Neutral Citation Number: [2020] EWCA Civ 1743

Case No: A3/2020/1258

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
CHANCERY DIVISION
MR ANDREW LENON QC SITTING AS A DEPUTY HIGH COURT JUDGE
[2020] EWHC 1889 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE HENDERSON
and
LORD JUSTICE POPPLEWELL

- -

Between :

STEPHENSON HARWOOD LLP	**Claimant**
- and -	
(1) MEDIEN PATENTVERWALTUNG AG	**Defendant/ Appellant**
(2) MICHAEL KAGAN (AS ADMINISTRATOR OF THE ESTATE OF IRVING KAGAN)	**Defendant/ Respondent**

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Mr Ali Reza Sinai (instructed by **OGR Stock Denton LLP**) for the **Appellant**
Mr George Spalton (instructed by **Griffin Law Limited**) for the **Respondent**

Hearing date: 3 December 2020

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Approved Judgment

Lord Justice Floyd:

1. In this stakeholder claim under CPR Part 86, Stephenson Harwood LLP, a firm of solicitors ("SH"), asked the court to determine rival claims to monies held in its client account. The two rival claims were those of the appellant, Medien Patentverwaltung AG, a Swiss company ("MPV"), and Mr Michael Kagan, the administrator of the estate of the late Mr Irving Kagan, who sadly died in the course of these proceedings. I will not seek to distinguish in what follows between the late Mr Irving Kagan and Mr Michael Kagan, his administrator, both of whom will be referred to as Mr Kagan. MPV wishes to challenge the jurisdiction of the court to try the stakeholder claim, but Mr Kagan disputes that it is entitled to do so. He says that the procedure laid down in CPR Part 11 applies and that MPV is deemed to have submitted to the jurisdiction or, alternatively, have submitted to the jurisdiction in fact. Deputy Master Bartlett, in a decision dated 6 June 2019, held that the jurisdiction challenge was not open to MPV, and Mr Andrew Lenon QC, sitting as a Deputy High Court Judge, dismissed MPV's appeal from the Deputy Master's order for the reasons given in a judgment dated 14 July 2020. Arnold LJ gave permission for a second appeal to this court, as the case raised, he thought, an important question about the relationship between CPR Parts 86 and 11.

2. The terminology of stakeholder claims can be confusing. Formally, the party issuing the claim, the stakeholder, is the claimant and the two or more rival "claimants" to the property held by the stakeholder are the defendants. In this judgment I will refer to SH as the stakeholder and MPV and Mr Kagan as the competing or rival claimants.

Background facts

3. The facts, which I can borrow with gratitude from the judge's paragraphs 7-12, are as follows.

4. In 2015 MPV brought patent infringement proceedings in the High Court against various parties. SH were the solicitors for MPV. Mr Kagan was a US Attorney practising and residing in New York, and who had a consultancy business called Kagan Consultants. Mr Kagan had previously worked with MPV and assisted MPV with the patent infringement proceedings. The patent proceedings in the UK were funded by a litigation funding company which paid SH's fees, the disbursements and a US$5,000 monthly fee to Kagan Consultants or Mr Kagan personally.

5. The patent proceedings were settled, alongside concurrent German litigation, in late 2018 for a global costs-inclusive payment of US$6.5m which was to be paid to SH. In November 2018, prior to the receipt of the settlement monies, SH was notified of the existence of a claim by Mr Kagan against MPV. Mr Kagan asserted that he was entitled to a success fee for services provided in connection with the patent proceedings. The quantum of the success fee was estimated to be around US$570,000. It was further asserted by Mr Kagan that he had a proprietary claim to this sum when received by SH as part of the settlement monies, preventing it from being released to MPV in Switzerland.

6. In response to Mr Kagan's claim, MPV denied that it had any contractual relationship with Mr Kagan personally. It contended that its relationship was with Kagan Consulting to whom nothing further was due.

7. On 8 January 2019 SH received a tranche of the settlement monies on behalf of MPV. In view of the competing claims made in correspondence on behalf of Mr Kagan and MPV, SH decided to set aside and retain the sum of $570,000 which remains in SH's client account pending the outcome of these proceedings ("the Monies").

8. Further correspondence ensued, in the course of which both MPV and Mr Kagan demanded that SH pay the Monies to them and threatened legal action if their demands were not met. In these circumstances, SH decided to make a stakeholder application to the court for directions.

