Neutral Citation Number: [2019] EWHC 3495 (Ch)

Claim No: HC-2017-001895

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS
BUSINESS LIST (CHD)
On appeal from Chief Master Marsh

Rolls Building, 7 Fetter Lane
London, EC4A 1NL

Date: 17/12/2019

Before :

Sir Geoffrey Vos, Chancellor of the High Court

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Between :

PUNJAB NATIONAL BANK (INTERNATIONAL) LTD

Claimant/ Appellant

- and –

(1) RAVI SRINIVASAN
(2) TRISHE RESOURCES INC (USA)
(3) NARASIMHAN RAMKHUMAR
(4) VATHSALA RANGANATHAN
(5) PESCO BEAM ENVIRONMENTAL SOLUTIONS INC (USA)
(6) PESCO BEAM ENVIRONMENTAL SOLUTIONS PRIVATE LIMITED
(7) ANANTHARAMAN SHANKAR
(8) LUKE STAENGL
(9) ANANTHARAMAN SUBRAMANIAN

Defendants/ Respondents

- -

Mr Philip Hackett QC and Mr Lee Schama (instructed by **Gunner Cooke LLP**) for Punjab National (International) Bank
Mr Nicholas Vineall QC and Mr Brian Dye (instructed by **Zaiwalla & Co**) for the first, second, and fourth to ninth defendants
Mr Matthew Morrison (instructed by **RHJ Devonshire Solicitors**) for the third defendant, Mr Narasimhan Ramkhumar

Hearing dates: 5th and 6th December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Sir Geoffrey Vos, Chancellor of the High Court

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. The claimant, Punjab National Bank (International) Limited ("PNB"), a bank based in London seeks permission to appeal against the order of Chief Master Marsh (the "Chief Master") dated 22nd February 2019, but date stamped by the court on 1st March 2019. By that order, the Chief Master set aside an order he had made on 13th September 2017 granting permission to PNB to serve these proceedings out of the jurisdiction by email, and a further ancillary order made by Deputy Master Bartlett (the "Deputy Master") on 9th February 2018 granting permission to serve the first defendant out of the jurisdiction by email, and extending the period for service of the proceedings on all defendants. The Chief Master also set aside both the claim form and service of the claim form on all the defendants.

2. Two High Court judges considered the application for permission to appeal. Neither granted permission, but on 24th July 2019, Barling J ordered a two-day hearing of the application with the substantive hearing of the appeal to follow, if permission was granted.

3. The case concerns a series of three loan transactions made by PNB to corporate borrowers and allegedly guaranteed, in broad terms, by the defendants (except the first defendant). The three loan transactions have been referred to, for convenience, as the "SEPL loans", the "Pesco loans", and the "Trishe loans". The loans were made between 29th March 2011 and 1st December 2014, and totalled some US$45 million. They were made for the purposes of oil re-refining and wind energy generating projects in the USA. The third to ninth defendants are all allegedly guarantors domiciled either in India or the USA. The borrowers themselves, with the exception of the fifth defendant ("Pesco USA") and the second defendant (Trishe Resources Inc (USA)), are not party to the proceedings because they are insolvent.

4. In the broadest outline, the Chief Master set aside the permission that had been granted to serve the proceedings out of the jurisdiction on the grounds that (i) PNB had been guilty of material non-disclosure, in that it failed properly to inform the court about two sets of proceedings that it brought in South Carolina, USA (the "US proceedings") and in Chennai, India (the "Chennai proceedings"), (ii) PNB had not shown that it had a serious case to be tried in respect of its claims for fraudulent misrepresentation and deceit, (iii) PNB had failed to demonstrate that England was clearly the most appropriate forum for their claims, (iv) PNB had failed to comply with the 13th September 2017 order because it served amended claim forms and particulars of claim without court approval, (v) no good reason based on exceptional circumstances had been provided justifying the order for service by email, (vi) the Deputy Master ought not to have granted an extension of time for service, (vii) service was, in any event, effective on 13th February 2018, which was one day outside the extended period allowed by the Deputy Master's order, and relief was not warranted, and (viii) PNB had in any event failed to show that it had a reasonable prospect of success on its contractual claims against the third defendant.

5. Mr Philip Hackett QC, leading counsel for PNB, has challenged every aspect of the Chief Master's decision. He concentrated on his submissions that:-

i) The Chief Master had failed to accord adequate weight to the exclusive English jurisdiction clauses and waivers in the loan agreements, which also included internal guarantees, and the English jurisdiction clauses in the guarantees. Those clauses should have been a weighty factor in favour of English jurisdiction.

ii) The Chief Master had wrongly evaluated the pleaded claims in fraudulent misrepresentation and deceit. Had he properly understood those claims, he would have seen that PNB did indeed have a strongly arguable claim. No repayment of any of the loans had ever been made, and the defendants had authorised a Mr Dheeraj Jain ("Mr Jain") to make repeated fraudulent misrepresentations to secure the loans.

iii) A combination of the exclusive jurisdiction clauses and the strongly arguable claims in fraud pointed towards the need to try the whole matter in one jurisdiction. England was the only possible jurisdiction. The omission to disclose the US proceedings and the Chennai proceedings caused the defendants no prejudice as they knew from the loan documentation that PNB was at liberty to bring parallel enforcement proceedings in different jurisdictions. The Chief Master ought to have placed strong reliance on articles 3 and 5 of the Hague Convention on Choice of Court Agreements (the "Hague Convention"), and article 25 of The Recast Brussels Regulation ("Brussels Recast"), which obliged the court to accept jurisdiction where there were such exclusive jurisdiction clauses.

