[2022 Gib LR 173]

DIGITAL ASSET EXCHANGE LIMITED v. OYEKENOV

SUPREME COURT (Restano, J.): June 1st, 2022

2022/GSC/15

Civil Procedure—service of process—service out of jurisdiction—claimant to obtain permission to serve defendant out of jurisdiction—refusal by defendant to disclose whereabouts does not justify claimant's failure to apply for permission for service out of jurisdiction nor entitle claimant to proceed as if defendant resident in Gibraltar

The defendant sought a declaration that the purported service on him of a claim form and particulars was invalid and should be set aside.

The claimant, a Gibraltar company, commenced proceedings against the defendant, a Kazakhstani national, for the delivery up of Bitcoin and Ethereum which it claimed was worth approximately £1.5m. and which it alleged the defendant converted and misappropriated from it. The claim form, particulars of claim and response pack were sent to the defendant by email and, on the following day, the claimant filed an application without notice to the defendant asking the court to order that service had been properly effected by email or that an order be made permitting service retrospectively. The defendant subsequently filed an acknowledgement of service form indicating his intention to dispute jurisdiction. The defendant filed an application seeking a declaration that the purported service of the claim form and particulars was invalid and that it should be set aside because the claimant had not obtained permission to serve the proceedings out of the jurisdiction. Alternatively, the defendant sought a declaration under CPR r.11(1)(b) that the court should not exercise any jurisdiction to hear the claim due to ongoing proceedings commenced by the defendant in the British Virgin Islands. The defendant also applied for a strike out of the claim/summary judgment application.

The defendant asserted that he had never been to Gibraltar, that he was not currently residing in the United Kingdom and that he had never resided there. The claimant asserted that the defendant had made a point of ensuring that his whereabouts were unknown.

Rule 3 of the Supreme Court Rules 2000, which dealt with service of documents, provided that a document could be served by fax or other means of electronic communication and that on matters of service the rules and directions that applied for the time being in the English High Court would apply so far as circumstances permitted. CPR r.6.15 dealt with

service of a claim form by an alternative method or at an alternative place. It stated that where it appeared to the court that there was good reason to authorize service by a method or at a place not permitted under CPR Part 6, the court could make an order permitting service by an alternative method or at an alternative place. CPR r.6.36 provided that a claimant could only serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in para. 3.1 of Practice Direction 6B applied.

The defendant submitted that (a) when he was purportedly served he was not in Gibraltar or the United Kingdom; (b) r.3(1)(d) of the SCR which allowed for service by electronic means was concerned solely with a permitted method of service and did not do away with the need to obtain permission for service out of the jurisdiction under CPR r.6.36 which was required in this case; (c) permission could not be granted retrospectively; (d) the claimant's case did not come within any of the gateways in PD 6B, para. 3.1; (e) nor could the claimant show that there was a serious issue to be tried, as there could be no claim in conversion for intangible property such as cryptocurrency; (f) alternatively, the British Virgin Islands was clearly the appropriate forum for the trial of this dispute, as there was an existing claim there concerning a larger amount of cryptocurrency; (g) it made no sense to hive off this part of the claim to the Gibraltar courts and there would be a risk of competing judgments if the Gibraltar claim were allowed to proceed; and (h) the strike out/summary judgment application had been made without prejudice to the jurisdictional challenge and did not amount to submission to the jurisdiction.

The claimant submitted *inter alia* that (a) it did not know where in the world the defendant was located and he had been obstructive by failing to disclose his whereabouts or to agree to allow his Gibraltar lawyers to accept service on his behalf; (b) the claim form and other documents had therefore been sent to the defendant's email address which had been disclosed in the BVI proceedings; and (c) it had been entitled to serve in the way it had under the SCR which allowed for service by electronic means. Alternatively, the claimant sought an order under SCR r.3(1)(d) and/or CPR r.6.15 allowing service on the defendant's Gibraltar lawyers, or granting retrospective permission to serve him by email. The claimant further submitted that (a) in making a strike out application, the defendant had submitted to the jurisdiction; and (b) Gibraltar was the appropriate jurisdiction for the trial of this dispute.

Held, ruling as follows:

(1) The claimant had not validly served the proceedings on the defendant. The claimant had not applied for permission to serve the defendant out of the jurisdiction. The defendant had no ties to Gibraltar and stated in his evidence that he had never been to Gibraltar. The requirement to apply for permission to serve out of the jurisdiction could be found in CPR r.6.36 which applied in Gibraltar under SCR r.3(4). The fact that the defendant refused to disclose his whereabouts did not justify the claimant simply

ignoring the need to apply for permission to serve out of the jurisdiction, nor did it entitle the claimant to proceed as if the defendant resided in Gibraltar. This type of situation was catered for in the rules under CPR r.6.37(5)(b)(i) which provided that the court could give directions about the method of service and therefore make an order for alternative service if the circumstances of the case warranted it when giving permission to serve out of the jurisdiction. The claimant had purported to serve the defendant who had never been to Gibraltar as if he was a resident in Gibraltar and without permission when permission was clearly required. In these circumstances, valid service had not taken place (paras. 34–37).

