[2015 Gib LR 328]

IN THE MATTER OF ALI ABDUL KARIM ABUL

ABDUL AZIZ ALI ABUL and GOLINSKY v. ABDULKARIM ABDULAZIZ ABUL and FOURTEEN OTHERS

SUPREME COURT (Butler, J.): November 10th, 2015

Civil Procedure—service of process—alternative methods of service—foreign government refusing to recognize Gibraltar as separate jurisdiction from UK under Hague Service Convention and returning documents to UK is "good reason" to authorize alternative methods of service under CPR, r.6.15(1)

The claimants applied for four orders in relation to the administration of a will of which they were executors.

The deceased died in Kuwait in 1992, leaving two wills. The first claimant was one of the deceased's children and was both a beneficiary and executor of the first will, but he died in 2014. The second claimant, a solicitor, was the other executor of the first will. The first and second defendants were the sons of the first claimant and were also beneficiaries under the first will. The 3rd–15th defendants were potential beneficiaries under the second will. Both wills purported to distribute the deceased's shareholding in a company.

The claimants brought a claim to resolve several issues regarding, *inter alia*, the interaction between the two wills. The court granted permission

for process to be served on the 3rd–15th defendants in Kuwait, where they were residing, but the claimants encountered serious difficulties in achieving this. The Kuwaiti authorities returned the documents to the UK Ministry of Justice rather than delivering them to the defendants, as they apparently refused to recognize Gibraltar as a separate jurisdiction from the United Kingdom for the purposes of The Hague Service Convention. The court then gave permission for service to be effected by courier service at the last known addresses of the defendants, but this raised further difficulties, including unspecified persons refusing to accept service at those addresses.

The claimants applied for orders that (a) the second defendant be removed as a defendant and substituted for the first claimant in order to avoid a conflict between the first claimant's positions as purchaser and executor resulting from his application, before his death, to purchase the deceased's shareholding in the company; (b) the third defendant represent the fourth to ninth defendants pursuant to CPR, r.19.7(2); (c) service on the fourth to ninth defendants be dispensed with pursuant to CPR, r.6.16; and (d) the fourth to ninth defendants be removed as parties, pursuant to CPR, r.19.2(3), together with an order that they would be bound by any decision or order of the court in these proceedings. Orders providing for alternative methods of service under CPR, r.6.15(1) and deeming the defendants to have been served under r.6.15(2) were also discussed.

Held, dismissing the applications:

(1) The claimants' application for the second defendant to be removed as a defendant and substituted as first claimant would be refused for the following reasons: (a) the alleged conflict between the first claimant's positions as executor and purchaser ceased to exist on his death as his application to purchase the shares was personal to him and did not survive his death; (b) this conflict may never have existed at all because he may never have been entitled to apply for permission to purchase the shares, as the court would not order the executors to sell the shares to any particular person; (c) the claimants had not complied with the prescribed procedure under CPR, r.19.2(4) in that the application was not properly supported by evidence and the second defendant had not filed his written consent to the application; and (d) r.19.2(4) provided that a party could only be substituted if this would enable to court to resolve the matters in dispute in the proceedings, which was not the case here because the second defendant was already a party and it was not necessary for him to be added as a claimant to resolve the relevant issues (para. 11; paras. 13–15).

(2) The claimants' application for the third defendant to represent the fourth to ninth defendants would also be refused. The court could not be confident that the third defendant's interests coincided with the interests of the fourth to ninth defendants as required by CPR, r.19.7(2)(d) and it was unwilling to place the burden of a representation order on the third defendant given that he resisted the application and claimed that he did not know the current addresses of the other defendants. It would require

strong reasons for the court to make a representation order in these circumstances (paras. 33–35).

(3) Further, the claimants' applications to dispense with service of the claim form on the fourth to ninth defendants and for the removal of those defendants as parties would also be refused. The difficulties encountered by the claimants in effecting service could eventually amount to exceptional circumstances for the purposes of CPR, r.6.16 if they were to continue, but they did not currently do so, and the claimants had not exhausted reasonable alternative methods of service (paras. 37–40).

(4) An order permitting the claimants to effect service by the following alternative methods would therefore be granted, provided that they were not illegal under the law of Kuwait: (a) personal service on a defendant anywhere in Kuwait; (b) leaving the relevant documents at any address at which it was known that a defendant lived; (c) posting the documents to such an address; (d) sending the documents by email or other electronic means; and (e) advertising in an appropriate national newspaper in Kuwait the fact and nature of the claim and how a defendant could obtain the relevant documents. Rule 6.15(1) required the claimants to show that there was "good reason" to authorize alternative methods of service and a general desire to avoid the delay inherent in the official methods of service was not sufficient but the difficulties already encountered by the claimants in effecting service were sufficient. If a defendant refused to accept service properly attempted by one of these alternative methods, it was likely that the court would consider very sympathetically an application to dispense with service on that defendant (paras. 41–44).

(5) Moreover, the court would deem the 4th, and 11th–15th defendants to have already been served with the claim form and accompanying documents under r.6.15(2) on the basis that it was extremely likely that they had received the documents but did not wish to play any further part in the proceedings (para. 46).