iv) Whilst the Hague Convention and Brussels Recast did not abrogate the Chief Master's discretion to set aside an order for service out on the grounds of material non-disclosure, they ought to have weighed heavily in the balance, when he was exercising his discretion in relation to the set-aside application. The Chief Master had made three significant errors as to the jurisdiction clauses, the fraud claim, and England being the most appropriate forum. Those errors explained why he had also reached the wrong conclusion on the non-disclosure issue.

v) In any event, the Chief Master ought to have allowed the claims in relation to the Pesco loans to proceed, since they are not the subject of any foreign proceedings.

vi) The Chief Master ought not to have set aside the order for an extension of time for service of the claim form, as there was no prejudice to the defendants in making that order.

vii) The Chief Master was wrong to decide that PNB needed a revised permission to serve the amended court documents. The Deputy Master's order approved those documents as was acknowledged at [106] in the Chief Master's judgment.

viii) Although the service was technically defective, there was no prejudice to the defendants, and relief ought to have been granted to PNB to cure the delay in service of one day.

ix) There were indeed appropriate grounds for the order allowing service by email in law and on the evidence.

Mr Hackett expressly agreed with this formulation in the course of his oral reply submissions.

6. Mr Nicholas Vineall QC, leading counsel for all defendants apart from the third defendant, submitted that the Chief Master had been right on all counts. He pointed out that, even if PNB succeeded in its arguments on jurisdiction, fraud, forum and non-disclosure, it still had to show that the Chief Master was wrong about each of (a) the Deputy Master's order not having approved the amended pleadings (save in respect of the first defendant), (b) email service having been unjustified, (c) the invalidity of the extension of time for service of the proceedings, and (d) the actual email service having only been effective after the extended deadline.

7. Mr Matthew Morrison, counsel for the third defendant, argued that the Master had been right to say that the only guarantee that PNB relied upon in its pleading against his client was that dated 7th April 2012, and that guarantee was subject to a Chennai jurisdiction clause, and did not cover the Trishe or any other pleaded loan. There was, he submitted, no properly pleaded contractual claim against the third defendant. Moreover, email service was particularly unmeritorious in the case of the third defendant, when he had never even been asked by PNB for his address.

8. The first question that I need to answer relates, of course, to permission to appeal. The applicable test is whether PNB has shown that there is a real prospect of success or some other reason why an appeal should be heard. The parties submitted that I should go through each ground of appeal in turn and answer those questions in relation to each. There is something quite unrealistic about adopting that course after hearing 1½ days' argument on the substantive issues, and having already confined the central issues in dispute to a manageable list. After due consideration, and for reasons that appear in the substantive sections of this judgment, I have formed the clear view that PNB made an adequate case for permission, on one or other of the tests I have adumbrated, in respect of all the arguments I have summarised at [5] above. I do not intend to go through the 24 discursive grounds of appeal enumerated in PNB's appellants' notice. In the interests of brevity, however, I should be taken to have refused permission for any grounds of appeal that go beyond my summary, on the basis that none of them has any real prospect of success. Indeed, they were not pursued orally in any event.

Factual background

9. I do not intend to summarise all the loans and guarantees alleged by PNB. They are complex and the loan documentation is hugely extensive. The issues that I have to decide on this appeal do not turn on the details of the loan documentation. Reference can be made to the Chief Master's judgment for more details of the precise arrangements. I shall assume for the purposes of this appeal the following facts:-

    i) The loan agreements, some of which included internal guarantees by one or more of the defendants typically included English governing law clauses and jurisdiction clauses and waivers in the following form:

> "The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement … (a Dispute).
>
> The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no party will argue to the contrary.
>
> This Clause … is for the benefit of the [lenders] only. As a result, no [lender] shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the [lenders] may take concurrent proceedings in any number of jurisdictions".

ii) All the defendants, except the first and third defendants, were allegedly parties to at least one internal or external guarantee including an English law clause and an English jurisdiction clause.

iii) All the defendants, except the first, second and eighth defendants, were also allegedly parties to other guarantees including either Indian or US law and non-exclusive jurisdiction clauses in either Chennai or the US.

10. None of the loans has been repaid in accordance with its terms. None of the guarantors has paid PNB anything under their guarantees. There is in some cases a dispute as to whether requisite demands have been served.

11. On 22nd March 2017, PNB and Bank of Baroda issued the US proceedings in South Carolina against the fourth to ninth defendants in respect of the SEPL loans and guarantees, seeking enforcement against certain real property in South Carolina.

12. On 29th June 2017, the claim form was issued making claims in fraudulent misrepresentation and breach of contract against the second to ninth defendants in respect of the SEPL loans, the Pesco loans, and the Trishe loans, and several guarantees of those loans.

13. On 30th June 2017, PNB applied for permission to serve the claim form and particulars of claim outside the jurisdiction against the second to ninth defendants and for permission to serve by alternative means.

14. On 4th September 2017, the Chief Master heard those applications *ex parte*. At that stage, the Chief Master was shown a pleading, which mentioned the US proceedings against SEPL. The Chief Master was not told that several of the proposed defendants were defendants to the US proceedings.