(2) The claimant sought an order allowing service on the defendant's Gibraltar lawyers or permitting service retrospectively under SCR r.3(1)(d) and/or CPR r.6.15, but those rules were concerned with the method of service and did not address the need to obtain permission to serve a defendant who was out of the jurisdiction. Those rules could not be invoked to validate service against a person who was resident out of the jurisdiction where permission had not been obtained. Even if the claimant had applied for permission to serve out of the jurisdiction as it was required to do, it would not have been a straightforward matter. Apart from showing that Gibraltar was the proper place in which to bring the claim despite there being related BVI proceedings, it would have had to show that the claim against the defendant fell within one or more of the heads of jurisdiction or gateways for which permission to serve out of the jurisdiction might be given as set out in PD 6B, para. 3.1, and that the claim had a reasonable prospect of success. The claim was for conversion in respect of cryptocurrency and the essence of conversion was a wrongful interference with the possession of tangible property, which cryptocurrency was not. This all showed that the claimant's failure to apply for permission to serve out of the jurisdiction was not just a technicality but an issue of substance (paras. 38–41).

(3) Even if the court had concluded that service had taken place, it would have ordered a stay of the proceedings on the ground of *forum non conveniens*. The only factor connecting this claim to Gibraltar was the fact that the claimant was a Gibraltar registered company. Given the existing BVI proceedings, if the claim were to proceed there would be a risk of inconsistent decisions. The BVI proceedings were well underway, they included all the parties to this dispute and dealt with or were able to deal with the entirety of the dispute. The BVI was the jurisdiction where this dispute could be adjudicated upon most comprehensively, which was a factor which militated strongly in favour of the BVI courts. For these reasons, the interests of justice were best served by allowing this dispute to be dealt with by the BVI courts (paras. 42–48).

(4) The defendant had not submitted to the jurisdiction by filing his strike out application. It could not be said that the only possible explanation of the defendant's conduct was an intention to have the case tried in Gibraltar. The opposite was true. The defendant had made plain his

opposition to the claim being tried in Gibraltar on jurisdictional grounds, first by disputing the court's jurisdiction and then by stating that his subsequent strike out application was being made without prejudice to his jurisdictional challenge (paras. 49–54).

Cases cited:

(1) *AK Inv. CJSC* v. *Kyrgyz Mobil Tel Ltd.*, [2011] UKPC 7; [2012] 1 W.L.R. 1804; [2011] 4 All E.R. 1027; [2011] 1 CLC 205, referred to.
(2) *Abela* v. *Baadarani*, [2013] UKSC 44; [2013] 1 W.L.R. 2043; [2013] 4 All E.R. 199; [2013] 2 CLC 92, considered.
(3) *B.A.T. Indus. plc* v. *Windward Prospects Ltd.*, [2013] EWHC 4087 (Comm); [2014] Lloyd's Rep. 559, considered.
(4) *Caretech Community Servs. Ltd.* v. *Oakden*, [2017] EWHC 1944 (QB), considered.
(5) *Cecil* v. *Bayat Telephone Systems Intl. Inc.*, [2011] EWCA Civ 135; [2011] 1 W.L.R. 3086; [2011] C.P. Rep. 25, considered.
(6) *Cruz City 1 Mauritius Hldgs.* v. *Unitech Ltd.*, [2013] EWHC 1323 (Comm), referred to.
(7) *Global Multimedia Intl. Ltd.* v. *ARA Media Servs.*, [2006] EWHC 3612 (Ch), considered.
(8) *Marashen Ltd.* v. *Kenvett Ltd.*, [2017] EWHC 1706 (Ch); [2018] 1 W.L.R. 288, considered.
(9) *Newland Shipping & Forwarding Ltd.* v. *Toba Trading FSC*, [2017] EWHC 1416 (Comm), considered.
(10) *OBG Ltd.* v. *Allan*, [2007] UKHL 21; [2008] 1 A.C. 1; [2007] 2 W.L.R. 920; [2007] 4 All E.R. 545; [2007] BPIR 746; [2007] Bus. L.R. 1600; [2007] IRLR 608, followed.
(11) *PJSC Bank "Finance and Credit"* v. *Zhevago*, [2021] EWHC 2522 (Ch), considered.
(12) *Spiliada Maritime Corp.* v. *Cansulex Ltd. ("The Spiliada")*, [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843; [1987] 1 Lloyd's Rep. 1, referred to.
(13) *Vedanta Res. plc* v. *Lungowe*, [2019] UKSC 20; [2020] A.C. 1045; [2019] 2 W.L.R. 1051; [2019] 3 All E.R. 1013; [2019] 1 CLC 619, [2019] BCC 520; [2019] BLR 327, followed.
(14) *Your Response Ltd.* v. *Datateam Business Media Ltd.*, [2014] EWCA Civ 281; [2015] Q.B. 41; [2014] 3 W.L.R. 887; [2014] 4 All E.R. 928; [2014] C.P. Rep. 31, referred to.

Legislation construed:

Supreme Court Rules 2000, r.3: The relevant terms of this rule are set out at para. 17.

