Neutral Citation Number: [2019] EWHC 2481 (Comm)

Case No: CL-2017-000749

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/09/2019

Before :

Mrs Justice Cockerill

- -

Between :

SAS INSTITUTE INC.	**Claimant**
- and -	
WORLD PROGRAMMING LIMITED	**Defendant**

- -
- -

Ms Monica Carss-Frisk QC and **Mr Andrew Scott** (instructed by **Macfarlanes LLP**) for the **Claimant**
Mr Thomas Raphael QC, Miss Josephine Davies and **Mr John Bethell** (instructed by **Keystone Law LLP**) for the **Defendant**

Hearing dates: 16th and 17th May 2019

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Approved 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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MRS JUSTICE COCKERILL DBE

Cockerill J:

1. This is an application by WPL (World Programming Limited) to continue an injunction granted to WPL without notice by Robin Knowles J just before Christmas 2018. It arises out of the judgment which I gave in this matter on 13 December 2018, reference number [2018] EWHC 3452 (Comm) ("the Enforcement Judgment").

2. In that judgment I refused SAS's (SAS Institute Inc.) application to enforce in this jurisdiction a judgment of the US Court. I did so on multiple grounds, namely that given the rather peculiar facts of this case:

    i) Previous proceedings here gave rise to a *res judicata estoppel* which precluded enforcement or rendered it abusive, holding that the two new spins were dependent on the breach of contract claim, and could and should have been brought in the English litigation;

    ii) Enforcement of the judgment would be contrary to public policy as enshrined in the Software Directive or contrary to the Protection of Trading Interests Act ("PTIA");

    iii) WPL had a counterclaim under section 6 of the PTIA for payment of sums equivalent to 2/3rds of any past and future recoveries by SAS under its UDTPA Claim (defined below) and that this cross-liability is on a *pari passu* basis, i.e. that any recovery by SAS of sums attributable to the multiple damages judgment at large triggers a liability to pay WPL a sum equivalent to 2/3rds of the amount recovered.

3. In the light of this judgment and events in the US litigation, WPL sought an anti-suit injunction. It was not possible for me to hear that application and Robin Knowles J stepped in. Having heard from WPL he made an order ("the Injunction") which included the following features:

    i) SAS was restrained from further pursuing certain proceedings in the US Courts seeking what are known as assignment orders and turnover orders (as explained further below);

    ii) SAS was restrained from seeking such relief in any other court of the USA;

    iii) SAS was restrained from pursuing any process in the US for relief of similar nature to assignment or turnover orders or *"[r]elief which imposes (or purports to impose) requirement or requirements on WPL to assign or transfer to SAS any assets and/or receivables of WPL and/or any debts owed to WPL and/or any assets, receivables or debts that may in the future be owed to WPL"*;

    iv) SAS was restrained from taking further steps in the existing US proceedings, and ordered to *"take all reasonable steps to procure… a stay or stays of"* the extant motions;

    v) SAS was ordered to *"take all reasonable steps to procure that the orders foreshadowed by and/or contemplated in (i) the Indicative Assignment Order*

Ruling and (ii) the Indicative Turnover Order Ruling, or any similar orders, shall not be made between the date of this order and the Return Date";

vi) SAS was restrained from pursuing anti-anti-suit processes before the US Courts (i.e. processes which *"prevent or restrain, or seek to prevent or restrain"* WPL from pursuing its "Anti-Suit Injunction Application" or *"any related application before this Court, and/or this action"* or *"any further application or claim before this Court for anti-suit injunction relief or related relief, or damages or compensation)… and from pursuing materially the same acts, or acts having materially the same effect"*.

4. The order was made in anticipation that it would only be in place on an *ex parte* basis for a matter of weeks – at the time of the hearing before Robin Knowles J it was anticipated that the matter could come back *inter partes* on 18 January 2019. In the event that did not prove possible, and matters so arranged themselves (given the events in the litigation more broadly) that it was not until late May that a date was fixed. During that time, at the instance of the Court in the USA, the parties had attempted mediation without success.

5. It is fair to say that the order is not a common order. It is plain to me that its grant has been regarded as a startling and unwelcome action by the US Court. It is a matter of regret in the light of the ties of comity which lie between this Court and the Courts of the United Sates, that the nature of the application and the time pressure under which it was brought meant that Robin Knowles J was not able to give a reasoned judgment, explaining the jurisprudence which underpinned his decision, and that it has then not been possible for the matter to be fully argued at an earlier date.

6. Before me the parties have argued with great skill the question of whether I can or should continue the injunction. The central question has been whether what the US Court proposes to do is an interference in matters which fall within this Court's jurisdiction such that I should continue the injunction; or whether in the light of fuller consideration, including as to the law, the extent of the proposed action and issues of comity, I should refuse to do so.

7. I should add that there was also an application to discharge the injunction on the basis that there had been a failure to give full and frank disclosure at the without notice hearing. I will deal with the points raised at the close of this judgment, but for present purposes I can say that these arguments were (rightly) not strongly pressed by Ms Carss-Frisk QC on behalf of SAS.

The Facts

8. The facts in this case present themselves in three chapters: the English Liability Proceedings, the US Liability Proceedings and the Enforcement Proceedings (in the UK and the US).

Chapter 1: The English Liability Proceedings

9. In the beginning SAS sued WPL in England for copyright infringement by WPL and for breach of contract, alleging that WPL used the SAS "Learning Edition" software in breach of its "click-through" licence terms. Both claims were eventually rejected

by Arnold J in judgments of 2010 and 2013, (the "English Liability Judgments"), but not before the matter had gone to the European Court.

10. A key conclusion of the English Liability Judgments was that the contractual claim was defeated by the Software Directive (enshrined in English law in the Copyright, Designs and Patents Act 1988) which permitted WPL's conduct and overrode the contractual terms to the extent they stated to the contrary.

Chapter 2: The US Liability Proceedings

11. Slightly overlapping with this, in January 2010 SAS brought proceedings in its home court, the District Court for the Eastern District of North Carolina (the "EDNC"). Those proceedings were themselves somewhat complicated. The claims brought involved copyright infringement, breach of contract/fraudulent inducement to contract, tortious interference and a statutory claim for contravention of the North Carolina Unfair and Deceitful Trade Practices Act ("the UDTPA Claim"), which was itself based on the fraud claim.

12. There was a *forum conveniens/lis pendens* challenge by WPL in early 2011 succeeded but was set aside on appeal. WPL then withdrew its objections and filed a formal "Consent to Jurisdiction" in 2012. The reasoning behind this appears to have been in part commercial in that, as WPL's counsel told the US Court, in order to deal commercially in the US WPL could not sensibly resist the jurisdiction of the US Courts. Or to put it another way, as Mr Raphael did in submissions, if WPL were doing business in the US, there would almost inevitably be jurisdiction. There was no attempt by WPL to injunct SAS from pursuing the US Proceedings.

13. Jurisdiction having been established, the parties then proceeded to fight the case. A point which SAS repeatedly emphasised both in the English enforcement hearing and in this hearing before me was that WPL chose to engage meaningfully in the US Proceedings. SAS succeeded on arguments that the English Liability Judgments did not prevent the claim being litigated in the US, so that the matter proceeded to trial.

14. By way of summary judgment in September 2014 SAS failed on copyright infringement but WPL was found liable for breach of the click-through licence, contrary to the English Liability Judgments. There was then a 14-day jury trial in September and October 2015 at which SAS succeeded on claims for fraud ("the Fraud Claim") and/or the UDTPA Claim. There were subsequent post-trial motions. Compensatory damages were set by a jury at some $26m for each of the breach of contract, fraud and UDTPA heads of claim; and the award in respect of the UDTPA Claim was trebled to some $79m.

15. The US Judgment was first handed down on 16 October 2015 and an amended version followed on 15 July 2016. An appeal was lodged. On 24 October 2017 the US Court of Appeals for the Fourth Circuit affirmed the US Liability Judgment. A petition to the US Supreme Court for *certiorari* was dismissed. During the course of the appeals process WPL lodged US$4.3 million as security as the price of a stay of execution.

16. Thus far direct enforcement in the US has been limited to this sum and an amount of US$1,131,799.65 was paid by WPL pursuant to an order made on 15 February 2019.

Chapter 3: The Enforcement Proceedings (in the UK and the US)

The English Enforcement Proceedings

17. SAS sought to enforce its US Judgment in England, by commencing this action on 8 December 2017. Because of the English Liability Judgments it did not seek to enforce the contractual part of the US Judgment. It recognised that this court would be bound to refuse enforcement of that part of the judgment, on the basis of *issue estoppel*. SAS sought instead to enforce only the heads of judgment based on fraud and the UDTPA, and those confined to $26m.

18. As noted above, that claim for enforcement in this country failed. In the Enforcement Judgment handed down in early December 2018 I held that the existence of the terms of the contract was a fundamental building block for the Fraud Claim and that without it that claim – as it was formulated in the US – could not have been run. Accordingly, the plea of *issue estoppel* which would have defeated the breach of contract claim equally defeated the fraud claim, and hence the UDTPA claim which was based on that fraud claim. I also held that even if the claim were not barred by *issue estoppel* it would have been barred because it could and should have been brought as part of the original claim. In the circumstances I did not need to decide the other grounds, but I also indicated that I would have found that:

    i) It would have been appropriate in this case to refuse enforcement on the grounds of public policy because of conflict with the Software Directive.

    ii) S. 5 of the PTIA would prevent recovery of the UDTPA claim.

19. The main reason why SAS sought enforcement here is that WPL is an English company and its only bank accounts are here. Hence SAS sought, but now cannot get, *in rem* enforcement in this jurisdiction. So much is clear.

20. What is also clear is that the US Judgment is effective within the US legal system. There is no dispute on that point and WPL has made clear it is not seeking any anti-suit injunction to restrain normal territorially confined enforcement measures in the USA, such as *in rem* enforcement as to property in the USA.

