat**<sup>23</sup> at paragraph 113 where he stated that a more liberal approach to such order is to be adopted where the respondent is not domicile in a convention state.
- [28] As to the decisions in **Abela and others v Baadarani** and **Daiwa Capital Markets Europe v Maan Abdul Wahed Al Sansea** relied on by counsel for Mr. Taher, VDHI points out that these cases involved applications for retrospective validation of service under the English CPR rule 6.15(2) -which provides that the court may, on application, order that ‘steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.’ It is submitted, that in the instant matter, we are dealing with ‘prospective service’

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<sup>20</sup> Ibid see paras 15, 54 – 56.

<sup>21</sup> Para. 9 of Mr. Naser Taher’s Skeleton Argument.

<sup>22</sup> [2021] EWHC 1029 (Comm).

<sup>23</sup> [2011] EWCA Civ 135.

and the sole test is and is no more than whether service under CPR 7.8 is 'impracticable'. I entirely agree with this submission.

### **Analysis and Conclusion**

- [29] The essential and practical purpose of CPR 7.8A, is that it provides a jurisdictional basis upon which a first instance judge can by order, stipulate some 'alternative' procedure for effecting or attempting to effect service of a claim form and statement of case on a defendant ordinarily resident outside the jurisdiction, which alternative method is only to be resorted to or adopted when the judge is satisfied that the methods of service stipulated or permitted by CPR 7.8(1) are 'impracticable'. This is clear from the language of CPR 7.8A(1) – 'where service under rule 7.8 is impracticable, the claimant may apply for...'. That is the only pre-requisite to the operation of CPR 7.8A(1). It invokes the court's jurisdiction to make an order for alternative or substituted service. Impracticability may be demonstrated both as a matter of fact and as a matter of law. This pre-requisite to an order under CPR 7.8A is buttressed by the procedural requirement under CPR 7.8A(4)(b) for the applicant to demonstrate by evidence on affidavit 'full details as to why service under rule 7.8 is impracticable'.
- [30] As stated above, 'impracticability' must be demonstrated or established to the court's satisfaction by cogent evidence. This may take the form of evidence as to unsuccessful attempts to effect service by one or more of the methods stipulated for service under CPR 7.8(1); or by establishing, through expert evidence or otherwise, that none of these methods are lawful or practically possible or available under the laws of the foreign country in which service out on the defendant is sought to be effected; or by other cogent evidence as to the impracticability (which need not raise to the level of impossibility) of effecting service through diplomatic means or by the Hague Convention or by personal service on the defendant in the foreign country. The list of factors or circumstances or events occurring, be it war, civil unrest, natural

disaster, or extenuating circumstances affecting the courts or appropriate authorities of the foreign State necessary or required to effect service, are limitless.

[31] The provisions in the corresponding English CPR Part 6 are not on all fours with the provisions of the EC CPR 7.8A. The decision of the UK Supreme Court in **Abela and others v Baadarani**, on the proper interpretation of Part 6 and its application to an application thereunder for substituted service on a defendant out of the jurisdiction, while instructive, is not binding on this court. I decline to follow it to the extent that it can be said to make it a mandatory requirement that an applicant for such an order must produce proof that he/she has unsuccessfully attempted service on the defendant out of the jurisdiction using one of the methods provided for in rule 6.40(3). Moreover, as observed above, the test under the corresponding English rule is 'good reason' and not 'impracticability'. These two tests are not the same. The 'good reason' requirement in the English CPR is wider than the 'impracticable' requirement under EC CPR 7.8A. While it may be said that 'impracticability' may be or will likely be considered a 'good reason' for making an order for substituted service on a defendant out of the jurisdiction, not every 'good reason' leads to it being impracticable so to do by one of the methods stipulated at EC CPR 7.8(1).

[32] In **JSC VTB Bank v Alexander Katunin et al**, there had been unsuccessful attempts by the applicant, over a considerable period of time, to effect service on the foreign defendant through diplomatic channels. Adderley J, quite correctly in my opinion, concluded on the basis of this evidence, that further attempts to effect service using the Hague Convention procedure would be a useless exercise leading to further delay of over a year without success.<sup>24</sup> This approach, however, does not lead to the conclusion, as a matter of principle, that evidence of prior unsuccessful attempts at service out through the conventional methods under CPR 7.8(1), is a necessary pre-requisite to establishing 'impracticability' under CPR 7.8A(1). As stated above, it is but one method by which, evidentially, an applicant can demonstrate that service by any of these conventional methods is 'impracticable'.

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<sup>24</sup> BVIHCM2014/0062 & BVIHCM2016/159 (delivered 11<sup>th</sup> October 2018, unreported). at paragraph 67.

[33] For the reasons set out above ground 1 fails.

**Grounds 2 and 3 – Impracticability of service under CPR7.8**  
**Mr. Taher's Submissions**

[34] Mr. Taher submits that the sole reason why the learned judge made the order for substituted service is because it would have been more expeditious for VDHI to serve him by email to Walkers (BVI) than through the usual or conventional methods stipulated at CPR 7.8(1) given the proximity of the trial set for some 4 months later in July 2022. Accordingly, the judge failed to take into account relevant factors prior to exercising his discretion and making the order and took into account wrongly the proximity of the trial and speed (or likely delay) of service through the usual methods.<sup>25</sup>

[35] As to 'speed' not being a relevant factor in the exercise of the court's discretion, Mr. Taher cites the dicta from the decision in **Cecil v Bayat** which states-

“...in general the desire of a claimant to avoid the delay inherent in service by the methods permitted by CPR r 6.40, or that delay, cannot **of itself** justify an order for service by alternative means. Nor can reliance on the overriding objective. If they could, particularly in commercial cases, service in accordance with CPR r6.40 would be optional; indeed, service by alternative means would become normal.”<sup>26</sup> (emphasis added).

[36] It is to be observed that this passage does not exclude from a court's consideration, matters of 'speed' as it relates to service by the usual means on a defendant outside the jurisdiction. What it does is to discount 'speed' as the only factor leading to the making of an alternative service order. With this principle I am wholly in agreement. Speed of service is but a factor which could or ought to be considered and properly weighed by the court when determining how to exercise its discretion on an application for an order for service by alternative means. In other words, the category of circumstances or factors which may be relevant to such consideration

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<sup>25</sup> Skeleton Arguments of Mr. Naser Taher at paragraph 24.