M. Haque, *Q.C.* with *K. Reina* (instructed by Cruz Law) for the defendant/applicant;
N. Gomez (instructed by Charles A. Gomez & Co.) for the claimant/respondent.

1 **RESTANO, J.:**

Introduction

This is a challenge to the way in which the claim form and related documents have been served in these proceedings. The claim was commenced on January 13th, 2022 by Digital Asset Exchange Ltd. ("DAE") (the claimant), a Gibraltar company against Mr. Oyekenov (the defendant) for the delivery up of Bitcoin and Ethereum which it claims is worth around £1.5m. and which it alleges Mr. Oyekenov converted and misappropriated from it.

2 On January 13th, 2022, the claim form, particulars of claim and response pack were sent to Mr. Oyekenov by email and the following day DAE filed an application without notice to Mr. Oyekenov asking the court to make an order that service had been properly effected by email or alternatively that an order be made permitting service retrospectively. That application was supported by the witness statement of Julian Svirsky, a director of DAE, dated January 14th, 2022 and the witness statement of Nicholas Gomez of the same date and it was originally listed for hearing on February 2nd, 2022. By that time, however, Mr. Oyekenov had filed an acknowledgement of service form dated January 28th, 2022 indicating his intention to dispute jurisdiction. In the circumstances, DAE's application was adjourned by Yeats, J. when it came before him.

3 On February 11th, 2022, Mr. Oyekenov filed an application seeking a declaration that the purported service of the claim form and particulars of claim was invalid and that it should be set aside because DAE did not obtain permission to serve the proceedings outside the jurisdiction. Alternatively, a declaration is sought under CPR r.11(1)(b) that the court should not exercise any jurisdiction to hear the claim due to ongoing proceedings in the BVI. This judgment is given following the hearing of that application on May 10th, 2022 together with DAE's adjourned application regarding service.

4 Mr. Oyekenov's application is supported by his first witness statement dated February 11th, 2022 where he states that he has not been properly served, that he has never been to Gibraltar and that the claim should be stayed in favour of the BVI proceedings. On the day before the hearing, Mr. Oyekenov filed his third witness statement, dated May 9th, 2022, in response to written submission filed by Mr. Gomez dated May 6th, 2022 where Mr. Gomez stated that an email thread showed that Mr. Oyekenov was resident in the United Kingdom. In this further witness statement, Mr. Oyekenov states that he is not currently residing in the United Kingdom and has never resided there either.

5 There is a further application which was filed by Mr. Oyekenov on April 1st, 2022, namely an application for a strike out of the claim/summary

judgment application. This application was supported by Mr. Oyekenov's second witness statement also dated April 1st, 2022. Although this application was not listed for hearing on May 10th, 2022, it is relevant because DAE contends that it shows that Mr. Oyekenov has submitted to the jurisdiction.

The issues

6 The applications filed by Mr. Oyekenov and DAE are mirror images of each other and in summary the matters for determination are these:

(1) Whether service of this claim was validly effected when the proceedings were sent to Mr. Oyekenov by email on January 13th, 2022 without the court's permission.

(2) If permission was required, can and should DAE be given permission retrospectively under SCR 3(1)(d) and/or CPR r.6.15? Alternatively, should DAE be given permission to serve Cruz Law under those same rules?

(3) Whether Mr. Oyekenov submitted to the jurisdiction by filing his application to strike out the claim.

The factual background

7 Mr. Oyekenov is a Kazakhstani national and a former Head of Protocol Service for the Eurasian Economic Commission. According to him, he agreed in 2017 with Julian Svirsky and Denis Donin ("the founders") to be equal partners in the creation of an online platform that would allow retail investors to acquire small stakes in real estate projects using blockchain tokens and enable platform users to rent real estate to one another. This project became known as "Atlant." A BVI company called Tensigma Ltd. ("Tensigma") was set up for this project. Mr. Oyekenov states that although Tensigma's original shareholders were only Mr. Svirsky and Mr. Donin, this was because he was told by Mr. Svirsky that his background working in government would make it more difficult to open a bank account for the company but was assured, however, that he would be registered as a shareholder in due course. Further, although on February 23rd, 2018 Mr. Svirsky and Mr. Donin transferred the shares they held for Mr. Oyekenov as promised, the transfer was not registered at the time.

8 Between August 1st, 2017 and October 31st, 2017, either Tensigma or the Atlant Group (consisting of Tensigma and some other companies) raised the equivalent of US$8m. in Bitcoin and Ethereum by means of an "initial coin offering." The Bitcoin was held in a multi-signature wallet, which required the approval of at least two of the founders to access. A multi-currency signature wallet in the name of Tensigma was later set up for the Ethereum.

9 DAE was incorporated in Gibraltar in November 2017 with a view to setting up a licensed cryptocurrency exchange in Gibraltar for Atlant to use. As with Tensigma, the registered shareholders and directors of DAE were Mr. Svirsky and Mr. Donin.

10 The dispute commenced when, according to Mr. Oyenekov, he discovered on January 20th, 2021 that the other two founders had made withdrawals from the Ethereum wallet to an unknown account. Mr. Oyekenov alleges that he was then excluded from the management of Tensigma and in February 2021, the remaining Bitcoin and Ethereum were transferred out of the wallets.

