Neutral Citation Number: [2017] EWHC 519 (Comm)

Case No: CL-2016-000598

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 17/03/2017

Before :

MR. JUSTICE TEARE

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Between :

Midtown Acquisitions LP	**Claimant**
- and -	
Essar Global Fund Limited	**Defendant**

- -
- -

Sonia Tolaney QC and Nehali Shah (instructed by **Boies Schiller & Flexner (UK) LLP**) for the **Claimant**
David Wolfson QC and Arshad Ghaffar (instructed by **RPC LLP**) for the **Defendant**

Hearing dates: 8 and 9 March 2017

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Approved Judgment

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

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MR. JUSTICE TEARE

Mr. Justice Teare :

1. The Claimant has obtained a judgment of the New York court and seeks to enforce it in this jurisdiction by an action upon the judgment. This is the judgment of the court on (i) a challenge to the jurisdiction of the court by the Defendant, (ii) an application by the Claimant for summary judgment on its claim and (iii) an application by the Defendant that execution of any judgment of this court be stayed. The applications have been heard together because they raise related issues.

The background

2. On 30 September 2014 the Defendant ("EGFL") guaranteed the obligations of Essar Steel Minnesota LLC ("Essar Steel") under a credit and security agreement dated 30 September 2014 pursuant to a Guaranty dated 30 September 2014. In addition EGFL incurred other liabilities under an Equity Contribution Agreement ("the ECA") also dated 30 September 2014.

3. Essar Steel defaulted and the Claimant and EGFL sought to resolve their differences. On 18 March 2016 EGFL entered into a binding term sheet with the US Bank National Association as agent for the Claimant. It is necessary to summarise some of its provisions. Pursuant to clause 3, "Settlement of Claims", EGFL "stipulate(d) to liability and confesse(d) to judgment" under the Guaranty for US$201.6m and under the ECA for US$415.4m. In consideration of the same the Lenders (as defined in the term sheet) waived their rights against affiliates of EFGL and their shareholders and directors. Pursuant to clause 4, "Payment Plan", EGFL could pay either US$360m plus interest, fees and expenses on or before 30 September 2016 ("the early settlement payment") or US$415.4m plus interest, fees and expenses on or before 31 March 2017. If it did so all the Lenders' claims would be cancelled in full and the Confessions of Judgment would be null and void. Clause 12, "Events of Default" included as events of default failure to pay the Settlement Amount (as defined in the term sheet). Clause 13, "Consequences of Default", provided that the consequences of an event of default were a default rate of interest, the right to appoint an observer to EGFL's board and the right to petition for the winding up of EGFL.

4. Pursuant to the Term Sheet an Affidavit of Confession of Judgment and stipulation of liability under the Guaranty was signed by EGFL in the sum of US$201.575m dated 18 March 2016 and an Affidavit of Confession of Judgment and stipulation of liability under the ECA was signed by EGFL in the sum of US$415,378,356 dated 18 March 2016.

5. On 24 August 2016 the Claimant applied to the New York court for judgment on the basis of the Affidavit of Confession of Judgment in respect of the Guarantee. The affidavit of counsel filed with the court stated that the Confession of Judgment was not conditioned in any way upon any default. Credit was given in respect of US$40m which had been paid to the Claimant pursuant to the Payment Plan. The affidavit also stated that notice to EGFL of entry of Judgment by Confession was not required under any agreement.

6. On 25 August 2016 the New York court gave judgment in an amount of US$171,769,169 including interest and costs.

7. On 31 August 2016 the judgment was served on EGFL who had 30 days in which to appeal. No appeal was lodged.

8. On 3 October 2016 the Claimant issued its claim for enforcement of the New York judgment in England. (At about the same time it also issued claims to enforce the judgment in the Cayman Islands, the Dubai International Financial Centre, Mauritius, the British Virgin Islands and Delaware.)

9. On 6 October 2016 this court gave the Claimant permission to serve the claim form out of the jurisdiction. Two jurisdictional gateways were relied upon. First, the proceedings were to enforce a judgment; paragraph 3.1(10) of PD6B. Second, the proceedings were made in respect of a contract, the Guaranty, and section 4.9(a) of the Guaranty amounted to a term to the effect that the English court shall have jurisdiction to determine a claim in respect of the Guaranty; paragraph 3.1(6)(d) of PD6B. The latter gateway is no longer maintained.

10. On 9 November 2016 a Judgment by Confession was also entered with respect to the Affidavit of Confession relating to the ECA.

11. On 11 November 2016 EGFL acknowledged service of the proceedings before this court and indicated that it would contest the jurisdiction of the court. On the same day it issued an application before the New York court seeking to vacate the judgment by confession with regard to the Guaranty on the basis of "fraud, misrepresentation or other misconduct" pursuant to New York Civil Practice law and Rules ("CPLR)" 5015. The basis of this application is an allegation that the Claimant "falsely represent(ed) to the Court that entry of judgment was appropriate because the Confession of Judgment 'is not conditioned in any way upon any default'….Furthermore, the Affirmation omitted any reference to the Term Sheet, which provides a settlement Payment Plan, secured by the Confessions of Judgment. They cannot be filed absent a default in the payment Plan, which did not occur."

