IN THE HIGH COURT OF JUSTICE
QUEEN'S B ENCH D IV IS IO N
COMMERCIAL COURT
[2014] EWHC 3977 (Comm)

No. 2014 Folio 570

Rolls Building
Royal Courts of Justice
Friday, 21st November 2014

Before:

MR. JUSTICE FLAUX

B E T W E E N :

(1) TALOS CAPITAL LIMITED
(2) THE CHILDREN'S INVESTMENT FUND MANAGEMENT (UK) LLP
(3) CHRISTOPHER HOHN
(4) MARTIN FRASS-EHRFELD
(5) JAMES HAWKS
(6) ARTHUR COX
(7) TCI FUND MANAGEMENT (US) INC. — Claimants

- and -

(1) JCS INVESTMENTS HOLDINGS XIV LIMITED
(2) JOHN FLYNN
(3) JOSEPH SHEEHAN
(4) CARMEL CAPITAL CREDIT (CAYMAN) LIMITED
(5) BENRAY LIMITED
(6) JAMES SHEEHAN
(7) JOSEPH SHEEHAN JR. — Defendants

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J U D G M E N T

(As approved by the Judge)

A P P E A R A N C E S

MR. G. BLACKWOOD QC AND MR B COFFER (instructed by Clifford Chance LLP) appeared on behalf of the Claimants.

MR. A. TOLLEY QC (instructed by Collyer Bristow) appeared on behalf of the Second and Fifth Defendants.

MR. JUSTICE FLAUX:

1 The court has before it an application by the second defendants, dated 13th November 2014, for an extension of time for filing an acknowledgement of service and for contesting the jurisdiction of the court under Part 11 of the CPR.

2 The matter arises in this way. Blackrock Hospital Ltd. (to which I will refer as 'BHL'), is the owner of a private hospital in Ireland. The third and fifth defendants are shareholders in BHL and the second defendant, Mr. John Flynn, controls the fifth defendant, which is an SPV. The shareholders entered into various loan agreements with Anglo Irish Bank between 2006 and 2008, and Anglo Irish Bank also made loans to a third shareholder, Dr. George Duffy, all those loans being secured against the shares of the three shareholders in question in BHL, which therefore amounted to 56% of the shares in that company, thus representing a controlling interest in the company. In about March of this year the three shareholders were looking to refinance the loans.

3 The first claimant, Talos, is an internationally renowned investment fund and in March 2014 the first claimant agreed to provide refinancing of the loans to the third defendant, the fifth defendant and Dr. Duffy, on condition that the first claimant obtained security over the shares. The terms of the agreements were evidenced by a term sheet between the second and third defendants, or, as it stated, companies that are 100% controlled by them, as borrowers and the first claimant, or an affiliate or subsidiary of the first claimant, as lender. The collateral shares described were a 56% shareholding in Blackrock Hospital Ltd. and the security was to be a first priority mortgage over the collateral shares and other customary securities to be provided. The loans were to be up to €45million and there was provision in the term sheet, under the heading "Expense deposit", for the following:

> "The Borrowers shall be required to post an Expense Deposit of €150,000 through the Lender. Alternatively, the Borrowers can procure the provision of a lawyer's undertaking in favour of the Lender and, on terms acceptable to the Lender, for up to €150,000 of the Lender's out-of-pocket expenses. The Borrowers shall remain liable for all of the out-of-pocket expenses of the Lender. Upon request, the Lender will inform the Borrowers of the amount of the out-of-pocket expenses incurred by the Lender at any point in time".

4 There was then, under the heading "Exclusivity", a provision that:

> "For a period of 60 days from and after full execution and delivery of the Term Sheets, the Borrowers will not encumber, pledge or grant any interest over the collateral shares to any other party other than the Lender".

5 Under the heading "Binding intent", it provided as follows:

> "This Term Sheet does not constitute or imply a commitment to provide funding by the Lender, nor a representation that such funding or investment would be made available. Any such commitment is subject to, amongst other things, contract and the agreement of definitive documentation. The Investor and the Borrower have agreed that in consideration of the payment to the Borrowers by the Lender of £10, receipt of which is hereby acknowledged by the Borrowers, the sections entitled 'Expense Deposit', 'Exclusivity' and 'Confidentiality', and the paragraph below describing the governing law of this Term Sheet and any non-contractual obligations arising out of or in connection with, are legally binding and enforceable in accordance with their terms. This Term Sheet and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with the laws of England and Wales.
> The courts of England shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Term Sheet, including a dispute relating to non-contractual obligations arising out of or in connection with this Term Sheet or the dispute regarding the existence, liberty or termination of the legally binding provisions contained in this Term Sheet".

6 A facility agreement was subsequently executed between Medfund and the first claimant on 17th March, and on 19th March an accession deed was entered between Medfund and the first defendant, JCS, which was an SPV for the borrowers, became the borrower under the facility agreement. The accession deed was signed on behalf of both parties by the third defendant, Mr. Sheehan. The facility agreement and the accession deed were both expressly governed by English law and the facility agreement contained, at clause 34, an exclusive English jurisdiction clause. Certain obligations of the first defendant under the facility agreement were guaranteed by the second and third defendants pursuant to a guarantee which was subject to Irish law and jurisdiction.

