NEUTRAL CITATION: [2022] EWHC 1117 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

No. PT-2021-001048

Rolls Building
Fetter Lane
London EC4A 1NL

Wednesday, 23 March 2022

Before:

HIS HONOUR JUDGE PAUL MATTHEWS

(Sitting as a Judge of the High Court)

B E T W E E N :

HOWARD FIELD
(as administrator of the estate of Douglas Field, deceased) — Claimant

- and -

GIOVANNI DEL VECCHIO — Defendant

MR T. SHERWIN (instructed by Howard Kennedy LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

J U D G M E N T
(As approved)

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B

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(Transcript prepared from an extremely poor quality recording)

JUDGE PAUL MATTHEWS:

1 This is an application for contempt against the defendant, Mr del Vecchio, brought by Mr Howard Field, who is the administrator of the estate of his late brother, Douglas Field. He was an artist (sometimes called a "post-pop" artist), who used the name "Duggie Fields" for this purpose. Unfortunately, Duggie Fields died in March last year. At that time he was living, as he had done since the 1970s, in a rented flat in Earls Court. in Wetherby Mansions, but since about 2019 he had lived in the flat with the defendant as a partner.

2 After the death of Duggie Fields, the claimant (his brother) obtained a grant of administration. There were then discussions between the claimant and the defendant as to obtaining possession of the many works of art, clothes and other artefacts that had belonged to the deceased. It appears that the defendant began to make demands for money (inaudible) damage some of the property, but access was not given to the flat. The landlord of the flat actually gave notice to quit in August last year, expiring in December.

3 In early December, this claim (the claim in which this contempt application is made) was issued for wrongful interference with goods and seeking an order for delivery-up. On 13 December, Marcus Smith J made an order for delivery-up of the relevant goods on 20 and 21 December. That order was made following a hearing in which the defendant participated. It was a remote hearing and he participated in it by telephone. However, when the time came for the delivery-up on 20 December the defendant claimed to have Covid and so the order was not complied with.

4 The claimant tried again in January, with an application to Falk J. A similar order, apart from the dates, was made by her on 20 January, for delivery-up on the 24th and 25 January.

On the 24th, one of the claimant's solicitors attended wit the requisite workmen to take away the possessions, but once again attendance was not given to the flat. Police accompanied the solicitors to the flat and actually had words with the defendant, but the defendant was adamant that he was not going to allow the solicitors and the workmen in to remove the goods.

5 On 4 February the claimant issued an application for judgment in default of acknowledgement of service and indeed of defence, and for non-compliance with the orders. A further application notice was issued on 3 March for contempt - that is the present application before me - and to give notice of a hearing in a window beginning today. From that time, the hearing day was foreshadowed.

6 On 7 March, a process server attempted to effect service on the defendant. I do not need to resolve for present purposes whether that was good service. I may have to do so shortly. However, it is clear that the process server had copies of the relevant documents, including the contempt application, and tried to serve them on the defendant personally in the street near the flat.

7 There was a further application from the claimant dated 16 March, intended to regularise the question of service of the contempt application if that should prove necessary. I have been told, and it is now in evidence in the second witness statement of the claimant, that the landlord informed the claimant on, I think, the 14th of this month that the defendant had given up possession of the flat on that day and since then the claimant has been able to enter and look at flat and cause videos to be made, which enabled more to be seen.

8 In light of that background, the application comes before me today, but, despite having been informed about the hearing that was going ahead today by email, which was an email to an email address which has been used in the past and using which the defendant had responded

to the claimant, the defendant has not attended today. The case has been called outside but there has been no response, and the question is whether I should issue a Bench Warrant to facilitate his coming to court and attending and taking part in a hearing of this contempt application.