12. On 17 November 2016 an appeal was entered against the judgment by confession relating to the ECA.

13. On 6 December 2016 a further application to vacate the judgment by confession with regard to the Guaranty was issued pursuant to CPLR 317 on the basis that notice of the application for judgment had not been given.

14. On 20 January 2017 EGFL issued a motion to stay execution of the judgment by confession with regard to the Guaranty.

15. The New York court is currently scheduled to hear argument on EGFL's applications on 29 March 2017. The motion to vacate pursuant to CPLR 5015 raises a point of construction of the Term Sheet. On behalf of EGFL it is said that so long as EGFL is making payments in accordance with the Payment Plan (which it says it was) a judgment by confession cannot be entered. A default in the Payment Plan was required before that could be done. The court was wrongly informed that no default was necessary. On behalf of the Claimant it is said that a judgment by confession can be entered without reference to the need for any breach in the Payment Plan. That is said to be apparent from the circumstance that the consequences of an event of default do not include the right to enter a judgment by confession. The resolution of this

dispute depends upon the true construction of the Term Sheet which is governed by New York law.

16. Before considering the applications before this court it is necessary to refer to the procedure which governs the issue of judgments by confession. Rule 3218 of CPLR provides that they may be entered without an action upon an affidavit which states the sum for which judgment may be entered, the facts out of which the debt arose and showing that the sum confessed is justly due. The Affidavit of Confession and the affidavit of the Claimant are filed with the clerk of the court who enters judgment for the sum confessed. The judgment may then be enforced in the same manner as a judgment in an action.

17. The judgment by confession is based on what is known in the literature as a "cognovit" (he has confessed) clause. A form of the procedure was known in English law pursuant to the Debtors Act 1869 but the relevant section of that act was repealed by the Administration of Justice Act 1956. According to Jowitt's Dictionary of English law the procedure had long been superseded in practice by orders of the court made by consent. Dicey at paragraph 14-078 states that a judgment based upon a cognovit clause is enforceable at any rate where the clause gives the claimant power to enter judgment against a defendant in the event of a default of payment and where the clause is valid by the law applicable to the contract. There does not appear to be any reported case on the question whether a New York judgment by confession can be enforced as a judgment in English law.

The challenge to the jurisdiction

18. Mr. Wolfson QC accepted that in this context the Claimant had to have a good arguable case that the court had jurisdiction in the sense that the Claimant had the better of the argument; the "*Canada Trust* gloss". He submitted that the Claimant did not have such a case. With regard to the suggestion that the proceedings issued by the Claimant were to enforce a "judgment" he said that the New York judgment was not a "judgment" as that expression is used in English law because (i) there was no *lis* between the parties in New York, (ii) the New York judgment was not final and conclusive and (iii) the New York judgment was not on the merits.

The need for a lis

19. It seems clear that there was no *lis* between the parties in New York. Rule 3218 of the New York rules expressly provides that a judgment by confession may be entered "without an action". It also clear that before the judgment by confession was sought there was no *lis* or action. Nevertheless, Miss Tolaney QC submitted that there was a *lis* or action. She relied upon the fact that the document evidencing the judgment has a heading which describes the Plaintiffs and the Defendant and that in the "Pre-Argument Statement" filed in the appeal from the judgment by confession relating to the ECA reference is made to "the title of the action" and to the fact that "this action arises from a binding term sheet". However, it does seem clear that that there was in fact no *lis* or action before the Claimant requested the issue of a judgment by confession. It may be that after the decision to issue the judgment was taken a *lis* or action was commenced but, as Rule 3218 recognises, the judgment by confession is entered "without action".

20. Mr. Wolfson, relying upon *ex parte Moore, In re Faithful* (1885) 14 QBD 627, said that this was fatal to the contention that the New York judgment was a judgment in English law.

21. The New York judgment states that "on filing the affidavit of Confession of Judgment …made by the defendants herein…it is ADJUDGED" that the Claimant recover from EGFL the stated sum "and that the plaintiff shall have execution thereof." Thus the document issued by the New York court is described as a judgment, it looks like a judgment and it was issued by an institution, the New York court, which, as part of its ordinary day to day work, issues judgments. The New York rules of court provided that the judgment may be enforced in the same manner and with the same effect as a judgment in an action. These matters are not of course conclusive because the judgment must be a judgment in English law but they do suggest that the judgment is that which would be understood in English law as a judgment.

22. The judgment by confession is a judgment upon an admission of liability. Judgments upon admissions are known to this court; see CPR 14.3. They are given in the context of a *lis* or action but they can be given at a very early stage, for example, immediately after service has been acknowledged. The rules of the New York court do not require a *lis* or action but in substance the New York court, when it issues a judgment by confession, is doing what this court does when it issues a judgment on an admission. In both cases the court is satisfied that because of a confession or an admission of liability by the defendant it is appropriate to issue a judgment based upon that confession or admission.

23. Mr. Wolfson submits that the decision of the Court of Appeal in *ex parte Moore* requires this court to say that the judgment by confession is not a judgment in English law. In that case an injunction was issued, a partnership was declared dissolved and an inquiry was ordered as to damages. The defendant was ordered to pay the costs of the action which were taxed and partly paid. There was in the event no inquiry as to damages. A bankruptcy notice was served on the defendant for the unpaid balance in respect of costs. He sought to have the bankruptcy notice set aside on the grounds that there been no "final judgment" within the meaning of the Bankruptcy Act because there had been no assessment of damages. The Court of Appeal held there had been a final judgment. The Earl of Selbourne LC said at p.632:

> "To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio*, and a final adjudication between the parties to it on the merits."

