

Neutral Citation Number: [2019] EWHC 2684 (Comm)

Case No: E40MA052

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN MANCHESTER**  
**CIRCUIT COMMERCIAL COURT (QBD)**

Manchester Civil Justice Centre.  
1 Bridge Street West,  
Manchester  
M60 9DJ

Date: 14/10/2019

Before :

**HIS HONOUR JUDGE PEARCE**

Between :

**ALEXANDER GORBACHEV** **Claimant**  
- and -  
**ANDREY GRIGORYEVICH GURIEV** **Defendant**

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**Mr PAUL LOWENSTEIN QC and Mr TONY BESWETHERICK** (instructed by  
**Fieldfisher**) for the **Claimant**  
**Mr TOM WEISSELBERG QC and Mr DANIEL CASHMAN** (instructed by **Brown**  
**Rudnick**) for the **Defendant**

Hearing dates: 3 & 4 July 2019

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**JUDGMENT**

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.
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**INTRODUCTION**

1. On 19 October 2018, a process server acting on behalf of the Claimant attempted personal service of the claim form in this case on the Defendant (who at the time was in the presence of a group of associates), on Berkeley Street, London. The events were recorded on mobile phones in the possession

of the two process servers who were present. After an exchange between the process server and members of the Defendant's group, the Defendant and his colleagues got into cars. The process server left a bundle of documents including the Claim Form, on the ground next to the Defendant's car, before it was driven off.

2. The Claimant contends that these circumstances amounted to good personal service of the Claim Form for the purpose of the Civil Procedure Rules.
3. The Defendant's case is that this was an "*ambush*" and did not amount to good service. By application dated 30 November 2018, he seeks a declaration that service had not been properly effected, and that in consequence the Court has no jurisdiction such that the court should make an order pursuant to CPR 11.1.
4. In the alternative, the Defendant initially sought a declaration that "*Pursuant to CPR 11.1, the court should not exercise any jurisdiction which it may have over the Defendant.*" This argument is clarified in the Defendant's evidence and written submissions to be based on the allegation that these proceedings should be stayed as an abuse of process.
5. In oral submissions, Counsel for the Defendant indicated that he did not pursue this part of the application although, as he put it, "*we would still want to be able to say in due course the court should not exercise its jurisdiction over Mr Guriev because of the type of reason that we have identified.*". In response, Counsel for the Claimant contended that, in respect of an abuse of process argument, the Defendant had either to "*move it or lose it.*"
6. It is not necessary for the purpose of this judgment to rule on whether it would itself be an abuse of process for the Defendant to pursue an abuse of process argument in a later application on another occasion. It is sufficient to note that this is a part of the application that was not pursued by the Defendant before me.

## **BACKGROUND**

7. The Claimant, Mr Gorbachev, is a Russian national. In 2003 he fled Russia and in 2004 was granted asylum in the United Kingdom.
8. The Defendant, Mr Guriev, is also a Russian national domiciled in the Russian Federation. He was formerly a senator in the Russian Federation Council and is currently deputy chairman of PhosAgro, a company listed on the Moscow Exchange and on the London Stock Exchange. That company is the parent of a group of companies which one of the world's leading suppliers of phosphate-based fertiliser products. Mr Guriev's family are apparently the beneficiaries of corporate structures that control just less than 45% of PhosAgro. Evidence annexed to the witness statement of Mr Andrew Lafferty, a solicitor acting for the Claimant, suggests that Mr Guriev has a net worth in excess of \$4 billion.
9. Mr Gorbachev and Mr Guriev had a business relationship from the early 1990s, initially in real estate and from around 1996 in the phosphate fertiliser business.
10. It is Mr Gorbachev's case that during discussions that took place between Mr Guriev and him in London in 2005, Mr Guriev made five oral declarations to Mr Guriev the effect of which is that Mr Guriev holds 24.75% of his interest in the fertiliser business on trust for Mr Gorbachev and/or that Mr Guriev is contractually bound to transfer that interest to Mr Gorbachev. Those declarations, collectively called the 2005 declarations in the draft Particulars of Claim, are said to have been made variously at a sauna, a public house and unspecified locations in London.
11. At paragraph 7 of the statement of Mr Lafferty dated 6 November 2018, it is indicated that the value of PhosAgro shares as at 5 November 2018 was just short of £4 billion – hence the claim would appear to have a value of just short of £1 billion.
12. The merits of the claim have no relevance to the service issue though would have had some limited relevance to the abuse of process issue. Suffice it to say that on Mr Guriev's behalf, his solicitor in his statement of 30 November 2018

at paragraph 32 states: “*For the avoidance of doubt, Mr Guriev denies that he has ever made any representation ... or that he has ever entered into an agreement with Mr Gorbachev in the vague terms that appear to be alleged.*”

### **PREVIOUS LITIGATION**

13. It is the Defendant’s case (uncontroverted by the Claimant) that there have been three sets of proceedings in Cyprus involving the same parties, one of which involves related issues (see paragraphs 46 to 86 of Mr Micklethwaite’s first statement). Interesting as this history is, it does not assist me in determining this application and it is unnecessary for me to set out the detail here.

