IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO G 188 of 2015

BETWEEN

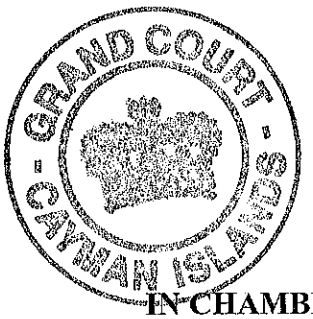
WILLIAM MCKEEVA BUSH OBE

Plaintiff

AND

(1) **DAVID BAINES OBE, COMMISSIONER OF POLICE**
(2) **DUNCAN TAYLOR CBE**
(3) **THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

Defendants



IN CHAMBERS

Appearances: **Mr. G. Cox Q.C. instructed by Mr. I Huskisson of Travers Thorp Alberga for the Plaintiff.**
Mr. M. Griffiths Q.C. instructed by Mr. D Schofield on behalf of the Attorney General's Chambers, representing the Second Defendant.

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **21 and 22 July 2016**

Draft Judgment Circulated: **05 October 2016**

Judgment Delivered: **11 October 2016**

HEADNOTE

Civil Practice and Procedure – Application to set aside ex parte Order for Substituted Service on the grounds of Non-disclosure – Whether service on diplomat by Courier or email at British Embassy in Mexico proper service – Vienna Convention 1961 - Hague Service Convention – Application for extension of time.

JUDGMENT

1. The Plaintiff, William McKeeva Bush ("Mr. Bush") filed a Writ of Summons on 21 October 2015 with a supporting Statement of Claim naming as the First Defendant David Baines, Commissioner of Police ("Mr. Baines"), the Second Defendant Duncan Taylor ("Mr. Taylor") and the Third Defendant, the Attorney General of the Cayman Islands ("the AG"). The First and Third Defendants are both represented by the Attorney General's chambers.

2. Mr. Bush was at the time of commencement of these proceedings, the current Leader of the Opposition and a Member of the Legislative Assembly. Mr. Baines was at the time of commencement of this action, the Commissioner of the Royal Cayman Islands Police Service. Mr. Taylor, to whom this application relates, is a British Diplomat who was the Governor to the Cayman Islands between January 2010 and September 2013 and is now the British Ambassador to Mexico.

3. There are a number of limbs to Mr. Bush's claim, including a claim for malicious prosecution, that the Defendants conspired to cause him to lose political office as Premier of the Cayman Islands, and that in so doing Mr. Baines and Mr. Taylor breached their respective constitutional duties as Commissioner of Police of the RCIPS and as Governor respectively.

4. On 27 January 2016 Mr. Bush's Attorneys-at-Law filed an Ex-parte Summons seeking leave to serve the Writ of Summons and Statement of Claim on Mr. Taylor by way of substituted service in a number of methods set out in the Summons. In his Affidavit in support of the application, filed 27 January 2016, at paragraphs 6-8 (inclusive) Mr. Bush states:-

> "***Leave to serve out***
>
> *6. The Writ was filed in the Grand Court on 21 October 2015. The Writ was hand delivered in an envelope addressed to Mr. Taylor*

care of Anne-Marie Rambarran, Crown Counsel, at the Government Administration Building in George Town on 21 October 2015. A letter dated 22 October 2015 was sent by the AG's Chambers advising that they were unable to accept service on behalf of the Second Defendant, Mr. Taylor, who was outside the jurisdiction and did not instruct them. The AG's Chambers have also since written another letter in which we note, at that time, that they were in the process of retaining external Counsel to represent Mr. Baines and the AG.

7. *I believe it would be practically impossible to serve Mr. Taylor personally in Mexico. I am not aware of where Mr. Taylor resides and doubt that this information would be available or that security would allow for a process server to deliver documents to him personally there. As the British Ambassador, I imagine he travels extensively.*

8. *I therefore ask that the Court grant me leave to serve the Writ by way of substituted service by the following means, all of which should result in the Writ being brought to the attention of Mr. Taylor by:....(ii) delivery by Fedex courier to Mr. Taylor at the British Embassy in Mexico City at.....(iii) email to the email address for the British Embassy in Mexico is available on the UK Government's website and is ukinmexico@fco.gov.uk;....*"

5. Following the hearing of the Application on 2nd March 2016, an Order was made by Williams J in the following terms:

> "1. *Pursuant to GCR Order 65, rule 4 the Plaintiff be granted leave to serve the Writ of Summons and Statement of Claim and any further applications, pleadings or orders on the Second Defendant out of the jurisdiction by way of substituted service by:*

a. *Delivery by FedEx courier addressed to Mr. Taylor at the British Embassy in Mexico City at Rio Lerma, No. 71, Co. Cuauhtemoc, CP. 06500;*

b. *By email to ukinmexico@fco.gov.uk or any alternative address provided to the Plaintiff in response to the email annexed to this order.*

2. *The Second Defendant shall, after the service of the Writ and Statement of Claim in the manner provided for in paragraphs 1. A. and 1. B. above, have 28 days to acknowledge service.*

3. *The Plaintiff's costs of and occasioned by this application be in the cause."*

THE APPLICATIONS

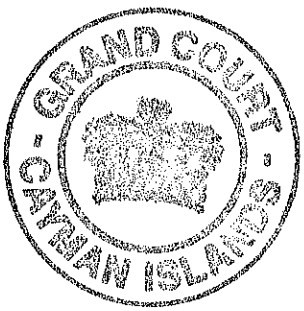
6. Mr. Taylor makes two applications to the Court. The first is to set aside the ex parte Order, as set out in the Summons filed on 13 May 2016 as follows:

> *"1. An order that the ex parte Order of the Honourable Mr. Justice Williams, dated 2 March 2016 ("the ex parte Order") be discharged under Grand Court Rules Order 12 rule 8 and/or on the grounds of failure to make full and frank disclosure of material facts and law to the Court at the ex parte hearing on 2 March 2016.*
>
> *2. An order setting aside service of the Writ and Statement of Claim and other documents on the Second Defendant pursuant to the ex parte Order.*
>
> *3. An order declaring that the Writ and Statement of Claim have not been duly served on the Second Defendant.*
>
> *4. An order that the costs of and occasioned by the ex parte Order and the costs of and occasioned by this Summons be the Second Defendant's costs in any event, to be taxed if not agreed on the indemnity basis and paid forthwith.*

5. *Further or other relief."*

7. Jacqueline Wilson, the learned Solicitor General, filed an Affidavit on 22 April 2016 in support of the application by Mr. Taylor to set aside the Order of Justice Williams dated 2 March 2016 and the related relief, and seeking indemnity costs. In her Affidavit Ms. Wilson states as follows:-

"*12. It does not appear that the Judge's attention was drawn to the Hague Convention which is referred to in the notes to the 1999 Supreme Court Practice. The Hague Convention (full name: The Convention of the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters) came into effect in 1969.*

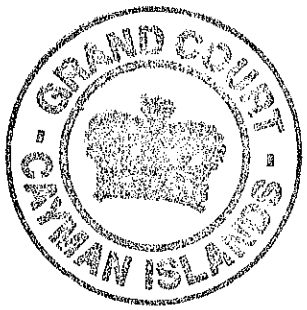


13. The Hague Convention was ratified by the United Kingdom in 1967 and came into force for the United Kingdom on 10 February 1969. It came into force for the Cayman Islands on 19 July 1970. It was ratified by Mexico in 1999 and came into force for Mexico on 1 June 2000.

14. The Hague Conference on Private International Law website at www.hcch.net contains details of Mexico's central authority (for the purpose of the Hague Convention) and of Mexico's responses to and derogations from the Hague Convention. This is now produced and shown to me marked "JW8".

15. The Hague Convention is not included in the Bundle for the hearing on 2 March. It is not referred to in the Plaintiff's Skeleton Argument. It is not mentioned in the File Note of the hearing and it is not mentioned in the Judgment.

16. No effort has been made in the Plaintiff's application, or in the Order which was obtained ex parte as a result of it, either to follow the letters rogatory procedure for overseas service usually followed in the case of non-parties to the Hague Convention, or to follow the provisions of the Hague Convention in relation to service.



17. *It does not appear that the Judge's attention was drawn to the mandatory provisions of Grand Court Rule Order 11 rule 5(3)(a) which requires service of a Writ outside the jurisdiction to be performed "in accordance with the law of the country in which service is effected".*

18. *It does not appear that any evidence was put before the Judge, or that any evidence had been sought or obtained by the Plaintiff, of the law of service of proceedings in Mexico.*

19. *The methods of service proposed by the Plaintiff in the ex parte summons, and the methods of service provided for in the ex parte Order, are not compliant with the law of Mexico. I base this statement on information from Mr. Xavier Cortina Cortina, whose evidence of Mexican law and procedure will be filed separately.*

20. .....

21. *In addition, there is the question of diplomatic immunity, including the diplomatic inviolability of the Embassy premises, and of the Second Defendant as a serving ambassador, and his residence. The Plaintiff's attorneys know that the Second Defendant is the United Kingdom Ambassador to Mexico and this is referred to (for example) in paragraph 6 of their skeleton argument*

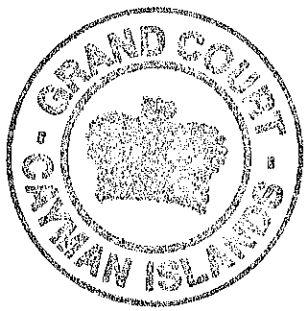
22. .....

23. .....

24. *I am informed by the Accreditation and Immunities Officer in the International Human Resources Team of the Foreign and Commonwealth Office that the proper way to serve a British Diplomat in Mexico would be through the Mexican Ministry of Foreign Affairs. Mission premises, diplomats and each diplomat's private residence are accorded inviolability by Articles 22, 29 and 30 of the 1961 Convention. That inviolability would be breached by serving process in person or by post on those properties....."*

8. As a result of mishaps which are explained in the Second Affidavit of Ms. Wilson and the First Affidavit of Douglas Schofield, this Summons was believed to have been filed in time on 22 April 2016 with the supporting Affidavit evidence. The Summons turned out not to have been filed and served on that date. Ms. Wilson's second Affidavit of 20 June 2016 explains *"this Application is made upon the ground that the late filing of the Summons occurred solely by reason of inadvertent error, in the circumstances which I shall explain below, which has caused no prejudice to the Plaintiff. I apologise to the Court and to the parties for this error."*

9. When this was discovered a duplicate Summons was issued and served on 13 May 2016 which was 14 days after the deadline for service under GCR Order 12 rule 8(1). A second Summons was therefore filed on 20 June 2016 seeking the following:-



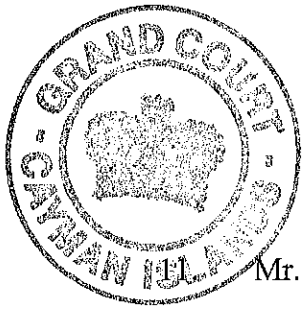
"1. An order pursuant to Order 3 rule 5 for extension of time for filing and service of the Second Defendant's application under Grand Court Rules Order 12 rule 8 so that the Second Defendant's summons filed and dated 13 May 2016 is within time.

2. An order that any costs of and occasioned by the within application shall be costs in the cause."

THE SUBMISSIONS ON BEHALF OF MR. TAYLOR

Second Defendant's application to set aside

10. Mr. Griffiths QC made submissions on behalf of Mr. Taylor, in respect of both applications. Mr. Bush's application was for substituted service and was made ex parte. Learned Queen's Counsel submitted that there was a failure to make full and frank disclosure. As a result, the Order made ex parte was not compliant with the Grand Court Rules, was not compliant with foreign law (of which no disclosure was made to the Grand Court), was not compliant with the Hague Convention, and was not compliant with the 1961 Vienna Convention. It should not therefore, he argued, have been made. It should be set aside with indemnity costs to compensate Mr. Taylor for having brought these defects to the Court's attention and to mark the Court's concern.