15. On 13th September 2017, the Chief Master made an order granting PNB permission to serve the claim form and the particulars of claim out of the jurisdiction and permission to serve the claim form by email (on those that are now the second to ninth defendants).

16. On 28th November 2017, the claimant issued proceedings in the Debt Recovery Tribunal in Chennai against the second, third and fourth defendants in relation to the Trishe loans, and seeking enforcement against certain real property there.

17. On 13th December 2017, PNB's solicitor emailed the court to say that counsel had re-worked the particulars of claim since the hearing on 4th September 2017 (but not enclosing a revised draft), suggesting that the Chief Master should consider the amended particulars of claim to satisfy himself that there was "sufficient merit in the case to warrant service out of jurisdiction".

18. On 21st December 2017, PNB issued a further application seeking permission to serve the (new) first defendant out of the jurisdiction by email, and for an extension of time for service of the claim form and particulars of claim until 19th January 2018.

19. On 15th January 2018, PNB amended the claim form so as to join the first defendant and restate the claim in misrepresentation, breach of contract and deceit. The amendment was substantial and the revised document did not show what amendments had been made.

20. On 18th January 2018, the Deputy Master heard PNB *ex parte* and was shown the draft amended particulars of claim, which mentioned the US proceedings against SEPL. The Deputy Master was not told that several of the proposed defendants were defendants to the US and/or the Chennai proceedings. PNB asked for and was granted an additional 14 days again to re-draft its particulars of claim.

21. On 1st February 2018, PNB's counsel emailed the Deputy Master attaching further revised particulars of claim. The Deputy Master replied saying that he was willing to extend time for service until 9th February 2018, but no longer.

22. On 8th February 2018, PNB's solicitors sent the court further revised particulars of claim saying that the case had again been re-shaped, and that there were numerous appendices that they would send the court if it wished. Appendix 14 in fact contained 70 pages of particulars of fraudulent misrepresentations.

23. On 9th February 2018, PNB's solicitors sent a draft order to the Deputy Master saying that PNB was ready to serve the pleadings on the defendants by 4pm on 12th February 2018.

24. On 9th February 2018, the Deputy Master made an order in the following terms:-

    i) By paragraph 1 that "[PNB] has permission to serve the claim form and the particulars of claim upon RAVI SRINIVASAN [first defendant] out of the jurisdiction pursuant to CPR Rule 6.36. and Gateway 9(a) of Paragraph 3.1 of Practice Direction 6B, namely on the basis that there is a good arguable case and a claim in tort where the damage was sustained, or will be sustained, within the jurisdiction"

    ii) By paragraph 2 that PNB had permission to serve the first defendant by email.

    iii) By paragraph 3 that "[p]ursuant to CPR Rule 7.6, the time for service of the claim form and particulars of claim be extended until 12th February 2018".

iv) By paragraph 4 that "[t]he claim form and particulars of claim shall be deemed served on the second business day after the sending of the email, pursuant to CPR Rules 6.14 and 7.5(1)".

25. On 9th February 2018 at 15.43, PNB's solicitors emailed the amended claim form and the amended particulars of claim and the two orders giving permission to serve out to each of the defendants.

26. On 12th February 2018 at 12.38, PNB's solicitors emailed the appendices to the amended claim form to each of the defendants.

27. It is now common ground that, because the appendices were not served until 12th February 2018, the effect of paragraph 4 of the Deputy Master's order was that the Particulars of Claim were not served until after the extended deadline of 12th February 2019.

28. On 25th April 2018, the defendants issued two applications (one by the third defendant alone) contesting the jurisdiction of the court and seeking multiple heads of relief.

29. On 14th January 2019, the South Carolina Court granted a default judgment against the defendants in the US proceedings for $23,181,476.03.

30. On 24th January 2019, the Chief Master gave judgment after a two-day hearing setting aside the orders of 13th September 2017 and 9th February 2018 and the claim form and service of the claim form. His order date stamped 1st March 2019 declared that the court would not exercise its jurisdiction, and ordered that the court's orders dated 13th September 2017 and 12th February 2018 (an error for the Deputy Master's order of 9th February 2018) and the claim form and service of the claim form were set aside.

31. On 13th May 2019, Mann J ordered on paper that the application for permission to appeal the Chief Master's order should be determined at a half-day hearing.

32. On 24th July 2019, Barling J adjourned the application for PTA to a full rolled-up two-day hearing with the substantive appeal hearing to follow if permission was granted.

<u>The legal position applicable to an application to serve out of the jurisdiction</u>

33. The Chief Master described the applicable legal tests as follows at [65]. Neither party suggested that this passage reflected any legal error:-

> "A claimant seeking permission to serve out of the jurisdiction must satisfy the court of three things that are derived from CPR 6.37 :
>
> (1) That there is a serious issue to be tried in relation to each cause of action in respect of each cause of action in relation to which permission is sought. Where extremely serious allegations are made, the proof to establish that there is a serious issue to be tried must be commensurate to the seriousness of the allegation.

> (2) That the claimant has the better of the argument that the case falls within one of the gateways specified in paragraph 3.1 of Practice Direction 6B.
>
> (3) That the courts of England and Wales are clearly the appropriate forum for the determination of the dispute and the court ought to exercise its discretion to permit service out of the jurisdiction; the court will not give permission unless it is satisfied that England and Wales is the proper place in which to bring the claim".

