Neutral Citation Number: [2021] EWHC 99 (Comm)

Case No: CL-2020-00217

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 20/01/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

HELICE LEASING S.A.S	**Claimant**
- and -	
PT GARUDA INDONESIA (PERSERO) TbK	**Defendant**

- -
- -

James Cutress QC (instructed by **Clifford Chance LLP**) for the **Claimant**
Aaron Taylor (instructed by **Baker & McKenzie Wong & Leow**) for the **Defendant**

Hearing dates: 19 January 2021

- -

Approved Judgment

Mr Justice Calver :

Introduction

1. This is the hearing of the Defendant ("D")'s application:

    (1) To set aside service of the claim form;

    (2) To stay the proceedings under s.9 of the Arbitration Act 1996 in favour of arbitration;

    (3) To stay the proceedings on the basis that Indonesia is allegedly clearly or distinctly the most appropriate forum to hear this dispute.

2. D's application to set aside service has resulted in a counter-application by the Claimant ("C") for retrospective permission to serve the claim form at an alternative place, or to extend time to serve the claim form, or to dispense with service altogether. C's counter-application has been heard at the same time as D's application.

3. C is represented by Mr. James Cutress QC on these applications, and D by Mr. Aaron Taylor.

4. Although it was not required to do so, for the assistance of the Court when hearing these applications, C has produced a draft Particulars of Claim which helpfully particularises its claims which it says it is entitled to bring before this Court.

5. As can be seen from the Draft Particulars of Claim, following a novation by a previous lessor (**ACG**) of an *Aircraft Operating Lease Novation and Amendment Agreement* dated 8 January 2016 between ACG as the original lessor, C as the new lessor and D as the Lessee (the novation**)**, C became the lessor and D became the lessee of a Boeing B737-800 aircraft MSN 38884 (the **Aircraft**) under an operating lease, the amended and restated terms of which are set out in sch.3 to the novation (the **Lease**).

6. The claim is one for non-payment of Basic and Additional Rent as defined in the Lease, as well as an indemnity. In particular, as set out in paragraphs 12-16 of the Draft Particulars of Claim, D had failed to pay *any* of the monthly Rent or Additional Rent that became due each month under the Lease from January 2020 (when default first occurred) to October 2020. Since service of the Draft Particulars of Claim, although D has acknowledged the debt by paying just over USD 585,000 towards the amounts outstanding, there have been further defaults in the payment of the monthly Rent or Additional Rent, resulting in a total now due of over USD 5.15m plus interest.[1] C says that the continuing payment breaches that have occurred constitute Events of Default under the Lease.[2]

[1] D's payments were made on 23 December 2020 (USD 100,000) and 30 December (USD 485,834). They have been applied to pay the September 2020 Basic Rent invoice in full and USD 100,000 towards each of the November and December Basic Rent 2020 invoices. In addition, as explained at Draft Particulars of Claim [11], on or about 21 May 2020, C applied a cash deposit of just over USD 1.15m to some of the outstanding

7. C says that D has not to date identified any defence to the claims and C is not aware of any such defence.[3] To the contrary, in correspondence D has essentially acknowledged the debt. In particular:

    (1) D's email of 21 April 2020 to C stated that:

    > *"We understand that we still have some outstanding payment to Goshawk,[4] however* ***it is not our intention to not paying you****. We are of course remain committed to meet our obligations, we only need some relaxation as things are getting worse right now … we require your support for lease rent deferral with a lengthier repayment period…"*

    (2) This followed an email to C of 16 April 2020 in which D stated that it could not then confirm a payment plan to meet the arrears as it was "*still finalizing the process of obtaining the financial support from our government*".

    (3) D subsequently put forward a payment plan by email dated 15 July 2020, which included the proposal that "*The overdue payments will start to be paid in January 2021 and spread until the end of the lease term*".[5] That was not acceptable to C.

8. It follows that D has never identified a defence and has impliedly admitted the debt in correspondence. I should add that D initially contended that these exchanges were protected from disclosure by without prejudice privilege: see Allen-2 [6]. In fact, that is wrong: see *Bradford & Bingley v Rashid* [2006] 1 WLR at 73 per Lord Brown. D did not pursue this point orally.

9. However, the fact remains that despite demands, D has not paid C the sums that it says are due and owing under the lease.

10. By its application, issued on 31 August 2020, D makes three challenges not to the substance of the claim, but rather in relation to jurisdiction. In particular:

    (1) First, D contends that service of the claim form was not valid, not being served in accordance with *rule 6.3* of the CPR. It then also seeks to resist C's counter-application issued on 15 October 2020 for retrospective permission to serve the claim form at an alternative place or to extend time to serve the claim form or to dispense with service. These objections to the validity of service, or to any attempt to remedy any defect in service, are all despite the fact that D accepts that "*it is*

---

instalments of Basic Rent, with the result that this amount is now due under cl.5.5(b)(ii) of the Lease in order to replenish the deposit, rather than being due by way of Basic or Additional Rent. Under cl.5.5(b)(ii), "*Upon any offset or application of any portion of the Pledged Moneys to the Secured Liabilities, Lessee shall immediately pay to Lessor an amount equal to the amount of the Pledged Moneys so offset or applied*."

[2] See Draft Particulars of Claim [19].

[3] Mack-1 [40].

[4] 'Goshawk' appears to be used in this email as shorthand for C - C is an indirect subsidiary of Goshawk Aviation Limited (see Mack-1 [4]).

[5] The payment plan also suggested replenishing the Security Deposit in 2021.

open to C to issue and serve fresh proceedings against D" (Allen-2 at [30].

(2) Second, D alleges that the proceedings have been brought in breach of the parties' arbitration agreement, and should therefore be stayed for arbitration, pursuant to the arbitration clause set out at cl.15.2 of the Lease.

(3) Third, D makes a *forum non conveniens* challenge, alleging that the most appropriate forum for the resolution of the proceedings is Indonesia.

11. I shall take these service issues in turn. For the purposes of the first issue (10(1)) I shall assume therefore that the court has jurisdiction to hear this action (that is, that D is wrong on its application, issue 10(2), before going on to consider whether that is correct or not.)

The Claimant's applications concerning service of the Claim Form

(1) Was service at the Hammersmith office valid service?

12. The Claim form in this case was issued on 16 April 2020 and was served on 16 July 2020 at D's Hammersmith, London address. I should say at the outset that D acknowledged service of the claim form on 3 August 2020, within the required 14 days after deemed service of the claim form on 20 July 2020. D did not say anything in correspondence or otherwise to indicate that the claim form had not been validly served. This is despite the fact that C also emailed D the claim form on 22 July 2020, referring to the "*claim form served on your English branch late last week*", as well as a covering letter which accompanied the claim form. That letter expressly referred to the fact that C understood from Companies House that the Hammersmith address was D's principal place of business in England. D did not respond and say: "*No that is not correct – we have moved*". Indeed, there is no evidence before me that it did not receive the claim form sent to its Hammersmith address. D chose not to raise any issue about the address for service until after the 16 August 2020 deadline for service had elapsed. It raised the issue for the first time when it filed its application on 31 August. Had it raised the point within the 4 weeks before expiry of the claim form C says it would have served on the Hounslow address to which D says that it moved on 1 July 2020, but this change of address was not posted on the Companies House website until 18 August 2020 – before that date it showed the Hammersmith address as being D's registered address.