<sup>26</sup> [2011] 1 WLR 3086 at 3106.

of impracticability, are not closed, may be many and varied, and the weight to be given to any of them in the overall circumstances of a case, must be carefully considered and determined by the presiding judge. It is clear from the transcript, that the learned judge accepted that speed itself is not a good reason for granting alternative service. This is in keeping with the principle in **Cecil v Bayat** in the passage quoted above. Accordingly, the learned judge was mindful of this principle when reasoning to his decision.

[37] In the context of the English CPR, it must also be kept in mind when considering these decided cases, that the test or requirement there is that of a 'good reason' not 'impracticability' as under EC CPR 7.8A. The common denominator between these corresponding rules, is that all the relevant circumstances must be considered by the court, whether it is charged with assessing a 'good reason' or 'impracticability'. This approach finds much support in the principles formulated by Popplewell J (as he then was) in **Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihacat A.S. and Others**<sup>27</sup> which was upheld by the English Court of Appeal in **Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihacat A.S. and Others**.<sup>28</sup>

[38] Of the nine essential principles formulated by the Popplewell J, Mr. Taher relied in his written submissions on four of them.<sup>29</sup> Borrowing extensively from his paragraph 26, the first is that all relevant circumstances must be taken into account in determining what is a 'good reason', and it is not enough to identify a single circumstance which when taken in isolation would constitute a 'good reason' if that circumstance is outweighed by other circumstances. The second is that 'a critical factor' is whether the defendant has learned of the existence and content of the claim form. In the instant matter, it is clear that Mr. Taher was well aware of the various claims before the Commercial Court involving the Multibank Group. The evidence before the learned judge in Priess 9 is that he is the 100% owner of MBFX

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<sup>27</sup> [2017] EWHC 667 (Comm).

<sup>28</sup> [2018] EWCA Civ 1093; [2019] 1 W.L.R. 346.

<sup>29</sup> Skeleton Arguments of Mr. Naser Taher at paragraph 26.

which is part of the Multibank Group of companies.<sup>30</sup> It was also the evidence before the judge that Mr. Taher had previously sworn to an affidavit used in the proceedings before the Court of Appeal. There was also evidence of the lengthy transcripts of meetings between Mr. Taher, Mr. Duthie and Mr. Smith (among others) in December 2020 which, VDHI contends, are central to its case that Mr. Taher was a party to a conspiracy to defraud investors in the Notes.<sup>31</sup>

[39] The third is that the mere fact that the defendant learned of the existence and content of the claim form cannot of itself constitute a 'good reason', something more is required. Again, this is but one relevant factor to be considered and weighed by a judge in deciding whether to exercise his discretion to order substituted service under CPR 7.8A, subject to the requirement being 'impracticality' and not 'good reason'. The fourth, is that the court will consider whether the claimant could have effected service on the defendant outside the jurisdiction within the period of the validity of the claim form and, if so, why he did not. Again, this is but one relevant consideration which to some extent goes to the question of delay and the conduct of the claimant in the proceedings. In the instant matter, the judge excused any question of delay on the part of VDHI in making the application for substituted service on Mr. Taher, on the basis that any delay was caused by MBFX's challenge to the court's jurisdiction, which was determined against MBFX on 17<sup>th</sup> January 2022. The judge accepted that it would have been pointless for VDHI to make the application for substituted service on Mr. Taher before it did on 21<sup>st</sup> February 2022 when the jurisdictional challenge had not yet been determined.

[40] The gravamen of these two grounds of appeal is encapsulated in two principal grounds relied on by Mr. Taher at paragraph 27 of his skeleton argument. The first is that the learned judge erred when he considered the single circumstance of 'speed of service' by reference to the proximity of the trial, in isolation, when making

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<sup>30</sup> Skeleton Arguments of Mr. Naser Taher at paragraph 12.

<sup>31</sup> Skeleton Arguments of Mr. Naser Taher at paragraph 17.

the substituted service order; and the second is that his finding that it was impracticable to serve Mr. Taher by the usual methods provided for in CPR 7.8 was 'against the weight of the evidence' and clearly wrong.

[41] In relation to the first, it is submitted by Mr. Taher that had the judge considered 'other relevant circumstances', he would not have concluded that it was appropriate to make the order. In response, VDHI, at paragraph 17 of its skeleton argument, contends that it is wrong to say that the learned judge considered a 'single circumstance', that is 'speed', when making the alternative service order. In fact, he 'plainly did consider all of the circumstances of the case', including the factors submitted by VDHI and summarized at paragraphs 14 to 16 of its skeleton argument.

[42] In my view, there is merit in Mr. Taher's submission. A reading of the transcript of the 18<sup>th</sup> March 2022 CMC hearing, shows clearly the learned judge, focused his reasons for concluding that it would be impracticable to serve Mr. Taher in the UAE through diplomatic channels, primarily on 'speed' (or the lack thereof) given the proximity of the trial then listed for July 2022 - approximately 4 months away. While properly identifying the 'critical' test or question as whether it is 'impracticable' (within the meaning defined by Adderley J), the judge focused his attention and reasoning on what he termed 'the current position'. This he described as being 4 months before the trial of the action, and that, on the expert evidence adduced by VDHI, service through diplomatic channels in the UAE 'will take four months [to] twenty-four months'. From this evidence, he concluded that 'there is no means by which Mr. Taher can be served before the trial begins'.<sup>32</sup> He observed that 'since one has to look at all the factual matrix when determining whether it's practical or impractical to serve through diplomatic channels', he considered it a 'key factor' that, on the clear expert evidence, service through diplomatic channels would mean that there was no possibility of Mr. Taher being served in time for the trial. The judge

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<sup>32</sup> Consolidated Appeal Bundle Volume 3 page 1492.

reasoned that ‘in those circumstances there can really be no objection to [the] alternative service as proposed’ and ‘the overwhelmingly convenient course is to grant the form of alternative service which is sought’.<sup>33</sup>

[43] The judge did not consider the factors enumerated by VDHI at paragraphs 15 and 16 of its skeleton argument as matters which it must be assumed the judge took into account when making the order for substituted service, with the exception of the expert evidence as to how long it would take for service through diplomatic channels to be effected on Mr. Taher in the UAE, and the fact that the UAE is not a signatory to the Hague Convention.

[44] The ‘other relevant circumstances’ relied on by Mr. Taher, and for convenience, VDHI’s responses<sup>34</sup> to each of them and my assessment of the merits of each of these points, are as follows:

**(i) VDHI had taken no prior steps to serve Mr. Taher whether through the usual methods under CPR 7.8(1) or otherwise.**

*This is not denied by VDHI, but it makes the point that this is not a jurisdictional obstacle and, in all the circumstances of the case, it was correct for the judge to make the order for substituted service.*

I have already dealt with this. In my opinion, evidence of prior unsuccessful attempts at service out on a defendant is but only one of several possible means by which impracticability in using these usual methods provided for at CPR7.8(1) might be established by an applicant for an order for substituted service; and the absence of proof of such prior unsuccessful attempts is therefore not necessarily fatal to such an application.