11 Mr. Oyekenov commenced proceedings in the BVI on April 19th, 2022 against Mr. Svirsky and Mr. Donin for oppressive, unfairly discriminatory and/or unfairly prejudicial conduct of Tensigma's affairs. On April 23rd, 2021, Mr. Oyekenov obtained an *ex parte* freezing injunction preventing them from dealing with Tensigma's assets.

12 On August 5th, 2021, Mr. Svirsky and Mr. Donin filed a defence and counterclaim where they allege that they were the founders of the business and that Mr. Oyekenov was only employed by Tensigma to assist with the operational workload including the administration and monitoring of Atlant's cryptocurrency wallets. Further, they allege that Mr. Oyekenov abused his position and *de facto* possession over the assets held in these wallets by misappropriating these funds. Mr. Svirksy and Mr. Donin also rely on an asset purchase agreement ("APA") dated July 15th, 2020 under which they say the business and assets of Tensigma were transferred to DAE. Following this, Tensigma was put into liquidation and later dissolved on March 2nd, 2021. The defence and counterclaim further alleges that Mr. Oyekenov had not been an equal partner in the project, that the share transfers were forgeries, that he had only been registered as a shareholder under duress and that he had used Tensigma assets for his personal benefit. The defence and counterclaim filed by Mr. Svirksy and Mr. Donin in the BVI is in line with what DAE alleges in these proceedings.

13 In Mr. Svirksy's witness statement dated January 14th, 2022 which he filed to explain why DAE had chosen to serve in the way that it had, he states that Mr. Oyekenov has made it a point of ensuring that his whereabouts are unknown and that he is wanted for questioning in Thailand in connection with a criminal investigation involving the theft of Bitcoin and Ethereum.

14 On August 12th, 2021, Mr. Svirsky and Mr. Donin applied to discharge the injunction granted in the BVI and that application came before Wallbank, J. on November 10th, 2021. The judge held that the freezing injunction should not have been granted because Tensigma had been dissolved but he did not discharge it and allowed Mr. Oyekenov time to restore Tensigma. The transcript of this hearing shows that in concluding

that Mr. Oyekenov had a good arguable case, the judge made damning comments about Mr. Svirksy and Mr. Donin, stating that they appeared to be ready to lie about Mr. Oyekenov's position within the business and had no qualms about hiding assets. I say no more about those comments because I do not consider them to be relevant for the purposes of these applications.

15 On November 30th, 2021 and following the hearing in the BVI, Mr. Oyekenov received messages from a private investigator in Thailand containing a picture of his wife and which he interpreted as a threat and which he said was the reason why he did not want to disclose his whereabouts.

16 On December 3rd, 2021, Mr. Oyekenov amended his statement of claim in the BVI proceedings in response to Mr. Svirsky's and Mr. Donin's reliance on the APA to include an allegation that the APA is a sham. On February 3rd, 2022, Mr. Oyekenov amended his statement of case again to join DAE as a party to the BVI proceedings and on March 8th, 2022, Wallback, J. gave Mr. Oyekenov permission to serve DAE out of the jurisdiction.

The relevant rules

17 Rule 3 of the Supreme Court Rules 2000 ("SCR") deals with service of documents and provides as follows:

> "3.(1) A document may be served—
>
> . . .
>
> (c) by fax or other means of electronic communication . . .
>
> (4) On matters of service the provisions of the rules and directions that apply for the time being in England in the High Court will apply, so far as circumstances permit."

18 CPR r.6.15 deals with service of the claim form by an alternative method or at an alternative place. This states that where it appears to the court that there is good reason to authorize service by a method or at a place not permitted under CPR Part 6, the court may make an order permitting service by an alternative method or at an alternative place.

19 CPR r.6.32 and r.6.33 deal with service out of the jurisdiction where permission is not required. These rules are not material as they refer to service in Scotland and Northern Ireland (r.6.22) or outside the United Kingdom in specified cases which do not apply such as consumer contracts and employment contracts (r.6.33).

20 CPR r.6.36 then deals with proceedings to which r.6.32 or r.6.33 do not apply and states that a claimant may only serve a claim form out of the

jurisdiction with the permission of the court if any of the grounds set out in para. 3.1 of Practice Direction 6B apply.

The competing submissions

21 Mr. Haque, Q.C., who appeared for Mr. Oyekenov, submitted that when Mr. Oyekenov was purportedly served, he was neither in Gibraltar nor in the United Kingdom. He also added that Mr. Oyekenov had not been willing to give his address because of threats made against him and that there was in any event no duty on a defendant to provide his address. He submitted that r.3(1)(d) of the SCR which allows for service to be effected by means of an electronic communication is concerned purely with a permitted method of service and does not do away with the need to obtain permission for service out of the jurisdiction under CPR r.6.36 which was required in this case. Mr. Haque cited *Marashen Ltd.* v. *Kenvett Ltd.* (8) as authority for the proposition that permission could not be granted retrospectively on this basis.