34. In the circumstances, I intend to accept the Chief Master's summary as an appropriate starting point. The issues between the parties raise different legal questions, but, before dealing with those issues, it is as well to clarify the basis on which the Chief Master dealt with the applications to set aside the orders for service out.

The Chief Master's judgment

35. The substantive parts of the Chief Master's judgment deal with the 7 main grounds relied upon by the defendants to set aside the proceedings and the orders of 13th September 2017 and 9th February 2018. It is, in effect, the Chief Master's decisions on each of these grounds that are challenged on this appeal. I shall, therefore, summarise the ground relied upon and the Chief Master's reasons for upholding it.

Ground 1 – was there a serious issue to be tried in fraud?

36. Ground 1 was the defendants' claim that PNB had not made out an arguable case in deceit against them. The Chief Master referred to the need for a concise pleading of the facts and a careful pleading of any allegation of fraud. He said that a defendant must be able to understand with relative ease the case that has to be met. He concluded that it was "literally impossible for any of the defendants to this claim to know what case in deceit they have to meet". It was not that PNB had failed to plead sufficient facts to constitute the causes of action, but rather that they were "too comprehensive and not sufficiently particular". The Chief Master said that the particulars of claim failed to "meet the minimum requirements that are essential. They are beyond being prolix and they are wholly unspecific in relation to each defendant". It followed that the claims in deceit and misrepresentation did not "demonstrate a serious issue to be tried in relation to the relevant cause or causes of action. Indeed, they [were] vulnerable to an order striking out that part of the claim". Since the claim against the first defendant was only in deceit and misrepresentation, the claim against him had to be set aside.

Ground 2 – was England the most appropriate forum?

37. Ground 2 was that PNB had not been able successfully to show that England was the most appropriate forum for these proceedings. The Chief Master summarised in some detail the relevant loans and the five types of jurisdiction clause he identified at [72]. He said that the letters of comfort relied upon did not contain language that was "clearly that of an obligor", so that the claims based on them had no real prospect of success. The Chief Master then recorded that a non-exclusive foreign jurisdiction clause raised a strong

presumption of *forum conveniens,* and that strong grounds were needed to justify refusal of jurisdiction, but he said that it was relevant to consider whether the party with the benefit of the clause had issued proceedings in another jurisdiction (see Lawrence Collins J in *Bas Capital Funding Corp v. Medfinco Ltd* [2004] 1 Lloyds LR 652 at [192] and [193], and Coleman J in *BP plc v. Aon Ltd* [2006] 1 Lloyds Rep 549 at [23]). The Chief Master concluded at [76] that "[c]oncurrent proceedings in separate jurisdictions [were] a significant factor in relation to whether the claimant can show that England is clearly the most appropriate forum". Moreover, he thought that maintaining separate proceedings might be vexatious or oppressive, so that the court had a power to stay claims if it considered it appropriate to do so in the interests of justice. The Chief Master also held that, since PNB had "entered into a series of broadly related contracts with inconsistent provisions [as to] applicable law and jurisdiction", "the effect of the English non-exclusive clause [was] diminished albeit that it [remained] an important factor".

38. The Chief Master said at [80] that significant factors pointed towards England as an appropriate forum, namely that PNB was based in London, the majority of the negotiations took place in London, the lending was signed off in London, the loans were made from London and were repayable there. Against those features, he said that the defendants were all resident and domiciled either in the USA or India and the loans were for projects in the USA.

39. On the question of forum, the Chief Master concluded at [81] that the "existence" of the US and Chennai proceedings trumped all other countervailing factors, and PNB had not been able to demonstrate that the English court was clearly the most appropriate forum for these claims. There was no good reason why those defendants should be sued in England as well as in the USA or India, in the light also of the weakness of the claims in deceit and misrepresentation. These conclusions determined the application, but the Chief Master nonetheless considered most other arguments in deference to the fact that they had been argued.

Ground 3 – material non-disclosure

40. Ground 3 assumed that PNB was right about grounds 1 and 2. On that basis, the defendants contended that the orders giving permission to serve out of the jurisdiction should be set aside for material non-disclosure, namely the failure to inform the court before 13th September 2017 of the US proceedings, and before 9th February 2018 of both the US proceedings and the Chennai proceedings.

41. The Chief Master recited that an *ex parte* applicant was under a duty to make full and frank disclosure, to be candid and to draw to the attention of the court all relevant matters. He emphasised that it was insufficient to include a material point within an exhibit or a dense statement of case, it was the knowledge of the applicant itself that was important, the existence of overlapping proceedings in a foreign jurisdiction was likely to be a particularly relevant matter which in normal circumstances should be disclosed, and "the nondisclosure of which may well lead to the order for permission being set aside" (see Lawrence Collins J in *Opthalmic Innovations International (UK) Ltd v. Opthalmic Innovations International Inc* [2004] 1 Lloyds Rep 2948 at [45]), and a failure to disclose a limitation defence where the court is asked to extend the period of validity of the claim

form which would deprive a defendant of limitation defence would normally lead to the order being set aside (see Rix J in *The Hai Hing [2000]* 1 Lloyds Rep 300 at page 308).