**(ii) VDHI had not submitted any actual and/or cogent evidence to the court to show it would be impractical to serve Mr. Taher in the UAE using one of the usual methods under CPR 7.8(1).**

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<sup>33</sup> Ibid page1493.

<sup>34</sup> VDHI’s Skeleton Argument at paragraph 17.



*VDHI relies on the expert evidence of Mr. Almobideen as cogent evidence that it was impracticable to serve Mr. Taher through diplomatic channels in the UAE. His evidence was to the effect that the process of service through diplomatic channels there “takes a substantial period of time” (between 4 and 24 months) and “it is commonly known in the UAE that one of the major grounds to prolong any proceedings ‘unnecessarily’ is to conduct service upon a party via the diplomatic channels”. Accordingly, the judge was perfectly entitled to rely on that evidence, as he did.*

In my judgment, this issue is at the kernel of this appeal. Accordingly, I shall deal with it extensively when analysing the various points and counter-points and reaching the Court’s conclusion on grounds 2 and 3.

- (iii) **The sole basis upon which VDHI sought the order for substituted service was because it believed that service through the usual methods under CPR7.8(1) would be “likely to occasion very considerable delay”<sup>35</sup> and the judge made the order on the basis of this alleged delay despite identifying correctly that speed of service is not a ground for making such an order.**

*VDHI disputes that the sole basis it relied on to obtain an order for substituted service was that service through the usual methods at r. 7.8 were likely to result in considerable delay. To buttress this argument, VDHI points to its skeleton argument dated 21<sup>st</sup> February 2022 citing the ‘other factors’, and to its further skeleton argument in advance of the 18<sup>th</sup> March 2022 hearing at section [29] “containing its submissions on impracticality.” Moreover, it submits that the instant matter where there is a trial date fixed (July 2022) “is a far cry from where the claimant simply wants to serve more quickly than it otherwise could.” (para. 17.2.3)*

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<sup>35</sup> VDHI Skeleton Argument dated 21<sup>st</sup> February 2022 at paragraphs 48.1 and 48.2; Transcript of CMC hearing on 18<sup>th</sup> March 2022 at 14/18.

I agree that this is not such a case. I also agree that considerations regarding a trial date already fixed and the evidence as to the likely time period within which it would take for Mr. Taher to be served with the court documents through diplomatic channels in the UAE (where service through the Hague Convention is not an available option), were relevant considerations for the judge to take into account when deciding, in the circumstances of this case, whether it was 'impracticable' to serve Mr. Taher through diplomatic channels as one of the permitted methods of service under CPR 7.8. However, these factors must be weighed against other relevant factors. These would include: the date when the application to join Mr. Taher as a defendant/ancillary defendant to the claim/ ancillary claim (21<sup>st</sup> February 2022); whether, in the circumstances, fairness required that the July 2022 trial dates be adjourned/relisted for later in 2022 to accommodate service by diplomatic channels on Mr. Taher in the UAE; whether it was correct, as a matter of principle and proper case management, to insist on keeping the July 2022 trial dates; the connection by Mr. Taher with the Multibank Group of companies and his actual or presumed knowledge and familiarity with the existing claims and proceedings and the underlying facts and allegations; the most effective way of bringing the proceedings, including the ASAC, to Mr. Taher's attention; the availability of legal representation to him; and his ability to prepare and file his defence to the claim and to do so within the period before the July 2022; the then current state of the pleadings and other steps necessarily to be taken in the said litigation in order to be ready for trial in July 2022. As mentioned above, MBFX's subsequent appeal against the judge's refusal to adjourn the July 2022 trial dates, was allowed during the April 2022 Special Sitting of the Court; and, thereafter, the proceedings below were further case managed and new trial dates fixed by a judge of the Commercial Court for January 2024, a year and 6 months after the July 2022 trial dates.

- (iv) **VDHI was culpable for its own delay and the very late joinder of Mr. Taher to the proceedings some 10 months after issuing them. No explanation was given by VDHI for this delay, including waiting 4 weeks after judgment on MBFX's jurisdiction challenge. This is so despite the fact that the facts upon which VDHI sought to join Mr. Taher were known to VDHI at the time when they issued the said proceedings.**

*VDHI denies that it was culpable for any delay in joining Mr. Taher as a defendant/ancillary defendant in the proceedings. It argues that it brought the joinder application "as soon as practicable once issues of service and jurisdiction against the other defendants had been dealt with..."*

In my view, this point is a non-starter. The learned judge did not determine the critical issue of 'impracticability' or the application for an alternative service order on the basis of any 'delay' on the part of VDHI and the reasons and culpability for any such delay.

- (v) **MBFX made an application to adjourn the trial which the judge refused. It was open to the judge to take the more obvious route and to adjourn the trial to accommodate his decision, but instead he ordered service by alternative means and abrogated Mr. Taher's rights to be treated in a normal way, simply to ensure that a trial fixture could be maintained.**

*VDHI argues that since the judge had refused to adjourn the trial from July 2022, it was proper for him to take the timing of the trial into account.*

In my view, the learned judge clearly had certain possible options available to him, which included adjourning or relisting the trial dates, to be considered when deciding how to exercise his discretion in relation to VDHI's application for substituted service. However, I would simply point out that the approaching trial date is but a factor to be considered when determining impracticability. As matters unfolded, this Court found that the judge was wrong when he failed to accede to MBFX's application to adjourn or relist the trial date to a date later in

2022, for the reasons set out in the decision to be given contemporaneously with the judgment in these eight appeals.

- (vi) ***It was open to the judge to adjourn the application for service by alternative means with liberty to restore it to allow VDHI to attempt service through the usual methods.***

*VDHI sees this line of argument as a repetition of the argument on behalf of Mr. Taher that VDHI should have attempted to effect service through diplomatic channels in the UAE.*

In my view, adjourning the application on the basis that VDHI would first attempt service through diplomatic channels, while technically an option available to the learned judge in the exercise of his case management powers under CPR Part 26, was not the preferred option or course of action. This option was not sought by VDHI, and the application should be decided on its merits and either granted or refused. Considerations of whether to adjourn the trial dates in July 2022 are matters to be considered in the exercise of the court's discretion. If the application was refused, the consequence may very well be that the trial dates would have to be adjourned to accommodate service on Mr. Taher through diplomatic channels. On the other hand, if the application for substituted service is granted and the order made (as is the case), considerations as to whether the July trial dates can still, realistically be kept or whether as a matter of fairness and proper case management the trial dates ought to be adjourned would still arise. These considerations would involve necessarily the current state of the pleadings, service on Mr. Taher, time for preparation of his defence, and any other necessary procedural steps to be taken in order for the parties to be ready for a trial.