9 Mr Sherwin, on behalf of the claimant, has referred me to a number of useful authorities on the question of whether the court should issue a Bench Warrant or to proceed in the absence of the defendant in such a case. In particular, he referred me to the decision of Briggs J in *JSC BTA Bank v Solodchenko* [2011] EWHC 1613 (Ch) concerning the 14th defendant, Mr Syrym Shalabayev, when Mr Shalabayev did not attend the court on the contempt application made against him. Secondly, he has referred me to the decision of Cobb J in *Sanchez v Oboz* [2015] EWHC 235 (Fam), which is a decision of the Family Division, where, again, the defendant did not appear at the hearing of the contempt application, and again the judge continued with the hearing. Thirdly, I was referred to the decision of Nugee J (as he then was) in *Johnson v Argent* [2016] EWHC 2978 (Ch), where he too decided to proceed in the absence of the defendant.

10 Lastly, I was also referred to **Arlidge, Eady & Smith on Contempt** [5th ed.) at [15-52A], where the court sets out some of the criteria to be applied. I have considered all of these and consider that Mr Sherwin has made out a strong case for the court continuing. However, one important point which troubles me is that it is not known where the defendant is. He may still be in the jurisdiction, since, despite being Italian, he has made this country his home in the last several years and has lived in the flat since 2019. It is not known whether he has left the country, which is, of course, a possibility, but by no means a certainty, and in these circumstances I consider that it is right to make a brief attempt to obtain his attendance at this court by issuing a Bench Warrant for his arrest and bring him before the court.

11 I have, therefore, decided to issue a Bench Warrant but to adjourn this hearing on the contempt application until Friday at 10.30 a.m., by which time if he has not been found and brought to court I anticipate being given evidence that will (inaudible) unnecessarily and it is not necessary to wait any longer, but that the court should pursue and deal with the contempt application in the defendant's absence. So that is what I will do.

[**LATER**]

12 The next point that has been argued before me in this contempt application relates to the question of service of the order made by Marcus Smith J on 13 December 2021. I have set out the background to this case in the earlier ruling I gave on the issue of the Bench Warrant; I shall not repeat that.

13 The order was made on 13 December and on 16 December 2021 it was served by email on the defendant at the email address which he used for correspondence. The order of Marcus Smith J, at para.13, said,

> "This order is to be served by the claimant on the defendant. The claimant may effect service of this order on the defendant at the defendant's email address (inaudible) email delivered to (inaudible) service".

14 However, Mr Sherwin quite properly tells me that it was accepted before the judge that this did not apply to the requirement of personal service for the purposes of a contempt of court application, so the claimant is not able to rely on para.13 and the email service for this purpose. Therefore, the claimant had to serve personally, unless the court had otherwise dispensed with it.

15 As to that, the process server concerned made an affidavit which set out what happened when he attended at the flat. The process server was a gentleman called Cesar Sepulveda

and he comes from a firm in Angel Gate, City Road, London EC1. He gives evidence in his affidavit that he attended first of all at the block of flats on 16 December in an attempt to give it to the defendant. He managed to get into the building and rang the door. He did not manage to engage the defendant in anything other than a discussion about whether he should go or not. He came back to the building later the same day, again got into the building but again was unsuccessful in engaging the defendant. I think on the second occasion he said there was no response when he rang the bell.

16 On the next day he returned to the block and again he managed to get into the building, but this time when he rang at the door, the defendant came to the other side of the door and started speaking to him. However, he did not open the door. Eventually, after some time, when Mr del Vecchio, the defendant, would not open the door (he was on the other side of it), the process server explained the nature of the documents, that it related to an injunction relating to the proceedings being brought by the claimant against the defendant, and then he simply pushed the envelope through the letter box to the interior of the flat.

17 The test for what constitutes personal service has been set out in a number of authorities. Conveniently, I have been referred to the discussion by HHJ Pearce, sitting as a Judge of the High Court, in *Gorbachev v Guriev* [2019] EWHC 2684 (Comm). At para.27 the judge said this:

> "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 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 affected 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 *Walkers v Whitelock*, unreported, 19 August 1994, cited by Phillips 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 Phillips 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)."