### **THE PRESENT CLAIM**

14. The claim form was issued on 6 July 2018. It stated that Particulars of Claim would follow.
15. The Defendant’s Acknowledgement of Service, dated 2 November 2018, indicated an intent to contest jurisdiction. By letter of the same date, his solicitors on his behalf indicated that the Defendant:
- i) disputed that good service had been effected;
  - ii) asserted that the attempted service amounted to an abuse of process; and
  - iii) disputed that the English court was the appropriate forum for the dispute.
16. By application dated 6 November 2018 (“the Service-Out Application”), the Claimant sought an order permitting service of the claim form out of the jurisdiction. The witness evidence in support, a statement from Mr Lafferty of Fieldfisher dated the same day as the application, indicates that Claimant’s primary position is that good personal service has already been effected (in which case of course an order for service-out would not be required).

17. The Service-Out Application came before HHJ Pelling QC for directions on 19 November 2018. He adjourned the application to 7 January 2019 and extended time for Mr Gorbachev's evidence, with the question of evidence to be considered at the adjourned hearing.
18. In the meantime, Mr Guriev issued the present application on 30 November 2018.
19. On 3 January 2019, HHJ Pelling QC adjourned the Service-Out Application for further directions to be given following the determination of whether Mr Guriev was served personally and Mr Guriev's alternative argument based on abuse of process. The hearing on 7 January 2019 was vacated.
20. It follows that this hearing was listed to deal with the questions of whether personal service was effected and, if so, whether the court should decline to exercise its jurisdiction on the basis that the proceedings are an abuse of process. As indicated above, the Defendant did not pursue the latter argument.

### **THE EVIDENCE**

21. The Defendant has served witness statements in support of the application from:
  - i) The Defendant himself dated 29 November 2018;
  - ii) Mr Alexei Motlokhov, described in his statement as "*a director of Mr Guriev's family office*", dated 29 November 2018;
  - iii) Mr Hisham Soliman, his driver, dated 29 November 2018;
  - iv) Mr Alexander Ionov, described in his statement as "*an assistant to Mr Guriev*", dated 29 November 2018;
  - v) Mr Denis Gromovoy, again described in his statement as "*an assistant to Mr Guriev*", dated 29 November 2018;
  - vi) Mr Neil Micklethwaite, a partner in the firm of Brown Rudnick LLP, solicitors instructed on behalf of Mr Guriev for the purpose of these

- proceedings, dated 30 November 2018, 22 March 2019 and 25 June 2019;
- vii) Ms Olga Bischof, another partner with Brown Rudnick, dated 25 June 2019;
  - viii) Mr Nikolay Bichkov, Chief Executive Officer of PhosAgro Trading, dated 25 June 2019.
22. Messrs Guriev, Motlokhov, Suliman, Ionov and Gromovoy were all present at the time of the purported service on 19 October 2018. Messrs Guriev, Gromovoy and Ionov signed statements in Russian. A translator's affidavit has been served relating to the translation of those witness statements. No issue has been raised with the accuracy of translation.
23. Mr Micklethwaite, Ms Bischof and Mr Bichkov all deal with the Defendant's ability to understand spoken English, in reply to the Claimant's case.
24. Mr Micklethwaite deals with other matters in addition, in particular:
- i) the issue of abuse of process;
  - ii) (in his second statement) revisions to the accounts of Messrs Motlokhov, Guriev, Ionov, Soliman and Gromovoy following receipt and review of the Claimant's evidence.
25. The Claimant served witness statements in reply to the application from:
- i) Mr Andrew Lafferty, solicitor for the Claimant, dated 6 November 2018 (relating to the service-out application) and 8 February 2019 (relating to the current application).
  - ii) The Claimant himself, dated 13 June 2019.
  - iii) Mr James Zjalic, a specialist in audio-visual forensics, dated 22 January 2019. This is expressed to be an expert report. Technically, the admission of expert evidence requires permission of the court under CPR35.4. No issue has been raised with me seeing this statement or

report. It is in large part factual evidence of how the various recordings have been manipulated. That part of his evidence which deals with the enhancement of the recordings arguably involves some questions of expertise but no issue has been taken with that, no doubt because neither doubts the integrity of what he says. Each side seeks to rely on the product of Mr Zjalic's work. I accept that the recordings produced by him accurately reflect what they purport to show.

26. The Claimant has also served affidavits from:
- i) Mr Ryan McDonagh-Allen, the process server who purports to have effected personal service, dated 7 February 2019;
  - ii) Mr Howe, a director of the process servers who employ Mr McDonagh-Allen, who observed and recorded the events of 19 October 2018, such affidavit again being dated 7 February 2019.

## **THE LAW**

27. The relevant law on the personal service of a claim form can be summarised as follows:
- i) CPR 6.3(1) provides for service of a claim form by various means, including "*personal service in accordance with rule 6.5.*"
  - ii) CPR 6.5(3) provides that "*a claim form is served personally on an individual by leaving it with that individual...*"
  - iii) Service on an agent could not be good personal service - see for example Morby v Gate Gourmet Luxembourg IV Sarl [2016] EWHC 74.
  - iv) In what has been described as a "*concession to practicality*", if the person upon whom service is being attempted will not accept the document, service can be effected either by handing the document to the person (what is often called a "limb 1" case) or by telling the person what the document contains and leaving the document with or

near the person (a “limb 2” case) - see Kenneth Allison Ltd v A E Limehouse & Co [1991] 3 WLR 671.