13. D has instructed solicitors and counsel in relation to this claim and upon these applications. Since, as the Supreme Court stated in Abela, the most important function of service is to ensure that the contents of the claim form are communicated to D, there is no doubt that this function has been fulfilled in this case. Moreover, there is no limitation defence which arises in this case as a result of any defective service; one may legitimately ask therefore why D requires the C to issue and serve a fresh claim form upon it, unless it is intended simply to delay matters.

14. As I say, the claim form was issued on 16 April 2020. It was amended on 16 July 2020. On the same day (and the day previously), C's solicitors checked D's details as

to D's place of business in the UK on the Companies House website. The information on the Companies House website gave D's address for its UK establishment as Level 6, 26-28 Hammersmith Grove, Hammersmith, London, W6 7BA (the **Hammersmith Address**). In particular: [6]

(1) The Form OS CH01 (Return by a UK establishment of an overseas company for change of details) dated 1 July 2019 filed and signed on behalf of D (the "**Hammersmith Filing**") and published on the Companies House website gave D's address for its UK establishment as the Hammersmith Address.

(2) The UK establishment office address stated on another page of the Companies House website[7] reflected that filing by stating the same address.

15. As a result, in reliance on D's public Hammersmith Filing, C's solicitors sent the claim form by first class post to the Hammersmith Address.[8] It would therefore have been deemed served under CPR r.6.26 (if valid) on 20 July 2020.[9]

16. The Hammersmith Address remained D's place of business in the UK as published on the Companies House website until 18 August 2020. On that date, the address details for D's UK establishment was shown as changed on the Companies House website to the Hounslow Address by reason of a further Form OS CH01 filed by D (the "**Hounslow Filing**"). Whilst the Hounslow Filing refers to the address having changed on 1 July 2020, from the Companies House stamp that appears on it, it does not appear to have been filed until 2 July 2020 and it was not published on the Companies House website until 18 August 2020: see the filing history, which under the date 18 August 2020 states "*Details changed for a UK establishment - BR001984 Address Change 26-28 hammersmith grove…*".

17. That was because, as D says, from 1 February 2020 to 1 July 2020, D ceased business activities from the UK, as a consequence of the travel disruption caused by the Covid-19 pandemic.

18. Since 1 July 2020, D's place of business in the UK has been 3rd Floor, Block B Suite 15, The Vista Centre, 50 Salisbury Road, Hounslow TW4 6JQ ("the **Hounslow address**").

19. It follows, so says D, that the Amended Claim Form was not sent, as a matter of fact, to a "*place within the jurisdiction where the [Defendant] caries on its activities*" or a "*place of business of the [Defendant] within the jurisdiction*". The fact that the website had not yet been updated to reflect D's filing of 2 July 2020 does not mean that the Hammersmith address was *in fact* D's place of business for the purposes of CPR 6.9.

---

[6] See generally Mack-1 [21]-[22].
[7] The then equivalent page to https://find-and-update.company-information.service.gov.uk/company/BR001984, which now contains the Hounslow Address.
[8] Mack-1 [22].
[9] CPR r.6.26 provides for deemed service in relation to first class post on the second day after posting, provided that such day is a business day (or if not, the next business day after).

20. C contends, by contrast, that service of the Claim Form at the Hammersmith Address by its letter dated 16 July 2020 constituted valid service in accordance with CPR r.6.9(2)(7). This provides for service of the claim form at "*any place of business of the company within the jurisdiction*".

21. Mr. Taylor on behalf of D submits that D did not make any representation that its address was the Hammersmith address after it wrote to Companies House with the new address. However, he also rightly accepted that the website operated for the benefit of the public. I consider that the representation that D knew it was making to the public, via the website, must continue until Companies House remove it, and D must know that or be deemed to know it. In consequence, as Mr. Cutress put it, the question is who bears the risk in the short interim period whilst Companies House is updating the website with the new address: the public or the company? In my judgment it must be the company. The company can take measures to ensure that there is no misapprehension during the short interim period:

    (1) It is the company which is seeking to change its address whose publicly available statements as to the address of its establishment are being relied upon. It can see that its address remains its published address on the Companies House website.

    (2) The company seeking to change its address could and should take simple steps to ensure any post is forwarded during the interim period after filing its change of address but before it is published. It could also record this fact on any email traffic that it sends.

    (3) If it were not possible to rely upon the published information on the Companies House website, in practical terms that would mean that such information could never be relied upon, since it might always be subject to an unpublished contrary filing. This would wholly undermine certainty and require potential litigants to seek to engage in a factual enquiry as to whether an unpublished change of address might have been filed.

22. Indeed, D says that the Hammersmith Address ceased to be its place of business from 1 February 2020. Yet it did not file any change of particulars of address in relation to its UK establishment until 2 July 2020. Under Reg.7 of the Overseas Companies Regulations 2009, D was required to file a return setting out (among other things) the address of its establishment and business carried on at it. Under Reg.13:

> *"13.—(1) If an alteration is made in any of the particulars delivered under— ... (b) regulation 7 (particulars of the establishment),*
> *the company must deliver to the registrar a return containing details of the alteration. ....*
> *(4) The details required of the alteration are—*
> *(a) the particular that has been altered,*
> *(b) details of the particular as altered, and*
> *(c) the date on which the alteration was made.*
> *....*
> *(6) The period allowed for delivery of the return is—*

> *…. (b) in the case of an alteration of any of the particulars specified in regulation 7 (particulars of the establishment), 21 days after the alteration is made."*

23. Under Reg.17 [408] it is an offence not to comply with such requirements. D did not comply with these requirements because it did not file a change of particulars to the effect that it had ceased business at the Hammersmith Address. Had it done so within 21 days of the alleged cessation of business (i.e. by 22 February 2020), then service never would have been effected at that address.

24. Further, if the test were a purely factual one, then D would be entitled to prove that it was not carrying out business at the Hammersmith Address even in circumstances where D had failed to comply with the above requirements by filing an alteration in particulars and even though its publicly available filings continued to represent that it was carrying out business at that address. Moreover, D could rely on the factual position as to a change of address even in circumstances where it had not yet filed a change of address with Companies House (given that it has 21 days to do so). This would mean the register could not be relied upon, undermining part of its purpose.

25. Once it is accepted that the test is not a purely factual one (and Mr. Taylor accepted in submission that this question is not a purely factual question), but rather that the company should be held to its statements on the public record as to its place of business, then the question arises as to the point at which it should cease to be held to such statements: should it be the point at which it has filed a change, which has not yet been published, or should it be the point at which the change is published and thus publicly available on the Companies House website? In my judgment it is the latter for the reasons I have already given.

26. Mr. Taylor also submits that C must be wrong because service at the Hounslow premises would be good service and there cannot be two places of business. But why not? Unless and until the address for service is removed from the website, there are indeed two places of business where service may be effected.

27. I therefore agree with C that in circumstances where D's statements in its Hammersmith Filing available as a matter of public record on the Companies House website stated that its address was the Hammersmith Address, D should not be entitled to go behind such statements by denying that the Hammersmith Address was a place of business of the company within the jurisdiction at the time of service.

28. Support for this conclusion may also be found in the judgment of Hamblen J (as he then was) in *Teekay Tankers v STX Offshore* [2014] EWHC 3612 at [47]-[48], where the Judge rejected a submission that STX's address registered at Companies House as a place of business of the company within the jurisdiction was not *in fact* a place of business at the time of service for the purposes of CPR r.6.9(2)(7) and s.1139(2)(b) of the Companies Act 2006[10], stating that:

[10] See [44], where Hamblen J stated that the same test was set out both for the purposes of CPR r.6.9(2)(7) and s.1139(2)(b) of the Companies Act 2006.

