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SERVICE OUT: ALTERNATIVE METHODS, 'TECHNICAL GAMES' AND EXCEPTIONAL CIRCUMSTANCES

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EXECUTIVE SUMMARY:

The High Court in *Khanna v Khanna* [2025] EWHC 3278 (Ch) dismissed the First Defendant's application to set aside an order for service by alternative means (i.e., email) in India (the "**Order**") and his application for permission to appeal the Order, despite India's objection pursuant to Article 10 of the Hague Service Convention.

The Court found that "exceptional circumstances" were present on the facts of the case and were sufficient to outweigh international comity concerns. These "exceptional circumstances" arose from a combination of factors relating to (i) the potential one-year delay if service by alternative means was not allowed, (ii) the multiple defendants and (iii) the First Defendant's conduct and gamesmanship. The Court made it clear that *"[w]hilst none of these factors [was] sufficient by itself to outweigh the importance attached to comity"*, their *"cumulative effect [was] sufficient to do so."* The Claimants were therefore allowed to serve the First Defendant out of the jurisdiction by alternative means.

BACKGROUND

The case relates to a family trust dispute between the Claimants and five Co-Defendants. The First Defendant was based in India, the Second Defendant was within the jurisdiction, and the Third to Fifth Defendants were in the British Virgin Islands.

The Claimants issued an application for service on the First Defendant in India by alternative means (i.e., email) on 26 April 2025 (the "**Application**") and were successful in obtaining the Order. For context, under the Hague Service Convention, India only permits a single method of service, which can take a year to effect and has lodged an objection to alternative methods of service pursuant to Article 10 of the Hague Service Convention.

The First Defendant made an application to set aside the Order and a further application for permission to appeal the Order. The only issue before the Court therefore related to the Order and

the hearing was confined to the issues regarding service on the First Defendant by alternative means.

The First Defendant submitted that at the hearing of the Application, the only arguments made by the Claimants related to the delay in serving in India via the permitted method of service and that there was no attempt to weigh the delay against considerations of comity.

The First Defendant also argued, in relation to the requirement in CPR r. 6.40(4)[1] that permission to appeal should be granted on the basis that there was no evidence before the Master as to whether service by email was contrary to Indian law. This was despite the fact that the First Defendant did not challenge the conclusion of the expert evidence subsequently submitted in answer to the set aside application which showed, at least on the balance of probabilities, that Indian law did not prohibit service by email.

DECISION

The Court noted that the Supreme Court[2] has previously confirmed that the power under CPR r. 6.15(1) to permit service by alternative means extends to service out of the jurisdiction under CPR r. 6.37(5)(b).

1. R. 6.15(1) requires the claimant to show "good reason" for service by alternative means and the same test applies to service out of the jurisdiction by alternative means. However, the caveat to that is that where the country in which it is intended to serve proceedings is a signatory to the Hague Service Convention and has lodged an objection to alternative methods of service pursuant to Article 10, it has been held that a higher threshold applied. In particular, in such cases it is necessary to show "exceptional circumstances", as opposed to "good reason". This higher threshold applies to India in light of the objection lodged under Article 10.

The Court reviewed the key authorities on "exceptional circumstances" and concluded that the term "exceptional" was not being used in its ordinary sense of rarity, which is why the word "special" was sometimes used instead. The judge understood that to mean that *"although the test is the same in all cases of service by alternative means (i.e. "good reason"), the reasons will not be "good" unless they sufficiently outweigh the significance attached to comity, where the country in which it is proposed to serve has lodged an objection under [the Hague Service Convention]."*

EXCEPTIONAL CIRCUMSTANCES: FACTORS

The Court analysed the relevant factors in support of service by alternative means, as follows:

1. **Delay.** The delay of around 12 months if service by alternative means was not allowed, which was "*close to being incompatible with the administration of justice*";

2. **Multiple Defendants.** The fact that there were four other defendants, who had all been properly served with the proceedings; and

3. **First Defendant's Conduct.** The fact that the First Defendant was plainly aware of the proceedings and was *"playing technical games to avoid service, in effect seeking to shelter behind an argument based on comity."*

The Court concluded that *"[w]hilst none of [the above] factors [was] sufficient by itself to outweigh the importance attached to comity"*, *"the cumulative effect [was] sufficient to do so."* On that basis, the factors did constitute "exceptional circumstances" justifying service in India by alternative means and the First Defendant's application to set aside the Order was therefore dismissed.

The Court also dismissed the First Defendant's appeal against the Order and confirmed that the Court's reasons for reaching the present conclusions were *"largely the same reasons"* that the Order was based upon.

Furthermore, and notably, the Court found that a claimant seeking such an order must always satisfy themselves that CPR r. 6.40(4) will not be infringed, and it would no doubt be good practice to put evidence to this effect before the court, but there is no requirement to go through a *"tick-box"* exercise in a case where the claimant is properly so satisfied. Therefore, the First Defendant's submission that the appeal should be allowed on (among others) the ground that there was no evicence before the Master to satisfy CPR r. 6.40(4) also failed.

CONCLUSION

This recent High Court decision helpfully clarifies the Court's assessment and approach to establishing "exceptional circumstances" for allowing the Claim Form to be served out of the jurisdiction by alternative means when a Hague Service Convention signatory has lodged an objection to alternative service. This case confirms that such service can be ordered when these circumstances are present on the facts, despite comity considerations (which can be outweighed).

BCLP routinely advise on all aspects of litigation with an international dimension, including service out of the jurisdiction and jurisdictional challenges. Should you have any questions, please reach out to Andrew.street@bclplaw.com and Catalina.diaconeasa@bclplaw.com.

[1] This states: *"Nothing in…any court order authorises or requires a person to do anything which is contrary to the law of the country where the claim form…is to be served."*

[2] See *Abela v Baadarani* [2013] 1 WLR 2043.

RELATED CAPABILITIES

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