Neutral Citation Number: [2026] EWHC 2426 (Ch)

BL-2025-001507

THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHANCERY DIVISION)

The Rolls Buildings,
7 Rolls Building,
Fetter Lane,
London EC4A 1NL

Date: 21 September 2026

BEFORE AMANDA HARDY KC SITTING AS A DEPUTY HIGH COURT JUDGE

B E T W E E N:

MARK DENNING

Claimant

and

(1) ARCEM RESOURCES LIMITED
(2) CHRISTOPHER PAUL MACDONALD MAIN

Defendants

Michael Hain (instructed by Ghaffari Fussell LLP) for the Claimant
Niranjan Venkatesan KC and **Joe Johnson** (instructed by Enyo Law LLP) for the Defendants

Hearing dates: 7-9 May 2026

This judgment was handed down remotely at 3:30pm on 21 September 2026 by circulation to the parties or their representatives by email and by release to the National Archives

Amanda Hardy KC sitting as a Judge of the High Court:

INTRODUCTION AND PRELIMINARY MATTERS

Introduction

1. This is my judgment in respect of the following applications:

   (1) the Defendants' Part 11 application challenging the Court's jurisdiction ("the Part 11 Application"); and

   (2) the Claimant's (alternative) cross-application to serve out of the jurisdiction and (if required) for ancillary relief.

2. Pursuant to a Loan Agreement ("the Loan Agreement") dated 18 December 2019, the Claimant, Mr. Mark Denning, lent US$1 million to the First Defendant, Arcem Resources Limited ("Arcem") and the Second Defendant, Mr. Christopher Main, agreed to guarantee Arcem's repayment obligations. The loan was to provide emergency funding for operations at the Minas Moatize coal mine in Mozambique.

3. The loan was due for repayment on 19 March 2020 by virtue of clauses 1.2.14, 1.2.15 and 4.1 of the Loan Agreement. On 13 May 2020 Mercatis Law (on behalf of the Claimant, and his then solicitors) wrote to Arcem requesting repayment of the loan plus accrued interest. On the same day Mercatis Law sent a separate letter to Mr. Main, in his capacity as guarantor, notifying him of Arcem's alleged breach and requesting payment. On 28 May 2020 and 2 June 2020 Mercatis sent further letters to Arcem and Mr. Main respectively demanding payment.

4. By clause 8, the Loan Agreement is expressly subject to English law.

5. At the date of the hearing the full amount of the loan remained outstanding.

6. By his claim and particulars of claim, both dated 27 November 2025, the Claimant sought repayment of the principal and interest totalling approximately US$2.9 million.

7. The Claimant submitted that he served the claim form and particulars of claim on Arcem and Mr Main outside of the jurisdiction on the basis that the claim was made pursuant to or in respect of "*a contract which contains a term to the effect that the court shall have jurisdiction to determine that claim*" under CPR 6.33(2B)(b) or (c).

8. It is common ground that the Loan Agreement itself does not contain a jurisdiction clause, however, the Claimant submitted that the relevant term is contained in a Security Letter dated 13 June 2021 ("the Security Letter"), as set out below.

9. The Claimant also submitted the Loan Agreement provides for a contractual method of service.

10. On 27 August 2025, the Claimant's new solicitors, Ghaffari Fussell, demanded repayment under the Loan Agreement. On 17 October 2025, Ghaffari Fussell made a similar demand of Mr. Main in his capacity as guarantor.

11. The Defendants dispute liability.

12. On 11 December 2025, the Claimant submits Arcem was served by email to the email address set out for Arcem in clause 1.2.4 of the Loan Agreement.

13. On 16 December, the Claimant submits Mr. Main was served by courier to the Bahamas address set out in in clause 1.2.7 of the Loan Agreement and he received the documents by email.

14. On 2 January 2026, the Defendants filed an acknowledgment of service, indicating their intention to contest the Court's jurisdiction. The Defendants continue to dispute that service was validly effected on a number of grounds which I set out below.

15. On 29 January 2026, the Defendants issued their Part 11 Application, supported by a witness statement of Mr. Rodgers.

16. On 9 February, the Claimant served his evidence in response to the application in the form of a witness statement of Mr. Fussell.

17. The Claimant submitted that the Part 11 Application should be dismissed on a number of grounds which I set out below and, if the Part 11 Application succeeded, he sought (i) permission to serve out pursuant to CPR PD 6B paragraph (6)(c) on the basis that he is making a claim in respect of a contract governed by the law of England and Wales; and (ii) an order extending time for serving the claim form. The Claimant relies on Mr. Fussell's witness statement in support of his cross-application.

18. I am grateful to all counsel for their helpful and detailed written and oral submissions in respect of all the issues before me.

Preliminary Issues

19. On 13 February 2026, Master Brightwell gave directions as to the listing of the two applications as follows:

> "*I consider it appropriate for both applications to be before the same Judge, as was the case in the SMT Global Logistics case before Bryan J, as explained at [100].*"

20. Master Brightwell's direction refers to the decision of Mr. Justice Bryan in *SMT Global Logistics v Georgian Airlines* [2025] EWHC 739 (Comm). There, as in the present case, there was an application by the defendant under CPR Part 11 challenging service and a contingent application by the claimant for permission to serve the claim form out of the jurisdiction (in the event the defendant's jurisdiction challenge were to succeed).

21. Paragraph 100 of Bryan J's decision, to which Master Brightwell referred, is as follows:

> "*Nevertheless as* [the application for permission to serve out] *was before me on an ex parte basis (on notice), I will address it. I foreshadow at the outset that I am satisfied it is an appropriate case for service out of the jurisdiction on this gateway and I grant permission to serve out. In the usual way, it will be open to the Defendant to apply to set aside service in due course if they see fit to do so.*"

22. I heard submissions at the beginning of the hearing from both Mr. Hain and Mr. Venkatesan in respect of the order of the issues before me and I directed that the Part 11 Application would be heard first.

23. I also heard submissions at the end of the first day of the hearing in respect of whether the Claimant's cross-application for permission should be heard *ex parte* or *inter partes* in order for Mr. Hain to be in a position to prepare full and frank disclosure if the application was *ex parte*.

24. I ordered that the cross-application would be heard *ex parte* for the following reasons. First, in ordering that the Claimant's cross application for permission was to be heard on the same basis as in *SMT Global Logistics*, with a specific reference to paragraph 100 of Mr. Justice Bryan's decision in *SMT Global*, I consider that Master Brightwell was directing that the cross-application was to be heard *ex parte*.