> *"STX should not be allowed to go behind the statement which it made as a matter of public record that it has opened a UK establishment where it is carrying on business."*

29. True it is that the Companies House website contains an unsurprising disclaimer that the information on the website is not intended to be comprehensive: see Allen/2/10. But that is simply Companies House protecting itself from litigation and it does not detract from the fact that D has made a representation as to its place of business via the website, knowing that it will be published to the world at large unless and until it is removed by Companies House.

30. Last, D also contends that service of the claim form did not comply with cl.16.10 of the Lease ("Notices"). This provides for "*notices*" and "*other communications*" to be "*in writing (including telefax and e-mail)*" and provides for them to be sent to D's address in Sch.7, namely an address or fax number in Indonesia. He submits, by reference to *Ageas v Kwik Fit* [2014] EWHC 2178 (QB) at [85] that service of the claim form is a communication within the meaning of this clause.

31. I reject that submission: Green J's remarks in [85] of *Aegeas* are obiter as Mr. Taylor accepts; they are also particular to the special facts of that case, where *service* was said to have a loose, colloquial meaning. The case is not authority for any proposition that a standard notice clause of the type that we have in this case means that it is mandatory to serve legal proceedings in accordance with its terms.

32. I agree with C that this clause concerns the sending of notices and other communications, not the service of proceedings. It is a standard notices provision, not a service of suit clause and that clause 2.1(i) of the Novation Agreement (which refers to the appointment of a process server) lends support to that construction. In any event, despite the mandatory nature of the Notice clause, CPR rule 6.11 is a permissive provision ("*the claim form may be served by a method or place stated in the contract*") and it does not exclude service in accordance with CPR rule 9. CPR rule 6.9 is subject to rule 6.8 but rule 6.8 does not apply to a business address outside the UK (here, Indonesia).

33. Accordingly, for these reasons, service at the Hammersmith Address on 20 July 2020 was valid service.

(2) Application for a retrospective order to serve at an alternative place

34. C also contends that if (contrary to C's position) service at the Hammersmith Address was not valid, then the court should exercise its powers to rectify the defect in service by various other means, rather than requiring C to issue and serve a fresh claim form, which it says would do nothing other than increase costs.

35. I shall briefly consider these in case I am wrong about the first point.

36. First, if service at the Hammersmith Address on 20 July 2020 was not valid service, then C seeks retrospective permission under CPR r.6.15 to serve the claim form at an alternative place, namely the Hammersmith Address. As to the relevant principles under CPR r.6.15:

(1) CPR r.6.15(1) enables the court to make an order permitting service at an alternative place "*Where it appears to the court that there is a good reason to authorise service … at a place not otherwise permitted by this Part*".

(2) CPR r.6.15(2) provides that on an application under CPR r.6.15, "*the court may order that steps already taken to bring the claim form to the attention of D … at an alternative place is good service".* C seeks such an order (i.e. an order that service at the Hammersmith Address was good service).

37. As set out in *Abela v Baadarani* [2013] UKSC 44 (per Lord Clarke):

1. "*the court should simply ask itself whether, in all the circumstances of the particular case, there is a good reason to make the order sought*" [35];
2. "*whether there is a good reason is essentially a matter of fact*" [33]; CPR r.6.15(1)-(2) only require "*good reason*", rather than (as per CPR r.6.16 in relations to applications to dispense with service) "*exceptional circumstances*" [33];
3. "*It should not be necessary for the court to spend undue time analysing decisions of judges in previous cases which have depended on their own facts*" [35];
4. "*The mere fact that D learned of the existence and content of the claim form cannot, without more, constitute a good reason to make an order under rule 6.15(2). On the other hand, the wording of the rule shows that it is a critical factor*" [36].
5. In this context, "*Service has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to D*" [37].

38. As further stated by Lord Sumption in *Barton v Wright* [2018] UKSC 12, there is only one stage to the inquiry, namely whether there is "*good reason*" to make the order. This is because "*If there is "good reason" to make the order, it would be irrational for a court to decline to make it as a matter of discretion*" (*ibid* at [12]).

39. D resists the application. It relies upon what Lord Sumption JSC stated in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [21], namely "*it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of D.*" That is not so it says of the Hammersmith address, since D was not at the date of purported service (and is not now) present at that address.

40. In my judgment, service at the address published at Companies House could reasonably have been expected to bring the proceedings to the attention of D for the following reasons and there is good reason to make the order sought:

(1) The claim form was brought to D's attention and received by D notwithstanding its change of address, as D filed the required

acknowledgement of service within 14 days (on 3 August 2020) and exhibited C's cover letter enclosing the claim form to Allen-1 in support of D's application issued on 31 August 2020.

(2) In serving at the Hammersmith Address, C relied on D's published statements as a matter of public record that the Hammersmith Address was C's place of business in the UK.

(3) Service would not have been effected at that address had D complied with its obligations to file a change in particulars in February 2020.

(4) D chose to refrain from informing C that its address had changed or that it objected to service at the Hammersmith Address until after the period for validity of the claim form had expired on 16 August 2020, almost a month after service at the Hammersmith Address on 20 July 2020. As Lord Clarke agreed in Abela at [38], service is "*not about playing technical games*".

(5) There is no prejudice to the Defendant if service is treated as effective in circumstances where the Defendant has received the claim form and filed both its Acknowledgment of Service and its jurisdiction application within the required timeframe.

(6) The limitation period has not expired and will not begin to expire until at least 2026, given that the contractual defaults commenced in January 2020.

(7) Service at the Hammersmith Address was such as could reasonably be expected to bring the proceedings to D's attention. That was the address published on the Companies House website at the time of service. Further, even if the question were to be asked in light of the matters now known (rather than known by C at the time), one would expect D to have had forwarding arrangements in place. This is particularly given that D only filed a change of particulars at Companies House on 2 July 2020. The fact that one would expect D to have had forwarding arrangements in place was a point made by C at Mack-1 [27(b)]. Notably, D did not state that it did not have forwarding arrangements in place in its reply evidence, nor did it state that it did not receive the copy of the claim form served at the Hammersmith Address[11]: see Allen-2 [15].

41. Accordingly, if service had not been validly effected by service at the Hammersmith Address on 20 July 2020 because that was not in fact any longer D's place of business, then I would have remedied that defect by ordering that such service at the Hammersmith Address is deemed to be good service.

42. Indeed, in this respect Mr. Taylor rightly conceded that if the retrospective order sought was for service by email "*I might have difficulty in resisting that*". But here service by email expressly referred to the service by post of the very same claim form

[11] A copy was also served by email.

at the Hammersmith Address which was sent under cover of the email. The distinction is therefore of no significance.

(3) Application for a retrospective order extending the time for service of the claim form

43. Alternatively, C seeks an order granting retrospective permission under *CPR r.7.6* to extend the time for service of the claim form to 17 September 2020. This would have the result that the claim form would be deemed to have been validly served on that date, because C served the claim form at the Hounslow Address on that date.[12] Again, Mr. Taylor realistically accepted that "*This is the most appropriate of all possible courses"* which C could take.

44. Under CPR r.7.6(3), where the application was (as here) made after expiry of the claim form, the court will only make an order if (so far as relevant):

> "*b. C has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and*
>
> *c. … C has acted promptly in making the application."*

45. D has agreed not to take any issue with CPR r.7.6(3)(c) (whether C acted promptly in making the application), so the only point in dispute relates to 7.6(3)(b) (whether C took all reasonable steps to serve within the 4 month period of validity).

