

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0025

BETWEEN:

FLAVIO MALUF

Appellant

and

[1] DURANT INTERNATIONAL CORP

**[2] MATTHEW RICHARDSON (as liquidator of DURANT
INTERNATIONAL CORP)**

**[3] KEVIN HELLARD (as Liquidator of DURANT INTERNATIONAL
CORP)**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE.

Chief Justice

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mde. Esco L. Henry

Justice of Appeal [Ag.]

Appearances:

Mr. John Machell QC, with him Mr. Timothy deSwardt for the Appellant

Mr. Adrian Francis with him Mr. Carl Moran and Mr. Scott Tolliss for the
Respondents

2022: May 11.

Motion for conditional leave to appeal to Her Majesty in Council – Section 3(2) of the Virgin Islands (Appeals to the Privy Council) Order 1967 – Whether conditional leave ought to be granted – Whether questions involved in proposed appeal are of great general or public importance – Service of claim form outside the jurisdiction to Hague Convention contracting state - Service to appellant in Brazil – Order of court dispensing with service – Rule 7.8B of the Civil Procedure Rules 2000 – Power of court to dispense with service of the claim form – CPR 26.1(6) – Power of court to dispense with the requirement to comply with any of the rules of the CPR – Court’s power to dispense with service outside the jurisdiction within a Hague Convention contracting state, that has opted out of Articles 8 and 10 of the Convention (signifying its opposition to service otherwise than through its central authority) where the steps taken to effect service were incompatible with the Hague Convention and the laws of the state – Claim form delivered directly to Brazilian court – Appellant’s lawyers

had access to documents delivered to Brazilian court – Order dispensing with service under rule 7.8B where service of the claim form was not effected during the period of service and an application to dispense with service made after period of service expired – No application made to extend time for service of claim form – CPR 8.13 – Power of court to extend the time for service of the claim form – CPR 26.1(2)(k) – Power of court to extend time for compliance with prescribed or court ordered timeline for service of claim form even if application made after time for compliance has passed – Court’s general case management powers to enlarge time under Part 26 of the CPR vis-à-vis the specific express restriction in CPR 8.13 against extension of time on application made after the period limited for service of the claim form

REASONS FOR DECISION

Introduction

- [1] **HENRY JA [AG.]:** This case involves two lawsuits from the Commercial Division of the High Court in the Territory of the Virgin Islands (“BVI”) between Durant International Corp (“Durant”) and Mr. Flavio Maluf (“Mr. Maluf”). Mr. Maluf is a director of Durant and resident in Brazil. In one claim, Durant was placed into liquidation,¹ which is being conducted by two court appointed liquidators – Messrs. Matthew Richardson and Kevin Hellard. They obtained from the BVI court and took steps to enforce a worldwide freezing injunction (“WFO”) obstructing Mr. Maluf’s access to millions of dollars held to his account. In the other claim, Durant commenced debt collection proceedings in the BVI to recover a loan allegedly made to Mr. Maluf by Durant.
- [2] In March 2020,² Durant applied to the High Court in the BVI for permission to ask the relevant court in Brazil by Letters Rogatory, to serve the claim form and supporting documentation in the debt claim on Mr. Maluf in Brazil and to enforce the WFO there. The court gave leave on 22nd April 2020³ by way of a service out order (“SOO”) and it issued Letters Rogatory to the Superior Court of Justice (“STJ”) in Brazil requesting assistance with both matters.

¹ By court order dated 6th November 2017.

² 23rd March, at pg. 532 of the Hearing Bundle.

³ At pg. 559 of the Hearing Bundle.

- [3] The STJ processed and forwarded the application to São Paulo's Federal Court to be actioned. Mr. Maluf's lawyers were granted access to the court file in Brazil which contained the claim form and the WFO. Mr. Maluf contested the actions taken by the court in Brazil. He also applied to the BVI court to set aside the SOO and discharge the WFO. In a judgment delivered on 23rd August 2021, the learned judge held that good service of the claim form was effected on Mr. Maluf in Brazil. He dispensed with service of the claim form and supporting documents and refused Mr. Maluf's application to discharge the WFO.
- [4] Mr. Maluf appealed the learned judge's decision to the Court of Appeal ('the Court'). The Court upheld and affirmed⁴ the decision to dispense with service on the ground that there were exceptional circumstances which justified making such an order. The WFO was also continued. The Court held further that while the **Civil Procedure Rules 2000** ("CPR") contains no provision to retrospectively extend time to serve an expired claim form, the court may in exceptional circumstances and in accordance with CPR 26.1(6) disapply the timelines for applying for an extension of time to do so. In such case, it may, pursuant to CPR 7.8B, dispense with service of the revalidated claim form if satisfied that exceptional circumstances have been established. Durant made no application in the lower court to disapply the timelines in CPR 8.13. The Court reasoned that since the learned judge did not address his mind to the expiration of the claim form, and the consequential invalidity, he thereby erred in principle in the exercise of his discretion and the Court was entitled to exercise its discretion afresh.
- [5] The Court held further that in deciding to dispense with service of the claim form, a court may (in accordance with Anderton Category 2 guidelines⁵) do so retrospectively, if the evidence establishes that the defendant does not dispute that his legal advisers received the court documents or that they were brought to his

⁴ In a judgment delivered on 13th January 2022.

⁵ See *Rhiannon Anderton v Clwyd County Council* (No. 2) and other appeals [2002] 1 WLR 3174.

attention by a permitted method of service, within the currency of the claim form. The Court ruled that the learned judge had erred in law by finding that good service had been effected on Mr. Maluf in Brazil, pursuant to Brazilian law and in accordance with CPR 7.8(1)(b).

- [6] The Court held further that rules 13.3 and 13.4 of the **Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules** (“ELP Rules”), obligate a claimant in a civil suit to serve the opposing party with the claim form, all other documents stipulated by the rules simultaneously with the authorisation code generated by the electronic portal. Each party was directed to pay its own costs on appeal and in the court below.
- [7] Mr. Maluf is dissatisfied with the Court’s judgment. He filed⁶ a motion for conditional leave to appeal to the Privy Council. Durant strenuously resisted the motion. It was heard on 11th May 2022. A unanimous decision was rendered refusing Mr. Maluf conditional leave to appeal to the Privy Council and awarding costs to the respondents. The Court undertook to provide reasons for its decision at a later date. These are the reasons. They represent the full expression of the entire panel’s unanimous opinion.