[45] As to the second bases - challenging the judge's finding that it was 'impracticable' to serve Mr. Taher by the usual methods provided for in CPR 7.8 - being against the

weight of the evidence, Mr. Taher relies on four points.<sup>36</sup> These summarised, together with VDHI's responses<sup>37</sup> and my assessment of each of the said points, are as follows:

(a) the judge's finding that the '*overwhelmingly convenient cause*' was to order service by an alternative method, is contrary to the test of 'impracticability' required under CPR 7.8A. Convenience is not a sufficient justification for ordering service by alternative methods (per Adderley J in *JSC VTB Bank v Alexander Katunin*- 'impracticable' means "not practically possible").

*VDHI's argues that the judge was clearly aware of the correct legal test and applied it, notwithstanding his use of the expression 'overwhelmingly convenient cause'.*

To be absolutely correct, the expression used by the learned judge was '*overwhelmingly convenient **course***' not 'cause'.<sup>38</sup> It was used by the judge to refer, not to the test of 'impracticability', but to the kind of relief – the course of action in ordering the particular method of alternative service sought by VDHI – namely, by email to Walkers (BVI). As to the test itself as to whether CPR 7.8A was engaged, the learned judge repeated earlier in his delivery that the test or the critical test was whether it was 'impracticable'. Accordingly, this point is a non-point. The more important issue is whether the learned judge properly applied the correct test as identified by him.

(b) there was no actual evidence of impracticability to serve Mr. Taher in the UAE by the usual methods put before the court since, as admitted, VDHI had made no attempt to serve him there using any of these methods before applying for service on him by alternative methods.

*VDHI argues that this contention is wrong for the reasons set out at paragraph 17.2.2 of its skeleton argument. There full reliance is placed by*

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<sup>36</sup> VDHI's Skeleton Argument paragraph 27(2)(a)(d).

<sup>37</sup> VDHI's Skeleton Argument paragraph 17.3.

<sup>38</sup> Supra, note 32.

*VDHI on the expert evidence as to the available methods of service of foreign process on an individual in the UAE, and the substantial period which in practice it takes for service through diplomatic channels to be effected.*

This is certainly a major consideration, whether the learned judge was correct in his finding of 'impracticability' based on the expert evidence of Mr. Almobideen and the approaching trial dates in July 2022. I shall address this when concluding on grounds 2 and 3.

(c) the expert report of Mr. Almobideen dated 21<sup>st</sup> February 2022 did not demonstrate that it was impracticable to serve Mr. Taher in the UAE, only that it may take some time to do so using appropriate diplomatic channels.

*VDHI argues that Mr. Almobideen's expert report "did demonstrate that it was impracticable in the circumstances of this case to effect service [on Mr. Taher] through diplomatic channels in Dubai." They also contend that "there were good reasons for needing service to be effected much sooner and more reliably than would have been the case through diplomatic channels."*<sup>39</sup>

In my view, as stated at (b) above, this is the most important issue for determination in this appeal.

(d) (i) As there was no prior attempt to serve Mr. Taher in the UAE, it was not possible to say with certainty how long service would actually take; (ii) the judge's reliance on the expert opinion evidence of Mr. Almobideen that it would take a minimum of 4 months to serve Mr. Taher in the UAE, was misplaced since he had provided no details or materials to support his time estimate; and, (iii) at paragraph 4.5 of his report, Mr. Almobideen identified a 'recent common practice' in the UAE of service of foreign proceedings carried out and effected through the State Notary Public/Dubai Notary Public, but did not opine on how long this process may take.

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<sup>39</sup> VDHI's Skeleton Arguments paragraph 17.3.3.

Mr. Almobideen also opines at paragraph 4.5.2, that if the recipient of the notice or his legal representatives participate in the proceedings then there would be no valid legal grounds to set the proceedings aside before the UAE court on the basis of invalidating service. And VDHI provided no evidence to the court below as to why it did not avail itself of this method of service of the court documents on Mr. Taher, the learned judge did not consider it, and he made no finding as to why this method of service should not have been attempted by VDHI prior to making its application for service by alternative methods.

*Taking these three points in turn, VDHI argues that (i) is incorrect (see para. 17.2.2); (ii) Mr. Almobideen in his expert opinion report, provided a range of time estimates and there was no basis on which to doubt his opinion; (iii) this contention involves speculation that this method would be quicker than the range stated by Mr. Almobideen, without any proper basis to do so. Given his overall time estimate, “it was legitimate for the judge to proceed on the basis that VDHI should not be required to attempt this method of service before alternative service is ordered where (as here) it is impracticable in the circumstances of the case to do so.” (para. 17.3.4)*

- [46] Finally, MBFX contends that contrary to the judge’s finding that it was impracticable to serve Mr. Taher in the UAE, service on him there was, on the evidence of Mr. Almobideen, ‘practically possible’, and there being no evidence of any prior attempted service on him, there was no direct evidence on which VDHI or the judge could rely to establish that it was impracticable to serve Mr. Taher. It is also submitted that there was no evidence or cogent evidence before the judge that Mr. Taher had been, in any way, evading service, and the vague allegations in VDHI’s skeleton argument that Mr. Taher “seek to evade service” or “seek somehow to cause procedural issue with the UAE” are entirely unsubstantiated.<sup>40</sup> No such

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<sup>40</sup> VDHI’s Skeleton Argument paragraph 28.

finding was made by Teare J in **Marketmaker Technology Limited v CMC Group Plc**<sup>41</sup> and VDHI's reliance on this<sup>42</sup> was misplaced.

### **VDHI's Submissions**

[47] In response to Mr. Taher's submissions under grounds 2 and 3, VDHI submits that these grounds are "hopeless"; and this was an appropriate case for the learned judge to make the order for substituted service of the claim form on Mr. Taher by email to Walkers (BVI). They rely on the following two primary reasons advanced before the learned judge, each of which they say the judge would have taken into account, even if not expressly referred to in his short *ex tempore* ruling.