46. I find that C did take all reasonable steps to serve within the 4 month period of validity:

(1) C served at the address for D set out in its publicly available statements on the Companies House website. It did so after checking the Companies House website twice, once on 15 July 2020 and once again on 16 July 2020 before posting the claim form that day.

(2) As the Supreme Court stated in Abela, the most important function of service is to ensure that the contents of the claim form are communicated to D. D acknowledged service of the claim form on 3 August 2020, within the required 14 days after deemed service of the claim form on 20 July 2020. D did not say anything in correspondence or otherwise to indicate that the claim form had not been validly served. This is despite the fact that D also emailed C the claim form on 22 July 2020, referring to the "*claim form served on your English branch late last week*".

(3) The 4 month period for service of the claim form expired on 16 August 2020, before D's change of address to the Hounslow Address set out in the Hounslow Filing was published on the Companies House website on 18 August 2020.

(4) D chose not to raise any issue regarding the address for service until after the 16 August 2020 deadline for service had elapsed. It raised the issue for the first time when it filed its application on 31 August 2020

[12] See Mack-1 [30].

(which it subsequently served on C's solicitors through the DX on 3 September 2020).[13] This was some 6 weeks after it had been served. Had D raised the point within the 4 weeks before expiry of the claim form, C would have re-served at the Hounslow Address within the 4 month period.[14]

(5) Accordingly, it was not apparent from the published information or from any correspondence from D that it was necessary to re-serve at the Hounslow Address until after the 4 month deadline for service had elapsed.

47. D submits that C did not take all reasonable steps and relies upon para 26 of Allen 2 in that respect:

(1) First, D complains that C waited three months before effecting service. However, as is apparent from the *inter-partes* correspondence at the time, the parties were engaged in discussions as to a payment plan for repayment of the outstanding liabilities. Further, this is not a case where C left it to the last moment: far from it, the claim form was posted to an address within the jurisdiction a month before its expiry. This was sufficient time to allow for an acknowledgement of service (which was filed) and for any issues D had in relation to service reasonably to be expected to be brought to C's attention. D did not raise any issue about service until after the expiry of the claim form.

(2) Second, D complains that C relied upon a single source of information to ascertain D's business address, namely the Companies House website which contains disclaimers. However, as to this, the source relied upon was a statement as to D's address filed by D itself at Companies House as a matter of public record. In the circumstances, there was nothing inappropriate in relying upon it: indeed, part of the purpose of the relevant statements is that they can be relied upon for service.

(3) Third, D complains that C used a method of service (first class post) that did not provide for confirmation of successful delivery. But this is a method permitted under the CPR and in any event D acknowledged service and did not raise any issue in relation to service for over a month afterwards.

48. Accordingly, I would, were it necessary, have ordered that any defect in service should be rectified by the mechanism of a retrospective order extending the period of time for service.

(4) Application for a retrospective order dispensing with service

49. In the further alternative, C seeks a retrospective order under *CPR r.6.16* dispensing with service. Under *CPR r.6.16*, the court may dispense with service in "*exceptional*

[13] Mack-1 [29(c)].
[14] Mack-1 [29(d)].

circumstances". Given that this is a higher burden than "*good reason*" under CPR r.6.15, the point is addressed briefly. As regards the relevant principles, as set out in *Kuenyehia v International* [2006] EWCA Civ 21 at [26] per Neuberger LJ:

> *"First, it requires an exceptional case before the court will exercise its power to dispense with service under r 6.9, where the time limit for service of a claim form in r 7.5(2) has expired before service was effected in accordance with CPR Part 6. Secondly, and separately, the power is unlikely to be exercised save where C has either made an ineffective attempt in time to serve by one of the methods permitted by r 6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form"*

50. Here C did (on the hypothesis that service was invalid) make an effective attempt to serve in time by one of the methods permitted by Part 6. Further, insofar as necessary, for all the reasons set out above, I find that the circumstances are exceptional – they include the existence of an unpublished change of address, combined with the filing of an acknowledgment of service and D's failure to make any objection to service for the remaining month of validity of the claim form, leading C to believe that it had effected valid service. Accordingly, in the further alternative, had there been any defect in service I would have rectified it by the mechanism of a retrospective order dispensing with service.

51. It follows that if the court has jurisdiction to hear this dispute, there has been good service by one means or another.

D's application for a stay

52. I turn next to the question of construction and D's application for a stay under s.9 of the Arbitration Act 1996.

Proper construction of clauses 13.2 and 15.2 of the Lease

53. D seeks an order that the proceedings be stayed pursuant to s.9 of the Arbitration Act 1996, which provides as follows:

> *"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim)* ***in respect of a matter which under the agreement is to be referred to arbitration*** *may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. …*
>
> *(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."* (emphasis added)

54. D contends that the proceedings are in respect of a matter which is required under the Lease to be referred to arbitration. This is on the basis of cl.15.2 of the Lease, which provides as follows:

> *(a) "Each of Lessor and Lessee hereby agrees that any dispute arising out of or in connection with this Lease Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (the "**LCIA Rules**"), which rules are deemed to be incorporated by reference into this clause.*
>
> *(b) The number of arbitrators shall be three and the seat or legal place of arbitration shall be London, England. The English language shall be the language used in the arbitral proceedings and in any award. The arbitration shall be conducted in accordance with the LCIA rules and the arbitration law of the place of the seat of the arbitration.*
>
> *(c) The award of the arbitrators shall be final, binding and incontestable, and may be used as a basis for enforcement in the republic of Indonesia or elsewhere. The parties waive their respective rights to appeal against such final arbitration award under the laws of or other policies that have the force of law in the Republic of Indonesia or any other jurisdiction to the fullest extent permitted under applicable law."*

55. So *any* dispute is to be referred to arbitration, and for clarity it is provided that that will include even questions concerning the existence, validity or termination of the lease (no doubt to prevent any argument that the arbitration clause is not valid or no longer applicable).

56. C disagrees that the proceedings are required to be referred to arbitration by reason of cl.13.2 of the Lease which it contends provides an exception to cl.15.2(a). That provides as follows:

> *"**If an Event of Default occurs**, and for as long as it shall continue, Lessor may **at its option** (and without prejudice to any of its other rights under this Lease Agreement or that may arise by operation of Applicable Law), at any time thereafter:*
>
> *…*
>
> *(b) **proceed by appropriate court action or actions** to enforce performance of this Lease Agreement or to recover damages for the breach of this Lease Agreement;"* (emphasis added)

57. An Event of Default is defined in clause 13.1 and it includes the following default at sub-paragraph (a)

> *"Each of the following events will constitute an Event of Default and a repudiation of this lease agreement by lessee:*
>
> *"(a) **Non payment**. "Lessee (i) fails to pay the agreed value and all other amounts required under section 11.2 on the settlement date; (ii) [and this is relevant here] fails to make*

> *any payment of Basic Rent or Additional Rent within two business days after the date on which such payment is due, or (iii) fails to pay any other amount payable under this lease agreement within five business days after written notice from lessor that such amounts are due."*

58. Clause 13.1 also provides, in subparagraph (c), that an Event of Default occurs if the lessee fails to comply with *any other provision* of the lease agreement, and also provides an Event of Default occurs under subparagraph (j) if it becomes unlawful for the lessee to perform any of its material obligations under the lease, and an Event of Default occurs under subparagraph (m), if the existence, validity, enforceability or priority of the rights of the lessor in respect of the aircraft are challenged by the lessee.

59. C makes four points in support of its construction as follows.

(1) Clause 13.2 is granting the lessor rights and it is implicit in that the rights are additional rights that are being granted under this clause because they are without prejudice to its other rights under the lease or at law.