Conditional leave to appeal principles

- [8] By the motion, Mr. Maluf has applied for:
- (a) Leave to appeal to Her Majesty in Council pursuant to section 3(2) of the Virgin Islands (Appeals to the Privy Council) Order 1967 (“1967 Order”) against the Court of Appeal’s judgment dismissing his appeal against the learned judge’s decision dated 23rd August 2021; and
 - (b) an order staying the further conduct of the proceedings against him in the Commercial Division of the High Court of the Virgin Islands in claims numbered 134 of 2017 and 62 of 2020;

⁶ On 2nd February 2022.

- (c) pending the disposal or determination of the appeal to Her Majesty in Council; or
- (d) if conditional leave is not granted, pending an application to Her Majesty in Council for special leave to appeal; and for a stay pending determination of such appeal.

[9] Section 3(2) of the 1967 Order has been invoked innumerable times in this Court. It provides:

“Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases –

- (a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, ... and
- (b) such other cases as may be prescribed by any law for the time being in force in the Virgin Islands.”

Mr. Maluf relies on paragraph (a).

[10] In giving effect to that provision, the Court is required in accordance with well-known and established principles to examine the proposed grounds of appeal on their merits, being mindful throughout that Mr. Maluf seeks to invoke the jurisdiction of the BVI's highest appellate court. When considering such motions, the Court is required to exercise its discretion judicially and must strive to act commensurate with its present practice and that of other courts of appeal that exercise such discretion under similar legislative provisions.

[11] An appellant who seeks conditional leave to appeal to Her Majesty in Council pursuant to section 3(2)(a) must satisfy the Court that the proposed appeal involves either legal questions of “great general or public importance” or questions that for other substantial reason ought to be submitted to the Board. The relevant principles

have been enunciated in numerous cases from this and other appellate courts. It suffices to re-state them.

- [12] The expression “great general and public importance” has been equated with the phrase “a difficult question of law”. As explained by Saunders JA in **Martinus Francois v The Attorney General**:⁷

“In construing the phrase “great general or public importance”, the Court usually looks for matters that involve a serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public.”

- [13] In **Pacific Wire & Cable Company Limited v Texan Management Limited et al**⁸ and **Renaissance Ventures Ltd et al v Comodo Holdings Ltd.**,⁹ this Court opined that a serious question of law of great general or public importance does not arise in the absence of a genuine dispute in respect of the applicable legal principles in the case which an appellant seeks to have referred to the Privy Council. Accordingly, where those legal principles have already been considered by the Board, are clear and settled by dint of case law at that level or by long-standing and consistent application by this Court, it cannot be said that a question of great general and public importance exists. Similarly, questions of law involving a complaint of improper exercise of judicial discretion generally do not satisfy the criteria of serious questions of law of “great general and public importance”. In such cases, referral to the Privy Council is not justified and an application for conditional leave to appeal to the Privy Council in such circumstances would be refused.¹⁰

- [14] Moreover, where the question of law raised by the proposed appeal is largely concerned with procedural principles of law, the Court would not be minded to grant conditional leave to appeal particularly where the decision is unanimous and

⁷ [2004] ECSCJ No. 126, Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2004) at. para. 13.

⁸ [2008] ECSCJ No. 109, British Virgin Islands HCVAP2006/0019 (delivered 6th October 2008).

⁹ [2018] ECSCJ No. 313; BVIHMAP2018/0005, BVIHMAP2018/0008 (delivered 8th October 2018).

¹⁰ See also *Boston and Others v Lelievre and Others* [1870] UKPC 1; *Bank of America National Trust and Savings Association v Chai Yen (Married Woman)* [UKPC] No. 39 of 1978, delivered 3rd December 1978; See also *Short v Attorney General of Sierra Leone* [1963] UKPC 31.

involves no substantial mistake. This is so especially where the legal principle in dispute pertains to procedural rules regarding which there is no counterpart in the corresponding rules of practice in the Supreme Court of England.

[15] Notwithstanding the high threshold for obtaining conditional leave to appeal particularly in cases involving procedural rules, this Court is likely to grant leave in rare cases if satisfied that significant injustice or prejudice has been caused to the appellant arising from the decision, or where the determination concerned the exercise of judicial discretion and the underlying question of law is one of real public importance. Conditional leave to appeal will also be granted if the Court is of the opinion that the procedural issues raised by the appeal are of great general legal importance and the local interpretation accorded to those rules has a draconian effect.

[16] Where however, the Court has considered the interpretation or application of a principle of law and it remains unsettled or its application lends itself to oppressive or sweeping consequences or is mired in uncertainty or for other good reason would benefit from guidance from the Board, this Court would be inclined to grant conditional leave to an appellant to appeal to the Board.⁹ A question of law may be unsettled either because of opposing judicial perspectives on it or if divergent appellate decisions on the point have created doubt.

[17] These principles have been exemplified repeatedly in decisions emanating from the Eastern Caribbean Supreme Court including several dealing with purely procedural issues. In this category are the decisions in **Isaacs v Robertson**¹¹ and **Lewis v St. Hillaire and another**¹² two appeals out of Saint Vincent and the Grenadines. In the former, the Board declared:

“...these are matters of practice and procedure under a rule of the Supreme Court of Saint Vincent which has no counterpart in the rules of the Supreme Court of England. They are best left to be developed by the courts of the

¹¹ [1984] 43 WIR 126.

¹² (1995) 48 WIR 134.

country concerned, with whose decisions as to the operation of the rule this Board would be reluctant to interfere.”¹³ (Emphasis added)

- [18] In the latter, the Board referenced **Isaacs v Robertson** and reiterated that guiding principle, stating:

“There was no unanimity on the point in the St. Vincent courts.

...