24. Cotton LJ said at p. 634 that a final judgment is

> "a judgment in an action between parties brought to establish some right of the plaintiff against the defendant."

25. It is to be noted that on the facts of that case there was an action between the parties. The issue before the court was not whether the absence of a *lis* or action meant that there had been no "final judgment" but whether the fact that damages remained to be assessed meant that there had been no "final judgment". The court held that it did not because there had been an adjudication on the merits (per the Lord Chancellor) or because a previously existing liability of the defendant had been ascertained or

established (per Cotton LJ). The ratio of the decision is not there must be a *lis* or action in order for there to be a judgment.

26. I accept that most judgments will be given in circumstances where there is a *lis* or an action between the parties. But I was not persuaded that the absence of a *lis* or action must inevitably lead to the conclusion that the judgment by confession in the present case is not a judgment in English law. It is, it seems to me, necessary to have regard to the reason why there is no *lis* or action. In this case it is because (a) EGFL "confesse[d] judgment and authorise[d] entry thereof in favour of Lenders" in the New York court and (b) the procedure of the New York court permitted a judgment by confession to be entered without an action. EGFL was no doubt advised by lawyers familiar with the procedure of the New York court and so must be taken to have agreed that a judgment by confession could be entered against it without the need for a *lis* or action to be commenced. In those circumstances I consider that it would not be right for the English court to deny the New York judgment the status of a judgment in English law simply because there was no *lis* or action between the parties.

Was the judgment final and conclusive ?

27. Mr. Wolfson submitted that the judgment was not final and conclusive in circumstances where it was open to review by the very court which had issued the judgment and, *a fortiori*, where a review of the decision has in fact been sought by EGFL and where that review is scheduled to take place later this month on 29 March 2017. Mr. Wolfson relied upon *Nouvion v Freeman* (1890) 15 App.Cas.1.

28. Miss Tolaney submitted that in New York there was no doubt that the judgment was final and binding unless and until the judgment was vacated by the New York court and that in those circumstances the judgment was final and binding in English law. Miss Tolaney relied upon the statement in *Dicey* at paragraph 14-023 that the test of finality is the treatment of the judgment by the foreign tribunal as *res judicata*. The authority for that proposition was also *Nouvion.*

29. *Nouvion* was a case in which an action was brought upon a Spanish "remate" judgment. The action failed because of the nature of a "remate" judgment in Spanish law. The Spanish proceedings which culminated in the "remate" judgment were to enforce a debt and were summary in the sense that the defendant could plead certain defences but could not set up a defence affecting the validity of the contract. Either party, if unsuccessful, could take ordinary or "plenary" proceedings in the same court in which all defences could be taken. In the plenary proceedings the "remate" judgment could not be set up as *res judicata*. It was therefore held that the "remate" judgment did not finally and conclusively establish the debt.

30. Lord Herschell said at p.9-10:

> "It must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it ……..then I do not think that a judgment which is of that

> character can be regarded as finally and conclusively evidencing the debt , and so entitling the person who has obtained judgment to claim a decree from our Courts for the payment of that debt. The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal."

31. Read literally this statement of principle might suggest that where a judgment of a foreign court may be set aside (for example, by reason of an error) by the very court which gave the judgment an action on the foreign judgment cannot lie. However, this would be to read too much into the statement of principle by Lord Herschell and to disregard the facts of *Nouvion* which did not involve the setting aside of a judgment on the grounds of error but which involved a "remate" judgment which either party could ignore by obtaining a judgment from the same court but in plenary proceedings. Lord Bramwell made this clear at p.15:

> "It was said that the argument I am now using would equally apply to all cases where there was a possibility of error being brought. Not so. There is no presumption that error may exist in the proceedings; the presumption is the other way: the presumption is that a Court of competent jurisdiction has given a right judgment. But there is no such presumption here; on the contrary, we learned that it is possible, not merely that what was decided in the Court may be nullified, but that there may be questions raised between the parties which could not be decided in the former proceeding. There is an essential difference, therefore, between the case where a Court of competent jurisdiction has entertained all the controversies between the parties which they could and chose to raise, and come to a conclusion, which is presumed to be accurate, and this case where there is not ground for saying all possible controversies between the parties have been decided."

32. It is immediately apparent that there is a very great difference between the judgment by confession in the present case and the "remate" judgment in *Nouvion*. The judgment by confession can be challenged on appeal (which challenge, it is common ground, is irrelevant to the question whether the judgment is final and binding) or on such grounds as error, fresh evidence or fraud, misrepresentation or other misconduct (see Rule 5015 of CPLR). By contrast, the "remate" judgment, if a party is dissatisfied with it, can be ignored by the party calling for a plenary hearing. I therefore do not consider that Mr. Wolfson's argument is supported by the decision in *Nouvion*. The "remate" judgment in *Nouvion* was, as Lord Ashbourne said at p.17, "a peculiar" judgment.