- v) Knowledge of what the documents contains for this purpose is acquired by it being brought to the intended recipient’s attention “*that it is a legal document which requires his attention in connection with proceedings*” - see Hoffman LJ in Walters v Whitelock, unreported, 19 August 1994, cited by Philips J in Tseitline v Mikhelson [2015] EWHC 3065 (Comm).
- vi) “*The focus is on the knowledge of the recipient, not the process by which it is acquired*” - per Philips J in Tseitline.
- vii) Once the intended recipient has “*a sufficient degree of possession of the document to exercise dominion over it for any period of time however brief, the document has been ‘left with him’ in the sense intended by the Rule*” - see Waite LJ in Nottingham Building Society v Peter Bennet & Co, The Times, 26 February 1997 cited by Phillips J in Tseitline.
- viii) If the intended recipient has gained possession within the meaning referred to in the previous sub-paragraph, it makes no difference that the person seeking to effect service may subsequently remove the document, for example because the intended recipient has not taken the documents and has walked away from them - see Phillips J in Tseitline.
- ix) The burden is on the Claimant to show a good arguable case that service was effected on the Defendant - see for example Tseitline.
- x) Where an issue of fact arises as to whether there is such a good arguable case, the court must take a view on the evidence if it can reliably do so (Goldman Sachs International v Novo Banco SA [2018] UKSC 34).
- xi) If the court is not able to make a reliable assessment of an issue on the evidence available, it is sufficient for the Claimant to show a plausible

evidential basis on the issue (again, Goldman Sachs International v Novo Banco SA [2018] UKSC 34).

28. There is no dispute between the parties as to these legal principles, though there is significant disagreement as to what assessment I should make of the evidence and how the legal principles apply to that assessment.
29. There is one issue of nuance on the law relating to whether the need for the Claimant to show a “*plausible evidential basis*” for any particular disputed factual issue on which he relies is synonymous with saying that the Claimant has the better of the evidence on the issue.
30. The Defendant says that the court’s starting point under Goldman Sachs has to be to endeavour to make sound factual findings on the balance of probabilities if it can.
31. Green LJ in Kaefer v AMS Drilling [2019] EWCA Civ 10 considered the decisions of the Supreme Court in Brownlie v Four Season Holdings [2017] UKSC 80 and Goldman Sachs v Novo Banco SA. In his judgment, he states that the reference by the Supreme Court in Goldman Sachs to showing a “*plausible evidential basis*” on disputed factual issues addresses the situation where the court cannot make clear findings on the evidence and “*moves away from a relative test and in its place introduces a test combining good arguable case and plausibility of evidence.*” He goes on, “*Whilst no doubt there is room for debate as to what this implies for the standard of proof, it can be stated that this is a more flexible test which is not necessarily condition upon relative merits.*”
32. I am bound by the decision in Goldman Sachs. The Defendant is right that the starting position is to assess whether the Claimant has the better argument on a particular issue. But I am not obliged to limit findings favourable to the Claimant to those issues where he can show that he has the better case of the two parties. Where I am concerned with what I can see or hear on the footage, I can easily make that assessment. In other respects, I am asked to look at why the Defendant and his witnesses behaved in the way that they did and whether that behaviour supports a finding that their knowledge or motive was different

to what is asserted in their respective witness statements. In those cases, it is unlikely to be possible to make the kind of firm assessment of who has the better of the evidence without having heard the witnesses give oral evidence. Where I simply cannot say from the material before me who has the better of the evidence, I should look at the plausibility of that evidence and whether a good arguable case can be made out based upon it. That is the test that I have applied in this judgment.

### **THE CLAIMANT'S CASE**

33. The process server did not hand the documents to Mr Guriev. It is therefore common ground that this is a limb 2 case within the Kenneth Allison test. The Claimant contends that the court can be satisfied on the evidence (or at least can find that there is a plausible evidential basis) for the following:
- i) That Mr McDonagh-Allen was attempting personal service on the Defendant;
  - ii) That the Defendant knew that documents were being proffered to him;
  - iii) That documents were left with or sufficiently near to the Defendant as to give him dominion over them;
  - iv) That Mr Guriev acquired sufficient knowledge of the nature of the documents to pass the test for personal service.
34. Of these issues, the Claimant says the first three are either not controversial or are plainly proved by the video evidence. Of the fourth, the Claimant says that the conclusion for which he contends can be drawn from a careful analysis of the video and is supported by inconsistencies in the evidence from the Defendant and his witnesses which is a consequence of an attempt to give a misleading impression of what occurred so as to evade a finding that Mr Guriev understood that there was an attempt to serve him with court papers.

## THE DEFENDANT'S CASE

35. The Defendant agrees that this is a second limb case under Kenneth Allison but contends that:
- i) The video shows that the process server did not state that he was trying to serve court papers;
  - ii) The circumstances shown on the video coupled with evidence of Mr Guriev's knowledge of the English language do not lead to the conclusion that he understood that the process server was trying to serve court papers;
  - iii) There is no adequate evidence to show even a plausible evidential basis for finding either that the other members of his group understood that there was an attempt to effect service of court documents or that such understanding was conveyed by one or more of them to Mr Guriev;
  - iv) In any event, the papers were not left "*with or near*" Mr Guriev – they were left on the ground by his car.