Given this difference of opinion their Lordships propose to examine the point in some detail. On the other hand, it is important to bear in mind that the question at issue is one under a rule of the Supreme Court of St Vincent which has no counterpart in the Rules of the Supreme Court of England. Generally, such procedural questions are best resolved by the courts of the country concerned. And the Board will be reluctant to interfere with decisions of the Court of Appeal in such cases.’¹⁴

- [19] As to the meaning of ‘or otherwise’ in section 3(2)(a) of the 1967 Order, this Court approved in **Pacific Wire** the interpretation ascribed to that term by Wolfe JA in a dissenting judgment in the Jamaican case of **Olasemo v Barnett Ltd.**¹⁵ His Lordship Justice of Appeal Wolfe opined that those words were inserted to enlarge the court’s discretion to grant conditional leave to appeal in cases which did not involve matters of great general and public importance. Into that ‘otherwise category’ would fall cases which the Court feels could benefit from a ‘definitive statement of the law’ from the Board in relation to questions of law, be they of an interlocutory nature or not. He was quite clear that not all interlocutory matters would qualify. That interpretation and application is re-affirmed for present purposes.

- [20] It is self-evident that the proposed appeal arises from interlocutory proceedings involving the exercise of judicial discretion in the interpretation and application of procedural rules. Accordingly, in order to be granted conditional leave to appeal to the Board Mr. Maluf had to establish to the Court’s satisfaction that at least one of his proposed grounds raises an issue of great general or public importance or

¹³ [UKPC] No. 2 of 1983, at pg. 4 per Lord Diplock.

¹⁴ [1996] 48 WIR 134, at. pg. 147e-g, per Lord Steyn.

¹⁵ (1995) 51 WIR 191 at pg. 200.

otherwise warrants referral to the Board for guidance. The foregoing guiding principles were applied in determining this motion.

Background

- [21] A brief overview of the circumstances out of which this motion arises would supply valuable context. The main elements of the factual matrix are not in dispute. They are captured succinctly in the Court's judgment. I find it useful to borrow from that narrative. The two discrete proceedings out of which this motion arises are Claim No. 134 of 2017 (the "Liquidation Proceedings") and Claim No. 62 of 2020 (the "Debt Claim").
- [22] The Debt Claim was filed on 7th May 2020. In it, Durant sued Mr. Maluf to recover US\$44,300,000.00, alleged to be a loan debt owed to it; and/or compensation for breach of fiduciary duty; and knowing receipt and/or dishonest assistance in respect of the loan. Durant pleaded that Mr. Maluf had secured a loan from it in May 1998 in excess of USD\$67m which remains unpaid. It claimed further that between 1993 and 1996, Mr. Maluf and his father Paulo Maluf (the then Mayor of São Paulo, Brazil) allegedly perpetrated a massive fraud against the municipality resulting in the misappropriation of over USD\$200m through bribes, secret commissions and other fraudulent payments which were reportedly laundered through Durant and two other BVI companies.
- [23] Civil and criminal proceedings were brought by the municipality and the Federal Republic of Brazil in relation to the alleged fraud. Convictions were secured against Mr. Maluf and his father in criminal proceedings in Brazil. A conviction has also been entered against Mr. Maluf in France in parallel criminal proceedings for aggravated money laundering. In the Crown Dependency of Jersey, a money judgment was entered against Durant and another BVI company¹⁶ arising from civil proceedings before the Royal Court of Jersey. Durant's appeal against that civil judgment¹⁷ was

¹⁶ Kildare Finance Ltd ('Kildare') which is a wholly owned subsidiary of Durant.

¹⁷ The Federal Republic of Brazil and another v Durant International Corporation and another [2015] JCPD 297.

ultimately dismissed by the Privy Council. The Board held that the equitable remedy of tracing is available in respect of the moneys misappropriated.

[24] In the wake of the international litigation, the learned judge in the BVI granted¹⁸ three *ex parte* orders in the Liquidation Proceedings and Debt Claim. The first was the referenced WFO against Mr. Maluf. As part of that process, Durant undertook to issue and serve a claim form and statement of claim against Mr. Maluf for appropriate relief. By the second and third orders, the learned judge granted leave to Durant to serve the claim form and supporting documents (the “BVI Court Documents”) on Mr. Maluf out of the jurisdiction in Brazil (collectively “the SOO”). The SOO permitted service on Mr. Maluf at either of two addresses in Brazil. It also provided for the issuance of the referenced Letters Rogatory to the relevant Brazilian Court.

[25] No order was made for service of the claim form on Mr. Maluf in accordance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“the Hague Convention”). At all material times, England and Brazil were signatories to the Hague Convention and its provisions were extended to the BVI by England which constitutionally retains responsibility for executing international treaties for its Overseas Territories including the BVI. Brazil entered reservations to and has thereby opted out of Articles 8 and 10. Article 8 permits service to be effected from abroad with no compulsion to do so through diplomatic or consular agents. Under article 10, a resident of an originating state is allowed to effect service by mailing the claim form to the resident of the designation state, unless the destination state objects by opting out.

[26] The Letters Rogatory dated 22nd April 2020 was issued by the learned judge to the Superior Court of Justice (“STJ”) in Brazil. The STJ, Brazil’s highest ordinary civil court accepted the Letters Rogatory and authorised the execution of the WFO

¹⁸ On 22nd April 2020.

against Mr. Maluf¹⁹ - (“the *exequatur* decision”). In the interim, the court file remained sealed as ordered. The *exequatur* decision was sent to the Federal Court of São Paulo for enforcement.

[27] On 6th August 2020, Mr. Maluf learnt of the BVI proceedings and the *exequatur* decision. Six days later,²⁰ his Brazilian lawyers were able to gain access to the Brazilian court file²¹ comprising over 700 pages including the referenced WFO, the claim form and statement of claim. Mr. Maluf acknowledged receipt²² but pointed out that the bundle of documents to which his lawyers were granted access did not include the authorisation code to enable him or them to register on the BVI E-Litigation Portal for the Debt Claim. It was emailed to his lawyers on 28th September 2020.

[28] In a decision by Federal Judge Cristiane dos Santos on 21st September 2020 (“the First dos Santos Decision”) the 9th Federal Lower Civil Court of São Paulo held²³ that because Mr. Maluf’s lawyers had had access to the Court file, there was deemed service of the substantive proceedings on him, by way of a voluntary appearance. Judge dos Santos has issued two further rulings²⁴ related respectively to objections taken by Mr. Maluf in Brazil to execution and implementation of the Letters Rogatory from the BVI court. Mr. Maluf filed an appeal in Brazil against the order that he had been properly served. Those appeals and related legal challenges are yet to be resolved.