[48] The first is that the evidence before the judge clearly shows the extent of Mr. Taher's control over entities in the Multibank Group, that he is either giving instructions directly to Walkers or is directing they who are. In any event, he is closely following what is going on in the litigation before the Commercial Court in BVI as is evident from:<sup>43</sup>

(i) the affidavit which Walkers served for him on 3<sup>rd</sup> November 2021 in support of MBFX's application to the Court of Appeal for a stay of the lifting of the confidentiality restrictions,<sup>44</sup> which affidavit makes clear that he is very closely involved in the *minutiae* of this case;

(ii) having been served with VDHI's application for an injunction against him, Mr. Taher was able to produce a 91-page affidavit together with 1,069-page exhibit,<sup>45</sup> the role of which was stated to be "*to assist the Court by setting the record straight*"; and

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<sup>41</sup> [2008] EWHC 1556 (QB).

<sup>42</sup> VDHI's Skeleton Argument paragraph 16.7

<sup>43</sup> VDHI's skeleton argument paragraphs 15.1-15.3.

<sup>44</sup> Consolidated Appeals Bundle Volume 17, Tab 7, pages 121-146.

<sup>45</sup> Consolidated Appeals Bundle Volume 14, Tab. 8, page 7.



(iii) the fact that both Walkers in correspondence and Mr. Taher's counsel in a recent hearing, have indicated that they are, or would be, preparing Mr. Taher's defence.

[49] The second primary reason is that "it is impracticable, in the circumstances of the present case, to serve Mr. Taher through diplomatic channels.<sup>46</sup> In support of this submission, VDHI relies on the points listed at subparagraphs (i) to (viii) below, to which I have added (in most instances), my assessment of their relative merits. These are:

- (i) alternative service by the methods sought by VDHI, was "highly likely to bring the proceedings to Mr. Taher's attention, which is a "critical consideration", albeit not, of itself, determinative, but which in combination with other relevant considerations, makes the order for alternative service justified.<sup>47</sup>
- (ii) Mr. Taher has submitted to the jurisdiction of the BVI Court for the purposes of the order against him which embodies undertakings that he has given to the Court.<sup>48</sup> This involves an undertaking or offer of an undertaking '*[u]ntil after trial or further order in the meantime*'.
- (iii) as the trial is listed to take place in July 2022, "it will be impossible to effect service on Mr. Taher in Dubai through the channels required under CPR [7.8] and the UAE procedural law so as to ensure service on Mr. Taher before the trial date;" and even if the trial was adjourned to the date proposed by MBFX, "service would still be unlikely to be effected in Dubai in sufficient time".

Here I must point out again that the appeal against the learned judge's refusal to adjourn the trial date from the dates listed in July 2022 was allowed by this Court at the conclusion of the April 2022 Special Sitting, and

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<sup>46</sup> VDHI's skeleton argument paragraph 16.

<sup>47</sup> Ibid at paragraph 16.1.

<sup>48</sup> Consolidated Appeals Bundle Volume 17, Tab1, pages1311-1316.

a judge of the Commercial Court has since listed the trial dates for January **2024**. In those circumstances, this submission has been overtaken by these developments. Keeping the July 2022 trial dates is no longer of such 'critical' importance to the time it would have taken to serve Mr. Taher through diplomatic channels in the UAE.

(iv) Mr. Taher speaks and reads perfect English (as the judge observed in the reasoning to his decision) and, no issues concerning the translation of documents into his native tongue arises. There are, therefore, no reasons why he could not immediately and properly instruct Walkers (BVI) in the preparation of his defence.

Again, it seems to me that this point has been overtaken by both the adjournment of the trial to dates to January 2024, and by the fact that Walkers were able to and have filed, on or about 24<sup>th</sup> April 2022, Mr. Taher's defence in the proceedings below.

(v) This is not a Hague Convention case, where it might be argued that alternative service could subvert the underlying policy of the Convention.

It was accepted, including by the learned judge, that the UAE is not a signatory to the Hague convention on the service of foreign process.

(vi) Mr. Taher having sought permission of this Court to appeal the service out order, he should be properly before the Court, if leave is granted and the appeal heard.

In my view, this is a non-point which does not advance the core issue of 'impracticability', and whether the learned judge properly exercised his discretion to make the service out order.

(vii) Even if service via diplomatic channels were attempted in this case, "VDHI believes that Mr. Taher will either seek to evade service, or seek somehow to cause procedural issues in the UAE."

In my opinion, this point is of little or no merit to the core issue of whether there was before the learned judge cogent evidence of 'impracticality', as required under CPR 7.8A . VDHI's point is based on vague allegations of 'beliefs', such as to be wholly lacking in any factual foundation. Neither, in my opinion, does his point benefit from VDHI's reliance on MBFX running allegedly "hopeless points about *forum conveniens* of this claim". MBFX was entitled to bring such a challenge to the jurisdiction of the BVI Court to try the claim, which challenge was subsequently rejected by the learned judge in his ruling in January 2022. Equally in my view, this point is not much improved by VDHI's reliance on the criticisms of Mr. Taher's conduct of the litigation by Teare J in the **Marketmaker Technology Limited**\_case. In that case, the said judge adverted to Mr. Taher's repeated changes of legal representation, and his failure to provide an address for service in the jurisdiction. He then went on to make an order for alternative service on Mr. Taher to avoid lengthy service via diplomatic channels. That decision was made by the said judge after considering all the factors and the provisions of the English CPR 6.15, where the requirement is a 'good reason' and not impracticability as under EC CPR 7.8A.

- (viii) It is consistent with the overriding objective that the claims against Mr. Taher are tried together with the claims against MBFX, Mex Clearing and Mex Securities as they are identical and arise from the same or similar facts. VDHI argue that it would be impractical therefore to require VDHI to serve Mr. Taher in Dubai via a process likely to take many months, and no prejudice could be suffered by Mr. Taher from the order for alternative service.

In my judgment there is merit in this submission. There are good case management reasons why the claims against Mr. Taher and those against the other Ancillary Defendant should be tried together. They should for the reasons articulated by VDHI. As to the issue of impracticality of service on

Mr. Taher via appropriate diplomatic channels in the UAE, within a time frame, so as to meet the then July 2022 trial date, the 'sting' has been taken out of this point by the Court allowing the appeal against the dismissal by the judge of MBFX's application to adjourn the said trial dates, and by the new trial dates being fixed for January 2024.

