Neutral Citation Number: [2019] EWHC 3475 (Ch)

Case No: BL-2019-000707

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 19/12/2019

Before:

MASTER CLARK

- -

Between:

OURSPACE VENTURES LIMITED **Claimant**

- and -

MR KEVAN HALLIWELL **Defendant**

- -
- -

Salim Merali (solicitor-advocate of **S Merali & Co**) for the **Claimant**
Mark Grant (instructed by **Howes Percival LLP**) for the **Defendant**

Hearing date: 28 November 2019

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Approved Judgment

This is the approved judgment handed down on the above date and is to be treated as authentic.

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Master Clark:

Application

1. This is my judgment on the application dated 17 September 2019 of the defendant, Kevan Halliwell, for a declaration pursuant to CPR Part 11 that the court does not have (or should not exercise) jurisdiction in respect of this claim.

Claim and background

2. The claim is for enforcement of a personal guarantee contained in a written agreement between the parties dated 8 April 2018 ("the Personal Guarantee"). This related and referred to a loan facility agreement of the same date ("the Facility Agreement") between the claimant and Ourspace TC International Limited, Mauritius ("the principal debtor")

3. The Personal Guarantee contained, at clause 17, provisions as to governing law and jurisdiction, which included, so far as relevant:

> "*17.1 Governing Law*
>
> *This Deed and any non-contractual obligations arising out of or in connection with it are governed by English law.*
>
> *17.2 Arbitration*
>
> *(a) Any dispute, claim, difference or controversy arising out of, relating to or having any connection with any Finance Documents* [the definition of which is at clause 1.5 and includes the Personal Guarantee itself], *including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it (for the purpose of this clause, a* ***Dispute****), shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules…*
>
> *17.3 Option to Litigate*
>
> *(a) Notwithstanding Clause 17.2 (Arbitration), [the claimant] may by notice (a* ***Litigation Notice****) in writing to [the defendant] require that all Disputes or a specific Dispute be settled exclusively by the English Courts. A Litigation Notice shall specify the following:*
>
> *(i) that a Dispute has arisen;*
>
> *(ii) the Parties involved in the Dispute; and*
>
> *(iii) the nature of the Dispute to be settled by the DIFC courts.*
>
> *(b) If a Litigation Notice is given by [the claimant] pursuant to this Clause, the Parties agree that:*
>
> *(i) the DIFC courts have exclusive jurisdiction to settle any Dispute which is the subject of any such Litigation Notice;*
>
> *(ii) the DIFC courts are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary and each waives objection to the DIFC courts on the*

grounds of inconvenient forum or otherwise in relation to proceedings in connection with the Finance Documents; and

(iii) the Parties cannot commence arbitration proceedings in respect of the Dispute(s) specified in the Litigation Notice and any arbitration proceedings commenced in respect of any such Disputes will be terminated.

(c) This clause is for the benefit of [the claimant] only. As a result, [the claimant] shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, [the claimant] may take concurrent proceedings in any number of jurisdictions."

(underlining added)

4. The Facility Agreement contains a substantially similar provision at clause 41.

5. The claimant alleges that in October 2018 the principal debtor defaulted in its repayment obligations under the Facility Agreement, and accordingly the defendant became liable under the Personal Guarantee. The sum claimed is about £2.3 million.

6. On 28 March 2019, the claimant sent the defendant a letter ("the Letter") in the following terms (so far as relevant):

> "*… A dispute has now arisen where in the parties involved are [the claimant] and [the defendant] which could, if [the claimant] chose, be settled by the DIFC in Dubai in relation to the breach of your guarantee and primary obligor obligations undertaken on behalf of* [the principal debtor].
>
> *However, please be notified that this dispute will be settled exclusively by the English Courts and in accordance with English law.*
>
> *Accordingly, take notice that this is a Litigation Notice under Clause 17.3 (k) of* [the Personal Guarantee].*"*

7. On 16 April 2019, the claim was issued. On 26 July 2019 I made an order for service of the defendant by alternative means. Paragraph 3 of that order provided that the deemed date of service was 7 days after the last of the permitted acts of service. Although no formal evidence of service was before me, the claimant's advocate informed me that the claim form and particulars of claim were posted and emailed to the defendant on the date the order was sealed, 29 July 2019. The deemed date of service of the claim form was therefore 2 August 2019; so that the acknowledgement of service was required to be filed by 19 August 2019.

8. On 19 August 2019, the defendant filed an acknowledgement of service in which he ticked 2 of the boxes on the form, stating that he intended to defend all of the claim and to contest jurisdiction.

9. On 2 September 2019, the defendant's solicitors sought an extension of time for filing and service of the Defence until 17 September 2019, which was due on 3 September 2019. This was also the date by which any application to challenge jurisdiction was required to be made, but the defendant's solicitors did not seek an extension of time for that application. The extension of time for the Defence was agreed to by the claimant's solicitors the next day.