Mr. Bush has, even now, Mr. Griffiths pointed out, filed no evidence and offered in correspondence neither an apology nor an explanation for the conduct of the ex parte hearing and its consequences.

12. Mr. Bush should have served Mr. Taylor properly or not at all, it was argued. He could have applied for an Order which was legally correct but did not do so.

Extension of Time

13. In relation to the application for an extension of time, it was learned Counsel's submission that the Plaintiff has suffered no prejudice from the delay and had in hand all of the evidence in support well before the deadline. The Court was urged that it would be just in the circumstances to grant the application.

Available method of proper service

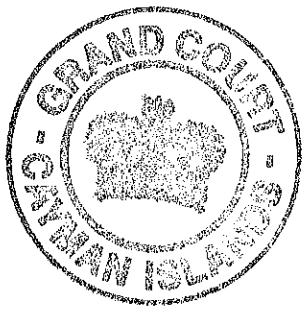
14. Mr. Griffiths argued that there was a straight forward and indeed well-known process for serving Mr. Taylor in Mexico, without any need for an order for substituted service. It was submitted that it was necessary to serve through the Mexican Ministry of Foreign Affairs.

The Hague Convention

15. This is the obvious method of service in any case, since it is the method of service allowed by the Hague Convention, learned Counsel continued. The ex parte application did not mention the Hague Convention or refer the court to it. Hague Service Convention is, however, the method of service suggested by GCR Order 11 rule 6(3). The ex parte application did not refer the Court to GCR Order 11 rule 6(3).

16. Mexico has been a party to the Hague Convention since ratification in 1999, in force since 1 June 2000. However, the court was not told this.

17. The Hague Convention provides that:



"Each contracting state shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States...."

18. Mexico has designated the Ministry of Foreign Affairs as this Central Authority. Reference was made to the declaration, which is freely available on the internet, and which provides as follows:

> *"In relation to Article 2 the Government of Mexico appoints the Directorate-General for Legal Affairs of the Ministry of Foreign Affairs as the Central Authority to receive requests for service of process of judicial and extrajudicial documents from other Contracting States who will forward them to the competent judicial authority for service"*

19. The ex parte Order applied for and obtained by the Plaintiff does not comply with the Hague Convention in any way at all, opined learned Counsel.

Diplomatic inviolability

20. Had service been ordered in accordance with The Hague Convention, difficulties arising from Mr. Taylor's position as an Ambassador in an Embassy would have been overcome, it was argued. This is because service through the Mexican Ministry of Foreign Affairs is acceptable even upon a diplomat residing in a diplomatic residence or Embassy, Mr. Griffiths claims, as does Ms. Wilson's first Affidavit, at paragraph 24. Service on Diplomats via the Hague Convention is a procedure known to Cayman practitioners, it was submitted, who have effected service of this sort before, and even the reported cases (necessarily a small portion of actual cases) reflect this. Reference was made to ***AB Junior and Madame B v MB*** [2013 (1) CILR 1] per Smellie CJ at paras 232 and 233 and ***Masri v Consolidated Contractors International Company SAL*** [2010 (1) CILR 265] per Jones J at paras 40 and 42.

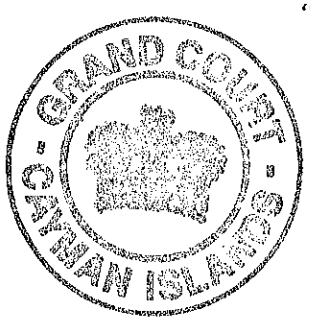
Mexican law

21. It is unfortunately also the case, continues the submission that the Order sought and granted ex parte did not fulfil the requirements of Mexican law. Reference was made to Mr. Cortina's first Affidavit, paras 18-22. This means that it was not compliant with GCR O.11 rule 5(3)(a) which requires service of a writ outside the jurisdiction to be performed "*in accordance with the law of the country in which service is effected*". The ex parte application did not, Mr. Griffiths submits, refer the Judge to Order 11 rule 5(3)(a) and it is apparent from the skeleton argument and the note of hearing as well as the evidence presented to the Court at the hearing that the Court was told nothing at all about the applicable Mexican law.

Vienna Convention

22. The ex parte application got into a further muddle, it was argued, by referring the Court to the Vienna Convention of 1967 which was not applicable to Mr. Taylor, rather than the Vienna Convention of 1961, which was. This aspect too was not properly researched for the information of the Court, Learned Counsel submitted.

23. Mr. Taylor's evidence is set out in his first Affidavit filed in support of these proceedings on 22 April 2016 at paragraphs 3,5, 7 and 8 as follows:



> "3. *On 4 March 2016, the Plaintiff sent an email to the address of the British diplomatic mission in Mexico (ukinmexico@fco.gov.uk)....It was addressed "Dear Sir or Madam" and marked for my attention. It stated "We act for the Plaintiff in legal proceedings in which Duncan Taylor CBE has been named as a party. The Court has ordered substituted service by email on Mr. Taylor. Please notify us of any preferred alternative email address for service on Mr. Taylor within 14 days, failing which we will serve the proceedings using this email address."*
>
> 4 .....
>
> 5. *The specified period of 14 days expired, I believe, on 18 March 2016.*

6 ……

7. *Well before expiry of the 14 day period referred to in the email of 4 March, which would have been the 18 March, a FedEx package containing not just the Order of substituted service, but also hard copies of all documents pertaining to the Claim in relation to this matter was, on 14 March 2016, received at the British Embassy in Mexico. The package consisted of a letter to me dated 10 March 2016 ....and the seven documents itemized in that letter. The FedEx proof of delivery which I have obtained from the internet ....shows that the package was shipped on 11 March. The package appears to have been delivered to the Embassy on Monday, 14 March; to have been signed for then at the gate by a contract security guard (although the FedEx tracking record said there is no signature as no signature was necessary for proof of delivery)' then to have been received and signed for as part of the British Embassy's internal process by our receptionist on Tuesday, 15 March; delivered to my office on the afternoon of Wednesday, 16 March; and opened and given to me on the morning of Thursday, 17 March. Delivery of the documents by FedEx directly to the Embassy breach my right to privacy because, entirely predictably in an office such as mine, it was opened by staff in my Executive Office before being presented to me.*

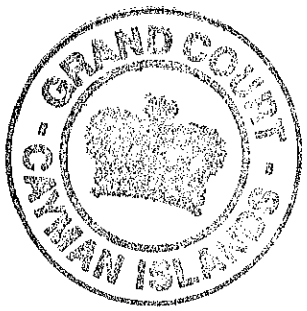
8. *At 15.09 on 18 March 2016 (which was shortly before expiry of the 14 days specified in the email of 4 March timed at 16.08 pm), an email from the Plaintiff's attorneys was sent to the email address of the British diplomatic mission in Mexico, using the ukinmexico@info.gov.uk email address.....The email incorporated the original email of 4 March and said "In absence of a response to the below, please find attached, by way of substituted service, a copy of the covering letter with attachments that you have already*

received by way of FedEx courier". These were attached to the email and emails which followed it.

9 ....."

24. Mr. Taylor further relies upon the evidence of Mr. Xavier Cortina Cortina, who is an advocate and member of a law firm in Mexico. In his Affidavit filed 22 April 2016 Mr. Cortina states as follows:-

> *"17. My opinion refers only to civil and/or commercial procedures and does not involve criminal matters. I base this opinion on Mexican Law and procedure; therefore I do not imply or interpret the laws applicable in any other country, nor advise on any foreign law or law system.*
>
> *18. The order of substituted service does not fulfil the formalities of Mexican Law, not those accepted by Mexico under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.*
>
> *19. According to Mexican law, any defendant residing in Mexico has the right to receive service of process according to Mexican Law in application of the Federal Code of Civil Procedures. In particular, the Supreme Court of Justice in Mexico has held that, in diplomatic cases, the applicable law is set by the Mexican Civil Code.*
>
> *20. Under those rules and precedents, service in Mexico is very formal and has to be performed in the Defendant's personal domicile, through a duly Court-authorized clerk, who asserts and acknowledges that he personally notified the person involved, granting him certified copies of the claim, with a written order explaining the nature of it, the Ordering Court, the nature of the claim, the time, place and means to answer.*
>
> *21. If the claim is in a language different than Spanish, all documents have to be translated. If the person is not present in the first*



attempt, once the clerk has been convinced, through information and belief, that such place is in fact the domicile of the person to be served, the clerk has to deliver a notice citing defendant for a certain time to expect service of process within 24 hours. If the person is not present at the scheduled time the day after, then the clerk can practise [sic] *service by delivering the aforementioned documents with any person residing in such domicile, for which he has to state the name of the person receiving, request its signature or provide a description of such person. In the case of opposition the clerk has the authority to affix such notice with the claim and attachments in the domiciles' door.*

22. *In order to fulfil the formalities mentioned above, it is necessary that the ordering Court, through a rogatory letter, request the cooperation of a Mexican Court to effect service. If the request is made through the official appointed authorities in each signatory country, legalization is not required, absent such participation, all documents have to be legalized and apostilled.*

23 .....

24. *The British Embassy in Mexico is not the same site as the residence of the British Ambassador. Therefore it is not his domicile.*

....."

25. Paragraph 24 of Jacqueline Wilson's First Affidavit states as follows:

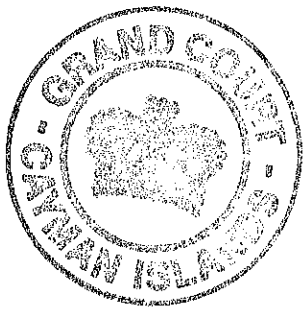
"24. *I am informed by the Accreditation and Immunities Officer in the International Human Resource Team of the Foreign and Commonwealth Office, that the proper way to serve a British Diplomat in Mexico would be through the Mexican Ministry of Foreign Affairs. Mission premises, diplomats and each diplomat's private residence are accorded inviolability by Articles 22, 29 and*

30 of the 1961 Convention. That inviolability would be breached by serving process in person or by post on those properties."

26. In his second Affidavit sworn on 19 July 2016, Mr. Schofield exhibited a communication by way of email from Mr. Taylor, sent July 19 2016. Mr. Taylor was responding in that email to paragraph 20 of Mr. Bush's skeleton argument, where it was stated that "However, it is apparent from paragraph 22 of Mr. Cortina's Affidavit that personal service would have to be undertaken by a court-appointed officer at the Defendant's domicile".

27. In that email, Mr. Taylor states as follows:

> " *I agree with the Solicitor General that (para. 24 of her witness statement) the proper way to serve a British diplomat in Mexico would be through the Mexican Ministry of Foreign Affairs." I do not agree that this would mean personal service...undertaken by a court-appointed officer at the Defendant's domicile." (as alleged in the Plaintiff's skeleton argument). That is not a procedure when a diplomat is being served through diplomatic channels.*
>
> *I would expect the Ministry of Foreign Affairs to use the Note Verbale procedure. A Note Verbale is a standard form of written communication sent from a Ministry of Foreign Affairs (or diplomatic mission)(such as the Mexican Ministry of Foreign Affairs) to another Ministry of Foreign Affairs (such as the Foreign and Commonwealth Office in London, the "FCO") or a diplomatic mission (such as the British Embassy in Mexico). If it went to the FCO, I would expect them to pass it on to me. Likewise, if it went through these diplomatic channels to the British Embassy in Mexico it would be passed on to me. Neither of these processes would involve personal service and neither would involve a breach of the diplomatic inviolability of the Embassy premises or of my official residence. A Note Verbale is a well-recognised form of diplomatic written communication. It*



could include the Writ and other documents as an enclosure or attachments. A Note verbale is distinguished by its use of certain well-recognised formal language and form of words. Otherwise, it is a written communication like any other, but it is the way in which diplomatic communications are made in accordance with diplomatic protocol."