## DISCUSSION

### a. The witness evidence

36. My starting point is to consider the relative weight to be attached to the video recording and the witness evidence before me. It is self-evident that the Claimant and his witnesses have an interest in asserting matters that support an argument for good service and that the Defendant and his witnesses have the opposite interest. Where I have the benefit of video and audio recordings of what occurred, this material is an obvious starting point. There are matters of detail that cannot readily be discerned from that material and to that extent I should bear in mind what the witnesses have to say. But I believe that I should be particularly cautious in this case about the accuracy of such evidence for the following reasons:

- i) I bear in mind the analysis of the frailties of human recollection expressed by Leggatt LJ at paragraphs 65 to 70 of his judgment in Blue v Ashley [2017] EWHC 1928 (Comm), citing and expanding on his earlier judgment in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm). Whilst in those cases he was dealing with events that were more distant in the witnesses' memories than is the case here, the same warnings of the distorting effects both of the passage of time and more importantly the process of litigation apply here.
- ii) I have not heard cross-examination of witnesses, therefore am less well placed than I might be to judge the reliability of what they say.
- iii) The Claimant's witnesses no doubt had the opportunity to see and hear the footage before making their statements – thus they are likely, consciously or unconsciously, to have been affected by its content in wording their statements as they have.
- iv) Conversely, the Defendant's witnesses did not have that benefit (though may have been aware at the time of making their statements that the attempt to serve could have been recorded – this is by no means the first occasion on which an attempt at personal service has been filmed, as is shown by the judgment of Phillips J in Tseitline, a judgment handed down in October 2015, therefore well before the events with which we are concerned, and in any event is a practice of which I have been made aware in other cases).
- v) Perhaps unsurprisingly there are differences between the original statements of the Defendant's witnesses and the events shown on the footage, which inevitably undermine the strength of their evidence.
- vi) The subsequent clarification of their evidence was achieved not by further statements from those witnesses, but a statement from their solicitor. Unlike the Claimant, I see nothing particularly sinister in this, but I must bear in mind that it is his understanding of their account, not their own words which is before me.

**b. The footage**

37. The video recording has been summarised both within the Defendant's skeleton argument and in a document relied on by the Claimant entitled "*Claimant's Analysis of Parties' Cases on Personal Service.*" These two documents together with review of the footage itself have helped me to come to findings of fact set out in an Appendix to this judgment, which findings I can safely make having regard to the test set out in Goldman Sachs International v Novo Banco SA. Whilst most of these facts and their chronology are not in dispute, some are not admitted. I have borne that in mind but where I have made findings it is either on the basis of agreement or of my assessment of the undisputed evidence. Where the evidence is disputed, I deal with it below.
38. In so far as the disputed issues are concerned, two, namely whether Mr Soliman made the comment "*No he didn't*" before saying "*He didn't touch anything*", and whether the documents touched Mr Ionov's arm before the process server dropped them, can be dealt with summarily.
39. As to the first, the alleged additional comment of Mr Soliman, nothing turns on this. It is common ground that Mr Soliman denied that there was contact between Mr Ionov both before and after the disputed words. Whether he asserted the same one more time in the middle of the exchange will make no difference to any conclusion in this case.
40. As to the second, since service on Mr Ionov would not be good service on Mr Guriev, the fact of actual contact of documents is irrelevant to whether service was achieved, save in so far as it shows that Mr McDonagh-Allen was very close to Mr Ionov. It undoubtedly is the case that they were very close but whether the documents actually made contact with Mr Ionov's body, whether deliberately or accidentally, does not add to the significance of this point. I deal below with whether the evidence of Mr Ionov on this issue affects his credibility.
41. The other issues identified in the appendix are all part of the broader issues in the case that can be identified as follows:

- i) Did Mr McDonagh-Allen correctly identify Mr Guriev as the person whom he intended to serve, or did he in fact mistakenly try to serve someone else? (If he mistakenly tried to serve someone else, that could not be valid service.)
- ii) Did Mr Guriev know that Mr McDonagh-Allen was trying to serve documents on him?
- iii) Did Mr Guriev have sufficient knowledge of the nature of the documents to allow a finding of service?
- iv) Did Mr McDonagh-Allen leave the papers sufficiently near to Mr Guriev as to allow a finding that they were left with him?

If the Claimant is able to show an adequate evidential basis in favour of each of these propositions, he will show a good arguable case that personal service has been effected.

c. **Did Mr McDonagh-Allen correctly identify Mr Guriev as the person whom he intended to serve?**

42. It is Mr McDonagh-Allen's evidence that he identified Mr Guriev correctly, having previously seen photographs of him. Having watched the video footage several times, I can see no reason to reject that evidence having regard to the following:

- i) He appears consistently to target his comments in Mr Guriev's direction;
- ii) Conversely, I can see no one else to whom he could have been consistently targeting the comments given the way he is facing at various points in the footage.
- iii) Whilst he did not in fact walk up to Mr Guriev, that is clearly explained by the fact that he was not able to because of the presence of other people in Mr Guriev's company. For these purposes, it is not necessary

to consider why this was the case, although that issue is relevant to the third and fourth issues referred to in paragraph 41 above.