[29] On 27th November 2020, Mr. Maluf filed an application in the BVI High Court out of which this motion arises. He maintained that he had neither been properly served with the claim form and supporting documentation in the Federal Republic of Brazil

¹⁹ On 28th July 2020.

²⁰ On 12th August 2020.

²¹ Para. 8 of the judgment of Jack J [Ag.] dated 23rd August 2021.

²² See hearing bundle, pgs. 602-603, paras. 19 and 21 of Flavio Maluf’s First Affidavit filed on 30th November 2020.

²³ On 21st September 2020

²⁴ On 5th April and 26th July 2021, respectively.

nor been personally served with any court papers in the BVI Proceedings. He indicated that he learnt of those proceedings upon discovering that his bank accounts had been frozen by court order in Brazil and after making inquiries at his bank. He sought, from the BVI High Court, an order setting aside service of the claim form, statement of claim and the SOO if it was determined that he had been properly served. In the alternative, he sought a stay of the Liquidation Proceedings and Debt Claim on the ground that the BVI court ought not to exercise jurisdiction.

- [30] On 23rd August 2021, the learned judge rendered his formal written decision in respect of Mr. Maluf's application and dismissed it. He found that as a matter of Brazilian law and pursuant to CPR 7.8(1)(b) good service of the Debt Claim and supporting documentation had been effected on Mr. Maluf in Brazil by virtue of his voluntary appearance when his lawyers accessed the court file.

Judgment of the Court of Appeal

- [31] This Court emphasised the objective of service of documents echoing the Supreme Court of England in **Abela and others v Baadarani**.²⁵ The Court agreed with Mr. Maluf that as a result of the Article 10 reservation there is an express prohibition against the transmission of documents by a requesting state directly to the courts or judicial authorities in Brazil for consideration and implementation of Letters Rogatory, as transpired in the instant case. It held that he had not in fact been served personally pursuant to the SOO 'in accordance with the Hague Service Convention' which mandated service through diplomatic channels by the competent authority. It held further that while the SOO specified a particular address for service on Mr. Maluf, personal service had neither been attempted nor effected on him at either of the addresses in the Letters Rogatory.
- [32] As to Mr. Maluf's argument that the court has no power under CPR 26.1(2)(k) or 26.1(6) to extend time for service of a claim form once its validity has expired, it held that CPR 8.13 makes no provision for application to be made retrospectively to

²⁵ [2013] UKSC 44, [2013] 1 WLR 2043.

extend the time for service of a claim form. Rather, CPR 8.13 expressly provides that an application to extend the time for service of a claim form must be made before the expiration of the initial 12-month period of validity of the claim form or within any extended period for service granted by court order.

[33] The Court re-affirmed its decision in **JSC VTB Bank v Alexander Katunin and another**²⁶ that the court's general case management power and discretion under CPR 26.1(2)(k) to extend time to comply with a rule, practice direction or order even after the time for compliance had expired, is not applicable to an extension of the time for service of a claim form since that power has been expressly circumscribed by CPR 8.13. Further, it reiterated another legal holding in **Katunin** that the court may disapply the timelines under CPR 8.12 for seeking extension of time to serve a claim form.

[34] The Court considered the Anderton tests enunciated in **Rhiannan Anderton v Clwyd County Council (No.2) and other appeals**.²⁷ Citing **Olafsson v Gissurarson (No.2)**²⁸ and **Lonestar Communications Corp LLC v Kaye**²⁹ the Court reasoned that in the circumstances, it can be said that an Anderton Category 2 case arises on the facts. The Court noted that service was being effected on Mr. Maluf in Brazil pursuant to the Hague Service Convention during the prevailing world-wide COVID-19 pandemic. It was satisfied that the evidence before the learned judge disclosed conclusively that the BVI Court Documents were received by Mr. Maluf's lawyers in Brazil and were brought to his attention since August 2020, well before 6th May 2021, when the claim form expired under CPR 8.12, which he did not dispute.

[35] The Court concluded that the fundamental requirement of service of court process on Mr. Maluf was satisfied and he was thereby made fully aware of the claim

²⁶ BVIHCMAP2016/0047 (delivered 18th April 2018, unreported).

²⁷ [2002] 1 WLR 3174.

²⁸ [2008] EWCA Civ 152.

²⁹ [2019] EWHC 3008 (Comm).

brought against him in the Debt Claim. It held that, in the premises, the learned judge was correct to consider whether to exercise his discretion to dispense with service on Mr. Maluf; that his decision to dispense with service of the BVI Court Documents on Mr. Maluf under rule 7.8B of the CPR was the correct decision and must be upheld. In light of this determination, the issue of discharging the WFO was rendered moot.

Proposed grounds of appeal

[36] Five proposed grounds of appeal were advanced. There is however significant overlap among three – the first, third and fourth grounds. They are therefore grouped together at this juncture and addressed jointly in the succeeding paragraphs. Without in any way minimising Mr. Maluf's arguments, the proposed grounds have been distilled into two and they are approached in that manner for the sake of good order.

[37] The first ground is essentially that the Court erred by holding that it may, pursuant to CPR 26.1(6) disapply the period of currency prescribed by CPR 8.12 and that it was empowered to make a retrospective dispensation order under CPR 7.8B in the absence of valid service of the claim form. (Interpretation of rule 26.1(6) vis-à-vis rule 7.8B point) The third ground is that in the alternative, even if the court can dispense with service retrospectively, it erred by finding that this is permissible in a case where the respondent does not dispute that the claim form came to his attention after it had been received by his legal advisers by a permitted mode of service. ("Anderton Category 2 issue")

[38] The fourth ground is that in the further alternative, the Court erred in re-exercising the dispensation power in that it misdirected itself by:

1. Finding that: -

- (a) this was an Anderton Category 2 case; and
- (b) that an attempt was made to serve Mr. Maluf under the Hague Convention; and

2. taking into account irrelevant factors and having insufficient regard to relevant matters. (“Re- exercise of discretion issue”)

[39] The second proposed ground of appeal is that alternatively, even if the Court has such retrospective dispensation power, it erred by holding that the power is exercisable in a case involving service of a claim form out of the jurisdiction in a contracting state to the Hague Convention that has opted out of service otherwise than through its competent authority. (“Hague Convention issue”) The fifth ground is that if the Court erred in making the dispensation order it erred in not discharging the WFO. As a consequence of the Court’s ruling on the first four proposed grounds, it was not necessary to consider this ground.