> "There is no analogy to it that I know of in our law; none has been stated; but no judgment known to our law or to the law of Scotland has been suggested which is at all really analogous to this peculiar form of "remate" judgment, which may be nullified, which may be paralysed, which may be reduced to a state of absolutely worthless paper in which the merits may be gone into. We are really asked to say that this judgment shall be accepted by our laws as final and conclusive, when the laws of Spain itself, which produced the judgment, say that it is one which is so little final and conclusive that it may be absolutely swept away when proceedings come before the court in which the merits can be gone into."

33. Miss Tolaney said that the test of finality was the treatment of the judgment by the foreign law as "res judicata". She submitted that it was clear that the New York judgment was final and binding in New York law because it was common ground that the judgment could be enforced notwithstanding the motion to vacate and indeed the later motion to stay; see the second witness statement, paragraph 13, of Mr. Meister, the New York lawyer acting for EGFL.

34. Miss Tolaney also referred to *Nash v Port Authority of New York* (2013) which was relied upon by Mr. Finestone, the New York lawyer acting for the Claimant, as authority for the proposition that a judgment continues to be final and conclusive notwithstanding the motion to vacate. Miss Tolaney said that this proposition appeared not to be disputed, no doubt because Mr. Meister made no comment on it in his second witness statement. Mr. Wolfson, however, suggested in his skeleton argument (without it seems any evidentiary support from Mr. Meister) that Mr. Finestone had made a partial quotation from *Nash* and that the full quotation did not support Mr. Finestone's opinion.

35. *Nash* concerned the question whether a defendant, the Port Authority of New York, who had been found liable to a claimant in respect of the 1993 terrorist bombing of the World Trade Centre, and had not appealed, could seek the vacation of the judgment on the grounds that in another case the Port Authority had been held entitled to the benefit of governmental immunity from liability for injuries sustained in the bombing of the World Trade Centre. The majority held that vacation of the judgment could be sought pursuant to CPLR 5015 because the two cases had involved a joint trial on liability in circumstances where one claimant had appealed and the other (Nash) had not. The minority considered that the majority had misunderstood CPLR 5015 and interpreted it in a manner which offended against well-settled principles concerning the finality of judgments. The majority judgment is consistent with the proposition that a judgment is final unless the court orders the judgment to be vacated.

36. This court has to decide whether the Claimant has the better of the argument on the question whether the judgment by confession is final and binding. In circumstances where (i) the New York rules of court provide that a judgment by confession is enforceable to the same extent as a judgment in an action, (ii) it is common ground that the New York judgment is enforceable today and (iii) there was no challenge by Mr. Meister to Mr. Finestone's opinion that the judgment continues to be final and conclusive notwithstanding the motion to vacate, I have concluded that the Claimant

has much the better of the argument on this issue, notwithstanding that a motion to vacate pursuant to CPLR 5015 might result in the judgment being set aside.

37. During the hearing of this jurisdictional challenge I was concerned that in circumstances where there was in fact a motion to vacate the judgment before the court in New York it would be, in terms of practical reality, wrong for this court to say that the judgment in New York was final and binding when an argument was due to be heard by the New York court at the end of this month that the judgment should be vacated. Miss Tolaney's answer to my concern was that a decision by this court that the judgment was not final and binding would be contrary to the position in New York law where the judgment is final and binding unless and until it is set aside. For the reasons I have given I accept that the Claimant has much the better of the argument on this question. I therefore accept that in those circumstances there is no difficulty in this court reflecting that position by accepting that the judgment is (presently) final and binding.

Was the judgment on the merits ?

38. Mr. Wolfson submitted that the New York judgment was not "on the merits" because, in order for a judgment to be on the merits, there must be a decision which establishes certain facts to be proved, states the relevant principles of law and expresses a conclusion with regard to the effect of applying those principles to the facts as proved; see *The Sennar No.2* [1985] 1 WLR 490 at p.499F.

39. Miss Tolaney submitted that it is well established that judgments by consent are final and conclusive on the merits; see *Naraji v Shelbourne and others* [2011] EWHC 3298 (QB) at paragraph 126. She said that the New York judgment was a species of consent judgment, EGFL's consent having been given in advance of the entry of judgment.

40. The judgment by confession was entered because there was proof that EGFL had confessed to liability in a particular sum and had authorised the entry of judgment. It seems to me that such a judgment is on the merits. It is based upon the best possible evidence that the defendant is liable for the sum in respect of which judgment is sought, namely, his own confession or admission. Such a judgment is on the merits because a court has been provided with evidence that the sum in question is due and owing. Mr. Finestone has expressed the opinion that a judgment by confession is on the merits in New York law. He said (at paragraph 33 of his first witness statement) that "even though a judgment by confession does not involve the presentation of factual issues, it nevertheless results in a judgment on the merits." Although Mr. Meister does not agree (at paragraph 16 of his second witness statement) that the authorities relied upon by Mr. Finestone support that proposition I have real difficulty in understanding why a judgment based upon a confession is not on the merits. As Mr. Finestone said (in paragraph 14 of his second witness statement) the key attribute of a judgment by confession is that it is enforceable to the same extent as a judgment in an action. In my judgment the judgment by confession is properly to be regarded in English law as on the merits just as a judgment on admission in this jurisdiction would be regarded as on the merits.

41. Since reliance was placed on *The Sennar No.2* by Mr. Wolfson I should comment on it. The issue in that case was whether a decision of a foreign court that claims for

breach of the contract of carriage in that case were only enforceable in the courts of Sudan was a decision "on the merits". The House of Lords held that it was. Lord Diplock said at p.494B

> "It is often said that the final judgment of the foreign court must be "on the merits." The moral overtones which this expression tends to conjure up make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction."