28. Mr. Griffiths neatly summarized Mr. Taylor's position as follows:

a) The ex parte Order was made without full and frank disclosure. The Court was not properly informed of the relevant law and facts (including foreign law, which is a question of fact) and was, indeed, seriously misinformed that anything other than substituted service was a *"practical impossibility"*;

b) The ex parte Order was in breach of the requirements of an Order for substituted service (it not being a case of practical impossibility);

c) The ex parte Order did not comply with the Hague Convention.

d) The ex parte Order did not comply with the relevant Vienna Convention.

e) The ex parte Order did not comply with GCR Rule 11 rule 5(3)(a) which requires service of a writ outside the jurisdiction to be performed "in accordance with the law of the country in which service is effected."

THE SUBMISSIONS ON BEHALF OF MR. BUSH

29. Mr. Cox Q.C., on behalf of Bush, opposes both applications on the basis that as a result of the Order for substituted service granted on 2 March 2016 by Justice Williams, the Writ and Statement of Claim have been served upon Mr. Taylor and these proceedings therefore serve no purpose other than to cause unnecessary delay.

30. It was submitted that the time should not be extended because it is a pointless exercise and will serve no purpose other than to cause further delay. Reference was made to the leading decision of the Supreme Court of England and Wales, ***Abela v Baadarani*** [2013] 1 WLR 2043. There is no doubt on the evidence, Mr. Cox maintains, that Mr. Taylor is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations.

31. Indeed, Mr. Taylor does not deny receiving the documents or that the existence and nature of these proceedings has been brought effectively to his attention. He complains about the methods directed by the Court to bring them to his attention, namely sending the documents by courier to the British Mission in Mexico City and by email to the email address of the British Mission.

32. Mr. Cox contends that when the court orders substituted service out pursuant to O.11. r.5 and O.65 r.4, it is not bound to employ a means of service that is valid service in the country in which it is to be effected or one for which provision is made under the Hague Convention, provided the method adopted is not contrary to the general law.

33. The conditions for the exercise of the Court's power to make an order for substituted service are:

a) That personal service is impracticable;
b) That the steps directed by the Court to be taken to bring the document to the notice of the person to be served are reasonably likely to achieve that end; and
c) That they are not contrary to the general law of the country in to which they are to be taken.

34. Further, it was submitted that it is contrary to the Vienna Convention for an officer of the receiving State (Mexico) to attempt in its jurisdiction to effect personal service on a diplomatic agent, such as Mr. Taylor, at his residence. According to the evidence of

Xavier Cortina, learned Queen's Counsel opined, the only available means of service in Mexico is personal service by a court officer at the Defendant's residence. Since personal service is impracticable, the first condition of O.65 r.4 is satisfied.

35. The steps directed by the court were likely to and plainly did achieve the intended notification of the Second Defendant. The second condition is also therefore satisfied, it was submitted.

36. There is no evidence that the means chosen to do so contravened the general law of Mexico. Therefore, the third and final condition for the exercise of the power under O.65 r.4 is satisfied.

37. It was submitted that it is not a breach of the Vienna Convention to draw the proceedings to the attention of the Defendant by the means adopted.

38. The submission continued that it is clear that personal service upon Mr. Taylor under the Hague Service Convention by the Central Authority of Mexico would be practically impossible. The First Affidavit of Ms. Wilson confirms this to be the case at paragraph 24.

39. Reference was made to the Vienna Convention, Articles 22, 29, 30 & 31 and the very recent English Court of Appeal decision in ***Al Malki v Reyes*** [2016] WLR 1785 per Lord Dyson MR at p. 1810 G-H.

40. Further, Mexico stipulates only "*personal service*" as available to Contracting States under the Hague Service Convention. Reference was made to the Hague Conference on Private International Law website.

41. Reference was made to paragraph 24 of Ms. Wilson's First Affidavit where she has suggested, apparently on advice that the proper method of service upon a British Diplomat in Mexico would be through the Mexican Ministry of Foreign Affairs.

42. At paragraph 26, she says, "*service in this form would also comply with the requirements of local law, as set out by Mr. Cortina in his affidavit....It would also accord with the provisions of the Hague Convention.*"

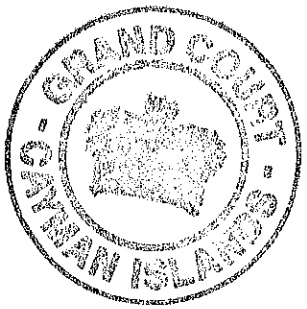
43. However, it is apparent from paragraph 22 of Mr. Cortina's Affidavit, learned Counsel submits, that the same method of personal service would have to be undertaken by a court appointed officer at the Defendant's domicile. Neither the Solicitor General nor Mr. Cortina explain how this would be possible or lawful in the light of Articles 22 and 30 of the Vienna Convention.

44. It was precisely for this reason Mr. Cox maintains, that when the AG refused to accept service on behalf of Mr. Taylor, and without knowing his proper address, Mr. Bush sought leave to make substituted service under GCR O.65 r.4.

45. It was further posited that in ordering substituted service, the court is not limited to valid methods of service for domestic proceedings in Mexico provided that the means of service thus ordered to be effective for the purposes of the Cayman Court are not expressly or positively prohibited by Mexican Law. Reference was made to ***Habib Bank Ltd v Central Bank of Sudan*** [2007] 1 All ER (Comm) 53; ***Embassy of Brazil v de Castro Cerqueira*** [2014] 1 WLR 3718; ***Maughan v Wilmot*** [2016] 1 WLR 2200].

46. Mr. Cox referred to Precedent No. 1, exhibited to the Affidavit of Mr. Cortina, and submitted that this Precedent makes it clear that under Mexican Law, an Embassy has extra-territorial status and is governed by the Laws of the country to which it belongs. Further, learned Counsel submits, English Law does not prohibit service by post or email. It was submitted that the existence of the Hague Service Convention, to which both the Cayman Islands and Mexico adhere, is no bar to the Court's power to order substituted service, if, as Order 65 Rule 4 requires, personal service is impracticable.

47. Therefore, learned Counsel summarises, the Court was right to exercise its power under O.65 r.4 for the following reasons:



a) Mr. Bush did not and still does not know the proper address of Mr. Taylor. As he observed in his First Affidavit, it is most unlikely that he will be able to discover it. The Hague Service Convention is inapplicable in such circumstances (Article 1).

b) Even if the Hague Service Convention is in theory applicable, the primary condition for the exercise of the power under O.65 r.4 is the impracticability of effecting personal service upon Mr. Taylor. For the reasons submitted above, the learned Judge was right to conclude that personal service could not be effected in these circumstances.

c) Since the only available means of service in Mexico under The Hague Service Convention is personal service, which cannot be effected, the Convention does not offer a viable route to the Plaintiff for bringing the attention of Mr. Taylor to the existence and nature of the action.

d) The only remaining conditions for the exercise of the power under O.65 r.4 are that the means chosen are reasonably likely to bring the documents to the attention of Mr. Taylor and that they are not contrary to the law of Mexico.

e) It is clear that the means were likely to, and did indeed, achieve the necessary notification. For the reasons given above, there is no evidence to suggest that those means were illegal, as opposed to being invalid methods of service for domestic proceedings, in Mexico.

DISCUSSION AND ANALYSIS

The application for an extension of time

48. Reference was made by Mr. Griffiths to the Court of Appeal of England and Wales' very recent decision in ***Zumax Nigeria Ltd. v First City Monument Bank*** [2016] EWCA Civ

567, at paragraphs 24-29, and 35-43. Reference was also made to ***Gabato v Immigration Appeals Tribunal*** [2011 (1) CILR Note 6].

49. The decision in ***Zumax*** provides very useful guidance as to the principles governing applications for extension of time, in particular at paragraphs 24, 25, 27, 28, 36, and 43. Lord Kitchen re-stated the three stages of enquiry discussed in earlier cases:

(1) Identifying and assessing the seriousness and significance of the default;
(2) Identifying the cause of the default, and
(3) Evaluating all of the circumstances of the case.

50. In allowing the appeal, at paragraph 43, Lord Kitchen stated:

> *"As Moore-Bick LJ emphasized in Salford Estates at [18], enforcing compliance with the rules is not an end in itself and it is not part of the function of the courts to impose sanctions for punitive purposes. In light of all of the foregoing I believe that FCMB should have been granted the short extension that it sought."*
> (My emphasis)

51. In ***Gabato v Immigration Appeals Tribunal***, Quin J provided useful guidance as to the considerations involved in considering applications for extension of time. The Case Note records Quin J as granting the applicant an extension of time of fourteen days within which to file and serve a notice of appeal, and holding the following:

> *"When determining whether to grant an extension of time, the court needed to consider in the round whether there was an acceptable reason for the delay that justified departing from the time limits, and whether granting an extension would cause prejudice to the other party (**Costellow v Somerset County Council** [1993] 1 W.L.R. 256, dicta of Bingham M.R. applied,*

Regalbourne Ltd. v East Linsay District Council (1993), 6 Admin L.R. 102, dicta of Kennedy L.J. applied).... "

CONCLUSION ON APPLICATION FOR AN EXTENSION OF TIME

52. In my judgment, the delays in the instant case could not properly be regarded as serious or significant. Whilst the reasons for the delay are not altogether satisfactory, (they really do appear to amount to careless mishaps), Mr. Bush has not been prejudiced in any way, in particular because his Counsel had already been served in the correct time, with supporting Affidavit evidence and the listing form which indicated the very matters which the Summons would seek. Having regard to all of the circumstances, to my mind, dealing with the application justly, requires that the Court grant the extension of time sought by the Second Defendant. Mr. Bush is entitled to the costs of the application.

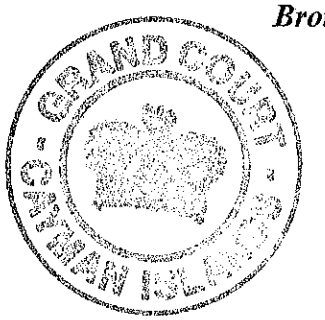
THE APPLICATION TO SET ASIDE THE EX PARTE ORDER FOR SUBSTITUTED SERVICE

53. I will now move on to consider the application to set aside the order for substituted service made by Williams J in March 2016. If the order made by Williams J was valid, this would mean that the Writ of Summons was served within the six month period of its validity.