43. In his witness statement, Mr Soliman says that Mr McDonagh-Allen “*seemed to be addressing Mr Ionov ... I can only assume that he thought that Mr Ionov was Mr Guriev, as he never tried to direct his comments at Mr Guriev or to pass papers to him, despite the fact that the passenger door of the first car was open.*” (In fact, at the point that Mr McDonagh-Allen drops the papers, Mr Guriev was not in the car so the fact that the passenger door was opened before he dropped them cannot assist in showing how the documents could have been handed over differently.) In their respective statements, Mr Motlokhov (paragraph 8), Mr Guriev (paragraph 8), Mr Ionov (paragraph 7) and Mr Gromovoy (paragraph 8) also all say that Mr McDonagh-Allen either spoke to Mr Ionov or appeared to be speaking to him. However things may have appeared to them at the time (a matter dealt with below), I am satisfied from the video footage that the Claimant has the better of the evidence and that I can safely rely on the evidence that Mr McDonagh-Allen had in fact correctly identified Mr Guriev as the person he was seeking to serve and addressed his comments to him.

**d. Did Mr Guriev know that Mr McDonagh-Allen was trying to serve documents on him?**

44. Mr Guriev’s account of the incident is that his English is limited, that he did not understand what Mr McDonagh-Allen was saying and that he did not understand what was going on (see paragraph 10 of his statement of 29 November 2018). Indeed, he thought that Mr McDonagh-Allen might have been trying to sell something, as suggested by his question to Mr Motlokhov at paragraph 11 of his statement.
45. As indicated above, each of Messrs Guriev, Ionov, Gromovoy, Motlokhov and Soliman say that Mr McDonagh-Allen either did speak to or appeared to be speaking to Mr Ionov. Having watched the video, I find it surprising that all five should make the same mistake unless they have colluded to agree a common account.

46. Further, Messrs Guriev, Ionov and Gromovoy each speak of Mr McDonagh-Allen running up to the group. Messrs Soliman and Motlokhov use the neutral word “*approach*” which would be consistent with running or walking. Having watched the footage, there is nothing that could lead a person to believe that Mr McDonagh-Allen was running – he was clearly walking. This does tend to suggest that the three witnesses who speak of him running may be embellishing their evidence, the obvious motive to be that they wish to give a picture of a confused scene, thereby explaining Mr Guriev’s alleged failure to realise that it was an attempt to serve him.
47. It might be said that the failure of all five witnesses to give the same account runs contrary to the suggestion of collusion – if they were colluding to give untrue evidence, why should all agree on one point, but only some on another, when they all could be said to have equal opportunity to view what happened? I bear this in mind when considering whether I am persuaded on the evidence that the Defendant’s witnesses have colluded to give misleading or false evidence on the matters that they witnessed and/or whether the Claimant shows a plausible evidential basis for a finding of good personal service.
48. The Claimant relies on inconsistencies between the witnesses’ original accounts and the video footage more generally as evidence that they are not telling the truth. Those alleged inconsistencies are closely analysed both in the Claimant’s skeleton argument and the document entitled “*Claimant’s Analysis of Parties’ Case on Personal Service.*” It is not necessary for me to go through them in detail. Whilst I acknowledge that there are inconsistencies in the evidence, it would be highly surprising if they could have accurately remembered the precise details of locations, movements and conversation, even a few hours after the incident. On the whole, their accounts are reasonably accurate and this in fact tends to suggest that they are not seeking to mislead the court.
49. On the particular issue of why the witnesses say that Mr Ionov did not touch the papers before Mr McDonagh-Allen dropped them, whereas the footage, in particular a still that has been obtained from that footage, seems to show that the documents brushed against Mr Ionov, the contact between the documents

and Mr Ionov is so slight that I could not conclude on the balance of probabilities that the witnesses must have known of the contact and therefore are lying.

50. However, there are other striking features of the evidence:

- i) As indicated above, I am satisfied that the better evidence is that Mr McDonagh-Allen was in fact targeting his remarks at Mr Guriev. It is clear that he used Mr Guriev's name in addressing him. Even if one did not understand the language being used, it would be clear that remarks were being addressed to Mr Guriev. Accordingly, all five witnesses have made the error referred to at paragraph 45 above in circumstances which are difficult to understand. The most obvious explanation is that they are lying to disguise the fact that they realised that Mr McDonagh-Allen was trying to serve documents on Mr Guriev.
- ii) The two witnesses with Mr Guriev at the scene who have sufficiently good English to make statements in this language, Mr Motlokhov and Mr Soliman, both say that Mr McDonagh-Allen spoke of having "*media papers*". In fact, he clearly says "*legal papers*". It may be that the witnesses agreed a common line that is simply wrong, or that one made a wrong suggestion as to what was said and the other went along with it. Either way, the most obvious reason for the mistake is that one or both of them has/have deliberately given an inaccurate account of what was said in an attempt to bolster the case that the witnesses did not know what was going on when at least one of them did.
- iii) I am satisfied from the sound track that, at around 00.41 and very shortly after Mr McDonagh-Allen said "*Sir, can you take them?*", Mr Soliman (who appears to be a native English speaker – his statement is in English) said "*Don't touch it.*" The obvious reason for him to say this is that Mr Soliman realised that this was an attempt to serve the documents and that touching the documents might amount to sufficient evidence of possession to lead a court to find that good personal

service had been effected. Indeed, I can not think of any other plausible reason for his saying this.