Interpretation of CPR 26.1(6) vis-à-vis CPR 7.8B

[40] Mr. Maluf makes the argument that the Court’s order dispensing with service of the claim form on him, effectively extended the time for Durant to serve him. He contended that the Court’s power to extend the time for service is expressly circumscribed by CPR 8.12 and is restricted to cases where an application is made under CPR 8.13 before the period for service of the claim form expires. He contrasted the provisions of the English CPR 7.6 and the Eastern Caribbean (“EC”) CPR 8.13 which empowers the court to extend time to serve the claim form. He argued that unlike the English CPR which permits retrospective application to be made to extend the time for service, the EC CPR 8.13 confers no such power.

[41] He reasoned that no valid service had been effected on him before the dispensation order was made, by which time the claim form’s validity had expired and no application had been made for its extension. He argued that in those circumstances the Court erred in making the dispensation order which by implication contained an order extending the validity of the claim form. Placing reliance on **Vinos v Marks & Spencer plc**³⁰ he submitted that a general rule cannot be used to sidestep an express restriction. He contended that it is strongly arguable that, on a proper

³⁰ [2001] 3 All ER 784.

construction of the EC CPR as a whole, the Court is not authorised by the general powers conferred by CPR 26.1(2)(k) or 26.1(6) to make an order that has the effect of extending or simply waiving the period for service.

[42] On his behalf, learned Queen's Counsel Mr. Machell submitted that there is a serious issue as to whether, and if so, in what circumstances the Court has implicit power to effectively extend time, by waiving or dispensing with compliance of CPR 8.12, either by making an order under CPR 26.1(2)(k) or CPR 26.1(6),³¹ or by dispensing with service pursuant to CPR 7.8B. He submitted that these matters raise a serious question as to whether this Court was right in **Katunin** and in the instant case to decide that the Court has such power under CPR 26.1(6) or CPR 7.8B.

[43] Learned Queen's Counsel, Mr. Machell posited that the law relating to service is fundamental to any judicial system and it is of great importance that the matters raised in this and the other proposed grounds of appeal be considered by the highest court. He reasoned that guidance from the Privy Council would be appropriate and will give greater certainty to litigants and those that advise them, not just in the BVI but in England and throughout the common law world because there is real doubt as to the correctness of this Court's decision.

[44] Durant countered that this is a procedural matter and was determined by this Court in **Katunin** and applied in this case and further that Mr. Maluf's arguments raise a question of law which is eminently procedural and therefore should be left to be determined by the Court in line with well-established precedents. Learned counsel, Mr. Francis submitted, on Durant's behalf, that Mr. Maluf's assertion that it is important that the highest court considers this argument is contrary to practice and authority as the Privy Council has repeatedly directed that questions of local procedure should be resolved by local courts. He submitted further that there is no

³¹ Paras. 3.1 and 11 of the appellant's skeleton arguments filed on 2nd February 2022.

suggestion that this Court's interpretation of the EC CPR results in draconian consequences.

Analysis – Interpretation of rule 26.1(6) vis-à-vis rule 7.8B

- [45] It is pellucid that the foregoing arguments touch and concern issues which are eminently procedural emanating as they do from rules of practice and procedure in the BVI court which have no equivalent in the English CPR. Mr. Maluf has conceded that no similar provisions to EC CPR 26.1(2)(k) and CPR 26.1(6) exist in the English CPR and that the 'corresponding provisions' are materially different from those in the EC CPR. He acknowledged also that while the English CPR rule 6.15 affords relief to a claimant to apply to extend the time for service after the prescribed service period no such relief is accorded under the EC CPR. He does not contend that the interpretation applied to CPR 26.1(2)(k) and CPR 26.1(6) vis-à-vis rules 8.13 and 7.8B creates dire consequences for him or the general public. His sole complaint centered on the manner in which the Court exercised its discretion.
- [46] The Court's construction and application of CPR 26.1(2)(k) in **Katunin** and this case arose from consideration of the identical principle of statutory interpretation lauded as a preferred and exemplary *ratio decidendi* in **Vinos v Marks & Spencer**. The Court's decision is to like effect. Moreover, the Court's pronouncement in this case was unanimous as it was in relation to the interpretation and application of CPR 26.1(6) in both cases.
- [47] The Court is of the considered opinion that no difficult or serious question of law arises in relation to the interpretation and application of CPR 26.1(2)(k) and 26.1(6) vis-à-vis CPR 8.13 and 7.8B. Those legal issues are now settled by the Court's consistent treatment. No draconian consequences flow from the Court's determination either on an individual or wider public level. No injustice or undue prejudice has been caused to the appellant and more tellingly he does not so claim. Fundamentally, how the BVI court interprets and applies CPR 26.1(2)(k) and CPR 26.1(6) vis-à-vis rules 8.13 and 7.8B is a matter best left to be developed and

resolved by it, there being no equivalent provision in the UK CPR. Further, there are no extra-ordinary features which otherwise qualifies this aspect of the first proposed ground of appeal as a fitting subject for referral for consideration by the Privy Council by grant of conditional leave to appeal.