25. Secondly, the correspondence between the parties to which I was taken in the course of the hearing proceeded on the basis that the application would be heard *ex parte*.

26. Finally, and most importantly, Mr. Venkatesan submitted, in my view correctly, that if the Part 11 Application is successful, the Defendants have not been validly served and he would not then be in a position to make submissions as to the merits of the cross-application without raising the risk of submitting to the jurisdiction and waiving their jurisdiction challenge. *Deutsche Bank AG v Petroma ASA* [2015] 2 Lloyd's Rep 15 provides a salutary lesson to litigators in this regard.

RELEVANT BACKGROUND

The Security Letter

27. On 13 June 2021, each of the parties signed the Security Letter which is central to the Part 11 Application.

28. The Security Letter was sent by Mercatis on their letterhead. Mr. Main signed the Security Letter on behalf of both himself and Arcem.

29. The Claimant was not described as a "client" of Mercatis and the signature page includes a signature by Mercatis on behalf of the Claimant.

30. The Security Letter is headed "Loan Agreements dated 18th December 2019, 29th March and 11th June 2021". Its first unnumbered paragraph provides:

> "*We refer to the Loan Agreements dated 29th March and 11th June 2021 between our clients Morebath Ltd as Lender and Arcem Resources Ltd as Borrower, and BHR Mining Mauritius Ltd, Paul Main and Minas Moatize Ltda as Guarantors, and also to the Loan Agreement dated 18th December 2019 between Arcem Resources Limited as Borrower and Mark E. Denning as Lender (which Borrowers shall be referred to collectively as the "Obligors" or the "Chargors"), and which Lenders shall be collectively referred to as the "Lenders", and which Loan Agreements shall be collectively referred to as the "**Loan Agreements**"*."

31. The Loan Agreement is, therefore, expressly referred to in the Security Letter.

32. The Security Letter also contains the exclusive jurisdiction clause on which the Claimant relies as follows:

> "*[T]his letter agreement shall be governed by English law, and any dispute arising out of or in connection with it or under either of the Loan Agreements shall be subject to the exclusion* [sic] *jurisdiction of the English Courts*."

THE LAW

33. I turn now to consider the relevant law.

Applicable legal principles

34. Mr. Venkatesan submitted that the relevant legal principles are as follows.

35. The valid service of a claim form is '*the act by which the defendant is subjected to the court's jurisdiction*', see Lady Justice Carr (as she then was) in *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2022] 1 WLR 2339 at paragraph 41. In civil proceedings, therefore, the foundation of the jurisdiction of the English court is the

service of the claim form, not its issue and this has various consequences which permeate the CPR. If the claim form is not validly served on the defendant, then the court does not have jurisdiction over the defendant.

36. The *Good Law* case involved a not for profit organisation and the issues arose in the context of Good Law's challenge in respect of the lawfulness of Government orders for items, such as PPE, during the COVID-19 pandemic.

37. In the pre-action correspondence, the Treasury Solicitor stated that they were authorised to accept service, but it must be sent to a bespoke email address called the new proceedings email address, newproceeds@governmentlegal.gov.uk, in order for the Government to monitor the issue of new claims. Good Law's solicitors sent the unsealed claim form to the specified email address, but they failed to send the sealed claim form once they had received it from the court office.

38. In principle, this did not cause any prejudice to the defendant because it not only knew about the claim, but had received both the sealed and the unsealed claim form addressed to the individual who had conduct of it on their behalf.

39. Despite that, the judge at first instance held that service was defective and her judgment was upheld by the Court of Appeal, despite Good Law's submissions on appeal that this was a technical defect which should not result in the loss of an important claim raising issues of public interest.

40. Lady Justice Carr, who gave the majority judgment, held at paragraph 41:

> "*As for the importance of valid service, service of a claim form can be distinguished from other procedural steps. It performs a special function: it is the act by which the defendant is subjected to the court's jurisdiction. This quality is reflected in the terms of CPR r 7.6, with its very strict requirements for any retrospective extension of time. Equally, reliance on non-compliant service is not one of the instances of opportunism deprecated by the courts (see for example Woodward v Phoenix Healthcare Distribution Ltd [2019] EWCA Civ 985 (Woodward) at [48]). The need for particular care in effecting valid service, particularly when there are tight time limits and/or a claimant is operating towards the end of any relevant limitation period, is self-evident.*"

41. Therefore, if the claim form is not validly served, the Court does not have jurisdiction to determine the claim and Lord Justice Coulson has recently noted that the proceedings themselves are '*on the face of it…a nullity*', see *Robertson v Google LLC* [2025] EWCA Civ 1262, at page 50.

42. The general rule is that a claim form can be served within the jurisdiction but not outside it, unless the Court's permission is obtained, see *Dexia Crédit Local SA v Patrimonio del Trentino SpA* [2024] EWHC 2717 (KB) at paragraph 41.

43. CPR 6.33(2B), on which the Claimant relies, identifies certain circumstances in which service out of the jurisdiction is permitted without the Court's permission:

> "*The claimant may serve the claim form on the defendant outside of the United Kingdom where, for each claim made against the defendant to be served and included in the claim form-*
>
> *(a) the court has power to determine that claim under the 2005 Hague Convention and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention;*
>
> *(b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim; or*
>
> *(c) the claim is in respect of a contract falling within sub-paragraph (b)*."

44. Where this rule is relied upon, the claimant is required to file, with the claim form, '*a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction*': CPR 6.34(1)(a).

45. Form N510 is the specified form of notice. It has been described as an '*important document because it provides the basis for a claimant's assertion that the UK courts have jurisdiction*': see *Robertson* at paragraph 11.

46. Mr. Venkatesan submitted, and I did not understand Mr. Hain to disagree, that if the defendant challenges the claimant's entitlement to serve out without permission, the burden is on the claimant to establish that entitlement, see Mr. Justice Bryan in *Dexia Crédir Local SA v Patrimonio del Trentino SpA* [2024] EWHC 2717 (KB) at paragraph 43:

> "*The burden of proof is upon the claimant to satisfy the Court that it has a "good arguable case" that the claim falls within the rule as explained in Brownlie v Four Seasons Holdings [2017] UKSC 80 ("Brownlie") at [7], and Kaefer Aislamientos v AMS Drilling Mexico [2019] EWCA Civ 10 ("Kaefer") at [73]*."

47. It was also common ground that the claimant is required to do so to the standard of a '*good arguable case*', which means that the claimant must have the better of the argument (and a plausible evidential basis) that CPR 6.33(2B) applies, see *Canara Bank v MCS International Ltd* [2022] EWHC 2012 (Comm) at paragraphs 41 and 51.