7 Under the terms of the facility agreement, the first defendant was entitled to call on a loan of €2.4million to be used as a deposit for the purchase of the loans made to the second defendant and Dr. Duffy. That sum was advanced by the first claimant on 7th April 2014. However, unbeknown to the first claimant,

the loans made to Dr. Duffy by Anglo Irish had in fact been repaid three days earlier on 3rd April 2014. The effect of that repayment was to deprive the first claimant of the security to which it was entitled over the Duffy shares, so that the first claimant would no longer take a controlling interest. Although Mr. Flynn now seeks to suggest that this redemption was not a problem because of the cross-guarantees secured on the shares, I am quite satisfied that the redemption did involve, or potentially involve, a dilution of the first claimant's security interest. This is because the loan by Anglo Irish to Dr. Duffy was one of the defined IBRC loan agreements under the facility agreement which was to be acquired by the borrower. Such acquisition being the purpose of the loan as defined in clause 3 of the facility agreement, the acquisition of all of the IBRC loan as defined was unable to go ahead by 5th May 2014, which was effectively the backstop date for completion under the facility agreement.

8 The consequence of that is that there was an event of default under clause 21.17 of the facility agreement. That provided that one of the events of default identified was "Non-completion" where both of the IBRC loan acquisition and either the NMA loan acquisition or the NMA loan redemption had not occurred by close of business on 5th May 2014. On this hypothesis, the Duffy loans having been repaid, the IBRC loans acquisition, as defined in the facility agreement, did not occur by close of business on 5th May 2014.

9 Given the existence of that event of default and other events of default under clause 21, as identified by Mr. Roxborough of Clifford Chance in his witness evidence before the court, the first claimant was entitled to demand immediate repayment of the deposit loan with interest and to enforce its security pursuant to clause 21.18 of the facility agreement, which provided for acceleration.

10 On 6th May 2014 the first claimant served notices demanding immediate repayment of the deposit loan and took steps to enforce its security by taking control of the first defendant and replacing the directors of the first defendant with its own nominees. However, the first defendant has failed to make a required repayment.

11 The response of the second, third and fifth defendants, together with the fourth, sixth and seventh defendants who are associated with them, was to issue proceedings in the District Court for the Southern District of New York on 8th May 2014, claiming damages of $100million not only against the first claimant but against the second claimant, by which the first claimant is owned, the third to fifth claimants, who are officers or employees of the first claimant, the sixth claimant, which is the well-known firm of solicitors in Dublin who had acted for the first claimant in relation to the guarantees, together with the seven claimant, the US subsidiary of the first claimant.

12 To say that the claim made was an astounding one would be an understatement. The claim was founded on the assertion that all the plaintiffs in the US entered into the facility agreement but that the claimants were using the facility agreement as a fraudulent scheme to take over control of BHL. That complaint was filed on behalf of all the current defendants as plaintiffs by US attorneys Leonard Zack and Lawrence Daniel O'Neill. I note that, although the second defendant now seeks to distance himself from those proceedings, he does not suggest in either of his witness statements that Mr. O'Neill did not have authority to commence and pursue those proceedings on his behalf. Indeed, in his first witness statement he said in terms that the proceedings were commenced on 7th May 2014 on the advice of Mr. O'Neill. It is striking that neither in the proceedings in the United States, nor in the current proceedings, has any attempt been made by the second defendant to justify the allegations that were being made in his name.

13 In the light of those proceedings, on 20th May 2014 the claimants issued the Claim Form in this court in which the first claimant sought against the first defendant, JCS, the other party to the contract, a declaration that the first defendant was in default under the facility agreement, together with repayment of the €2.4million deposit loan and costs and expenses. The first claimant also sought a declaration that it was not liable to the defendants for accelerating payment and enforcing security under the facility agreement, together with declarations that the facility agreement was not part of a fraudulent scheme. It also sought declarations to that effect against the second and third defendants, and it sought an anti-suit injunction against the second to seventh defendants. Separately from those heads of claim, the first claimant pursues a claim for its out-of-pocket expenses of some £270,000 in all under the term sheet against the second and third defendants.

14 The claimants made an application to this court for an interim anti-suit injunction on the grounds that the New York proceedings were in breach of the exclusive jurisdiction clause in the facility agreement and/or were vexatious and oppressive. Notice of the application was given to the defendants on about 21st May 2014. Mr. O'Neill's response, on behalf of the second to seventh defendants, is indicative of the apparent contempt which he has for the English courts. That provided as follows:

> "Neither they [that is his clients] nor the subject matter of this action is subject to the jurisdiction of the English courts and has not been since July 1776. We intend to proceed aggressively in New York against your clients. We do not recognise the jurisdiction of the English courts in this matter and are quite sure that the US Federal Courts will agree. We note that your answer to the New York complaint is due shortly. We look forward to seeing you and your clients in New York".

15 In an email, copied to the second defendant, of 3rd June 2014, Mr. O'Neill then said that his clients had instructed English lawyers to attend the hearing of the application for an anti-suit injunction, which was to take place a few days later, solely, he said, to challenge the jurisdiction of the English court. This is important, because it shows that not only had Mr. O'Neill sought English law advice on behalf of his clients, but he was aware that one could turn up before the English court solely to challenge the jurisdiction of the court without submitting to that jurisdiction. In other words, he and Mr. Flynn (who was copied in on that email) knew that it was possible, as I say, to challenge jurisdiction without submitting to the jurisdiction of the court.