Anderton Category 2 issue

- [48] In relation to the Anderton Category 2 issue, the crux of Mr. Maluf's complaint is that CPR 7.8B does not confer power on the Court to dispense with service of a claim form retrospectively (i.e., after it has expired). Citing **Godwin v Swindon Borough Council**³² he argued that there is no possibility of effective service where the period for service has already passed and it is his contention that in such cases the court cannot dispense with service under CPR 7.8B.
- [49] Mr. Maluf acknowledged that the applicable tests in retrospective dispensation cases involving service of a claim form out the jurisdiction were enunciated in **Rhiannan Anderton v Clwyd County Council (No.2) and other appeals**³³ and applied in several cases including **Kuenyehia v International Hospitals Group Limited**.³⁴ He submitted that even if the Court is empowered to make a retrospective dispensation order, the Court made serious errors in law by misstating and applying a wrong test to the facts of this case and by misstating the parameters within which the power falls to be exercised.
- [50] Mr. Maluf argued that if retrospective dispensation is permissible in the BVI, **Kuenyehia** is authority for the proposition that in such cases the court may make a retrospective dispensation order within certain limited parameters. Those narrow boundaries he submitted exist exclusively in cases where attempts have been made to serve the claim form within the period of its validity, and only if the attempted service was invalidated by a minor departure from the permitted method of service. He contended further that the Court erred in law by holding that the power to

³² BC [2001] EWCA Civ 1478, [2002] 1 WLR 997.

³³ [2002] 1 WLR 3174.

³⁴ [2006] EWCA Civ 21 at [26].

retrospectively dispense with service of the claim form under CPR 7.8B can be properly exercised where the applicant asserts that the respondent does not deny that he or his legal advisers have received the claim form or had his attention drawn to it by a permitted method of service before its validity expired.

- [51] Learned Queen's Counsel Mr. Machell highlighted the following passage from the Court's judgment and submitted that it did not correctly frame the Anderton test. There, the learned Justice of Appeal stated:

"In my judgment, the instant matter is an Anderton Category 2 case, that is one where 'the ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service' within the period of the validity of the claim form."³⁵

- [52] Learned Queen's Counsel submitted that by omitting reference to 'minor departure' in this formulation of the Anderton test, elsewhere in the judgment and particularly at paragraph 115 of the judgment, the Court misstated the Anderton test and the relevant parameters.

- [53] He argued that on the facts of this case, there was not merely a minor departure but a willful and serious one because Durant failed to serve or attempt to serve the claim form in accordance with the Hague Convention which mandated delivery through diplomatic channels to the Brazilian Central Authority pursuant to EC CPR 7.9(3) and CPR 7.10. He added that this is compounded by the Brazilian court's failure to attempt to serve Mr. Maluf with the claim form.

- [54] On these matters, learned counsel Mr. Francis argued that the factual premise to this proposed ground of appeal is that Durant has neither served Mr. Maluf in accordance with the Hague Convention or Brazilian law, and has not attempted to do so. He submitted that as a matter of Brazilian law Durant was not obliged to serve Mr. Maluf in accordance with the Hague Convention and was permitted to do so via

³⁵ Paragraph 115 of the Court's judgment.

the Brazilian court by the Letters Rogatory. He maintained that the service was valid, but even if it was not, that Durant had made an attempt to serve Mr. Maluf in accordance with Brazilian law. He argued that for these reasons, this case falls squarely within a standard Anderton Category and is therefore a suitable case for dispensing with service.

- [55] Learned counsel Mr. Francis submitted that the Court in **Kuenyehia** did not hold that in order to secure a dispensation order, it must be proved that a 'minor departure' from the required method of service occurred. He concluded that there is no basis for Mr. Maluf's contention that this Court's judgment misstates the Anderton test or applies wider parameters than allowed, within which the dispensation power falls to be exercised.

Analysis – Anderton Category 2 issue

- [56] EC CPR 7.8B is at the heart of these arguments. It states simply "the court may dispense with service of a claim form in exceptional circumstances". There is no argument between the parties that the court is empowered by this rule to dispense with service of a claim form out of the jurisdiction in exceptional circumstances.
- [57] The English CPR 6.9 is the subject of the English cases referred to by the parties. It is expressed in more general and broad terms than EC CPR 7.8B and applies to the service of all documents. It provides simply "[t]he court may dispense with service of a document". Unlike the EC CPR, no express limitations or qualifications are imposed on the exercise of this discretion by reference to 'exceptional circumstances.' However, the Anderton tests arose from consideration of that provision and by consistent interpretation and application in the English Courts have incorporated the element of 'exceptional circumstances' as an essential criterion to be satisfied by a successful applicant. Further, the House of Lords and United Kingdom Court of Appeal have unequivocally acknowledged the court's power

under rule 6.9 of the English CPR to dispense with service prospectively and retrospectively.³⁶

[58] **Anderton** laid out two tests³⁷ to govern the approach of the court when considering applications to dispense with service under UK CPR 6.9. We are not concerned with that test in the instant case. The second test applies to cases where the claimant “has in fact already made an ineffective attempt in time to serve a claim form by one of the methods allowed by r 6.2”,³⁸ and grounds his application for a dispensation order on assertions that “the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service within the period of 4 months, or an extension thereof”.³⁶ This has come to be known as the Anderton Category 2 test as enunciated by Mummery LJ in **Anderton**.

[59] In the passage from the judgment highlighted earlier, the learned Justice of Appeal used identical terms to those employed by Mummery LJ in framing the grounds of such an application. The learned Justice of Appeal stated further:

“...Notwithstanding the expiration of the claim form at the time when the application to dispense with its service was made and the judge made the Dispensation Order, a court is nevertheless empowered to consider and to make an order dispensing with its service on a defendant, in circumstances where, as here, there has been a clear attempt by Durant to serve the claim form and other documents on the appellant in Brazil pursuant to the Hague Service Convention.”³⁹ (Emphasis supplied)

[60] It is self-evident that the Court in its articulation of the Anderton Category 2 test echoed the original formulation of the test and stayed within those parameters when applying the facts to them. Mr. Maluf is correct that the Court did not advert to a ‘minor departure’ from the modes of service as part of its reason for concluding that

³⁶ See *Phillips and another v Symes and others sub nom Phillips and another v Nussberger and others* [2008] UKHL 1. See also *Anderton* at paragraph 50.

³⁷ At paragraphs 57 – 59.

³⁸ At paragraph 58 of *Anderton* per Mummery LJ.