21. That leaves the question of what happens as regards debts owed to WPL by persons based in neither the UK nor the US. The position here is that normal *in rem* enforcement of the US Judgment in other foreign countries against WPL's assets and receivables in those countries is open to SAS. Whether that route is likely to be fruitful is open to question. The question of whether those other countries would recognise and enforce the US Judgment is a matter for the laws of each such country. So far as European countries are concerned there must be a very real prospect that those countries would refuse to enforce the US Judgment in the light of the inconsistency with the Software Directive.

22. In this connection what has come into focus since the Enforcement Judgment is that the majority of debts owed to WPL by customers based in other countries (aside from the USA) will still be as a matter of English law debts situate in the UK and will be payable to WPL in the UK. The reason for this is that under WPL's pre-December 2018 standard terms, all customers save those from six countries (including the US)

and some customers who contracted on bespoke terms, contracted for London arbitration and hence were enforceable, and thus situate, in England.

23. Further in December 2018 WPL introduced new standard terms applicable to customers other than those in the USA. These provide universally for English exclusive jurisdiction (by clause 13.1) and include terms that make it clear beyond doubt that debts are situate here, including a deeming provision (clauses 13.2 and 13.3) and a provision that all payments are recovered by collection against a deposit here (clauses 2.5 and 2.7). As a consequence all debts owed to WPL by customers contracting on these terms - wheresoever resident - will be (as a matter of English law) debts situate in the UK.

24. This is because under English Law debts owed pursuant to agreements containing such terms as to jurisdiction will be situate in England. This was a point considered in the context of third party debt orders in the recent case of *Hardy Exploration v India* [2019] QB 544 where Peter Macdonald-Eggers QC sitting as a Deputy Judge of the High Court noted the general presumption that a debt is sited in the place of the debtor's residence. He went on to say this:

> "The general rule or presumption is open to displacement if it can be demonstrated that the relevant debt is properly recoverable or enforceable in a jurisdiction other than the debtor's residence or domicile, for example if suit must be brought against the debtor in that other jurisdiction, such as by a "special agreement" or an "exclusive right of suit" agreed between the parties in question; if the position were otherwise, the anomalous situation may arise where a third party debt order is made in respect of a debt which a foreign court with exclusive jurisdiction holds to be non-existent."

25. It is, in reality, these debts owed by non-UK and non-US counterparties which are the focus of the injunction, in the light of the progress of SAS's enforcement efforts.

The US Enforcement Proceedings

26. As regards the US, SAS registered the US Judgment in the Central District of California ("CDC") on 28 December 2017. The first step to taking enforcement action was to file a "Writ of Execution" against WPL, which SAS did on 4 January 2018.

27. Having chosen California as the base for its enforcement proceedings, SAS became entitled as a matter of US Law to utilise the procedures available under the laws of California. It is not in issue that these include assignment and turnover orders.

28. As regards assignment orders, the key provision is Cal. Civ. P. §708.510, which provides materially that *"the court may order the judgment debtor to assign to the judgment creditor"* payment rights as further specified. The Court is thus empowered to make an order against the judgment debtor requiring it to assign particular assets.

29. As regards turnover orders, the key provision is Cal. Civ. P. §699.040, which provides materially for the making of *"an order directing the judgment debtor to transfer to the levying officer"* assets as further specified. The levying officer for these purposes

is a US Marshal. The statute makes clear that there is power to make an order against the judgment debtor, requiring it to deal with assets in a particular way.

30. The first application came in February 2018. It was for assignment and turnover orders, but was limited in its ambit. It was directed only at receivables from customers in the USA, although by error one non-US customer was included. SAS explained that it had *"instituted this proceeding in order to seek to collect on one of the few – if not only – US-based assets of WPL, namely amounts payable to WPL by its US licensees"*. SAS's object was to obtain relief against WPL in respect of the amounts payable to it from those licensed to use its product in the US.

31. WPL conceded that *"an assignment order may properly enter with respect to WPL's direct customers located in the United States who are obligated to remit money to WPL"*; but submitted that *"enforcement with respect to any assets that are outside of the United States should be deferred to the U.K. courts, where [SAS] has already instituted an enforcement proceeding"*. WPL also submitted that comity should lead the US Courts to defer to the UK Court as regards property outside the US. There was, and apparently remains, a dispute as a matter of US law as to whether the power to order assignment is one that can be exercised outside the USA.

32. In its Reply, SAS indicated that it was then only seeking orders regarding US based customers but stated that it *"specifically reserves the right to seek to amend the assignment order once SAS obtains information regarding WPL sales outside the United States in the North Carolina proceedings"*, making clear that on its case the US Court had power over any assignable property of the debtor, including property outside the jurisdiction, so long as the court has jurisdiction over the debtor.

33. It was at this point that WPL first sought injunctive relief. On 22 March 2018 WPL sought an anti-suit injunction from this court as regards *"customers, licensees, bank accounts, financial information, receivables and dealings in England"*. The injunction application was made both as to orders for disclosure which were then pending in the EDNC and the proposed assignment order in California. As to the latter, the application was made on the basis that any such order would be an *in personam* order. The application, before Robin Knowles J, did not succeed. Whether or not (as was in issue between the parties) he regarded the application as "premature", he did consider it inappropriate to grant the injunction when the application was geared to UK assets, and nothing was then impending from the US Courts which could bite on such assets.

34. Very shortly thereafter the February application (for assignment and turnover orders) was dismissed without prejudice by the California Courts. The basis for that dismissal was an evidentiary one; essentially the court was not satisfied that the case had been sufficiently made as to customers owing money to WPL.

35. The attempts at enforcement with which the present injunction is on its face concerned started with a motion on 18 June 2018 for an assignment order.

36. Before proceeding to consider the nature of the relief, I should note that SAS places reliance on the fact that WPL have also at the enforcement stage fully participated in the Enforcement Proceedings in the US – in the sense that they have acknowledged jurisdiction saying *"[i]t would have been a difficult and unattractive argument for*

WPL to argue that the California Court did not have jurisdiction" and have proceeded to contest the ambit of the orders sought.

37. It is the *in personam* nature of these steps which is the centre of gravity of WPL's arguments. Although WPL denies that it objects to *in personam* relief per se, it certainly appears to object to the combination of *in personam* relief and the forms of relief in question: assignment and turnover orders. As Mr Raphael made clear in closing that is an objection which although not raised in exactly that form in February 2018 in fact extends to any *in personam* assignment or turnover order, regardless of the nationality of the debtor. The concern may be at its most acute as regards UK debtors and at its least acute as regards US debtors, but logically extends to all.

38. What is said to be offensive about these *in personam* orders – and offensive to the extent that this court should issue an anti-suit injunction - is that they "reach in" to this court's jurisdiction; and in doing so they are said to cut across both the Enforcement Judgment and the original English Liability Judgments.

39. The two orders primarily in question now are:

    i) An *in personam* Assignment Order being sought by SAS since 10 October 2018 under the First Remand Motion;

    ii) An *in personam* Turnover Order initially sought by motion dated 11 October 2018 and now being pursued under a Second Remand Motion dated 4 December 2018.

40. There is a third Order which should be mentioned – indeed it was perhaps the most controversial order of all: the Order of 5 September 2018 ("the September Order") granted as a result of the June 2018 application. On its terms, it is almost purely *in rem* – it purports to assign debts itself without obliging WPL to do anything; and as an *in rem* order it would not be enforced abroad. That this is how the order reads was not seriously in issue. Its only arguably *in personam* aspect is the penal notice attached to it, which is addressed to WPL.

41. There is however fierce contention about the September Order. WPL says that SAS has undergone a recent change of stance; that they previously accepted it was an *in rem* order only (indeed they relied on it as an *in rem* order in writing to WPL's clients) and that their position before me – that it was an *in personam* order and always had been – was a *volte face*. SAS submits that WPL is being deliberately obtuse; that the September Order as sought was always *in personam* and that WPL plainly appreciated this and responded to the application on that footing. I will resolve this dispute at the outset so that it is plain which orders are "in play".

42. This is a point where (broadly) SAS's submissions were compelling. The history of the September Order is as follows. The application was made in June pursuant to the provision quoted above at [28]. That application did refer to seeking an order assigning all of WPL's interests in specific debts, but did reference authority which spoke in terms of a right to order WPL to assign such debts. It made plain that it was applying under the relevant rule and that that rule *"authorises a court to issue an order directing WPL to assign to SAS or to a receiver"*.

43. The response of WPL was to contest the making of the order including the scope of the California Court's power under the California statute and discretionary considerations of comity and territoriality. WPL submitted *"a US court order requiring WPL to assign assets … would conflict with [other] countries' recognition rules"*. It did not take any issue with the formulation of the order, or seek to argue that the relief sought was *in rem*, and therefore impermissible.

44. The order was granted in the following terms; which as noted above are essentially *in rem* terms.

> "Under applicable California law, upon application of the judgment creditor or notice motion, the court may order the judgment debtor to assign to the judgment creditor all or part of a right to payment due or to become due, whether or not the right is conditioned upon future payments ...
>
> … the Court GRANTS IN PART the Motion for Assignment Order. The Court assigns to SAS WPL's right to payments from entities identified on SAS's Customer List, as supplemented by Hewitt Schedule 1-1, as customers with accounts receivable, active customers, and customers with recently expired licences. All of WPL's rights and interest, whether or not the right is conditioned on future developments, to payment due or to become due from these companies shall be and hereby are assigned to SAS until such a time as the North Carolina judgment in the amount of $79,129,905.00 is fully satisfied or until further order of the Court.
>
> The Court DENIES IN PART the Motion to the extent it seeks assignment of WPL's right to payments by resellers of its software and by "non-customers," i.e., the entities identified in paragraph 8 of the Robinson Declaration. As SAS withdrew the request for assignment of WPL's right to payments from customers located in the United Kingdom, those customers are excluded from this Order.
>
> Counsel for SAS shall provide notice of this Order to all WPL customers subject to the Order at the addresses identified on the Customer List, as supplemented by Hewitt's Schedule 1-1. Counsel for SAS may contact these companies to request that all such payments be made directly payable to [them, with details specified]…
>
> [f]ailure by WPL to comply with this Order may subject WPL to contempt of Court proceedings."