22 Mr. Haque went on to say that DAE's failure to obtain permission was not an oversight as it had been drawn to the attention of its lawyers in a letter dated February 4th, 2022 and no permission application had been made by them. This omission was not just a technicality but a question of substance because DAE was unable to satisfy the necessary requirements for an order for permission to serve out of the jurisdiction to be granted. This was because it could not come within the gateways in PD 6B para. 3.1 nor could it show that there was a serious issue to be tried as there can be no claim in conversion for intangible property such as cryptocurrency (*OBG Ltd.* v. *Allan* (10)).

23 In the alternative, Mr. Haque submitted the BVI was clearly the appropriate forum for this dispute where there was an existing claim for around US$25m.–US$30m. worth of cryptocurrency and that the claim in Gibraltar was only for a small part of that amount. In his submission, it made no sense to hive off this part of the claim to the Gibraltar courts when both disputes were about the ownership of the cryptocurrency, both sets of proceedings were inextricably linked by the APA and there would be a risk of competing judgments if the Gibraltar claim were allowed to proceed.

24 In opposition to DAE's contention that Mr. Oyekenov had submitted to the jurisdiction because he had filed a strike out/summary judgment application, Mr. Haque referred to the fact that the strike out/summary judgment application had been made without prejudice to Mr. Oyekenov's jurisdictional challenge. Further, he relied on *PJSC Bank "Finance and Credit"* v. *Zhevago* (11) as clear authority showing that the filing of a strike out application did not amount to a submission to the jurisdiction by Mr. Oyekenov.

25 Prior to the hearing, Charles A. Gomez & Co. had complained that Mr. Oyekenov's reliance on the evidence filed by him and his BVI lawyer, Timothy Wright, in the BVI proceedings together with a transcript of a hearing in those proceedings was in breach of the collateral use rules in CPR r.32.12. Mr. Haque said that these objections were misplaced because there was no prohibition to the use of the documents under BVI law and because the transcript was not a document which had been disclosed. Further, Mr. Oyekenov and Mr. Wright had provided their written consent to the use of this evidence which, in his submission, was the end of the matter.

26 Mr. Gomez who appeared for DAE focused his submissions on the fact that his client did not know where in the world Mr. Oyekenov was located and that he had been obstructive by failing to disclose his whereabouts or agreeing to allow his lawyers in Gibraltar, Cruz Law to accept service on his behalf. As a result, he said that the claim form and other documents had been sent to Mr. Oyekenov's email address which had been disclosed in the BVI proceedings. Mr. Gomez submitted that Mr. Oyekenov's witness statements stating that he was neither a resident in Gibraltar nor in the United Kingdom were not conclusive as he had failed to say where he lived and that DAE had therefore been entitled to serve in the way that it had under the SCR which allowed for service by electronic means.

27 In his written submissions, Mr. Gomez also said that time stamps in an email thread dated January 13th, 2022 showed that Mr. Oyekenov was likely to be living in the United Kingdom at the time that the proceedings were sent to him by email. Following the filing of Mr. Oyekenov's third witness statement to the effect that the time stamp just showed the location of the email's recipient, namely Mr. Oykenov's London solicitor, Mr. Gomez conceded that these emails were not "conclusive" and that this evidence was "not as strong as [he] thought originally" and he did not pursue this argument further. In his written submissions, Mr. Gomez had also said that because English proceedings could be served in Gibraltar without permission under CPR r.6.42, it followed that proceedings issued in Gibraltar could also be served in the United Kingdom without permission. When pressed on the basis on which he was making this submission, Mr. Gomez accepted that he was unable to provide any legal basis to support this submission.

28 Alternatively, DAE sought an order under SCR r.3(1)(d) and/or CPR r.6.15 allowing service on Cruz Law as Mr. Oyekenov's legal representatives, or granting retrospective permission to serve him by email. Mr. Gomez relied on *Caretech Community Servs. Ltd.* v. *Oakden* (4), *Abela* v. *Baadarani* (2) and the commentary in CPR r.6.40.4 to show that the method of service employed by DAE was appropriate in the circumstances.

29 Mr. Gomez further submitted that in making a strike out application, Mr. Oyekenov had submitted to the jurisdiction and in that connection relied on *Global Multimedia Intl.* v. *ARA Media Servs.* (7) and *Newland Shipping & Forwarding Ltd.* v. *Toba Trading FZC* (9).

30 Mr. Gomez said that Gibraltar was the appropriate jurisdiction for this dispute to be tried. He relied on the fact that DAE, a Gibraltar company was the owner of the cryptocurrency at the time when DAE was alleging that a large part of its assets had been misappropriated by Mr. Oyekenov. As for the BVI proceedings, he said that they concerned an unfair prejudice claim which was about whether Mr. Oyekenov was a part owner of the business but that this was a separate issue to whether Mr. Oyekenov had misappropriated the cryptocurrency which was the subject of the Gibraltar claim. He also said that the validity of the APA had only been raised by Mr. Oyekenov in the BVI after the Gibraltar claim had been commenced.

31 Mr. Gomez said that the damning comments made by Wallback, J. were "startling" given that they were made following an application to set aside an injunction and that a trial had not yet taken place.