48. Mr. Venkatesan accepted that the phrase "the better of the argument" is not a reference to the balance of probabilities, that is it is lower than that, but is higher than strike out summary judgment, in effect, the standard of serious issue to be tried.

49. However, Mr. Venkatesan submitted that, if the question of jurisdiction raises issues of law or the construction of a contract, such issues should be decided finally and not to the good arguable case standard, see for example, *Lloyd v Google* [2019] 1 WLR 1265, at paragraph 50 per Mr. Justice Warby (as he then was), as affirmed [2022] AC 1217, at paragraphs 6 and 160 by Lord Leggatt. He submitted that this was relevant to the present case because, to the extent the Claimant's ability to come within the rules permitting service out without permission turns on a point of principle, that should be decided finally and the Claimant needs to be right about it to come within the rules.

50. Mr. Venkatesan further submitted that, in this case, the Claimant's Form N510 stated that he was entitled to serve out of the jurisdiction under CPR 6.33(2B)(b) or (c). These rules provide that the claimant may serve the claim form without permission where each claim is made pursuant to or in respect of '*a contract* [which] *contains a term to the effect that the court shall have jurisdiction to determine that claim*'.

51. Mr. Venkatesan noted that CPR Rule 6.34 provides as follows:

> "*Notice of statement of grounds where the permission of the court is not required for service.*
>
> *6.34(1) Where the claimant intends to serve a claim form on a defendant under rule 6.32 or 6.33 the claimant must -*
>
> *(a) file with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction; and*
>
> *(b) serve a copy of that notice with the claim form.*
>
> *(2) Where the claimant fails to file with the claim form a copy of the notice referred to in paragraph (1)(a), the claim form may only be served -*
>
> *(a) once the claimant files the notice; or*
>
> *(b) if the court gives permission.*"

52. Mr. Venkatesan noted that the Claimant in his Form N510 stated that he is entitled to serve out without permission under sub-rules (b) and (c) of 6.33(2B) but not sub-rule (a), however, the Claimant's skeleton argument suggests in a footnote that the Claimant is also entitled to rely on sub-rule (a), to which Mr. Venkatesan took issue.

53. Finally, on the relevant legal principles, Mr. Venkatesan submitted that the meaning of sub-rules (b) and (c), which provide, in (b) "*a contract contains a term to the effect that*"

and in (c) "*the claim is in respect of a contract falling within subparagraph (b)*" read together distinguish between the contract as a whole and the jurisdiction clause within it, that is, they are not the same thing.

54. Mr. Venkatesan submitted that this is important as, in order to invoke sub-rules (b) and (c), the Claimant will need to satisfy the court that he has a good arguable case that there is a contract containing an English jurisdiction clause, not merely that he has a good arguable case that there is an English jurisdiction clause. This means that the Claimant must have a good arguable case that the Security Letter as a *whole* amounts to a contract and that it contains a term providing for English jurisdiction.

55. It was Mr. Venkatesan's case that if the Claimant fails on that, that is, if the Security Letter does not constitute a contract, then we do not get into the question of whether there is a term providing for English jurisdiction because the language in (b) and (c) requires the Claimant to establish both the existence of the contract and the existence of the term within it providing for English jurisdiction. That would consequently mean that the principle of separability does not arise.

56. Mr. Venkatesan submitted this was clear as a matter of statutory interpretation and was also supported by two authorities, *Canara Bank v MCS International Ltd* [2022] EWHC 2012 (Comm) and *Rimpacific Navigation Inc. v Daehan Shipbuilding Ltd* [2009] EWHC 2941 (Comm).

57. In *Canara Bank*, the issue was whether the second defendant, MCS France, was bound by an English jurisdiction clause in a contract of guarantee dated 22 November 2013.

58. Mr. Nigel Cooper Q.C., sitting as a Depuy Judge of the High Court held, at paragraphs 41, 44 and 45:

> "*41. In order to bring itself within CPR 6.33(2B)(b), Canara has to establish that it has a good arguable case that MCS France is a party to and bound by the jurisdiction agreement within the Guarantee, which also means establishing a good arguable case that MCS France was a party to and bound by the Guarantee…*
>
> *44. In Rimpacific Navigation Inc. v Daehan Shipbuilding Co. Ltd [2009] EWHC 2941 (Comm), a question arose as to whether letters of guarantee containing an English law and jurisdiction clause were binding on a defendant. Steele J. held that the claimant had to show that there was a good arguable case that the contract as a whole existed and that one should not consider the jurisdiction clause separately ([22] to [24]). It is not enough to establish that if there was a contract, that contract arguably contained a relevant jurisdiction clause. He went on to find that the Claimant had established jurisdiction.*
>
> *45. Aikens J. also considered whether a guarantee with an English law and jurisdiction clause was binding on a defendant when it was said to have been signed by someone*

without authority in Marubeni Hong Kong and South China Ltd v. Mongolian Government [2002] 2 All ER (Comm) 873. The judge held that the issue was whether there was a good arguable case that the guarantee was a valid contract and that one should not consider the jurisdiction clause separately ([15]). On the question of whether the guarantee was signed by an agent with appropriate authority, he held that the claimant had to show a good arguable case ([25])."

59. In *Rimpacific*, the claimant brought a claim for money allegedly due under a guarantee executed by a foreign defendant, a South Korean company. The guarantee contained an exclusive jurisdiction clause in favour of the English Court.

60. Mr. Venkatesan submitted that if the Claimant's submissions in the present case are correct, *Rimpacific* would have been a very straightforward case as the court would have held that the principle of separability applies to the particular clause in the guarantee and as the jurisdiction clause contained mutual promises it was valid and service could be effected outside the jurisdiction.

61. Mr. Venkatesan further submitted that the judge in *Rimpacific* rejected that analysis. It arose in that case as it was argued that the containing contract, the guarantee, as a whole was invalid because the person who purported to sign it did not have authority to do so. The claimant argued (as in the present case) that that did not matter as the jurisdiction clause was separable, relying on *Fiona Trust v. Privalov* [2007] Bus LR 1719. Mr. Justice David Steel framed the issue as follows, at paragraph 11:

"*Separability*

[11] At the heart of the dispute between the parties is the defendant's contention that the letters of guarantee on which the claimants rely are not (or strongly arguably are not) binding. Thus the first issue that arises is whether the claimants have a good arguable case that there is jurisdiction under CPR PD 6B, para 3.1(6)(c) or (d). This in turn gives rise to a threshold point raised by the claimants. It is this. Is this issue to be determined by reference to the existence and validity of the guarantees or to the existence and validity of the law and jurisdiction clauses."