45. It seems fairly plain that what happened was that the statement of relief sought in the motion and the draft order put forward were infelicitously drafted (whether wittingly or not) and that the court understandably simply adopted the format offered. However,

the intention seems (again despite those oddities in the drafting) to have been to seek and to grant *in personam* relief. This reading is supported by the fact that the relevant statute plainly only makes provision for *in personam* relief. That was the provision relied on, pursuant to which the only option was *in personam* relief. There was no other provision which could have been relied upon to give rise to *in rem* relief.

46. It is also supported by (i) the initial reference to the jurisdiction (ii) the reference to contempt (inapplicable if the remedy were one *in rem*) and (iii) the Court's later issue of a "clarification" so as to make the order plainly an *in personam* order – this development is dealt with below.

47. However, as a result the September Order as made was not an *in personam* order. Yet the statute does not, as SAS's evidence recognised: *"empower an order against the property itself, for example an order changing title to the property"*. It was therefore, as the US Courts have since effectively found, a dead letter. Because it was, as made, an *in rem* order (i) it could not bite as there was no jurisdiction to make such an order and (ii) it could not be "clarified" pending appeal; it could only be amended post any appeal.

48. It is certainly true that SAS wrote to WPL's customers relying on the terms of the order overtly: *"Any and all amounts owed by you to WPL have been assigned to SAS"*. However, this does not change the nature of what was applied for. It is perhaps not surprising that SAS opportunistically availed themselves of this favourable wording. It is perhaps ironic that it has in fact led to further delays and legal costs.

49. The applications for the other orders came into being against the background of the September Order. On 11 September 2018, WPL issued a notice of appeal and a motion seeking to stay enforcement *"as to entities that are outside the territory of the United States"* pending determination of the appeal together with supporting submissions. The appeal argued that the CDC had no power under the California statute to *"directly assign WPL's rights to payment overseas to [SAS]"*, and that to the extent that the September Order purported to affect assets outside the US, the California statute did not authorise that; or it was an abuse of the CDC's discretion to order it. WPL also argued that the court had no jurisdiction to directly order the assignment of WPL's rights to payment. This appeal and stay was opposed by SAS, relying on the personal jurisdiction of the California Court over WPL.

50. On 13 September 2018 the CDC, of its own motion, purported to amend the September Order so that it now ordered WPL to assign the relevant payment rights to SAS and execute such assignment within 7 days of the Order. WPL submitted that this was impermissible while the Order was under appeal; and made further submissions on subject matter jurisdiction and comity. Again the application was opposed by SAS.

51. On 20 September 2018 the CDC broadly agreed with WPL (at least to the extent that it considered it "prudent" to vacate the amended order). However, in an indicative ruling, the CDC said it would be "inclined to issue" such an *in personam* assignment order if the matter was remanded to it by the Ninth Circuit.

52. On 10 October 2018, SAS filed with the US Court of Appeals of the Ninth Circuit a motion seeking a limited remand to the CDC to enable the CDC to make the amended

assignment order foreshadowed in its "Indicative Assignment Order Ruling": "the Remand Motion".

53. The Remand Motion indicates that the order ("the Turnover Order") sought would be as follows:

> "The Court Grants in Part the Motion for Assignment Order … the Court orders WPL to assign to SAS its right to payments from entities identified on SAS's Customer List, as supplemented by Hewitt's Schedule 1-1, as customers with accounts receivable, active customers, and customers with recently expired licenses. Within seven days of entry of this Order, WPL shall execute an assignment to SAS of all rights, whether or not conditioned on future developments, to payment due or to become due from these companies until such time as the North Carolina judgment in the amount of $79,129,905.00 is fully satisfied or until further order of the court."

54. The order, if made, would require WPL, acting in England, to assign debts payable to it in England (and often from outside the USA) to SAS. It would impose personal obligations and is enforceable in contempt.

55. On 11 October 2018, SAS then brought an application for an *in personam* turnover order "the Turnover Order". This was again opposed by WPL. The CDC held it could not grant that application while the September Order was under appeal, but gave an indicative ruling that it would grant it if the matter was remanded to it:

> "The Court would grant SAS's application for a turnover order if jurisdiction is reinstated. The turnover order appears necessary in light of WPL's refusal to remit any payment to SAS, despite the Court's Assignment Order [i.e. the 5 September 2018 Order], which has not been stayed, and the outstanding $79,129,905.00 judgment against WPL."

56. The Turnover Order sought required WPL to:

> "transfer to the United States Marshal Service for the Central District of California all money, accounts, accounts receivable, contract rights, residual accounts, deposits, streams of income, revenue streams and residual rights, which arise from, directly or indirectly, business conducted between WPL and customers with accounts receivable, active customers, and customers with recently expired licenses, as listed on the Customer List".

57. There is an issue as to whether it can cover intangibles such as past payments from such customers already in WPL's bank accounts; SAS appears to say it can. It is thus possible that it could extend to cash already held in UK banks. Although the drafting

is not perfectly clear in that the Customer List covers customers worldwide and includes UK customers, SAS has indicated that the order was intended only to apply to receivables due/moneys received from customers outside the UK.

58. The order, if made, would be personally binding on WPL and enforceable in contempt.

59. The issue which WPL identifies therefore is that if made, this Turnover Order would reach into the UK in two respects:

    i) It would require WPL to hand over to the US Marshal all the targeted customer debts and payments. This would mean WPL (in England) assigning debts to the US Marshal. It would therefore positively require WPL to do something in England.

    ii) It might also require WPL to turn over to the US Marshal even existing monies. That would involve WPL paying monies from its bank accounts in England to the US Marshal.

60. This is not exactly what would have happened if SAS had succeeded before me in the English Enforcement Proceedings; but in terms of effects there are undoubted similarities. It should be noted that while the English Enforcement Proceedings was limited to US$26 million, this US Enforcement Proceedings would seek to enforce right up to the US$79 million limit, if necessary via these forms of relief.

61. On 4 December 2018, SAS made its Second Remand Motion to the Ninth Circuit asking for the Turnover Order application to be remanded to the CDC. That motion was duly opposed by WPL. That opposition was filed on 14 December 2018 – the day after I handed down the Enforcement Judgment.

62. On 19 December 2018 WPL issued its application for an interim anti-suit injunction and sought a without notice hearing. The earliest date this court could offer was 21 December. The position on 21 December was that the outcome of the remand motions was awaited. The extent to which they might be granted at any moment was in issue, but my conclusion on the evidence was that this was a possibility, if some way short of a likelihood.

63. The piece of background to add is that on 11 January 2019, and in reaction to the Enforcement Judgment and Robin Knowles J's injunction, SAS applied to the EDNC under the All Writs Act ("AWA") and obtained an *ex parte* injunction preventing WPL from licensing to new customers in the USA unless the $79m judgment is satisfied, which was then given final effect by Judge Flanagan on 18 March 2019 ("the AWA Injunction").

64. The final aspect of the US litigation which I should mention is that the EDNC went on to grant orders of its own motion on 15 February 2019, including an order imposing on WPL an obligation *in personam* to pay SAS certain monies received in the past into its English bank accounts from US customers. These would be payments made subject to the old terms and conditions.

65. I should also note that WPL plainly believes that SAS's aim is destructive and punitive. It believes that SAS aims to damage WPL's business and punish it for defending the claims in this action. I do not consider that I have the evidence to reach a conclusion on this point. But in any event, it seems to me that whether that is the case or not is neither here nor there. Subject to the kinds of questions which underpin the grant of anti-suit relief, SAS are perfectly entitled to use any legitimate means to defend their commercial position. Indeed this is a case where it is quite apparent that both parties have used the resources of talented legal teams on both side of the Atlantic to try to produce the best possible results for their respective businesses.

66. All that matters for the purposes of this judgment is whether what SAS has done meets the requirements for this Court to exercise its discretion to grant an anti-suit injunction. To that aspect I now turn.

The law on anti-suit injunctions and the parties' contentions

67. The backdrop to the debate is the jurisdiction to grant anti-suit injunctions. The existence of this power is not contentious. The Court has the power under s. 37(1) of the Senior Courts Act 1981 to grant injunctions where it is *"just and convenient"* to do so.

68. The jurisdiction is one which is exercised with caution. Often it will require a finding that foreign proceedings are vexatious or oppressive. This is basically because the court has a keen eye to the requirements of comity. Thus:

> "[t]he fundamental principle applicable to all anti-suit injunctions… [is that] the court does not purport to interfere with any foreign court, but may act personally on a defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require": *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41 [2015] AC 616 (PC), [17];

69. To similar effect is *Société Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC) 892-894, *"[s]ince such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised by caution."*. This word "caution" is repeated for example in *Airbus v Patel* [1999] 1 AC 119, 138: and in *Deutsche Bank v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725 [2010] 1 WLR1023 at [50]: *"An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court."*

70. The paradigm case and the one in which this Court's mind will be most at ease is the situation where the anti-suit injunction is sought to protect a party whose contractual right not to be sued abroad is infringed or threatened with infringement. This is not such a case.

71. Anti-suit injunctions are also granted, without requiring vexation or oppression, where the foreign proceedings interfere with the processes, jurisdiction, or judgments of the English court. The re-litigation of matters already decided in England is an established example of vexatious re-litigation and interference. Examples are found in: *Aerospatiale* 892-894; *Masri v Consolidated Contractors International (UK) Ltd*

(No.3) [2008] EWCA Civ 625 [2009] QB 503 [26], [82-89], [100]; *Deutsche Bank* [50]; *Shell* 630E-631A.

72. The paradigm such case is where the injunction is necessary to restrain re-litigation of issues decided by an English judgment given in proceedings in which the respondent has submitted. One rationale for the grant of relief in such cases is that it may be vexatious and oppressive for the respondent to relitigate in such circumstances; another is that the injunction may be necessary to protect the English Court's jurisdiction and judgments.