16 The day before the hearing, on 4th June 2014, the second to seventh defendants, as plaintiffs in New York, made an emergency application for an anti-anti-suit injunction. That was granted by the motions judge but then set aside on appeal by a District Judge who also ordered the US plaintiffs to file a brief by 20th June showing cause why the US proceedings should not be dismissed for want of jurisdiction. I should add in that context in parenthesis, that that appears to have been a reference to want of diversity jurisdiction, the position being that where claimants or plaintiffs and defendants are resident in different states of the United States, the Federal Courts have diversity jurisdiction. Where, however, one or more of either the claimants or defendants are resident in a country other than the United States (which was the position as regards the complaint as it stood in June 2014 where a number of the defendants and claimants in New York were resident outside the United States), the position is that there is no diversity jurisdiction available to the Federal Courts.

17 The matter came before me on 5th June 2014. The first defendant appeared by Mr. Khurshid of counsel, instructed by Davis & Co. The first defendant, I should add, had had new directors appointed who were independent of the parties, the claimants having enforced their security, as I have said, by securing the appointment of a new board of directors of the first defendant. The first defendant indicated, through Mr. Khurshid, that it would not pursue a claim in New York, so no injunction was sought against the first defendant. The second to seventh defendants did not appear.

18 On the material put before me, specifically the first affidavit of Mr. Iain Roxborough of Clifford Chance, I was satisfied that it was appropriate to grant the anti-suit injunction on both the grounds pursued by the claimants. I also gave permission to serve the second and seventh defendants outside the jurisdiction on the basis of two of the gateways in Practice Direction 6B, specifically 6BPD para.3.1(3), the so-called "necessary or proper party" head or gateway, and 3.1(6)(c) and (d), that is where a claim is made in respect of a contract which is governed by English law or contains an exclusive English jurisdiction clause.

19 The immediate response of the second to seventh defendants, through Mr. O'Neill, to the service of the court order was: "We shall ignore this order". Thereafter the US plaintiffs served an amended complaint which removed two of the foreign-based plaintiffs (that is the fourth and fifth defendants), and also removed any allegation that the second to seventh defendants were parties to the facility agreement. It was said in the application for permission to amend in the United States that, shortly after filing the first complaint, the plaintiffs had learned that they were never, in fact, parties to the facility agreement so the exclusive jurisdiction clause was not applicable to them, an assertion which was repeated by Mr. O'Neill in a letter of 20th June 2014. I agree with Mr. Blackwood QC, on behalf of the claimants, that the suggestion that prior to some date in June the defendants did not know that they were not parties to the facility agreement simply cannot be true. The facility agreement was negotiated by Mr. O'Neill and signed, on behalf of the borrower, by the third defendant.

20 In the US proceedings the claimants argued that the removal of the fourth and fifth defendants did not resolve the problem over diversity jurisdiction and pointed out that even after the removal of the fourth and fifth defendants there were other plaintiffs who were resident outside the jurisdiction, specifically arguing that the second defendant, Mr. Flynn, was an alien so far as the US courts were concerned. In response to that, before the Federal Court, Mr. O'Neill argued on behalf of the plaintiffs that if TCI were right then the court could dismiss the claim against the second defendant in New York as he was dispensable. However, at that stage in late June the second defendant remained a plaintiff in New York and his removal did not take place until a later date.

21 In these circumstances, given that the second defendant was still a plaintiff and that the fourth and fifth defendants had given no indication that they intended to abandon their claims, insofar as it was thought appropriate or sensible on their part that they might pursue those claims elsewhere or seek to raise them by way of defence and counterclaim, the withdrawal in New York was not an abandonment of the claims but appears to have been designed to cure the defect in jurisdiction. In those circumstances the claimants decided to seek to maintain the anti-suit injunction against all the defendants at the return date. They had concerns, which I consider were reasonable, that unless the defendants were restrained (specifically the second defendant) he would continue the New York proceedings and/or that he, the fourth and fifth defendants would seek to renew their claims in another US jurisdiction, for example in the state courts. At the return date, on 26th June, Blair J. was quite satisfied that the anti-suit injunction should be continued against all the defendants until trial or further order.

22 It is noticeable that although in his witness statement in opposition to the current application, and in support of the claimants' application for summary judgment, Mr. Roxborough says that the withdrawal by the second defendant from the US proceedings was a tactical ploy, for the reasons I have given, in order to seek to bolster the diversity jurisdiction in New York, Mr. Flynn does not deal with that matter in his witness statements at all, let alone deny it.

23 Immediately prior to the return date of 26th June, Mr. O'Neill had written to Clifford Chance, on 24th June, in an email, which was again copied to the second defendant, which provided:

> "Dear Mr Roxborough,
>
> I have reviewed all of your documents and the order made by the court on 5th June. I note that the order, pursuant to its specific language, only applies to parties within the jurisdiction of the courts of England and Wales. As none of our clients are now or have ever been subject to the jurisdiction of the English courts we shall presume that the order and any further rulings by that court are inapplicable to Mr. Flynn and the Sheehans, all citizens of and/or domiciled in the United States. Thus, as this hearing has no relevance to our clients, on advice of English counsel, we shall not be making an appearance on the 26th".

As with the earlier reference in his letter of 3rd June about having instructed English counsel, this is important because it is a clear statement that the US plaintiffs had received advice from English lawyers. In its context, that can only have been advice as to the jurisdiction of this court and the merits of attendance before this court. Although, as I say, in his second witness statement the second defendant seeks to challenge Mr. Roxborough's suggestion that he had received advice from the firm of solicitors of Clintons, who were acting for his son (who was briefly the eighth defendant to these proceedings) and says that he does not know what legal advice Mr. O'Neill was receiving, it seems to me that it is fairly clear from those two emails that, contrary to what he says in his witness statements, Mr. Flynn was well aware of the advice that Mr. O'Neill said that he was receiving.