42. Lord Diplock's explanation appears to deal with both the concept of "on the merits" and the concept of "final and binding".

43. Lord Brandon said at p.499F

> "The argument in relation to the first contention was that the judgment of the Dutch Court of Appeal was procedural in nature, in that it consisted only of a decision that a Dutch court had no jurisdiction to entertain and adjudicate upon the appellants' claim, and did not pronounce in any way on the question whether the claim itself, or any substantive issue in it, if it were to be entertained and adjudicated on, would succeed or fail. In my opinion, this argument is based on a misconception with regard to the meaning of the expression "on the merits" as used in the context of the doctrine of issue estoppel. Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression "on the merits" is interpreted in this way, as I am clearly of opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel. In my view, therefore, the argument for the appellants on this point is misconceived and should be rejected."

44. The other three members of the court agreed with both Lord Diplock and Lord Brandon and so it is unlikely that there was perceived to be any conflict or difference between these two formulations. That was also how it appeared to Popplewell J. in *Naraji v Shelbourne and others* at paragraphs 127-128.

45. The judgment by confession is on the merits when that part of Lord Diplock's test dealing with "on the merits" is applied. The New York court had jurisdiction to adjudicate upon the issue and set of facts raised by the application for a judgment by confession.

46. The judgment by confession is also on the merits when Lord Brandon's test is applied. Evidence was required to establish the necessary fact that liability was confessed by EFGL. The Court expressed its conclusion by saying that it was "adjudged" that the plaintiffs recover from the defendant the sum in question. In circumstances where EFGL had confessed to judgment and had authorised the entry of judgment that appears to me to be all that is necessary in order to explain the court's conclusion. Lord Brandon's explanation of a decision on the merits was appropriate for the facts of the case before him which concerned the question whether an exclusive jurisdiction clause applied to the cause of action sought to be pursued. I do not regard his explanation as requiring precisely the same proof of facts, statement of relevant principles and conclusion with regard to applying the principles to the facts of the case where the court gives judgment upon a confession or an admission.

Conclusion on jurisdiction

47. It is necessary for the Claimant to establish that it has a good arguable case that the New York judgment by confession is a judgment in English law and that the argument is of sufficient strength that the Claimant has much the better of the argument. That test is, in my judgment, satisfied.

Clause 4.9 of the Guaranty

48. This clause (which was incorporated into the Term Sheet) provided as follows (with numbering added to aid discussion):

> "Submission to Jurisdiction. (1) (a) The Guarantor hereto irrevocably hereby expressly waives all right to object to jurisdiction or execution in any legal action or proceeding relating to this Agreement which it may now or hereafter have by reason of its present domicile or by reason of any subsequent or other domicile the Guarantor might have. (2) The Guarantor hereby irrevocably consents and agrees that any legal action, suit or proceeding arising out of or relating to this Agreement may be commenced in the Federal or State Courts located in the Borough of Manhattan, City and State of New York, and (3) by execution and delivery of this Agreement, each party hereto submits to and accepts and consents, generally and unconditionally, to personal jurisdiction in any such court with regard to any such action or proceeding for itself and in respect of its properties and assets. (4) The Guarantor agrees that a judgment in any such action, suit or proceeding may be enforced in any other jurisdiction by suit upon such judgment, a certified copy of which shall be conclusive evidence of judgment. (5) The Guarantor hereby waives any objection it may now or hereafter have to the laying of the venue of any such action, suit or proceeding, and (6)

> further waives any claim that any such action, suit or proceeding brought in any of the aforesaid courts has been brought in any inconvenient forum."

49. Miss Tolaney submitted that on the true construction of this clause EGFL cannot pursue its jurisdictional challenge because it expressly agreed that a judgment of the New York court could be enforced in any other jurisdiction and that it had waived any objection to the laying of venue of any such action and any claim that the action was brought in an inconvenient forum. In the light of my conclusion on the jurisdictional challenge this argument does not need to be decided. I shall therefore deal with it shortly.

50. There is no doubt that pursuant to parts 2 and 3 EGFL agreed that the New York court had jurisdiction to issue a judgment arising out of the Term Sheet. There is also no doubt that pursuant to part 4 EGFL agreed that a judgment of the New York court could be enforced in any other jurisdiction, which would of course include England. Part 5 appears to be a waiver of any objection "to the laying of venue" of any action to enforce the judgment and part 6 appears to be a waiver of any argument that judgment is being sought in an inconvenient forum. However, Mr. Wolfson pointed out that part 5 referred to "such action, suit or proceeding" and that part 6 referred to "any such action, suit or proceeding brought in any of the aforesaid courts" which he submitted referred back to the action, suit or proceeding before the courts listed in part 2. This submission has linguistic attraction but in my judgment the commercial sense of parts 5 and 6 was to ensure that EGFL waived any objection to the venue or forum chosen by the Claimant to enforce a judgment of the New York court. That is the meaning which, in my judgment, the words would reasonably be understood to bear.