73. One issue is the extent to which my exercise of the Court's power in this case is delineated by these previous authorities. SAS submitted that the Court's power to grant such relief must be exercised in accordance with principle and having regard to prior authority identifying the categories of case where the ends of justice have been held to require relief. Such statements occur in a number of places, but perhaps the most useful is in *Shell* [18] referring to:

> "…three categories of case which … have served generations of judges as tools of analysis. The first comprised cases of simultaneous proceedings in England and abroad on the same subject matter. If a party to litigation in England, where complete justice could be done, began proceedings abroad on the same subject matter, the court might restrain him on the ground that his conduct was a "vexatious harassing of the opposite party". The second category comprised cases in which foreign proceedings were being brought in an inappropriate forum to resolve questions which could more naturally and conveniently be resolved in England. Proceedings of this kind were vexatious in a larger sense. …. Third, there are cases which do not turn on the vexatious character of the foreign litigant's conduct, nor on the relative convenience of litigation in two alternative jurisdictions, in which foreign proceedings are restrained because they are "contrary to equity and good conscience"."

74. The point was not however hugely contentious given that it is well established that it was accepted that: *"[T]he width and flexibility of equity are not to be undermined by categorisation": Castanho v Brown & Root (UK) Ltd* [1981] AC 557, 573.

75. Ultimately therefore one might say that the power is always to be exercised with caution, but it is to be exercised with particular caution in a case falling outside these well-established categories.

76. This debate was relevant because WPL contended that in some cases anti-suit injunctions can also be granted to protect the important public policies of the forum. There was an issue between the parties as to the extent to which such an injunction might be granted only where an injunction may be appropriate on other grounds, e.g. vexation and oppression, or a need to protect the Court's jurisdiction, in which case such policies may be relevant to an assessment of what comity demands in all the circumstances.

77. WPL pointed in particular to *Barclays Bank v Homan* [1992] BCC 757 per Hoffmann J at 762G-H referring to cases where:

> "the foreign court is, judged by its own jurisprudence, likely to assert a jurisdiction so wide either as to persons or subject-matter that to English notions it appears contrary to accepted principles of international law. In such cases the English court has sometimes felt it necessary to intervene by injunction to protect a party from the injustice of having to litigate in a jurisdiction with which he had little, if any, connection, or in relation to subject-matter which had insufficient contact with that jurisdiction, or both. …. These are cases in which the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law."

78. SAS argued that an anti-suit injunction could not be based solely on considerations of public policy, relying on Mr Raphael's own words in an article entitled *"Do as you would be done by"* [2016] LMCLQ 256, where at p259 he said that *"granting an injunction solely to protect the public policies of the forum may go too far, without a finding of vexation or oppression or a need to protect the jurisdiction of the court."*

79. Finally, there was consideration of the special refinement of anti-enforcement injunctions. The parties were united in accepting that the court has a power to make such an injunction; and also more or less so in accepting that such injunctions will be rare. Both referred to *Masri (No 3)*, per Lawrence Collins LJ (with whose judgment Sir Anthony Clarke and Longmore LJJ agreed) at [94]-[95].

> "…it will be a rare case in which an injunction will be granted by the English court to prevent reliance abroad on, or compliance with, a foreign judgment, or an injunction which will indirectly have that effect. But there is no general principle that even in such a case no injunction will be granted…. No doubt the power will only be exercised in exceptional circumstances."

80. The paradigm is a case where a respondent has obtained and/or sought to enforce the foreign judgment fraudulently or in breach of contract. Two such cases referred to were: *Ellerman Lines v Read* [1928] 2 KB 144 (CA); *Bank St Petersburg OJSC v Arkhangelsky* [2014] EWCA Civ 593 [2014] 1 WLR 4360 (CA). SAS rested heavily on these cases, saying that the present case was manifestly not of this type. It also pointed to the numerous cases where such an injunction has not been granted.

81. WPL put the argument round the other way, emphasising that the present case is very different from the cases where an anti-enforcement injunction has been refused. It submits that those cases were ones where (i) the equity upon which the injunction relied related to whether the foreign judgment should have been obtained at all, not to the nature of the enforcement measures flowing from an unchallenged judgment, and (ii) either the injunction was sought post the foreign judgment to restrain conventional

in rem enforcement worldwide; (iii) and/or the fact the injunction is at the enforcement stage may mean that there has been culpable delay.

82. Thus it submitted that *Ecobank v Tanoh* [2015] EWCA Civ 1309 [2016] 1 WLR 2231, on which SAS relied, was a very different case being a case of breach of an arbitration clause, where there were liability proceedings going through to judgment in the foreign court, and then an attempt post the judgment to say that because of the arbitration clause, the party who had obtained the judgment should not get the extraterritorial enforcement worldwide.

83. WPL submits that there is no reason why an injunction should not be forthcoming where the equity relied on relates to the exorbitant nature of the enforcement measures themselves, and their interference with the Enforcement Judgment, where there is no attempt to restrain conventional *in rem* enforcement worldwide; and there has been no delay. Key to this latter argument was the concept of the "post judgment equity". WPL says that usually what is relied on is an inconsistency which pre-dates the judgment; and thus by the time that equity is sought to be invoked the answer is that it is too late.

84. WPL relied on *Ardila v ENRC* [2015] EWHC 1667 (Comm) [2015] 2 BCLC 560 as an example of a case where a mandatory order has been made in relation to foreign enforcement measures. In that case it was held that vexatious interference with due process of the Court and the interests of justice justified the grant of an injunction where the purpose of the proceedings was to frustrate an order for security supporting extant English proceedings in which the other party had submitted to the jurisdiction.

85. WPL relies in essence on five factors as justifying this unusual course:

    i) Interference with and relitigation of the Enforcement Judgment which denies enforcement here;

    ii) Relitigation of my conclusions as to *res judicata* and *Henderson v Henderson*;

    iii) Violation of English public policy, in particular the Software Directive, the PTIA and the rules on recognition;

    iv) The exorbitant territorial effect – "reaching in" to England in relation to assets largely situated outside the USA, but substantially here;

    v) The intended destructive effect on WPL to which I have alluded above.

    WPL says a combination of a few of these factors would suffice, but that taken together they provide an overwhelming case. Only limited weight is placed on the original English Liability Judgments, effectively as an element in a cumulative case.

86. The central issue between the parties has two facets: "reaching in" and interference, as WPL characterise them. They are two sides of the same coin.

87. The essence of WPL's case is that what these *in personam* orders seek to do is to reach into England and act directly on WPL here, in relation to largely UK assets, forcing WPL to take steps in England, on pain of contempt, to transfer them to SAS. WPL contends that the effect of my judgment is that WPL should not be affected here

by legal obligations operating in England to pay the US Liability Judgment and that the US processes objected to would cut across this. It is said that (i) the orders seek to achieve what my orders mean should not happen, in and from England and (ii) they would not have been sought had my judgment gone the other way. The result, it is submitted, is to collaterally attack, and set that decision at naught.

88. Against this there is SAS's contention that the US process is separate and different. It says that the Enforcement Judgment is concerned with whether the US Liability Judgment gives rise to obligations enforceable in this Court; and held that it does not, with the consequence that this Court's enforcement processes are unavailable to SAS. It says that it is not central, but on the contrary irrelevant, given that SAS is not seeking to use the English Court's processes to enforce the US Judgment. It is seeking to use the enforcement processes of courts in the US, where the US Judgment is indisputably enforceable. The Enforcement Judgment does not address the issue of whether these US processes are available to SAS and should not operate as a trigger for anti-suit relief.

89. On the policy arguments, once the legal debate was cleared out of the way there were a variety of issues between the parties reflecting the different policies relied on. SAS contended that the Software Directive makes no provision for member states to export the protections given by the Directive to other states; it protects from enforcement but does not enable injunctive relief.

90. WPL contended that this was not about exporting the directive, but rather about making meaningful those protections which it does give to English software development. There is no good reason why that cannot support an injunction; such relief need not specifically be stipulated.

91. Similar arguments were deployed as to the appropriateness of an injunction to support *Henderson v Henderson*.

92. So far as the PTIA is concerned, SAS relied on Parker J in *British Airways Board v Laker Airways* [1984] 1 QB 142, where he held that the PTIA did not provide a basis for seeking anti-suit injunctive relief to restrain US proceedings for multiple damages. WPL countered by arguing that that case dealt with whether the PTIA could justify injunctions to restrain US liability litigation for trebled damages; and not the considerations that arise where there is an attempt to rely on a trebled US judgment by extraterritorial enforcement reaching into England, in ways which seek to circumvent an English judgment refusing enforcement here.

93. There was also what might be called a "sauce for the goose" argument – the parties differed as to whether this Court would grant equivalent relief to that being sought via the US Courts; the argument being that if it would it should not therefore act to halt it being granted by another Court. In particular in this connection SAS relied on the position in relation to worldwide freezing relief and receivership orders.

94. The parties also joined issue on the questions of delay and submission. On delay, WPL's position was that there was no relevant delay and *a fortiori* no culpable delay that would justify refusing an injunction, given the strong equities in favour of the injunction. WPL says that its injunction is centrally based on recent matters; namely

the features of extraterritorial enforcement measures sought in autumn 2018 and their conflict with my judgment and the legal position it enshrines.

95. As for submission at the enforcement stage, WPL submitted that this should not be a heavy factor against it, particularly given that it had contested the jurisdiction of the US Courts initially, and contested the California Court's jurisdiction as regards the extra territorial relief.

96. WPL pointed to *Shashoua v Sharma* [2009] EWHC 957 (Comm) [2009] 2 Lloyds Rep 376, [53-54] urging a nuanced approach to this question. Reliance was also placed on *Svendborg v Wansa* [1997] 2 Lloyd's Rep 559, 570, 573, 575 where an anti-suit injunction was granted notwithstanding submission, the court observing it was reasonable to have submitted to the jurisdiction in the circumstances.