24 Mr. Adam Tolley QC, on behalf of Mr. Flynn, sought to suggest that, in this instance, Mr. O'Neill may simply have been not telling the truth and, as it were, being a braggart. The answer to that is that if that was a point that Mr. Flynn wished to make he could, and should, have asked Mr. O'Neill whether it was true that he had received the advice that he said he received or not. Absence any such clarification, the court is entitled to take at face value what Mr. O'Neill said. I should add, in relation to the return date, that although it was suggested by Mr. Tolley at one point that the second defendant was no longer a plaintiff in New York at that date, that is not correct. The application

for leave to file a second amended complaint was not made until the following day, 27th June, and the complaint was only filed in which only now the third defendant, Mr. Sheehan was named as plaintiff on, I think, 11th July.

25 After Mr. O'Neill received the transcript of the hearing for the return date he sent another email to Clifford Chance, on 21st July, in these terms:

> "I remain of the opinion that the opinions and rulings of Her Majesty's courts have no force or effect in the United States nor any bearing on the decisions of the US courts. At present the United States is not a party to any treaty regarding the enforcement of foreign court orders or judgments, and in particular the US courts would not recognise or enforce injunctions, be they preliminary or final, issued by English courts. We would be pleased to litigate that point in the Federal Courts in New York. Pending such litigation we do not consider ourselves or our client bound by these orders".

26 The position, as I say, at present, is that only the third defendant is pursuing the New York proceedings but he continues to do so in breach of the injunction. Although the second defendant is not a plaintiff in New York any longer, and although he has offered an undertaking not to pursue the proceedings in New York, or not to pursue any other proceedings in New York, the first claimant has pursued proceedings in Ireland against the second and third defendants under a guarantee and the claimants' concern is that if they obtain judgments against the second and third defendants they, and specifically the second defendant, will seek to raise the same allegations by way of defence and counterclaim in resisting any attempt to enforce such judgment against him in Florida in the State courts. Indeed, Mr. Tolley intimated as much at the hearing before me on 31st October.

27 The second defendant was actually served with these proceedings in Florida on 7th August, so the time for acknowledgement of service of 22 days expired on 29th August. Then he obtained permission from Popplewell J to pursue an application for summary judgment, notwithstanding that the defendants had not acknowledged service. The claimants issued their application for summary judgment on 24th September.

28 On 3rd October Collyer Bristow were instructed by the second and fifth defendants, then by the fourth, sixth and seventh defendants, and on 22nd October Collyer Bristow wrote to Clifford Chance saying that the claim against the fourth to seventh defendants should be stayed with no order as to costs, asserting that the fourth to seventh defendants had been included in the US proceedings by mistake. It was not explained how that mistake had occurred and at that stage it was not suggested that the second defendant had been included by mistake. However, at the hearing before me on 31st October, at

which Mr. Tolley appeared to resist an order for expedition, on the grounds that his clients intended to challenge the jurisdiction, Mr. Tolley submitted, on instructions, that the defendants he represented (in other words the second and fifth defendants) had been included in the New York proceedings by mistake. He was unable to tell me what that mistake was and said the matter required investigation.

29 At all events, it no longer seems to be being asserted that the second defendant, let alone any other defendant, was included as a plaintiff by mistake. As I have already indicated, in his first witness statement Mr. Flynn actually says in terms that the proceedings in New York were commenced in his name on the advice of Mr. O'Neill. There is no explanation given, either in Mr. Flynn's witness statements or in the witness statement of Miss Alexander of Collyer Bristow, as to how the assertion came to be made in the first place, either in correspondence or at hearing on 31st October, that any of these defendants were included as plaintiffs in the United States by mistake. I agree with Mr. Blackwood QC that it is not remotely credible. As I said, there is no evidence that Mr. O'Neill acted without authority and, quite the contrary, Mr. Flynn appears to accept in his witness statement that Mr. O'Neill was acting on his behalf. Furthermore, despite his attempt in his witness statement to paint himself as a man with no knowledge and experience of the legal systems of this country, or of other countries, it is clear from the material referred to in Mr. Roxborough's fifth witness statement (which the second defendant has not sought to deny or to challenge in his evidence) that the second defendant is an experienced litigator, not only in the United States but in this jurisdiction, having participated in at least one of the Lloyds Action Groups in the 1990s.

30 Although Collyer Bristow have been instructed since 3rd October, and although Mr. Tolley told me at the hearing on 31st October that his clients intended to challenge the jurisdiction and seek to set aside the proceedings against them, no acknowledgement of service was served by the second defendants until 12th November, that acknowledgement of service being the prerequisite of any challenge to the jurisdiction under CPR Part 11. Accordingly, that acknowledgement of service was filed 75 days late. The time for acknowledgement of service having expired on 29th August, the application under Part 11, insofar as it was made in the Commercial Court, should have been filed 28 days later, by 26th September.