(2) Secondly, 13.2(b) then allows C to proceed by appropriate court action or actions. C emphasises the word *court*. It is permitting C to proceed by way of court litigation not arbitration.

(3) Third, it is allowing a claimant to proceed by way of court action or actions. The reference to "action" is indicative of the court process, not the arbitral process. In the context of arbitration, one much more naturally uses the word "arbitral proceedings" rather than "action". Further, the fact that the clause envisages the potential for more than one court action is, again, indicative of the court process. If it was referring to an arbitration, one would expect only one set of arbitral proceedings. It is quite common in lease enforcement claims to bring more than one court action because one set of proceedings may be brought in the jurisdiction in which the aircraft is physically located, for example, if it is necessary to ground or arrest the aircraft. In another set of proceedings, the substantive proceedings are brought in another jurisdiction, such as England, for the substantive claim for damages and other relief.

(4) Fourth, the clause then sets out the permitted purposes of the court action or actions, which are either to enforce performance of the lease or to recover damages. Again, this is widely drafted by reference to the types of claim which the lessor would most likely pursue on an event of default.

60. So taking these points together, C submits that clause 13.2(b) is a unilateral option to the lessor to litigate in court, by way of court action or actions upon an event of default and that option, it says, makes good commercial sense because it is understandable that on an event of default, the lessor would wish to have greater

flexibility as regards forum, due to the location of the aircraft or D's other assets or the availability of summary procedures.

61. D makes four main points in response. First, D contends (in essence) that the right in cl.13.2(b) is subject to cl.15.2(a), such that "*the only "appropriate" enforcement action that can be taken is to bring arbitral proceedings in accordance with that clause*". D further states that any interim or enforcement actions in support of the arbitration could be brought before the English court, as the seat of the arbitration is England.

62. Second, D contends that "*a more reasonable interpretation of the reference to "court action" in this context is that this was an erroneous remnant of the original Lessor's template lease agreement, which seems to have contemplated the law and courts of New York, as evidenced by the reference to New York law in clause 2.1(k) of the Lease Agreement"* Furthermore, Mr. Taylor submits that the reference to *"court*" is a slip.

63. Third, D complains that C's interpretation "*presupposes that which [C] is required to prove*" and "*is circular*", since it requires C to prove that there is an Event of Default, which is one of the issues apparently to be determined in the proceedings.

64. Fourth, D refers to the fact that claims by C for rescission or a declaration of nullity, or claims by D, do not fall within the scope of the option to litigate under cl.13.2(b). In this respect, D notes that under cl.13.2(b) C is entitled to proceed by appropriate court action "*to enforce performance of this Lease Agreement or to recover damages for breach*"; and says that claims for rescission or for a nullity are not appropriate actions for such purposes.

65. On any view clause 13.2 is not happily worded. However, in my judgment, the proper construction of the Lease is as follows. How do clauses 13.2 and 15.2 inter-relate?

66. The first point to note is that Clause 15.2 is not said to be *subject to* clause 13.2 as one would expect to see if 13.2 was carving out a right on the part of the lessor at its option to take certain disputes to court. One would particularly expect to see that where the carve out is so extensive, namely in respect of any Event of Default, which is widely defined in clause 13.1 and includes, for example, a breach of <u>any</u> provision of the Lease Agreement (13.1.(c)); or false representations or warranties (13.1(d)). Moreover, clause 13.1(j) provides that there is an Event of Default if it becomes unlawful for the Lessee to perform its material obligations under the Lease; and likewise, clause 13.1(m) provides that there is an Event of Default if the Lessee challenges the existence, validity and enforceability of the rights of the Lessor. And yet, under clause 15.2 the parties have agreed to arbitrate any question concerning the existence, validity or termination of the Lease.

67. An Event of Default on the part of D gives rise to various rights on the part of C. I consider that Clause 13.2 is simply a clause which sets out the <u>rights</u> of C <u>if</u> an Event of Default occurs. The rights are various and consist of each of those described in sub-clauses (a)-(e). They include, therefore, at (b), the right on the part of C to proceed by appropriate court action or actions to enforce performance of the Lease Agreement or to recover damages for breach of the Lease Agreement. In my judgment, all that clause 13.2 is doing is setting out the options that are available to C – its "rights" - in

the event of a default by D. I consider that what the parties objectively intended was to refer any dispute to arbitration and, in clause 13.2, they were intending to provide that in the case of an Event of Default, C would have a series of rights, which included proceeding to arbitration to enforce performance of the lease or to recover damages, and that would not prevent it from seeking the other items of relief listed in clause 13.2. I do not think that this renders 13.2(b) redundant: it clarified this fact.

68. Mr Cutress QC says that these are additional rights without prejudice to C's other rights, and one of these additional rights is the right to proceed in court, by court action. Whether they are additional or not (and for what it is worth the clause is headed "Rights" not "Additional Rights"), the purpose of this clause is, in my judgment, to make clear that C may adopt any of these courses of action, regardless of whether they arise in any event under applicable law. In other words, as well as proceeding by "appropriate court action" to enforce performance of the Lease or to recover damages for breach under clause 15.2, which two courses of action naturally arise in the case of an Event of Default, C may at its option also terminate the lease; take possession of the aircraft; sell the aircraft; de-register the aircraft.

69. In this context, in order to give the contract a business common sense construction, I consider that "court action" in clause 13.2(b) must reasonably have been intended by the parties to mean action before the London *Court* of International arbitration, that is action within clause 15.2.

70. Some support for that construction is also provided by clause 2.1(k), whereby D represents and warrants to C that "*The choice by [D] of the law of England and Wales to govern this lease agreement as set out in section 15.1 and the submission by [D] to the non-exclusive jurisdiction of the courts as set out in section 15.2 are valid and binding."*

71. Mr. Cutress QC submits that 2.1(k) in fact doesn't support a case that "courts" is referring to LCIA arbitration. Rather, what it is referring to is the non-exclusive jurisdiction of the English courts as the seat of the arbitration. Clause 15.2(b) provides that the seat of the arbitration is England. So Mr. Cutress QC says the reference to non-exclusive is a reference to the English courts as the seat of the arbitration and this also reflects the fact that the seat is not exclusive, not least because clause 13.2(b) entitles the lessor to sue in court upon an event of default. So that is why, he suggests, it is the non-exclusive jurisdiction of the court. He adds that the reference to courts makes clear that this is not a reference to the Court of Arbitration, singular.

72. As I have said, the relevant clauses of the lease are not happily worded. However, I do consider that clause 2.1(k) throws some light on what was objectively intended. Clause 15.2 is a consent to jurisdiction clause – both parties consent to submit to the jurisdiction of the London Court of International Arbitration. The decision of that court is final and incontestable. That submission is said to be valid and binding. True it is that the clause refers to courts; but the fact that clause 15.2 only refers to one court does not seem to me to matter. The greater embraces the lesser. True it is that there is a reference to non-exclusive jurisdiction in clause 2.1(k) but whether exclusive or non-exclusive, the reference in that clause is to the submission to the jurisdiction of the courts identified in 15.2. That is a reference to the Court of arbitration, whose decision is agreed to be final and binding by the parties.

73. Perhaps most importantly, were the Claimant's construction of clause 13.2 and 15.2 to be adopted, it is difficult to see how clause 13.2 would operate. 13.2 only applies "*If an Event of Default occurs*". It does not say "*If an Event of Default is alleged*". If there is a dispute as to whether an Event of Default has occurred, that is something which must surely be resolved under clause 15.2. I do not accept the argument of Mr. Cutress QC that whether an event of default has occurred or not is a jurisdictional fact for the court to determine, on a "*Who has the better of the argument*" basis. That would be to usurp the role of the arbitrator, because whether an Event of Default has or has not occurred is plainly a "dispute" within the meaning of clause 15.2.