97. SAS contended on these issues that this was the clearest possible case of delay based not just on the nine-year delay but also on the quality and extent of WPL's participation in the US Proceedings. On submission it says that in circumstances where the proceedings in the US have been on foot for nine years, WPL has fully participated in them, and the US Judgment has been given against it, it is just too late for WPL to ask this Court to interfere with an anti-enforcement injunction. It submits that the time for WPL to seek injunctive relief (if at all) was when the US Proceedings were commenced and that having allowed the proceedings to run to judgment and well beyond it would be unprecedented and contrary to principle to exercise the court's discretion in WPL's favour. It argues that my judgment is analytically irrelevant to the application.

Discussion

98. The jurisdiction to grant an anti-suit injunction derives from the power under s. 37(1) of the Senior Courts Act 1981; it rests on the broad *"just and convenient"* basis.

99. As such, it is an area where the authorities have tried to delineate in specific cases whether that test is met.

100. One area concerns injunctions granted to restrain proceedings brought in breach of jurisdiction agreements. This is the relatively straightforward end of the jurisdiction. It is of no relevance here.

101. Outside this enclave the courts have to grapple with this broad test in the context of a range of less easily defined grounds. As a result it is extraordinarily easy to lose the wood in the trees which represent the various points which come into focus in different cases based on their specific facts. It is also, as a result of the number of features which can be relevant, possible to present a result as deriving from more than one factor, depending on the prism through which one views a particular case. This was very noticeable in the analysis of the authorities presented during the course of argument, where the parties saw the route to the result in very different ways. It might equally well be said of the result at which I arrive in this case.

102. Each case however comes back to this fundamental question: balancing all the relevant factors together, is it just and convenient to grant the injunction sought?

103. Ultimately the conclusion which I reach is that the answer to this question is, fairly clearly, no. WPL's argument, although with some sound building blocks, was overstrained and cannot succeed.

104. I will deal below with the various strands of argument which were put forward for consideration and which, when considered in the light of the facts of this case and the guidance of the authorities, have contributed to the result which I reach.

105. In terms of legal approach generally there was not much between the parties. Both agreed on the parameters within which the Court's jurisdiction is normally exercised. Both ultimately agreed that the categories for such relief are not closed, though previous cases can provide useful tools of analysis. Both agreed that *"the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails"* (per Lord Goff, *Airbus v Patel* [1999] 1 AC 119, 138) and that the Court will naturally, particularly with the requirements of comity in mind, proceed with caution.

106. Both agreed that one basis on which an injunction may be granted is that it may be either vexatious or oppressive (or both) for a party to relitigate issues decided in an English judgment, and that another is that the injunction may be necessary to protect the English Court's jurisdiction and judgments.

107. The only real issue of principle between them was as to the question of whether it was permissible for an anti-suit injunction to be founded on a question of public policy alone. The reason why this was of any significance was that WPL chose to place reliance not on any one factor as sufficient in and of itself, but rather to identify three factors, including that of public policy, as justifying the grant of relief.

108. Although it was never quite so expressed, it appeared to have been (rightly) anticipated that an injunction founded solely on the grounds of vexation or interference would not meet the test. I shall deal with the various issues which arise on these heads in more detail below, but in summary: vexation is a ground which WPL conceded most often requires a finding that England is the natural forum. In any event such an argument would naturally rely most heavily on the original English proceedings, but WPL's full participation in the later US Proceedings creates an obvious difficulty for any such argument. Basing the application in interference faces *inter alia* the problem that since my judgment is not one on the merits, but is a judgment relating to enforcement of a judgment of the US Courts, the question of "protecting the jurisdiction" is therefore something of an uncomfortable fit.

109. Hence, bearing in mind my conclusions on the public policy aspects in the Enforcement Judgment, WPL naturally wish to rely on public policy.

110. Again, however, WPL hedged its bets; it was never suggested that this was the only basis for the relief. Instead it was argued essentially that public policy could found an anti-suit injunction and that public policy aspects could therefore provide a ground. On that basis this, together with the additional ballast given by vexation and interference, was said to satisfy the wide test which underpins the Court's jurisdiction.

111. As to this approach of adding elements together, it may be that this is possible in an appropriate case; certainly both vexation and interference have been relied on jointly

in other cases. However, there is a danger that adding elements of different justifications may result in a degree of double counting. This, bearing in mind the need for caution, must be avoided.

112. So far as concerned the possibility of public policy operating as a justification in and of itself, it has appeared to me that in the end the issue of public policy as an independent ground did not therefore arise and a detailed view on this issue is better saved for a case where it really does arise. I will therefore only note in passing that it seems to me far from impossible that public policy could, conceptually at least, give an independent basis for an anti-suit injunction. Certainly Robert Goff LJ (as he then was) in *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45 , 58, was clear that: *"an English Court may grant an anti-suit injunction where that is necessary to prevent the litigant's evasion of important public policies in an English forum ..."* and that view has been cited with approval not just by Lawrence Collins LJ (as he then was) in *Masri No 3* [2008] 1 CLC 887; [2009] QB 503, at [86] but also by Sales LJ (as he then was) in *Petter v EMC* [2015] EWCA Civ 828 [2015] 2 C.L.C. 178, 198. The suggestion of public policy as a ground therefore has a distinguished pedigree.

113. Similarly in *Shell v Krys*. There the Privy Council was dealing with the jurisdiction of the Dutch court under its own law to authorise the attachment of an Irish debt owed to a BVI company in liquidation in the BVI, in circumstances where the effect would be to obtain an unjustified priority in violation of a mandatory statutory scheme. It characterised such an attachment as exorbitant and adopted the dictum of Hoffmann J in *Homan*:

> "the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law."

114. That certainly suggests that were another court to act in a way which varied in a significant manner from an important policy of this jurisdiction, an injunction might be granted primarily based on the policies of this jurisdiction.

115. However, while this is a conceptual possibility there seem to me to be two factors which reduce this possibility to one of near vanishing slightness in practical terms. The first is that for this to be so the circumstances will be highly unusual. While Mr Raphael resiled a little from the suggestion in his article that the policies had to be *"radically at variance"*, there must be a variance, and it seems to me that that variance must be both significant (if not necessarily "radical") and must to relate to an important policy of this jurisdiction. Further the jurisdiction which the party injuncted is to be restrained from invoking must be one which is properly regarded as exorbitant. In *Shell* for example there was a wide jurisdiction being invoked in Holland, which was compounded by the fact that the Dutch court had no capability to look at the question of convenient forum, the attachment in question being a matter of right, subject only to very minor qualifications.

116. Secondly, as Mr Raphael accepted in argument, very often the question of protecting policies will in fact go hand in hand with protecting jurisdiction, as seems really to have been the case in *Shell*, and as indeed it is said to do here. I have real doubts as to

the practical reality of a situation where a public policy ground arises, absent more conventional grounds also existing.

117. So I would be minded to accept that protection of public policy is conceptually capable of standing alone, and therefore of offering an independent strand of justification for an anti-suit injunction. However, I do not regard this as adding anything to the argument in this case, where the basis for the application did include significant questions of vexation and interference and where those arguments themselves overlapped with the basis for the public policy arguments. The Enforcement Judgment is what it is in large measure because of those policies; it would be double counting to take this as a separate head for justifying an injunction.

118. As regards public policy, to the extent that it is relevant as a ground amongst others, while I would not accept SAS's argument that a public policy based injunction could not arise here because of an absence of specific provision in the relevant enactments, it seems likely that the way in which each policy is treated in its relevant enactment might, if a free-standing public policy injunction were under consideration, have a bearing on the balancing exercise with comity.

119. However, I accept WPL's argument that while the PTIA does not apply in itself as a ground to restrain US Liability Proceedings, because the PTIA specifies remedies for those liability proceedings, the matter may be different at the stage of enforcement when US enforcement proceedings could themselves nullify the PTIA remedies. For present purposes therefore there is nothing which precludes a consideration of public policy insofar as it adds any separate consideration to the balance.

120. The next question relates to the specific context given by the fact that what is in question is an anti-enforcement injunction. Specifically, the question arises whether an anti-enforcement injunction could ever be available in such a case. Again on the law, I am with WPL to a limited extent. I consider that WPL's characterisation of the authorities to date is correct. I accept that none of the cases where anti-enforcement injunctions were refused arose in a situation with any real resemblance to the present case.

121. However, at the same time neither can it be said that the cases where such an injunction was granted bear much similarity to this case. It is therefore impossible to deduce from the authorities tightly drawn principles either as to when such an injunction will be granted, or when it will not.

122. In this connection it is worth looking at three cases. The first is the case of *Man v Haryanto*. It was a case to which both parties looked for assistance – not least, perhaps, because it was, of the "refusal" cases, the case closest to the present in terms of the tortuous factual background.

123. In that case (the facts of which were dryly described by the Court of Appeal as *"a little complicated"*) Mr Haryanto, who was an Indonesian resident, had been sued by ED&F Man, well known sugar traders, in arbitration in England on contracts of sale in relation to which a dispute had arisen. He disputed the jurisdiction of the arbitrators on the basis that some of the contracts concluded with Man were illegal. That argument was defeated at trial. There was then a settlement by contract relying on that judgment. Under that settlement agreement Mr Haryanto was to pay a

substantial sum by three instalments. An instalment of the settlement sum was paid but the second was not. Mr Haryanto then proceeded to relitigate in Indonesia saying the contracts were illegal, and that meant the settlement failed for illegality too. Man participated and lost. Man also (in parallel) responded by seeking an anti-suit injunction and further declarations in England saying the settlement was binding and valid. Both injunction and declarations were granted. Ultimately the inconsistent Indonesian decisions were held to be unenforceable, pursuant to *Henderson v Henderson*. Then a further injunction was sought to restrain Mr Haryanto from arguing that the contracts were illegal anywhere else in the world.