³⁹ Paragraph 118.

this case is an Anderton Category 2 case. **Kuenyehia**⁴⁰ makes it clear that when enunciating the tests in **Anderton** it was merely following, refining and consolidating its approach in **Godwin**, the principles having already been supplemented and refined in **Cranfield v Bridegrove**.⁴¹ In the consolidated rendition of the test, the Court in **Kuenyehia** incorporated the original formulation outlined in **Anderton** as one type of Category 2 cases and added another class of category 2 cases which were not covered in **Godwin**, **Anderton** or **Cranfield**.

[61] It is helpful to set out the Court's re-framed Anderton Category 2 prescription in **Kuenyehia**. The Court stated:

“... First, it requires an exceptional case before the court will exercise its power to dispense with service under r 6.9, ... Secondly, and separately, the power is unlikely to be exercised save where the claimant has either made an ineffective attempt in time to serve by one of the methods permitted by r 6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form.”⁴² (Emphasis supplied)

[62] **Kuenyehia** introduced the ‘minor departure’ element as part of the Anderton category 2 as a supplement to the **Anderton** elucidation of the original category 2 class. This addition to category 2 was not intended to and did not replace or displace the original criteria. It is manifest that the ‘minor departure’ qualification is not an essential ingredient of the recognised Anderton category 2 types of cases or a necessary criterion in all cases involving the court's exercise of its discretion to dispense with service retrospectively, it being appreciated that the classes are not closed.

[63] The Anderton category tests deal wholly with procedure and practice in the courts with respect to retrospective dispensation of service of a claim form. The tests embody well-established principles of law in respect of which no conflicting opinions

⁴⁰ At paragraph 23.

⁴¹ [2003] EWCA Civ 656, [2003] ALL ER129, [2003] 1 WLR 2441.

⁴² Paragraph 26.

have emerged in the instant case or at all in the BVI court or within the jurisdictions served by the Eastern Caribbean Supreme Court. They were articulated and applied in the instant case by the Court in the exercise of its discretionary power in interlocutory proceedings involving procedural rules which are different in material respects from the rules.

- [64] No prejudice or injustice is occasioned to Mr. Maluf as a result of the Court's application of the Anderton category 2 test and parameters in arriving at its decision and no grievous consequences flow from either. In our opinion, the complaint that the Court exercised its discretion improperly by misstating and mis-applying the Anderton Category 2 test and parameters does not involve the consideration of any serious issues of law of great general and public importance generally or in the instant case and does not otherwise justify an appeal to the Board for its pronouncement on these matters. The proposed third ground of appeal is therefore does not constitute a satisfactory basis for granting conditional leave to appeal to the Board because it simply does not rise to the high threshold outlined in the 1967 Order.

Re-exercise of discretion

- [65] In relation to the Court's re-exercise of the dispensation discretion, Mr. Maluf attacked the manner in which the determination was arrived at by submitting that it had regard to irrelevant considerations and failed to take account of relevant matters such as international comity. These are all factors of the Court's exercise of its discretion in interlocutory proceedings on a matter of practice and procedure.

Prejudice and comity

- [66] Mr. Maluf argued that the Court wrongly treated the lack of prejudice to him as a positive reason in exercising the dispensation power. Citing **Kuenyehia**⁴³ he contended that prejudice to him is a reason for not dispensing with service, but the absence of prejudice cannot usually, if ever, be a reason for dispensing with service.

⁴³ Paragraph 33.

He contended further that the Court failed to take into account or give sufficient weight to issues of comity with respect to its treatment of issues arising from Brazil's reservations to provisions of the Hague Convention. He argued that the fact that Brazil had opted out of Article 10 is a highly material factor in the exercise of the discretion.

[67] The importance of considering any prejudice to the respective parties which may arise from granting or refusing such an application is a necessary consideration to be factored into the exercise of the Court's discretion irrespective of how this factor impacts the outcome. It is a necessary part of the exercise of judicial discretion in every scenario and not just for purposes of retrospective dispensation of service. As to consideration of the principle of international comity, the learned judge discussed it at paragraphs 44, 68 and 70 of his judgment.

[68] The Court's duty to take account of prejudice is but one of the matters that a court must consider in the exercise of judicial discretion. It is not a novel principle of law which found expression for the first time in **Anderton**. Furthermore, it is not a legal principle which requires further elucidation by the Privy Council for this Court's benefit. In short, it does not qualify as a serious issue of great general or public importance. Further, it is settled law that an appellant's dissatisfaction with the judicial exercise of a discretion involving questions of procedural rules and practice is generally not amenable to scrutiny by the Board by way of conditional leave to appeal. To the extent that Mr. Maluf disagrees with the treatment of and the weight attached to issues of prejudice and international comity by the Court, those criticisms do not qualify as serious questions of law of great general and public importance or ones which would otherwise trigger this Court to seek a definitive statement of law from the Board.

Evidence of pandemic

[69] Mr. Maluf argued that the Court wrongly took into account the Covid-19 pandemic and its supposed effect on service in accordance with the Hague Convention. He

reasoned that the Court was obviously wrong to do so because Durant never intended to serve pursuant to the Hague Convention and made its decision to attempt to serve by Letter Rogatory for reasons of supposed convenience and speed that had nothing to do with the Covid-19 pandemic. He submitted further that no evidence was adduced as to the effect of the pandemic on the possibility of Hague Convention service or the time period over which any difficulties lasted.

- [70] The contentions that there is no evidence to support the finding that the diplomatic channels were not available for service pursuant to the Hague Convention and/or for what period they were unavailable involves mixed issues of fact and law. As regards the question whether the Court as a matter of law took into consideration irrelevancies in relation to the effect of the pandemic on service through the competent authority, those are by no means serious disputed issues of law of real general public importance. Their interpretation and application have caused no far-reaching or dire consequences and are not likely so to do. Even if the Court exercised its judicial discretion improperly, as contended, that would not satisfy the threshold test for granting conditional leave to appeal to the Privy Council. In the Court's opinion the requirements outlined in section 3(2)(a) the 1967 Order have not been satisfied in relation to issues of prejudice, comity or evidence about the pandemic.

Conclusion – Anderton Category 2 and re-exercise of discretion issues

- [71] We are satisfied that Mr. Maluf's complaints about the way in which the Court exercised its discretion involve settled legal principles in relation to procedural issues and exercise of judicial discretion. Those principles neither constitute serious legal issues of real general public importance nor as such as would otherwise benefit from a definitive pronouncement from the Privy Council on the applicable law. They have not by their application produced any draconian effects. That is also our opinion with respect to the contentions that the Court misstated the Anderton Category 2 test and the parameters.