51. However, Mr. Wolfson further submitted that whilst EGFL had waived its right to object to the venue or forum chosen by the Claimant to enforce a judgment of the New York court, there had been no waiver of any right to challenge the subject matter jurisdiction of the court. In this case it is said that the English court has no subject matter jurisdiction because the judgment by confession is not a judgment in the eyes of English law. I accept that clause 4.9 does not contain a waiver of EGFL's right to take that objection. However, for the reasons I have given that challenge has failed.

Summary judgment

52. Upon an application for summary judgment the claimant has to show that the defendant has no real prospect of defending the claim. In the present case EGFL relies upon (i) the same arguments upon which it relied to challenge the jurisdiction, (ii) a defence alleging that the judgment was obtained by fraud, by which is meant, not a dishonest misrepresentation of the position to the New York court but an innocent misrepresentation of the position to the New York court and (iii) a defence alleging that the judgment by confession was obtained in breach of natural justice.

53. With regard to the first defence, namely, that the judgment by confession was not a judgment in the eyes of English law and so could not be enforced by an action upon the judgment, I have already concluded that the Claimant has much the better of the argument that the court has jurisdiction. The question now is, does this defence have a

real prospect of success? A real prospect of success is one that carries some degree of conviction; see *JSC VTB Bank v Skurikin* [2014] EWHC 271 at paragraph 15.

54. The evidence reveals some differences of opinion as to New York law (which are of course disputes as to fact in this court). The differences of opinion relied upon concern, primarily, the true construction of the Term Sheet but they are not material for this purpose. The only other dispute identified by Mr. Wolfson concerned Mr. Finestone's reliance upon *Nash v Port Authority of New York* (2013) as authority for the proposition that a judgment continues to be final and binding notwithstanding the motion to vacate. I have already referred to this dispute and expressed my view that the Claimant has much the better of the argument upon it. In circumstances where it is common ground that the rules of the New York court provide that the judgment may be enforced in the same manner and with the same effect as a judgment in an action and where Mr. Meister expressly accepts that the judgment can be enforced notwithstanding the issue of a motion to vacate (and a motion to stay) I find it very difficult to say that EGFL's case that the judgment is not final and binding carries any degree of conviction. I have asked myself whether any more evidence can reasonably be expected to be available at trial. It may be that if there were a trial there would be greater analysis of the decision in *Nash* than is presently available. But I find it very difficult to say that such analysis might show that the judgment is not final and binding in circumstances where Mr. Meister accepts that it can be enforced now notwithstanding the issue of motions to vacate and stay the judgment.

55. For the reasons I have given I consider that the New York judgment by confession has the necessary qualities to be recognised as a judgment by the English court. It is a judgment for a debt and is final and conclusive on the merits; see *Dicey* Rule 42. The dispute as to whether the judgment has those qualities is suitable for summary determination. The court has heard very full argument on the issue over two days. It is difficult to conceive how there could be any fuller argument or any further material evidence of New York law were the matter to be resolved at trial. I do not consider that the argument the judgment is not a judgment in English law carries any degree of conviction. There is no real prospect that such a defence will succeed at trial.

The fraud exception

56. *Dicey* at Rule 50 states that a foreign judgment is impeachable for fraud. The fraud may be extrinsic, for example, consisting of the bribery of witnesses, or intrinsic, for example, consisting of the giving or procuring or perjured or forged evidence; see paragraph 14-138. There does not appear to be any suggestion in *Dicey* that fraud requires anything less than dishonest wrongdoing. However, Mr. Wolfson submitted that dishonesty was not required. It was sufficient, he submitted, that the foreign court had been misled by an innocent misrepresentation. In support of this submission he relied upon *Jet Holdings v Patel* [1990] 1 QB 335.

57. Miss Tolaney submitted that nothing less than fraud in its strict sense was required. She referred to *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm) where Simon J., at paragraph 27 (quoting from Aikens J. in an earlier case dealing with the setting aside of a domestic judgment) referred to the need for "conscious and deliberate dishonesty".

58. The starting point to consider these contrasting submissions is *Abouloff v Oppenheimer* (1883) 10 QBD 295 which established the proposition that where a foreign judgment has been obtained by fraud it cannot be enforced in this jurisdiction notwithstanding that the question of the fraud had been considered and rejected by the foreign court. The fraud alleged in that cases consisted of fraudulently concealing certain evidence from the foreign court; see p.299 per Lord Coleridge CJ. The principle in question concerned a foreign court which had been "misled intentionally by the fraud of the person" seeking to enforce the foreign judgment; see p.301 per Lord Coleridge CJ. Thus there can be no doubt that that case concerned dishonesty. Similarly, in *Vadala v Lawes* (1890) 25 QBD 310 there was an allegation that the foreign court had been misled by evidence known to be false; see p.317 per Lindley LJ. The Court of Appeal followed the decision in *Abouloff* that the allegation could be considered notwithstanding that the allegation could not be proved without re-trying the questions adjudicated upon by the foreign court. In both of these cases the conflict between the fraud exception and the principle that the English court cannot go into the merits when they have been considered and determined by the foreign court was resolved in favour of the fraud exception. In the context of resolving that conflict one would expect the fraud exception to involve dishonesty. In *Jacobsen v Frachon* (1928) The Law Times Vol.138 p.386 the Court of Appeal emphasised the need for fraud on the part of the party in whose favour judgment was given; see p.391 per Lord Hanworth MR. It was not sufficient that one of the witnesses had given perjured or biased evidence. It would be different if the successful party had procured a witness to give perjured or biased evidence; see p.394 per Atkin LJ.