124. The Court of Appeal by this stage had to consider three fields of battle: England, Indonesia and the rest of the world. It decided that the position in England was already taken care of by the existing declarations, and that the rest of the world was a matter for the rest of the world. As regards Indonesia (said to be the analogy for the US in this case) the court said:

> "it would be wrong for this court to grant an injunction which is designed to take effect inside Indonesia and which would interfere or purport to interfere with the judgment of a court of competent jurisdiction inside that country."

125. SAS obviously relies on this as a case where a conclusion made by the courts here that an argument was abusive did not drive a conclusion that an injunction should follow. WPL argues that the position there was relevantly different, in that what was in issue was the right to argue about illegality, not the right to enforce and *a fortiori* not the right to enforce in a way which operates *in personam* inside the UK. Both arguments have force; I conclude that the case is not analogous for the reasons given by WPL, but the case nonetheless provides an example of the careful eye which has to be had to comity, even in quite extreme circumstances.

126. It is also worth looking at the two cases where a true anti-enforcement injunction was granted. The first is *Ellerman Lines v Read*. In that case the respondent had entered into a Lloyd's salvage agreement providing for London arbitration. Regardless of this he then commenced proceedings in Turkey and, lying to the Turkish courts about the existence of that agreement, obtained a judgment; unsurprisingly that judgment was held to have been obtained not just in breach of contract but also by "gross fraud".

127. The Court of Appeal (Scrutton LJ) said, responding to the submission that there was no jurisdiction to make an anti-enforcement injunction:

> "If there is no authority for this, it is time that we made one, for I cannot conceive that if an English Court finds a British subject taking proceedings in breach of his contract in a foreign court, supporting those proceedings and obtaining a judgment by fraudulent lies, it is powerless to interfere to restrain him from seeking to enforce that judgment. I am quite clear that such an injunction can be and in this case ought to be granted in the terms asked for in the statement of claim."

128. The second case is the *Bank of St Petersburg* case. In that case judgments had been obtained in Russia and had then been compromised by way of a submission of an

overall dispute to the English Court under an exclusive jurisdiction agreement. However, the respondent nonetheless tried to enforce these Russian judgments. The Court of Appeal held that the situation was different only in minor degree from *Ellerman Lines: "only to the extent there that the English trial had already taken place so that there was a finding that the Turkish judgment had been procured by fraud. Here the trial has not yet taken place and the allegations of fraud are only allegations."* In doing so it plainly placed significant weight on the exclusive jurisdiction clause.

129. Plainly in my judgment these two cases, where the application for relief was successful, are a considerable distance from the present case. In each of those cases there was blatant wrongdoing in the respondent's actions. In both cases that wrongdoing could easily be recognised and labelled.

130. WPL also directed my attention to *Ardila* which was an attachment (not an enforcement) in the context of a pending summary judgment application. The case was, as Simon J (as he then was) said, a plain case of: *"... vexatious interference with due process of the court"*. Further it was not analogous in that it was not an injunction restraining enforcement of a regular judgment.

131. Reference was also made in reply to the case of *Bloom v Harms* [2009] EWCA Civ 632 [2010] Ch 187. This was also a case of attachment. It arose in the context of an administration of a company incorporated in England and with no assets in the US, made by non-US parties, without notice to the administrators and without the New York court being informed either that the High Court had made an administration order or that the charterparties under which the claims were made had exclusive London arbitration clauses. Again it is hardly surprising to find that Stanley Burnton LJ concluded that there were factors which: *"brought it into the exceptional category in which the grant of injunctive relief is justified."*

132. In my judgment neither of these cases says anything to diminish the message of exceptionality which is communicated by the true anti-enforcement authorities. On the contrary they tend to reinforce that message.

133. Finally regard should be had to *Ecobank*. This case tells us that:

> " … the cases in which the English courts have granted anti-enforcement injunctions are few and far between. …
>
> This dearth of examples is not surprising. If, as has heretofore been thought to be the case, an applicant for anti-suit relief needs to have acted promptly, an applicant who does not apply for an injunction until after judgment is given in the foreign proceedings is not likely to succeed. But he may succeed if, for instance, the respondent has acted fraudulently, or if he could not have sought relief before the judgment was given either because the relevant agreement was reached post judgment or because he had no means of knowing that the judgment was being sought until it was served on him."

134. The authorities in my judgment therefore show that in the generality of cases it will take something of the force of a fraud to persuade the court to interfere with another court's enforcement processes after a judgment has been gained. This present case is plainly not a case of fraud or even of breach of contract. That does not mean that WPL is wrong that an injunction may be capable of being granted in circumstances where what is at issue is the exorbitant nature of the relief sought against a background of a judgment which from this Court's perspective was gained by an abuse of process. However, the authorities do indicate that something very much more than mere exorbitance is likely to be required; only then will the inequity identified be of a sufficient gravity to rank similarly with cases such as judgments obtained by fraud.

135. Looking at the authorities thus far I do therefore conclude that were I to continue the injunction in this case I would be breaking new ground. I would, as SAS submits, be maintaining an unprecedented order. Although WPL cavilled at the designation of "exceptionality" for relief to be granted in this context, it was not able to point to any analogous case, and did not really resist the submission that I would be taking a novel step.

136. As to the point which was at issue on the terminology, I do conclude that when one looks at (i) the rarity of the cases where such a step has been taken (ii) the extremity of the factual scenarios which have prompted the grant of such relief and (iii) the way in which the relief has been justified by the judges in those cases, the term "exceptional" appears to be entirely justified. It follows that if I were to be prepared to maintain the order I would have to satisfy myself that this was an exceptional case.

137. There are effectively two limbs to what WPL says as to why this is an exceptional case. The first is the question of exorbitance – the fact that the relief proposed "reaches in". The second is the question of interference with my judgment, of which the question of abuse and breach of public policy are essentially aspects. WPL complains of interference because it says that my judgment holds that enforcement here should not occur and cuts across both the normal enforcement processes and safeguards as well as my conclusion that the US Liability Judgment was an abuse of process. That same conclusion on abuse of process then underpins the argument on public policy.

138. On the question of exorbitance, the first issue canvassed was whether the relief sought in the US Enforcement Proceedings was relief this court could grant, as SAS argued. On this, again I substantially accept WPL's argument that there is no true analogy with freezing orders and receivership. At least there is certainly far from a complete analogy. A freezing order does just what it says – it freezes pending judgment. It does not enforce. Therefore, although a freezing order is sometimes described as a "nuclear weapon" it is not designed to produce a final effect in the way enforcement measures are. It does nothing with ownership of assets. A receivership order (which is what was in issue in *Masri (No. 3)*) is closer, in that the receiver will collect assets for an ultimate purpose; but it is still not as final as enforcement.

139. Further, WPL's point that both of these too will be subject to what is referred to routinely in this court as *Babanaft* provisos was well made. What is referred to here is the fact that when granting worldwide relief it is the practice of this court, following the decision in *Babanaft v Bassatne* [1990] Ch 13 to include provisos which ensure

that persons outside England and Wales would not be affected by it unless certain conditions were fulfilled. In normal circumstances these provisos are drawn in the following terms:

> "Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this Court.
>
> (2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this Court—
>
> (a) the Respondent or its officer or its, her or his agent appointed by power of attorney;
>
> (b) any person who–
>
> (i) is subject to the jurisdiction of this Court;
>
> (ii) has been given written notice of this order at it, her or his residence or place of business within the jurisdiction of this Court; and
>
> (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this order; and
>
> (c) any other person, only to the extent that this order is declared enforceable by or is enforced by a Court in that country or state."

140. The basis for this approach was given by Nicholls LJ, as he then was, as being:

> "It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim an altogether exorbitant, extra-territorial jurisdiction."

141. This process of comparison does illustrate the fact that this Court considers such orders, even to the extent granted by this Court, potentially very intrusive to another court's jurisdiction and at the limits of what this Court will grant.

142. In this connection I was directed to the case of *Joujou v Masri* [2011] EWCA Civ 746 [2011] 2 CLC 566, where the nature of the relief was outlined at [11] of the judgment. In essence, what had been ordered and then upheld by the Court of Appeal was an order appointing a receiver in relation to CCOG's interest in revenues from an oil concession in Yemen, and a freezing order restraining CCOG from disposing of its interest in the concession or selling oil from the concession otherwise than in the ordinary course of business. The order was upheld by the Court of Appeal on the basis that the receivership order was not contrary to principle because it was not a

proprietary remedy. It did not change the title to the debts, but merely placed a personal obligation on CCOG, which was subject to the court's jurisdiction, to perform certain acts which had a genuine connection with England, i.e. compliance with an English judgment.

143. Further the extension made to that order whereby the receiver was empowered *"... to receive, take possession of, sell, deal with or otherwise dispose of all [oil to which CCOG might become entitled], and to exercise all such rights to oil, in the name of and on behalf of CCOG ... The receiver shall hold all such oil and any proceeds thereof to the credit of this action and to the order of the court"* was itself essentially upheld, with Rimer LJ holding: *"... I can see no reason in principle why [the] order, if confined to and directed at CCOG, was not properly made, albeit that it may have fallen at the more intrusive end of the court's jurisdiction."*

144. The order made in *Masri* may therefore be regarded as the high-water mark of this court's jurisdiction. It should also be noted that it was made in circumstances of repeated and determined attempts by the debtor to render itself judgment proof, both before judgment was delivered, and after. In addition, the application for the extension arose in circumstances where it was clear that the reason the initial order had not been successful was because of deliberate steps taken to frustrate that order. It was described by Toulson LJ as: *"a particularly bad example of wealthy debtors using their resources to go to elaborate lengths to avoid payment of a judgment after a full trial of the merits of the dispute before a court whose jurisdiction the debtors had accepted"*.

145. While there is plainly a parallel between that case and this, I do not consider that either the circumstances or the relief are analogous. As to the relief, in my judgment even the *Masri* order (as amended) might well be said to be less intrusive than that which SAS seeks from the US Court in this case. Although it was in a sense more intrusive in that it enabled active management of the assets and to that extent came very close to being proprietary in nature, it might more credibly be said to be less intrusive, for the reason highlighted by Rimer LJ – it did not purport to change the ownership of the oil in the way that an assignment order would.