18 In that particular case there was an attempt by a process server to serve papers on the defendant in Berkeley Street in London at a time when he was on the pavement but surrounded by four other men who may have had the function of seeking to protect him from unwanted attention, and the evidence before the judge here was that these four men came forward and prevented the process server from getting close to the defendant for the purpose of serving him, and then they got the defendant into a car, which was then driven away, but before that happened, the process server had managed to put the papers next to the car, and the question was whether that constituted good personal service. At para.61 and following the judge says:

"61. On any version of events, Mr Guriev was 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 [I interpolate to say that this was shown to the court] 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 act 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 ... 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 submission, 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.
>
> 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."

I need not read the final paragraph of the judgment.

19 So that is the decision of HHJ Pearce both on the law and on the facts. This case is not a case where the process server attempted to hand the documents to the defendant. Instead it is one where he left the documents with the defendant. It is a "limb 2" case rather than a "limb 1" case. First of all, the evidence entirely satisfies me that the process server, as befits a professional process server knowing the law, explained through the locked door what the documents were, that they related to the proceedings and an injunction. Secondly, I am also satisfied that, by pushing the envelope containing the documents through the letter box when the defendant was on the other side of that locked door, and talking, or having just been talking to the process server through the door, those documents were left as close to the defendant as was reasonably possible for the process server to achieve. They could not have failed to come to the notice of the defendant, who was, after all, in the flat with a locked door and there was no possibility of any other person coming along and taking the documents away from him.

20 In those circumstances, therefore, I am entirely satisfied that good personal service was effected on the defendant on 17 December 2021 at about 10.30 a.m.

[**LATER**]

21 Mr Sherwin applies for judgment in default of acknowledgement of service, and indeed the claim, on the part of the defendant, and has helpfully supplied a draft order, in which he asks for, first of all, an immediate delivery-up to the claimant of such of the personal possessions of the deceased, Mr Duggie Fields, that are or have been under the defendant's power or control and these are clearly set out in the schedule (inaudible) explains what is in the schedule, effectively artwork, and there is also non-artwork, but the more important thing, from the claimant's point of view, is actually to know where everything is at the moment and, therefore, para.2 asks for the defendant to provide certain information within a limited amount of time - 14 days from the date of the order is what is currently in the draft.

22 So the first question is this, "Is this a case in which there should be an order for delivery-up without the option to pay value?" and this is something which is permitted under the Torts (Interference with Goods) Act 1977, section 3(2), where it provides that the relief which is available under section 3(1) is,

> "(a) an order for delivery of the goods, and for payment of any consequential damages".

So that is not (inaudible) for the (inaudible).

23 I have also been referred to subsections (3), (4) and (6) of that section. Subsection (6) says that:

> "An order for delivery of the goods under subsection (2)(a) or (b) may impose such conditions as may be determined by the court, or pursuant to rules of court [and then there some further words which I need not read]".

So the question is whether the conditions upon which the order is made can include a provision for the supply of information as to the whereabouts of the assets themselves. For myself, I am not sure that the words used in subsection (6) really cover a situation where what is required is information which is, as it were, collateral, in the sense that it is information of the situation or location of the assets which were referred to, in order for delivery of the goods to be subject to conditions. It would not be a condition of the order, unlike, say, if it rains tomorrow you must deliver-up of the goods, or something like that. Here it is to know in any event without supply of the goods as well as the goods actually are.

24 So there is a question mark here as to what jurisdiction the court has to make the order in this court. Mr Sherwin has helpfully referred me to two different bases for the court having jurisdiction. The first relates to a decision of the High Court, a decision of Hoffmann J in the case of *Arab Monetary Fund v Hashim (No.5)* [1999] 2 All ER 911. There Hoffmann J (as he then was) made clear that the court had a jurisdiction to order a third party to provide information as to the whereabouts of assets in circumstances where there was a real prospect that that information might lead to the location or preservation of the assets claimed by the claimant. The judge referred in particular to the dictum of Templeman LJ in a case called *Mediterranea Raffineria Siciliana Petroli SpA v Mabanaft GmbH* [1978], which is set out on p.914 of the report at letter H, and it reads:

> "A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain."