Analysis and decision

32 In determining the principal question which is whether service has been properly effected by email, it is instructive to draw a distinction between permitted methods of service and the question of whether the court's permission to serve is required. This distinction was explained by Stanley Burton, L.J. in *Cecil* v. *Bayat* (5) who said the following ([2011] EWCA Civ 135, at para. 61):

> "[The judge] . . . referred to service as a means of bringing proceedings to the attention of the Defendants. However, service is more than that. It is an exercise of the power of the Court. In a case involving service out of the jurisdiction, it is an exercise of sovereignty within a foreign state. It requires the defendant, if he is to dispute the claim, to file an acknowledgment of service and to participate in litigation in what for him is a foreign state."

33 In *Abela* v. *Baadarani* (2) ([2013] UKSC 44, at para. 53), Lord Sumption said that it was no longer realistic to view service out of the jurisdiction as the exercise of sovereign power but rather a routine incident of modern commercial life. He added that the decision as to whether to grant permission is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.

34 However one characterizes service out of the jurisdiction, in this case there has simply been no application for permission to serve Mr. Oyekenov out of the jurisdiction when it is clear that he has no ties to Gibraltar and he has now stated in his evidence that he has never been to Gibraltar. The

requirement to apply for permission to serve out of the jurisdiction can be found in CPR r.6.36 which applies in Gibraltar under r.3(4) of the SCR.

35 The fact that Mr. Oyekenov is refusing to disclose his whereabouts does not justify DAE simply ignoring the need to apply for permission to serve out of the jurisdiction altogether nor does it somehow entitle them to proceed as if Mr. Oyekenov resides in Gibraltar. This type of situation is catered for in the rules under CPR r.6.37(5)(b)(i). This provides that the court may give directions about the method of service and therefore authorizes the court to make an order for alternative service if the circumstances of the case warrant it when giving permission to serve out of the jurisdiction. In this case, Mr. Oyekenov could be served by an alternative method or at an alternative place because he is bringing a claim in the BVI and can be contacted through his solicitors there.

36 Turning to the suggestion that Mr. Oyekenov was resident in the United Kingdom when the email purporting to serve the proceedings was sent to him, Mr. Gomez appeared to accept at the hearing that the time stamp in the email thread relied on by Mr. Gomez only showed the local time of the recipient, in this case Mr. Oyekenov's London solicitor. In any event, there is no proper evidential basis on which to conclude that Mr. Oyekenov was resident in United Kingdom when he was served especially in the light of his third witness statement where he states that he is not currently residing in the United Kingdom and has never resided there, let alone during the currency of these proceedings. I cannot see what difference this would have made in any event as Mr. Gomez was unable to provide a proper legal basis to support his contention that Gibraltar proceedings could be served in England without permission.

37 DAE has therefore purported to serve Mr. Oyekenov who has never been to Gibraltar as if he was a resident in Gibraltar and without permission when permission was clearly required. In these circumstances valid service has not taken place.

38 In the alternative, DAE seeks an order allowing service on Cruz Law (although this was not specified in the application notice) or permitting service, retrospectively under SCR r.3(1)(d) and/or CPR r.6.15. Both these rules, however, are concerned with the method of service and do not address the need to obtain permission to serve a defendant who is out of the jurisdiction. Further, these rules cannot be invoked to validate service against a person who is resident outside the jurisdiction where permission has not been obtained. As David Foxton, Q.C. (then sitting as a deputy High Court judge) said in *Marashen Ltd.* v. *Kenvett Ltd.* (8) ([2017] EWHC 1706 (Ch), at para. 17):

> "an order for service by an alternative method within the jurisdiction against a defendant who is resident outside of the jurisdiction can only

be made if the court has satisfied itself that the case is a proper one for service out of the jurisdiction, and has made an order to that effect."

39 Mr. Gomez also relied on three authorities to support this part of DAE's application. The first of these was *Caretech Community Servs. Ltd.* v. *Oakden* (4) which he said provided a helpful summary of how a court should deal with an application of this kind. In that case, however, all the defendants were domiciled within the jurisdiction. The second case was *Abela* v. *Baadarani* (2) which concerned an application for service to be validated retrospectively. In that case the claimant had already obtained permission to serve outside the jurisdiction and a judge has been satisfied that there was a good arguable case for service outside the jurisdiction. Finally, Mr. Gomez relied on the commentary at CPR r.6.40.4 citing *Cruz City 1 Mauritius Hldgs.* v. *Unitech Ltd.* (6) and two other cases (considered in *Cruz* itself) that the Commercial Court's practice in arbitrations the seat of which is within the jurisdiction is to regard the fact that service on the respondent's lawyers within the jurisdiction as far more speedy than service under a Convention or Treaty or the Service Regulation, as a good reason within r.6.15(1) and (2). That, however, refers to arbitration proceedings where the parties have already submitted themselves to the supervisory jurisdiction of the court and to which specific rules apply.

40 In my view, therefore, none of these authorities supports the grant of the retrospective permission or permission to serve on Cruz Law when DAE has not first made an application to satisfy the court that this is a proper case for service out of the jurisdiction.