Cases cited:

(1) *Abela* v. *Baardarani*, [2013] 1 W.L.R. 2043; [2013] 4 All E.R. 119; [2013] 2 C.L.C. 92; [2013] I.L. Pr. 40; [2013] UKSC 44, referred to.

(2) *Ferrarini S.p.A.* v. *Magnol Shipping Co. Inc. (The Sky One)*, [1988] 1 Lloyd's Rep. 238, referred to.

(3) *PNPF Trust Co. Ltd.* v. *Taylor*, [2010] Pens. L.R. 261; [2010] EWHC 1573 (Ch), distinguished.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.6.15:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

r.6.16: "(1) The court may dispense with service of a claim form in exceptional circumstances.

(2) An application for an order to dispense with service may be made at any time and—

(a) must be supported by evidence . . ."

r.6.37(5): "Where the court gives permission to serve a claim form out of the jurisdiction—

. . .

(b) it may—

(i) give directions about the method of service . . ."

r.6.40(3)(c): The relevant terms of this paragraph are set out at para. 42.

r.19.2(4): "The court may order a new party to be substituted for an existing one if—

(a) the existing party's interest or liability has passed to the new party; and

(b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings."

r.19.7(2): "The court may make an order appointing a person to represent any other person or persons in the claim where the person or persons to be represented—

. . .

(d) are a class of persons who have the same interest in a claim and—

. . .

(ii) to appoint a representative would further the overriding objective."

M.P. Garcia for the claimants;
C. Keightley-Pugh for the first and second defendants;
G.C. Stagnetto for the third defendant.

1 **BUTLER, J.:** In this vexed matter, various applications are now made by Miss Garcia on behalf of the second claimant.

The claim

2 The original claim was filed by the first and second claimants as named executors of the estate ("the Gibraltar estate") of Ali Abdul Karim Abul ("the deceased"), who died on September 10th, 1992 in Kuwait (where he was resident and domiciled), in a will ("the first will") dated January 30th, 1986. The first claimant was one of the deceased's surviving children (his only surviving son) and a beneficiary under that will. The

second claimant is a practising solicitor in London. The claim was led by the first claimant, the second claimant being content to allow him to do so. Although the capacity in which the claimants respectively brought the action is not stated in its title, it is clearly stated in the "details of claim" that they seek, "as named executors of" this will, declarations (a) as to whether the first will should be admitted to probate in Gibraltar and, if not, whether any other will of the deceased should be so admitted, or whether the deceased died intestate; and (b) as to the proportions in which the deceased's estate in Gibraltar should be distributed amongst the persons entitled thereto. It is then further pleaded that in "the event that the court declares that the 1986 will be admitted to probate, the first claimant seeks an order that he be authorized to purchase (on such terms as the court shall direct) all issued shares in Karim Co. Ltd. . . ." Miss Garcia, who represented both claimants, has confirmed during her oral submissions that the first claimant was acting as named executor save that, in relation to the application for authorization to purchase the shares in the company, he was acting in his personal capacity. That point has not been developed further but it seems to me to be of significance. A claim by the first claimant in his personal capacity would in normal circumstances survive his death. I have not heard submissions as to whether it was appropriate for the first claimant to bring his personal claim in this way or whether the deceased's estate should be a defendant in any application for such permission.

Demise of the first claimant

3 The first claimant died on September 13th, 2014. His death gives rise to further complications to which I shall refer later.

Background

4 In the first will, the deceased purported to leave his shareholding in the company to the first and second defendants. There is no indication that his estate in Gibraltar includes any assets save for 99 of the 100 shares in the company, though there is a suggestion that he may have loaned money to the company for the purchase of property, which could constitute an additional asset within the Gibraltar estate. The matter is further complicated by the fact that the deceased was at all times domiciled in Kuwait. The claimants purported to take an entirely neutral stance on these issues, though the first claimant clearly has a personal interest in the outcome.

5 There exists a second will of the deceased, dated August 22nd, 1992 and executed in Kuwait. The Gibraltar estate appears to comprise shares in Karim Co. Ltd. ("the company"), which owns a substantial leasehold property in London ("the London property," which was valued in April 2011 at over £2m.). The first and second defendants are the sons of the first claimant. The 3rd–11th defendants are siblings who are potential

beneficiaries under the second will. The 12th defendant is the estate of Adel Jafar Abdulraheem, also a potential beneficiary under the second will. The 13th–15th defendants are siblings, also potential beneficiaries under the second will. Under the second will, the deceased purported to leave the whole of his estate to the beneficiaries named in that will. Nothing is said about the first will or about the company or its shares or about the London property.

6 The issues presently identified are as follows:

(a) The effect of the second will on the first, which seems likely to depend upon Kuwaiti law. The advice obtained by the claimants is that the second will does not revoke the first and that Kuwaiti law requires the two wills to be reconciled as far as possible and their terms applied together.

(b) Whether, if the first will is still operative, the claimants are entitled to a grant of probate. Though under Gibraltar law they may be so entitled, it seems that under Kuwaiti law any person named in the will may be considered to be the executor.