Then Hoffmann J goes on to say that, in *Bankers Trust Co v Shapira* [1980] 1 WLR 1274:

> "The Court of Appeal approved of the exercise of this jurisdiction against third parties in aid of tracing claims."

I do not need to read any more of that part of the judgment.

25 Here, of course, this is not a case of an interlocutory order. This is a final order being sought by the claimant on the basis that the defendant is in default under the rules, but I cannot see that the position should be less strong when it comes to the enforcement of a final order than in the case of interlocutory proceedings where the idea is to make sure that any final order can actually be executed, if one were to be made in favour of the claimant. So in principle I can see that there is jurisdiction for the court to make orders requiring disclosure to be made as to the whereabouts of assets so they can be preserved for the benefit of the claimant, who *ex hypothesi* in final orders has established a right to those assets.

26 It is true that this is said to be in relation to trust funds, and that is what Templeman LJ said, but we have come a long way since the fusion of law and equity in 1875. I cannot think that these days the law would be different if it were not a beneficiary of the trust seeking to follow trust funds, but instead the owner at law of an asset seeking to do so. In the present case the claimant is, of course, the owner at law of the assets, being the administrator of Duggie Field's estate.

27 Then at p.918 of the report, Hoffmann J also says this, between letters E and G:

> "What are the limits of the *Bankers Trust* jurisdiction? They must, I think, be deduced from the reasoning upon which that jurisdiction, like the *Norwich Pharmacal* jurisdiction, is distinguished from the 'mere witness' rule. It rests upon the proposition that unless the assets in question can be

> located and secured, the ultimate determination of ownership of those assets may be frustrated by their removal or dissipation and there will be no point in calling on the third party at the trial to produce the required documents or give the requested information. In my judgment, therefore, the first principle of the *Bankers Trust* case is that the plaintiff must demonstrate a real prospect that the information may lead to the location or preservation of assets to which he is making a proprietary claim."

28 Then, as he says, this is a matter upon which opinions may differ, but, in my judgment, the mere fact that opinions may differ does not relieve me of the necessity of saying whether I consider there is a real prospect in this case. I have to say that, even at this late stage, I do think there is a real prospect of information being given leading to the location and preservation of assets to which the claimant has established a proprietary claim. I note, of course, that these are orders directed at third parties rather than at the defendant himself but I cannot think that, if an order can be made against the third party to give the information, such an order cannot be made against the defendant himself, who ought to know what he has done with the assets in question.

29 So there is a basis there, as it seems to me, for the court to make an order of the kind which Mr Sherwin urges me to make. Secondly, he refers to section 37(1) of the Senior Courts Act 1981, which, as is well known, is the basis for the court to grant injunctions, whether interlocutory or final, and the test there for the grant of an injunction is whether it appears to the court to be just and convenient to do so.

30 The use of the word "injunction" is interesting because that does not naturally lend itself to being understood as an order to provide information. Yyet an order to provide information is simply an example of effectively a mandatory injunction on a recipient to produce something. But in any event, in the case of *JSC BTA Bank v Ablyazov (No.8)* [2013] 1 WLR

1331, to which Mr Sherwin also referred me, it was held at para.168 in the judgment of Rix LJ:

> "In the light of the jurisprudence cited above it seems to me to be impossible to submit that the court lacks jurisdiction, whether under section 37 of the 1981 Act or under its own inherent jurisdiction, to do what is just and convenient, and necessary, to protect its own orders and to give effect to the interests of justice. *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 specifically considered these matters, and the question has never been doubted since. There is no doubt that the bank has a legal or equitable right, namely the causes of action which it has deployed in its claim forms, to entitle it to seek freezing orders from the court; and there is no doubt that the court thereafter has the power to do what is just and necessary to give effect to such orders."