54. It is useful to place this matter in context. In that regard, I will refer to the judgment of the Supreme Court of England and Wales in ***Abela and others v Baadarani*** where at paragraph 38, Lord Clarke of Stone-cum-Ebony agreed with Lewison J that:

> *"38.....The purpose of service of proceedings, quite obviously, is to bring proceedings to the notice of a defendant. It is not about playing technical games. There is no doubt on the evidence that the defendant is fully aware of the proceedings which are sought to be brought against him, of the nature of the claims made against him and of the seriousness of the allegations."*

55. It was Mr. Griffiths' submission that applications for leave to serve out of the jurisdiction involve an exorbitant jurisdiction - that is, a jurisdiction outside the ordinary - deviating from the normal, prescribed, or customary track, as the Oxford Dictionary puts it. Reference was made to the dicta of Pearson J in ***Societe General de Paris v Dreyfus Brothers*** (1885) 29 Ch D 243: , where he stated :



> *"...I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."*

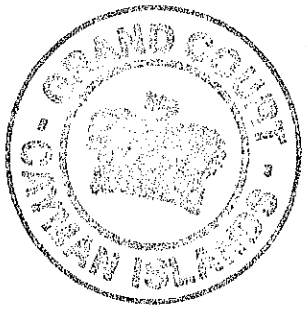
56. Mr. Griffiths pointed out that Pearson J's statement was referred to with approval by the Court of Appeal of the Cayman Islands in ***Ahmad Hamad Algosaibi and Bros Co. v Saad Investments Co. Ltd.*** [2010 (2) CILR 289] at 299, para. 18. He also referred to the criticism by Kerr LJ in ***The Volvox Hollandia BI of:***

> *"... an exorbitant assumption of jurisdiction by the English Courts under O. 11 without regard for the implications of two relevant international Conventions."*

and to the fact that this was quoted by the Court of Appeal of the Cayman Islands in ***Insurco International Ltd. v Voluntary Purchasing Group Incorporated*** [1999 CILR 532] at 542).

57. However, whilst I agree with Mr. Griffiths that applications for leave to serve out of the jurisdiction and under GCR Order 11 are serious matters, and must be taken seriously, the days of considering the jurisdiction as "exorbitant" are over.

58. Whilst ***Abela*** was a decision that did not involve the Hague Convention or any treaty, at paragraph 53 of the Supreme Court's decision in ***Abela***, Lord Sumption JSC (with whom Lord Neuberger of Abbotsbury PSC, Lord Reed and Lord Carnwath JJSC agreed), shed new light upon, and characterised the nature of the jurisdiction as follows:



"53. In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an "exorbitant" jurisdiction, which would be made even more exorbitant by retrospectively authorizing the mode of service adopted in this case. This characterization of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of different conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorized there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. The basic principles on which the jurisdiction is exercisable by the English courts are similar to those underlying a number of international jurisdictional conventions, notably the Brussels Convention (of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters..... and the Lugano Convention on jurisdiction and the recognition of judgments in civil and commercial matters of 30 October 2007... The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ ("We command you...") . But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide

whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum. "
(Underlining emphasis mine)

59. I note that in the Cayman Islands the old form of writ ("We command you etc.") is also no longer used.

60. It is important to consider the provisions of the Vienna Convention. It is also necessary to point out that in relation to the instant application, the issues as to service on Mr. Taylor as a diplomat are a completely separate matter from the question, which does not arise before me, as to whether Mr. Taylor is entitled to claim immunity from suit.

61. The Recitals to the Vienna Convention on Diplomatic Relations Done at Vienna on 18 April 1961, and articles 22, 29 and 30 thereof, provide as follows:

> "*The States parties to the present Convention,*
>
> *Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,*
>
> *Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,*
>
> *Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,*

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

……

Article 22

1. *The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.*
2. *The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.*
3. *The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.*

……

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. *The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.*
2. *His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability."*

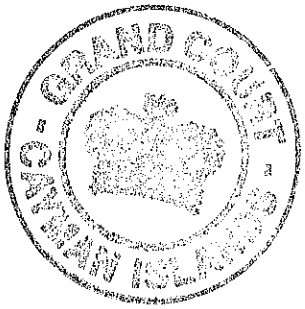
62. Mr. Griffiths referred to the decision of the United States Court of Appeal in ***Hellenic Lines Ltd. V Moore*** [1965] 345 F2nd 978. In that case, it was decided that a United States marshall was justified in refusing to serve a summons in respect of a libel claim in personam against the Republic of Tunisia, on the Tunisan Ambassador to the United States, on the ground that the Ambassador's diplomatic immunity would be violated by any compulsory service upon him. This case was about personal service and not service by post or substituted service. However, the decision does discuss diplomatic notes, and seems to point to the difficulty that may arise in that regard (As pointed out by Lord Dyson M.R. in ***Reyes v Al-Malki*** discussed below). At footnote 3 to the decision, Chief Judge Bazelon noted the following:

> *"3. We do not decide whether service of process by diplomatic note would violate diplomatic immunity. In reply to our request for information, the Department of State through its Acting Legal Adviser stated, "The Department would not, in the absence of express statutory authority or treaty provision, attempt to transmit the summons by an official diplomatic note to the embassy of a sending state, unless the embassy indicated a willingness to accept the summons." Letter from Leonard C. Meeker to John W. Douglas, Assistant Attorney General, August 10, 1964."*

63. Mr. Griffiths referred me to the very useful text of <u>*Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*</u>, 4th Edition, edited by Eileen Denza. At pages 123-126, the learned author discusses Article 22, and service of process, in the following manner:

> ***"Service of process***
>
> *It is clear that personal service of legal process is prohibited by the terms of Article 22, whether it occurs within the premises of the mission or at the door. Where it is appropriate for proceedings to be begun by personal*

service of a writ, this should be transmitted through the diplomatic channel.....



.....

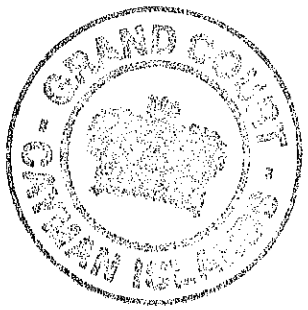
Whether service of process by post is a breach of inviolability, was, however, initially somewhat unclear. The question was discussed by the International Law Commission both in 1957 and in 1958, and most Members took the view that although service by post would not be effective in many circumstances or at all, under the law of some States, it would not in itself be a breach of inviolability. The Commission's Commentary on the 1958 draft articles stated that "There is nothing to prevent service through the post if it can be effected that way. At the Vienna Conference, Japan proposed to clarify the text in the sense of the Commission's Commentary by adding a new paragraph 4: 'No writ may be served by a process server within the premises of the mission.' The amendment met with a mixed reception from those few delegations who addressed the point, and was withdrawn by the representative of Japan 'on the understanding that it was the unanimous interpretation of the Committee that no writ could be served, even by post, within the premises of a diplomatic mission.'

The view that service by post on mission premises is prohibited seems to have become generally accepted in practice.....

.....

*In **Reyes v Al-Malki**, however .... The English Court of Appeal, after reviewing the uncertainty left by the records of the Vienna Conference, the US case of Renchard v Humphries & Harding (described above, and the difficulties of serving process through the diplomatic channel where the plaintiff claims that the defendant is not entitled to immunity (also discussed above) concluded that under Article 22 service of process could be effected by posting the documents to the mission or to the private residence of a diplomatic agent.*

*The Superior Provincial Court of Cologne in the **Garden Contamination Case**, a claim against the Soviet Union for contamination following the*



accident at the nuclear reactor at Chernobyl, refused to allow service of the writ by sending it to the Soviet Ambassador in the Federal Republic of Germany. Belgian practice is to serve all judicial process on the Ministry of Foreign Affairs of the relevant foreign State, with a copy for information to their embassy in Brussels. Salmon argues that no distinction can be drawn between the presence of a process server and delivery of process by post, since the objection is not to the physical presence of the official - who might lawfully enter in some different capacity - but to the summons implied in serving the document.

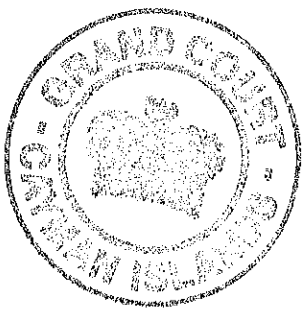
Given that many individuals resident in such premises may not be entitled to immunity from jurisdiction, Article 22 as interpreted in practice already makes proceedings against such persons difficult. It is unfortunate that the original understanding of the International Law Commission was not reflected in the final text of Article 22 or in subsequent state practice. A consensus that service by post on mission premises was not permissible under Article 22 appeared to be emerging, but this has been cast into further confusion by the decision of the English Court of Appeal in Reyes v Al-Malki."

(Underlining emphasis mine)

64. In the very recent decision of the Court of Appeal of England and Wales, relied upon by Mr. Cox, ***Al –Malki v Reyes*** [2016] 1 W.L.R. 1785, and referred to in Ms. Denza's Work in the paragraph above, it was held that while personal service of the diplomat and his wife, who had employed the Plaintiffs, at the mission of the Kingdom of Saudi Arabia was prohibited by article 22 of the Vienna Convention, and all personal service on the diplomat was prohibited by article 29, service of proceedings which, the claimant alleged, fell within the exceptions to immunity could be effected, subject to the rules of the relevant court or tribunal, by posting documents to the private residence of the diplomat; and that therefore, the sending of the claimant's claim form to the employer's private residence was good service.

65. I have noted both learned Counsels' indication that leave to appeal to the Supreme Court has been granted. Mr. Griffiths goes further, and submits that ***Al-Malki v Reyes*** is widely thought to be wrongly decided.

66. Be that as it may, there are few decisions that deal with the issue of whether service by post on a diplomat is permissible under the Vienna Convention. Thus I must consider this extant decision and the reasoning involved. At paragraphs 79, 83-88, 91 - 94 (inclusive), Lord Dyson M.R. discusses the relevant considerations as follows:



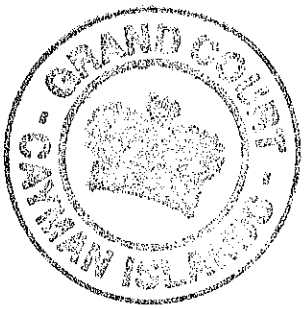
"The service issue

....

79. The tribunal rules in force at the relevant time were the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI2004/1861). Service by each of the methods attempted was effective service in accordance with the Employment Tribunals Rules of Procedure 2004 in Schedule 1: see, in particular, rule 61(1)(a) which explicitly permits service by post.

.....

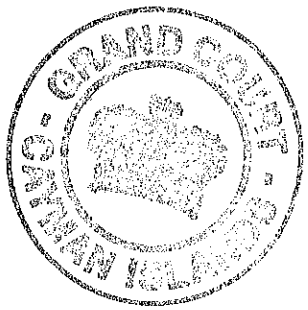
83. It would be odd if service was not possible. It is true that the 1961 Convention (i) makes clear that the person of a diplomatic agent is inviolable and a mission and the private residence of a diplomatic agent are inviolable, and (ii) generally accords a diplomatic agent immunity from civil and administrative jurisdiction. But the Convention clearly precludes immunity in three situations, including in respect of actions relating to commercial activity outside the diplomatic agent's official functions. If service could never be effected on a diplomatic agent (except by consent), the three carefully crafted exclusions to immunity would be futile. It is pointless to say in one breath that a diplomatic agent may be liable to suit in civil and administrative proceedings, but in the next breath that such proceedings may never be served on a diplomatic agent (except with his consent). The parties to the 1961 Convention could not have intended such



a state of affairs. Such an interpretation of the Convention would be incompatible with one of the core principles of treaty interpretation, namely that "the object and purpose" of the Treaty should be taken into account : see Article 31(1) of the 1969 VCLT.

84. I agree with the employers that personal service at the mission is prohibited by article 22 of the 1961 Convention. I also agree that all personal service on the diplomatic agent is prohibited by article 29: see Hellenic Lines Ltd. v Moore (1965) 345 F 2d 978, per Chief Judge Bazelon, which decided that, as a matter of international law, personal service of a claim against the State of Tunisia could not be effected on the Tunisan ambassador. See also Eileen Denza, Diplomatic Law, p268.