74. Indeed, if C's construction were correct, and there was a dispute about whether or not an Event of Default had occurred, there could potentially be a lengthy trial of many disputed issues, thereby emasculating the arbitration agreement. And what if in determining whether an Event of Default had occurred, the Court was required to determine other, disputed events, which would otherwise require to be determined under clause 15.2. What is the court then to do? For example, if D argued that no Event of Default had occurred because the lease is invalid as a matter of competition law; or because the lease had already terminated? These are issues which fall expressly within clause 15.2. Does the court have to adjourn the proceedings before it and refer the matter to arbitration?

75. And, importantly, what of cross-claims by a Defendant? A Defendant might say that he has a claim in damages which exceeds C's claim. Does he have to bring that claim in arbitration, whilst C obtains its damages in a High Court action? This is likely a recipe for confusion, cost and delay.

76. There may be also be sub-issues which require determination in the court action which fall within the remit of the arbitrators. How would that be resolved? Would the court have to stay its proceedings and refer those issues to the arbitrators? This construction runs entirely contrary to the one-stop shop construction of such arbitration clauses advocated by the House of Lords in *Fiona Trust* v *Privalov* [2007] UKHL 40.

77. Moreover, if it is for the arbitrators to decide whether there is an event of default or not it, as I find it is, it makes no sense for the contract then to provide a right to the lessor to go to court to enforce the lease or obtain damages for breach rather than the arbitrators themselves providing that remedy.

78. I also agree with D's submission that claims by C for rescission or a declaration of nullity, do not fall within the scope of the option to litigate under cl.13.2(b). In this respect, D notes that under cl.13.2(b) C is entitled to proceed by appropriate court action "*to enforce performance of this Lease Agreement or to recover damages for breach*"; and yet claims for rescission or for a nullity are not appropriate actions for such purposes. That seems to me to be an unlikely result, particularly applying a *Fiona Trust* construction to this clause. I have already referred to the significance of this in the context of clauses 13.1 (j) and (m). Mr. Cutress's only response to this point was to say that it is unlikely that C would wish to avail itself of those remedies, but I do not see why that would necessarily always be so and will depend upon the facts of the particular case.

79. Mr. Cutress QC also submits that the reference to court action or actions support his argument that 13.2 is focusing on court proceedings. I do not accept that submission. The wording is undoubtedly loose. However, in the overall scheme of the lease, where the word "court" is used loosely (possibly as D says by way of hangover from a standard form or different draft), I consider it very unlikely that the parties intended to carve out certain remedies in this way from the arbitration clause. In any event, in the same way that a party might wish to bring more than one court action, it might wish to bring more than one set of arbitration proceedings in respect of, for example, different events of default, albeit that they may ultimately come to be consolidated in one arbitral reference.

80. Although it is not necessary to rely upon the point, I also note that the original lease contained an identical clause 15.2, 13.2(b) and a reference in the choice of law clause at 2.1(k) to the non-exclusive jurisdiction of the courts as set out in clause 15.2; the parties changed the governing law from New York to English law in the novated version of clause 2.1(k) but they left in that clause the reference to the "courts" as set out in clause 15.2.

81. I should add that I do, however, agree with Mr. Cutress QC that it cannot be the case that the appropriate court action being referred to in clause 13.2 is interim or enforcement action in support of an arbitration, as the clause is not drafted in such restrictive terms, but rather confers the much broader right to litigate "*to enforce performance of this Lease Agreement or to recover damages for the breach of this Lease Agreement*".

82. Finally, as I have set out, Mr. Taylor submits that "*a more reasonable interpretation of the reference to "court action" in this context is that this was an erroneous remnant of the original Lessor's template lease agreement, which seems to have contemplated the law and courts of New York, as evidenced by the reference to New York law in clause 2.1(k) of the Lease Agreement*". Similarly, he says, the reference to "*court"* is a slip. As I have said, I do consider that what the parties objectively intended was to refer *any* dispute to arbitration and, in clause 13.2, they were intending to confirm that in the case of an Event of Default, C would have all of the rights set out in that clause, which included proceeding to arbitration to enforce performance of the lease or to recover damages, and that would not prevent it from seeking the other items of relief listed in clause 13.2. I would therefore have been prepared, if necessary, to correct clause 13.2(b) to read "proceed by way of arbitration under clause 15.2", applying the approach in Lewsion on Interpretation of Contracts, clause 1.33 and 1.34, namely that in exceptional circumstances the court may conclude that the parties have used the wrong words; if it is clear what the error is, and the nature of the correction required, the court may correct it[15]). However, I do not consider that it is necessary to do so for the reasons that I have given.

Dispute capable of being referred to arbitration?

83. This brings me to the issue of whether or not there is a dispute capable of being referred to arbitration.

[15] Applying *ICS v West Bromwich* [1998] 1 WLR 896 and Lord Hoffmann's 5th principle; and *Chartbrook v Persimmon* [2009] AC 1101.

84. I do consider that back in correspondence back in April 2020 D impliedly admitted that monies are owed by it to C for Basic Rent and Additional Rent. It has never purported to put forward any defence in correspondence. It has never suggested that it disputed the quantum of the claim. The furthest D goes in its skeleton is a bare assertion that D "*will defend*" the allegation of an Event of Default in the substantive proceedings. This gives rise to an argument that it was open to C to bring these proceedings, as there is no dispute capable of being arbitrated.

85. However, whilst I find that D has impliedly admitted that sums are due and owing to C by way of Basic and Additional Rent and that it said, back in April 2020, that it was not its intention not to pay C, the fact is that it has failed to pay the majority of the monies due and it is now before the court, telling it that it will defend the claim and that it is now not going to pay. In these circumstances, is there *a dispute*?

86. This requires an analysis of three authorities: *Halki Shipping v Sopex* [1998] 1 WLR 726; *Exfin Shipping v Tolani* [2006] EWHC 1090 and *PvQ* [2018] EWHC 1399. Mr Cutress QC urges me to find that *Exfin* was wrongly decided in the light of *Halki Shipping*.

87. In *Halki Shipping* the Court of Appeal was concerned with the following issue:

> *"whether it is still open to a plaintiff to bring [summary judgment] proceedings to enforce a claim to which D has no arguable defence, where the claim arises under a contract which contains an arbitration clause."*

88. The case concerned a claim for demurrage under a charterparty for $517,000, and the defendants did not admit liability. The question was therefore, as Henry LJ recorded at 746A:

> *"whether there is a dispute within the meaning of the arbitration clause when the charterers refuse to admit and refuse to pay the amount claimed."*

89. This was a case therefore where, although the defendant had no arguable defence, it refused to admit, and it refused to pay the claim.