(c) Assuming the answer to (b) to be affirmative, whether distribution of the estate will nevertheless be overridden by the mandatory rules of Kuwaiti law of succession (since the applicable law relating to succession is that of the deceased's domicile at death) and, if so, to whom and in what proportions the estate should be distributed. The advice received by the claimants was that the most likely result would be that charity should receive a one-fifteenth share and the first claimant's sons (the first and second defendants) seven-fifteenths each. The claimants sought (and the second claimant still seeks) a declaration to that effect.

(d) The first claimant's application for authorization to purchase the shares. It is said that the purchase by the first claimant of the shares rather than the property itself would have had stamp duty and tax advantages for him. The shares are "movable property."

(e) If such permission were granted, the terms upon which it should be granted and how the price should be determined. The first claimant suggested that account should be taken of over £400,000 allegedly spent by him on the property since January 1991 and also his costs of this application in determining the appropriate price for him to pay. At present, I find that proposition difficult but this is not the time at which to determine it.

7 There have been proceedings brought in 2006 by the executors of the second will in the High Court of Justice in London relating to the deceased's estate in England. The first claimant in the present proceedings was the first defendant in the English proceedings. The deceased was survived by a son (the first claimant) and a daughter (since deceased). Her six sons and four daughters are defendants in the present proceedings (the

estate of one son being the 12th defendant). In the proceedings in England, her son (the third defendant in the present claim) was appointed to represent his siblings and by order dated July 12th the claimants in the English claim were granted permission to serve their claim form and all further documents at an address in Kuwait or elsewhere in Kuwait.

Application for the second defendant to be removed as defendant and substituted as first claimant

8 In notices of application (said to be made by both claimants) dated November 11th, 2014 and October 21st, 2014, an order was sought that—

> ". . . the claimants be granted permission to amend the claim form . . . pursuant to the Civil Procedure Rules, rr. 17.1, 17.4(4), 19.1 and 19.4 by permitting the second defendant . . . to now act in the proceedings as the executor of the estate of [the first claimant], and as the first claimant, following the death of [the first claimant] . . ."

9 In her oral submissions, Miss Garcia sought an order that the second defendant be removed as a defendant in order for him to be substituted as first claimant.

10 I am bound to say that I have found these applications difficult to follow. It seems to be suggested that the second defendant should be substituted for the first claimant both in his capacity as named executor in the first will and in the first claimant's personal capacity.

11 No such application has been made by the second defendant. Miss Garcia tells me that the second claimant naturally wishes to pursue the case to clarify the effect of the wills and his duties but he does not wish to pursue the first claimant's application in relation to the purchase of the company's shares. As I understand it, the main (if not the sole) reason for the first claimant's application for such permission was the potential conflict between his positions as purchaser and as executor. That situation no longer arises. Whatever the theory as to survival of his claim, it is difficult to see how it can survive his death in this case. The second defendant could not pursue the same claim, since the first claimant cannot now purchase the shares. It remains unclear to me exactly what order the second defendant would be seeking instead. Perhaps he would be seeking permission for the first claimant's estate to purchase the shares? Perhaps he would be seeking permission for the shares to be sold to the first and second defendants? Or simply to himself? Furthermore, I am not convinced that the first claimant could have sought permission in his personal capacity. The court would not order the executors to sell to a particular purchaser. The application would be for permission to sell, rather than permission for the first claimant to purchase. It seems to me that the claim can only be pursued by the second claimant, as the sole surviving named executor under the first will. No issues of conflict apply to him. He does

not require the court's permission to sell. His duties are clear. He should realize the shares (or the property) for the best price reasonably achievable, realize the estate and distribute it according to the court's findings as to the effect of the will. The second defendant does not require the permission of the court to purchase the shares. It is for the second claimant, once the court has determined the continuing effect of the first will, to decide whether to accept any offer made by anyone, including any of the defendants. If he thought there were any potential conflict, he would now wish to apply for an order granting him permission to sell to a particular individual. I have not heard submissions as to whether it was appropriate for the first claimant to bring his claim for permission to purchase the shares in this way or whether the deceased's estate should have been a defendant to such a claim. It is no longer necessary to consider those points.

12 I am not convinced that the second defendant, even if discharged as a defendant, would have any right to be substituted for the first claimant. The correct course is for the second claimant, as sole surviving named executor, to continue the claim so far as he wishes, at least in so far as it was made jointly by the claimants. Miss Garcia, in her latest skeleton argument, makes the point herself that "it may be that the court will now consider that the self-dealing is now not engaged because the proposed sale would now be to the first claimant's estate rather than to him."

13 On the death of a sole claimant after an action brought in a case where the cause of action survives, the executor or administrator may obtain an order to carry on the proceedings. On the death of one of a number of claimants in a joint action which survives to remaining claimants, those claimants may continue the action even without an order adding the personal representative of the deceased as an additional defendant (see the notes to CPR, r.19.2 in 1 *Civil Procedure*, at para. 19.2.9 (2015 ed.)). In so far as it may be said that the first claimant brought this action in his personal capacity, it seems to me that he should be regarded as being in the position of a sole claimant. No application has been made by his executor or administrator. Nor is it clear to me that any cause of action of the first claimant survives his death in this case, though the point has not been argued. It seems to me that his claim was personal to him and could not survive his death. His affidavit in support of it emphasized his own emotional attachment to the property and the money which he has spent on it. If the intention is to seek a declaration that the first claimant (and now his estate) was entitled to the return of or credit for the money which he has expended on the property, no doubt the second defendant will receive appropriate advice but the claim was not put in that way by the first claimant in these proceedings.