That was, of course, where the order in question was an order that the defendant surrender himself (he having absconded) to the Tipstaff or police that he file and serve an affidavit disclosing worldwide assets and that unless he complied with the surrender order and the disclosure order he would be debarred from defending the claims that were brought against him, and the Court of Appeal by a majority held that that order was justified under the section 37 jurisdiction.

31 So it seems to me, by analogy, that, where there is jurisdiction available (and, of course, section 37 refers expressly final or interlocutory injunctions), to make an order of the kind that is sought here, the circumstances of this case, where the assets disappeared from the flat where they were, and the defendant also disappeared because he had either taken them with him or he had disposed of them, mean that there is a very good reason why the defendant

should be required to provide information about their whereabouts. I am satisfied that it is a proper use of the jurisdiction of the court to make that order.

32 There are orders sought for consequential damages and an inquiry as to those consequential damages may be held before the Master. That may or may not turn out to be of use to the claimant, but I can see no good reason why he should not be entitled to it in this order. So, I will make an order for judgment in default of acknowledgment of service and defence in favour of the claimant largely in the form of the draft that has been provided, perhaps with one or two slight variations which I have discussed with Mr Sherwin.

[**LATER**]

33 I am asked to deal with the question of costs. There have been two injunction hearings, one before Marcus Smith J and one before Falk J. In the first case, the judge reserved the costs entirely to the judge hearing today's application. In the second case, the judge decided that the costs should be assessed on the indemnity basis but left the actual assessment to be decided today, although she ordered £10,000 to be paid on account (inaudible). Then there are the costs of the action generally, except that the statement of costs I have seen does not include the costs of the contempt application, or at least the application for an alternative form of service and, accordingly, I am not concerned today with those costs.

34 As for the costs themselves overall, the statement shows a grand total of £52,454, plus VAT. So the first question I ask myself is, "What is the basis of assessment of the costs which are sought by the claimant?". Strictly speaking, I first have to decide whether there is an order at all for the payment of costs by the defendant. However, in my judgment, it is clear there ought to be an order and the general rule is that the unsuccessful party should pay the successful party, being the claimant. Here, there is no basis for not applying the general rule. So there will be a costs order in favour of the claimant.

35 The next question is the basis of assessment of the costs, "Should it be on the standard basis or an indemnity basis?". Mrs Justice Falk has given me a nudge in the right direction by ordering that the assessment of costs of the hearing in front of her should be on the indemnity basis, and I can see why she reached that conclusion. It seems to me that the conduct of the litigation on the part of the defendant in this case has been way out of the norm, with participation by telephone in the initial hearing and then pretty much a blanket refusal to cooperate thereafter, failure to engage with the process, and failure to respond to enquiries. This is not the right way to deal with litigation that has been brought, and I am entirely satisfied that it is appropriate in these circumstances to order the assessment on the indemnity basis.

36 The next question is whether I should assess these costs summarily or whether I should leave it to go off for detailed assessment. Although it covers a number of hearings, and the costs generally of the proceedings, each of the hearings could have been dealt with separately as a summary assessment and I can see no good reason to not summarily assess the entire amount, so I will do so summarily now.

37 I have seen the statement of costs which I understand has been served by the claimant on the defendant, and will consider them immediately. As to that, I am satisfied that although the hourly rates claimed are the high end of the spectrum, they are not unreasonable for this kind of litigation, which needs to be done properly and needs to be done relatively quickly. So that is not a problem. I am satisfied that there has been appropriate delegation of legal work down from the top, so that it is has not all been done by a grade A fee earner, as sometimes one finds, but there has been appropriate delegation. Thirdly, I am satisfied that the hours recorded are not unreasonable in the circumstances and work done on documents appear to me to be appropriate for the case as has been presented. I am also satisfied that

counsel's fees are proper and reasonable in the circumstances and then there are court fees and VAT.

38 So I will assess the costs summarily for the claim and in the contempt application and the application for personal service in the sum claimed of £62,635.26, including VAT.

_____

CERTIFICATE

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