Legal framework

9. Stakeholder proceedings under CPR Part 86 correspond in broad terms to what, under the former Rules of the Supreme Court, were called interpleader proceedings. Those were governed by Order 17 of the Rules of the Supreme Court. In *Glencore International v Shell International Trading and Shipping Co Ltd and another* [1999] 2 Lloyd's LR 692 Rix J described the claim for interpleader relief under Order 17 in the following terms:

> "… a claim for interpleader relief (1) is an application to be released from proceedings, not a claim for any substantive right; (2) is conditional on at least the threat of adverse claims to the same subject matter; (3) is further conditional on the applicant disclaiming any interest in that subject matter; (4) typically results in the release of that applicant from any pending proceedings and (5) leads to the stating of an issue or issues between the claimants themselves (hence "interpleader")."

10. CPR Part 86 has similarities to the former Order 17, but there are also differences. It provides, so far as relevant:

> "86.1
>
> (1) This Part contains rules which apply where—
>
> (a) a person is under a liability in respect of a debt or in respect of any money, goods or chattels; and
>
> (b) competing claims are made or expected to be made against that person in respect of that debt or money or for those goods or chattels by two or more persons.
>
> …
>
> 86.2
>
> (1) A stakeholder may make an application to the court for a direction as to whom the stakeholder should—
>
> (a) pay a debt or money; or

(b) give any goods or chattels.

(2) Such application must be made to the court in which an existing claim is pending against the stakeholder, or, if no claim is pending, to the court in which the stakeholder might be sued.

(3) A stakeholder application must be made by Part 8 claim form unless made in an existing claim, in which case it must be made by application notice in accordance with Part 23.

(4) A claim form or application notice under this rule must be supported by a witness statement stating that the stakeholder—

(a) claims no interest in the subject-matter in dispute other than for charges or costs;

(b) does not collude with any of the claimants to that subject-matter; and

(c) is willing to pay or transfer that subject-matter into court or to dispose of it as the court may direct.

(5) The stakeholder must serve the claim form or application notice on all other persons who, so far as they are aware, asserts (sic) a claim to the subject matter of the stakeholder application.

(6) A respondent who is served with a claim form or application notice under this rule must within 14 days file at court and serve on the stakeholder a witness statement specifying any money and describing any goods and chattels claimed and setting out the grounds upon which such claim is based.

(7) The claim form or application notice will be referred to a Master or a District Judge.

86.3

(1) At any hearing in a stakeholder application, the court may—

(a) order that any stakeholder or any claimant to the subject matter of the application be made a defendant in any claim pending with respect to the subject-matter in dispute;

(b) order that an issue between all parties be stated and tried and may direct which of the parties is to be claimant and which defendant, and give all necessary directions for trial;

(c) determine the stakeholder application summarily;

> (d) give directions for the determination of the application summarily or of any issue on the application; or
>
> (e) give directions for the retention, sale or disposal of the subject matter of the application, and for the payment of any proceeds of sale.
>
> (2) Nothing in this rule limits the court's case management powers to make any other directions permissible under these Rules.
>
> 86.4
>
> (1) Part 39 will, with the necessary modifications, apply to the trial of a preliminary issue directed to be tried in a stakeholder application as it applies to the trial of a claim.
>
> (2) The court by which an issue is tried may give such judgment or make such order as finally to dispose of all questions arising in the stakeholder application.
>
> 86.5
>
> (1) The court may in or for the purposes of any stakeholder application make such order as to costs or any other matter as it thinks just.
>
> (2) Where a respondent fails to appear at the hearing, the court may direct that the stakeholder's costs shall be summarily assessed."

11. Rule 5(1) of the former RSC Order 17 provided that the court could make any of the rival claimants a defendant *in substitution for* the applicant in any pending proceedings. In this way, the applicant could be released from proceedings. There is no equivalent to this in CPR 86.3(1)(a). Rule 5(1) appears to have been the basis of Rix J's characterisation of interpleader proceedings as an "application to be released from proceedings and not a claim for any substantive right". Moreover, the powers expressly given to the court in CPR 86.3 include an express power to give to the stakeholder directions for the retention, sale or disposal of the subject matter of the application, and for the payment of any proceeds of sale, powers which were not expressly given to the court under Order 17, which referred only to "interpleader relief". The stakeholder, although taking a back seat during the resolution of any issue between the rival claimants, nevertheless remains a party throughout and will be the subject of the court's binding direction at the end of the proceedings. It follows that the description of interpleader proceedings as simply an application to be released from proceedings no longer gives the whole picture.