31 The first question I have to consider is whether to give the second defendant permission to serve the acknowledgement of service out of time and to grant the necessary extension. In support of his application, Mr. Tolley submits that this is not a case where the second defendant is seeking relief against sanctions under CPR 3.9. He says the court is simply exercising its discretion under CPR 3.1(2)(a) so that the principles established in *Mitchell v News Group Newspapers* [2013] EWCA Civ. 1537, [2014] 1 WLR 795, as clarified in

Denton v TH White Limited [2014] EWCA Civ. 906, [2014] 1 WLR 3926, simply do not apply. In support of that proposition he relies upon the judgment of Moore-Bick LJ in the recent Court of Appeal decision of *Altomart v Salford Estates (No.2) Ltd* [2014] EWCA Civ. 1408. That was a case where a respondent was seeking an extension of time to file a respondent's notice in the Court of Appeal under CPR 52.5(2)(b). Mr. Tolley relied upon para.10 of that judgment, where Moore-Bick LJ said:

> "In my view it is clear from the language of rule 3.8 that it is concerned with a sanction imposed by the very rule, practice direction or order of which the applicant is in breach, hence the use of the words "imposed by the rule, practice direction or court order." In such cases the consequences of default are spelled out; a classic example is an "unless" order. Rule 3.9 does not repeat the words "by the rule, practice direction or court order", but Rule 3.8 provides the context in which rule 3.9 has to be read and in my view it is also directed to sanctions in the sense of consequences imposed by the rule, practice direction or order of which the applicant is in breach. Most rules, practice directions and orders, however, do not provide specific sanctions for their breach, leaving it to the court to decide what, if any, consequences should follow. In my view rule 3.9 does not, therefore, apply to such cases and an application for an extension of time is not one that falls within the scope of rule 3.9, either expressly or by analogy. Such applications are governed by rule 3.2(1)(a)."

32 However, as Mr. Tolley was essentially constrained to recognise in his oral submissions before me, that overlooks what Moore-Bick LJ went on to say at paras.12 and 13, which was essentially to the effect that the courts have recognised the existence of implied sanctions capable of engaging the approach contained in rule 3.9. Moore-Bick LJ said this:

> "In *Mitchell* itself, however, the sanction from which relief was sought had not been prescribed as a consequence of default by any rule practice direction or previous order of the court. It was a sanction imposed by the court in the exercise of its discretion for a failure to comply with a rule that itself prescribed no sanction for default. To that extent it might be thought that the case did not fall within the natural ambit of rules 3.8 and 3.9. Liberty to apply for relief from that sanction appears to have been given in order to allow fuller argument at a later date when more time could be made available; otherwise one might have thought that an appeal against the order imposing it would have been the more appropriate course. Nonetheless, the application proceeded under rule 3.9 and laid down principles which are intended to govern applications under that rule. The question remains, however, whether they were

> intended to govern applications, such as the present, for extensions of time where no sanction is prescribed for the default.
>
> 13. The consequences of failing to file a respondent's notice within the prescribed time are not spelled out in the rules, so on the face of it there is no sanction within the meaning of that expression in rules 3.8 and 3.9 from which the respondent needs relief. However, in a number of cases dating back more than a decade the courts have recognised the existence of implied sanctions capable of engaging the approach contained in rule 3.9 and therefore now the *Mitchell* principles. The first was *Sayers v Clarke Walker* [2002] EWCA Civ 645, [2002] 1 WLR 3095…".

Moore-Bick LJ then considered that case and, specifically, the judgment of Brooke LJ dealing with 3.9 in that context. Then he goes on to say at para.15 of his judgment:

> "In *Mitchell* itself the court made it clear at paragraphs 49-51 that it considered that similar principles applied in other cases of failure to comply with the rules, describing an application for an extension of time for service of particulars of claim as being in substance an application for relief from sanctions under CPR 3.9, and since then the concept of the implied sanction has played a prominent part in a number of decisions…".

He then cites a number of cases, and then says:

> "Accordingly, I think it is now established that an application for permission to appeal out of time is analogous to an application under rule 3.9 and is therefore to be decided in accordance with the same principles."

Then at 16 he says:

> "The purpose of the respondent's notice is to enable Altomart to rely at the hearing of the appeal on grounds for upholding the judgment that were not before the court below. If an extension of time is not granted it will be unable to do so. To that extent that area of dispute will not come before the court. In my view for a respondent to be prevented from pursuing the merits of a case it wishes to pursue on the appeal is no more or less of an implied sanction than it is for an appellant to be prevented from pursuing its case on appeal. In my view, therefore, the *Mitchell* principles apply with equal force to an application for an extension of time in which to file a respondent's notice."

33 In my judgment, that reasoning is equally applicable to the second defendant's application for an extension of time in which to file an acknowledgement of service. The consequence of not being granted an extension would be that the acknowledgement of service filed on 12th November will have to be set aside as a nullity, and the second defendant will not be permitted to mount his challenge to the jurisdiction. That is clearly an implied sanction, just as the respondent's inability to pursue its case on the merits was in *Altomart*. Accordingly, in my judgment, the *Mitchell* principles apply.

34 The applicable principles are clarified in *Denton v White* and usefully summarised in Moore-Bick LJ's judgment in *Altomart* at paras.19 and 20, where he says as follows:

> "More recently the rigour of the decision in *Mitchell* has been tempered by the decision in *Denton*. In that case the court recognised that *Mitchell* had been the subject of criticism and, while holding that the guidance it provided remained substantially sound, sought to explain in rather more detail how it should be interpreted and applied. In doing so it identified three stages of enquiry: (i) identifying and assessing the seriousness and significance of the default which engages rule 3.9; (ii) identifying its cause; and (iii) evaluating all the circumstances of the case, including those specifically mentioned…".

Those specifically mentioned are the two points specifically mentioned in 3.9, namely the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with the rules. What Moore-Bick LJ then goes on to say is:

> "The court clearly contemplated that if the default is not serious and significant, relief is likely to be granted."