14 It is true that, at the last hearing, Miss Garcia handed me a letter from the first and second defendants' lawyer confirming that the second

defendant did not oppose her application. But this confirmation has not been filed. It seems to me that any such application should be his. It should be supported by evidence (I do not at this stage even have evidence that the second defendant is an administrator of the first claimant's estate). Any evidence would need to be such as to justify the application. I do not now rule on any application which may be made by him, though in light of my observations it may be that none will be made. The application is made under CPR, r.19.2(4). Permission is required, since the claim has been served on at least some defendants. The required procedure, however, has not been followed. An application under CPR, r.19.2(4) must be supported by evidence (either completed Part C to Form N244 or in a separate witness statement (Practice Direction 19A, para. 1.3)). The person it is proposed to add must have filed his consent in writing, though that could easily be remedied. An order for removal, addition or substitution of a party must be served on all parties.

15 I observe that it is open for any defendant to counterclaim if the circumstances permit and that the first and/or second defendants are able, if they think it necessary or worthwhile, to do so. It should not be necessary for either of them to be added as a claimant in order to put a claim before the court. The second claimant would then stand as a defendant to the counterclaim, which may in any event be more appropriate (see also r.57.8(1)). CPR, r.19.2 governs changes of parties. Rule 19.2(2)(a) allows the court to order the addition of a person as a party where it is desirable in order to enable the court to resolve all matters in dispute in the proceedings. The second defendant is already a party. It does not at this stage seem to me that it is necessary for him to be added as a claimant in order to resolve relevant issues.

16 For the above reasons, it seems to me that the second defendant has no *locus standi* to act as an executor named in the first will and cannot be substituted for the first claimant in that capacity. If the second defendant were substituted as first claimant in a personal capacity, there may well be some conflict with the second claimant, who would need to consider the interests of all beneficiaries, including any obligation to provide for charity. For all these reasons, I dismiss the application to remove the second defendant as defendant and the application for him to replace his deceased father as the first claimant.

17 Finally, I observe that the application for permission to purchase the shares may in practice be premature and an unnecessary complication. Once the issue of the effect of the wills has been resolved, it may be confirmed that (save for charity) the only beneficiaries are the first and second defendants. So far as charity is concerned, no doubt the second claimant would take advice. Subject to that, however, it seems unlikely that the remaining beneficiaries will disagree.

Probate claims: procedure

18 Rules governing contentious probate claims are contained in CPR, Part 57. They must be commenced using the Part 7 procedure (r.57.3(b)). Probate means a claim for "(i) the grant of probate of the will, or letters of administration of the estate, of a deceased person . . . (iii) a decree pronouncing for or against the validity of an alleged will . . ." (r.57.1(2)(a)). Rule 57.7(1) requires that the claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate. An application for directions by personal representatives is within CPR, r.64.2(a) and must be made by Part 8 claim form. This includes a claim for determination (Practice Direction 64A, para. 1) of—

> "(a) any question as to who is included in any class of persons having—
>
> . . .
>
> (ii) a beneficial interest in the estate of [a deceased person] . . .
>
> (b) any question as to the rights or interests of any person claiming—
>
> . . .
>
> (ii) to be entitled under a will or on the intestacy of a deceased person . . .
>
> (2) a claim for any of the following remedies—
>
> (a) an order requiring a trustee—
>
> . . .
>
> (iii) to do or not do any particular act
>
> (b) an order approving any sale . . .
>
> (c) an order directing any act to be done . . ."

19 A default judgment cannot be obtained in a probate claim (r.57.10).

20 The claim form in this case suggests that the claim is made "pursuant to CPR, Parts 57 and/or 64." The claim number is "2013-Probate-1."

21 I have doubts as to whether the claim can be pursued under both Part 64 and Part 57 but have not yet been addressed on this issue. It has been brought under Part 8, which applies to Part 64 claims. I raise it now because, especially in light of the problems which the claimant has had with service of the claim form, it would be unfortunate if it were raised later, perhaps causing a need for re-service.

22 Miss Garcia seeks to rely upon r.19.2(4). I observe that r.19.2(3) enables the court to order that a party cease to be a party if it is not desirable for that person to be a party to the proceedings. It seems clear to me that it is desirable for the second defendant to be a party. Rule 19.2(4) enables the court to order a new party to be substituted for an existing one if (a) the existing party's interest or liability has passed to the new party, and (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings. Any existing party may make the application. It may well be that, in so far as the application is made by the second defendant other than in his personal capacity, he should be regarded as a new party but again I have not heard submissions on this point.