- [50] In response to Mr. Taher's submissions at paragraph 28 of his skeleton argument, VDHI argues that the definition of '*impracticable*' by Adderley J in **JSC VTB Bank v Alexander Katunin et al**, makes it clear that "mere possibility of service being effected through the usual channels is not fatal to an application under CPR r. 7.8A."
- [51] As mentioned earlier in this judgment, I agree that the test under CPR 7.8A is not 'impossibility' but 'impracticability'. Impossibility would be far too stringent a test or requirement as a threshold basis for invoking the court's power to make an order for alternative service on a foreign defendant to proceedings in the BVI. Of course, proof that impossibility of service by a certain 'usual' method provided for under CPR 7.8, whether it be that none of the usual methods are sanctioned by and available under the laws of the foreign State in which the defendant is said to reside and where service on him/her is sought to be effected, would be conclusive proof that service by such methods is 'impracticable'. Put shortly, 'impracticable' is a wider test than 'impossibility', and while every 'impossibility' (if proven) leads to 'impracticability', not every situation of 'impracticability' equates with 'impossibility'.
- [52] VDHI submits<sup>49</sup> that "[i]mpracticability in this context focuses on practical possibility in the circumstances of this case, in which, ... a trial date is to take place in mid-July." Accordingly, it was clearly not wrong for the judge "to consider the issue of timing; it was a paramount consideration." In fact, the judge in rendering his decision, considered 'timing' of the trial to be an 'important question';<sup>50</sup> and what he concluded, on the expert evidence, that there was no possibility for Mr. Taher to be

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<sup>49</sup> VDHI's skeleton argument at paragraph 18.2.

<sup>50</sup> Consolidated Appeals Bundle Volume 3 at page1491.

served in time for the trial, as a 'key factor'. The question, therefore, is whether in so reasoning the learned judge erred such that any error rendered his exercise of discretion in making the alternative service order, plainly or blatantly wrong.

- [53] As to Mr. Taher's contentions at paragraph 28(3) and (4), where it is alleged that the judge took certain factors concerning Mr. Taher conduct and his likelihood to evade service in the UAE into account, VDHI argues that these factors were in fact not taken into account by the judge in reaching his decision and, if they were, they are further reasons in favour of making the order for substituted service.<sup>51</sup>

### **Discussion and Conclusion on grounds 2 and 3**

- [54] As stated above, in my view the learned judge identified the correct test under CPR 7.8A – whether it was 'impracticable' for VDHI to serve Mr. Taher through any of the usual methods or modes of service of a claim form out of the jurisdiction provided for in CPR 7.8(1). The learned judge also ascribed the correct meaning of the term 'impracticable' (which is not the same as a 'good reason' under the correspondent rule 6.15 of the English CPR), and in concluding that it was not fatal to the application for substituted service, that VDHI had not made any prior attempt to serve Mr. Taher in the UAE through the appropriate diplomatic channels. No evidence of any prior unsuccessful attempts at service in the UAE were put before the judge in support of its application, and hence, none can be relied on by VDHI to establish that it was impracticable to serve Mr. Taher through any of the usual methods under CPR 7.8(1). Proof of unsuccessful attempts at service by one or more of these 'usual' methods, is but one way in which an applicant for an order for substituted service can seek to establish, to the court's satisfaction, that service by these methods is 'impracticable'. Accordingly, Mr. Taher's submission that the application ought to fail in the absence of such proof of prior unsuccessful attempts at service, is incorrect and wrong in principle. No such limitation is expressed or is to be implied in CPR 7.8A. The only requirement is for the applicant for a substituted

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<sup>51</sup> VDHI's skeleton argument at paragraph 18.3.

service order to support his/her application with evidence on affidavit 'giving full details as to why service under CPR7.8 is impracticable'.<sup>52</sup>

[55] In my judgment, the critical issue raised by grounds 2 and 3, is whether the learned judge erred in his finding that the test of 'impracticability', as explained above, was made out by VDHI in its application for an order for substituted service of the ASAC and other documents on Mr. Taher out of the jurisdiction in the UAE. More specifically, whether the judge was wrong when he found that the expert evidence of Mr. Almobideen regarding to the methods of service of foreign process available (or not available) to a claimant under UAE law, and the time period which, in practice, it would likely take to effect service there through diplomatic channels (service under the Hague Convention being not an available legal option), amounted, in all the circumstances, to it being impracticable to serve Mr. Taher through diplomatic channels, and to do so before the trial date fixed for July 2022. This finding of 'impracticability' by the judge, was based on the 'speed' or time frame within which it would take to serve Mr. Taher through diplomatic channels, and his conclusion that there was 'no possibility' that Mr. Taher could be served through diplomatic channels in the UAE before the trial date then fixed for July 2022.

[56] As to the requirement for proof of 'impracticability', the evidence relied on by VDHI in support of its application for an order for substituted service is the Ninth affidavit of Olaf Alexander Priess.

[57] In Priess 9, it was averred that MBFX is 100% owned by Mr. Taher, who is the founder and chairman of the Multibank Group of which MBFX is a part. As to the alleged role and involvement of Mr. Taher in the alleged fraud giving rise to the Consent Order (Tomlin Order) and the transfer of the sum of 36.4 million euros out of the accounts of Mex Securities at MBFX to Mex Clearing, Mr. Priess referenced, inter alia, certain findings made by Justice Jack in a written judgment at paragraph 81, delivered in September 2021, that Mr. Taher was the controlling mind of MGW

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<sup>52</sup> CPR 7.8A(4)(b).

and MBFX, “so his knowledge can be imputed to MBFX”. He also referenced the judge’s finding and that “MBFX was wholly under the control of Mr. Taher against whom a good arguable case of fraud has been made...”. As to basis of VDHI’s application for permission to serve the ASAC on Mr. Taher out of the jurisdiction by alternative means, this is addressed by Mr. Priess at paragraphs 94 to 96 and 101 to 115.

[58] At paragraph 103 of Priess 9, Mr. Priess summarises the expert opinion received from Mr. Almobideen as to the available methods of service of foreign process on an individual in the UAE in the absence of any bilateral agreement or special law, and his opinion that the commonly used method of service is “through diplomatic channels then via the appropriate court in the UAE”. At paragraph 103€ he states that it is “well known that such process takes a substantial period of time” (between 4 and 24 months) and “it is commonly known in the UAE that one of the major grounds to prolong any proceedings ‘unnecessarily’, is to conduct service upon a party via diplomatic channels”.<sup>53</sup>

[59] Mr. Priess also avers at paragraph 105 that the methods of service set out at CPR 7.8(1) “are either prohibited under UAE law or would cause very considerable delay to effect service on Mr. Taher”. As to the requirement for these methods to be shown as ‘impracticable’, Mr. Priess discounts service by personal or email service as being “prohibited” under the laws of the UAE. He avers that the alternative means sought in the application - service of the documents by email on Walkers (BVI) - is sure to have them brought to Mr. Taher’s attention (para. 111(b)).<sup>54</sup> This is because Walkers (BVI) who “are currently representing MBFX, it is clear, due to the control that Mr. Taher has over entities in the Multibank Group, that he is either giving instructions directly to Walkers or is directing those who are. In any event he is clearly closely following what is going on in this litigation.” This is evident from an affidavit which Walkers served from him on 3<sup>rd</sup> November 2021 in support of MBFX’s

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<sup>53</sup> See p 868 exhibit “OAP-9”.