146. At the same time certainly, the circumstances were different. In *Masri* all the rights in question were plainly governed by English Law and the Court was simply looking at one layer of jurisdiction: there had been an English judgment, and the argument was all about how to enforce that English judgment. That would be analogous to the US Proceedings considered alone. But here there is the added complication of the original English Liability Judgment, and the Enforcement Judgment.

147. Further although there is to some extent an analogy with the *Babanaft* provisos in that the order sought in the US may not compel acts by third parties over whom it does not have personal jurisdiction, but can only order the judgment debtor to assign his rights in and to the property for payments, the overall thrust of the relief which the California Court can grant is more intrusive.

148. For these reasons when we posit a reverse situation to that in which the US Court is placed I consider it unlikely that this Court would grant analogous relief to that which is being sought by SAS in the USA.

149. I accept therefore that this court would not ever grant precisely analogous relief; and if it did grant such relief would do so only subject to safeguards designed to minimise their intrusion into another court's jurisdiction.

150. However, I do not see this question of whether this court would or could act similarly in a mirror image case as a determinative issue. Courts do not exercise their powers in the light of comity on a reflexive basis. Indeed, it is at the heart of comity that courts have respect for each other's processes, and respect the fact that another court may legitimately draw lines in some ways differently to those which that court would do itself.

151. It follows that in considering exorbitance one must also consider the extent of the exorbitance.

152. WPL made points with regard to the nature of the relief by reference to *Masri (No 2)* [2008] EWCA Civ 303 [2009] QB 450. I was urged to put weight on the *dicta* regarding the possibility of an *in personam* order being contrary to international law or comity. This however seemed to be an inapposite reliance – *Masri* was of course dealing with the fleeting territorial presence of a person being used to found jurisdiction and hence relief; that is in stark contrast to the present case which is concerned with very substantial presence and participation. Further this approach would seem to lead to exactly the argument which WPL disavowed – that of objecting to the relief simply by virtue of its *in personam* nature.

153. I was also reminded that in that case the House of Lords cited the earlier judgment of Lord Hoffman in the *Eram* case, where he said:

> "54 … The execution of a judgment is an exercise of sovereign authority. It is a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries …"

154. This, it was suggested, was just such a case – compelling citizens to do acts within its boundaries. Yet when one looks at what was accepted to be the key passage at [59] in this judgment, the conclusion is this:

> "In deciding whether an order exceeds the permissible territorial limits it is important to consider: (a) the connection of the person who is the subject of the order with the English jurisdiction; (b) whether what they are ordered to do is exorbitant in terms of jurisdiction; and (c) whether the order has impermissible effects on foreign parties."

155. Drawing the threads together on exorbitance in the light of that conclusion, the position here is that we are looking at relief which is certainly different from *in rem* enforcement. It is *in personam* relief. It is relief which is available to the US Court because of WPL's real presence in that jurisdiction and because of WPL's participation in the proceedings which led to the US Liability Judgment.

156. As to the relief itself, it is relief which is very much towards the extreme end of the spectrum, in the sense that it is relief which this court would not grant. When it comes to "reaching in" it is fair to say that the relief sought certainly has a capacity to operate here. I am not however persuaded that it necessarily "reaches in" to this jurisdiction in a markedly exorbitant fashion, in that it is not necessary for anything to be done under it to be done in this jurisdiction; it is simply that what is to be done will have an effect on what does or would otherwise occur in this jurisdiction.

157. So under the assignment order WPL would have to (somewhere) assign the rights to debts which fall to be paid here, but in relation to those debts, until money is paid, the relevant funds will exist in other jurisdictions. Although it is said that the order would force WPL to act here "on pain of contempt" that is not correct as regards this jurisdiction. WPL will be under an order of the US Court to act, but a failure to do so would not be a contempt for the purposes of this jurisdiction. Again, the matter comes back to the US Court's jurisdiction over WPL. What is being asked is for this court to interfere in that jurisdiction – including as a matter of logic even as regards sums owing from customers in the USA. As to the Turnover Order the matter is perhaps even more straightforward – the requirement is to "turn over" to the US Marshal, who is an American law enforcement officer. Plainly this is a requirement to act in the US, not here.

158. In addition, the question of "reaching in" is one which might be said to apply to all *in personam* relief; the nature of the jurisdiction is what "reaches in". Although WPL maintained that the objection was not a blanket objection to *in personam* relief but hinged on the nature of the relief, the logic of the "reaching in" objection is one which applies to all *in personam* relief. To the extent that that is the objection it is not one which could prompt this court to act, because this Court also will grant *in personam* relief of various types against a party which is amenable to or has submitted to its jurisdiction.

159. I therefore do not consider that the differences between the relief this court might grant and the relief being sought make the potential relief exorbitant in very great measure. The relief sought goes further than this court would order but it is not, one might say, in a different ballpark. I cannot conclude that it is exorbitant to the extent that this court would regard exorbitance alone as sufficient ground to give rise to a basis for anti-suit, still less anti-enforcement relief.

160. The next question concerns interference. On this it is fair to say that the relief sought is relief which will have an effect in terms of enforcing a judgment which, within this jurisdiction, is to be regarded as contrary to public policy in more than one respect.

161. However, the question of interference has to be considered against the full factual backdrop of the judgments in question. In particular it is necessary to bear well in mind what my judgment is, and what it is not. My judgment is not a liability judgment on the merits of the claims. There are two liability judgments: the English Liability Judgment and the US Liability Judgment. My judgment is a judgment which arises out of and is in a sense accessory to the US Liability Judgment. That is because it is a judgment in proceedings brought to enforce that judgment.

162. In the Enforcement Judgment I have not purported to decide the merits of the dispute. Nor have I decided that enforcement should not occur at all. What I have done is to

say that, because of the existence of the English Liability Judgment (and the Software Directive, which itself underpins that judgment) and because of the PTIA, this court will not assist in the enforcement of the US Liability Judgment.

163. This is not therefore a case of interference in the jurisdiction of this court as the proper forum for the dispute; that was an argument which could have been raised at an earlier stage – after the English Liability Judgment, and before the end of the US Liability Proceedings - but was not. Nor is it a case of the English Court's judgment being set at naught. The Enforcement Judgment was a specific judgment in the context of specific enforcement relief; and again matters have moved on considerably since the English Liability Judgment.

164. When it comes to the questions of delay and submission, which are very important in the context (in particular) of anti-enforcement injunctions, I regard these as to a large extent overlapping. This was effectively the approach taken in *Ecobank* at [133], although obviously there may be cases where the two issues need to be considered separately, or where only delay is relevant.

165. The first point here is that I cannot accept the submission by WPL that the time spent in the US Liability Proceedings is not relevant to delay at all. WPL argues that this injunction application is based on recent matters; namely the features of extraterritorial enforcement measures sought in autumn 2018 and their conflict with the Enforcement Judgment. However, that is in a sense to look at the litigation history with a very partial perspective, ignoring the earlier US Liability Judgment. The application may be fairly prompt in the timeline of the enforcement proceedings, but those proceedings are the tail end of a longer liability story.

166. It is inherent in the jurisprudence relating to anti-enforcement injunctions that a good reason for not trying to stop the foreign proceedings before judgment will be necessary. Such good reasons were found to exist in the two rather unusual cases where such injunctions were granted: in *Ellerman* it is clear that there was only a fleeting appearance by the Master before the owners withdrew from the proceedings and that judgment came so swiftly that no steps could effectively be taken before that (it was, it will be recalled, a 1927 case). In *Bank of St Petersburg* the Russian proceedings predated the existence of the basis for the anti-suit injunction (namely the agreement to bring all disputes in London). But neither of those situations is akin to the present.

167. Aside from such "outliers" it may be the case that in the event of extremely exorbitant enforcement measures following a submission/delay an anti-suit injunction would be granted. There may be cases where enforcement measures are so truly exorbitant, or where enforcement measures were later introduced, where previous submission or delay would have no weight. However, in the normal course of events a submission, an engagement with the foreign process, and/or a failure to attempt to stop that process, has a significance which exists - though its weight will obviously be fact dependent. This is not an outlying case for any of the reasons contemplated in the authorities or above.

168. This early delay strikes me as of greater significance indeed than later delays relied on – for example as to the period following Robin Knowles J's refusal of relief in March 2018. Absent the initial period the question of delay would not loom so large; there is

certainly force in the argument that no further application could sensibly be made following the March application at least until the intention to pursue *in personam* worldwide relief became apparent. I also accept that my judgment, even if not fundamental to the relief sought, did provide a tipping point in terms of applying for anti-suit relief. It did, after all, provide an opportunity for "refreshment" of the value to be placed on the English Liability judgment, absent which the failure to challenge the US Proceedings would have been even more significant. Further it did provide a conclusion on abuse of process which obviously provided WPL with some assistance in their argument that the enforcement measures are vexatious.

169. However, even in that context it might be said that there was delay; these latter factors are separate elements in the consideration and neither provided such support that waiting for them could be entirely excused. Even if an avowedly *in personam* worldwide application was not made until October, the reality of what was sought must have been apparent earlier. Even if one says it was not 100% clear until October, there was still a chance to make the application well before 21 December.

170. Further the choice of California as a venue seems always to have been apprehended to be a forum more favourable to judgment creditors – certainly WPL objected to its being chosen as the enforcement forum on that basis. There was no reason why a "hold the ring" application could not have been made earlier as it was in relation to disclosure. And I have concluded that WPL knew that an order for a broader assignment than one directed purely to US customers was a real possibility from a very early stage.

171. As for submission itself I am reminded that Briggs, *Civil Jurisdiction and Judgments* (6th edn) at p550 states that *"an applicant who has already submitted to the jurisdiction of a foreign court should find that this is a substantial obstacle to his obtaining an anti-suit injunction from an English court"*.