41 It is also worth noting that had DAE applied for permission to serve out of the jurisdiction, as it was required to do, this would not have been a straightforward matter. Apart from showing that Gibraltar was the proper place in which to bring the claim despite there being related BVI proceedings, it would have had to show that the claim against the foreign defendant falls within one or more of the heads of jurisdiction or gateways for which permission to serve out of the jurisdiction may be given as set out in PD 6B, para. 3.1 and that the claim has a reasonable prospect of success. This is a claim for conversion in respect of cryptocurrency and the House of Lords made it clear in *OBG Ltd*. v. *Allan* (10) that the essence of conversion is a wrongful interference with the possession of tangible property which cryptocurrency is not. Whilst this is an authority which has been criticized as a wasted opportunity to set the law on a modern footing (see Moore-Bick, L.J.'s judgment in *Your Response Ltd.* v. *Datateam Business Media Ltd.* (14) ([2014] EWCA Civ 281, at para. 27)) it remains good law. This all goes to show that DAE's failure to apply for permission to serve out of the jurisdiction was not just a technicality but an issue of substance.

42 Mr. Oyekenov's secondary case is that these proceedings should be stayed on the grounds of *forum non conveniens*. The applicable principles in determining this question were established in the well-known speech of Lord Goff in the House of Lords in *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (12), reiterated by the Privy Council in *AK Inv. CJSC* v. *Kyrgyz Mobil* (1) and by the Supreme Court in *Vedanta Res. plc* v. *Lungowe* (13). These can be summarized as follows:

(1) Whether there is another available forum which is clearly and distinctly more appropriate than Gibraltar. The burden of proving this first limb falls on the defendant.

(2) If the defendant discharges that burden, then the court will normally grant a stay unless there are circumstances by reason of which justice requires that the case is tried here. The burden on this second limb falls on the claimant and the court will look at all the circumstances of the case including those which go beyond those taken into account when considering connecting factors with other jurisdictions.

43 In *Vedanta*, Lord Briggs, J.S.C. said the following ([2019] UKSC 20, at para. 66):

> "'The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; . . .'
>
> That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."

44 One of the factors that the court may take into account when considering what the appropriate forum is for a dispute is whether ongoing proceedings are taking place in another jurisdiction which could give rise to inconsistent decisions. This factor is of particular weight where the whole of the dispute could be resolved in one forum but not the other. In *B.A.T. Indus. plc* v. *Windward Prospects Ltd.* (3), Field, J. said as follows ([2013] EWHC 4087 (Comm), at paras. 70–71):

> "70. The fact that all possible related claims can be tried in one of the competing *for a* but not another carries great weight in deciding where the claims can best be tried in the interests of the parties and the interests of justice. In *Donohue v Armo Inc et al* [2002] 1 Lloyd's Rep

425 (where the issue was whether effect should be given to an exclusive jurisdiction clause) Lord Bingham said:

> It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice. (Para 34)

71. To like effect are these observations of Rix LJ in *Konkola Copper Mines plc v Coromin* [2006] 1 All ER (Comm) 437 (CA):

> . . . the attitude of the English courts is, if possible, to avoid fragmentation of disputes between different jurisdictions where such fragmentation raises the twin dangers of waste of resources and of inconsistent decisions."

45 The only factor connecting this claim to Gibraltar is the fact that DAE is a Gibraltar registered company. DAE's standing to bring this claim at all, however, is based on the validity of the APA which sold all of Tensigma's assets to DAE and which Mr. Oyekenov is alleging is a sham in the existing BVI proceedings. If this claim were to proceed, there is therefore a risk of inconsistent decisions on this important issue which already features in the BVI proceedings and which would form part of the Gibraltar proceedings if they went ahead. Indeed, even Mr. Gomez acknowledged the risk of contradictory decisions although he said that this was only a small risk.

46 Whilst Mr. Gomez made the point that the amendment to Mr. Oyekenov's statement of claim alleging that the APA was a sham was made after the Gibraltar proceedings had been commenced, this was done as the BVI proceedings developed and in response to the defence filed by Mr. Svirksy and Mr. Donin in that jurisdiction. Those proceedings are now well underway, include all the parties to the dispute including Tensigma, and they deal or are able to deal with the entirety of the dispute.

47 The BVI is also the jurisdiction where this dispute can be adjudicated upon most comprehensively which is a factor which militates strongly in favour of the BVI courts. This is because Mr. Oyekenov cannot bring his unfair prejudice claim in Gibraltar as he has already started proceedings in the BVI and the administration of BVI companies is a matter for the BVI courts. DAE on the other hand can pursue its claim in the BVI where it is now a party.

48 For these reasons, the interests of justice are therefore best served by allowing this dispute to be dealt with by the BVI courts which is the

jurisdiction best suited to make a reliable and comprehensive judgment on all the matters in issue and which would ensure that there is no risk of inconsistent judgments or wasted resources. Even if I had concluded that service had taken place, I would have therefore ordered a stay of the proceedings.