59. Against that background one then comes to *Jet Holdings v Patel* [1990] 1 QB 335. In that case three US companies brought an action to recover sums alleged to have been misappropriated by the defendant while he was in their employment. He cross-claimed for damages for actual and threatened violence by the president of the plaintiff companies. Orders were made for the medical examination of the defendant in Los Angeles. He refused to comply saying that he feared that his life would be in danger if he went to Los Angeles. The plaintiff then obtained judgment against him by default and sought to enforce the judgment in England. The Court of Appeal said that there was an arguable case that the judgment had been obtained by fraud. Staughton LJ said at p.346:

> "It is I think clear that the plaintiff's Californian lawyers were asserting to the court implicitly and even to some extent expressly, that the defendant's account of violence, threats and fear was untrue. If in fact it was true, that assertion, together with the actual incidents relied on, is capable of amounting to fraud in this context: see the speech of Viscount Dilhorne in *R v Humphreys* [1977] AC 1 ,21, where he quotes a passage from *Spencer, Bower and Turner, Res Judicata*, 2nd.ed. (1969) p.323 with approval:
>
> > The fraud necessary to destroy a prima facie case of estoppel by res judicata includes every variety of mala fides and mala praxis whereby one of the parties misleads and deceives the judicial tribunals.

> Although that was said in the context of estoppel by res judicata, I cannot see that it is any the less applicable in the context of enforcement of a foreign judgment; nor apparently did Viscount Dilhorne, since in that passage he also cited *Abouloff v Oppenheimer* 10 QBD 295 and *Vadala v Lawes* 25 QBD 310."

60. Mr. Wolfson submitted that Staughton LJ (with whom Nicholls LJ agreed) was referring to an innocent misrepresentation by the Californian lawyers since he cannot have had in mind that the lawyers would have acted dishonestly. I do not consider that Staughton LJ had in mind an innocent misrepresentation by the plaintiffs. He probably had in mind that if the Californian lawyers had made the assertion that the defendant's account was untrue they did so on instructions from the plaintiffs and that if the account was true such assertions were capable of amounting to fraud on the part of the plaintiffs. I find it very difficult to accept that having regard to the circumstance that *Abouloff* and *Vadala* both concerned fraud in its strict sense of meaning some form of intentional misleading of the court Staughton LJ had in mind that an innocent misrepresentation could amount to fraud for this purpose.

61. In *JSC VTB Bank v Skurikhin* Simon J. referred to *Jet Holdings v Patel* in the following terms:

> "Secondly, fraud in this sense includes very kind of fraudulent conduct, *mala praxis* and well as *mala fides*. Thus a default judgment following threats of violence if a defendant were to attend court would give rise to a triable issue as to its enforceability, see *Jet Holdings v Patel* [1990] 1 QB 335 (CA). "

62. Whilst this may not, with respect, be a complete account of the fraud which Staughton LJ had in mind, it certainly does not suggest that an innocent misrepresentation is sufficient to amount to fraud. Simon J's later reference to the need for a "conscious and deliberate dishonesty" would make no sense if it did.

63. Finally, reference was made by Miss Tolaney to *The Ampthill Peerage* case [1977] AC 547 at p.571 where Lord Wilberforce said that if fraud was to be used to attack a declaration of legitimacy

> "only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it. "

64. Mr. Wolfson said that this statement was made in the context of domestic judgments whilst the present case concerns a foreign judgment. He submitted that, as explained by *Briggs* in *Civil Jurisdiction and Judgments* 6th.ed. at paragraph 7.69 there is a difference between a court asked to set aside an English judgment where the decision to set aside will prevent the judgment being enforced anywhere and a court being asked to set aside a foreign judgment where the decision not to enforce will only have effect in England. However, it is to be noted that in *Vadala v Lawes* Lindley LJ said at p.316

> "There is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter: using general language, that is a general proposition unconditional and undisputed. "

65. I consider that if conscious and deliberate dishonesty is required when seeking to impeach an English judgment the same is required when seeking to impeach a foreign judgment.

66. Since Mr. Wolfson expressly disavowed any allegation of dishonesty on the part of the Claimant or its New York lawyer it follows that the defence based upon the fraud exception has no prospect of success.

Breach of natural justice

67. *Dicey*, Rule 52, provides that a foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice. Mr. Wolfson submitted that the circumstances in which the Claimant obtained its judgment by confession were contrary to natural justice because no notice of the Claimant's proceedings was given to EGFL.