62. Mr. Venkatesan noted that nothing turns on the reference to CPR PD6B 3.1(6)(c) or (d) as 3.1(6)(d) was omitted after Brexit and now the equivalent is in 6.33(2B). The difference is you can now serve out without permission if you come within it and previously it was one of the grounds on which you could seek and obtain permission. The meaning of the words is the same and is why the case is treated as good law in *Canara Bank* as set out in paragraph 58 above.

63. Mr. Venkatesan further noted that Mr. Justice David Steel referred to the threshold point in the same terms as the Claimant in the present case, that is, do you look at the contract as a whole and ask if that is valid or came into existence, or do you fillet out the jurisdiction clause, apply the principle of severability to it and say as long as that is valid a claimant can bring the foreign defendant before the English courts. In that case, as in this, the defendant made the same submission, namely, that the doctrine of severability is of no application on the basis that the rule provides that the containing contract must be valid.

64. Mr. Justice David Steel accepted the defendant's submission:

> *"[23] I prefer the defendant's stance on this issue. CPR PD 6B, para 3.1(6) provides for service out of the jurisdiction where, inter alia, '[a] claim is made in respect of a contract' where the contract '(c) is governed by English law; or (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract'. It follows in my judgment that a good arguable case must be made out that the contract existed. It is not enough to show that, if there is a contract (or a serious issue that there is a contract), it would arguably contain a law and jurisdiction clause. The 'relevant' contract in the present proceedings is the guarantee as a whole and not the law and jurisdiction agreement.*"

65. Accordingly, Mr. Venkatesan submitted that, in the present case:

(a) The Claimant must establish that the Defendants are party to a contract containing a term that the English court has jurisdiction to determine the claim advanced by Claimant.

(b) The Claimant must establish that to the good arguable standard, save that any point of law or construction that arises should be decided finally.

66. I agree with Mr. Venkatesan's analysis of the applicable legal principles. First, I consider that it is clear from, *inter alia*, the *Good Law* and *Robertson v Google* cases that, if the claim form is not validly served, the Court does not have jurisdiction to determine the claim and, as Lord Justice Coulson noted, the proceedings themselves are "*on the face of it…a nullity*".

67. Secondly, I agree that the *Canara Bank* and *Rimpacific* cases establish that, in order to invoke sub-rules (b) and (c), the Claimant needs to satisfy the court that he has a good arguable case that there is a contract containing an English jurisdiction clause, not merely that he has a good arguable case that there is an English jurisdiction clause. This means that the Claimant must have a good arguable case that the Security Letter as a whole amounts to a contract and that it contains a term providing for English jurisdiction.

68. Accordingly, in the present case, the following issues arise:

(1) Issue 1: is the jurisdiction clause valid? This gives rise to two sub-issues:

(a) Issue 1(a): does the Security Letter lack consideration?

(b) Issue 1(b): if so, is the jurisdiction agreement in it nonetheless enforceable?

(2) Issue 2: if the Security Letter lacks consideration but is nonetheless enforceable, does the jurisdiction agreement apply as a matter of construction? This raises three questions:

(a) Issue 2(a): what is the effect of clause 9.4 of the Loan Agreement?

(b) Issue 2(b): does the jurisdiction clause apply to disputes pre-dating it?

(c) Issue 2(c) does the does the jurisdiction agreement apply to Mr. Main?

(3) Issue 3: was the method of service used by the Claimant valid? This needs to be considered in respect of each of the Defendant's:

(a) Issue 3(a): was Arcem served by a valid method?

(b) Issue 3(b): was Mr. Main served by a valid method?

Issue 1: is the jurisdiction clause valid?

69. The first issue that arises, therefore, is whether the Claimant can rely on the jurisdiction clause within the Security Letter in order to come within 6.33(2B)(b) and (c). As I have held above, the Claimant must first satisfy the court that he has a good arguable case that there is a contract containing an English jurisdiction clause.

70. Mr. Hain's primary case in his Skeleton Argument was that the jurisdiction clause in the Security Letter is separable and supported by consideration even if the Security Letter as a whole is void for lack of consideration, that is, Issue 1(b). Mr. Hain's fallback position was that the Security Letter as a whole is also supported by consideration.

71. However, both Mr. Venkatesan and Mr. Hain took Issue 1(a), that is, does the Security Letter lack consideration, first.

Issue 1(a): does the Security Letter lack consideration?

72. Mr. Venkatesan correctly submitted that a party must provide consideration, that is, something in exchange for a promise, in order to be able to enforce that promise. A bare promise, that is to say a promise in return for which there is neither benefit to the promisor nor detriment to the promisee, is not a contract: *Chitty on Contracts* (36th Edition 2026) [6-001] ("Chitty").

73. Mr. Venkatesan further submitted that the Security Letter lacked consideration because (i) it purports to impose a series of obligations on the Defendants; but (ii) the Claimant gave nothing in return for those obligations, the loan having already been advanced. There was neither benefit to the Defendant borrowers in return for the apparent promise to give security in June 2021, nor any detriment to the Claimant. More particularly, he submitted that:

(a) the Security Letter states that Arcem must grant the Claimant a first ranking security over certain assets, a charge over the contents of its bank accounts and certain shares, an assignment of certain rights and interests, and first floating charges over the whole of its undertaking and other assets;

(b) the Security Letter also appears to require Arcem to refrain from creating or permitting to subsist further security interests over its assets or from disposing of or agreeing to dispose of assets except with Claimant's written consent; and

(c) by contrast, the Security Letter does not impose any obligation on the Claimant: it does not say that the Claimant is to do anything in return for the obligations apparently imposed on Arcem.

74. Mr. Hain submitted that the argument that the Security Letter lacked consideration was wrong for two main reasons. First, that the lender's forbearance from suing the borrower constitutes consideration, that is, the Defendants promised to give security in June 2021 and therefore the Claimant did not sue the Defendants for the money which had become due by then and that amounts to consideration. Secondly, the Security Letter is supported by consideration, in the form of the jurisdiction clause.

75. In respect of forbearance, Mr. Venkatesan accepted that conceptually, Mr. Hain was correct, in that forbearance can amount to consideration, however, he submitted that there had to be a causal link between the borrower's promise to give security and the lender's decision to refrain from suing the borrower. Absent that link, he submitted that refraining to sue is incapable of constituting consideration for the simple reason that you have not refrained to sue in return from the promise. The whole point of the doctrine of consideration is what happened in return for the promise.