49 DAE also argued that Mr. Oyekenov had submitted to the jurisdiction when he filed his strike out application on April 1st, 2022. Mr. Gomez relied on *Global Multimedia Intl. Ltd.* v. *ARA Media Servs.* (7), where a threat to strike out a claim was held to be conduct contrary to a jurisdictional challenge. Mr. Gomez said that Mr. Oyekenov's conduct went even further because he had not only threatened to strike out the claim but he had actually filed a strike out application. In *Global Multimedia Intl.*, however, there were various reasons why the judge concluded that there had been a submission to the jurisdiction by the defendant, only one of which was the threat to strike out the claim. The correct approach to determine whether there has been a submission to the jurisdiction, as summarized by the Chancellor, the Rt. Hon. Sir Andrew Morritt, in his judgment in *Global Multimedia Intl.*, is as follows ([2006] EWHC 3612 (Ch), at para. 28):

> "Thus the test to be applied is an objective one and what must be determined is whether the only possible explanation for the conduct relied on is an intention on the part of the defendant to have the case tried in England."

50 Applying the test as summarized by the Chancellor in *Global Multimedia Intl.* to the present case, it is clear that Mr. Oyekenov's conduct cannot be viewed as only displaying an intention to have the case tried in Gibraltar. In fact, the opposite is true. Mr. Oyekenov filed an acknowledgment of service form on January 28th, 2022 indicating his intention to dispute jurisdiction. On February 4th, 2022, his solicitors at the time, Wilkinson Law, wrote to Charles A. Gomez & Co. setting out the basis on which Mr. Oyekenov disputed jurisdiction. On February 11th, 2022, Mr. Oyekenov filed this application which seeks a declaration that purported service was invalid and also disputing jurisdiction. On March 9th, 2022, Cruz Law wrote to Charles A. Gomez & Co. stating that it was Mr. Oyekenov's intention to apply to strike out the claim if the court accepted jurisdiction. Charles A. Gomez & Co did not reply to this letter so on April 1st, 2022, Mr. Oyekenov issued his strike out/summary judgment application. This application was supported Mr. Oyekenov's second witness statement which states as follows at para. 4:

> "For the avoidance of doubt, this application is without prejudice to my primary position that (a) the Court has no jurisdiction to hear this claim and/or (b) I have not been properly served with the claim. To

> the extent that the Court finds against me on both of those points, I respectfully ask the Court to determine this application."

51 Mr. Oyekenov therefore made his opposition to the claim being tried in Gibraltar on jurisdictional grounds plain, by first disputing the court's jurisdiction and then by stating that his subsequent strike out application was being made without prejudice to his jurisdictional challenge.

52 Mr. Gomez also relied on *Newland Shipping & Forwarding Ltd.* v. *Toba Trading FZC* (9) which he said was a case where the court accepted that applying to set aside an order was at odds with a jurisdictional challenge. He referred to Cockerill, J.'s judgment where she said as follows ([2017] EWHC 1416 (Comm), at para. 18):

> "I do not accept the argument that the Fifth Defendant is making the wrong application; the authorities, including the excerpts from Briggs and Dicey cited by Mr Abraham in his second witness statement, make clear the very great degree of caution which a party who is challenging jurisdiction must exercise. The point appears to be open; neither party referred me to authority which dealt with this point in terms. It certainly seems possible that an argument that challenging the default judgment in partnership with a jurisdictional challenge might be said to amount to a submission to the jurisdiction in circumstances where the authorities tend to suggest that taking any step in relation to the merits of the claim can amount to a submission (see *Global Multimedia International v ARA Media Services* [2006] EWHC 3612, [2007] 1 All E.R. (Comm) 1160 and *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA Civ 226 [2015] 1 WLR 4225). Accordingly it seems to me that the Fifth Defendant was entitled to form the view that it was unsafe to apply to set aside the default judgment now and the course of action taken cannot fairly be described as wrong. On the contrary, challenging jurisdiction was logically the first step, whether or not it might have been combined with a very cautiously worded challenge to the default judgment."

53 *Newland Shipping & Forwarding Ltd.* does not assist DAE either because all that the judge was saying in that case was that it could not be said to be wrong in the particular circumstances of that case that the fifth defendant had chosen to challenge the court's jurisdiction before applying to set aside a default judgment because he was concerned that bringing a dual application might be unsafe. Further, she said that challenging jurisdiction was logically the first step, whether or not combined with a very cautiously worded challenge to the default judgment.

54 In *PJSC Bank "Finance and Credit"* v. *Zhevago* (11) it was held that a strike out application made at the same time as a jurisdictional challenge did not amount to a submission to the jurisdiction of the court even though the strike out application did not make it clear that it was without prejudice

to the challenge to the jurisdiction as the defendant's conduct in that case was, at best equivocal. The same conclusion is to be drawn in the present case albeit with even greater force as Mr. Oyekenov did state that his strike out/summary judgment application was without prejudice to his strike out application.

Conclusion

55 DAE has not validly served these proceedings on Mr. Oyekenov as he was clearly not resident within the jurisdiction when the claim form and other documents were sent to him by email and the court's permission was required before they could be served on him. Mr. Oyekenov's application seeking an order that the purported service of the claim form and other documents is invalid is therefore granted.

56 It follows that DAE's application for a declaration that service was properly effected is dismissed. DAE's alternative application that the defective service be allowed to stand or that it be allowed to serve the claim form and other documents on Cruz Law is also dismissed.

Judgment accordingly.