He then went on in his judgment to consider further passages from the *Denton* case which I do not need to summarise for present purposes.

35 The first and second stages, as set out by Moore-Bick LJ, can be considered together, namely the identification and assessment of the seriousness and significance of the fault which engages CPR 3.9 and its cause. The following matters are of significance. Firstly, the delay here is considerable, 75 days, more than three times the period of 22 days actually permitted to the second defendant under the rules for acknowledgement of service. Secondly, the failure to file an acknowledgement of service, in my judgment, and contrary to what Mr. Flynn says in his witness statements, was quite deliberate. Taking what Mr. O'Neill said at face value, he had advice from English lawyers, including advice that you could appear solely to challenge the jurisdiction of the English court, and it is inconceivable that those lawyers did not advise him,

and therefore through him the second defendant, as to the steps required to challenge the jurisdiction of the English court. In his witness statement the second defendant seeks to maintain that he was entirely reliant on the advice of Mr. O'Neill, believing on the basis of that advice that there was no need to engage with the English proceedings. As will be apparent from this judgment, I am extremely sceptical about that and what Mr. O'Neill said about having advice from English lawyers was, as I said, copied to Mr. Flynn on both of the occasions and it would be surprising if Mr. O'Neill did not share with his clients the advice that he had received. Added to which, as I have said, the second defendant was an experienced litigator.

36 However, even accepting what he says, and accepting that in a case of accidental non-compliance with the rules through the fault of the solicitor, subsequent cases such as *Denton* and *Altomart* have tempered the stringent position in *Mitchell*, which was that accidental non-compliance with the rules as a result of error by legal advisers is unlikely to be a good reason for relief against sanctions, this case is not one of accidental non-compliance. This is a case of deliberate non-compliance with the rules. Mr. O'Neill was deliberately cocking a snook at this court knowing what the consequences would be. As Mr. Blackwood reminds me, the position has been clear since long before the *Mitchell* case that in considering the conduct of a party, the conduct of a party's solicitor is generally taken as the conduct of a party itself for the purposes of considerations of matters under the rules.

37 In any event, it seems to me that whatever it was that Mr. O'Neill was doing, on the material that is before the court, the second defendant was well aware of that and was quite happy to go along with it. In those circumstances there is much force in reaching the conclusion that the second defendant should be left to whatever remedy he may have against Mr. O'Neill for the fact that the tactics employed have backfired.

38 Thirdly, and following on from the second point, Collyer Bristow were instructed on 3rd October and yet the acknowledgement of service was not filed for another 40 days. There is simply no explanation at all for that additional failure. If it was tactical in the sense that the second defendant was assessing the relative merits of various options available to him, such as not appearing at all and then seeking to run an argument to challenge an English judgment when it came to enforcement in the United States, that is clearly not a good reason for relief against sanctions.

39 The court then has to evaluate all the circumstances in the case, including the two considerations expressly identified in 3.9: the need for the litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with the rules.

40 So far as the former is concerned, this failure by the second defendant to comply with the rules has led to a half day hearing on an urgent basis which has, in fact, now lasted nearly all day, in circumstances where I remain of the view that the application is tactical and designed to obstruct the claimants in any attempt to obtain judgment and enforce that judgment against the first defendants, on the one hand, and the second and third defendants particularly on the other, in relation to their obligations on the contractual documentation, the term sheet in particular, and under the guarantees which are the subject of the proceedings in Ireland.

41 More serious, however, is the need to enforce compliance with the rules. In my judgment, the court should simply not countenance deliberate non- compliance and flouting of the rules. The whole regime of Part 11, which requires applications to challenge the jurisdiction to be made within 28 days, in the case of the Commercial Court, of the acknowledgement of service, is designed to ensure that such applications are made promptly. In the present case, for tactical reasons, the second defendant and his legal advisers deliberately disregarded the rules. Even when English solicitors were instructed they did not seek the requisite extension of time, as I say, for another 40 days.

42 Mr. Tolley submits that if the extension of time is granted the claimants will suffer no prejudice. I do not accept that the claimants have not suffered prejudice because they have clearly been put to considerable cost by the tactical games being played by the second defendant, including the steps he has taken to evade service in the United States, which appear, on the face of it, to include an impersonation of somebody who is said to have been his cousin.

43 Even if I had thought it appropriate to grant the extension of time sought, I would only have done so on the condition that the second defendant pay the claimants' costs of this application and additional costs incurred by the claimants in the consequence of the second defendant's conduct within a very short timeframe as a condition of any extension of time being granted. But, in any event, the fact that the claimants can only show a limited amount of prejudice which could be compensated for in costs, is only one of a number of factors to be weighed in the balance in considering all the circumstances in the case. That factor is far outweighed in this case by the fact that the substantial delay which has occurred is deliberate.

44 Accordingly, I refuse to grant the extension of time, from which it follows that the acknowledgement of service must be set aside as a nullity and the second defendant's application under Part 11 is dismissed.

45 However, given that this judgment may be used elsewhere, I propose to consider, albeit more briefly than I might otherwise have done, the merits of the second defendant's challenges to the jurisdiction.

46 The three principles to be applied in deciding whether to grant permission to serve out of the jurisdiction have most recently been restated by Lord Justice Lloyd in *VTB Capital v Nutritek International* [2012] EWCA Civ. 808, [2012] 2 Lloyd's Reports 313 at 99-100. They have been summarised as follows, (i) that the applicant/claimant must show that he has a good arguable case on the merits, by which is meant a real as opposed to a fanciful prospect of success on the claim; (ii) the claimant must satisfy the court that there is a good arguable case against the foreign defendant falling within one or more of the gateways under the practice direction, para.3.1, and in that context "good arguable case" means that the claimant has much better of the argument than the defendant, and (iii) that the claimants must satisfy the court that in all the circumstances England is clearly the appropriate forum for the trial of the dispute.