<sup>54</sup> Ninth Affidavit of Olaf Alexander Priess filed 21<sup>st</sup> February 2022 at (para. 111(b)).

application to the Court of Appeal for a stay of the lifting of the confidentiality restrictions The Court is respectfully invited to read this affidavit, which makes it clear that Mr. Taher is very closely involved in the minutiae of this case, having presumably been kept closely informed by MBFX's legal representatives."

[60] At paragraph 112, Mr. Priess confirms that VDHI "has not yet attempted to serve Mr. Taher via the methods provided for in r.7.8". He 'submits', "that it is impracticable, in the circumstances of the present case, to serve Mr. Taher by those methods, and an order for service by the alternative methods detailed above is justified". In support of this conclusion he proffers five reasons (a) to (e) at paragraph 112 by which reliance was placed, inter alia, on the proposed alternative method of service – by email to Walkers (BVI) – as being "highly likely to bring these proceedings to Mr. Taher's attention, which is a "critical" consideration"; and service by the CPR 7.8 methods being "likely to take a considerable period of time – at one extreme, up to 24 months – and, in any event, considerably longer than affecting (sic) service by email, as proposed". He also pointed out that the UAE is not a signatory to the Hague Convention.

[61] In his short *ex tempore* judgment on 18<sup>th</sup> March 2022 when making the order for substituted service on Mr. Taher of the ASAC, the learned judge identified the test to be applied as that given by CPR 7.8A. He observed that the requirement therein that service be 'impracticable', is more stringent than the requirement of a 'good reason' in the corresponding English CPR provision. He observed, correctly in my view:

"It's certainly right that in order to show that it's impracticable there must also be a good reason, but it doesn't follow that a good reason suffices if it is practicable to serve by the ordinary methods."

[62] The learned judge considered that the test which he needed to apply is that which was formulated - 'practically possible' - by Justice Adderley in **JSC VTB Bank v Alexander Katunin et al** at paragraph 22:

"The word impracticable is not defined in the rule, but I take it to mean not **practically possible**, meaning it is more difficult than impractical even though it might not be virtually impossible...It is common ground that the question of impracticability is one which is a question of fact." (emphasis added)



[63] The learned judge also accepted that:

**“[S]peed itself** is not a good reason for granting alternative service. Very often if service has to be effected through diplomatic channels or through the Hague Convention it will take a long time, but the fact that there is a long time is not something which renders the rule automatically applicable. **One still has to come back to the critical question of whether it is impracticable within the meaning as defined by Justice Adderley.**”  
(emphasis added)

[64] In the reasoning to his decision to make the order for substituted service on Mr. Taher, the learned judge considered that “an important question is the question of timing of the trial. In a judgment I delivered today, I rejected an application to adjourn the trial which is currently listed for July [2022]”. He then went on to attribute the delay in VDHI issuing the application for alternative service on Mr. Taher, to MBFX’s application challenging the jurisdiction of the court, which application he had dismissed in a judgment on 17<sup>th</sup> January 2022. He accepted the submission of lead counsel for VDHI, Mr. Penny KC, “that it would have been pointless to add Mr. Taher as a party before it was established whether this court had jurisdiction over the claims which have been brought against the Multibank Group. In those circumstances there is no delay in their issuing the application which was very shortly after the judgment delivered on the 17<sup>th</sup> January [2022]”. In my view, nothing in this appeal turns on the question of delay and at whose fault.

[65] The learned judge saw the ‘current position’ in the claims before the Commercial Court to be as follows:

“There is now some four months to the trial of the action. The expert evidence which has been adduced by [VDHI] is that service through the diplomatic channel – I should add that the United Arab Emirates are not parties to the Hague Convention – that service through diplomatic channel will take between four months to 24 months. It’s apparent from that that there’s no means by which Mr. Taher can be served before the trial begins.”<sup>55</sup>

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<sup>55</sup> Consolidated Appeals Bundle Volume 3, page1492.

- [66] The learned judge dealt head on with the submission by Mr. Rees KC, learned counsel for Mr. Taher, that in all the reported cases, the applicant for an order for service out by an alternative method had taken some steps in order to serve the defendant. He observed: 'That may be right, but the test is not as to whether attempts have been made; it's whether service is impracticable, and that can be proved in a number of ways'.
- [67] With this statement of principle, I agree entirely. Put differently, 'impracticability' is not to be established only by proof of prior unsuccessful attempts to serve the defendant by the usual methods or means of service of the claim form. That it is impracticable to serve a defendant by such conventional means, whether through diplomatic channels or under the Hague Convention, can be shown or established by cogent evidence of the impracticality of the deployment of such conventional methods of service on a defendant out of the jurisdiction in a particular foreign country. For example, in the instant matter, as the learned judge observed, that the UAE where Mr. Taher resides, is not a party to the Hague Convention. Accordingly, it would be fruitless, a legal impossibility, and hence a complete waste of time and resources, and therefore wholly impracticable, to attempt service of the ASAC on him in the UAE under the Hague Convention. In short, service of foreign process under the Hague Convention – one of the 'usual' methods under CPR 7.8(1) – is simply not available to any claimant. This is clearly established by the expert evidence of Mr. Almobideen and accepted by both sides in this matter.
- [68] However, in considering evidence of impracticality, absent any prior attempt to serve the claim form by any of the usual methods permitted by CPR 7.8(1), a judge must take care to not be influenced solely by the perceived length of time (speed or lack of speed) it would take to effect service through one of these conventional methods, as a basis for concluding that it would be impracticable, to effect service out by any such method and warranting consideration of an order for service by a substituted method on the defendant.