- iv) When he is walking to and from the rear of the car and shortly before he gets into the passenger seat, Mr Motlokhov appears to be showing interest in the papers. He can certainly be seen looking at them at around 02.08 to 02.14. There is nothing surprising in this – it is not an everyday event for someone to approach a colleague in the street with a bundle of papers in their hand, to attempt to speak to the colleague then to drop the papers on the street. The natural reaction in such a situation would be to pick up the papers and read them oneself – or look down at them on the ground and read them. The latter appears to be exactly what Mr Motlokhov was doing. Given that he can sign a statement in English, I would expect him to be able to read documents of the kind that are said to have been handed over here. Given the repeated attempts to look at the documents over several seconds, it is inconceivable that he was looking at a blank sheet of paper. The overwhelming probability is that he was reading something of substance. On the evidence before me, that was most likely page 554 of the bundle (the document also appended as an exhibit to Mr McDonagh-Allen’s affidavit at page 629 of the bundle). This is the front sheet of the bundle of documents which Mr McDonagh-Allen states that he was trying to serve (see paragraphs 8 and 13 of his affidavit). It states that the documents that are attached are “*important legal documents*” and refers to “*the commercial court*” and “*an issued claim form*”. It follows in turn that there is a sound evidential basis for finding that Mr Motlokhov knew of the nature of the documents, including that they were addressed to Mr Guriev. If this is so, Mr Motlokhov’s assertion that the man “*seemed to be trying to give some papers to Mr Ionov*” would be a false statement. The most obvious explanation for that is that Mr Motlokhov is lying to assist Mr Guriev.

51. Without having heard cross examination of these witnesses, I cannot safely conclude that all or any of them are lying, though I have a strong suspicion

that this is so. Certainly, there is a plausible evidential basis for concluding that this is so and that the reason that they are lying is to cover up the fact that they each knew that this was an attempt to serve documents upon Mr Guriev.

52. The mere fact that some or all of the people who were with Mr Guriev realised that this was an attempt to serve papers upon him does not mean that Mr Guriev himself realised this. Without hearing oral evidence on this issue, it is difficult to assess who has the better of the evidence on this issue. However in my judgment, there is a plausible evidential basis for concluding that Mr Guriev did realise that this was an attempt to serve papers upon him. I say this for the following reasons:

- i) Given Mr McDonald-Allen's proximity to Mr Guriev and the overwhelming likelihood that Mr Guriev would recognise his own name, whether said with a Russian accent or an English one, it is probable that he realised that Mr McDonald-Allen was seeking to address him rather than anyone else. It follows that the argument at paragraph 51 above applies to him as much as any of the other witnesses.
- ii) At 00.33, Mr Guriev says "*What does he want?*" in Russian. Once Mr Guriev had asked that question, it is likely that it would be answered by someone. It is apparent from the footage that some discussion takes place at least amongst those next to Mr Guriev, if not Mr Guriev himself, the detail of which cannot be made out - it is not possible to make out precisely who speaks, when or in what language. This provides a plausible evidential basis for concluding that at least one of the people with Mr Guriev who spoke better English (Mr Motlokhov and Mr Soliman) would have answered his question. For the reasons given above, there is a plausible evidential basis for concluding that both of those men understood what Mr McDonagh-Allen was trying to do. It follows that there is a plausible evidential basis for concluding that one or both of them told Mr Guriev what Mr McDonagh-Allen was seeking to do.

53. Certain other matters have been raised either for or against my reaching this conclusion. They do not take matters any further for the following reasons:

- i) Mr Guriev's knowledge of English. There is no dispute in the witness evidence as to the standard of Mr Guriev's English. Assuming it to be as he and his witnesses state, his knowledge of English would not stand in the way of realising that the remarks were addressed to him for reasons set out above. Therefore his level of English does not take matters further.
- ii) Mr Motlokhov's relationship with Mr Guriev. The Claimant's evidence is that Mr Motlokhov is Mr Guriev's son-in-law (see paragraph 4 of the second statement of Mr Lafferty). This has not been disputed by the Defendant. However none of the witness statements disclose this situation. This is suggested to be indicative of a lack of frankness by the Defendant and/or his son-in-law. Whilst the failure to refer to this is perhaps a little surprising, I would infer from the previous close connection of the Claimant and the Defendant that Mr Gorbachev knew exactly who Mr Motlokhov was. If that is so, the failure to mention the connection cannot be said to be indicative of an intention to deceive.

e. **Did Mr Guriev have sufficient knowledge of the nature of the documents?**

54. It is of course not sufficient for the Claimant to prove that the Defendant knew that the person was trying to give him documents (or at least to show a plausible evidential basis for such a finding). He must further show at least a plausible evidential basis for the conclusion that the Defendant knew that he was being served with legal process.

55. The Defendant points to the passage in the judgment in Walters v Whitelock, (cited by Phillips J in Tseitline) where Hoffman LJ said that "*It is sufficient if it is brought to his attention [that is to say the attention of the person being served] that it is a legal document which requires his attention in connection with proceedings.*" It is suggested that words that are less than expressly

indicative that the documents relate to court proceedings will not suffice to give the recipient the relevant knowledge.