85. It is right to mention that the US Court of Appeals (2nd Circuit) decision in Tachiona v United States (2004) 386 F3d 205, 221-224 suggested that personal service of proceedings is not prohibited in cases which fall within the exceptions to immunity set out in article 31 (1) of the 1961 Convention. But in my view the language of article 29 is uncompromisingly clear. On its face, it admits of no exceptions. It is difficult to see how an exception from the principle of personal inviolability that is enshrined in article 29 can be carved out to accommodate the service of claims which fall within the exceptions to diplomatic immunity. The inviolability of the diplomatic agent is central to the 1961 Convention. If it had been intended to exclude the operation of article 29 as regards the service of claims which fall within the exception to immunity, it would have been easy enough so to provide. But the Convention does not say so expressly. I accept that, if personal service were the only means by which claims within the exceptions to immunity could be served on a diplomatic agent, there would be an argument for holding that article 29 must, by necessary implication, be interpreted as permitting personal service of such claims. For the reasons that follow, however, I accept the submission of Mr. Otty that service of proceedings which fall within the exceptions to immunity can be effected by post.



86. I need to repeat that article 30 of the 1961 Convention provides that "the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission" and that article 22 (1) provides: "the premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of mission." As a matter of ordinary language, it is difficult to see why posting documents to the private residence of a diplomatic agent by way of service of proceedings on him infringes the inviolability of his residence. It certainly does not involve entry into the residence by agents of the receiving state.

87. In Renchard v Humphreys and Harding Inc. (1973) 63 ILR 21 the District Court of the District of Columbia found that service on the State of Brazil had been validly effected by registered post to the Brazilian Embassy. The court held, at p.23, that the purposes of diplomatic immunity were not violated by registered mail service on an embassy. The reasons it gave for this conclusion were that, unlike the situation where a federal marshal attempts service on an ambassador personally, the delivery of a letter to the embassy does not affront the ambassador's personal dignity. Nor does service by registered mail cause public embarrassment to the ambassador or cause him to restrict his movements to avoid being served with process. The Hellenic Lines decision 345 F 2d 978 was distinguishable because that case was concerned with personal service and not service by post.

88. I find the reasoning in Renchard persuasive. The question of whether service by post on a mission or the private residence of a diplomatic agent is valid does not appear to have received much attention from judges or academic commentators. In the Yearbook ILC of 1958, vol II, p95, para (5) of the commentary on article 20 (which became article 22) stated that a special application of the principle of the inviolability of a mission was that no writ may be served within the premises of the mission. It said that process servers may not enter the premises or carry out their duty at the

door:" The service of such documents should be effected in some other way." It continued: "There is nothing to prevent service through the post if it can be effected in that way." It is also relevant that at the meeting of 4 June 1958 (Yearbook of the ILC of 1958, vol 1, p131, para 24) Sir Gerald Fitzmaurice said:

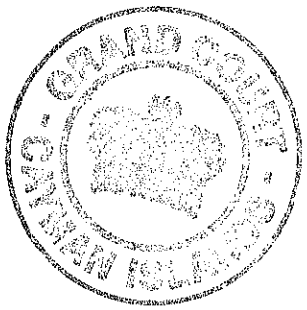
> *"The last sentence in paragraph 2 of the commentary was unnecessarily categorical in saying that all judicial notices of that nature must be served through the Minister of Foreign Affairs of the receiving state."*

.....

91. It seems to me that the position in relation to service by post is not as clear as one would wish. There appears to be no clear jurisprudence in support of the proposition that article 22 prohibits service of proceedings on a mission or on the private residence of a diplomatic agent by post. There is some support in the jurisprudence and in the travaux preparatoires for the 1961 Convention for the proposition that service can be effected by post, I have already said that I find the reasoning in the Renchard case to be persuasive.

92. For the reasons I have given at para 83 above, the parties to the 1961 Convention must have intended that service could be effected on diplomatic agents in cases which come within the exceptions to immunity. The only realistic possibilities are personal service or service by post (and now by fax and e-mail). I have rejected personal service for the reasons I have given at paras 84 and 85 above. Service through diplomatic channels remains to be considered. The difficulty with this lies in its unreliability: the receiving state may refuse to effect service by these means. The likelihood of this occurring was noted by the United Kingdom delegate at the UN session in 1958: see the records in the Yearbook of the ILC for 1958, vol 1, para 36. The same point was recorded by Chief Judge Bazelon at footnote 3 to his judgment in Hellenic Lines Ltd. v Moore 345 F2d 978.

93. In some jurisdictions service may be effected by sending the relevant document to the employer's authorised representative or by means of



substituted service. But such mechanisms are not universal. I do not consider that the parties to the 1961 Convention would have intended this to be the sole means of effecting service.

94. I conclude therefore that, subject to the rules of the relevant court or tribunal, service within the jurisdiction can be effected by posting the documents to a mission and to the private residence of a diplomatic agent."

(Underlining emphasis mine)

67. I now turn to look at the provisions of O. 10 R. (1), O. 11 , R. (1)(c) and (f),4(e), 5,6 and O. 65, rule 4 which are relevant to a consideration of this application. The GCR plainly permit substituted service of writs for service out of the jurisdiction in appropriate circumstances, i.e. where it appears to the Court that it is impracticable for any reason, to serve the document personally on the person in question.

68. O.10 Rule 1(1) provides:

"Originating Process; General Provisions Service of O.10 R.(1)

A writ must be served personally on each defendant by the plaintiff or his agent."

69. O. 11 Rule 1(c) an (f) provide:

"Service of Process Out of the Jurisdiction

Principal cases in which service out of the jurisdiction is permissible

(1) ..... service of a writ out of the jurisdiction is permissible with the leave of the Court if in an action begun by the writ-

...

(c) the claim is brought against a person who has been or will be duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary party thereto;

....

(f) the claim is founded on a tort, fraud or breach of duty whether statutory, at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction;.."

70. O. 11 Rule 4 (1) (e) provides as follows:

"Application for, and grant of, leave to serve writ out of the jurisdiction

1(1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating-

....

(e) if service is not to be effected personally the method or methods of service which are in accordance with the law of the country in which the service is to be effected."

71. O.11 Rule 5 provides as follows:

"Service of Writ abroad; general (O.11, R.5)

5. (1) Subject to the following provisions of this rule, Order 10, rule 1(1), (2), (3) and (4) and Order 65, rule 4, shall apply in relation to the service of a writ, notwithstanding that the writ is to be served out of the jurisdiction, save that the accompanying form of acknowledgment of service shall be modified in such manner as may be appropriate.

(2) Nothing in this rule or in any order or direction of the Court made by virtue of it shall authorize or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

(3) A writ which is to be served out of the jurisdiction-

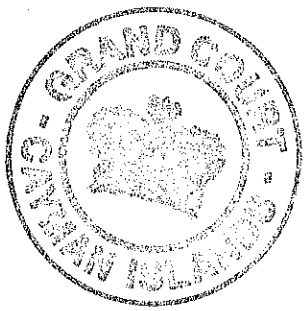
(a) need not be served personally on the person required to be served so long as it is served in accordance with the law of the country in which service is effected; and

(b) need not be served by the plaintiff or his agent if it is served by a method provided for by rule 6 or rule 7.

(4) An official certificate stating that a writ as regards which rule 6 has been complied with has been served on a person personally, or in accordance with the law of the country in which service was effected on a specified date, being a certificate-

(a) by a British consular authority in that country; or

(b) the government or judicial authorities of that country; or



(c) by any other authority designated in respect of that country under the Hague Convention,

shall be evidence of the facts so stated.

(5) An official certificate by the Secretary of State stating that a writ has been duly served on a specified date in accordance with a request made under rule 7 shall be evidence of that fact.

(a) A document purporting to be such a certificate as is mentioned in paragraphs (4) and (5) shall, until the contrary is proved, be deemed to be such a certificate.

(7) In this rule and rule 6 "the Hague Convention" means the convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters signed at the Hague on November 15, 1965."

72. O. 11 Rule 6(3) provides as follows:

*"**Service of writ abroad through foreign governments, judicial authorities and British consuls (O. 11, r.6)***

.....

(3) Where in accordance with these Rules a writ is to be served on a defendant in any country which is party to the Hague Convention, the writ may be served-

(a) Through the authority designated under the Convention in respect of that country; or

(b) If the law of that country permits-

i. Through the judicial authorities of that country; or

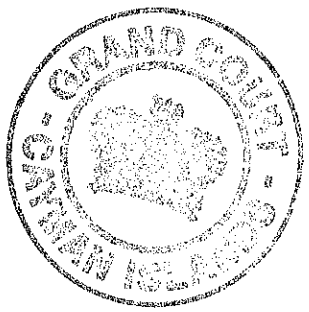
ii. Through a British consular authority in that country.

....."

73. O. 65 Rule 4 provides as follows:

*"**Substituted service***

1 (1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it



appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.

a. An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.

b. Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served."

(Underlining Emphasis mine)

74. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded 15 November 1965, provides, so far as relevant, as follows, in the Preamble, and in Articles 1,2, 3,5,6, 8-10,14, and 21:

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

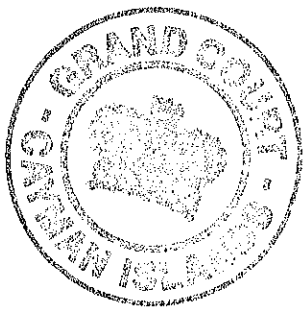
Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER 1- JUDICIAL DOCUMENTS

Article 2



Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

.....

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either-

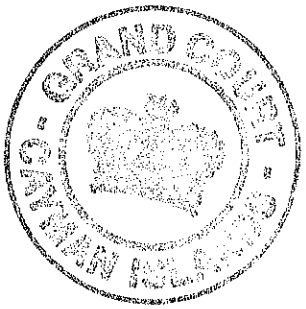
a) *By a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or*
b) *By a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.*

Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6



The Central Authority of the State addressed or any authority which it may have designated for that purpose shall complete a certificate in the form of the model annexed to the present Convention.

The Certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The Certificate shall be forwarded directly to the applicant.

.....

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any Sate may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

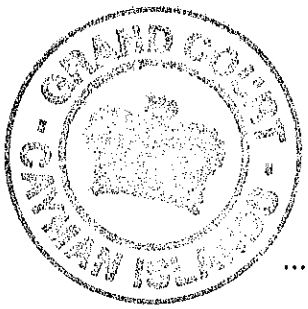
Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with-

a) *the freedom to send judicial documents by postal channels, directly to persons abroad,*



b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

.....

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

.....

Article 21

Each Contracting State shall, at the time of the deposit of the instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following-

a) the designation of authorities, pursuant to articles 2 and 18,
a) the designation of the authority competent to complete the certificate pursuant to Article 6;
b) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of-

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10.
b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,
c) all modifications of the above designations, oppositions and declarations."

75. At paragraph 14 of her First Affidavit, the learned Solicitor General referred to the Hague Convention on Private International Law website at www.hcch.net which contains details of Mexico's Central authority (for the purpose of the Hague Convention) and of "Mexico's responses to and derogations from the Hague Convention." This extract was exhibited to the Affidavit and indicates certain declarations which in some cases modified the declarations made at The Hague in November 1965. The relevant aspects of the extract read as follows:

"Mexico-Central Authority & Practical information

Contact details

Ministry of Foreign Affairs

Directorate-General of Legal Affairs

Forwarding authorities

(Art. 3(1)) - *Judges and General Direction of Legal Affairs*

Ministry of Foreign Affairs (incl. its regional offices)

Methods of service

(Art. 5(1)(2)- Personal Service

Translation requirements:

(Art. 5(3)) - *In relation to Article 5, when the judicial and extrajudicial documents to be served in Mexican territory are written in a language other than Spanish, they must be accompanied by the corresponding Spanish translation.*

....

Oppositions and declarations

(Art. 21(2)) - *(Click here to read all the declarations and reservations made by Mexico under this Convention)*

Art 8(2) - *Opposition (see declarations)*

Art. 10 - *Opposition*

.....