12. CPR Part 11 lays down the procedure where a defendant wishes to challenge the court's jurisdiction:

> "(1) A defendant who wishes to –

> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
>
> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
>
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
>
> (4) An application under this rule must –
>
> (a) be made within 14 days after filing an acknowledgment of service; and
>
> (b) be supported by evidence.
>
> (5) If the defendant –
>
> (a) files an acknowledgment of service; and
>
> (b) does not make such an application within the period specified in paragraph (4),
>
> he is to be treated as having accepted that the court has jurisdiction to try the claim."

13. CPR 11(5) thus effects a deemed submission to the jurisdiction of the court in respect of "the claim". As is well settled, it is the failure to make the Part 11 application within the period specified, rather than the failure to tick the appropriate box on the form of acknowledgment of service, which constitutes acceptance that the court has jurisdiction to try the claim.

14. Some indication that Part 11 was intended to apply to Part 86 applications can be seen from the following. CPR 86.2(3) provides that the stakeholder application if not made within existing proceedings must be made by Part 8 claim form. CPR 8 PDA 9.1 provides a table of types of claim for which the Part 8 procedure must be used which includes stakeholder applications under Part 86. The Part 8 procedure includes, under CPR 8.31 and CPR 8 PDA 5.2, the filing of an acknowledgement of service in Form N210. That Form is not modified for Part 86 claims, and includes the familiar boxes which ask a defendant whether they intend to defend the claim, or dispute the court's jurisdiction to hear it, in line with the procedure under Part 11. There is, in any event, no issue on this appeal that Part 11 does apply to a stakeholder claim. The issue concerns the consequences for a defendant of submitting to the jurisdiction in such a case.

15. In *Eschger v Morrison, Kekewich Co* (1890) 6 TLR 145 there were rival claims to a consignment of copper in the hands of wharfingers in London, one of the claims already being the subject of direct proceedings against the wharfinger. The wharfinger took out an interpleader summons, an issue was directed to be tried between the rival claimants, one of whom was English and the other a French firm, and the proceedings in the direct action were stayed. The English rival claimant had an additional money claim against the foreign claimant, and sought to raise it within the interpleader proceedings. The Master and the judge in chambers both refused to allow this, but the Divisional Court ordered the issue in the interpleader to be set aside, and the parties in the direct proceedings to be amended to substitute the French claimant for the wharfinger, whereupon the claimant in those proceedings was to be permitted to claim for both the copper and the additional debt. The Court of Appeal set aside this order.

16. The Master of the Rolls, Lord Esher "doubted very much whether the court had the power to transform an interpleader issue into a wholly general action", and, whether or not that was so, it was wrong to do so in the present case. The effect of the order had been:

> "to make a foreign firm, wholly domiciled abroad, defendants without observing any of the conditions which the law required to be observed before making a foreigner a defendant in an independent action. The court ought not to allow itself to mix up modes of procedure for the purpose of doing that which they had no power to do in a direct way."

17. Bowen LJ said the proposed defendants in the direct claim:

> "were not liable to English law to any further extent than their position as claimants enabled a Judge in Chambers to impose upon them in granting an interpleader issue. They were not before the Court for all purposes."

18. *Commonwealth of Australia v Peacekeeper International and another* [2008] EWHC 1220 concerned four armoured vehicles leased by Australia for use in Iraq. Australia issued interpleader proceedings in the High Court in England. Two rival claimants to the property returned the acknowledgment of service, but sought subsequently to widen the scope of interpleader proceedings to add additional claims by one rival claimant against Australia for continuing payments under the lease and by one claimant against the other for unlawful interference with its business with Australia.

19. Foskett J held at [48] that Australia had not submitted to the jurisdiction for any purpose other than asking the English court to assist in dealing with the dilemma it faced arising from the competing claims of the rival claimants to the four vehicles. The rival claimant had also not submitted to the jurisdiction "other than to participate in the interpleader proceedings in their traditional sense" ([49]).

20. It is clear therefore that the courts have been careful not to regard submission to the jurisdiction in the case of a stakeholder application as a submission to the jurisdiction for all purposes or for the purposes of extraneous claims against the stakeholder or the rival claimants. None of the cases, however, suggests that a foreign defendant should

not be treated as submitting to the jurisdiction for the purposes of determining the stakeholder claim itself.

The proceedings

21. SH's Claim Form was issued on 30 January 2019 naming the rival claimants to the Monies, MPV and Mr Kagan, as the defendants. The short details of the claim were

> "The Claimant seeks relief by way of a stakeholder claim under CPR 86.2 for directions as to the payment of monies currently held in the Claimant's client account (in the sum of US$570,000) for provision to be made for the Claimant's costs and for such other relief as the court thinks fit to grant."