42. The Chief Master recorded at [84] that a decision as to whether to set aside an order affected by material non-disclosure involved a consideration of the circumstances in which the breach occurred, and that even a deliberate breach did not inevitably lead to the order being set aside.

43. The Chief Master concluded, after setting out the circumstances, that in relation to the hearing on 4th September 2017, "[t]he failure to inform the court fully and fairly about the US Claim was a material breach of the claimant's duty of frankness". The Chennai claim was not only an enforcement process and was duplicative of these proceedings. The existence of the Chennai claim should have been drawn to the attention of the court at the hearing in January 2018. The "failure to do so was a material breach of [PNB's] duty of frankness".

44. Although the Chief Master decided also that it was a breach of PNB's duty not to draw certain limitation issues to the attention of the Deputy Master when seeking an extension to the validity of the claim form, he did not rely upon that failure for his ultimate decision.

45. Under this ground also, the Chief Master criticised PNB's solicitor for non-disclosures in relation to the application for service by alternative means. His decision on ground 3 was, however, that the non-disclosure of the US and Chennai proceedings was a serious breach of PNB's duty to the court. They were "highly material to the exercise of the court's jurisdiction to give permission to serve out", and the failure tainted the orders of 13th September 2017 and 9th February 2018: "[e]ven without the additional matters to which I have referred, the failures are such that the court should set those orders aside. I do not consider they are failures which can be overlooked".

Ground 4 – did the court approve the amended Particulars of Claim?

46. Ground 4 was the defendants' contention that the court had never given permission to serve the amended claim form and the amended particulars of claim on the second to ninth defendants.

47. The Chief Master thought that the 13th September 2017 order, which gave the claimant permission to serve "the claim form and the particulars of claim" out of the jurisdiction, "plainly" related to the statements of case in the form previously considered, and not to the amended drafts. He was prepared to decide the case on the basis of the construction of the order rather than on authority. The necessity of referring an amended pleading back to the court depended on the scope of the amendment. Here, the changes were so extensive that the failure to seek the court's approval was "foolish indeed". The service of the amended claim form and particulars of claim on the second to ninth defendants without obtaining approval from the court, was a failure to comply with the order of 13th September 2017 and, in effect, the 9th February 2018 order.

Ground 5 – ought service by email to have been allowed?

48. Ground 5 was the defendants' contention that permission to serve the proceedings by email ought not to have been granted. CPR Part 6.37(5)(b)(i) allowed the court to permit service out by email. The threshold test was that set out by Mr David Foxton QC in *Marashen Ltd v. Kenvett Ltd* [2017] EWHC 1706 (Ch), where he held at [57] that permission to permit service by alternative means in a Hague Service Convention case should only be permitted if exceptional circumstances existed. Here, when looked at objectively there were no reasons, let alone good ones, to suppose that the defendants would evade service. PNB's solicitor's evidence on the point was not entirely satisfactory.

Ground 6 – was time for service validly extended?

49. Ground 6 was the defendants' contention that the order extending the validity of the claim form ought not to have been made. The Chief Master said that the principle was that the court should normally only exercise its power to extend the period of service where the extension is needed due to issues relating to service, but here PNB had taken no steps to serve the second to ninth defendants. PNB had lost sight of the need to take steps to serve the claim promptly, so that their reliance on CPR Part 7.6 was ill-founded.

Ground 7 – was service ultimately effected out of time?

50. Ground 7 was the argument that service was not, in any event, in time. The Chief Master said that the Deputy Master's order had granted an extension of time for service until 12th February 2018, but contained a provision deeming service effective on the second business day after sending the email. PNB's solicitors did not send the defendants the appendixes to the pleadings until 12th February 2018. Since they were an essential element of the claim, service was not effected until they were supplied, and the deeming provision deemed service on 13th February 2018 [sic] and thus outside the extended period. PNB's counsel's oral application for relief from sanctions was rejected in the absence of a formal application, and as being "without merit in light of the catalogue of procedural failings on the part of the claimant".

The third defendant

51. In relation to the claims against the third defendant, the Chief Master concluded that the only claim was in deceit. PNB had failed to point to a guarantee signed by the third defendant or to a link between the Trishe facility letter dated 31st January 2012 and the later loan agreement, to which the third defendant was not a signatory. PNB had failed to show that it had a reasonable prospect of succeeding on any contractual claim against the third defendant.

The Chief Master's conclusion

52. The Chief Master concluded that the applications succeeded on multiple grounds, but he would have been willing to grant the relief in relation to service out and by alternative means on the non-disclosure ground alone.

53. I will deal with PNB's grounds of appeal in the order that the Master dealt with the defendants' grounds for setting aside the 13th September 2017 and 9th February 2018 orders.

Ground 1: Was there a serious issue to be tried in fraud?

54. The Chief Master was very unimpressed with PNB's claims in fraud. He thought that they transgressed the requirement for clarity and the inhibition on prolixity. Moreover, he thought that the particulars did not descend to sufficient particularity as to what precise misrepresentations were alleged against which defendants. PNB complains that the Chief Master had not properly considered the numerous emails placed before the court which evidenced the course of repeated misrepresentations and, it contends, fraud on PNB.