90. The rival submissions were recorded by Hirst LJ, who dissented, at 731 G-H as follows:

> *"Mr. Hamblen [for the Claimant owners] submitted that the critical question is what is meant by "dispute," which, as here, and as in most arbitration clauses, is under section 9 the "matter which under the agreement is to be referred to arbitration." Relying on the decision of the House of Lords in Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H. [1977] 1 W.L.R. 713, and on a number of subsequent Court of Appeal decisions, he submitted that it is settled by well established and binding authority that "dispute" means a genuine or real dispute, and that a claim which is indisputable because there is no arguable defence does not create a dispute*

> *at all. It follows, he submitted, that claims to which there is no arguable defence are outwith the scope of section 9, and are therefore properly the subject matter of court proceedings under Order 14, notwithstanding the omission from section 9 of the 1975 qualification.*
>
> *Mr. Waller on the other hand [for the Defendant charterers] submitted that "dispute" means any disputed claim, and therefore covers any claim which is not admitted as due and payable, thus leaving no scope whatsoever for court proceedings under Order 14 save where the defendant has made a positive admission. He relied primarily on a decision of Saville J. in Hayter v. Nelson [1990] 2 Lloyd's Rep. 265 , which he portrayed as a landmark decision; in that case it was held that the word "dispute" in an arbitration clause should be given its ordinary meaning, and was not confined to cases where it could not then and there be determined whether one party or the other was in the right, so that the fact that a person has no arguable grounds for disputing something does not mean in ordinary language that he is not disputing it."*

91. The Judge referred at 735G-H to *Ellerine v Klinger* [1982] 1 WLR 1375, which concerned an arbitration clause under section 1(1) of the 1975 Act. Lord Templeman, giving the leading judgment, said this:

> "*Again by the light of nature, it seems to me that section 1(1) is not limited either in content or in subject matter; that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say 'I don't agree.' If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation"*

92. The Judge then referred at 736B-C to the judgment of Kerr J in *Tradax v Cerrahogullari* [1981] 3 All ER 344 at 350:

> *"Where an arbitration clause contains a time limit barring all claims unless an arbitrator is appointed within the limited time, it seems to be that the time limit can only be ignored on the ground that there is no dispute between the parties if the claim has been admitted to be due and payable. Such an admission would, in effect, amount to an agreement to pay the claim, and there would then clearly be no further basis for referring it to arbitration or treating it as time-barred if no arbitrator is appointed. But if, as here, a claim is made and is neither admitted nor disputed, but simply ignored, then I think that the time limit clearly applies and that the claimant is obliged*

> *(subject to any possible extension of time) to appoint an arbitrator within the limited time."*

93. Henry LJ and Swinton Thomas LJ were in the majority in the Court of Appeal. Both Judges relied upon the fact that the 1996 Arbitration Act (with which they were concerned) effected a change in the law from the position which obtained under s. 1(1) of the Arbitration Act 1975. Under the 1975 Act one of the grounds for refusing a stay of legal proceedings was where there was an arbitration agreement was where the court was satisfied that "*there is not in fact any dispute between the parties with regard to the matter agreed to be referred*". Under section 9 of the 1996 Act, however, it is simply provided that:

> *"A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."*

94. The reference to there not being *in fact* any dispute does not appear in the 1996 Act, and the Court considered the change to be significant. As Swinton Thomas LJ stated at 762C, "*The important distinction between section 9 of the Act of 1996 and section 1(1) of the Act of 1975 is the omission of the words "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred." Accordingly the court no longer has to consider whether there is in fact any dispute between the parties but only where there is a dispute within the arbitration clause of the agreement, and the cases which turn on that distinction are now irrelevant."*

95. In particular, both Henry LJ and Swinton Thomas LJ approved a particular passage in the judgment of Clark J at first instance in Halki, to which Henry LJ referred at 753C-D as follows:

> *"In Ellerine Bros. (Pty.) Ltd. v. Klinger the Court of Appeal was also considering a question of construction of an arbitration agreement, in which it was agreed that all disputes or differences whatsoever should be referred to arbitration. The plaintiffs claimed an account. The defendants had simply done nothing. The Court of Appeal expressly followed the decision in [Tradax Internacional S.A. v. Cerrahogullari T.A.S. [1981] 3 All E.R. 344] and held that silence did not mean consent and that, as Kerr J. said, until the defendant admits that a sum is due and payable there is a dispute within the meaning of the arbitration clause.* ***Even in such a case I can see an argument for saying that a claimant would be entitled to an award if the respondent then refused to pay.*** *But, however that might be, the Ellerine Bros . case is authority for the proposition that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration. It follows that there is binding Court of Appeal*

> *authority in favour of the defendant's case on construction of the clause."*
>
> (emphasis added)

96. Swinton Thomas LJ again referred to the question before the court at 755H, and the argument which the court rejected at 756A-C. It is in that context that he held at 761F-G: "*In my view, following those cases, Mr. Waller's submission is correct, and in the words of Templeman L.J. in Ellerine Bros. (Pty.) Ltd. v. Klinger [1982] 1 W.L.R. 1375 , 1383H there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable."*

97. The Court of Appeal accordingly decided that even if no arguable defence is advanced by the defendant, but he simply refuses to pay the claim, there is a dispute for the purposes of the arbitration clause and section 9 of the 1996 Act. But what the court did not say, as is apparent from the fact that the passage from Clark J's judgment was approved by it, is that if a defendant admits that a sum is due and payable, but then thereafter refuses to pay it, that there is no dispute for the purposes of an arbitration clause such as clause 15.2 in the present case.

98. Before leaving this case, it is worth noting at 757D-F, Swinton Thomas LJ cited with approval Templeman LJ's observations in *Ellerine* which are pertinent in this case as demonstrating the kind of problems which would arise on C's construction of clause 13.2.

99. When *Halki Shipping* is properly understood as above, the decision of Langley J in *Exfin Shipping* is unsurprising. That was a wholly unmeritorious application by the charterers. As the Judge recorded in paragraph 5 of his judgment, the applicant's argument was as follows:

> *"The Charterers' submission is, and was, that there was no dispute because they had admitted their liability, and the amount of the claim, and the due date for payment and the fact that payment had not been made. All they had not done, of course, was pay."*

100. This is therefore the situation that Clark J envisaged in the passage of his judgment in *Halki Shipping* set out above, and it is the situation with which this court is concerned.

101. At paragraphs 7-11 of his judgment Langley J pointed out the difficulties with the charterers' argument in determining that there was clearly a dispute capable of being referred to arbitration. In particular at paragraph 11 he stated:

> *"In The Halki, at first instance, [1998] 1 Lloyd's Rep 49, Clarke J, referring to it making no commercial sense to conclude that arbitrators only had jurisdiction over those parts of a claim which were defendable, decided that it made more sense to hold that the arbitration clause there (materially the same as the present clause) was intended to give the arbitrators jurisdiction over all claims which either party had refused to*

> *pay. Henry LJ, in the Court of Appeal (at page 478) quoted that passage with approval. So too did Swinton Thomas LJ (at page 484). Mr Mocatta relied upon it. The Halki was a case of refusal to admit and refusal to pay. Mr Aswani, on behalf of Charterers, sought to distinguish the case on that basis. But I see no good reason why the one should not be characterised as a dispute as much as the other. It would be remarkable if parties had chosen to address the issue of jurisdiction by reference to whether non-payment was due to a failure to admit a valid claim rather than a failure to pay it."*

102. I respectfully agree with this analysis. It follows in my judgment that there is no inconsistency between *Halki* and *Exfin*, and I follow the reasoning of Langley J in *Exfin*.

103. Finally, the reasoning in *Exfin* was also approved by Sir Richard Field in *P v Q* at paragraph 52 of his judgment.

104. It follows that by reason of D's refusal to pay in this case, which may very well be wholly unmeritorious, there is nonetheless a dispute within the meaning of the arbitration clause.