Service

23 On January 13th, 2013, I granted permission for the 3rd–15th defendants to be served out of the jurisdiction, in Kuwait (the third defendant not yet having instructed solicitors in Gibraltar to accept service). Miss Garcia emphasized at that stage that the defendants were "necessary and proper parties to the claim . . . [A]ll . . . have an interest and connection with the Gibraltar estate and the issues which need to be determined . . ." Kuwait is a signatory to the Hague Service Convention. The Registrar of this court is the designated authority under the Convention in relation to arranging service. Relevant bundles of documents (including the claim form) were prepared for each defendant and requests for service under the Convention, together with translations in Arabic, were filed with the Registrar. On April 22nd, 2013, the relevant Kuwaiti authorities had received the bundles and the Registrar awaited certificates of service from them under the Convention. Despite extensive enquiries by the Registrar, there was no response. There should have been no difficulty but the relevant Kuwait authorities appear to have been much less than helpful. I am satisfied that the Registrar has taken every reasonable step to persuade the Kuwait authorities to provide Hague Convention certificates. The third defendant says that he was served with the documents in early to mid-July 2013. Regrettably, the Kuwait authorities have not accepted that Gibraltar is entitled to be treated as an entity separate from the United Kingdom for the purposes of the Convention. They have returned bundles and (in relation to some defendants) purported certificates of service to the Ministry of Justice in the United Kingdom, which has made the position clear to the Kuwait authorities. Still they have failed to respond adequately to the Registrar of this court. This has caused real difficulties for the parties and this court and appears to be an unfortunate failure on the part of the Kuwait authorities to co-operate or to comply with their obligations under the Convention. On August 1st, 2013, the Foreign Process Section of Her Majesty's Courts Service in the United Kingdom sent some bundles to the claimants' solicitors with a letter dated

July 17th, 2013 to Messrs. Verralls, solicitors. The Registrar continued to make enquiries of the Kuwait authorities. The third defendant says that he has made enquiries as to whether other defendants have been served but that he has no clear information. A letter from the Kuwait Ministry of Justice to the UK Court Service appears to acknowledge receipt of a request to serve the 14th defendant. The Registrar has tried to make productive contact by telephone, email and fax, all to no avail. A letter dated August 13th, 2013 from the Registrar to the Ministry of Justice in Kuwait shows that bundles for the 3rd, 4th, 5th, 13th, 14th and 15th defendants were sent to the UK Court Service and thence back to Messrs. Verralls. The Registrar has sought confirmation as to who has been served and certificates of service pursuant to art. 6 of the Convention.

24 It is in those circumstances that, on November 7th, 2013, I gave permission for service to be effected by courier service at the last known addresses of the 4th–15th defendants (though I did suggest that further enquiries first be made by the Registrar with the Kuwait authorities). The Registrar has still heard nothing further from Kuwait. I set out the latest position in relation to service with regard to each defendant separately below.

25 On March 17th, 2014, it was decided to serve the 4th–15th defendants by courier (DHL Courier Service). On April 22nd, 2014, they advised that four defendants had received the documents and on April 29th they said that six of the defendants had been served; six others could not be served as relevant addresses could not be ascertained. Attempts have been made to ascertain more current addresses but I do not have details of those attempts. It seems that the 15th defendant has confirmed receipt of the documents for herself and the 13th and 14th defendants but there is no evidence that the 13th and 14th defendants have received them or that the 15th defendant had any authority to receive the documents on their behalf. In an email dated January 28th, 2014, the claimants' agent in Kuwait claimed that it had been told by the Kuwait Legal Authority under the Convention that seven defendants had been served and that the original certificates were sent to the United Kingdom because the Kuwait authorities do not recognize Gibraltar as a separate entity. I have examined those documents, which do appear (though they are not strictly in the form required by art. 6 of the Convention) to be confirmations of service, sent to the UK Ministry of Justice by the Assistant Under-Secretary of Legal Affairs relating to the 3rd, 4th, 5th, 6th, 13th, 14th and 15th defendants. On November 20th, 2013, the Kuwait authority sent the documents to the UK Ministry of Justice saying that it had been unable to notify the 12th defendant owing to the documents referring to the wrong address. It further stated that the addresses for the 5th, 7th, 8th, 9th, 10th and 11th, 13th, 14th and 15th defendants were incorrect but seemingly confirming

that the 4th defendant had been served. I am unable to be satisfied that these defendants have in fact been served by the Kuwait authorities. Indeed, Miss Garcia has not argued otherwise but I confess that in these circumstances I have been tempted to find that the Kuwaiti authorities have effected service on some defendants.

26 I have carefully considered the evidence of Rosanne Darby, sales manager of DHL Express and the affidavits of Miss Garcia. I have found it necessary to consider the position of each defendant separately and set out my conclusions in para. 46 of this ruling. It is regrettable that service or attempted service has not been fully evidenced and explained in relation to each defendant individually.

27 Miss Garcia applies alternatively for orders (a) that service on the 10th–15th defendants be deemed valid service pursuant to CPR, r.6.15(2); (b) that the third defendant represent the fourth to ninth defendants; (c) alternatively, that service on those defendants be dispensed with under CPR, r.6.16; or (d) that they be removed from the claim under Part 19 together with an order that they be bound by any decision or order of this court.

28 I confess that I have found the evidence contained in the affidavit of Rosanne Darby extremely confusing, not least because it seems (a) that defendants have been identified in various places by reference to differing names and/or defendant number or the number of a consignment; (b) much of the evidence is hearsay and vague in its effect; (c) names are used without identifying which defendant is being referred to; and (d) details of what exactly has happened are difficult to fathom.