22. In the supporting witness statement, Richard Gywnne, a partner in SH, set out the factual background and produced the relevant correspondence from MPV and Mr Kagan. It is perhaps worth noting two points. First, in paragraph 6.3 of his witness statement Mr Gwynne refers to a letter to SH of 3 January 2019 from solicitors for Mr Kagan which sought confirmation that the Monies would be set aside and not remitted to MPV on the basis that they were subject to express or constructive trusts in favour of Mr Kagan. Secondly, in paragraph 6.9, Mr Gwynne explained that on 23 January 2019 SH had received a letter from English solicitors instructed by MPV, threatening injunctive relief against SH unless all the Monies were paid over to MPV. The same witness statement also confirmed (in accordance with CPR Part 86.2(4)) that SH claimed no interest in the Monies, did not collude with any of the parties and was willing to pay the Monies into court or dispose of them as the Court directed.

23. On 14 February 2019, MPV and Mr Kagan filed acknowledgements of service. MPV's solicitors completed the acknowledgment of service form by ticking the box in Section B indicating that MPV intended to contest the claim and adding the following details in manuscript of the remedy they were seeking:

> "The First Defendant claims that the monies currently held in the Claimant's client account in the sum of US$570,000 should immediately be paid to the First Defendant together with accrued interest".

24. MPV's solicitors did not tick the box in Section C to indicate that MPV intended to dispute the Court's jurisdiction.

25. On 27 February 2019 the parties exchanged witness statements. MPV served a statement from Gerhard Lehmann, its chief executive officer, in support of its claim that the Monies should "be immediately released to MPV together with accrued interest". He confirmed that MPV had sufficient assets to pay any judgment obtained by Mr Kagan in the "the appropriate jurisdiction, which is likely to be a Court outside of the UK." Mr Lehmann explained why he did not accept that Mr Kagan was entitled to a success fee. He stated that he did not agree and did not believe that that any agreement between MPV and Kagan Consultants was governed by English law or subject to the jurisdiction of the English courts. He concluded:

> "I would respectively (sic) ask the court to make an order that [SH] pay the Monies to MPV forthwith together with accrued interest."

26. As the judge observed, this witness statement was the first occasion on which MPV had indicated that it might dispute the jurisdiction of the English court to resolve issues raised in the stakeholder application.

27. Mr Kagan's witness statement of 27 February 2019 explained why he considered that he was beneficially entitled to have a proprietary interest in the Monies. He contended that there was an express trust to that effect. In the alternative he contended that the facts gave rise to a constructive trust in his favour. In the further alternative he asked that an equitable lien, equivalent to a solicitor's lien, should be imposed in his favour.

28. By a letter dated 21 March 2019 to Mr Kagan's solicitors, MPV's solicitors said: "we do not consider it appropriate for the Master to determine the underlying claim pursued by Mr Kagan by way of a trial within the stakeholder claim. This is not the jurisdiction in which to determine the claim." By a letter dated 28 March 2019, Mr Kagan's solicitors asked MPV's solicitors to say what the correct jurisdiction would be for Mr Kagan's contractual claim as they had refused to do so on the telephone. In a letter the following day, MPV's solicitors said that Mr Kagan was claiming the Monies on the basis of the disputed terms of his retainer and that this dispute could not be determined in England and must be determined in Switzerland. On 1 April 2019 MPV's solicitors wrote to the court to say that MPV would seek to treat the forthcoming hearing as a disposal hearing and ask for the immediate release of the Monies to it.

29. On 3 April 2019, MPV served a second witness statement from Mr Lehmann rebutting points in Mr Kagan's first witness statement concerning the arrangements for payment of his fees.

30. At the hearing before the Deputy Master on 6 June 2019, it was argued on behalf of MPV that the Court had no jurisdiction to try the merits of a claim between itself and Mr Kagan, alternatively that it should not exercise that jurisdiction as a matter of discretion and it should either order the money to be paid or it should retain the money for a limited period in order to give Mr Kagan an opportunity to commence a claim in whatever jurisdiction he considered proper to recover the money. It was argued on behalf of Mr Kagan that, as MPV had not challenged jurisdiction in accordance with the provisions of CPR Part 11, it was now not open to it to do so and that MPV had actively engaged with the proceedings by serving two rounds of evidence in response to the Part 8 claim brought by SH[1].