76. In support of this proposition, Mr. Venkatesan cited Chitty at paragraphs 6-058 and 6-059:

> **"*Relation between actual forbearance and the promise made in return for it***
>
> *Where the consideration is alleged to consist of an actual forbearance, that forbearance must be causally connected with the debtor's promise. A creditor does not give consideration merely by forbearing to enforce an antecedent debt. In Wigan v English & Scottish Law Life Assurance Society a debtor executed an assignment of an insurance policy by way of mortgage in favour of his creditor. Parker J held that the creditor, who knew nothing of the mortgage, had given no consideration for it; but he added that the creditor would have provided consideration if he had been told of the mortgage and if, "on the strength of" it, he had actually forborne to sue for the debt.*
>
> ***Express or implied request of debtor necessary***
>
> *The crucial question, therefore, is whether the creditor has forborne "on the strength of" the debtor's promise. They will clearly have done so where the debtor has expressly requested the forbearance. But such an express request is not necessary. In Alliance Bank v Broom the bank's forbearance was held to constitute consideration even though the defendant had not expressly requested it. Lord Macnaghten later explained the case on the ground that the debtor had impliedly requested forbearance. It seems that an actual forbearance which is not induced by either the express or the implied request of the debtor is no consideration. In Combe v Combe a husband during divorce proceedings promised to pay his wife an annual allowance. In an action to enforce this promise, the wife argued, inter alia, that she had given consideration for it by forbearing to apply to the court for a maintenance order. But it was held that there was no consideration as the wife had not forborne at the husband's request.*"

77. As Mr. Hain pointed out, footnote 262 at the end of the quote reads, however, "*Quaere whether such a request should not have been implied*", that is, in the *Combe* case.

78. Mr. Venkatesan submitted that the words "*on the strength of it*" are the critical part of that passage and relies on the sentence "*It seems that an actual forbearance which is not induced by either the express or the implied request of the debtor is no consideration*".

79. He further submitted that bare forbearance is incapable of amounting to consideration; you need either an express or implied request. He accepted that, as in any case involving the construction of contracts or other instruments, you can look at the factual matrix and can imply things from conduct, but you need a causal link between forbearance and a promise to provide security, captured by the words "*on the strength of*".

80. On that basis, Mr. Venkatesan submitted that there are two reasons why the Claimant cannot show that he refrained from suing the Defendants on the strength of, or because of, the security provided in the Security Letter.

81. First, because there is no foundation in the Claimant's evidence or the pleadings. Mr. Fussell's witness statement on behalf of the Claimant, served after it was clear that the Defendants would contend that the Security Letter as a whole lacked consideration, only states that "*the mutual promise to litigate disputes in England was consideration*" and does not explain why it is not void for lack of consideration.

82. Mr. Venkatesan submitted that there is therefore an issue of fact, namely, was it actually on the strength of the promise that the Claimant refrained from suing or was it for some other reason? He also submits that it is common ground that the Claimant bears the burden of proof and he has to discharge it to the standard of good arguable case, requiring a plausible evidential basis, as discussed above.

83. So, Mr. Venkatesan submitted, if the Claimant's case were that he refrained from suing the Defendants because of the promise to provide security, at a minimum, one would expect a witness statement at least to say it and then to explain it, however, the witness evidence does not deal with it at all. Mr. Fussell does deal with the letter that was sent on 27th August 2025, four years after the Security Letter, seeking repayment, however, even in the section of the witness statement which says that it is going to identify relevant factual matrix, it does not identify the point on forbearance which has emerged for the first time in the Claimant's skeleton argument.

84. Mr. Venkatesan submits that is fatal - one does not get into the detail of why the Claimant did not sue because if there is no evidence at all that Mr. Denning refrained from suing the Defendants on the strength of the Security Letter, then it must follow that the Claimant cannot satisfy the test identified by the Supreme Court for a good arguable case, which is that the claimant must "supply" a plausible evidential basis.

85. He relies on the *Canara Bank* case where the judge noted, at paragraph 46 "*The meaning of 'good arguable case' has been the subject of many authorities including two recent decisions of the Supreme Court and a decision of the Court of Appeal*", referring first to *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR, where Lord Sumption put the test in the following terms:

> "*What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a*

superior standard of conviction that is both uncertain and unwarranted in this context."

86. Mr. Cooper Q.C. noted that, although Lord Sumption's formulation of the test for jurisdiction was *obiter* in *Brownlie*, it was endorsed by a unanimous Supreme Court in *Goldman Sachs International v. Novo Banci SA* [2018] UKSC 34 at [9] and followed by the Court of Appeal in *Kaefer Aislamentios SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 at [62] to [71].

87. Mr. Cooper Q.C. also noted as follows at paragraph 50 of *Canara Bank*:

"*Having adopted the three limb test set out above, the Court in Kaefer Aislamentios went to give guidance as to how the test is to be applied; see per Greene LJ at [73] to [80].*

i) The reference in limb (i) to a plausible evidential basis is a reference to an evidential basis showing that the claimant has the better of argument. It is also a test which is context specific and flexible.

ii) In expressing a view on jurisdiction, the court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits.

iii) The adjunct "much" must now be laid to rest.

iv) Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it reliably can. Jurisdiction challenges are inevitably interim and will be characterised by gaps in the evidence. Limb (ii) is an instruction to use judicial common sense and pragmatism not least because the hearing is intended to be one conducted with due despatch and without hearing oral evidence.

v) Limb (iii) addresses the situation where the court finds itself simply unable to form a detailed conclusion on the evidence before it and is therefore unable to say who has the better argument. To an extent it moves away from a relative test and introduces a test combining good arguable case and plausibility of evidence. The intention is that this should be a more flexible test, which is not necessarily conditional upon relative merits."

88. Mr. Venkatesan submitted therefore that the Claimant must supply an evidential basis and it must be plausible, even if it is contested. It was his case that no evidential basis is supplied by Mr. Fussell and that is a complete answer to the forbearance point.

89. In response, Mr. Hain submitted that the primary documents form the contemporaneous record which comprise demands, Security Letter, no demands, no lawsuit and that sequence is good enough for forbearance to amount to consideration.

90. Mr. Venkatesan contended, secondly, that it is not only the absence of evidence which is fatal. He contended that the reason the evidence is not there is because it is a bad point on the facts for the following reasons.

91. On the Claimant's case, the money under the Loan Agreement became payable on 18 March 2020. Demands for payment were made in May and June 2020. Payment was not made at that time, but importantly no claim was brought, nor was any enforcement step taken (at least there is no evidence that it was) between then and the Security Letter in June 2021.

92. Mr. Venkatesan submits that this is inconsistent with the suggestion that the reason why the Claimant refrained from suing the Defendants is the Security Letter because, during that period, the Security Letter did not exist, which suggests that there are other reasons why the Claimant did not sue the Defendants, and those other reasons may have persisted after June 2021.

93. Mr. Venkatesan submitted that this is supported by the enforceability clause in the Security Letter which provided: "*The security created pursuant to this letter agreement shall become immediately enforceable and the Lenders may enforce all or any of their rights hereunder as they think fit*".

94. He submitted that if there was some understanding (even implied) that the Claimant would refrain from suing because the Security Letter was executed, then it is hard to see why there would be a provision which says it is immediately enforceable. He did not put this too high, acknowledging that it is possible that there is some collateral agreement where even though it is immediately enforceable, there is an agreement not to enforce it, but he submitted that it is yet another inconsistency unexplained on the Claimant's evidence.

95. Mr. Hain submitted that this reasoning misses one factual and one legal point. The factual point is that as a matter of proper interpretation, the rights "hereunder" are the rights created under the Security Letter. Mr. Hain put this as it being perfectly consistent to say "I need to enforce my security right, but I am not going to sue you". He submitted that these are not inconsistent promises and Mr. Venkatesan misreads the word "hereunder".

96. The legal point it misses, Mr. Hain submitted, is that it does not actually matter whether there was a promise not to sue for the purposes of consideration and forbearance. He relies on the end of the Security Letter where the parties state "We hereby confirm our agreement to the terms set out above". This is, he submits, completely inconsistent with the suggestion that this is not meant to be a legally binding agreement.

97. Mr. Hain also submitted that, in *Blue v Ashley* [2017] EWHC 1928 (Comm), a case Mr. Venkatesan relied upon for Issue 1(b), whether the jurisdiction agreement was enforceable, supported the proposition that the courts bend over backwards to give effect to agreements that are otherwise intended to be binding. In the context where Mr. Justice Leggatt (as he then was) recorded, at paragraph 60, that "*the defence of lack of consideration was accordingly hopeless and was quite rightly not pursued by counsel for Mr. Ashley at trial*", Mr. Justice Leggatt noted at paragraph 58 that "*The requirement of consideration… does not cause a problem. It would be unusual if it did, as I am not aware of any case in the twenty-first century in which a claim founded on an agreement has failed for want of consideration*".

98. Further, Mr. Hain relied on Professor John Cartwright's Book, *Formation and Variation of Contracts* at paragraph 8-28, where Professor Cartwright states:

> "*However, the courts appear generally to be reluctant to find that a promise made seriously with an intention that it should be legally binding is enforceable for the reason that the promisee has not provided consideration for it. Donaldson J* [in *Thoresen Car Ferries Ltd v Wymouth Portland BC* [1977] 2 Lloyd's Rep. 614 at 619] *said that 'A defence of lack of consideration rarely has merit' and the courts will sometimes look hard in order to discover the consideration which justifies the enforcement of a promise. Some older cases can be explained as the courts' seeking to give effect to a promise through the law of contract for which a remedy in tort was not yet available.*"

99. I note, however that in footnote 181, Professor Cartwright refers to a recent case where the court found there was no consideration: *Costa v Disociadid Ltd* [2022] EWHC 1934.

100. Mr. Hain submitted that the court should be extremely reluctant to say that the Security Letter was meaningless as this would defeat the expectations of reasonable, honest, commercial business people which are precisely the expectations that English courts have for centuries striven to uphold.

101. Mr. Hain submitted that practical benefit is good enough and forbearance is a practical benefit which is good enough consideration, the Security Letter is supported by consideration or at the very least, the Claimant has a good arguable case that it is so.

102. Mr. Hain's second submission was that, in any event, the jurisdiction clause is not only separable but constitutes consideration for the Security Letter as a whole. He submitted that, in circumstances where a peppercorn is of value, the promise to sue in England must be something of value to the Defendants.

103. Mr. Venkatesan accepted that if there is an exclusive jurisdiction clause then both parties are making mutual promises to sue only in England and not elsewhere, but he submitted that a jurisdictional clause or an arbitration clause cannot on its own constitute consideration for a contract that otherwise lacks it. He submitted that a bare promise that was otherwise unenforceable cannot become a contract merely because of a dispute resolution provision.

104. Mr. Venkatesan submitted this was consistent with at least three authorities: *Goberdan v Knights of Columbus* [2023] ONCA 327, *Ismail v First York Holdings Inc* [2023] ONCA 332 and *DHL Project & Chartering Limited v Gemini Ocean Shipping Co Limited* [2023] Bus LR 584, EWCA Civ 1555. He submitted that the first two Commonwealth cases held that an arbitration clause in a contract is unenforceable because the contract as a whole lacks consideration.

105. In *Knights of Columbus*, an employee who was sacked after eight years of service brought an unfair dismissal claim and his employer's response was "You cannot sue me in the court because the employment contract has an arbitration clause." The employee submitted that the arbitration clause was unenforceable because the employment contract (which was a subsequent contract) lacked consideration and the Ontario Court of Appeal agreed, holding that the later employment contract imposed burdens on the employee, but the employer gave nothing in return for those additional burdens. In those circumstances, the contract as a whole was unenforceable and therefore the arbitration clause was also unenforceable.

106. In *DHL*, in the English Court of Appeal, Lord Justice Males expressly identified lack of consideration as a contract formation issue which would invalidate an arbitration or a jurisdiction clause in the contract in question. Again, Mr. Venkatesan submits it must be implicit in that reasoning that once you have concluded that the containing contract is void for lack of consideration, a jurisdiction or arbitration clause does not change that.

107. Mr. Venkatesan submitted that it must be implicit in that that an arbitration or jurisdiction clause cannot of itself constitute consideration because if it could, those cases would have been decided the other way.

108. Mr. Venkatesan submitted that it is very clear that the Security Letter as a whole therefore does lack consideration. He recognised that he did not need to go that far. It is sufficient for the Defendants to say that the Claimant does not have a good arguable case that the Security Letter as a whole is supported by consideration.

109. If that is right, and, as I have held, if Mr. Venkatesan is right about the point of construction, the statutory interpretation point he made about 6.33(2B)(b) and (c), he submits that is the end of it. That would mean that the Part 11 application succeeds and we do not get into the question whether the separability principle is engaged.

Decision on Issue 1(a)

110. I agree with Mr. Venkatesan that on the evidence before me, the Claimant does not, at present, have a good arguable case that the Security Letter as a whole is supported by consideration for the following reasons.

Forbearance

111. As I have set out, Mr. Hain submitted that (i) forbearance constitutes consideration and/or (ii) the jurisdiction clause was consideration.

112. In respect of forbearance, I accept Mr. Venkatesan's submission that there has to be a causal link between the borrower's promise to give security and the lender's decision to refrain from suing the borrower. The doctrine of consideration concerns what happens in return for a promise. As recognised in Chitty, set out in paragraph 76 above, the crucial question is whether the Claimant has forborne "*on the strength*" of the Defendants' promise.

113. Actual forbearance can be induced by the express or implied request of the debtor, however, in order to satisfy the test for a good arguable case, the Claimant must supply a plausible evidential basis for either.

114. As I have noted, Mr. Hain submitted that the primary documents form the contemporaneous record which comprise demands, Security Letter, no demands, no lawsuit and that sequence is good enough for forbearance to amount to consideration. Further, he submitted that practical benefit is good enough and forbearance is a practical benefit which is good enough consideration.

115. However, I consider that the authorities show that bare forbearance is incapable of amounting to consideration and in order to have a good arguable case on forbearance, a plausible evidential basis must be supplied.

116. As Lord Sumption put it in *Brownlie*, the Claimant must (i) supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) if there is an issue of fact about it, or some other reason for doubting it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

117. In the present case, there is an issue of fact within (ii) as to why the Claimant refrained from suing the Defendants, and in particular whether it was on the strength of the promise to provide security by means of the Security Letter in general and/or on the strength of the jurisdiction clause in particular.

118. This issue of fact is pertinent, particularly as the money became due on 18 March 2020 and, subsequent to the initial demands for payment in May and June 2020, there were no claim or enforcement steps taken, on the evidence before me, between then and the Security Letter in June 2021.

119. It is common ground that the burden of proof is on the Claimant, and whilst Mr. Fussell's witness statement deals in helpful detail with the factual matrix, there is no exposition as to why the forbearance that has occurred both before and after the Security Letter took place.

120. I also bear in mind Lord Justice Greene's guidance in *Kaefer* as to how the test set out by Lord Sumption should be applied, as follows.

121. First, the test is context specific and flexible. Secondly, the court must be astute not to express any view on the ultimate merits of the case. Thirdly, the adjunct "much" has been laid to rest.

122. Fourthly, Lord Sumption's (ii) is an instruction (a) to the court to seek to overcome evidential difficulties and arrive at a conclusion if it reasonably can as jurisdictional challenges are inevitably interim and will be characterised by gaps in the evidence; and (b) to use judicial common sense and pragmatism.

123. Finally, that limb (iii) addresses the situation where the court finds itself simply unable to form a detailed conclusion on the evidence before it and is therefore unable to say who has the better argument. To an extent it moves away from a relative test and introduces a test combining good arguable case and plausibility of evidence. The intention is that this should be a more flexible test, which is not necessarily conditional upon relative merits.

124. I consider that the present case therefore falls within (iii) of Lord Sumption's guidelines in *Brownlie*, that is the nature of the issue and the limitations of the material available to me at this interlocutory stage are such that no reliable assessment can be made.

125. On that basis, there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. Even applying a more flexible and pragmatic test combining good arguable case and plausibility of evidence, in relation to forbearance no evidential basis other than the bare sequence of events is supplied and I agree with Mr. Venkatesan that that is a complete answer to the point.

126. I consider that Mr. Venkatesan's argument that the enforceability clause in the Security Letter supports this conclusion has some force, however, both his and Mr. Hain's arguments in this respect rely on the factual position surrounding the forbearance, which will need to be dealt with in any substantive hearing.

127. Finally, I have carefully considered Mr. Hain's submissions that the court should be extremely reluctant to say that the Security Letter was meaningless and that courts bend over backwards to give effect to agreements that are otherwise intended to be binding, particularly on the basis of lack of consideration.

128. In my view, and mindful of Lord Greene's guidance that the court must be astute not to express any view on the ultimate merits of the case, the fact that the Claimant's argument that forbearance amounted to consideration fails for lack of evidence does not involve a decision that the Security Letter is meaningless, rather that the Claimant has not, at this stage made out a good arguable case by providing plausible evidence in respect of the issue of forbearance.

Jurisdiction clause as consideration

129. Mr. Hain submitted that, in the context where a peppercorn is of value, the jurisdiction clause in the Security Agreement, comprising a promise to sue in England must be something of value to the Defendants.

130. I agree with Mr. Venkatesan that a jurisdictional clause cannot on its own constitute consideration for a contract that otherwise lacks it, that is a bare promise that was otherwise enforceable cannot become a contract merely because of dispute resolution provision.

131. This is consistent with the commonwealth decision in *Knights of Columbus*, where the Ontario Court of Appeal, at paragraph 22, upheld the motion judge's decision, including that mediation and arbitration clauses were not fresh consideration and *Ishmail*, at

paragraph 46, where the Court of Appeal held that an "*agreement to arbitrate cannot 'survive' where there was no contract to survive from*".

132. It is also consistent with the decision of the Court of Appeal in *DHL* where Lord Justice Males expressly identifies lack of consideration as a contract formation issue which would invalidate an arbitration or jurisdiction clause in the contract in question, see paragraph 47: "*where the issue is one of contract formation, it will generally impeach the arbitration clause*". Where the containing contract fails for lack of consideration, a jurisdiction or arbitration clause does not change that.

Conclusion on Issue 1(a)

133. On the basis that the Claimant needed to satisfy the court that he has a good arguable case that the Security Letter as a whole amounts to a valid contract and he has not shown a good arguable case that he has given consideration, the Defendant's Part 11 application succeeds.

134. In light of that, I do not need to explore the many other issues on which I received helpful submissions, in particular the question of whether the separability principle is engaged and the validity of the methods of service.

The Cross-application

135. As I have set out above, the cross-application for permission to serve the claim form out of the jurisdiction under paragraph 6(c) of Practice Direction 6B was heard *ex parte*, on notice.

136. I am grateful to Mr. Hain for his submissions including those going to the full and frank disclosure necessary in respect of the application, including taking me to the relevant documentation, the Defendants' evidence on the substantive issues and to the authorities.

137. Mr. Hain structured his submissions in three parts. First, the principles relevant to the exercise of the court's discretion in relation to the application for permission. Secondly, the relevant documentary evidence, and thirdly the cases that deal with the substantive arguments.

138. In respect of the principles, Mr. Hain noted that Mr. Justice Bryan recently set out these out in *SMT Global* at [101]-[104] and [112]-[113].

139. The law governing the Loan Agreement is to be determined in accordance with Rome I. The governing law of the contract is to be determined in accordance with Rome I. Article 3.1 of Rome I provides that:

> "*A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract*."

140. This question is not to be addressed through a prism of English law (see *Dicey, Morris & Collins on the Conflict of Laws*, 16th Edition, at para 32-085):

> "*The question of interpretation as to whether a provision constitutes a choice of law by the parties should be looked at from a broad Regulation-based approach not constrained by national rules of construction*."

141. Mr. Hain submitted that the Loan Agreement is governed by English law by reason of clause 8. This provides:

> "*GOVERNING LAW*
>
> *The entire provisions of this Agreement shall be governed by and construed in accordance with the laws of England and Wales as amended from time to time.*"

142. The requirements for permission to serve out are set out in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 at [25] per Lord Lloyd-Jones, with whom Lords Reed, Briggs and Burrows agreed):

> *"… a claimant must establish*
>
> *(1) a good arguable case that the claims fall within one of the gateways in CPR PD 6B, paragraph 3.1;*
>
> *(2) a serious issue to be tried on the merits; and*
>
> *(3) that England is the appropriate forum for trial and the court ought to exercise its discretion to permit service out of the jurisdiction.*"

143. Taking them in turn, Mr. Hain relied principally on clause 8 of the Loan Agreement itself. I am satisfied that the Claimant has established a good arguable case that a claim is made in respect of a contract where the contract is governed by the law of England and Wales within the meaning of CPR PD 6B paragraph 6(c).

144. In respect of a serious issue to be tried, Mr. Hain submitted that as the money remains outstanding, *prima facie*, there is a serious issue to be tried. Mr. Hain also took me to

Loan Agreement, including the provisions, at clauses 2.2 and 4.1 respectively that provide "should the Lender fail to repay" and "the Lender will repay", which he noted gave rise to a serious issue to be tried as to whether that properly refers to the borrower rather than the lender. Further, in respect of clause 4.5, the guarantee, he submitted that there was a serious issue to be tried in respect of the guarantee in the event that a default occurred because the borrower breached its obligations and failed to remedy that breach.

145. Mr. Hain also took me to the Framework Agreement, in the context of whether there was some other fetter not contained in the Loan Agreement that entitled the borrower and/or the guarantor not to repay, and in particular, he submitted that there was a serious issue to be tried that this does not fetter the Claimant's ability to call for the repayment of the loan.

146. Mr. Hain properly took me to the Defendants' arguments as set out in the correspondence from Enzo Law, their solicitors, noting that the Defendants relied, *inter alia*, on both an implied duty of good faith and the Braganza limitation. Mr. Hain submitted that even if Enyo were correct about everything, there is at least a serious issue to be tried that it does not stop the Claimant from recovering the sums advanced.

147. Equally, I am satisfied that Mr. Hain has established that there is a serious issue to be tried on the merits that Arcem and/or Mr. Main owe money to the Claimant under the terms of the Loan Agreement.

148. Finally, Mr. Hain dealt with the appropriate forum for trial. He submitted that this requires the Claimant to show that England is clearly or distinctly the appropriate forum for the trial of the claim (see *Dicey* rule 41(3); and paragraph 12R-001).

149. Mr. Hain submitted that the following principles and factual answers were pertinent:

    (1) *Choice of English law.* This "*is generally a positive factor in favour of England as the appropriate forum, though it is not dispositive and may be outweighed by other factors such as the location of witnesses and evidence*" (see *Dicey* at §12-034).

    (2) *English documents.* All the relevant correspondence was conducted in English, and the documents are all in English.

    (3) *Local expertise.* The court's and the local legal expert community's experience and expertise in resolving the relevant type of dispute are factors to be taken into

account "*in the objective interests of justice*" as they contribute to "*efficiency, expedition and economy*" as well as "*assisting the court to reach a just resolution and promoting a possibility of settlement*" (see *The Spiliada* [1987] AC 460 at 486 per Lord Goff).

(4) *Multiplicity of proceedings.* There are related claims (that have not yet been brought but intimated in correspondence) against the same Defendants in connection with the same Security Letter and the related Loan Agreements. Unless all the claims are litigated in England, there is a serious risk of inconsistent judgments on overlapping issues, including the validity of the Security Letter. Mr. Hain submitted that this was a weighty factor.

(5) *No other, better forum.* The assessment is relative – in other words, England has to be more appropriate than the alternatives (see *SMT Global* at [115(4)]). Mr. Justice Bryan considered in *SMT Global* that the possible alternatives were Georgia and Hong Kong and concluded that a neutral forum was the more appropriate one. Here Mr. Hain submitted that potential alternatives might be the Bahamas (the given address of the Second Defendant at the time of the agreement), or Kenya, where it is submitted that the Second Defendant presently lives. There was also a suggestion that, at the date of the particulars, the Second Defendant was living in South Africa. Finally, Arcem is in Mauritius. Mr. Hain submitted that none of the potential forums was more appropriate.

150. Mr. Hain noted the potential arguments against him, including (i) choice of law is not dispositive; (ii) English documents are not a good reason today as all documents are in English; (iii) local expertise was a self-fulfilling prophecy to enable England to be the appropriate forum for litigation; (iv) in respect of multiplicity of claims, some documents may not be subject to English law, for example, the Security Letter is arguably not subject to any law or because there are arbitration clauses, such as contained in the Framework Agreement, so there may have to be multiplicity in any event.

151. Mr. Hain summarised that the real reason for England is that it is a neutral forum.

152. I note that Mr. Justice Bryan extrapolates in *SMT Global* that "*the underlying aim is to identify the forum in which the case can be suitably tried for the interests of all the parties and the ends of justice*".

153. In all the circumstances, I am satisfied that England is the appropriate forum for trial and that the court ought to exercise its discretion to permit service out of the jurisdiction and I grant permission to serve out in respect of each of the Defendants.

154. In respect of the extension of the validity of the claim form, Mr Hain submitted that the application for an extension of time for service of the claim form and to the extent necessary, the particulars, should be granted, again raising potential counter arguments on the basis of full and frank disclosure and taking me to Mr. Fussell's evidence in this respect.

155. I will also order that time to serve is extended to 30th January 2027.

156. Associated orders can be addressed in the Order that is provided to the court for its approval.

157. In the usual way, it will be open to the Defendants to apply to set aside service in due course if they see fit to do so.