172. Although WPL argued that there was no submission in the US Liability Proceedings, that is not a realistic analysis. Of course, jurisdictional points were taken and thoroughly pursued. But ultimately: (i) WPL did abandon that resistance and took a full part in the proceedings and (ii) WPL did not seek to halt or derail those proceedings by seeking the assistance of this court at a time before all the multitudinous costs and resources expended in those proceedings had been expended. That submission may not have been sufficiently significant to prevent this court's active assistance with enforcement, but it does not follow that the same position pertains when what is in question is not active assistance with enforcement, but active assertion to prevent steps being taken in another competent court, indeed in the country where the judgment was obtained.

173. As regards the California submission, while submission and participation may not have much weight, it does nonetheless have some. This is not a case where there was no possibility of avoiding jurisdiction; WPL are not resident in California. While the basis for resistance was difficult, it was not ultimately taken. In context this is not a heavy point against WPL, but it is a point nonetheless.

174. Although for reasons I have given I accept that the *Man* case is not analogous, the dictum of Steyn J (as he then was) at first instance is telling on the subject of the kinds of factors which will be given weight:

> "there is already in existence an Indonesian judgment; it was given in proceedings begun by Man; it was unsuccessfully appealed by Man; the Indonesian court was a court of competent jurisdiction; the procedure adopted is not criticised; the correctness of the Indonesian judgment as a matter of Indonesian law cannot be questioned; reliance on that judgment was only defeated on the ground of English principles of res judicata and English public policy."

175. As Ms Carss-Frisk noted there is a close parallel between those facts and these, although the detail of the case is very different.

176. All of this suggests that the balance tips against the exercise of a discretion to grant an injunction. Further, when one revisits the authorities on comity, the position in my judgment becomes tolerably clear. I note in particular the following points.

177. This court should not assume a superiority in making such a decision. As Hoffmann J said in *Barclays Bank v Homan*:

> "Today the normal assumption is that an English Court has no superiority over a foreign court in deciding what justice between the parties requires, and in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. …there must be a good reason why the decision to stop the foreign proceedings should be made here rather than there. Although the injustice which can justify an anti-suit injunction must inevitably be judged according to English notions of justice, it will usually be assumed that a similar quality of justice is available in the foreign court, so the fact that the proceedings would, if brought in England, be struck out as vexatious or oppressive in the domestic sense will not ordinarily, in itself, justify the grant of an injunction to restrain their prosecution in a foreign court. The defendant will be left to avail himself of the foreign procedure for dealing with vexation or oppression."

178. There are in fact indications that this court will want to see something of the order of an inability of that other court to act before it takes precedence over the court more naturally the forum for such a determination. So, in *Homan* consideration was given to whether what was to happen in the other jurisdiction was contrary to accepted principles of international law. Similarly, Toulson LJ in *Joujou v Masri* indicated (in the minority) that he would say that the court might act if it were satisfied that justice according to internationally acceptable standards could not be obtained in the courts to whose jurisdiction a matter more naturally appertains. Further in the passage from *Deutsche Bank* below there is reference to breach of customary international law or manifest injustice.

179. A margin of appreciation must also be allowed for different courts to do things different ways. Thus in *Deutsche Bank* at [50]:

> "the principle of comity requires the court to recognise that in deciding questions of weight to be attached to different factors, different judges operating under different legal systems, with different legal policies, may legitimately arrive at different answers without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English Court to arrogate to itself the decision how a foreign court should determine the matter."

180. Here I am weighing a situation where the line which the US Court has open to it is one which is contrary to this Court's principles, in the sense that the relief it can give has an extent which is not where this Court would draw the line. At the same time the nature of the relief this Court may grant suggests the difference is one of degree not substance. Further it is plain from the submissions placed before me that the CDC does have a discretion as to whether to exercise this jurisdiction and on what terms.

181. In those circumstances I am unable to accept WPL's submission that the relief is so exorbitant as to trigger relief. Nor can I accept the submission that if this Court's judgment in itself, and as reflecting English policy, is not to be set at naught, it is necessary that this court protect itself and WPL from the interference that SAS seeks to create.

182. There is plainly a possibility that the court in the US will grant the orders currently sought in full; but that it will do so is not a foregone conclusion. This is not a case such as *Shell* where one can be sure that that is what will happen. It may be that the US Court, with the benefit of this judgment, and the explanations which I have given above of both the position as regards the *situs* of much of the outstanding debts, and as to the nature of the relief sought, may itself chose to draw the line of the relief which it is prepared to grant in some different place. But that is a matter which, bearing in mind the principles of comity and the respect which this Court has for the courts of the United States of America, should properly be left to that court. There is no necessity in this case such as that juridical necessity which drove the court in *Shell* to decide that the demands of comity should not in that case be given primacy.

183. But also, there cannot be said to be a necessity in circumstances where there has been submission both as to liability and enforcement; indeed, where enforcement might well have been capable of stronger challenge if the original submission had not been made.

184. I would however add this. It will be perceived that part of the balancing exercise in reaching the result to which I have come involves not just considerations of comity but also the factor that the decision whether and on what terms to grant such relief is one which is open to the US Court. It has been a factor in the balancing exercise that this is therefore very far from the type of cases alluded to in some of the authorities where the measure sought to be enjoined will follow absent an injunction, or where there are insufficient safeguards available in the relevant jurisdiction.

185. It will also be perceived that I anticipate that my judgment in this matter will be of interest to the courts in the USA when they come to consider the relevant applications.

186. In this context it seems to me that the following passage from the minority judgment of Toulson LJ in *Joujou v Masri* is apt:

> "While comity involves self-restraint in refraining from making an order on a matter which more properly appertains to the jurisdiction of a foreign state, the courts of one country may legitimately wish to state plainly how they see the issues in a case in which they have a legitimate interest, in the hope that their perspective may assist the foreign court in its judgment of the matter. That is not the same as trying to dictate to a foreign court how it should decide a matter within its own jurisdiction. Conversely, part of the concept of comity is an expectation that the courts of different countries will, where appropriate, lend their assistance to one another. In some circumstances this can only be achieved by the cooperation of the courts in different jurisdictions. There are inevitably some situations where the policies of different countries are in conflict (for example, because of security considerations or because of matters of vital economic interest), but happily they are the exception rather than the rule. The general principle that contracts should be honoured (*pacta sunt servanda*) is common throughout developed legal systems, and countries have a mutual interest in not allowing a party which is properly subject to the jurisdiction of a particular court to try to undermine the effect of that court's orders by a recourse to an alternative jurisdiction."

187. The Enforcement Judgment explains in some detail that from the perspective of this Court, in the light of the original English Liability Proceedings, and the policies which underpinned the result in that carefully and long fought litigation, the US Liability Judgment is one which, with regret, this Court cannot enforce.

188. Further, as I have explained above, there are two points of concern to this court as regards the orders which SAS seeks from the US Court. The first is that the nature of the orders sought go further than any order this court would make – even in the most extreme cases of contumelious default. This court would not order a party resident in the USA to take such steps; and it would refuse to do so because of the principle of comity.

189. Secondly (and this of course overlaps with the first point) the measures which are sought to be adopted in the USA to enforce the US Liability Judgment are ones which, for all WPL's submission to the jurisdiction in the USA, have a potential to have effects in this jurisdiction which to a greater or lesser extent cut across the Enforcement Judgment. The extent to which this occurs will depend critically on the wording adopted in any order. It is even possible that such an order might, if not carefully worded, require WPL to pay over funds which were specifically sought to be made the subject of the English Enforcement Proceedings – or even funds which SAS specifically accepted in the English Enforcement Proceedings could not be enforced here.

190. It seems that this is a case where this Court and the Court in the US have jurisdictions which could clash with each other – and that the parties, despite the wise encouragement of the Court in the US, have not reached a consensus on a line on which they can agree. On the one hand, this Court has jurisdiction to make an order as sought by WPL, but by this judgment I decline to exercise my discretion to do so. On the other hand, although I understand the matter of jurisdiction to be open to debate, it may well be that the US Court has the jurisdiction to make the orders sought by SAS, yet may decline to do so, or choose to exercise that discretion only to a limited extent. That must be a matter for my sister and/or brother judges in that jurisdiction.

Arguments on discharge

191. I pass briefly to consider the arguments made on discharge.

192. On conduct it was submitted that there was no basis for a without notice application given the rarity with which US Courts grant *ex parte* relief and the unlikelihood of SAS being able to accelerate a decision in the US. It was also argued that there was no basis for obtaining the injunction without the usual undertaking in damages. Finally, it was argued that there was a failure of full and frank disclosure on a number of points.

193. As I fairly openly signalled at the start of this judgment I was not persuaded by any of these arguments; and Ms Carss-Frisk realistically did not press them with enthusiasm.

194. On the question of the without notice application, absent a failure of full and frank disclosure it would be an unusual case where an injunction was discharged on this basis only (though it has recently been done in a rather different context and with an accompaniment of failure of full and frank disclosure by Warby J in *Birmingham City Council v Afsar* [2019] EWHC 1560 (QB)).

195. However, in any event I am satisfied that given the injunction was only ready on the date it was, it was impracticable to bring the matter forward on notice, and I am also satisfied that there was (just) sufficient justification for a without notice application; in terms both of risk of a without notice application in the US and a risk of the US Court being persuaded to move in the matter. US Courts may not act truly *ex parte* very often; no more will this court. But (as with this Court) it is plainly possible for it to do so.

196. As for the absence of the undertaking in damages, this was an unusual course, but it cannot be said that it was not raised or disclosed. Any judge of this court (and Robin Knowles J is an experienced judge of this Court) is very well aware of the usual course and will know that in dispensing with the undertaking he or she takes a different approach. It is not necessary for the unusualness of the request to be specifically flagged. In this case the relevant principles and the default position were clearly stated in the skeleton. Nothing more was required.

197. As for full and frank disclosure, some of these drop away in the light of the conclusions above. As for the remainder the points raised fall some way short of the hurdle of material non-disclosure. Further (and this is to some extent a different way of saying the same thing) there is no real prejudice suggested as arising out of any of these points; which, as Mr Raphael submitted, suggests that the injunction would have been granted if these had been disclosed.