DECLARATION/RESERVATION/NOTIFICATION

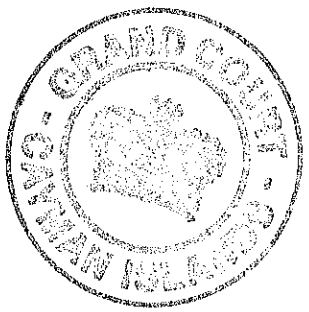
Declarations

Articles 5, 6, 7, 8, 10, 12, 15, 16

...

Declarations made at the moment of accession (1999)

(Courtesy translation)



II. In relation to Article 5, when the judicial and extrajudicial documents to be served in Mexican territory are written in a language other than Spanish, they must be accompanied by the corresponding translation.

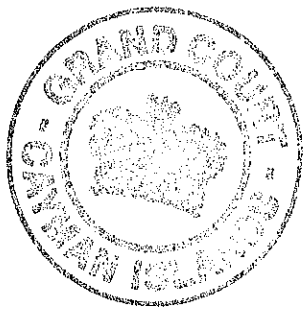
IV. In relation to Article 8, the contracting States shall not be able to effect service of judicial documents directly through its diplomatic or consular agencies in Mexican territory, unless the document is to be served upon a national of the State in which the documents originate and provided that such a procedure does not contravene public law or violate individual guarantees.

V. In relation to Article 10, the United Mexican States are opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory according to the procedures described in sub-paragraphs a), b), and c), unless the Judicial Authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document."

(Underlining emphasis mine)

76. ***Knauf UK GmbH v British Gypsum Ltd*** [2002] 1 W.L.R. 907, is another authority which was referred to by Mr. Griffiths. This case did not involve service on a diplomat. The Headnote adequately sets out the facts as follows:

> *"The claimant, a German company, wished to bring proceedings in England against the first defendant, an English company, and the second defendant, another German company. The claimant feared that once the second defendant knew that it might be served with proceedings in England it would begin proceedings in Germany which would then have priority by virtue of article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The claimant*

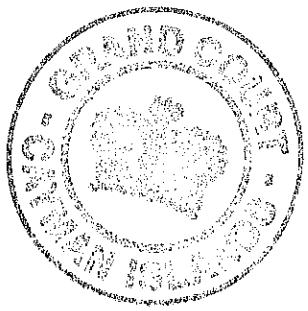


would then have to litigate in England against the first defendant and in Germany against the second defendant. It was common ground between the parties that service by post on the second defendant in Germany was not permitted. Service by any of the other methods allowed under either the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention") or the Convention regarding Legal Proceedings in Civil and Commercial Matters between the United Kingdom and German (the "Bilateral Convention") would not have achieved the element of surprise necessary to pre-empt the possibility that the second defendant would bring German proceedings. Accordingly the claimant made a without notice application for permission to serve a claim form on the second defendant by an alternative method, namely service within the jurisdiction on the second defendant's London solicitors who had not been nominated to receive service. The attention of the judge was not drawn to the existence of an exclusive jurisdiction clause in favour of the German court which was arguably incorporated into the contract between the parties. The judge granted the application on the basis that there was "good reason" to do so under CPR r.6.8. The second defendant was served accordingly and countered by serving its own German proceedings against the claimant. The second defendant applied in the English courts to set aside the alternative service and to challenge the English jurisdiction. The application was refused."

77. On appeal by the second defendant, the Court of Appeal allowed the appeal. At paragraphs 46 and 47 of the judgment prepared by Rix LJ, handed down by Henry LJ, the issue of service was discussed as follows:

"The rule as to service

46. The long and short of all this is that, whether it is due to a rule of English law or to a rule of German law (that as we say is opaque), it is



common ground that it is not permissible under either the Hague Service Convention or the Bilateral Convention to effect postal service upon Peters from England to Germany. It follows that Knauf UK accepts that without an order for service within England by an alternative method, viz upon Morgan Cole, Peters could not have been served save by methods which would have involved delay. Indeed, Knauf UK asserts and relies upon such delay as a critical part of its "good reason".

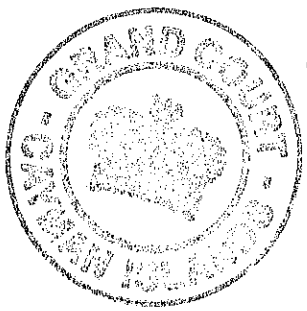
47. It was argued by Peters before the judge that the Hague Service Convention and the Bilateral Convention were a "mandatory and exhaustive code of the proper means of service on German domiciled defendants", which therefore excluded alternative service in England. The judge did not accept that submission, pointing out that those Conventions were simply not concerned with service within the English jurisdiction. Peters did not repeat that submission on this appeal. Nevertheless, it follows in our judgment that to use CPR r. 6.8 s a means for turning the flank of those Conventions, when it is common ground that they do not permit service by a direct and speedy method such as post, is to subvert the Conventions which govern the service rule as between claimants in England and defendants in Germany. It may be necessary to make exceptional orders for service where there is "good reason": but a consideration of what is common ground as to the primary method of service of English process in Germany suggests that a mere desire for speed is unlikely to amount to good reason, for else, since claimants nearly always desire speed, the alternative method would become the primary way."

(Underlining emphasis mine)

78. Reference was made by Mr. Cox to a number of important decisions. In ***Cecil v Bayat*** [2011] 1 W.L.R. 3086, it was held that because service out of the jurisdiction without the consent of the state in which the service is to be effected is an interference with the sovereignty of that State, service on a party to the Hague Convention by an alternative

method under the English CPR Rule 6.15 should be regarded as exceptional, to be permitted in special circumstances only.

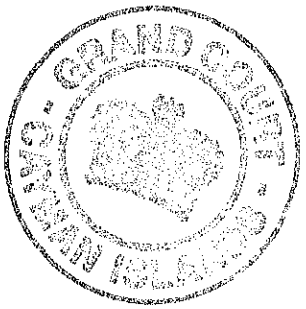
79. Mr. Cox also referred to the decision of Cooke J, sitting in the Queen's Bench Divison Commercial Court in ***Deutsche Bank AG v Sebastian Holdings*** [2014] EWHC 112. In fact, Mr. Griffiths places great reliance on this authority also. At paragraphs 19 and 27, Cooke J took a view that was quite different to that of Mostyn J in ***Maughan v Wilmot (No.2) Practice Note*** [2016] 1 WLR 2200, discussed below. Cooke J stated:



"19. I was referred to the decision of the Court of Appeal in Cecil v Bayat [2011] 1 WLR 3086 and that of the Supreme Court in Abela v Baadarani [2013] 1 WLR 2043 in relation to the exercise of the jurisdiction to order alternative service out of the jurisdiction. It was agreed that these decisions set out the relevant principles to be applied. The former was a decision involving service in a country which was party to the Hague Convention whereas the latter was not. In my judgment that is a critically important distinction, as submitted by Mr. Stephen Rubin QC. The USA, Monaco and the UK are all parties to that Convention.

.....

27...The Court of Appeal referred to service as more than a means of bringing proceedings to the attention of a defendant. The exercise of a power of the court was an exercise of sovereignty within a foreign state requiring the defendant to file an acknowledgement of service and participate in litigation in another country, if he wished to dispute the claim. Although the Supreme Court considered that to talk of "interference with the sovereignty of a foreign state" was to overstate the position, the fact remains that where there is an applicable convention, the two states in question have specifically agreed to the service of foreign process in accordance with it. In such circumstances this must represent the prime way of service in such a contracting state. Even if service by alternative means is not to be seen as "exceptional" and to be permitted in special



circumstances only, there must still be good reason for allowing service by a means other than that provided by CPR 6.40(3)(b)namely in accordance with a relevant convention. Otherwise the Convention would be subverted."

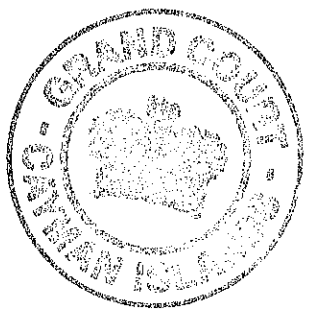
80. In ***Habib Bank Ltd. v Central bank of Sudan*** [2007] 1 WLR 470, Field J (as he then was), held that where the Court makes an order permitting service of a claim form out of the jurisdiction by an alternative method, the method of service does not have to be expressly permitted by the foreign jurisdiction in order for it to be good service within CPR r. 6.24. Further, it was implicit in rule 6.24(2) that the court may permit any alternative method of service under CPR r.6.8 so long as it does not contravene the law of the country where service is to be effected. At paragraph 27, Field J spoke of impracticality of certain methods of service in terms which are useful for discussion of the GCR Rule, which also speaks of impracticality. He stated the following:

> "*27. The evidence before Cooke J from Mr. Salih was that it would not be possible to serve the claim form in a manner expressly permitted by the law of Sudan because the law of Sudan requires service of process to be effected by a Sudanese court and a Sudanese court would not recognize a request to serve process issued out of an English court on a Sudanese defendant. On the other hand, Mr. Salih reported that the method of service Cooke J was asked to and did permit was not contrary to the law of Sudan. The court has a broad discretion to allow service by an alternative method where service would otherwise be impractical or would involve extensive delay: see Marconi Communications International Ltd. v PT Pan Indonesia Bank Ltd. [2004] 1 Lloyd's Rep. 594, 601-602. Plainly, service of the originating process through diplomatic channels in this case was both impractical and subject to very extensive delay.*"
>
> (Underlining emphasis mine)

81. In ***Embassy of Brazil v Castro Cerquiera*** [2014] 1 W.L.R. the English Employment Appeals tribunal held that section 12(1) of the ***State Immunity Act 1878*** did not on its true

construction authorize the use of the method of service which it prescribed where that would involve doing something which was contrary to the law of the State where service was to be effected; that service pursuant to the section would only be contrary to such law if it involved acts prohibited by the law of that state; and that, since there was no evidence that the method of service via the Foreign and Commonwealth Office to the Ministry of Foreign Affairs in Brazil was prohibited by the law of Brazil, service of the claim form was effective for the purposes of the law of England and Wales, even though it was not a method of service provided for by, and would not have been effective service for the purposes of, Brazilian law.

82. At paragraph 27 of the decision Lewison J provides one of his reasons for reaching that conclusion above as follows:



> *"27. First, section 12 of the Act is dealing with the method by which service is to be effected for the purpose of the laws of the constituent parts of the United Kingdom. It is prescribing the method by which service is to be effected as against a state for the purposes of proceedings within the United Kingdom. It is not concerned with the different question of whether that means of service would be effective for the purposes of the law of the state where service is to be effected. Consequently, while Parliament did not intend to require service by a means prohibited under the law of the state concerned, there is no reason to equate the situation where the method of service is not provided for by the law of the state concerned with the different question of whether the law of the state concerned prohibits the acts in question."*

83. In the very recent decision of ***Maughan v Wilmot(No.2) Practice Note***[2016] 1 WLR 2200, in relation to an application to set aside an order for service by alternative means in Family proceedings, Mostyn J held that the use of information and communication technology requires a fresh view of the old tropes that service out of the jurisdiction is an exorbitant jurisdiction and an exercise of sovereignty within the country in which service

is to be effected. Where the Hague Convention applies, or if there exists a bilateral treaty about service with that country, the court will ordinarily expect service to be effected in accordance with the treaty. However, FPR r.6.1(b) permits the court to direct email service out of the jurisdiction if there is good reason for doing so. The application to set aside was dismissed.