68. The obtaining of a judgment against a defendant without notifying him that proceedings have been commenced seeking a judgment is sufficiently striking to cause the English judicial eyebrow to rise. Indeed, in *Starlight International v Bruce* [2002] EWHC 374 (Ch) Lawrence Collins J. said at paragraph 17 that a judgment will not be enforceable if the foreign proceedings were contrary to natural justice, "especially if the defendant did not have notice of the proceedings and was not given an opportunity to present his case". But in circumstances where the judgment is obtained pursuant to a long standing procedure in a sophisticated jurisdiction such as that of the state of New York and is expressly set out in New York procedural law it would be a bold step for this court to say that that procedure is contrary to natural justice. That is especially so where there is evidence before the court from Mr. Finestone to the effect that constitutional challenges to the judgment by confession procedure (albeit in other states) have failed on the grounds that the debtor has waived his right to due process so long as the waiver is knowing, intelligent and voluntary. Whilst there is also authority criticising the procedure the criticism is in the context of judgments entered on "warrants of attorney" rather than pursuant to an affidavit of the debtor. Mr. Meister's response to Mr. Finestone's opinion is somewhat muted and appears to accept the principle that due process rights can be waived. Notwithstanding that concession he makes no attempt to suggest that in the present case EGFL did not waive its due process right to notice of the Claimant's issuance of proceedings seeking a judgment by confession. The authority discussed by both Mr. Finestone and Mr. Meister, *Fiore v Oakwood Plaza Shopping Ctr* (1991) 78 NY 2d.572, makes clear that the enforceability of a cognovit judgment depends in each case on whether there has been a voluntary, knowing and intelligent waiver of the right to notice and an opportunity to be heard; see p.580. In that case it was held that there was "a bargain struck between sophisticated commercial parties. It is clear that the defendants made a voluntary, knowing and intelligent waiver of their right to notice and an opportunity to be heard, and should be held to the consequences of their conduct"; see p.582.

69. In its affidavit of confession of judgment EGFL "confesses judgment and authorises entry thereof in favour of lenders ….in any federal or state court located in the Borough of Manhattan, City and State of New York…." The term sheet evidences a bargain between sophisticated commercial parties. In circumstances where EGFL's affidavit of confession of judgment suggests that notice of proceedings to enter such judgment has been waived the absence of any expression of opinion by Mr. Meister (either in his evidence before this court or in his memoranda of law in support of EGFL's motions before the New York court) that there had been no effective waiver is striking.

70. In *Batavia Times Publishing v Davis* (1977) 82 DLR 247 the Ontario High Court had to consider whether a judgment entered in Pennsylvania pursuant to an agreement whereby the debtor submitted to the jurisdiction and empowered "any attorney …to appear for and enter judgment" against the debtor was a denial of natural justice in that no notice of the proceeding was given to the debtor. The court decided that it was not a denial of justice. Carruthers J. said at p.251:

> "In my opinion, the defendant in authorising and empowering "any attorney" to appear for and enter judgment against him has constituted that attorney as his agent. When the agent does in fact enter judgment against the defendant in accordance with the defendant's written authorisation, what further notice is required? The defendant had notice through his agent."

71. That reasoning is applicable to the present case. EGFL, in its affidavit of confession to judgment authorised the Claimant to enter judgment against it in the amount of the stated sum.

72. Whilst this court would not enter judgment without notice to a defendant I am not persuaded that there is a real prospect that this court would at trial hold that the New York procedure was contrary to natural justice. The reason I am not persuaded that there is such a prospect is (a) that on the material before the court it appears that there was an effective waiver of the right to notice, (b) that no case has been advanced that there was no such waiver and (c) that no suggestion has been made that at trial there can reasonably be expected to be available evidence showing that there had been no such waiver.

Conclusion on summary judgment

73. There is no real prospect that at trial the New York judgment will be held not to be a judgment in English law or that the fraud exception applies or that the judgment will be regarded as having been obtained in breach of natural justice. It therefore follows, there being no other reason for a trial, that summary judgment should be entered.

<u>The stay application</u>

74. Mr. Wolfson's final submission was that on case management grounds the court should stay enforcement of any summary judgment granted by the court. He submitted that this was appropriate in circumstances where the New York judgment may be vacated pursuant to the motions which are already before that court. This would avoid the need to undo any execution in this jurisdiction in the event that the

New York judgment were vacated. Miss Tolaney submitted that clause 4.9 of the Guarantee (incorporated into the Term Sheet) contained an agreement not to seek a stay. Whilst it contained an agreement not to seek a stay on *forum conveniens* grounds I do not consider that it contained an agreement not to seek a stay on case management grounds. She further submitted that the stay should be refused because it could be for a long time (since it is not known when the New York court will give judgment on EGFL's motions and there might be an appeal) and there had been no offer not to dissipate assets in the meantime.

75. There is a motion before the New York court to stay execution of the judgment by confession. It is due to be heard at the end of this month along with the motions to vacate the judgment. Were the New York court to grant a stay pending its judgment on the motions to vacate it would be odd, and arguably inconsistent with the doctrine of comity, were this court to permit execution of this court's summary judgment on assets within this jurisdiction. I therefore consider that in circumstances where the New York is very shortly to consider the motions before it there should be a stay of execution of this court's summary judgment until one week after the hearing in New York on 29 March 2017. If the New York court grants a stay of execution of the judgment by confession then the stay of this court's summary judgment should last as long as the stay in New York. If however the New York court decides not to grant a stay pending determination of the motions to vacate then the stay on enforcement of this court' summary judgment will end 7 days after the hearing in New York. To ensure that the stay causes no prejudice to the Claimant the stay should be conditional upon EGFL undertaking not to deal with or dispose of its assets within the jurisdiction.

Conclusion

76. This court has jurisdiction to hear and determine the claim to enforce the New York judgment by confession. The Claimant is entitled to summary judgment on its claim to enforce that judgment. There must however be a stay of execution of that summary judgment on the terms indicated in paragraph 75 of this judgment. I request counsel to prepare an order giving effect to this judgment.