29 Miss Garcia, at my request, has prepared a useful schedule in an attempt to clarify what has happened. The problems with service, if anticipated, could perhaps have been avoided to some extent if the proposed defendants had been traced and asked whether any were prepared to accept service or communications on behalf of identified others who might also agree that course. The interests of the 4th–15th defendants probably do coincide, on the face of it.

30 Save for the first three defendants, none has acknowledged service or contacted the claimants' solicitors. The first two defendants naturally support the claims. The third defendant has indicated an intention to defend.

31 In a note from the claimants' solicitor dated November 18th, 2014, it is conceded that it is unclear whether, "apart from the third defendant other defendants may have received the claim via the Hague Service Convention. The position is unclear." It is suggested, however, that it is clear that service on the 10th–15th defendants is the best that could reasonably be achieved in the circumstances "and it is requested that the

court make an order to establish the validity of this service." With regard to the fourth to ninth defendants, "we know that most have been unhelpful and evasive and if the court still feels that the claimant needs to take further steps, we would ask for specific directions which can be attended to . . . to enable the substantive matter to proceed . . . If the court does dispense with service, it will need to make an order providing that the 4th–15th defendants be bound by any order made by this court."

Whether the third defendant should be ordered to represent the fourth to ninth defendants

32 I begin with Miss Garcia's original submission that the defendants were all proper and necessary parties to this litigation because they have a potential interest in it. I am told that in the UK proceedings the third defendant agreed to represent his siblings. Since then, though I do not have evidence of it, it is suggested that there has been a rift between them (possibly relating to a division of opinion as to whether the claim should be opposed—in the UK proceedings he was apparently the only defendant holding out against the claim). In my bundle is a copy of the order of the High Court in London that the claimants have permission to serve the claim form and all further documents until further order on defendants 3–5 at an address in Kuwait or elsewhere in Kuwait. Those defendants are the 13th–15th defendants in this action. They did ultimately take part in the English proceedings. They were served in Kuwait with the court's permission but it is said that there were difficulties in communication and in obtaining responses from them. They are grandchildren of the deceased, their father having died before his father (the deceased).

33 The third defendant strongly resists the application that he should represent his siblings. Neither party has found a single case in which such an order has been made against the will of a party. Mr. Stagnetto, for the third defendant, has referred me to *PNPF Trust Co. Ltd.* v. *Taylor* (3). That case, however, involved an objection by the applicant to being represented by an existing party. He was allowed to instruct his own lawyers to represent him in an otherwise representative action. The representative structure was otherwise agreed. The application was made under CPR, r.19.2(2) for joinder of the applicant as a party.

34 In this case, there has been no suggestion that a representation order be made until now. I accept that I have power to make such an order. I accept that I should have regard to the overriding objective and have done so. I cannot say with confidence, at least at this stage, that the third defendant's interests coincide with those of the fourth to ninth defendants. At least at this stage, I am unwilling to place the burden of such an order on the third defendant. He claims to be no longer aware of their current addresses. It would be, in my view, an unjustifiable imposition to transfer the claimants' obligations and expenses in relation to service to him. It is

possible that the situation may change as the case progresses but, in my view, it would require strong reasons for this court to make such an order.

35 I have considered the test under CPR, r.19.7(2). As I have said, I am not yet convinced that all of the defendants concerned have the same interest in the claim or that to appoint a representative would further the overriding objective.

36 I have also had regard to my findings in relation to attempts to achieve actual service set out below at para. 46.

Dispensing with service of the claim form on the fourth to ninth defendants

37 This application is made pursuant to CPR, r.6.16. Such an order may only be made in exceptional circumstances. The application must be supported by evidence. The only exceptional circumstance suggested in this case is the difficulty experienced concerning service. I do not rule out the possibility that in some circumstances such problems could amount to exceptional circumstances. In my judgment, this is not yet such a case. It was thought right that these defendants be joined in order to protect their interests. To remove them now (and to make an order that, as non-parties, they be bound by the orders of this court, before they have been shown to have been served with notice of the claim) would, in my judgment, be an extreme course. It may be that circumstances will later arise in which such an order would be appropriate but that stage has not been reached.

38 It may also be appropriate later, pursuant to CPR, r.6.28 (under which exceptional circumstances need not be shown), to dispense with service of other documents but I need not consider that possibility further at this stage.

39 It does not seem to me that it has been shown that reasonable alternative methods of service have been exhausted. In relation to many of the defendants in this case, telephone numbers are known. The evidence before me of the attempts to ascertain the current addresses of the defendants is sparse. I have sympathy for the claimants' dilemma but it does seem to me that the present applications are at least premature. I am not convinced that reasonable enquiries by the claimants' agents in Kuwait could not reveal the whereabouts of the defendants. If it transpires that all such enquiries are fruitless, or that the defendants or any of them are shown to be deliberately avoiding service, this court may well be persuaded to make a draconian order.

Removal of defendants as parties

40 It follows from what I have said that I am not prepared to order that any of the defendants at this stage be removed as parties. I note also that

CPR, r.19.4(5) requires an order for removal, addition or substitution of a party to be served on all other parties.

Alternative methods of service

41 I am, however, prepared to make very flexible orders for alternative methods of service. The primary concern is that the defendants should be aware of this claim and what it entails. It may well be that they will not wish to take part, even to the extent of filing acknowledgements of service. Appropriate orders can then be made in order to save time and expense and to further the overriding objective, safe in the knowledge that no one will be prejudiced by such orders.