84. At paragraphs 26, 28 and 29 Mostyn J made the following astute observations:

"26. In my judgment these views (as expressed in ***Cecil v Bayat*** in respect of service being something more than bringing the proceedings to the attention of the defendant) *cannot survive the decision of the Supreme Court in Abela v Baadarani [2013] 1 WLR 2043. The decision is clear. The purpose of service, indeed the only purpose of service, is to inform the defendant of the contents of the claim form and the nature of the claimant's case. That is what the first recital to the Hague Convention suggests. Service is not "more than this". To my mind the judgment of Lord Sumption* [set out in in paragraph ....above] *really sums up why the old views are now to be regarded as unworldly in this data age.*

.....

28. .....Plainly, if the other country is a Hague Convention country (or if there exists a bilateral treaty about service with that country) the court would want to know why the treaty route was not followed. The normal answer would I expect be delay or inability to pin down the defendant's location. Those would be good reasons. I note that in Cecil v Bayat.... Para. 68, Stanley Burton LJ, accepted that there were some special circumstances where service by alternative means would be appropriate even where the Hague Convention was in play. So the pass has been sold. In my opinion the effect of Lord Sumption's judgment in Abela v Baadarani.... is merely to lower the bar somewhat.

29. In my judgment the husband has not shown that Ryder J was wrong to authorize email service on the husband on the facts of this case. Indeed on

the facts I would say that he was plainly right. The fact that he did not appear to inquire why the use of the Hague Convention was not practicable is at its highest a procedural lapse and certainly not any kind of fatal defect."

(Underlining emphasis mine)

85. In relation to substituted service and Order 65 Rule 4, reference was made by Mr. Griffiths to the decision of Smellie CJ in ***Chile Holdings (Cayman) Limited v Santiago de Chile Hotel Corporation S.A. et al*** [1997 CILR 319] where at page 328 Smellie CJ held that substituted service can only be resorted to where there is a "practical impossibility" of actual service, and referred at page 329 to *The Shorter Oxford Dictionary, 3rd edition* as giving the meaning of "impracticable" as meaning " that which is not practicable; that cannot be carried out or done; practically impossible."

86. I note that Order 56 Rule 4 requires that it appear to the Court that it is impracticable for any reason to serve the document personally.

87. I also remind myself, that section 1.1 and section 2 of ***The Grand Court Rules*** *1995 (Revised Edition), Preamble,* require the Court to achieve the overriding objective of justice as follows:

> *"**1.1 The Overriding Objective***
>
> *1.1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.*
>
> ....
>
> ***2. Application by the Court of the overriding objective***
>
> *2.1 The Court must seek to give effect to the overriding objective when it-*
>
> *(a) applies, or exercises any discretion given to it by these rules; or*

(b) interprets the meaning of any Rule.

2.2 *These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits."*

88. In the present case, it is common ground that at the hearing of the ex parte application, the Judge was not referred to the Hague Convention. It also does not appear that the Judge's attention was drawn to the provisions of Order 11 rule 5(3)(a). It is also common ground that the Judge was referred to the wrong Vienna Convention; he was referred to the 1967 Vienna Convention on Consular Relations when Mr. Taylor is not a Consul. The Judge was not referred to the 1961 Vienna Convention on Diplomatic Relations, which does govern Mr. Taylor's position.

89. The Plaintiff and his lawyers have not filed any affidavit evidence in relation to this application to set aside on the basis of non-disclosure. However, there is nothing to suggest that this non-disclosure was intentional.

90. In fact, at the ex parte hearing, Williams J was referred to the decision in ***Hellenic Lines*** and at paragraphs 6 and 7 of the skeleton argument advanced on behalf of Mr. Bush, it was stated as follows:

> *"6. As to substituted service, the notes to the White Book indicate the Plaintiff must show that it is "practically impossible" to serve the Second Defendant personally out of the jurisdiction in the normal way. Attempts to serve the Second Defendant through the Attorney General have failed and it is likely to be practically but more importantly legally impossible to serve the Second Defendant in Mexico where he is currently working as the United Kingdom's Ambassador there.*
>
> *7. As serving Ambassador in a Vienna Convention country the Second Defendant is immune from service of process under Article 29 of that*

Convention, to which Mexico is a signatory. In the case of Hellenic Lines v. Moore...the United States Court of Appeals found that the Tunisian Ambassador to the United States was immune from personal service in the United States."

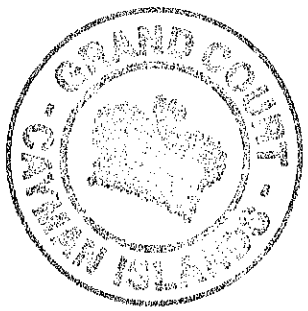
91. Williams J in his ex tempore judgment at paragraph 16, indicated his reasons for holding that it would be impossible for a process server to serve Mr. Taylor, as Ambassador to Mexico, personally. This included reference to the ***Hellenic Lines*** decision as demonstrating that as a serving Ambassador Mr. Taylor would be immune from personal service of process.

92. In ***Cable & Wireless (Cayman Islands) Ltd. V Information and Communications Technology Authority*** [2007 CILR 273] at page 294, para 58 Smellie CJ pointed out that:

> *"It is now established that an applicant for ex parte relief owes the following further duties: (i) to disclose relevant law as well as relevant facts: Memory Corp plc v Sidhu (No. 1) [2000] 1 W.L.R. 1443."*

93. In the ***Knauf UK GmbH*** decision, at paragraphs 62, and 65, the issue of non-disclosure was discussed as follows:

> " *Non-disclosure*
>
> *62. Finally, there is the issue of non-disclosure, which is a freestanding ground on which Peters seeks to have the orders of Aikens J set aside.*
>
> .....
>
> *65. The leading cases remain Brink's Mat Ltd. v. Elcombe [1988] 1 WLR 1350 and Behhehani v. Salem [1989] 1 WLR 723. Those authorities in this court bring their reminder of the essential principles: that there is a "golden rule" that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion; that failure to observe this rule entitles the court to discharge the order*



obtained even if the circumstances would otherwise justify the grant of such relief; that a due sense of proportion must be maintained between the desiderata of marking the court's displeasure at the non-disclosure and doing justice between the litigants; that for these purposes the degree of any culpability on the part of the applicant or of any prejudice on the part of the respondent are relevant to the reviewing court's discretion; and that a balance must be maintained between undermining "the heavy duty of candour and care" which falls on applicants and promoting a "tabula in naufragio" to save respondents who lack substantial merits."

94. In ***MRG (Japan) Ltd (A Company Incorporated under the Laws of the Bahamas) v Englehard Metals Japan Limited (A Company Incorporated under the laws of Japan)*** [2003] EWHC (Comm) Toulson J, (as he then was), sitting as a Judge of the Queen's bench Division Commercial Court, declined to grant an application to set aside on the grounds of non-disclosure, an order of Steel J, giving permission under CPR rule 6.20 95) (c) and (d) for service of a claim form out of the jurisdiction.

95. In discussing the material matters which should be disclosed to the court, Toulson J at paragraphs 24 - 26, and 43, stated as follows:

> *"24. It is for the court to determine what is material according to its own judgment and not the assessment of the applicant: Brink's Mat Limited v. Elcombe. This means that if the court considers there to have been non-disclosure,it is not an answer that the applicant in good faith took a different view, although that may affect the court's exercise of its discretion in deciding what to do in light of the non-disclosure. It does not mean that an applicant is under a duty to disclose facts which could not reasonably have a bearing on the decision which the judge has to make.*
>
> *25. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it. I was referred to a number of statements on the duty of*

disclosure in the context of applications for freezing injunctions. In such cases the court is being asked to make an order of an exceptional kind, prohibiting or restricting a defendant's use of its own assets before any adjudication has been made against it. Because of its draconian nature, it is a jurisdiction which requires great caution and a wide range of factors may have a bearing on the court's decision.

26. An application for permission to serve out of the jurisdiction is of a very different nature. The general principles about disclosure on without notice applications still apply, but the context is different. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute....

.....

Conclusion

43. It follows that the application to set aside the order of David Steel J fails. If I had concluded that there had been wrongful non-disclosure, I would still have declined to set aside the order, because I would have regarded such a step as disproportionate and contrary to the overriding objective of dealing with the case justly. If there are serious issues to be tried, arising out of contracts containing English choice of law and jurisdiction clauses, and in respect of which England is clearly the appropriate forum, it would not advance the objective of dealing with the case justly to decline jurisdiction. In the absence of any intention on the part of MRG to mislead the court, non-disclosure could be penalized without prejudicing that objective by some form of costs sanction."

96. I derive the following principles from the Grand Court Rules, the case law and the Hague Convention:-

(1) The purpose of service of proceedings is to bring the proceedings to the notice of a defendant. It is not about playing technical games – ***Abela*** and ***Maughan v Wilmot.***

(2) A writ for service within the jurisdiction in the Cayman Islands must be served personally on the Defendant unless an order for substituted service is made – O. 10 Rule 1(1), O.65, Rule 4.

(3) A writ for service out of the jurisdiction need not be served personally if it is served by a method that accords with the Law of the country in which service is to be effected – Order11 Rule 4(1)(e) and Order 11 Rule 5(3)(a). These Rules are not dealing with substituted service orders. Affidavit evidence of service and as to the law of the relevant country would be required after service. For example: in England, the CPR allows for service by post. Therefore, if a writ from the Cayman Islands is to be served out of the jurisdiction in England, it may be served by post without an order for substituted service.

(4) Where a writ is to be served on a Defendant in any country which is party to the Hague Convention the writ may be served through the authority designated under the Convention in respect of that country, or if the Law of the country permits, through the judicial authorities of that country – O.11. Rule 5, O. 11 rule 6(3).

(5) Where the Hague Convention applies, and service can be effected by one of the means provided for under the Convention, then service should ordinarily be effected in that manner. However, an order for substituted service can nevertheless be made in the Cayman Islands on the grounds that it is impracticable to serve the writ personally. In England, an order for service by an alternative means can be made for good reason.

(6) An order for substituted service may be made in relation to a writ for service out of the jurisdiction. However, the Rules do not authorize and the Court

must not order, the doing of anything in a country that is contrary to the law of that country – O.11 Rule 5(1) and (2).

(7) The words "*contrary to the law of that country*" in O. 11 Rule 5(2) mean expressly or positively prohibited by the laws of the other country – ***Habib Bank Ltd v Central Bank of Sudan, Embassy of Brazil v De Castro Cerquiera.*** An alternative method of service may be ordered even if it is not expressly permitted by the foreign jurisdiction. It is not required to be a method permitted by the other country's laws. What must not happen is that the method must not be one prohibited by the Law of the foreign jurisdiction. There is no reason to equate the situation where the method of service is not provided for by the law of the state with the different question of whether the law of the state concerned prohibits the acts in question – ***Embassy of Brazil.***

(8) Substituted service of a writ may be ordered where it is impracticable for any reason to serve the writ personally on that person – O. 65 rule 4.

(9) "Impracticable" means a practical impossibility of actual personal service. It means that personal service cannot be done, or carried out, it is practically impossible – ***Chile Holdings (Cayman) Ltd.***

(10) The terms of O. 65 Rule 4 are of very wide application, and give a wide discretion to the Court- and mere technicalities have been disregarded - see 1999 White Book Order 65/4/2.

(11) Service through diplomatic channels may be impractical – ***Habib Bank.***

97. The overriding objective requires that I seek to give effect to dealing with this case justly, expeditiously and economically in interpreting the meaning of O.65 Rule 4 and the other relevant Rules. In my view, a just and reasonable interpretation of this Rule means that "impracticable" encompasses legally impossible or prohibited. If it is legally prohibited to

serve personally, the consequence is that personal service cannot be done or carried out. Although in the 1999 White Book, Note 65/4/17, which deals with substituted service of a writ issued for service out of the jurisdiction, states that an application may be made "*after efforts to serve have failed*", this plainly means "*after efforts to serve personally have failed*". However, these words are there, in my view, because in most situations it is legally possible to serve personally and therefore one should in an ordinary case first demonstrate efforts to serve personally. However, this cannot mean that one should try to serve personally first, if that would be legally impossible.