47 So far as good arguable case on the merits is concerned, despite the arguments which Mr. Tolley advanced to the contrary, I am satisfied that the claimants more than satisfy that requirement. Indeed, in my judgment, such defences as are suggested here have no real prospect of success. In summary, firstly, there clearly were one or more events of default under the facility agreement as at 6th May 2014, when the first claimant served a default notice, which entitled the first claimants to serve an acceleration notice and to enforce their security. In circumstances where the allegations in New York were being made, it was clearly appropriate that the claimants should seek declarations against all of the defendants as to that entitlement to declare an event of default and to enforce that security.

48 Secondly, again in view of the outrageous allegations in the United States, for which there is not even now a shred of evidence put forward, the claimants clearly had a more than arguable case for the negative declaratory relief they seek. Despite Mr. Tolley's suggestion that it serves no useful purpose now that his clients are no longer plaintiffs in New York, I disagree. A declaration by this court would give rise to issue estoppel or collateral estoppel in the United States, according to Mr. Houck, a partner of Clifford Chance who has put in a witness statement. So if the judgment serves no other purpose, it will prevent the second defendant from raising these vexatious, oppressive and unfounded allegations elsewhere in the United States.

49 Thirdly, so far as the claim under the term sheet is concerned, the liability of the second and third defendants was clearly intended to continue after the facility agreement was entered into as there was a continuing liability to pay the out-of-pocket expenses. Mr. Tolley sought to submit that the provision could only relate to expenses in the past, but it seems to me that the short

answer to that point is that the final paragraph under "Expense deposit" provides:

> "Upon request the Lender will inform the Borrowers of the amount of the out-of-pocket expenses incurred by the Lender at any point in time".

That is a provision which clearly only makes sense in the context of expenses to be incurred in the future. So it seems to me quite clear that the claimants have, at the very least, a good arguable case under that head.

50 So far as the other claims against the second defendant are concerned, the primary gateway relied upon by the claimants, upon the basis of which I have granted permission to serve out, was that the other defendants, specifically the second defendant for present purposes, were necessary or proper parties to the claim against the first defendant. Mr. Tolley submits that that gateway was not met essentially for two reasons. Firstly, that there was no real issue between the first claimant and the first defendant which it was reasonable for the court to try; secondly, that there is insufficient connection between the claim against the first defendant and the claim against the second defendant, to make the second claimant a necessary or proper party.

51 So far as the first point is concerned, it is accepted that this question is to be judged at the time of the application for permission to serve out, albeit the court should look at the totality of the evidence before it at the time of the hearing of the challenge, to determine what the position was at the time of service out. At that time the first defendants had not paid any part of the €2.4million and, indeed, that remains the position. The first defendant, in fact, served an acknowledgement of service on 24th August 2014 stating that it intended to defend the proceedings against it. Given the claims being advanced in the United States at the time of permission to serve out as to the invalidity of the facility agreement on grounds of fraud, in my judgment, it was entirely appropriate for the claimants to pursue claims for declarations, firstly, that there were events of default entitling them to accelerate and enforce security and, secondly, that the facility agreement was binding and there was no fraud. They were entitled to pursue those declaratory claims against the actual other party to that agreement, namely the first defendant, in the jurisdiction which had been contractually agreed to have exclusive jurisdiction (namely this court).

52 Mr. Tolley submits that at the time of the application to serve there was no real issue because the first defendants had not indicated that they were in fact, as he put it, taking their own course, and the highest it could be put was what Mr. Roxborough had said, that they might take or they may take their own course. Mr. Tolley submitted that that was not good enough. In my judgment, strenuously though that point was pressed by Mr. Tolley, there was a real issue

to be tried between the claimants and the first defendant at the time the permission to serve out was sought. The first defendant had made no admissions. It had not submitted to judgment, and so the claimants had to bring their claim before the court in order to obtain the relief that they sought. As I said, the fact is that when the acknowledgement of service was served the first defendant indicated that it intended to defend the claim. Under the rules it could, in fact, have simply served an admission of the claimants' claim if that is what it had been intending to do. From that I am quite satisfied that at the time when permission to serve out was granted there was a real issue to be tried between the claimants and the first defendant.

53 Furthermore, given that the third defendant still pursues the extravagant and outrageous allegations in New York, and the second defendant has not forsworn seeking to pursue them elsewhere if it suits him, it remains the case now that there is a real issue to be tried between the claimants and the first defendant, albeit that the claimants now seek summary judgment against the first defendant. The fact that the claimants may be entitled to summary judgment against the first defendant, or indeed that by the time of the challenge to the jurisdiction summary judgment has been entered against the first defendant, does not affect the position (see *Erste Bank v Red October* [2013] EWHC 2926 (Comm) at para.7 and 104).