42 Pursuant to CPR, r.6.40(3)(c), service outside the United Kingdom may be effected in these circumstances "by any other method permitted by the law of the country in which it is to be served." This does not mean that such a method must be expressly permitted. It is sufficient that the method is not illegal under the law of the country in which it is to be adopted. In *Ferrarini S.p.A.* v. *Magnol Shipping Co. Inc. (The Sky One)* (2), the Court of Appeal held that, except in a very strong and unusual case, the court's discretion to allow purported service in a foreign country to stand should not be exercised where the law of that country stipulates that service should be through official channels. I am satisfied that I do have power under CPR, r.6.37(5)(b)(i) to give directions as to alternative service at a place or by a method not otherwise permitted by Part 6 pursuant to CPR, r.6.15(1) and that I have power in appropriate cases to make such an order retrospectively pursuant to CPR, r. 6.15(2).

43 In *Abela* v. *Baardarani* (1), it was made clear that the question to be asked is whether there is good reason in prospective cases to declare that service by the proposed method or at the proposed place shall be regarded as good service and in retrospective cases that it should be regarded as having amounted to good service. Generally, the desire of a claimant to avoid inherent delay in service by the r.6.40 permitted methods does not alone justify an order for service by an alternative method. The only bar to the exercise of the discretion under r.6.15(1) or (2), if otherwise appropriate, is that nothing may be authorized which is contrary to the law of, in this case, Kuwait, in the sense that it is positively contrary to the law of Kuwait. It is for the claimant to show that service is adequate and in accordance with local rules, unless there is actual notice.

44 I have decided that service may be effected in this case by any one or more of the following methods, provided that, in respect of each such method, it is not unlawful according to the laws of Kuwait and that the law of Kuwait does not stipulate that service should be through official channels:

(a) Personal service on the defendant anywhere in Kuwait.

(b) By leaving the claim form and other relevant documents at any address at which it is known that the defendant lives.

(c) By posting the documents to such an address (provided that there is evidence, for example by certificate of recorded delivery).

(d) By email or other electronic means in the case of any defendant whose email address or telephone number is known.

(e) By advertising in an appropriate national newspaper in Kuwait, giving notice to the defendant of the fact and nature of the claim and where and how the relevant documents may be obtained by the defendant. It has been suggested that such an advertisement would be expensive but no evidence has been produced to that effect. It seems unlikely to me to be a disproportionate expense.

In the event that a defendant refuses to accept service which is properly offered or attempted, it is likely that this court would thereafter consider very sympathetically an application to dispense with service.

45 If it can be proved satisfactorily that service has already been effected by any of the above means, the court may consider a retrospective order in due course.

Findings and conclusions with regard to each defendant

46 My findings and conclusions in respect of each defendant are as follows:

Fourth defendant: no purported certificate of service under the Hague Service Convention has been received by the Registrar of this court. It is said that a "person" refused to accept service at the address given for the fourth defendant on May 7th, 2014 and that on April 25th, 2014 a person at that address did receive the documents but later returned them to DHL. It seems extremely likely to me that the fourth defendant has received the documents but wishes to play no part in these proceedings. I cannot be sure that he has been personally served but am willing to rule and do rule that he should be deemed to have been served. It seems to me that no injustice will come from such a ruling, since I propose also to order that each defendant be served with a copy of my order (and this ruling), which will also give leave in each case to apply to set aside or vary my order or to seek service of the claim form from the claimants' solicitor within 28 days of service of my order upon him or her.

Fifth defendant: the Registrar has received no certificate of service. I am satisfied on balance that someone at the address given for him refused to accept service on May 7th and 27th, 2014, claiming that this defendant was outside the jurisdiction. In those circumstances, I cannot find that

good service has been effected. It is likely that he is aware of these proceedings but I cannot be sure. I do not think that sufficient has been done in his case to effect service of the relevant documents. No one appears to have made any further enquiries to ascertain his whereabouts or whether he has been or still is away from that address. It is likely that simple enquiries would have revealed more. As with the other defendants, it is regrettable that proper forms setting out exactly what has been done and when and what was said and by whom, together with as much additional information as possible, signed and dated by the process server and, if possible, by anyone to whom the process server spoke, were not obtained. I have no idea who the person at the address was claiming to be. It seems that nothing was done to check what he or she said. If more expense has now to be incurred, it seems to me that this might have been avoided if fuller enquiries and records had been made at the time.

Sixth defendant: No certificate under the Convention has been received by the Registrar. I am satisfied on balance that it is likely that persons at the address given refused to accept the documents on May 7th and 27th, 2014. Similar comments apply as to the inadequacy of the evidence and records of exactly what has been said and done. It is said that a telephone number was said to be incorrect by the person who picked up the telephone (I do not know from whom the number was obtained and do not know what evidence there is as to its likely accuracy; nor do I know what, if anything, was done to check the number again with the source of it or to take any other steps). I am told that a new address was provided for the defendant on September 24th, 2014 (but not by whom or with what information which may show its reliability) but that the defendant was contacted by phone (I do not know by whom, on which number or pursuant to what information or how it was known that the defendant was the person spoken to) and that he said that he would not accept papers from the claimants' solicitor. It may well be that these deficiencies can be cured and that, if satisfied that the defendant has indeed declined to accept service, service should be dispensed with. In the meantime, I order that this defendant be served with a sealed copy of my order and this ruling. If service of those documents (duly translated) produces no response, this will add weight to the claimants' case.