[72] Accordingly, the first, third and fourth grounds of appeal fall short of meeting the threshold for the grant of conditional leave to appeal to the Privy Council.

The Hague Convention issue

[73] Mr. Maluf submitted that even if the Court is empowered to retrospectively dispense with service out of the jurisdiction, a serious legal issue arises as to whether this is permissible in a contracting state that has opted out of articles 8 and 10 of the Hague Convention, where service is effected otherwise than through the competent authority or in accordance with the law of the destination state. He contended that the Court erred by holding that such power exists. He reasoned that it is incompatible with the terms of the Hague Convention for the Court to exercise its procedural powers to permit (a) service to be effected; or (b) the need for service to be waived; where Durant relies on service or steps taken to serve which are incongruent with Brazil's objection to Articles 8 and 10.

[74] He stressed that in light of Brazil's stance, Durant made no attempt at all to serve in accordance with the Hague Convention, but instead sought to effect service by direct delivery to the Brazilian court, relying on 'supposed service' by that court on him. Citing **Shiblaq v Sadikoglu**⁴⁴ and **Société Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS and others**⁴⁵ he submitted that the BVI court is powerless to treat the steps taken by Durant as valid service or justification for dispensing with service. It is for this reason he said, why it is important that the Board should consider generally the impact of the Hague Convention on the Court's procedural powers in light of the express reservations made by the United Kingdom Supreme Court in **Abela**. He contended that this is a serious and important argument fit for consideration by the Board.

[75] Durant submitted that it is now settled by the highest courts in England that in exceptional circumstances, service of a claim form may be dispensed with even in

⁴⁴ [2004] EWHC 1890 (Comm) at paras. 57 and 58.

⁴⁵ [2019] 1 WLR 346 at paras. 31 to 35.

a Hague Convention case where service was effected otherwise than through the competent authority. He relied on **Olafsson** and **Phillips and another v Symes and others (sub nom Phillips and another v Nussberger and others)**⁴⁶ a 2008 decision of the House of Lords. In **Nussberger** the House of Lords held that a retrospective dispensation order can be made under CPR rule 6.9 in a service convention case in exceptional circumstances.⁴⁷

[76] Learned counsel Mr. Francis argued that contrary to Mr. Maluf's argument, the High Court and Court of Appeal in **Goldas** opined that it was permissible for the court to dispense with service in a Hague Convention or other service treaty case in exceptional circumstances. The court also remarked that in Hague Convention matters where the destination state has made a reservation to Article 10, comity requires courts in the requesting state to be mindful of and give weight to those objections and for this reason in such cases dispensation orders should seldom be granted and only in exceptional circumstances.⁴⁸

[77] Durant maintained that service by Letters Rogatory was in accordance with Brazilian law and compliant with CPR 7.8(1)(b). Learned counsel Mr. Francis contended that even if, legally service had to be effected on Mr. Maluf under the Hague Convention, the Court was still empowered to dispense with service in exceptional circumstances.

Analysis – The Hague Convention issue

[78] The authorities cited by the parties make it abundantly clear that so far as retrospective dispensation of service in Hague Convention cases is concerned, there is no gray area in the English Courts as it relates to the interpretation and application of rule 6.9. The House of Lords has pronounced on this with absolute clarity in the **Nussberger** case. That decision has been followed in a number of

⁴⁶ [2008] UKHL 1.

⁴⁷ At paragraph 35.

⁴⁸ Paragraph 33 of *Société Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS and others*.

cases in the lower courts in England including **Goldas**. It is beyond dispute that the law on that point is now settled.

[79] Lord Brown who delivered the leading judgment in **Nussberger** and with whom the other learned Law Lords agreed stated:

“... even if a dispensing order ... was properly to be regarded as retrospectively validating what would otherwise have been ineffective service, in my judgment it would have been within the court's power to make such an order. ... so too can an English court, applying its own procedural rules to dispense with service of a particular document, make an order which is effective retrospectively to validate what would otherwise have been an invalid form of service”.⁴⁹

[80] The Court in this case applied the same legal principles in its unanimous judgment thereby dispelling any potential uncertainty regarding its power under CPR 7.8B to make a retrospective dispensation order with respect to service of a claim form in a destination state that has opted out of articles 8 and 10 of the Hague Convention. The interpretation and application of CPR 7.8B is in harmony with the cited English authorities and has put that issue beyond debate in the BVI and in the jurisdictions served by the Eastern Caribbean Supreme Court. The referenced error of fact in the judgment does not negate or undermine that settled position and in no way constitutes a legal issue of any kind, far less a serious one of great general public importance.

[81] Moreover, issues of retrospective dispensation of service of a claim form in the BVI are governed by the rules of procedure laid out in the EC CPR. They are in the Court's opinion fundamentally matters of practice and procedure best reserved for resolution by the Eastern Caribbean Supreme Court. The question of whether the Court may, pursuant to CPR rule 7.8B dispense with service in a Hague Convention case involving a destination State that has opted out of Articles 8 and 10 are also eminently procedural in nature. Furthermore, as regards Brazil's article 10

⁴⁹ At para. 35.

reservation, no injustice or prejudice was occasioned by the Court's dispensation of service of the claim form on Mr. Maluf in Brazil pursuant to CPR 7.8B.

[82] This fourth proposed ground of appeal like the ones discussed earlier concerns procedural rules and practice and the exercise of a judicial discretion in interlocutory proceedings. No serious questions of law of great public importance arise for consideration and no draconian consequences flow from the Court's determination. No other appropriate reason for granting conditional leave to Mr. Maluf to pursue this proposed ground of appeal before the Privy Council has been advanced or is discernible to this Court. This ground does not meet the statutory requirements in the 1967 Order of being of great general and public importance or being deserving of consideration by the Privy Council for other reason. For all of these reasons the motion was refused.

[83] The Court was presented with very comprehensive and helpful submissions from both sides. We wish to record the Court's collective appreciation for the assistance rendered.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

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

By the Court

Chief Registrar