31. In his *ex tempore* judgment the Deputy Master held that CPR Part 11 applied to the stakeholder application and that, as MPV had failed to make a Part 11 application disputing the Court's jurisdiction, it was to treated as having accepted that the Court had jurisdiction to try the claim.

[1] Mr Kagan's skeleton argument for the hearing before the Master, paragraph 44.

32. The Deputy Master gave directions requiring Mr Kagan to file and serve Points of Claim setting out his case to the beneficial entitlement to the Monies and for MPV to serve Points of Defence. On 15 July 2019 Mr Kagan served Points of Claim. The relief sought in the Points of Claim was that the court should (1) direct SH to pay the Monies to Mr Kagan, (2) order MPV to pay Mr Kagan's and SH's costs, and (3) give such further or other relief as the court thought just. The proceedings were then stayed pending the outcome of the first appeal, for which permission was granted by Morgan J.

33. The appeal came before Mr Lenon QC who identified a number of issues which required resolution. The first was whether CPR Part 11 applied to a stakeholder application, and, if so, what was the effect of MPV's failure to make a Part 11 application. On this issue he concluded that Part 11 did so apply, and that MPV's failure to make a Part 11 application meant that it was treated pursuant to CPR 11(5) as having accepted the jurisdiction of the court to determine the stakeholder application, including the making of any directions and the determination of any issues arising in the stakeholder application as to whether Mr Kagan or MPV is entitled to the Monies.

34. The second issue identified by the judge was whether MPV had, by its conduct, submitted to the jurisdiction of the Court to determine the issues raised by Mr Kagan in any event. The judge concluded that MPV had, by the steps it had taken in the proceedings, submitted to the jurisdiction in fact.

35. The judge also identified a third issue which was whether the court would have jurisdiction to determine the issues raised by Mr Kagan irrespective of any submission to the jurisdiction. The Master had declined to decide this issue, and the judge declined to decide it as well.

The appeal

36. Ground 1 of MPV's appeal challenges the judge's conclusion that, by not making an application under CPR 11(5), MPV was to be treated as submitting to the jurisdiction "for the determination of the issue which [Mr Kagan] wanted determined by way of a trial". Ground 2 challenges the judge's conclusion on the second issue he decided, that MPV had also submitted to the jurisdiction by its conduct. In addition, Ground 1 confusingly asserts that MPV was correct to assert that the court does not have jurisdiction to determine the issue requested by Mr Kagan between him and MPV. I will treat this as Ground 3.

37. Mr Sinai, who appeared for MPV, accepted that the purpose of a Part 11 application was to dispute the court's jurisdiction to try the claim set out in the claim form. He submitted, however, that the only claim set out in the claim form was an application for directions. It was only at a later stage when the issues for determination were identified that the court could decide questions of jurisdiction. It would be futile for a defendant to challenge the court's power to give these preliminary directions. By failing to file a Part 11 application, MPV was not to be treated as having accepted that the Court had jurisdiction to determine the separate claim made by Mr Kagan against MPV.

38. Mr Sinai placed considerable reliance on the decision in *Cool Carriers A.B. and another v HSBC Bank USA and others* [2001] 2 Lloyd's LR 22 which, he submitted, showed that it was inappropriate to use interpleader proceedings to compel a foreign party to submit to the jurisdiction for the purposes of resolving the dispute between it and another party, when that other party could not bring about that result itself.

39. Mr Sinai also submitted that the judge had been wrong to hold that MPV had submitted to the jurisdiction by its conduct because MPV had at all times made clear that it was not submitting to the court's jurisdiction for any trial directions.

40. Mr Spalton, who appeared for Mr Kagan, supported the judge's decision. Stakeholder proceedings had both procedural and substantive aspects. Even if they are to be regarded as purely procedural, the claim had *in personam* consequences for SH and the parties. In the present case it was clear from the outset what the nature of the claim was and what issues were to be decided in it. There was no basis for leaving jurisdictional challenges to a second stage.

Discussion

41. A stakeholder claim is a claim by a party facing rival claims to some form of property which asks the court to decide which of the rival claimants has the better claim to the property. The purpose of bringing the claim is so that the stakeholder may safely decide how to dispose of the property. The court has the power to give a direction as to how the property is to be disposed of which binds the parties to the proceedings. If the stakeholder disposes of the property in accordance with the directions of the court, it can do so without incurring liability to one or other of the rival claimants. In the normal case, the court will decide that the stakeholder is not liable to one of the claimants, but liable to the other.