Seventh defendant: A communication from the Ministry of Justice in Kuwait dated November 20th, 2013 suggests that it was unable to effect service owing to the address given being incorrect. On May 7th and 27th, 2014, "persons," presumably at the same address, refused to accept service by DHL. I do not know whether this was because the address was incorrect or what attempts were made to check it. It is said that a maid "at the address" kept hanging up the phone (which indicates that a phone number has been obtained) without providing details. Again, I do not

know who provided the core information or how reliable it was or what steps have been taken to check it in the light of what has happened.

Eighth defendant: No certificate has been provided to the Registrar. I am told that a person present at the address refused to accept service on May 7th and 27th, 2014. At the same time, I am told that a person "actually received papers on May 7th, 2014 and then contacted DHL requesting collection." Again the situation is unsatisfactory and full details have not been provided to me. What enquiries were made in order to establish whether this person was the defendant?

Ninth defendant: No certificate has been received by the Registrar. I am told that "persons at address refused to accept papers on May 7th and 27th, 2014" and that "phone number wrong according to person who picked up." I have no information as to the phone number used, from where it was obtained, what checks have been made or enquiries to obtain the correct number if it was indeed incorrect. I am not satisfied that sufficient has been done to make contact with this defendant and to ensure that she has proper notice of these proceedings and the claims made in them. As with other defendants, it may be possible to obtain statements from them that they do not wish to take any part in this action or to receive any further papers or information relating to it.

Tenth defendant: No certificate has been received by the Registrar. Again, a "person at the address refused to accept the papers on May 7th and 27th, 2014." It is then said that "courier received by Chrestana, the maid." It seems to me that other enquiries should have been made to make contact with this defendant, by telephone or otherwise.

Eleventh defendant: Similar observations apply. It is said that Chrestana the maid received the papers. The evidence of this is not entirely satisfactory but I am prepared to accept it on balance and to make the same order as I have indicated in respect of the fourth defendant.

Twelfth defendant: Exactly the same observations apply. It is not clear to me how the estate of Adel Jafar Abdulraheem, deceased, is determined. No representatives of that estate are named. I shall hear submissions on this point when I hand down this ruling.

Thirteenth to fifteenth defendants: No certificate has been received by the Registrar. I have no firm evidence that the 15th defendant is or was in a position or authorized to accept service on behalf of the 13th and 14th defendants but they live at the same address. It is extremely likely that all three have been served and are well aware of the existence and nature of these proceedings but do not wish to take part. In respect of the 15th defendant, I am satisfied that she has been served. There is a document purporting to be signed by "Mariyam" and to show that delivery at a named address in Kuwait on April 20th, 2014 was made to "Fader Abdul

Mesha." It is overwhelmingly probable that the signature is that of the 15th defendant. I order that the 13th and 14th defendants be deemed to have been served on the same basis as for the fourth defendant.

47 If, by the date on which I hand down this ruling, any other appropriate method of service has been identified, I am prepared to listen to further submissions in that regard. My concern is that the defendants should all be aware of the claim, its content and the time for filing an acknowledgement of service.

48 It is a matter of regret that the relevant authorities in Kuwait have failed properly to give effect to the operation of the Convention. There has now been more than adequate time for them to do so and there seems little point in pressing them any further.

49 No issue arises in relation to service on the first, second and third defendants, who are represented in Gibraltar by lawyers instructed to accept service. There have been serious problems with service of the claim form on the remaining defendants. These are likely to arise for the first, second and third defendants too. It therefore seems to me that it would be sensible and in their interests that they should co-operate in finding and providing information which would assist in relation to service on the remaining defendants. They are most likely to be in the best position to ascertain the relevant information. They may also be able to persuade all or some of the other defendants to appoint one of them or a third party to accept service on their behalf. This would not involve a necessity for them to take any part in the proceedings but would enable the matter to proceed as swiftly as possible to a proper conclusion.

Conclusions

50 The claimants' applications for orders that—

(a) the second defendant be removed as defendant and substituted as first claimant;

(b) the third defendant represent the fourth to ninth defendants;

(c) service of the claim form on the fourth to ninth defendants be dispensed with; and

(d) any of the defendants be removed as parties,

will be dismissed.

51 Service of the claim form and accompanying documents and this judgment and order may be effected, provided that in respect of each such method it is not unlawful according to the laws of Kuwait and that the law of Kuwait does not stipulate that service should be through official

channels, by any one or more of the alternative methods mentioned in para. 44 of this ruling.

52 The 4th, 11th, 12th, 13th and 14th defendants will be deemed to have been served with the claim form and accompanying documents.

53 The 15th defendant will be declared to have been served with the claim form and accompanying documents.

54 The defendants will each be served with a copy of this order and judgment.

55 Each defendant has permission to apply to set aside or vary this order or to seek service of the claim form and accompanying documents from the claimants' solicitor within 28 days of service of my order and ruling on that defendant.

Orders accordingly.