[69] The learned judge found it was impracticable to serve Mr. Taher with the ASAC through 'the usual channels'. His reasoning is as follows:

"In this case, the expert evidence shows, in my judgment, quite clearly, **that diplomatic service will mean that there is no possibility of Mr. Taher being served in time for the trial and since one has to look at all the factual matrix when determining whether it's practical or impractical to serve through the diplomatic channels, that is, in my judgment, a key factor.** I therefore find, as a matter of fact, that it is impractical to serve Mr. Taher."<sup>56</sup>(emphasis added)

[70] As to the alternative method of serve on Mr. Taher proposed by VDHI, the learned judge stated:

"In those circumstances there is really no objection to alternative service as proposed. Walkers are already acting for the Multibank Group and there is [no] doubt at all that Mr. Taher is well aware of these proceedings. He, himself, speaks fluent English. There are no issues of translation. In those circumstances, **the overwhelmingly convenient course** is to grant the form of alternative service which is sought."<sup>57</sup> (emphasis added)

[71] In summary, the finding by the learned judge that service by the usual methods was 'impracticable', rested on the expert evidence as to speed (or delay) in serving the court documents in the UAE through diplomatic channels, as an available method of service permitted by CPR 7.8(1), and it not being possible to effect service by that method before the July 2022 trial date. The judge accepted that, in the circumstances, the proposed alternative method of service by email to Walkers (BVI) was quicker, more certain, and not disadvantageous or prejudicial to Mr. Taher who, from the evidence, is fluent in English, and has a close knowledge of the proceedings to date, including, presumably, the allegations made against him in the ASAC, which allegations are the same or very similar to those which were made against the other Ancillary Defendants in the SAC. These allegations, as averred in Priess 9, concern Mr. Taher's involvement in the alleged conspiracy to defraud the Noteholders of their investment, including, as borne out by the transcripts of certain

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<sup>56</sup> Consolidated Appeals Bundle Volume 3, page1493.

<sup>57</sup> Ibid.

meetings with Mr. Smith and others at which Mr. Taher was present and participated.

[72] In my judgment, the learned judge was correct to rely on the expert evidence of Mr. Almobideen as to the applicable law and available avenues in the UAE for service of foreign process. This evidence was essentially uncontradicted. The judge correctly accepted and relied on his expert opinion on UAE law that service through diplomatic channels, though available there, could, in practice, take from 4 to 24 months. The learned judge was also correct to view this period (4 to 24 months), not as evidence of 'impossibility', but as some evidence that, given the July 2022 trial dates, it would be 'impracticable' to serve Mr. Taher by diplomatic channels by the trial date some 4 months hence.

[73] That said, it seems to me that the learned judge was fixated on keeping the July 2022 trial dates. After all, he had that very day dismissed MBFX's application to adjourn the trial dates. In doing so, he may have attached too much importance to keeping the trial dates, although it was certainly a relevant consideration when determining 'impracticability' in the circumstances of the proceedings below. I say too much weight may have been given to keeping the July trial dates, for all of the reasons and factors which led this Court to allow MBFX's appeal against his refusal to adjourn the said trial dates.

[74] I would also add, that where the order for substituted service was made, as it was on 18<sup>th</sup> March 2022, and Mr. Taher was served by alternative means by email to Walkers (BVI) in March 2022, it did not permit Mr. Taher, having only recently been joined as a defendant/ancillary defendant to the proceedings, much time, even accepting, as I did his close knowledge and familiarity with the extant proceedings in the Commercial Court involving the other Multibank companies, within which to be able to instruct lawyers and to prepare his defence to what are serious allegations of fraud and collusion, which are now made against him in his personal capacity. Of course, I am mindful that, notwithstanding the relatively short time

period, Mr. Taher's defence, prepared by Walkers, was filed and served in the proceedings on 24<sup>th</sup> April 2022, that is, some 4.5 weeks after the order for substituted service, and in full compliance with the CMC Order.

[75] In my judgment, Mr. Taher having been served in compliance with and through the alternative method ordered by the learned judge and having filed his defence to the ASAC in the proceedings in compliance with the CMC Order, there is no valid basis upon which to set aside the order for substituted service. In doing so, Mr. Taher has complied with the very order for substituted service which he now appeals and has participated in the proceedings below as an ancillary defendant. In those circumstances, it would be pointless to set aside the very order which, to a large extent, he has complied with in circumstances where he was not only closely connected with and knowledgeable about the said proceedings but he filed an affidavit in relation to an aspect of those proceedings before the Court of Appeal.

[76] In my opinion, the fundamental purpose of service of a claim is to ensure that proceedings brought against a named defendant, is brought to his or her attention so that they are fully cognisant and knowledgeable of the allegations and claims made against them, and therefore, in a position to properly respond thereto by way of their defence to the claim. This fundamental principle of justice and fairness has been satisfied by the order for substituted service made on 18<sup>th</sup> March 2022 at the CMC. In no way was Mr. Taher disadvantaged or prejudiced by the said order for substituted service, and the fact of service of his detailed defence on 24<sup>th</sup> April 2022 in the said proceedings puts this beyond doubt.

[77] In my judgment, the learned judge made the correct order in the circumstances of this case. He was correct as a matter of principle and as a matter of the exercise of his judicial discretion, to do so. He identified and applied the correct test. He was correct to take into account the likely delay in being able to effect service on Mr. Taher through diplomatic channels, and the likely effect such a delay could have on keeping the July trial dates. This was justified, as some evidence of

impracticability, in circumstances where Mr. Taher was, in reality, not a new 'party' to the litigation, but one who was and had been closely connected to the Multibank companies and with the said proceedings, including the allegations of fraud and collusion made therein. This is substantiated by Priess 9 and was accepted, correctly, by the learned judge. Accordingly, the learned judge was correct to conclude that, in the particular circumstances of the proceedings below, it was 'impracticable' having regard to the uncertainty and likely delay, in attempting to effect service in the UAE via diplomatic channels as provided for in CPR7.8(1). I therefore conclude that VDHI had satisfied the requirement of 'impracticability' in CPR 7.8A, and the learned judge was correct to make the order for substituted service by email to Walkers (BVI), who was on record as representing the Multibank companies – Mex Securities, Mex Clearing and MBFX -in the said proceedings, and who now acts for Mr. Taher himself in the said proceedings. For these reasons grounds 2 and 3 also fail.

### **Disposition**

- [78] For the reasons given in this judgment, I would dismiss the appeal by Mr. Taher. On the issue of costs, VDHI has been successful in the appeal and is entitled to its costs on the general rule at CPR 64.6(1).

### **Orders**

- [79] Accordingly, I would make the following orders:

- (1) The appeal is dismissed.
- (2) Mr. Taher shall pay VDHI's costs in the appeal, such sum to be assessed by a judge of the Commercial Court if not agreed within 21 days.

[80] I apologise for the somewhat extended time it has taken to deliver this judgment, albeit its timing has been, to some extent, affected by the subsequent developments in certain of the eight appeals involving these parties heard by the Court during the April 2022 Special Sitting. We thank learned counsel and their teams for the helpful written and oral submissions.

I concur.  
**Mario Michel**  
Justice of Appeal

I concur.  
**Paul Webster**  
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**