56. But, as noted above, Phillips J himself acknowledged in Tseitline that the focus is on the knowledge itself, not the process by which it is acquired.
57. The Claimant's case here might have been more straightforward if Mr McDonagh-Allen had said that the documents related to court proceedings. But the evidence relied on in support of the Claimant's contention that Mr Guriev knew that the documents were meant for him (or at the very least that there is a plausible evidential basis for such a finding) apply with equal force to Mr Guriev's knowledge of the documents. If, as is at least arguable, Mr Guriev has not told the truth about his understanding of whom Mr McDonagh-Allen was trying to address, it is equally at least arguable that he is not telling the truth about his understanding of the nature of the documents.
58. That on its own does not demonstrate that, at the time of attempted service, he knew of the nature of the documents. But when one adds to the picture the evidence referred to above that provides an evidential basis for concluding that Mr Guriev was in a discussion about what Mr McDonagh-Allen was trying to do and the evidence below that those with Mr Guriev were trying to stop Mr McDonagh-Allen getting near to him, one reaches a position where there is a plausible evidential basis for concluding that Mr Guriev knew that service of court proceedings was being attempted.
59. As with the question of whether Mr Guriev realised that this was an attempt to serve court papers, I cannot go further on the available evidence and say who has the better of the argument. Having regard to the proper application of the test in Goldman Sachs, it is unnecessary for me to do so.

**f. Did Mr McDonagh-Allen leave the papers sufficiently near to Mr Guriev?**

60. The Defendant in his submissions places emphasis on the importance of not diluting the requirement of the person who is purportedly served exercising dominion over the documents.

61. On any version of events, Mr Guriev is a wealthy person. It is unsurprising that, when on the streets of London, there are people near him who can provide protection if that is necessary. When the exact role of the people is not identified in the witness statements, the overwhelming inference is that at least part of the reason for there being four associates or family members with him on the street is to protect him against unwanted contact with others. It takes very little analysis to think that this might include trying to avoid personal service of court proceedings taking place.
62. A careful study of the footage shows a strong case that the people with Mr Guriev were acting in a concerted way to protect such contact here. One of the striking features of their movements during the incident, amply demonstrated by the helpful diagrams produced by the Defendant and annexed to Mr Micklethwaite's second witness statement, is that Mr Guriev starts the incident in the middle of the group of men, but as the confrontation with Mr McDonagh-Allen proceeds all four other men come to be between him and Mr McDonagh-Allen.
63. I have no hesitation in finding on the basis of the events as apparent from the footage, that those with Mr Guriev were trying to stop Mr McDonagh-Allen getting any closer to him.
64. There was some debate during submissions about whether when Mr Soliman starts to open the car door, he can properly be described as "*corralling*" Mr McDonagh-Allen away. Whether that is the correct term or not, the overwhelming inference from the evidence is that this was an attempt to make it hard for Mr McDonagh-Allen to get near Mr Guriev. The overall impression from the footage is that Mr McDonagh-Allen got as near to Mr Guriev as he could have done without assaulting someone and/or risking his own safety. I fail to see how Mr McDonagh-Allen could, by the time he let go of the documents, have got any closer to the Defendant.
65. The Defendant draws attention to the fact that Mr McDonagh-Allen might have leant into the car to deposit the document inside or indeed might have stayed on the scene until the roof was retracted and deposited the documents

in the car from above. As to the first of these, I consider that to be unrealistic. It would not have been easy for Mr McDonagh-Allen to reach into the car through the partially open door and, had he done so, he would have risked injury through the door being closed on him. (I should emphasise that I am not suggesting that any member of the Defendant's group would deliberately have injured him but that it was an obvious risk of someone inadvertently or deliberately closing the door on his arm that would readily explain why someone would not risk chancing that.) The second of course supposes that Mr McDonagh-Allen should have anticipated that the roof would be retracted. No doubt the pleasure in driving a car of this kind lies in retracting the roof when possible, but I doubt whether the roof would have been retracted had Mr McDonagh-Allen remained on the scene attempting to serve the papers – my assessment of the conduct of the men referred to above would suggest that this would have been unlikely. Certainly Mr McDonagh-Allen could not have expected that they would have done so.

66. It follows from the analysis above that Mr McDonagh-Allen left the papers as near to Mr Guriev as was reasonably practicable at the time he let go of them. I leave for another day the argument of whether that would be sufficient to allow a finding of personal service if the documents were not dropped in the eyesight of the person to be served. But these documents were so deposited. In my judgment, where the Claimant is able to show that the person to be served had sufficient knowledge of the nature of the documents and where, within the sight of the person to be served, the process server left the documents as close to that person as was possible given the attempts by those with the Defendant to prevent him getting any closer to the Defendant, the court has sound material to conclude that the documents were left sufficiently near to the person to render the service good.

## **CONCLUSIONS**

67. It follows from the analysis above that I am satisfied that the Claimant effected personal service of the Claim Form on the Defendant on 19 October 2018.

68. I will allow the parties the opportunity to make submissions on the final form of order with a further hearing to deal with that and any consequential matters (if these cannot be agreed).