98. I derive the following from the Vienna Convention and the case law, authorities and evidence:-

(1) Personal Service on an Ambassador at the Embassy is prohibited by Article 22 of the Vienna Convention. – The Convention, ***Hellenic Lines v Moore*** and ***Al-Malki v Reyes***. Personal service could not be effected on Mr. Taylor at the Embassy in Mexico.

(2) Personal Service of an Ambassador is also prohibited at his residence or anywhere else – Article 29 of the Convention and ***Al-Malki v Reyes***. Mr. Taylor could not have been personally served at his residence. In any event, Mr. Bush stated that he was unaware of Mr. Taylor's place of residence.

(3) Service within the jurisdiction by post or by email can be effected on an ambassador at the Embassy or private residence – ***Al-Malki v Reyes***.

(4) Based on the reasoning in ***Al-Malki v Reyes***, which I regard as sound, I see no reason why the same principle would not apply to service on an ambassador outside of the jurisdiction except that the Court's Leave to Serve out of the jurisdiction and for substituted service has to be obtained. ***Al-Malki*** did not involve service out, and Saudi Arabia was not a party to the Hague

Convention. However, it seems to me that the same reasoning is applicable, in keeping with the practical and pragmatic approach embraced by the Supreme Court in ***Abela***.

(5) Indeed, if by virtue of international law an Embassy or Mission is to be regarded as extra-territorial and the British Embassy is to be regarded as governed by UK Law, the UK is a party to the Hague Convention and there is nothing before me to suggest that the UK have objected to Article 10 of the Hague Convention which allows for the freedom to send judicial documents by post directly to persons abroad. To the contrary, the English CPR provides for service by post and by email as alternative forms of service to personal service. In any event, service on a diplomat at an Embassy by post or email within the English jurisdiction is proper service – ***Al-Malki v Reyes***

(6) Service through diplomatic channels may be difficult and unreliable – See ***Hellenic Lines, Al-Malki v Reyes*** and ***Habibo Bank.***

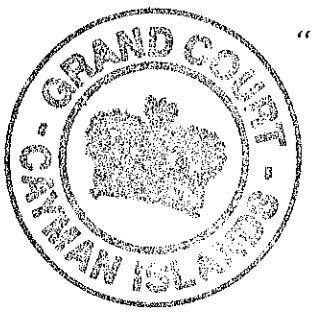
(7) In the Cayman case of ***AB Junior and Madam B v MB*** (Paragraphs 232 and 233) as it was not necessary for that decision, the method of service on the diplomat in question was not discussed. In ***Masri v Consolidated Contractors*** although service took place through diplomatic channels, (discussed at paragraphs 40 and 42) the case did not involve service on a diplomat.

99. What are the methods of service that Mr. Taylor is saying should have been used? Up until the filing of Mr. Schofield's Second Affidavit exhibiting Mr. Taylor's email just before the hearing, there was no mention of the "*Note Verbale*". Mr. Cox is correct that what Mr. Cortina's Affidavit appears to suggest is that the Federal Civil Procedure provides only for personal service. Further, that service has to be performed at Mr. Taylor's "*domicile*". However, the Vienna Convention prohibits personal service both at the Embassy and at the Ambassador's place of residence. Mexico has stipulated only

personal service as being available under the Hague convention unless their judicial authorities exceptionally grant the "*simplification different from the national regulations*" – see the Declarations in relation to Article 5 and Article 10 of the Hague Convention recited earlier at paragraph 75.

100. On the other hand, the evidence and Declarations appear to suggest that whilst postal service is not expressly provided for in Mexico, it is not prohibited by Mexican Law; postal service is just "different" from the national regulations, and is exceptional.

101. I think that it is also interesting to note that in Precedent No. 1, exhibited to the Affidavit of Mr. Cortina, it is stated that , amongst other matters:



"In view of the fact that, in accordance with Article 1A, paragraph X, of the Mexican Foreign Service Law, the term "Embassy" means the permanent representation of the Mexican State to the Government of another country, this means that, in accordance with international law, the Embassy has extraterritorial status and is governed by the Law of the country to which it belongs."

102. Although this precedent seems to be discussing Mexican embassies in other countries, it accords with my own understanding of International Law and the status of the territory of an Embassy. The British Embassy is not treated as part of Mexican territory.

103. Further, neither of the other two precedents deal with service on diplomats in Mexico. Even if they did, it does not seem to me that they could differ from what is stated in the Vienna Convention.

104. In my judgment, none of the Precedents support Mr. Taylor's claim as to how diplomats are to be served in Mexico.

105. What is the method of service that is being suggested as the proper means? In her Affidavit at paragraph 24, Ms. Wilson suggests that the proper way to serve a British diplomat in Mexico would be through the Mexican Ministry of Foreign Affairs. She did not say exactly how this service would be effected. However she stated that this would comply with the requirements of local Mexican Law as set out by Mr. Cortina in his Affidavit.

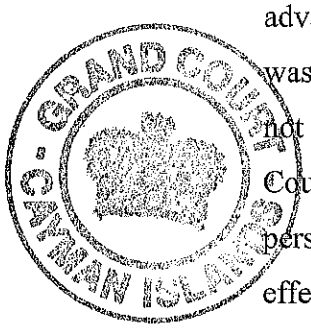
106. Mr. Taylor's email of 19 July 2016 suggests that the Mexican Ministry of Foreign Affairs would use the Note Verbale procedure. He stated that the Note Verbale could include the Writ and other documents as an enclosure or attachment, and if sent to the FCO in London, or to the British Embassy in Mexico, he would expect the documents to be passed to him.

107. Ms. Denza, in her work, opines that where it is appropriate for proceedings to be begun by personal service of a writ, this should be transmitted through diplomatic channels. However, she concedes that after ***Al-Malki v Reyes***, the position as to whether service can be effected by posting the documents to the mission or private residence of a diplomat is unclear.

108. In my judgment, there is no settled law or evidence to suggest that the method of service through diplomatic channels on an Ambassador is compulsory or mandatory. Indeed, in both ***Hellenic Lines*** and ***Al-Malki v Reyes***, service through this process has been described as unreliable or difficult. Further, there is nothing to suggest that this Note Verbale process has any link to the Hague Convention. Whilst this evidence is being given by Mr. Taylor on his own behalf, there is no independent expert or authority that has opined that this is the only process to be used. In my view, the Flow Charts as to the operation of the main, alternative and derogatory channels of transmission under the Hague Convention, handed up by Mr. Griffiths, did not take the matter any further in relation to service on an Ambassador.

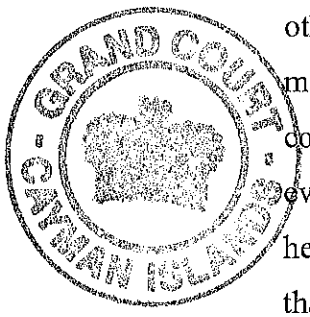
109. At all events, the process suggested by Mr. Taylor is a very round-about and circuitous process. Mr. Taylor has notice of Mr. Bush's claim, and this has occurred without any personal service upon him; through email and by courier. The point being taken by Mr. Taylor is no doubt a point he has the right to take. But it cannot be denied (especially in light of the description of the Note Verbale process in the circumstances of this case), that the objection being taken is very technical in nature.

110. In any event, it seems to me, that one of the difficulties with the arguments being advanced on behalf of Mr. Taylor is that much of the focus was on demonstrating that it was neither practically nor legally impossible to serve Mr. Taylor in Mexico. That is really not the question. The question, plainly and simply, was whether it was permissible for the Court to come to the view that it was impracticable for any reason to serve the writ personally on Mr. Taylor and that the methods of substituted service ordered would be effective to bring the documents to the notice of Mr. Taylor.



111. In my view, the correct Vienna Convention ought to have been brought to Williams J's attention on the ex parte hearing, although it would seem he was indirectly referred to the correct Convention in so far as he was referred to, had before him, and relied upon, the ***Hellenic Lines*** decision. There should also have been some discussion of the Hague Convention. But even if the Convention was discussed, it would arise simply to point out that there might be difficulties with that route also. In my judgment, there was no need to refer to O.11 Rule 5(3) (a) since Mr. Bush was not seeking to have service effected in accordance with the Law of Mexico, or of the country in which service was to be effected. He was seeking an order for substituted service under O.65 Rule 4. In my view, it was not fatal in the circumstances of this case that no reference was made to the issue of whether the mode of service proposed was contrary to the Law of Mexico. There is no evidence that it was.

112. I bear in mind that the non-disclosure does not have to be intentional to be critical. Indeed, the failure to observe the "golden rule" in respect of full and frank disclosure on ex parte applications, may entitle the Court to discharge the order even if the circumstances would



otherwise justify the grant of such relief. However, a due sense of proportion must be maintained. I would regard setting aside the order of Williams J as disproportionate and contrary to the overriding objective of dealing with cases justly. Although no affidavit evidence was put before me by Mr. Bush or by Counsel who appeared at the ex parte hearing, I accept Mr. Cox's statement that Counsel is most apologetic, and "mortified" that he referred to the wrong Vienna Convention. In other words, despite there being a bit of a muddle, the Court was sufficiently assisted to arrive at the right result. There were procedural lapses and non-disclosure, but in my view they were not fatal.

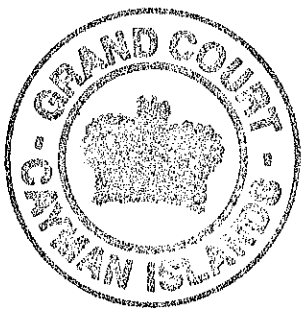
113. In the course of making his submissions, Mr. Griffiths submitted that if I were to allow the order for service by email, then no one will proceed via the route of the Hague Convention. I do not think that would be a consequence of my decision; these are special circumstances where substituted service was appropriate because it is legally impossible, and therefore for that reason, impracticable to serve the writ on Mr. Taylor personally.

114. The Vienna Convention is a specific Convention dealing with diplomats and Ambassadors, whereas the Hague Convention does not. It is the case, as Mr. Cox points out, that whereas the UK is the sending State and Mexico is the receiving State for the purpose of the Vienna Convention, the Convention does not expressly say what is to happen when one is considering legal process issuing from another State, such as in this case, the Cayman Islands. However, in my view it would seem that the rules to do with diplomats and their inviolability in relation to the process of the Receiving State would also hold true in respect of legal process from anywhere else, as a matter of International Law.

115. In this case, I think that the validity of the Order for substituted service by way of email is assisted by the fact that the Embassy may be regarded as being governed by British Law, the law of the country to which it belongs, and in relation to the email server, that is located in the UK, even if the email was opened at the Embassy.

116. In my judgment service by email was an acceptable mode of substituted service. The delivery by fed ex is delivery by courier, which is not the same as post. However, in ***Al-Malki v Reyes***, in agreeing with the US decision of ***Renchard*** at paragraph 87, it was stated that the delivery of a letter to the embassy does not affront the ambassador's personal dignity. It also does not take the form of a command. Courier is simply delivery of documents or a package and to my mind, it is susceptible to like reasoning.

117. In my judgment, the application to set aside the order of Williams J should be dismissed. However, a costs sanction should be imposed on Mr. Bush because of the non-disclosure, so that although successful in contesting this application, (and ordinarily costs would follow the success on the event), there shall be no order as to costs on this application.



THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT