Neutral Citation Number: [2021] EWHC 1415 (Comm)

Claim No: E40LS341

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

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.

Date: 02/06/2021

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

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Between:

(1) FORMAL HOLDINGS LIMITED **(2) FIHAG FINANZ UND HANDELS AKTIENGESELLSCHAFT**	**Claimants**
- and -	
(1) FRANKLAND ASSETS INC **(2) LENA HOLDINGS CORPORATION** **(3) FREELAND INVESTMENT CORPORATION** **(4) DORSET INVESTMENT CORPORATION** **(5) GEMONA INVESTMENT CORPORATION** **(6) LEXINGTON CORPORATION** **(7) MARYLAND INVESTMENT CORPORATION** **(8) MYRON INVESTMENT CORPORATION** **(9) NAPIER INVESTMENT CORPORATION** **(10) NYRA INVESTMENT CORPORATION** **(11) PRIMROSE INVESTMENT CORPORATION** **(12) WELLSIDE INVESTMENT CORPORATION** **(13) BAILOR INVEST AND FINANCE CORPORATION**	**Defendants**

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Alan Gourgey QC and **Bobby Friedman** (instructed by **DLA Piper UK LLP**) for the **Claimants**
Neil Kitchener QC and **Rachel Oakeshott** (instructed by **Pinsent Masons LLP**) for the **Defendants**

Hearing dates: 24 March, 10 May 2021

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Approved Judgment

I direct that 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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HH JUDGE KLEIN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and by release to BAILII. The date and time for hand-down is deemed to be 10:30 a.m. on 2 June 2021.

HH Judge Klein:

1. The Claimants began a debt claim ("the claim") against the Defendants for the principal sum of £25 million on 17 May 2018. The Defendants are, in the case of the First, Second and Thirteenth Defendants, incorporated in the British Virgin Islands ("the BVI") and, in the case of the other Defendants, incorporated in Liberia. The initial six-month period for service on the Defendants of the claim form out of the jurisdiction ended on 17 November 2018. By an application notice dated 4 September 2018 the Claimants applied to extend the validity of the claim form until 17 February 2019 ("the Extension Application"). I extended the validity of the claim form until 31 December 2018 at a without notice hearing on 13 September 2018 ("the September hearing"). My order also provided that the Defendants could apply within seven days after service of the order on them to have it set aside or varied. The Claimants served the claim form and Particulars of Claim on the Liberian-incorporated Defendants on 19 December 2018 and on the BVI-incorporated Defendants on 21 December 2018. The Defendants did not respond by filing an acknowledgment of service or defence, but the Claimants did not apply for a default or summary judgment. In consequence, the claim was stayed automatically, under CPR 15.11, in July 2019. Following a without notice hearing on the Claimants' application on 25 September 2020, I lifted the stay and extended the time for the Defendants to acknowledge service to 4 December 2020. The Defendants acknowledged service on 13 November 2020 indicating an intention to contest jurisdiction. Following an on-notice hearing, on 26 November 2020 I extended the time for the Defendants to apply to contest jurisdiction under CPR Part 11 until 11 December 2020. The Defendants made an application on 11 December. By their application notice, they sought (amongst other remedies) an order:

   i) setting aside my order, made at the September hearing, extending the validity of the claim form ("the September order"). (It has not been argued that the Defendants' application for this order cannot be made under CPR Part 11 or that it is out of time (because the September order gave the Defendants only seven days, from its service, to apply to have it set aside));

   ii) setting aside the December 2018 service of the claim form in Liberia and the BVI.

   Although the application notice was framed more broadly and the evidence filed in support of the application (and, to a lesser extent, in opposition to the application) was extensive, with the main hearing bundle running to in excess of 3,800 pages, the issues for determination on the application ("the present application") are these:

   i) Did the Claimants fail to fairly present the Extension Application at the September hearing (or, to put it another way, did they fail to make full and frank disclosure at the hearing), as it is accepted they were required to do? (To be clear, the Defendants do not argue that, in the way the Extension Application was presented to me, I made the wrong decision. Nor do they invite me to rehear the Extension Application and on the material now available then set aside the September order);

   ii) If the Claimants failed to fairly present the Extension Application, should I nevertheless not discharge the September order as a matter of discretion?

iii) If the September order is not discharged, is it sufficiently arguable that, at the time the claim was begun (or at any later relevant date), the First Claimant ("Formal") was entitled to rely on an exclusive jurisdiction clause in the loan agreement on which the Claimants have sued, so allowing it to serve the claim form out of the jurisdiction without the court's permission? Whether or not it is sufficiently arguable that Formal was entitled to rely on the exclusive jurisdiction clause depends on whether or not it is sufficiently arguable that the benefit of the loan agreement was assigned by the Second Claimant ("Fihag") to Formal. As I shall explain, the parties to the loan agreement were Fihag and the Defendants. Formal claims to be the assignee of the benefit of the loan agreement and thereby to be entitled to the benefit of the exclusive jurisdiction clause. The Defendants contend that (i) whether Formal can rely on the exclusive jurisdiction clause as the basis for its service of the claim form out of the jurisdiction without the court's permission depends on whether the agreement on which Formal relied in the Particulars of Claim as an assignment is actually an assignment, (ii) it is sufficiently established that that agreement is not an assignment and (iii) therefore, the basis on which Formal contends that it was permitted to serve out of the jurisdiction without the court's permission cannot be established.

iv) If the September order is not discharged, but Formal was not entitled to serve the claim form out of the jurisdiction without the court's permission as the Defendants contend, has Fihag brought an alternative claim (as the Claimants contend) or is Fihag only a party to the claim as the assignor of the benefit of the loan agreement (as the Defendants contend)? In the latter case, the Defendants contend, the claim should not be permitted to proceed because, in this scenario, although one claimant (Fihag) has legitimately served the claim form on them, that claimant has brought no claim against them.

This is the judgment on the present application and, in particular, on these four issues.

2. The Claimants were represented by Alan Gourgey QC and Bobby Friedman at the hearing and the Defendants were represented by Neil Kitchener QC and Rachel Oakeshott. I am grateful to them for all their assistance, including in the preparation of an agreed case memorandum and chronology. The broader dispute between the parties and those connected with them is complicated. The case memorandum in particular has brought real clarity to that dispute and, because it is agreed, I adopt it (and refer to parts of it verbatim) in the next section of the judgment.

Background

3. In this section of the judgment, I set out the relevant factual background to the present application. In doing so, I mention (sometimes in more detail) some of the events to which I have already referred.

4. Formal and Fihag entered into a loan agreement on 1 December 2016. By that agreement Formal is recorded as lending Fihag £25 million. The agreement also recorded that Fihag was liable to repay that loan by 31 December 2018.

5. Fihag and the Defendants entered into a loan agreement ("the loan agreement") the next day, 2 December 2016, by which Fihag agreed to lend the Defendants £25

million, repayable primarily on 2 December 2019. As I shall explain, and as the Claimants plead in the Particulars of Claim, the loan agreement contains interest payment obligations and an accelerated payment obligation in the event that the Defendants defaulted in any of their payment obligations under the loan agreement. Clause 19 of the loan agreement ("the exclusive jurisdiction clause") provides:

> "19.1 This Agreement shall be governed by the laws of England.
>
> 19.2 The Parties do hereby irrevocably agree and undertake that the courts of England shall have exclusive jurisdiction to determine any matter which may arise out of or in connection with this Agreement and to enforce the provisions thereof and to issue any process or enforce any judgment against any of the Parties."

Clause 20 of the loan agreement provides:

> "20.1 The Parties choose as their domicilia citandi et executandi for all purposes under this Agreement, whether in respect of payments, court process, notices or other documents or communications of whatsoever nature the following addresses:
>
> …the Borrowers c/o Applegate FS SA [("Applegate")]
> 6 Avenue de Frontenex
> PO Box 3036
> 1211 Geneva 3
> Switzerland
> Telefax No: +41 22 849 09 99
>
> 20.2 Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if given in writing but it shall be competent to give notice by telefax, provided receipt is received confirming due completion of transmission."

6. About a year later Formal and Fihag made an agreement, described as a "Settlement Agreement" ("the settlement agreement"). It is dated "31 Dezember 2017" and is likely to have been prepared by someone for whom English is a second language. The settlement agreement provides:

> "FIHAG has a receivable including interest
>
> Wellcourt Investment £25.950.957,36
>
> FIHAG has a payable including interest
>
> Formal Holdings Ltd. £25.950.957,36
>
> Both parties herewith agree that the above stated receivables and payables of FIHAG can be settled.

> Formal will inform Wellcourt Investment to repay the loan directly to Formal Holdings Ltd.
>
> Both parties herewith confirm the remaining balances £0,00"

7. The claim was begun by the Claimants on 17 May 2018. The brief details of claim on the claim form are as follows:

> "A debt claim arising from two loan agreements. The First Claimant made an initial loan agreement with the Second Claimant, who in turn made a loan agreement with the Defendants. The Second Claimant has assigned to the First Claimant the right to recover the debt from the Defendants."

The Particulars of Claim accompanied the claim form. By the Particulars of Claim the Claimants claim that the Defendants have been in default of their obligation, in clause 6.2 of the loan agreement, to pay in arrear, annually, interest on the outstanding balance of the loan, that that default triggered the accelerated payment obligation in clause 11 of the loan agreement, causing the Defendants to become liable to pay all the amounts outstanding under the loan agreement on receipt of a notice by the Defendants or Applegate, and that such a notice was faxed to Applegate on 27 April 2018, but that the Defendants have not paid any amounts outstanding. The Claimants also claim, by the Particulars of Claim, that Fihag assigned the benefit of the loan agreement to Formal by the settlement agreement and that written notice of that assignment was given to Applegate on 27 April 2018. By paragraph 14 of the Particulars of Claim the Claimants claim that the Defendants were notified, by the 27 April 2018 notice, that the sums referred to in the notice "had immediately become payable or repayable by the Defendants to [Formal], alternatively [Fihag]" and, by paragraph 15-17 of the Particulars of Claim, they claim that:

> "Despite such demand and in breach of the Loan Agreement, the Defendants have failed to pay to the First Claimant, alternatively the Second Claimant, the Loan sum of £25,000,000; the sum of £950,957.36 due in interest to 31st December 2017 and/or the sum of £288,660.205 due in further interest to 26th April 2018 or any part of such sums.
>
> Further the First Claimant, alternatively the Second Claimant, is entitled to and claims to recover pursuant to clause 6.1 of the Loan Agreement further interest due to it on the Loan sum claimed under paragraph 16 at the contractual Interest Rate of 3.5% per annum from 27 April 2018 to the date hereof amounting (21 days) to £52,257.45 and thereafter interest at the daily rate of £2,488.45 until judgment or sooner payment.
>
> In the alternative, the First Claimant, alternatively the Second Claimant, is entitled to and claims to recover pursuant to section 35A of the Senior Courts Act 1981 interest due to it at a rate of 8% per annum on the Loan sum claimed under paragraph 16…, alternatively at sum rate and on such sums and for such period as the Court shall deem fit."

By the prayer "the First Claimant and/or the Second Claimant" claim repayment of the sum of £25 million and interest or damages for breach of contract and interest.

8. The Claimants' former solicitors, Shoosmiths LLP ("Shoosmiths"), purported to serve the claim form and Particulars of Claim by fax on Applegate, as the Defendants' nominee, relying on clause 20 of the loan agreement, on 22 May 2018. (The Claimants now accept that that purported service was not good). The Claimants applied for judgment in default of acknowledgment of service ("the default judgment application"), apparently in Formal's favour, on 16 July 2018. The application was listed before me on 25 July 2018. Wilton Trustees (IOM) Ltd ("Wilton") wrote to me (copying in Shoosmiths) on 24 July 2018. Wilton said that it was one of the trustees of the Erica Settlement and that it was writing on its own behalf and on behalf of its co-trustee; Fiduciana Verwaltungsanstalt ("Fiduciana"). It claimed that the Erica Settlement had recently been divested of a 50% shareholding in Wellcourt Investment Group SA ("Wellcourt") by means of a breach of trust, but that it retained the remaining shares in Wellcourt. It explained that the Defendants are wholly owned subsidiaries of Wellcourt. It continued that, as part of an unlawful means conspiracy, the Defendants were in the control (to be precise, under the sole directorship) of Mr Malcolm King, who also controlled Formal, so that the Defendants were "not in a position to take substantive steps to defend themselves". Wilton asked for an eight-week adjournment "so as to allow [them] to take steps to defend and protect the Defendants' position (including potentially seeking permission to defend on a derivative basis)". On 25 July 2018, at the hearing of the default judgment application, I adjourned the hearing of the application to 13 September 2018 (so for just over seven weeks) and directed that notice of the adjourned hearing should be given to Wilton as soon as reasonably practicable.

9. Neither Wilton, nor any other representative of the Erica Settlement, made any application in relation to the case or the September hearing. Nor did they attend that hearing, or, apparently, write to me.

10. By an application notice dated 4 September 2018 (issued the following day and returnable at the adjourned hearing of the default judgment application on 13 September), the Claimants made the Extension Application and, as I have noted, by the September order I extended the validity of the claim form until 31 December 2018. On that occasion, at the Claimants' invitation, I dismissed the default judgment application. Although I had directed that Wilton be notified of the September hearing, it has never been suggested that the Claimants also notified Wilton of the Extension Application. Nor is it disputed that the hearing of that application was a without notice hearing.

11. The only evidence in support of the Extension Application was that in Part C of the application notice as follows:

> "1. Following His Honour Judge Klein's Order of 25 July 2018 (perfected 16 August), the Claimants instructed my firm to prepare and file – without prejudice to the Claimant's Application for Judgment in Default – a Request to the Foreign Process Section ("FPS") for service of the Claim Form and other documents pursuant to Swiss law ("the Request").

> 2. Consequently we lodged the Request and accompanying documents on Monday 3 September 2018. I attach a true copy of FPS's receipt. FPS has declined to say how long service on the Defendants' contractual nominee, Applegate FS SA ("Applegate") in Switzerland might take, but based on our experience of other cases I have reason to believe that the process might take 12 weeks.
>
> 3. Such a period would expire on 26 November 2018, which is later than the 6-month time limit for service of the Claim Form. The current deadline for service falls on 17 November 2018.
>
> 4. Under the circumstances, the Claimants seek an adjournment of the Application for Judgment in Default until after service has taken place pursuant to the Request.
>
> 5. As a precaution. the Claimants also seek an extension of the time allowed for service of the Claim Form. Because of the unpredictable length of time of the process by which the Swiss authorities are effecting service following the Request. we respectfully propose that the Court extends the six-month period by three months, until 17 February 2019, to allow for possible delays and the Christmas holiday period and to save the need for and costs occasioned by a further application.
>
> 6. The Claimants demanded payment of the principal sum claimed pursuant to the Loan Agreement on 27 April 2018 (as pleaded in paragraph 14 of the Particulars of Claim), the court issued the claim on 17 May 2018 and the original 6-month time limit is due to expire on 17 November 2018 and so the court will not be concerned with limitation in this case.
>
> 7. **At the time of this Application, although Applegate has acknowledged receipt of the Claim Form and other documents through its representative, Noirmont (as mentioned in my Affidavit of 13 July 2018 at paragraphs 7 –10 inclusive), the Defendants have yet to respond to the claim nor appoint solicitors. We are making the Application without notice to them, but shall serve details of both Applications and related documents in early course.**
>
> 8. For the sake of completeness, we served a copy of His Honour Judge Klein's Order of 25 July 2018 on Wilton Trustees (IoM) Limited by email to that company and its solicitors on the day that we received the perfected order, which was 20 August 2018" (emphasis added).

12. The Claimants' then counsel filed a brief skeleton argument for the September hearing. It did not refer to Wilton's 24 July 2018 letter or any of the allegations contained in that letter. In the only relevant paragraph of the skeleton argument counsel said:

> "It is submitted that this is not an application that raises problematic issues between the parties or has an impact on the wider case (see for example the more complex cases considered in the notes and in the authorities set out at §7.6.2 of the White Book). Rather it is a straightforward matter in which there is good reason for not having served in time and where there can be no prejudice to Ds by an extension (not least because they are relieved of a complex argument as to whether past service was effective) especially on account of the claim being made so early with no issues arising as to limitation."

13. There is a transcript of the hearing. It is clear from that transcript that, throughout the hearing, I clearly had in mind that the Claimants' (or Shoosmiths') erroneous belief that service by fax in Switzerland was good service, that there was apparently a delay of some six weeks after the 25 July 2018 hearing before the Foreign Process Section ("the FPS") was approached and that almost four months of the six month validity of the claim form had elapsed before the FPS was approached, weighed against extending the validity of the claim form (see paragraphs 10, 12 and 17 of my judgment).

14. It is also clear from the transcript that I did not recall Wilton's 24 July 2018 letter or, if I did, that I did not recall its contents (and, in particular, the contention that Mr King was in control (and the sole director) of the Defendants themselves) and that, in initially reminding me of the letter, counsel did not mention that Wilton had contended that Mr King was in control of the Defendants. The following exchange took place between counsel and me:

> "Counsel: …I think the court might have been party to…considerable correspondence between basically all sorts of people who are making numerous allegations in relation to Applegate, which is the party---
>
> Judge: **In this case?**
>
> Counsel: In this case.
>
> Judge: I haven't--- **All I know, Mr Cook, is that there was a request that I approve a copy of the transcript of the proceedings last time**…
>
> Counsel: Right, yes. **You may recall that there was a letter from Wiltons last time making a host of allegations in relation to breach of trust and conspiracy, and there were issues as to whether Applegate, which is the party to be served under the contract, remained the appropriate trustee and serving party.**
>
> Judge: **Is this because it is suggested that the individual standing behind your client has taken control over Applegate?**

> Counsel: **Certainly has a considerable interest, possibly even a controlling interest, in the defendants**…And so the matter has got rather protracted. Days before we came before you, there was a letter from Applegate to my instructing solicitors saying that they accepted that the claim form had been served for the purposes of clause 20 of the loan agreement. So, after I came before you, this matter got more and more complicated---
>
> Judge: Applegate are those who--- I confess, I am getting confused. Applegate are those who were nominated under the loan agreement…for the service of certain notices.
>
> Counsel: Yes, that's right.
>
> Judge: And before the last hearing they had said…they have received the claim form. Did they accept there had been proper service?" (emphasis added).

A little later in the hearing, counsel also made the following points:

> "Counsel: …Now, my understanding is, although I am not involved in the dispute in the BVI and in Liberia but my understanding is that there are mooted if not commenced proceedings in the BVI…
>
> Counsel: …May I also say that there is comfort, in my submission, in the fact that once the defendants have service of this order they can apply to set aside."

15. The material now available paints a more complete picture of the events leading up to the September hearing, which I now set out. It is true that there was passing reference to some of those events, which I have noted above, but, apart from those passing references, I did not know of those events at the time of the hearing, or, to the extent I might have known them from Wilton's 24 July 2018 letter, I did not recall them.

16. Mr King has, throughout, been in control of Formal (and is apparently its "ultimate beneficial owner") and acted, in the claim, for Fihag under a power of attorney. He was also the Defendants' sole director from 2 May 2018 to 23 March 2020.

17. Mr King was therefore appointed the Defendants' sole director fifteen days before the claim was begun and twenty days before the claim form was purportedly served on Applegate in Switzerland.

18. On 5 September 2018, on the same day as the Extension Application was actually issued, a claim was begun in the BVI ("the BVI proceedings"). The claimants are Wilton and Fiduciana as trustees of the Erica Settlement ("the Erica trustees"). There are twenty seven defendants; including Formal, Fihag, Mr King and Applegate.

19. In the BVI proceedings, the Erica trustees claim that the loan agreement was procured by fraudulent misrepresentation or is a sham and that:

> "…Applegate, Fihag, Formal and/or Mr King have combined with the intention of injuring [the Erica Settlement] and its beneficiaries by…unlawfully procuring the appointment of Mr King as a director of Wellcourt [and the Defendants] [and by] intending and/or using the issue of 1,000 shares to Fihag and/or the appointment of Mr King as the sole director of Wellcourt and [the Defendants] to disable [the Defendants] from being able to mount a defence to [the present claim (i.e. the claim in the Circuit Commercial Court in Leeds)] and thereby causing damage to [the Erica Settlement]…"

Amongst the other remedies they seek is an injunction to restrain the Claimants continuing with the claim (i.e., claim number E40LS341) ("the present claim"). The Claimants (and Mr King) actively dispute the allegations.

20. By way of further explanation, and repeating some of what I have already recorded, the Erica Settlement holds shares in Wellcourt, of which the Defendants are wholly owned subsidiaries. The Erica trustees are the settlement's present trustees. David Sussman was the settlement's settlor, and its beneficiaries are his, and his wife's, children and remoter issue. The sole adult beneficiary is their son, Ryan Sussman ("Mr Sussman"). The Defendants are the proprietors of a UK property portfolio ("the property portfolio"). Markus Jooste is a South African businessman and was formerly the CEO of Steinhoff International Holdings NV ("Steinhoff"); one of the largest South African publicly listed companies. There have been public reports of investigations into accounting irregularities at Steinhoff (and/or at other companies in the group of which it is the parent company). In the BVI proceedings the Erica trustees complain that the Erica Settlement, which had previously been Wellcourt's sole shareholder, was wrongly divested, in Fihag's favour, of half that shareholding. Fihag contends (presumably to explain the share transfer) that, in about 2011, Fihag, the Sussmans and Mr Jooste agreed that Fihag would receive a 50% beneficial interest in the property portfolio as consideration for payments it had made to Wellcourt. The Erica trustees also contend that the loan agreement was procured by Mr Jooste's fraudulent misrepresentations that (i) £12.5 million of the sum advanced under it represented the proceeds of the sale of shares in Steinhoff which had been held on trust for the Erica Settlement, (ii) half the interest payable under the loan agreement would be for the benefit of the Erica Settlement and (iii) the arrangement was only recorded, by way of the loan agreement, as a loan, for anti-money laundering purposes and because to do so was advantageous from an accounting perspective. Finally, the Erica trustees contend that the loan agreement is a sham because it has always been understood that no payments under it would be made by the Defendants. Mr Jooste disputes the allegations against him and the Claimants contend that Formal lent £25 million to Fihag (because Formal would not lend directly to the Defendants), that Fihag then lent £25 million (by way of a back-to-back loan) to the Defendants, and that the loan agreement is a genuine loan agreement.

21. Returning to the chronology of events, at 6:29 p.m. on 6 September 2018 Conyers Dill & Pearman ("Conyers"), who act for the Erica trustees in the BVI proceedings, emailed a copy of the then unsealed Statement of Claim in the BVI proceedings to Mourant Ozannes, the Claimants' lawyers in the BVI proceedings. They copied Shoosmiths into the email. At the same time, they emailed a copy of a then unissued

receivership application in the BVI proceedings which they had also filed on 5 September 2018 ("the receivership application"). They indicated that they intended to have the receivership application listed before 13 September 2018 but, they added:

> "…if your firm were able to procure sufficient assurances (in the form of a written undertaking) from the claimants in the English Proceedings (Claim No. E40LS341) that they will not pursue the application for judgment in default (currently listed to be heard on 13 September 2018) on that date and will procure that that application be adjourned to a date not less than 14 days after the determination of the receivership application, then we would be prepared to explore the possibility of adjourning the hearing of the receivership application to a later date, and to agree directions to that end."

A stated purpose of the receivership application was for the appointment of receivers of Wellcourt's shares who could defend the present claim on the Defendants' behalf. By the application the Erica trustees also sought:

> "Such further or alternative interim relief as may be just and convenient in order to enable [the Defendants] independently to challenge service in, seek a stay of, and/or defend, the proceedings styled as Claim No. E40L8341 in High Court Registry in Leeds, England ("the Leeds Claim") brought by [the Claimants (i.e., Formal and Fihag)] against [the Defendants]".

22. At 8:19 a.m. on 7 September 2018 Shoosmiths notified Conyers, and Covington & Burling LLP ("Covington"), the Erica trustees' English solicitors, that they had notified the court (the Circuit Commercial Court in Leeds) that the Claimants would not be proceeding with the default judgment application at the September hearing. They enclosed a copy of their letter to the court by which they notified that intention. The letter made no reference to the Extension Application but Shoosmiths' covering email to the court, which they did not forward to Conyers or Covington, said that it remained the Claimants' intention "to proceed with their second application, which we filed with the court earlier this week and seeks (amongst other things) an extension of time for the service of the claim form". The letter had said:

> "We refer to the hearing listed before His Honour Judge Klein next Thursday, 13 September.
>
> The Claimants wish to withdraw their Application for judgment in default. Please ensure that this letter is placed on the court file in advance of the hearing. Counsel for the Claimants…will appear before His Honour Judge Klein at the hearing with instructions to confirm the withdrawal of the Application."

23. Mr King swore an affidavit in the BVI proceedings, on 10 October 2018, in opposition to the receivership application, in which he deposed:

> "**I confirm that I did give consideration as to whether I ought to cause the Subsidiaries [(i.e., the Defendants)] to take steps to defend the English Proceedings. However, as I was unaware of any defence to the claims, I did not think that it was in the best interests of the Subsidiaries to do so.**
>
> Although Wilton sent a letter to the Leeds Court dated 24 July 2018 referring to an "unlawful means conspiracy" the full facts of which were "complex and will need to be pleaded in due course", it was not until 15 August 2018 that Covington provided any detail of the alleged conspiracy on an "open" basis.
>
> In essence, I understand that the Trustees are contending that the Subsidiaries are entitled to set aside the [loan agreement] on the basis that it was entered into as the result of a fraudulent misrepresentation...I have taken advice in relation to that allegation. I do not waive privilege over that advice. The conclusion that I have come to is that it would not be in the best interests of the Subsidiaries to raise that allegation in the English Proceedings. Amongst other things, as I understand it, even if the loan agreement were to be set aside, the Subsidiaries would not simply get to keep the £25 million, but would have to pay it back.
>
> I therefore maintain the view that it is not in the best interest of the Subsidiaries to defend the English proceedings. Doing so will only be a waste of time and money, and may ultimately lead to substantial adverse costs orders being made against them.
>
> I certainly do not think it would be in the interests of Wellcourt or the Subsidiaries for receivers to be appointed over their businesses, not least because of the significant expense that that would involve. I fully understand and intend to comply with my duty to act in the best interests of Wellcourt" (emphasis added).

24. By an application notice dated 9 November 2018 the Claimants applied for permission to serve out of the jurisdiction because they were concerned that the Defendants might later challenge any service out of the jurisdiction without the court's permission which relied on the exclusive jurisdiction clause. That application was heard, in the first instance, by HH Judge Mark Raeside QC without notice on 23 November 2018. Prior to the hearing of the present application the Defendants' case was that, at the 23 November 2018 hearing, Judge Raeside had effectively made a decision that the settlement agreement was not an assignment and that Formal could not therefore rely on the exclusive jurisdiction clause, so that permission to serve out of the jurisdiction, on the basis of the exclusive jurisdiction clause, could not be given to Formal. All of this is to mischaracterise what happened at the hearing and it is to Mr Kitchener's credit that he did not seek to maintain that case. It is clear, from the transcript of the hearing, that Judge Raeside expressed only a preliminary view,

having considered the papers before him and without having heard argument, that the settlement agreement was not an assignment, that he indicated that he was minded to adjourn the hearing of the application, to permit the Claimants to adduce further evidence, and that he invited counsel, if counsel wished, to persuade him at the hearing that he should give permission to the Claimants to serve out of the jurisdiction, but that counsel instead took up the invitation of an adjournment. In fact, the adjourned hearing never took place. Instead, the Claimants served (or purported to serve) the Defendants in December 2018 as I have indicated, without the court's permission, under CPR 6.33, relying, in the case of both Claimants, on the exclusive jurisdiction clause, and on the basis that, because of the exclusive jurisdiction clause, they were entitled to rely on Article 23 of the Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed by the European Community on 30 October 2007 ("the Lugano Convention") and on Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) as amended from time to time ("the Judgments Regulation", sometimes referred to as Brussels I (recast)).

25. Shoosmiths wrote to Conyers on 9 January 2019:

> "While we very much doubt that your clients (or indeed, for that matter, the parties who have retained Covington Burling LLP in relation to this matter) have any standing to make an application in the English proceedings, there should be no need to add to the costs of the dispute by making any such application because our clients have no intention of applying for a Default Judgment. Should that position change, we will obviously give notice to the Defendants in the English proceedings, as appropriate."

26. For the reasons I have already set out, the claim was stayed automatically, under CPR 15.11, in July 2019 and, following a without notice hearing on the Claimants' application, on 25 September 2020 I lifted the stay and extended the time for the Defendants to acknowledge service to 4 December 2020. The Defendants acknowledged service on 13 November 2020 indicating an intention to contest jurisdiction and, following an on-notice hearing on 26 November 2020, I extended the time for the Defendants to contest jurisdiction under CPR Part 11 until 11 December 2020, when the present application was made.

27. On 23 December 2020, apparently in the face of the present application and, I understand, to take advantage of the provisions of the Lugano Convention following the end, on 31 December 2020, of the transitional period following the UK's departure from the EU if they began a claim before then, the Claimants began a second claim claiming the same remedies as in the present claim ("the second claim"). The second claim form's validity expires on 23 June 2021. I understand that the second claim form has been served in the jurisdiction on the Defendants' solicitors who have been authorised to accept service, without prejudice to any jurisdictional challenge the Defendants could have made had they been served out of the jurisdiction.

28. In a witness statement filed in opposition to the present application, the partner at Shoosmiths who had conduct of the claim on the Claimants' behalf says:

> "…I wish to record that at every stage the Claimants and I acted in ways that we thought were appropriate and in accordance with our obligations to the Court and the Defendants.
>
> To the extent that steps were taken that the Court now finds should not have been taken, those steps were taken mistakenly and I would suggest have not caused any prejudice to the Defendants, and I apologise to the Court and the Defendants. In particular, without waiving privilege, the Claimants considered at the outset that it was appropriate to proceed with the claim and to seek default judgment notwithstanding Mr King's position as sole director given that there is no defence to the liability to repay the £25 million. I wish to remind the court that, in light of the Director Conflict Issue (as defined in Mr King's witness statement), the Claimants decided not to proceed with the [default judgment application] and, on deciding that permission was not needed, they chose not to proceed with [the application for permission to serve out of the jurisdiction]. Once the Claim Form was served on the Defendants, no further substantive steps were taken until a second director was in place and the Defendants are now in a position to seek to defend the claim on the merits if they can."

He does not say that the Claimants had taken a decision by 13 September 2018 that they would never seek to have the claim summarily determined otherwise than on its merits.

29. Mr King has also filed a witness statement in opposition to the present application. He explains how Formal and Fihag came to enter into the December 2016 loan agreements, how he came to be appointed the Defendants' sole director and how, before that happened, the settlement agreement came to be made. His case is that, on 11 January 2018, he had a telephone conversation with Fihag's then director, Mr Siegmar Schmidt, who informed him that Fihag was not in a position to repay the £25 million loan which Formal had made to Fihag on 1 December 2017. He continues:

> "…The best we could do, Mr Schmidt said, would be to have Fihag cede and assign the loan to [Formal], so that it could recover its money from the Defendants directly, as soon as possible.
>
> Mr Schmidt and I agreed that, in consideration of [Formal] discharging its rights to pursue Fihag for payment of the sums that would fall due under the [1 December 2016 loan agreement between them], Fihag would assign to [Formal] all of the lender's rights against the Defendants under the loan agreement. If the Defendants had repaid the loan agreement, I was concerned that, because of its financial situation, Fihag

> might not pay the moneys to [Formal]. To record the terms we had agreed, Mr Schmidt sent me a short draft agreement, accompanied by an invoice and corresponding credit note from [Formal] to Fihag confirming that its liability had been discharged.
>
> I decided to sign the draft, without seeking advice, in case Fihag had a change of heart. By that time I had no idea whether Fihag might collapse and just wanted something, urgently, to enable Formal to recover its money from the Defendants. To the best of my recollection, Mr Schmidt and I both signed in late January 2018. The resulting settlement agreement…appears to have been made on 31 December 2017, but I believe Mr Schmidt wanted to put that date on the document so that he could confirm the total amount due from the Defendants to Fihag as at that date (principal and accrued interest). I had no objection to that."

(There is, in evidence, an email, dated 4 April 2018, from Mr Schmidt to Mr Sussman which may be read as suggesting that Mr Schmidt denies that the settlement agreement was made).

30. Mr Sussman has made a witness statement, in opposition to a summary judgment application which the Claimants have previously indicated they would be making, which the Defendants rely on in the present application. In that witness statement Mr Sussman refers to what he says is a text message exchange between Mr King and a Mr Evans of Applegate which he has obtained. He says:

> "It seems that, on 19 July 2018, Mr King sent Mr Evans "a quick reminder for the acknowledgement letter we referred to yesterday if you can make sure we get it today please". Mr Evans responded that he had, "Not forgotten. JeanNoel out of town till this afternoon." Mr King sent the following response: "OK thanks, it will shorten the whole process by at least 3 months if we can be successful next Wed in court. There can be absolutely no come back on you or J-noel and if they try I will fund it."
>
> I believe Mr King was referring here to "next Wednesday", 25 July 2018, being the date of the scheduled default judgment hearing.
>
> In response, Mr Evans confirmed: "Letter emailed to David earlier - trust received ok". I assume Mr Evans was referring here to [the partner at Shoosmiths]".

It is reasonable to suppose that the letter referred to in this text message exchange is a letter from Applegate indicating that they accepted that the claim form had been served (at least for certain purposes). At the September hearing, counsel told me:

> "Days before we came before you [on 25 July 2018], there was a letter from Applegate to my instructing solicitors saying that they accepted that the claim form had been served for the purposes of clause 20 of the loan agreement."

31. Having set out the background to the present application, necessarily comprehensively, I turn to consider the first two issues for determination I have identified; that is, whether the Claimants fairly presented the Extension Application and, if they did not, whether I should not discharge the September order as a matter of discretion.

The Extension Application

32. There is no dispute about the test the court should apply when it is asked to determine whether to extend the validity of a claim form prospectively.

33. A useful starting point is Blackburne J's decision in *Sodastream Ltd. v. Coates* [2009] EWHC 1936 (Ch), where the judge said at [50]:

> "The discretion to extend time under rule 7.6(2) is at large: the rule does not lay down any explicit guidance as to how the discretion is to be exercised. As might be expected, however, the correct approach has been the subject of judicial decision, notably *Hashtroodi v. Hancock* [2004] EWCA Civ 652; [2004] 1WLR 3206, *Collier v. Williams*, *Carnegie v. Drury* [2007] EWCA Civ 497 and *Hoddinott & ors v. Persimmon Homes (Wessex) Ltd.* [2007] EWCA Civ 1203; [2008] 1WLR 806, from which I derive the following propositions.
>
> (1) An application to set aside an order extending time obtained on a without notice application is a rehearing of the matter, not a review of the decision to extend time.
>
> (2) The principal and frequently the only question is to determine whether there was a good reason for the claimant's failure to serve the claim form within the period allowed by the rules.
>
> (3) If there was a very good reason for the failure to serve within the specified period, an extension of time will usually be granted, for example where the court has been unable to serve the claim form or the claimant has taken all reasonable steps to serve but has been unable to do so.
>
> (4) Conversely, the absence of any good reason for the failure to serve is likely to be a decisive factor against the grant of an extension of time.
>
> (5) The weaker the reason for failure to serve, the more likely the court will be to refuse to grant the extension.

> (6) Whether the limitation period applicable to the claim has expired is of importance to the exercise of the discretion since an extension has the effect of extending the period of limitation and disturbing the entitlement of the potential defendant to be free of the possibility of any claim.
>
> (7) The fact that the claimant has delayed serving the claim form until the particulars of claim were ready is not likely to provide a good reason for the failure to serve.
>
> (8) The fact that the person to be served has been supplied with a copy of the claim form or is otherwise aware of the claimant's wish to take proceedings against him is a factor to be considered.
>
> (9) Provided he has done nothing to put obstacles in the claimant's way, a potential defendant is under no obligation to give any positive assistance to the claimant to serve the claim form, so that the fact that the potential defendant has simply sat back and awaited developments (if any) is an entirely neutral factor in the exercise of the discretion."

34. To the judge's nine points I add a tenth. A court should only extend the validity of a claim form when it is satisfied that to do so furthers the overriding objective. That ought to be clear from CPR 1.2, which requires the court to "seek to give effect to the overriding objective when it…exercises any power given to it by the [CPR]". In any event that is a point which the Court of Appeal made expressly in *Hashtroodi* at [18]. Put another way, a court should only extend the validity of a claim form when to do so will enable the court to deal with the case in question "justly and at proportionate cost" (see CPR 1.1(1)), which, in turn, requires the court to ensure that "the parties are on an equal footing and can participate fully in proceedings" and that the case is dealt with "fairly" (see CPR 1.1(2)).

The fair presentation obligation

35. As I have said, there is no dispute that, because the September hearing was without notice, the Claimants had a duty to fairly present the Extension Application (or, to put it another way, they had a duty to give full and frank disclosure of all material matters).

36. Of the authorities on the fair presentation obligation to which I was taken (all of which I have considered, as I have considered all the other authorities I was referred to), the most pertinent on the present application is *Fundo Soberano de Angola v. Dos Santos* [2018] EWHC 2199 (Comm), in which Popplewell J explained at [50]-[53]:

> "The applicable principles are well settled. It is sufficient for present purposes to quote the summary of Ralph Gibson LJ in *Brink's Mat Ltd. v. Elcombe* [1998] 1WLR 1350 at 1356F to 1357G:

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 KB 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy MR, at p.504, citing *Dalglish v. Jarvie* (1850) 2 Mac & G 231, 238, and Browne-Wilkinson J in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] FSR 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] FSR 8. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade LJ in *Bank Mellat v. Nikpour* [1985] FSR 87, 92-93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure…is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson LJ in *Bank Mellat v. Nikpour*, at p.91, citing Warrington LJ in the *Kensington Income Tax Commissioners' case* [1917] 1 KB 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on

> the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was or perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes afforded:" per Lord Denning MR in *Bank Mellat v. Nikpour* [1985] FSR 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:
>
> > "when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant…a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell LJ in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings plc*, ante, pp.1343H-1344A."

Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in *Memory Corporation v. Sidhu (No.2)* [2000] 1 WLR 1443…This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is

> not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.
>
> Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to disclosure of documents…"

Did the Claimants fairly present the Extension Application?

37. The Defendants have particularised their allegations of material non-disclosure at the September hearing in a schedule, as follows:

    i) the Claimants failed to inform me that Mr King was in sole control of both the Claimants and the Defendants and was preventing the Defendants from defending themselves;

    ii) counsel inappropriately said to me that I could be comforted because the Defendants could apply to set aside the September order;

    iii) counsel said incorrectly in his skeleton argument that the Extension Application did not raise problematic issues between the parties or have an impact on the wider case and that the Extension Application was a straightforward matter in which there was a good reason for not serving in time;

iv) counsel said incorrectly in his skeleton argument that the Defendants were not prejudiced by an extension of the validity of the claim form;

v) the Claimants failed to inform me that the BVI proceedings had begun and they did not give me any details about, or documents relating to, those proceedings;

vi) the Claimants failed to inform me that there was likely to be a jurisdiction challenge to the present claim in the BVI proceedings, at which it might be relevant which of the present claim and the BVI proceedings had been begun first and at which the relative progress of both proceedings might be relevant;

vii) the Claimants failed to inform me that they had an interest in trying to ensure that the present claim was concluded before the BVI proceedings and that the present claim was progressed as much as possible whilst Mr King was in control of the Defendants;

viii) the Claimants failed to inform me that, if they had to begin a second claim because I did not extend the validity of the claim form, that would delay any judgment in their favour;

ix) the Claimants failed to inform me that the Defendants had a "particular" interest in minimising the progress of the present claim whilst Mr King was in control of the Defendants and they could take no steps to address or defend the claims against them; particularly because an order by the court in the BVI proceedings might have caused the present claim to be dismissed or stayed;

x) the Claimants failed to mention that it was the Defendants' case that the benefit of the loan agreement had not been assigned by Fihag to Formal;

xi) the Claimants failed to inform me "of correspondence from [Shoosmiths] taking the point that the Erica trustees had no standing to participate in [the present claim], and seeking to engineer a position in which the court would hear from no-one who had the Defendants' interests at heart";[1]

xii) counsel failed to identify any legal points against the Extension Application in his written or oral submissions.

38. I need to say a little more about the last two allegations.

39. The allegation that the Claimants failed to inform me of Shoosmiths' correspondence taking the point that the Erica trustees had no standing to participate in the present claim and seeking to engineer a position in which the court would hear from no-one who had the Defendants' interests at heart derives from a similar (but not precisely the same) allegation made by the Defendants' solicitor, at paragraph 35 of her third witness statement in support of the present application. As I explained to Mr Kitchener during the hearing, it seemed (and remains) clear to me that, by the choice of the word "engineered", particularly in the context of the present application, the allegation is a criticism of Shoosmiths' conduct. As I also explained to Mr Kitchener during the hearing, criticism of an opposing lawyer's conduct is a serious matter. It

[1] To be clear, this is a direct quote from the schedule.

requires cogent corroborating evidence. At one point during the hearing Mr Kitchener argued that the allegation was not intended to be an attack on Shoosmiths' conduct. Ultimately, both Mr Kitchener and Ms Oakeshott and the Defendants (and their solicitor) withdrew any criticism (whether intentional or unintentional) of Shoosmiths' conduct; properly, on the evidence, in my view. Instead, they sought to argue that the Claimants were seeking to engineer, by the correspondence, a position in which the court would hear from no-one who had the Defendants' interests at heart.

40. The correspondence comprises two letters Shoosmiths wrote to Conyers; the first on 17 August 2018 (after the 25 July 2018 hearing and the receipt of Wilton's letter the day before), and the second on 9 January 2019 (some four months after the September hearing) from which I have already quoted. In the first letter, Shoosmiths said:

> "We have of course read the letter which your client [(i.e., Wilton)] wrote to the court on 24 July (sending us a copy), quoting its reference E220.005NH.TJB, ahead of the hearing before His Honour Judge Klein the following day. At the hearing, he adjourned the matter until 13 September. We await the perfected order and shall share it with you and your client as soon as we have it.
>
> Our Application was made without notice to the Defendants, because we and our clients had no obligation to make such an Application on notice. Under the circumstances, we wonder how you found out about the Application. Please explain. Notwithstanding Judge Klein taking account of your client's letter, your client is not a party to the proceedings and has no standing in relation to it. That position will not change by virtue of your client succeeding Applegate FS SA as Trustee of Erica Trust (if indeed such a change takes place; we understand that there remain certain formalities to be discharged). Under the circumstances and subject to only to sharing the perfected order and receiving from you the explanation which we have requested, we see no reason to indulge in correspondence with you about the proceedings.
>
> For the avoidance of doubt, our reluctance to comment on any point that your client raised in its letter to the court should not be construed as an admission on our clients' part and we reserve their position accordingly."

In the second letter, they said (as I have already quoted):

> "While we very much doubt that your clients (or indeed, for that matter, the parties who have retained Covington Burling LLP in relation to this matter) have any standing to make an application in the English proceedings. there should be no need to add to the costs of the dispute by making any such application because our clients have no intention of applying for a Default Judgment. Should that position change, we will

> obviously give notice to the Defendants in the English proceedings, as appropriate."

41. The particular legal point which the Defendants contend counsel did not fairly present to me at the September hearing is that the negligence or incompetence of a party's solicitor which causes the service of a claim form to be delayed weighs against extending the validity of a claim form.

42. As presented to me at the hearing of the present application the Defendants' central complaint is that, at the September hearing, that Mr King was in sole control of both the Claimants and the Defendants and was preventing the Defendants from defending themselves was not fairly presented to me. I turn now to consider that central complaint.

43. I was not told at the September hearing that Mr King was the Defendants' sole director or, as I am satisfied was the case at the time, that he had direct, and day-to-day, control of the Defendants' response to the claim. Counsel did say that Mr King might have a controlling interest in the Defendants but that would be equally consistent with him having a sufficiently large shareholding in them which might, I accept, have allowed him to take control of the Defendants' response to the claim, probably indirectly.

44. As presented to me at the hearing it appeared that the Defendants did have autonomy (free of Mr King's influence) to decide how to respond to the claim. The Claimants suggested, in the evidence in support of the Extension Application, that the Defendants had yet to respond to the claim or appoint solicitors. The impression that evidence reasonably conveyed was that the Defendants could, as any other defendant might (so independently of the Claimants), respond to the claim. This impression was reinforced by counsel's submissions that Applegate (the Defendants' agent) had actually responded to service of the claim form and that the Defendants could apply to set aside the September order.

45. The true position was somewhat different. It is clear from Mr King's 10 October 2018 affidavit in the BVI proceedings that he was in control of the Defendants' response to the claim and had determined that the Defendants would not acknowledge service, so that, contrary to the Claimants' evidence in support of the Extension Application and counsel's submissions, the possibility of any response by the Defendants to the claim was illusory on 13 September 2018.

46. As I have already acknowledged, Wilton's 24 July 2018 letter did draw to my attention that Mr King was the Defendants' sole director but, as I have pointed out, and as the transcript of the September hearing establishes, I did not recall the contents of the letter.

47. Mr Gourgey drew my attention to Mr King's evidence in his witness statement in opposition to the present application, that:

> "During that period, I had control of the Defendants in the sense that I was the director, but I regard my control as notional. This is because I soon discovered that Wellcourt did not have its own bank account, nor records of the Wellcourt

> Portfolio's rental income and expenditure on property maintenance, etc.
>
> I found that Wellcourt relied on two service companies, Cedar Estates Limited…and Propfurn Limited (whose director and ultimate beneficial owner is [Mr Sussman]). Cedar acted as Wellcourt's letting and managing agent under a series of service agreements – one for each property. Propfurn also acted under a service agreement, which related to all of the properties, but its engagement was less frequent..."

This evidence does not assist the Claimants. When Mr King speaks of having only "notional" control of the Defendants I am satisfied that he means that he was not in a position to manage the property portfolio on a day-to-day basis. As I have already said, his affidavit in the BVI proceedings makes clear (as does his July 2018 text message exchange with Mr Evans) that he had direct control over how the Defendants responded to the claim.

48. I was not told, at the September hearing, that, being in control of how the Defendants responded to the claim and having determined that they should not take any steps to defend the claim (as he explains in his 10 October 2018 affidavit in the BVI proceedings), Mr King thereby caused the Defendants not to acknowledge service.

49. The Claimants have elected not to waive privilege. It would be wrong for me to speculate about what they may have been advised. In any event, it is axiomatic that I should determine the present application only on the material before me. On that material, the picture which has emerged is a troubling one.

50. Although Mr King did not have day-to-day control over the management of the property portfolio, there is no material which suggests that, as the Defendants' sole director, he was not in a position practically to use the property portfolio to satisfy the claim. If Mr King believed, when the present claim was begun or shortly after (by the time when service had to be acknowledged), that the Defendants had no defence to the claim, as he apparently did, and that he could act in the Defendants' best interests, as he also apparently did, why, it may be asked rhetorically, did he not take steps to settle the claim on the Defendants' behalf before the default judgment application was made? If, on the other hand, he felt that there was an obstacle to him deciding whether the present claim should be satisfied, or, indeed, responded to, so that he wanted to effectively surrender the decision whether the Defendants should satisfy the claim to the court and call on the court to decide the claim on its merits, why, it may also be asked rhetorically, was the default judgment application made, thereby creating a risk that the court might finally determine the present claim procedurally and not on the merits?

51. In the circumstances as they existed, I cannot think of a good reason why the Claimants made the default judgment application. From Mr King's perspective, it was either an unnecessary, or an inappropriate, application to make. Indeed, from Mr King's perspective, in the former case the present claim itself was unnecessary.

52. It is against that background that I turn to Mr King's July 2018 text message exchange with Mr Evans. I have come to the clear conclusion that, by his text messages to Mr

Evans, Mr King consciously sought to encourage the Defendant's representative, Applegate, to take a step in the present claim for the benefit of the Claimants and contrary to the interests of those connected with the Erica Settlement – that is, to write a letter which might strengthen the default judgment application – or, to put it another way, so that the Claimants could "be successful…in court", with the promise of an indemnity "if they try" to challenge that. Mr King acted in a way which he thought might make a default judgment more likely. The most probable explanation for Mr King's text messages is that, in the run up to the hearing of the default judgment application, he only had the Claimants' interests in mind.

53. Taking into account all that I have said, and after careful consideration, on the material to which I was taken I have concluded that, at least after the default judgment application was made until the evening of 6 September 2018 (so after the Extension Application was made), most probably the Claimants (through Mr King) intended to obtain a court order for the purpose of giving superficial legitimacy to, or cover for, a plan to have the Defendants meet their demand for repayment of £25 million plus interest. Most probably, the Claimants (and Mr King) wanted a court order to which they could point, if challenged, in order to be able to say: steps taken to extract value from the Defendants were taken merely to comply with the court's order.

54. Shoosmiths informed Conyers and Covington on 7 September 2018, shortly after notice of the receivership application and Conyers' threat to have that application determined urgently if the Claimants proceeded with the default judgment application, that the Claimants were not proceeding with the default judgment application, although, until 10 October 2018 at least, Mr King opposed the receivership application and it was not until 9 January 2019 when Shoosmiths said that the Claimants did not have a present intention to make a default judgment application and that, if they did make an application, it would be on notice.

55. In his witness statement in opposition to the present application, the Shoosmiths' partner says that "in the light of the Director Conflict Issue…, the Claimants decided not to proceed with" the default judgment application. It is not clear to me that what is meant by this evidence is that the Claimant finally determined, before the September hearing, never to make a default judgment application. It may be, in the light of the contemporaneous evidence to which I have just referred, that that is not what the Shoosmiths' partner meant by his evidence.[2]

56. There was a great deal of debate at the hearing about whether the Claimants' conduct of the claim in the period up to, and including, the September hearing was abusive. As Turner J explained recently in *Municipio de Mariana v. BHP Group plc* [2020] EWHC 2930 (TCC) at [47]-[49]:

> "The classic statement of the law with respect to striking out a claim as an abuse of the process of the court is to be found in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 at p.536:

[2] The Claimants could not have proceeded with the default judgment application in any event, because the 22 May 2018 purported service on Applegate was not good.

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

A working definition of abuse of process was formulated by Lord Bingham, in *Her Majesty's Attorney General v. Barker* [2000] 1 FLR 759. At paragraph 19, he defined an abuse of the process as:

> "…a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

In *Johnson v. Gore Wood & Co.* [2002] 2 AC 1, Lord Bingham held at p.22C-E:

> "The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court… This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward."

57. Principally by reference to *JSC BTA Bank v. Ablyazov* [2011] EWHC 1136 (Comm), Mr Gourgey argued that the Claimants' conduct was not abusive, because, as has not been disputed on the present application, the Claimants have a claim which is fit to proceed to trial which the Defendants have not admitted, so that, Mr Gourgey argued, there is a dispute between the parties on which the court ought to adjudicate. Mr Gourgey is right at one level of course but his submission does not take into account the reality as it was on, and before, 13 September 2018.

58. It should go without saying, but, in a case such as the present claim, it is not the court's function to facilitate a claim in which all the parties are controlled by the same individual, who has conduct of the claim on behalf of all of them, who can legitimately decide how they deal with the claim, and who, in fact, has decided that the defendant has no defence to and should not defend the claim. In those

circumstances, there is no dispute, or difference, for the court to resolve. It should also go without saying that it is not the court's function to facilitate a situation in which a claimant prevents a defendant from responding to a claim in the way it might wish to if freed from the claimant's influence. Whether or not such conduct should be labelled as abusive (as, it happens, I think it should be) does not really matter for the purpose of determining whether there has been material non-disclosure. Of more importance is that the court would not be furthering the overriding objective if, in either of these scenarios, it facilitated the claimant's conduct of its claim. To facilitate a claim where there is no dispute, or difference, between the parties is likely to result in disproportionate cost being incurred and disproportionate court time being allocated to the claim. To facilitate a claim in which the defendant is not free to respond to the claim perpetuates a state of affairs in which the parties are not on an equal footing and in which the defendant cannot fully participate in the proceedings, so that the court cannot fairly deal with the claim.

59. Taking into account all I have said, I have come to the conclusion that the following material matters ("the Material Matters") were not presented to me at all at the September hearing or, if they were, were not presented to me as they should have been (i.e., fairly):

i) Mr King was the Defendants' sole director;

ii) Mr King controlled the Defendants' response to the present claim;

iii) Mr King had decided that the Defendants would not respond to the present claim;

iv) Mr King had made arrangements for Applegate to write its letter to which I have referred;

v) he did so to advance the Claimants' case;

vi) the Erica trustees had made a receivership application in the BVI proceedings;

vii) a purpose of the receivership application was for the appointment of a third party to have conduct of the present claim on the Defendants' behalf;

viii) there was no evidence that the Claimants had finally resolved not to have the present claim determined otherwise than on its merits and, in particular, there was no evidence that the Claimants had finally resolved never to make a default judgment application;

ix) against the background of the 25 July 2018 order and my concern at the hearing on that day that Wilton should be aware of the September hearing so that it could take any appropriate steps to participate in it, Wilton's solicitors (Conyers and Covington) had been told by Shoosmiths in their 7 September 2018 letter that the Claimants would not be proceeding with the default judgment application but were not told that the Claimants had made the Extension Application or that it was listed for hearing on 13 September 2018.

60. I should say a little more about this last matter. Had a member of the court staff turned their mind to it, or had I turned my mind to it if I was provided with the 7 September 2018 correspondence, we might have thought it a little unusual, but are unlikely to have appreciated any significance in the fact, that Shoosmiths sent a substantive letter to the court explaining that the Claimants would not be proceeding with the default judgment application and, in the covering email but not in the letter, explained that the Claimants would be proceeding with the Extension Application at the September hearing. Conyers' and Covington's understanding of the purpose of the September hearing is likely to have been different. It is likely that, having received only the letter, they would have understood that the Claimants' counsel was only attending the hearing as a courtesy to explain to me that the default judgment application was not being proceeded with. This probably explains why the court did not then receive correspondence from Wilton or its solicitors, as the court had done from Wilton on 24 July 2018, and why, it appears, Wilton took no interest in the September hearing.

61. The Material Matters were material because they were relevant to the issue of whether, if I extended the validity of the claim form at the September hearing, I might not be furthering the overriding objective. This conclusion can be tested by answering the question: what am I likely to have done at the hearing had the Material Matters been presented to me fairly?

62. I do not think that I would have dismissed the Extension Application, even if there was no good reason to extend the validity of the claim form because there was no dispute, or difference, between the parties, or because Mr King was in a position to appoint a solicitor in the jurisdiction to accept service of the claim form.

63. If the Claimants had offered me an undertaking not to seek a determination of the present claim otherwise than on its merits, it is possible that I would have extended the validity of the claim form. Most probably, however, if the Claimants had fairly presented to me at the September hearing that Mr King controlled the Defendants' response to the claim, and, even more so, had they fairly presented to me the other Material Matters, I would have adjourned the hearing of the Extension Application and required the Claimants to notify Wilton of the Extension Application and of the adjourned hearing, and, on that adjourned hearing, if I extended the validity of the claim form, I would have stayed the claim following service of the claim form until the determination of the receivership application in the BVI proceedings, giving the Claimants liberty to apply to lift the stay earlier on notice to Wilton. I would have acted in this way even though there was, in reality, a good reason for extending the validity of the claim form; namely, the delays at the FPS.

64. In short, I would not have made the September order and it is liable to be discharged.

65. As presented to me, all the Defendants' allegations of material non-disclosure, save for the last three (see paragraphs 37(x)-(xii) above), were really different ways of framing the Defendants' central complaint. In the light of the conclusions I have already reached on that matter and because, for the reasons I shall give, I propose to discharge the September order as a result, I consider the Defendants' other allegations briefly.

66. To the extent that those other allegations were intended to present the Defendants' central complaint in a different way, they do not need any further consideration.

67. Some of those other allegations can be considered though without reference to the central complaint. In that context, those other allegations, if made out, do not establish any material non-disclosure, or, if they do, they are sufficiently innocuous that they would not have caused me to discharge the September order. So, in that context:

    i) counsel was right to say that a defendant can apply to set aside an order extending the validity of a claim form (see paragraph 37(ii) above);

    ii) counsel was right that there was a good reason for extending the validity of the claim form (see paragraph 37(iii) above);

    iii) it is obvious, and I did not need to be told, that there may well be a tactical advantage to a defendant if the validity of a claim form is not extended and there may well be a tactical advantage to a claimant if the validity of a claim form is extended (see paragraphs 37(iv), (vii) and (viii) above, and *National Bank of Greece SA v. Outhwaite* [2001] CP Rep 69 at [57]);

    iv) whether or not there was a jurisdictional challenge to the present claim in the BVI proceedings was not material to the Extension Application. As Mr Gourgey pointed out, when Article 23 of the Lugano Convention applies, as, it is not disputed, it does in the present claim, the court cannot decline jurisdiction and other courts have no power to override an exclusive jurisdiction clause (see paragraph 37(vi) above and Dicey, Morris and Collins on the Conflict of Laws (15th ed), at paragraph 12-145).

68. Nor was it material for me to know that the Erica trustees dispute the present claim including that the benefit of the loan agreement had been assigned by Fihag to Formal. As I have already noted, this is not a case in which it has been suggested that, on the merits, there is no serious issue to be tried in relation to Formal's claim as pleaded in the Particulars of Claim. So, that, ultimately, it might be established on balance at trial that Fihag did not assign the benefit of the loan agreement to Formal as pleaded was immaterial to the Extension Application (see, for example, *MRG (Japan) Ltd. v. Engelhard Metals (Japan) Ltd.* [2003] EWHC 3418 (Comm) at [23]-[31] and *Konamenemi v. Rolls Royce Industrial Power (India) Ltd.* [2002] 1 WLR 1269 at [180]).

69. The correspondence about which the Defendants complain (see paragraphs 37(x), 39 and 40 above) provides no foundation at all for the allegation that, on, or before, the September hearing, the Claimants were "seeking to engineer a position in which the court would hear from no-one who had the Defendants' interests at heart". The first letter on which the Defendants rely (Shoosmiths' 17 August 2018 letter) merely records the fact, accurately, that the default judgment application could be made, as it was, without notice and that Wilton was not a party to the present claim and it further records that Shoosmiths did not intend to correspond with Conyers. The second letter (Shoosmiths' 9 January 2019 letter) post-dates the September hearing by about four months and so its contents cannot have been disclosed at the hearing.[3]

[3] For completeness, I should add that I am not satisfied that, by their 7 September 2018 letter to which I have referred, Shoosmiths were seeking to "engineer" the state of affairs about which the Defendants complain.

70. As I have already noted, at the September hearing I weighed in the balance against extending the validity of the claim form that Shoosmiths had believed wrongly that they could serve the claim form in Switzerland as they had purported to do. It does not follow, from the fact that they made this error and did not appreciate the particular service limitations in Switzerland, that they were negligent or incompetent. The Defendants' final complaint (see paragraph 37(xii) above) is therefore not made out.

Should I not discharge the September order?

71. In *The Libyan Investment Authority v. J.P. Morgan Markets Ltd.* [2019] EWHC 1452 (Comm), at [92]-[94], Bryan J helpfully referred to three authorities often cited in this context:

> "The principles to be applied to breaches of full and frank disclosure were summarised in *OJSC ANK Yugraneft v. Sibir Energy plc* [2008] EWHC 2614 (Ch), in which Christopher Clarke J. approved the following guidance at [102]:
>
> > "Mr Boyle drew my attention, with appropriate diffidence, to a decision of his own, sitting as a Deputy Judge of the Chancery Division, as to the approach to be taken by the Court in the event that there is culpable non-disclosure. In *The Arena Corporation Limited v. Schroeder* [2003] All ER (D) 199 (May) at paragraph 213, he summarised the main principles which should guide the Court in the exercise of its discretion as follows:
> >
> > > (1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
> > >
> > > (2) Notwithstanding the general rule, the court has jurisdiction to continue or re-grant the order.
> > >
> > > (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
> > >
> > > (4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
> > >
> > > (5) The Court should assess the importance and significance to the outcome of the application for an

> injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the Judge might have made the order anyway is of little if any importance.
>
> (6) The Court can weigh the merits of the plaintiff's claim but should not conduct a simple balancing exercise of which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the courts should have regard to the proportionality between the punishment and the offence.
>
> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

In *Knauf UK GmbH v. British Gypsum Ltd.* [2001] EWCA Civ 1570 the Court at [65] explained the "golden rule" which must be followed with respect to full and frank disclosure:

> "65. The leading cases remain *Brink's Mat Ltd v. Elcombe* [1988] 1 WLR 1350 and *Behbehani v. Salem* [1989] 1 WLR 723. Those authorities in this court bring their reminder of the essential principles: that there is a "golden rule" that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion; that failure to observe this rule entitles the court to discharge the order obtained even if the circumstances would otherwise justify the grant of such relief; that a due sense of proportion must be maintained between the desiderata of marking the court's displeasure at the non-disclosure and doing justice between the litigants; that for these purposes the degree of any culpability on the part of the applicant or of any prejudice on the part of the respondent are relevant to the reviewing court's discretion; and that a balance must be maintained between undermining "the heavy duty of candour and care" which falls on applicants and promoting a "tabula in naufragio" to save respondents who lack substantial merits.""

(see also, to similar effect, *Dar Al Arkan Real Estate Development Co. v. Al Refai* [2012] EWHC 3539 (Comm) at [148]-[149], *Fundo Soberano* at [82], and *The Public*

Institution for Social Security v. Amouzegar [2020] EWHC 1220 (Comm) [139]-[143] (and, in particular, [141])).

72. I must make four preliminary points before explaining why I have concluded that the September order must be discharged.

73. First, although in some cases where there has been material non-disclosure a proportionate response is not to discharge the order in question but to impose a costs sanction (see, for example, *Al Refai* at [149]), that would not be a proportionate, or otherwise appropriate, response in this case for the following reasons:

    i) I made no order as to costs on the Extension Application and the Defendants incurred no costs in relation to it, so the Extension Application itself cannot be a vehicle for a costs sanction;

    ii) It would be to pre-judge where the costs of the present application should fall, in circumstances where I have heard no submissions on costs and where there may be many factors other than the material non-disclosure which may affect costs questions on the present application, if the costs of the present application were used as vehicle for a sanction for the material non-disclosure;

    iii) if the September order is discharged, it has not been suggested that thereby the Claimants will lose the opportunity to litigate in the English courts, so increasing the risk that discharging the September order may be disproportionate.

74. Secondly, it may be suggested that discharging the September order serves no practical purpose. The Claimants issued the second claim in December 2020, whilst the UK was party to the Lugano Convention. The second claim form has been served. It has not been suggested on the present application that the response of the English or BVI courts to the second claim will be any different to what it might have been had the UK remained party to the Lugano Convention from 1 January 2021. Additionally, the present claim has hardly advanced beyond service of the claim form. Whilst the Defendants have acknowledged service that has been done only to challenge jurisdiction so far. In the result, the present claim is not much more advanced than, or any different to, the second claim.

75. That discharging the September order may serve no practical purpose does not mean that to discharge the order is inappropriate. In particular, that no practical purpose may be served does not make the discharge of the September order a disproportionate response to the material non-disclosure. To the contrary, that, in practice, the Claimants will be hardly worse off by the discharge of the September order tends to support its discharge as a proportionate response to the material non-disclosure.

76. Thirdly, it may be suggested that what has in fact happened, that is, that the present claim has been stayed since 2018, would have been the outcome I would have ordered had there been no material non-disclosure and, on that basis, the September order should not be discharged. Such a response would not give any weight to the penal element of the jurisdiction to set aside for material non-disclosure and, if it is appropriate to give little weight to the fact that the judge would have made the same order they made had there been no non-disclosure, it ought to follow that little weight

should be given to the fact that, fortuitously, what has happened since 2018 reflects what I am likely to have ordered.

77. Finally, the Defendants contend that not only was the Claimants' presentation of the Extension Application abusive, but, more generally, the Claimants' conduct of the present claim has been abusive, and that that conduct should be taken into account in the decision whether or not to discharge the September order.

78. By the time of the 24 March 2021 hearing in the present application the Defendants had not prepared a schedule of particulars of the abuse they rely on in support of this contention. The absence of such a schedule was unhelpful to me and, more importantly, to the Claimants. I therefore ordered the Defendants to prepare a schedule in good time before the adjourned hearing. That schedule has been filed and served.

79. To a large extent the particulars in that schedule merely repeat, but in a different way, the Defendants' central complaint and so they require no further consideration. To the extent that those particulars contain additional complaints, they do not take matters any further. The Defendants make two such additional complaints.

80. First, they contend that it was an abuse for the Claimants to serve the claim form out of the jurisdiction without the court's permission in the light of Judge Raeside's indication that Formal could not rely on the exclusive jurisdiction clause. As I briefly explain below, having heard detailed arguments on the point, and because there is more relevant material before me than there was before Judge Raeside, I have concluded that it is sufficiently arguable that Formal can rely on the exclusive jurisdiction clause, contrary to Judge Raeside's preliminary view, so that Formal was entitled to serve the claim form out of the jurisdiction without the court's permission (so long as that was done in time) and so that service of the claim form out of the jurisdiction by Formal without the court's permission was not abusive.

81. Secondly, the Defendants contend that the Claimants warehoused the present claim. Warehousing is intended to refer to a situation in which a claimant unilaterally decides not to pursue a claim to a final determination at all or for a fixed (or limited) period of time.

82. It is right that the Claimants did not pursue the claim for a long time. They did not do so, however, not because they did not want to pursue the claim but because the Erica trustees (and others) objected to them pursuing the claim until someone unconnected with Mr King had conduct of the claim on the Defendants' behalf. It was only in the autumn of 2020, after I had lifted the automatic stay, that third party directors were appointed and took over conduct of the claim on the Defendants' behalf. If it was abusive for the Claimants to have sought to pursue the claim to a final determination in circumstances where Mr King was in control of the Defendants, as the Defendants have so strongly contended, I cannot see how it was abusive for the Claimants not to have sought to pursue the claim to a final determination in those circumstances. In short, I cannot see how the Defendants can complain that the Claimants have not sought to have the claim finally determined since September 2018 when that is the very state of affairs that the Defendants have wanted.

83. Turning to the question I must answer, I have concluded that the September order should be discharged for the following reasons:

i) the general rule is that, because of the material non-disclosure which I have found, the September order should be discharged;

ii) the unfair presentation of the Material Matters was serious. The Material Matters were important to a key question I had to consider on the Extension Application; namely, whether an extension of the validity of the claim form furthered the overriding objective. It was also serious because, by extending the validity of the claim form, the court was at risk of facilitating abusive conduct by the Claimants;

iii) the Material Matters (save perhaps for Shoosmiths' 7 September 2018 correspondence) were well known to the Claimants (through Mr King). They cannot have forgotten about them or overlooked them in September 2018;

iv) discharging the September order is a proportionate response to the material non-disclosure, particularly in the light of the second claim;

v) to not discharge the September order in these circumstances would be to give insufficient weight to the penal element of the jurisdiction to set aside for material non-disclosure. In fact, in the circumstances of this case, if the September order is not discharged, there would be no sanction for the Claimants' default. Mr Gourgey pointed out that, if I had not made the September order, an English claim against the Defendants would only have been delayed by less than two weeks, because the Claimants had only delivered the claim form in the present claim to the FPS shortly before the September hearing and the Claimants could have issued the second claim immediately after the September hearing. Mr Gourgey is right but that does not mean that discharging the September order is a disproportionate response. As I have already indicated, to not discharge the September order would be to give insufficient weight to the penal element of the jurisdiction in issue;

vi) as I have explained, had the Material Matters been fairly presented to me, in particular had Mr King's control of the Defendants been fairly presented to me, I would not have made the September order.

<u>Is it sufficiently arguable that at the time the claim was begun (or at any later relevant date), Formal was entitled to rely on the exclusive jurisdiction clause?</u>

84. The consequence of my decision that the September order must be discharged is that the claim form was not served in time and, subject to any further submissions, that the December 2018 service of the claim form must be set aside. It follows that I do not need to decide whether the court would have had jurisdiction to try Formal's claim in the present claim. As I indicated at the beginning of this judgment, the Defendants have argued that the court has not had jurisdiction to try that claim. The Claimants have disputed this. The parties agree that, whether or not the court would have had jurisdiction to try Formal's claim depends on whether it was sufficiently arguable that, at the relevant time, Formal was entitled to rely on the exclusive jurisdiction clause. Because I heard full arguments on the issue, and in the event that my decision

to discharge the September order is wrong, I will briefly give my reasons for concluding that it was sufficiently arguable that, at the relevant time, Formal was entitled to rely on the exclusive jurisdiction clause, so that the court would have had jurisdiction to try Formal's claim.

85. The parties referred me to *ING Bank NV v. Banco Santander SA* [2020] EWHC 3561 (Comm) at [64]-[66], where Cockerill J summarised the applicable test when a defendant challenges the court's jurisdiction in the present context:

> "In summary:
>
> i) The onus is on [the claimant] to establish that they have a "good arguable case" that the English court has jurisdiction.
>
> ii) The burden is on them to show that it has the "better argument on the material available" (making due allowance for the limitations of the material available at an early stage of the case).
>
> iii) The standard is, for the purposes of the evidential analysis, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either).
>
> iv) The test is context specific and flexible and, if there is an issue of fact, the court must use judicial common sense and pragmatism, not least because the exercise is to be conducted with due despatch.
>
> ING urged me to follow the recent consideration of the test given by Sir Michael Burton in *Alta Trading Ltd. v. Bosworth* [2020] EWHC 2757 (Comm) at [10] to [13]. In *Alta*, the Judge cited the three stage test in *Brownlie* at [7]:
>
> > "What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."
>
> The Judge in *Alta* explained the application of the test as follows at [13]:
>
> > "(i) In limb (i) the Court must decide if it can who has the better of the case. If it decides that the claimant has the better

> of the case, he will have a good arguable case or a plausible evidential basis. If the defendant has the better of the case then the claimant fails.
>
> (ii) Limbs (ii) and (iii). The judge may have to struggle because at the jurisdiction stage the evidence may be wholly uncertain and insufficient and, in particular, because there has been no testing of that evidence by cross-examination or otherwise, and usually no adequate disclosure of documents by either side. He or she may not be able to reach even a provisional conclusion as to which party has the better case, and even if the judge tried to do so he or she may well turn out to be wrong. In such a circumstance where the judge cannot decide, after conscientiously doing his or her best, who has the better of the case, then it is sufficient if the claimant has a plausible evidential basis and that will suffice for a good arguable case.""

(see also *Alta Trading UK Ltd. v. Bosworth* [2021] EWCA Civ 687 at [30], where Sir Michael Burton's decision was recently upheld on appeal).

86. In my view, and in agreement with Mr Kitchener, the question whether a claimant has a good arguable case that the English courts have jurisdiction has to be determined by reference to their pleaded case, because it is that case in respect of which the claimant asks the court to take jurisdiction.

87. I also agree with Mr Kitchener that for the court to have jurisdiction, the claimant must have had a good arguable case that the court had jurisdiction at the commencement of the claim. In *Galapagos Bidco SARL v. Kebekus* [2021] EWHC 68 (Ch) Zacaroli J said at [141]:

> "The House of Lords *in Canada Trust Co v. Stolzenberg (No.2)* (above) identified the date of issue of proceedings as the relevant time to establish domicile for the purposes of Article 8(1). The only authority cited to me as to the time at which jurisdiction pursuant to Article 25(1) is to be established was *Sebastian Holdings Inc. v. Deutsche Bank AG* [2010] EWCA Civ 990. At [62], Thomas LJ said "…the question as to whether a claim falls within the jurisdiction clause is an issue that has to be determined at the time the proceedings are issued." Mr Allison submitted that this passage was not addressing the point in time at which jurisdiction was to be established pursuant to Article 25, but was concerned with a different question as to a series of contracts with competing jurisdiction clauses. I do not detect anything, however, in the surrounding paragraphs of the judgment of Thomas LJ which casts doubt on his proposition as to timing in [62]."

It was not suggested that the position under Article 25 of the Lugano Convention was different to that under Article 23 of the Judgments Regulation which Zacaroli J was considering in *Galapagos*.

88. Mr Kitchener referred me to note 2.3.13 in the 2020 White Book, which in turn referred to an unreported decision in *Canadian Union Insurance Co. v. Catatumbo Compania Anonima de Seguros* in which, according to the note, the court held that, where permission to serve out of the jurisdiction is sought, the claimant's cause of action is ascertained from the claim form. I was not taken to the authority itself or to any fuller note of the decision. If the White Book note intended to suggest that the jurisdiction question has to be determined by reference to the position as it was when the claim began, I do not dissent from the note, because it is consistent with the conclusions I have already reached. If the note intended to suggest that the court could only take into account the claimant's case as pleaded in the claim form and must ignore what the claimant has pleaded in particulars of claim which accompany the claim form then, not having seen the decision in *Canadian Union* itself, I respectfully disagree.

89. In support of the contention that it is the claim form alone by which the jurisdiction question has to be judged, Mr Kitchener pointed to what Gloster J said in *National Navigation Co. v. Endesa Generacion SA* [2009] EWHC 196 (Comm) at [72(v)-(vi)]:

> "…If Mr. Askins genuinely believed that there was such jurisdiction, then it was incumbent upon him to set out in the claim form the factual basis for that belief, in a manner that was transparent and comprehensible.
>
> It is very important in cases said to fall under the Regulation, where this court takes jurisdiction on the basis of a statement in a claim form pursuant (now) to CPR 6.33, and accordingly there is no requirement for the court's leave to serve the proceedings out of the jurisdiction, that solicitors issuing proceedings take particular care to ensure that they have a reasonable basis for their belief, and that the facts supporting it are stated in a transparent fashion in the claim form. First seisure under the Regulation may obviously have important consequences for both parties, and for proceedings in other jurisdictions. It is therefore vitally important: (a) that jurisdiction is not wrongly asserted without reasonable belief; and (b) the grounds are clearly stated so that a jurisdictional challenge can, if necessary, be speedily and easily made. This did not happen in the present case."

It is important, however, not to take what the judge said out of context. The part of her judgement I have quoted represents part of her reasoning for ordering the claimant to pay any assessed costs on the indemnity basis. The judge had already decided that the court did not have jurisdiction. A little earlier in her judgment the judge had said (at [65]):

> "…this court does not have, and has never had, power to hear the claim made in Folio 64 pursuant to Article 23 of the Regulation. The evidence now shows (as, indeed, was common ground) that both the relevant charters contained London arbitration clauses, and, therefore, necessarily did not contain clauses agreeing to submit to disputes to the exclusive or non-

> exclusive jurisdiction of the English courts, such as to invoke this court's jurisdiction based on Article 23. Unless, therefore, there is another sustainable ground for supporting the jurisdiction of the English court under the Regulation in respect of Folio 64, the claim must be dismissed. It would clearly be wrong for this court to maintain jurisdiction in the light of a valid jurisdictional challenge simply in order to permit one party to take advantage of the "first-seised status" of the Commercial Court Action, when such proceedings were issued in circumstances where the English court in fact had no jurisdiction under the Regulation, and the asserted basis for jurisdiction was incorrect."

That conclusion is not inconsistent with the court being able to look at what is pleaded in particulars of claim which accompany the claim form for the claimant's case that the court has jurisdiction.

90. For the court to be unable to consider the particulars of claim, when particulars of claim accompany the claim form, would be to elevate form over substance, a state of affairs about which Laws LJ was critical in *Evans v. Cig Mon Cymru Ltd.* [2008] 1 WLR 2675, to which I make further reference below.

91. I also note in passing that it would be a little odd if I was unable to consider the contents of the Particulars of Claim, because Mr Kitchener's attack on jurisdiction focused on the Claimants' case pleaded in the Particulars of Claim, as I recorded at the beginning of this judgment.

92. As I have also recorded, in the Particulars of Claim which accompanied the claim form, the Claimants have pleaded that the benefit of the loan agreement (and so, of the exclusive jurisdiction clause) was assigned by Fihag to Formal by the settlement agreement.

93. Mr Gourgey referred me to Guest on the Law of Assignment (3rd ed.), at paragraphs 1-43-1-44, which say:

> "Form of words. No particular form of words need be used for an assignment provided that they express "a final and settled intention to transfer the property to the assignee there and then". The words "assign" or "assignment" need not be employed. In construing the words used, the test is how they would be understood by a reasonable man, having regard to the nature and purpose of the transaction and the surrounding circumstances.
>
> Intention to assign. There must be an intention to assign, that is, to transfer the property in the chose in action from the assignor to the assignee. The intention must be manifested: "The mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention". The expression of intention will be construed objectively. An assignment may be collected from

> the outward expression of intention, whether or not an assignment was subjectively intended by the assignor. The intention must be a "final and settled" intention to transfer, and not one which is qualified or contingent or a mere revocable mandate. The intention must also be to assign immediately ("there and then"). An intention to assign an existing chose in the future may be evidence of an agreement to assign, which may vest an equitable interest in the assignee, but it will not support an actual present assignment of the chose. The determination of an intention to assign is a question of fact."

(To similar effect, see Bullen & Leake & Jacob's Precedents of Pleading (19th ed.); paragraph 6-05)).

94. Mr King has given evidence about the context in which the settlement agreement was made. There is no contrary evidence on the present application. The settlement agreement has to be considered in that context (in particular, in the context of Fihag's impecuniosity). I have already pointed out, and it should be clear in any event, that the settlement agreement is not in clear English. It does, however, record that:

i) it is a settlement agreement;

ii) Fihag made a loan to the Defendants and that Fihag owed an equivalent sum to Formal. These are clearly references to the loan agreement and the 1 December 2016 loan by Formal to Fihag. It is true that the loan by Fihag is said to be to Wellcourt but it was not seriously suggested that the loan referred to was not the loan made under the loan agreement (and, on all the evidence, it is clear to me that it was);

iii) the parties to the settlement agreement agreed (and intended) that Formal would be able to demand repayment of the loan the subject of the loan agreement directly from the Defendants;

iv) Formal would no longer be able to have recourse to Fihag, "the remaining balances" having been set at £nil.

95. In the context in which the settlement agreement was made I am satisfied that the Claimants have had a good arguable case that the court has had jurisdiction to try Formal's claim because they have had a good arguable case that Formal has had the benefit of the exclusive jurisdiction clause by virtue of the settlement agreement by which (it has been sufficiently arguable) the benefit of the loan agreement was assigned by Fihag to Formal.

Has Fihag brought an alternative claim (i.e., a claim in its own right)?

96. Because I have decided that the September order must be discharged I do not need to resolve whether Fihag (i) has not brought a claim and has been a claimant only as an assignor of the benefit of the loan agreement or (ii) to the contrary, has brought a debt claim in the alternative to Formal's claim.

97. I have also concluded that it is sufficiently arguable that, by the settlement agreement, the benefit of the loan agreement was assigned by Fihag to Formal. On this basis too, I do not need to resolve whether or not Fihag has brought an alternative claim. At the hearing, I asked Mr Kitchener what I should do if I decided that (i) it is sufficiently arguable that the settlement agreement was an assignment, (ii) Fihag has brought an alternative claim and (iii) (as is not disputed) Fihag has assigned the benefit of the loan agreement to Formal in any event since at least 2020. He told me that, in that scenario, it would be appropriate for Fihag to remain a claimant, as assignor of the benefit of the loan agreement. It must follow from this that the Defendants accept that, so long as it is sufficiently arguable that, by the settlement agreement, the benefit of the loan agreement was assigned by Fihag to Formal, whether or not Fihag has brought a claim in its own right does not matter for present purposes because, on any basis, it would have a place in the present claim as a claimant.

98. As it happens though, had I had to resolve the question whether or not Fihag has brought an alternative claim, in agreement with Mr Gourgey I would have concluded it has done. Briefly, my reasons are as follows.

99. The claim form is not very clear. It explains that the Claimants' claim is a debt claim. It mentions, probably unnecessarily, that Formal lent money to Fihag. It says that Fihag has assigned the right to recover the debt to Formal, but it does not set out clearly whether that is the Claimants' sole case (so that Fihag is only a party to the claim as assignor) or whether that is an alternative case.

100. I have already briefly referred to *Evans*. The background to the Court of Appeal's decision is set out in the headnote of the law report, as follows:

> "The claimant commenced proceedings seeking damages for personal injury, allegedly caused by an accident while employed at the defendant's factory. The claim form erroneously gave details of the claim as arising from abuse at work rather than from the accident. After the expiry of the primary limitation period the claimant served the claim form accompanied by the particulars of claim and the medical report, both of which related solely to the accident. The defendant applied to strike out the particulars of claim as inconsistent with the claim form. The claimant applied to amend the claim form by deleting the word "abuse" and inserting "an accident" to rectify the error. The district judge, holding that CPR r.17.4 precluded the court from allowing the amendment sought after the expiry of the limitation period, refused the claimant's application and struck out the particulars of claim. The judge dismissed the claimant's appeal on the basis that the proposed amendment to the claim form raised a new cause of action after the expiry of the limitation period and was therefore barred by rule 17.4."

The Court of Appeal allowed the appeal. In doing so, Arden LJ said, at [28]-[31]:

> "I start by applying the usual rules of interpretation. The claim form is a unilateral document which sets out the cause of action

> which the claimant claims to have and wants to rely upon. It must be interpreted objectively – that is, by reference to the words according to their objective meaning. On the other hand, account must be taken of the factual matrix. That matrix would include communication between the parties made before or at the same time as the service of the claim form. As Lord Steyn said in *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532, para 28: "in law, context is everything."…
>
> …It is true that the rules impose a number of requirements which touch and concern the claim form. The claim form has a very important function in our procedural system. It is the document which commences proceedings. There are special rules about its service, and I need only summarise the most important rules. There are, as I said, special rules about service, and the time for service, and then the extension of time of service. There are special rules about what the claim form must contain. There is a special rule about amendment and there are, importantly, special rules about adding or substituting new parties or claims, or altering a party's capacity after the limitation has expired: see rule 17.4. But I do not see any basis in any of the rules to which we have been referred for saying that the rules regulate the interpretation or meaning of the claim. Nor do I see any rules which, by necessary implication, require some special rule to be applied in this context (contrast the position in *Totty v. Snowden* [2001] 2 WLR 1384 as regards the use of the power to waive irregularities in the context of an extension of time for service). Nor do I consider that because the claim form is a public document the court is compelled to interpret the claim form without reference to the other document once it is issued. So far as the parties are concerned, the claim form is intended to be read with the particulars of claim. As it happens, the public can in general inspect statements of case filed after October 2006, unless the court otherwise directs. Of course, the overriding objective applies, but no one suggests that that would require a contrary interpretation in this case."

101. Laws LJ added, at [35]:

> "I agree with both judgments. The decisions below represent a stark surrender of substance to form. We should not allow such a thing unless irresistibly driven to do so. For the reasons given by Toulson and Arden LJJ, we are not so driven."

102. When the (unclear) claim form is read against the background of the Particulars of Claim, in particular the pleas at paragraphs 14-17 of the Particulars of Claim and the prayer, it becomes clear that Fihag has brought an alternative claim.

103. I might add that, whilst it is right that, on the default judgment application, an order was sought only in Formal's favour, that cannot be taken into account in interpreting the claim form.

Disposal

104. In the light of the conclusions I have reached, the September order must be discharged, and it must follow that the claim form was not served in time. As I have said, subject to any further submissions, it seems to me that the December 2018 service of the claim form on the Defendants must also be set aside. I will hear further from counsel on the appropriate form of order to give effect to my decision and on all consequential matters.

105. Because the Claimants have begun the second claim, and bearing in mind that the present application, and, indeed, in the last eight months, the present claim, have been heavily fought, so that it is likely that the second claim will be equally heavily fought, I should make clear that, even though I have been critical of the Claimants' conduct up to, and including, the September hearing, and particularly up to 6 September 2018, I have not struck out any statement of case or dismissed the claim on grounds of abusive conduct. Rather, I will discharge the September order, which means that the claim form was not served within its validity, and any further orders I make are in consequence of that.