APPENDIX

RELEVANT FACTUAL ISSUES IN RESPECT OF THE AFTERNOON OF 19 OCTOBER 2018 IN CHRONOLOGICAL ORDER

Finding of fact	Source of evidence for finding of fact	Disputed issue	Notes
The incident was videoed from the Mayfair Hotel which is on the opposite side of Berkeley Street to 19 Berkeley Street	Affidavit of Mr Howe, paragraphs 10 and 13		
Mr McD-A <sup>1</sup> went to Berkeley Square with a bundle of documents in an envelope which he intended to serve on Mr Guriev	Mr McD-A affidavit, paragraphs 5 to 9		
Mr McD-A saw a convoy of cars comprising a convertible Rolls Royce a Bentley and a Mercedes arrive	Mr McD-A affidavit, paragraphs 7 and 10		
The Rolls Royce was parked with the driver's door to the pavement on the same side of Berkeley Street as 19 Berkeley Street (therefore the passenger side of the car was nearer the camera)	Video footage generally		
Mr Guriev and two other people entered 19 Berkeley Square	Mr McD-A affidavit, paragraph 12	Did McD-A correctly identify Mr Guriev as being one of the people who got out of the Rolls Royce?	
Mr McD-A met up with another member of his team then went to wait in a branch of Starbucks	Mr McD-A affidavit, paragraphs 14 and 15		

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<sup>1</sup> Mr McDonagh-Allen's name is abbreviated in the table because it appears often and is quite long. Other names are not abbreviated because to do so might create confusion. No disrespect is intended to him through this.

Mr Guriev, Mr Ionov, Mr Gromovoy, Mr Motlokhov and Mr Soliman came out of 19 Berkeley Square			Video footage, 00.10-00.18 <sup>2</sup>		
As Mr Guriev started to go to the passenger door side of the Rolls Royce, Mr McD-A approached the group; the diagram at <b>2/14/507</b> shows the approximate location of each person.			Video footage, 00.18		
The following exchange took place	Mr McD-A	Hello Mr Guriev Sir. These are, these are for you sir	Video footage 00.18 -00.27	When Mr McD-A says “you” during these exchanges, is he addressing his comments to Mr Guriev or to another member of the group?	
	Mr Ionov	Sorry			
	Mr McD-A	Sir these are			
	Mr Ionov	Sorry			
	Mr McD-A	I’m instructed			
	Mr Ionov	Sorry			
	Mr McD-A	Sir			
	Mr Ionov	Sorry			
	Mr McD-A	Erm			
Mr Guriev turns away from Mr McD-A. As he does so, Mr Soliman walks closer to Mr McD-A, Mr Ionov towards the passenger door of the Rolls Royce and Mr McD-A walks towards the rear of the passenger side of the Rolls Royce; the diagrams at <b>2/14/508</b> and <b>509</b> show the approximate routes of each person			Video 00.27	Was Mr McD-A’s movement caused by Mr Ionov and/or Mr Soliman ushering him away from Mr Guriev?	
The exchange continues	Mr McD-A	Sir, I’ve been instructed to hand you these papers. Er they’re very im...	Video footage 0027 – 00.33		
	Mr Soliman	Look			
	Mr Ionov	Sorry			
	Mr Guriev	What does he want?			Mr Guriev spoke in Russian – this is an agreed translation as to what he said.

<sup>2</sup> Time references are to exhibit RMA 3 and are approximate.

Mr Soliman starts to open the passenger door of the car; meanwhile Mr Ionov holds his briefcase in front of Mr McD-A.			Video footage 00.33		It is not clear exactly when the opening of the door starts but the precise timing is not material
Exchange continues	Mr McD-A	Excuse me, they're very important legal papers	Video footage 00.33 – 00.38		
	Mr Ionov	No, no, no			
	Mr McD-A	I'm suggesting sir I'm suggesting you have a look at these			
Mr Guriev starts to move in the direction of the driver's door of the Rolls Royce			Video footage 00.38		
Exchange continues	Mr Ionov	Sorry, sorry please	Video footage 00.38 – 00.41		
	Mr McD-A	Sir can you take them?			
	Mr Ionov	Sorry please			
				Is this exchange followed by Mr Soliman saying, "don't touch it?"	
Mr McD-A drops papers to the ground as Mr Guriev continues towards the driver's door of the Rolls Royce; the diagram at <b>2/14/511</b> shows the approximate location of each person, with the direction of Mr Guriev towards the driver's door.			Video footage 00.41	Did the documents touch Mr Ionov's arm before Mr McD-A let go of them?	
The exchange continues	Mr McD-A	He touched it, he touched it	Video footage 00.41 – 00.49		
	Mr Ionov	Sorry, sorry			
	Mr Soliman	He didn't touch it			
	Mr McD-A	He did touch it, I just seen him touch it			
	Mr Soliman	He didn't touch anything		Was this comment preceded by Mr Soliman saying, "No he didn't."	
	Mr McD-A	Sir if ... they're out of my hands			
	Mr Soliman	No one touched it			
Mr McD-A walks away from the scene			Video footage		

	00.49		
Mr Motlokhov walks to the boot of the Rolls Royce	Video footage 00.51		
Mr Guriev gets into the driver's seat of the Rolls Royce	Video footage 00.55		
Mr Motlokhov gets into the passenger seat of the Rolls Royce	Video footage 01.36		
The roof of the Rolls Royce starts to retract	Video footage 01.52		
			Between 02.08 and 02.14, can Mr Motlokhov be seen looking at the documents that Mr McD-A has dropped on the street?
Mr Guriev and Mr Motlokhov drive away in the Rolls Royce	Video footage 02.36		