42. This short characterisation of the nature of stakeholder relief shows that it is analogous in some respects to a claim for a declaration. The court's direction at the end of stakeholder proceedings is comparable to a declaration of the stakeholder's non-liability to one of the rival claimants and of liability to the other in respect of the claims to the property. In that sense there is a substantive aspect to the claim.

43. Although a stakeholder claim may give rise to an issue being stated between the rival claimants, a rival claimant does not bring a claim against the other. The issue, if directed, arises as a consequence of the fact that the stakeholder claim is brought to determine the rival claims against the stakeholder.

44. MPV's case on this appeal therefore mischaracterises the nature of SH's claim in at least two respects. Firstly, it was not a claim simply seeking procedural directions for the trial of an issue. It was a claim seeking a binding direction as to how the Monies should be disposed of. The relief sought by the claim form made this abundantly clear, as did the witness statement of Mr Gwynne which MPV had seen before it returned the acknowledgment of service and long before the time expired for making its Part 11 application.

45. Secondly, SH's claim was not, and did not create, a claim by Mr Kagan against MPV. I do not accept that the fact that issues are raised in the stakeholder claim which would also arise in a direct claim by Mr Kagan against MPV engages the principle in

Eschger or *Australia* (both cited above). The issues which arise are limited to those which arise because the court is deciding the rival claims in the stakeholder proceedings, and do not stray beyond that objective.

46. Once these points are understood, MPV's case on this appeal falls away. It simply was not open to MPV to accept the court's jurisdiction, as it claims to be able to, in two separate tranches. It must accept the jurisdiction of the court to try the claim, or challenge it. Having failed to issue a Part 11 application within the time specified (or indeed at any time) it is deemed to have accepted the jurisdiction of the court to try the claim.

47. *Cool Carriers A.B. and another v HSBC Bank USA and others* (cited above) does not assist MPV's arguments. In that case the issue was whether leave to serve out of the jurisdiction should have been granted in interpleader proceedings under the former Order 17. Tomlinson J had to consider whether the claim to interpleader relief could properly be characterised as a claim in respect of a contract. No question arose in that case as to whether the defendants had submitted to the jurisdiction of the court for any purpose.

48. For these reasons, I would dismiss MPV's first ground of appeal. It is therefore not necessary to consider the second ground of appeal, which arises only if the first is upheld. I am entirely satisfied, however, that this ground of appeal should also fail. First, in the absence of any error of principle, the judge's conclusion that MPV had, by its conduct, accepted the jurisdiction of the court to try the stakeholder claim was an evaluative conclusion with which this court would not be entitled to interfere. There was no error of principle in the judge's approach. He did not misunderstand the nature of a stakeholder claim, or the issues which arose within it. Secondly, it is just not true to say that MPV had at all material times made clear that it did not accept the jurisdiction of the court to give a direction as to the correct destination of the Monies. MPV took the earliest opportunity which it could to assert that the English court could make such a direction, by causing its solicitors to write on the acknowledgment of service that it required the court to order payment of the Monies to it together with interest.

49. In the witness statements submitted on its behalf, MPV proceeded to engage with Mr Kagan on the merits of the claim, and repeat their demand for payment out of the Monies to it. The passages in Mr Lehmann's witness statement which refer to jurisdiction do not explain why the English court does not have jurisdiction to try the stakeholder claim, as opposed to a putative claim by Mr Kagan against MPV. Instead they assert (1) that MPV have sufficient assets to pay Mr Kagan's claim "in the appropriate jurisdiction, which is likely to be a court outside the UK"; (2) that the agreement between MPV and Kagan Consultants was not governed by English law or subject to the jurisdiction of the English courts (paragraph 15); (3) a belief that the English court is not the appropriate forum to determine a term of the alleged fee agreement between MPV and Kagan Consultants "and certainly not as part of a stakeholder application" (paragraph 23); and (4) that the English court was not the proper forum to determine what was agreed at a mediation in Vancouver (paragraph 24). None of this comes near to an assertion that the English court has no jurisdiction to determine the Part 86 stakeholder claim and give a direction as to whom SH should pay the Monies. In any event it all comes too late.

50. We were also addressed on MPV's Ground 3 (as I have identified it above). This ground would only arise if MPV had succeeded on its other grounds. Neither the Master nor the judge thought that they should decide this issue. We did not consider that we should decide it either. In consequence we did not hear argument from the Mr Kagan on it, and I need say no more about it.

51. For the reasons I have given, if my Lords agree, the appeal must be dismissed.

Lord Justice Henderson:

53. I agree.

Lord Justice Popplewell:

54. I also agree.