105. This conclusion is fortified by the fact that C also seeks an indemnity pursuant to clause 13.3 of the lease, which was not foreshadowed by it in inter partes correspondence, and as Mr. Taylor points out is therefore not admitted and he says bound to be contested. Mr. Cutress QC says that the claim to an indemnity is either a claim to damages for breach of the agreement or an action to enforce performance of the lease. I disagree. I do not consider this can be characterised as an action to enforce performance of the Lease and nor do I consider it can properly be characterised as a claim for damages for breach of the agreement. It is not a claim for breach; it is a claim to be indemnified under the terms of clause 13.3. Indeed, it is no doubt for this reason that it is pleaded by Mr. Cutress QC as an alternative to damages in the prayer for relief in the draft Particulars of Claim. It follows that this element of the claim does not fall within clause 13.2 at all and on any view must be referred to arbitration. This highlights the problem with C's construction, as then its claim will be proceeding in two different fora, a result that the parties surely cannot have intended. One can see very substantial disputes potentially arising under clause 13.3.

106. Nor do I accept Mr. Cutress's fall-back position in this regard, that the Claimant is not yet advancing a claim for an indemnity in paragraph 20 of the draft Particulars of Claim. That paragraph states that "*Further, the Claimant is entitled to and will claim an indemnity from garuda for any loss, damage, expense, cost or liability … suffered or incurred by the Claimant directly or indirectly as a result of the matters set out in clause 10.1(a)(i) of the Lease; and/or … sustained or incurred directly or indirectly by the Claimant as a result of the Events of Default*…"

107. The Claimant positively asserts that it is entitled to and will claim an indemnity from the Defendant. It must, presumably, have something in mind in order for it to wish to plead this aspect of its claim. Moreover, clause 10.1(a)(i) is not an Event of Default and this aspect of the claim would undoubtedly fall within the scope of the arbitration agreement in clause 15.2. The Defendant has not admitted that the Claimant is entitled

to any such indemnity; indeed, it has not even been asked to confirm that it will afford any indemnity to the Claimant.

108. In all the circumstances, I grant the Defendant a stay of these proceedings under section 9 of the Arbitration Act 1996 in favour of arbitration under clause 15.2 of the Lease.

109. Finally, I add that, whilst not as quick as court proceedings, it is nonetheless possible nowadays for a party to an LCIA arbitration to obtain an expedited constitution of a panel under the LCIA Rules, article 9A, and a relatively speedy award.

D's application to stay English proceedings on ground of forum non conveniens

110. I turn finally to the Defendant's application to stay on *forum non conveniens* grounds. This would only arise if C were right on its construction of the lease, which I have found it is not. I shall therefore deal with it relatively briefly in deference to the parties' arguments on the point.

111. In my judgment this application is hopeless.

112. In order to establish this ground for a stay:

(1) "*[T]he burden resting on D is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum*": *Spiliada v. Cansulex* [1987] AC 460 at 477.

(2) The appropriate forum is where the case may be tried more suitably for the interests of all the parties and the ends of justice (*ibid* at 476C).

(3) The highest D puts its case is that "*[s]everal factors link the present case to Indonesia*". The existence of mere links is not sufficient to establish that Indonesia is clearly a more appropriate forum than England.

(4) It is also incumbent upon a defendant seeking to stay proceedings on forum non conveniens grounds to *"identify the issues concerned and to state as clearly as possible how they arise or may arise in the proceedings*": *Limit v PDV* [2005] EWCA Civ 383 at [72] per Clarke LJ.[16] Thus, as Mr. Cutress QC submits, to make good the case for a stay on this ground, the issues must be identified and then the appropriateness of the competing fora for the trial of those issues considered.[17]

(5) The court will have regard to factors including convenience or expense (such as availability of witnesses), but also to other factors such as the

[16] This was said in the context of a defendant seeking to set aside service out, notwithstanding the fact that in such a case *C* has the burden of proving that England is clearly the more appropriate forum. The principle applies *a fortiori* in a case where D seeks a stay on *forum non conveniens* grounds, since D then has the burden of proving another forum is clearly and distinctly more appropriate.
[17] *Sawyer v Atari* [2005] EWHC 2351 at [54] per Lawrence Collins J.

law governing the relevant transaction and the places where the parties reside or carry on business (*ibid* at 478A-B).

113. D contends that Indonesia is clearly or distinctly more appropriate than England.[18] However, it has failed to discharge its burden of showing that another forum is clearly or distinctly more appropriate in circumstances where it has not identified any defence to the claim and accordingly any particular disputed *issues* that would more appropriately be tried elsewhere. Indeed, it has not identified any such issues in the two witness statements served on its behalf.

114. For this reason alone, the application to stay on *forum non conveniens* must fail: D has not identified any particular issues which it would be clearly more appropriate to try elsewhere. Without an articulation of the issues which might arise, all that the court is left with are the following factors:

(1) D has a place of business in the UK (namely, at the Hounslow Address), despite the fact that D is incorporated in Indonesia. In contrast, C does not have any place of business in Indonesia.[19]

(2) The Lease is governed by English law.[20] No other law has been shown to be relevant.

(3) The Lease and other Operative Documents are all in English.[21]

(4) The correspondence between the parties is all (or almost all) in English: see, for example, the correspondence in which D acknowledged the payments then overdue and proposed a payment plan.[22]

(5) The correspondence shows D's representatives corresponding in English. In contrast, no one representing C can speak in Bahasa.[23]

(6) The English courts are now used to resolving and regularly resolve disputes remotely, with the result that any dispute can be determined notwithstanding any further lockdowns here or in Indonesia or any difficulty in travel. D has not adduced any evidence as to the operation of the Indonesian courts during the pandemic.

(7) Whilst C is a French SPV, C's documents and potential witnesses are based predominantly in Ireland. It is more practically convenient for C for the case to be heard in England than Indonesia.[24]

(8) It is notable that despite the burden on it of showing that Indonesia is clearly or distinctly more appropriate, even D does not assert that practical matters make Indonesia a more appropriate forum. Rather, at Allen-2 [39(a)] it asserts (emphasis added):

[18] Allen-1 [24]-[25].
[19] Mack-1 [40(h)].
[20] Cl.15.1.
[21] Mack-1 [40(b)].
[22] See also Mack-1 [40(c)].
[23] Mack-1 [40(d)].
[24] This appears to be accepted at Allen-2 [39(a)].

> *"The first category is practical matters (translation of documents, interpreters, location of documents).* ***These issues are neutral as to jurisdiction****; whilst it may be more practically convenient for C (a French entity) if the claim were to be heard in England, it would be more practically convenient for D (an Indonesian entity) for it to be heard in Indonesia."*

115. The remaining factors put forward by D do not assist it:

(1) The Aircraft's state of registration and habitual base is Indonesia. However, these matters are irrelevant: D has not shown that any of these matters are relevant to any issue that arises in relation to the proceedings.

(2) The Aircraft is currently located in Indonesia and subject to Indonesian law regarding tax/customs and airworthiness. However, no issue regarding the tax/customs and airworthiness (still less Indonesian law in relation to such matters) or the Aircraft's location is said to arise, so even if this point is correct, it is irrelevant. The best D is able to say in its skeleton is to speculate (for the first time) that such matters "*may*" be relevant to C's claim for an indemnity. However, there is no evidence whatsoever to establish that any such issues do arise in relation to the indemnity (or if so, what precisely those issues are).

116. In the circumstances, I would have dismissed D's application to stay on *forum non conveniens* grounds.

117. Finally, I should mention that at paragraphs 17-21 of its Skeleton argument, D takes issue with C's reliance upon expert evidence in support of certain other factors which it says makes England the proper forum ("the **MKK Letter**"). I accept those submissions: no permission was sought or obtained to rely upon this evidence (as it should have been) and C is therefore unable to rely upon it: see Baker J in *BB Energy v Al Amoudi* [2018] EWHC 2595 at [49].