54 So far as the second aspect is concerned, whether the second defendant is a necessary or proper party to the claim against the first defendant, the test remains that formulated by Lord Esher in *Massey v Heynes* (1888) 21 QBD 330 at 338, which I summarised in para.130 of my judgment in *Red October* and in relation to which Lord Collins, in *Altimo Holdings* [2011] UKPC 7, [2012] 1 WLR 1804 at [87] said:

> "Third, the question whether D2 is a proper party is answered by asking: "Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": *Massey v Heynes & Co* (1888) 21 QBD 330 at 338, per Lord Esher MR. D2 will be a proper party if the claims against D1 and D2 involve one investigation: *Massey v Heynes & Co* at 338, per Lindley LJ; applied in *Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] EWCA Civ 418, [2001] 1 Lloyd's Rep 203, at [33] and in *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [48], where Clarke LJ also used, or approved, in this connection the expressions "closely bound up" and "a common thread".

55 When that question is asked, in my judgment, there is only one answer. The claims for declaratory relief against the second defendant are the same claims as are pursued against the first defendant. They are pursued in each case precisely because of the extreme allegations made by all the other defendants

at the time of the permission to serve out, and still pursued by the third defendant and which, as I have said, have not been disavowed by the second defendant. It follows that, whether then or now, that there is a real utility or purpose in seeking the negative declaratory relief here against all the defendants so that the defendants should not be able to make allegations as to the claimants' conduct in relation to and under this contract which was between the claimant and the first defendant. Furthermore, as Mr. Blackwood points out, the undertaking not to pursue proceedings in New York is one which is not a particularly worthwhile undertaking in circumstances where the effect of Mr. Flynn's withdrawal from the proceedings is that Mr. Sheehan hopes to be able to pursue the diversity jurisdiction, and where Mr. Flynn re-joining the proceedings or making fresh claims in New York might destroy that jurisdiction.

56 Finally, in relation to this aspect, I remind myself that the necessary or proper party head of jurisdiction is, in a sense, an anomalous one because there is no separate jurisdictional basis for pursuing the claim so that caution should be exercised, a point that was made most recently by Lord Collins in *Altimo* Holdings at [73]. The point was also made by Males J in *Cruz City v Unitech* [2014] EWHC 3704 (Comm) at paras.15 and 16, that although service out of the jurisdiction should no longer be described as "exorbitant", any doubt as to the correct construction of the jurisdictional gateways should be resolved in favour of the defendant. But I agree with Mr. Blackwood that this case might be said to be a paradigm case of someone being a necessary or proper party.

57 In the circumstances it is not strictly necessary to consider the other gateway upon which I gave permission to serve out, that the claim is in respect of a contract governed by English law and which contains an exclusive English jurisdiction clause. At the time that permission was granted the defendants were asserting in New York that they were parties to the facility agreement, but by the return date that was in the process of being abandoned and, by the time of service of proceedings, had been abandoned. It seems to me that, despite Mr. Blackwood's submissions to the contrary and albeit this point is far from clear on the authorities, it would be very difficult to say that on that particular point that he had the better of the argument.

58 In so far as the anti-suit injunctive relief was sought and granted on the alternative basis, that the proceedings in the US were vexatious and oppressive, I would be inclined to follow the judgment of Andrew Smith J in *The Lucky Lady* [2013] EWHC 328 (Comm); [2013] 2 Lloyd’s Rep 104 at para.14. To like effect is my own judgment in *Red October* at para.140. The jurisdiction to grant such an injunction must, as Mr. Tolley says, be found either in the inherent jurisdiction or in s.37 of the Senior Courts Act, and there is here no assertion vis-à-vis the second defendant of a contractual right. In the circumstances I would not have been prepared to uphold permission to serve

out on the basis of that alternative gateway but the point is an academic one, because I have decided this clearly falls within gateway (3), necessary or proper party.

59 So far as the claim against the second defendant under the term agreement is concerned, that can be dealt with very shortly. Mr. Tolley submitted that the exclusive jurisdiction clause that I read out earlier in the "Binding Intent" section of the term sheet was not one of the terms which was expressed to be legally binding and enforceable, and those were only the expense deposit, exclusivity, confidentiality and choice of law clause. It seems to me that the short answer to that point is, firstly, that the provision, as it stands in the agreement, makes it clear that the English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with the term sheet, including a dispute relating to non-contractual obligations arising out of or in connection with it. So that it is expressly contemplated, that the jurisdiction clause applies to both contractually binding and other disputes arising out of the term sheet.

60 Secondly, and in a sense following on from that point, and really demonstrated by the terms of that clause, exclusive jurisdiction clauses of this kind are effectively freestanding contractual commitments which will prevail even in circumstances where there is no contract. If there is an agreed provision that says in terms that any dispute arising out of non-contractual obligations will be subject to the exclusive jurisdiction clause then that provision will prevail notwithstanding that other terms of the agreement are not contractually binding. In those circumstances, it seems to me that the claim under the term sheet is one which is within the exclusive jurisdiction clause and, in those circumstances, jurisdiction is plainly founded.

61 So far as *forum conveniens* is concerned, Mr. Tolley, of course, does not pursue any suggestion that England is not a convenient forum in relation to that last point, if the exclusive jurisdiction clause bites, which I have held that it does. As far as *forum conveniens* in relation to the other claims are concerned, I have no doubt England is the convenient forum for the claims against the second defendant. The facility agreement is governed by English law and jurisdiction. The claimants whose integrity is being impugned by the allegations in the United States are based in England and the claim against the first defendant proceeds in England. Despite the second defendant being in Florida, as I said, he is an experienced litigator, including in England, so that overall England is clearly the most convenient forum.

62 In all the circumstances, I would have dismissed the challenge to the jurisdiction even if I had granted the extension of time. However, as I have already indicated, I am not prepared to grant the extension of time for acknowledgment of service. Overall, Mr. Tolley's application is dismissed.