55. I have looked carefully at the lengthy pleading, at appendix 14 to the final amended particulars of claim, and at the emails relied upon by PNB. As it seems to me, PNB has mixed up a number of truly factual representations, such as those relating to the financial position of the various parties, with a conspiracy theory that suggests that everything every defendant ever did in relation to PNB's lending was one large fraud, whereby the loans were never intended to be repaid or even to be used for the green energy projects for which they were intended. The problem with the conspiracy theory is that PNB made loans and then extended their facilities in each case. It seems possible that one of the problems with the lending was its timing and its objective, which was for green energy projects at a time when US shale gas was coming on stream in profusion.

56. Whether or not that is the position, the case for fraud on the face of the pleading is extremely thin, and seems to depend largely on representations allegedly made on behalf of all the defendants by a non-party, Mr Jain. There is not one specific allegation of a representation made personally by any of the individual defendants on a particular day to a particular official of PNB. There are no pleaded details of how Mr Jain is said to have been authorised to act on behalf of each of the defendants.

57. It is well-established that, if a claim for fraud is to be made out and to be regarded as properly arguable, it must be properly particularised and quite specific against each person said be guilty of the fraud. Here, the claim is diffuse and generalised. The emails relied upon do not assist, because the details of why they are said to be false at the time they were written are missing. The gap is, in every case, filled with the conspiracy theory that asks the rhetorical question: why, if the defendants truly intended to be straight with PNB, have they not repaid a single dollar? Unfortunately, there could in this, as in so many other commercial situations, be many possible answers to that question. The answer that PNB proffers is but one, and actually one quite remote, possibility.

58. In these circumstances, I see no basis to interfere with the Master's decision on this ground. I agree with his conclusion that no sufficiently serious case of misrepresentation and deceit was made out against any of the defendants. Accordingly, no permission ought to have been granted to serve those claims out of the jurisdiction.

Ground 2: Was England the most appropriate forum?

59. This is really the nub of PNB's appeal. PNB submitted that the Chief Master failed to accord anything like adequate weight to the exclusive English jurisdiction clauses. International borrowers, like these defendants, understand full well that commercial lenders reserve the right to sue in multiple jurisdictions, particularly when they need to enforce against real property overseas. That does not mean that the court can simply ignore the parties' agreement to a main jurisdiction of choice – in this case England.

60. PNB also relied strongly on article 25 of Brussels Recast and Articles 3 and 5 of the Hague Convention. In *Skype Technologies SA v. Joltid Ltd.* [2009] EWHC 2783 (Ch), Lewison J considered the effect of what is now article 25 and of *Owusu v. Jackson (t/a Villa Holidays Bal Inn Villas)* (C-281/02) [2005] Q.B. 801. He concluded at [33] that it followed that:-

> "what one might call the standard considerations that arise in arguments about *forum non conveniens* should be given little weight in the face of an exclusive jurisdiction clause where the parties have chosen the courts of a neutral territory in the context of an agreement with world-wide application. Otherwise the exclusive jurisdiction clause would be deprived of its intended effect. Indeed, the more "neutral" the chosen forum was the less the importance the parties must have placed on the convenience of the forum for any particular dispute".

61. In *UBS AG v. HSH Nordbank AG* [2009] EWCA Civ 585, Lord Collins said at [100]-[102]:-

> "100. But against that, it is most unusual for an English court to stay proceedings brought in England pursuant to an English jurisdiction agreement. In British Aerospace v Dee Howard [1993] 1 Ll Rep 368, at 376, Waller J said (in the context of an exclusive English jurisdiction clause) that it should not be open to a party to start arguing about the relative merits of fighting an action in the foreign jurisdiction as compared with fighting an action in London, where the factors relied on would have been foreseeable at the time that they entered into the contract. That case involved an application to set aside service out of the jurisdiction. It has been approved in this court in the context of an application to stay English proceedings (*Ace Insurance SANV v Zurich Insurance Co [2001] EWCA Civ 173; [2001] CLC 526* , at [62], per Rix LJ) and of an application to restrain foreign proceedings in which the foreign court was asked to prevent a party suing in England pursuant to an English jurisdiction clause (*Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan [2002] EWCA Civ 1643; [2004] 1 CLC 149* , at [36], per Waller LJ) and it has been applied in many decisions in the Commercial Court.

> 101. The next difficulty is that there is an express agreement in the jurisdiction clause the effect of which is that HSH irrevocably waived any claim that proceedings had been brought in an inconvenient forum. In *National Westminster Bank v Utrecht-America Finance Co [2001] EWCA Civ 658; [2001] CLC 1372*, at [23], Clarke LJ thought it was 'fatal' to any forum non conveniens case, whereas in Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan, ante, at [36] Waller LJ did not treat such an agreement as decisive, but thought that it underlined the point that the jurisdiction agreement would be overridden only in exceptional circumstances.
>
> 102. Finally, it is a matter of controversy whether there is any room at all under the Brussels I Regulation regime for a stay on forum conveniens grounds. …"

62. Ultimately, Mr Hackett did not contend that it was jurisdictionally impossible for the court to conclude that the exclusive jurisdiction clauses upon which he relied should not be given effect. But he submitted that the Chief Master had completely under-estimated their importance, even in the face of the US and Chennai proceedings.

63. In my judgment, the Chief Master made an imbalanced assessment of whether England was the most appropriate forum for these proceedings. He was too greatly influenced in this context, I think, by the non-disclosure of the foreign proceedings. I will deal with that issue next, but under this heading there were other relevant factors, the most important being the choice of jurisdiction clauses in both loan agreements and guarantees, the effect of Brussels Recast and the Hague Convention, the fact that some parallel proceedings can be necessary where enforcement against real property is required, and the centre of gravity of the lending relationship which was indeed in London. In addition, the US and Chennai proceedings did not cover the Pesco loans at all, so that disallowing English jurisdiction for those contractual claims prevented PNB from bringing proceedings in its main chosen jurisdiction in respect of that lending and the guarantees given in respect of it.

64. In my judgment, the Chief Master fell into error in deciding that England was not the most appropriate forum, at least for (a) the claims under the Pesco loans and guarantees that had not been the subject of claims overseas, and (b) the fraud claims, had there been a serious case to be tried in respect of them. He was justified in deciding that England was not the most appropriate forum for the contractual claims based upon the SEPL and Trishe loans and guarantees, but only because they had been the subject of existing claims in the US and Chennai proceedings. Those claims in fact went beyond simply making enforcement claims against real property in those places. No explanation was provided as to why duplicative contractual (as opposed to fraud) claims needed to be made in respect of the SEPL and Trishe loans and guarantees.

65. In the result, the error made by the Chief Master may not have any significance as will in due course appear, but I shall consider its consequences when I have dealt with the other grounds.

Ground 3: Was the Chief Master right to set aside permission to serve out on the ground of material non-disclosure?

66. PNB's main argument under this heading was that the whole sub-stratum on which the Chief Master's decision was based was wrong. It was submitted that he had been mistaken about each of the jurisdiction clauses, most appropriate forum, the sustainability of the fraud claims, and the non-disclosures themselves. Had he considered the question against the right background, he would at least have reinstated the orders, even if they fell to be set aside as a result of the non-disclosures.

67. It is now apparent that I am at least in partial agreement with PNB about the Chief Master having made an error in his consideration of whether England was the most appropriate forum. The next question is whether the Chief Master was right in the censorious approach he took to the non-disclosures themselves.

68. I have found assistance from the summary of the applicable law by Bryan J in *Libyan Investment Authority v. JP Morgan* [2019] EWHC 1452 (Comm) at [90]-[123]. He cited Christopher Clarke J's *dicta* in *OJSC ANK Yugraneft v Sibir Energy plc* [2008] EWHC 2614 (Ch) at [102] as follows:

> "(1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
>
> (2) Notwithstanding the general rule, the court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the Judge might have made the order anyway is of little if any importance.
>
> (6) The Court can weigh the merits of the plaintiff's claim but should not conduct a simple balancing exercise of which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.

> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the courts should have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances".

69. Bryan J commented as follows at [120]:-

> "The importance of the duty of full and frank disclosure, on applications for permission to serve out, just as in the context of a freezing injunction, cannot be over-stated. There is a difference in terms of what the disclosure must be directed at, and the matters being considered, but the underlying reason and rationale for the duty remains the same, as is the need to comply with the same. A failure to comply with that duty is by its very nature serious – an individual or entity has been brought into the jurisdiction without having had any opportunity to address the court as to why permission should not be granted, and as demonstrated by the present case, they are then exposed to very considerable costs upon an application to set jurisdiction aside".

70. I respectfully agree with these *dicta*. There are statements to similar effect in *Munrib Masri v. Consolidated Contractors International Company* [2011] EWHC 1780 (Comm) at [58]-[68] per Burton J, and per Popplewell J in *Banco Turco Romana S.A. v. Cortuk* [2018] EWHC 662 (Comm) at [45].

71. In my judgment, PNB's failure to alert the Chief Master to the US proceedings, and the Deputy Master to the US and the Chennai proceedings was a serious default. It was deliberate in that PNB and its solicitors were fully aware of those proceedings. The relevance of the foreign proceedings must have been obvious to any lawyer. The English proceedings were in large part duplicative of the US and the Chennai proceedings. It is of little importance that the duplication might have been justified. PNB had a duty to tell the court the full story and it failed to do so. The Chief Master was absolutely right to conclude that the normal consequence of such a default was that the orders made should be set aside. The only question which he did not fully consider was whether the order should have been partly or wholly reinstated. Apparently, there was no submission before him that at least the Pesco claims should have been reinstated.

72. I have considered the whole question afresh in the light of the decisions I have made already. As I have said, the general rule is, in a case of deliberate and material non-disclosure, that the orders should be discharged, but there is a discretion to reinstate. That jurisdiction should, however, be exercised sparingly. I take into account the need to

protect the administration of justice and uphold the public interest in requiring full and fair disclosure.

73. I assess the degree and extent of PNB's culpability, as did the Chief Master, at a high level. I have no doubt that disclosure of the foreign proceedings would have given each of the Chief Master and the Deputy Master cause to reconsider whether the orders sought were appropriate. This was a case where, on analysis, the main fraud claims were extremely weak. That fact would, in all probability have weighed heavily with the court. It is true that the jurisdiction clauses would also have weighed heavily in favour of allowing service out of at least the Pesco contractual claims. One question is whether it would be simply too unjust to prevent PNB bringing those claims back-dated to the dates of the original orders. As Mr Vineall submitted, even the unserved but verified particulars of claim alleged that the Pesco loans fell due for repayment on 31st August 2015. In those circumstances, it is hard to see how PNB would be prevented from bringing new proceedings now in relation to the Pesco loans and guarantees. That is a factor that can be weighed in the balance of justice. I bear in mind also the need to have regard to the proportionality between the default on the one hand, and the impact on PNB of setting aside the orders on the other hand.

74. Taking into account all relevant circumstances, I have concluded that the Chief Master was right to set aside both orders and not to reinstate them. These were serious breaches of the duty of disclosure. The proper order was, as the Chief Master said, to set aside the orders of 13th September 2017 and 9th February 2018 in their entirety, and leave PNB to seek to bring any new proceedings if it chooses to do so.

75. That conclusion makes it unnecessary to deal with the remaining grounds, but since they have been argued, I will briefly state my conclusions in relation to each.

Ground 4: Did the court approve the amended Particulars of Claim?

76. I take the view that the Chief Master considered this aspect on rather too narrow a basis. It was true, of course, that the 13th September 2017 order only gave permission to serve the unamended draft claim form and particulars of claim. The real question, however, turns in my judgment on the proper construction of the 9th February 2018 order. That order was made after the Deputy Master had been shown the amended pleading that PNB intended to serve on 8th February 2018, and had been offered the annexes to that pleading.

77. The three critical paragraphs of the 9th February 2018 order are paragraphs 1, 3 and 4. Paragraph 1 obviously refers to the revised draft claim form and particulars of claim that included the first defendant. Mr Vineall argued that paragraph 3 referred to the unamended versions of these documents, because it related to the extension of the time for service against the second to ninth defendants. But, as it seems to me, paragraph 4 must refer to the amended versions since the whole paragraph relates to both the first and the remaining defendants, and it is obvious that, in relation to the first defendant, the claim form and particulars of claim referred to must be the amended ones. If paragraph 4 is to be so understood, I take the clear view that the words "the claim form and the particulars of claim" in each of paragraphs 1, 3 and 4 of the 9th February 2019 order are referring to, or at least including a reference to, the latest amended documents.

78. Accordingly, I think the Master was wrong to hold that PNB did not obtain permission to serve the amended documents on all the defendants.

Ground 5: Ought service by email to have been allowed?

79. I have considered the documents that the Chief Master considered under this ground. I can see no basis on which to disagree with his conclusions. He was right, I think, to prefer the decision of David Foxton QC in *Marashen Ltd v. Kenvett Ltd* [2017] EWHC 1706 (Ch) and to apply the test that required there to be exceptional circumstances before service by alternative means should be allowed. I agree with the Chief Master that, despite PNB's detailed submissions on this issue, no such exceptional circumstances existed in this case justifying email service. PNB had the addresses of the defendants and none had tried to evade or delay service of documents or in the foreign proceedings.

80. I would, therefore, dismiss the appeal against the Chief Master's order on this ground.

Ground 6: Was time for service validly extended?

81. It is true, as PNB submitted, that the court knew the true position, as to the absence of efforts having been made to serve under the original permission, when it granted the extension of time on 9th February 2018. But I have concluded that the Chief Master was correct to say that the court should normally only exercise its power to extend the period of service where the extension is needed due to issues relating to service. Here, PNB was so concerned about drafting the particulars of claim and redrafting them that it lost sight of the need to serve proceedings promptly once permission had been given to serve out of the jurisdiction. I see no error in the Chief Master's approach and would dismiss the appeal on this point.

Ground 7: Was service ultimately effected out of time?

82. Both sides accepted that service was in fact out of time, because the annexes to the particulars of claim were not served by email until 12th February 2018, and the 9th February 2018 order deemed service two working days after the email was sent. PNB submitted, however, that it should have been granted, in effect, relief from sanctions and that the Chief Master ought to have treated the proceedings as served in time. I do not agree. As the Chief Master said, in the light of the catalogue of PNB's other errors and the order that the Chief Master intended to make as a consequence of the material non-disclosure, there was no basis to grant PNB relief in relation to its failure to serve in time. I would dismiss PNB's appeal on this ground.

The third defendant

83. There is no need for me to address the specific questions raised by Mr Morrison in relation to the third defendant. The orders will be set aside as much as they affect the third defendant as they will for the other defendants. If PNB decides to include the third defendant in any fresh claims it may choose to bring relating to the Pesco loans and guarantees, it will need to make sure that it does indeed have a sustainable contractual claim against him that can be brought in England.

Conclusions

84. For the reasons I have tried shortly to give, I will grant PNB permission to appeal on all the points adumbrated at [5] above.

85. PNB persuaded me that the Chief Master was wrong (i) in part on ground 2 and (ii) on ground 4. He ought to have held that England was the most appropriate forum for the contractual claims on the Pesco loans and the English jurisdiction guarantees of the Pesco loans, and for the fraud claims, had they been (which they were not) seriously arguable as presently pleaded. The Chief Master ought to have held that, on a proper interpretation of the 9th February 2018 order, PNB actually obtained permission to serve the latest versions of the amended documents on all the defendants.

86. Nonetheless, since the Chief Master was right on ground 3 in deciding that both his own order of 13th September 2017 and the Deputy Master's order of 9th February 2018 ought to have been set aside on the grounds of material non-disclosure and not reinstated, the appeal as a whole against the Chief Master's order of 1st March 2019 must be dismissed.