10. The Defence was served on the same date that this application was made. Paragraphs 3 to 6 of the Defence set out the defendant's grounds for asserting that the English court does not have jurisdiction:

> "***Jurisdiction of England and Wales is not correct***
>
> *3. The Defendant disputes that the jurisdiction of the courts of England and Wales to try this claim on the grounds that there is an express agreement between the parties, pursuant to the [Personal Guarantee], that the DIFC courts… have exclusive jurisdiction to settle any dispute (as provided for at paragraph 17. 3 (b) of the Facility Agreement).*
>
> *4. The Claimant purports to have issued a litigation notice on the Defendant in accordance with the [Personal Guarantee] at clause 17.3 (a). Accordingly, the correct court in which to bring this dispute is in the jurisdiction of the DIFC courts are not the courts in England and Wales. Clause 17.3(b) of the [Personal Guarantee] is set out as follows, and the parties agreed that:*
> [sets out paras 17.3(b) (i) and (ii) of the Personal Guarantee]
>
> *5. Accordingly, the parties expressly agreed that no party will argue against and that they waived any objection to the DFIC courts having exclusive jurisdiction in relation to these proceedings. For the avoidance of any doubt, the Defendant avers that the courts of England and Wales do not have any jurisdiction to hear these proceedings and are subsequently not courts with jurisdiction for the reasons set out herein and that clause 17.3(c) is therefore not applicable.*
>
> *6. Without prejudice to the above assertion, if it is contested that clause 17.3 of the Facility Agreement provides for exclusive jurisdiction for any disputes arising out of the facility agreement and/or the [Personal Guarantee], then because it is a matter of interpretation of the Facility Agreement and/or the [Personal Guarantee], the correct mechanism for interpretation of the Facility Agreement and/or the [Personal Guarantee] will be arbitration pursuant to clause 17.2 of the [Personal Guarantee]. Pursuant to clause 17.2 of the [Personal Guarantee], arbitration is the correct procedure for the parties to invoke to decide the jurisdiction of the claim, and subsequently this matter should not be litigated in the courts."*

11. No formal application to extend time for making the application has been made by the defendant.

Issues in the application

12. In the above circumstances, the following issues arise in the application:
    (1) whether the defendant submitted to the jurisdiction before making the application;
    (2) if not, whether an extension of time should be granted for making the application;
    (3) whether, on the proper construction of clause 17.3, the reference to "the English Courts" should be construed as referring to the DIFC courts;
    (4) whether the Letter was a Litigation Notice;
    (5) if the Letter was not a Litigation Notice, whether the claimant is entitled to bring the claim in the English courts;
    (6) if the Letter was a Litigation Notice, whether the claimant is nonetheless entitled by reason of cl 17.3(c) to bring the claim in the English Courts.

Submission to the jurisdiction

Applicable legal principles

13. CPR 11, so far as relevant, provides

> "(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."

14. The test to be applied in determining whether conduct amounts to submission to the jurisdiction is set out in *Global Multimedia v Ara Media* [2007] 1 All ER (Comm) 1170 at [27] to [28], quoting from the judgment of Patten J in *SMAY Investments v Sachdev* [2003] EWHC 474. For present purposes, this can be summarised as follows:
    (1) the test is objective;
    (2) to amount to submission to the jurisdiction, the conduct relied upon must, in all the circumstances, be unequivocal i.e. such that the only possible explanation for it is an intention to have the case tried in England;

(3) if the conduct relied upon is explicable on grounds other than agreement to accept the jurisdiction, then that is sufficient to prevent there having been submission.

Discussion and conclusion

15. The claimant relied upon 2 matters as separately or together constituting submission to the jurisdiction by the defendant:
    (1) his request for an extension of time for his Defence;
    (2) his failure to either apply to challenge jurisdiction, or (before the expiry of the time limit) to seek an extension of time to do so.

16. As to the first act, it is clear that this is not of itself enough to amount to a submission: see *Global, SMAY, Mouly v AIG Europe* [2016] EWHC 1794 (QB) at [32] referring to *Texan Management Limited v Pacific Electric Wire & Cable Company Limited* [2009] UKPC 46 (to which I was not referred) at [85].

17. In *Global*, there had been no previous indication by the defendant of an intention to contest jurisdiction: he had only ticked box 1 and not box 3 on the acknowledgment of service form. He had also, in addition to seeking an extension of time for his Defence, advanced a defence on the merits and threatened to strike out the claim if the claimant refused to discontinue it. It was the combination of these acts which the judge found to be an unequivocal expression of an intention to accept jurisdiction.

18. In *SMAY*, it was held that seeking an extension of time for the Defence could only operate as an unequivocal submission to the jurisdiction if the only possible explanation for it was an intention to have the case tried in England. In that case, the defendant had not acknowledged service, but had sworn an affidavit in which he indicated that he intended to contest jurisdiction. In those circumstances, it was held that seeking the extension was not inconsistent with a continuing intention to contest jurisdiction.

19. As to the failure to apply within the time limit to challenge jurisdiction, there is an apparent inconsistency between *SMAY* and *Global*. In *SMAY*, the Judge expresses the (obiter) view that a failure to issue the application challenging jurisdiction within the time limit prescribed by CPR 11(4) would have rendered the defendant's position unequivocal.

20. However, it is clear in *Global* that the parties (and the Judge) regarded this as a neutral factor: see [26] and [28 (iv)]. At [26] this is explained:

> "mere failure to make the appropriate application within the period of 14 days gives rise to a deemed submission to the jurisdiction by virtue of 11(5). But subject to the power of the court under CPR Rule 3.1(2)(a) to extend the time for a challenge to the jurisdiction (see *Sawyer v Atari Interactive Inc.* [2005] EWHC 2351) If time is extended, then the defendant is able to challenge the jurisdiction of the court over him on any grounds otherwise available to him. But if by conduct he has affirmatively submitted to the jurisdiction then there is no point in granting an extension of time to make an application for that purpose which is bound to fail."

21. Taking into account the obiter nature of the judge's remarks in SMAY, I prefer the reasoning in *Global*, which is supported by *Texan Management* at [77]:

> "77. To summarise, the overall position is this: (1) if at the time the proceedings are first served, there are circumstances which would justify a stay, the application should be made promptly under … CPR Part 11; (2) any failure to comply strictly with time-limits may be dealt with by an extension of the time-limits, and any formal defect in the application may be cured by the court; (3) if circumstances arise subsequently which would justify an application for a stay, the application would be made under the inherent jurisdiction or … CPR r.3.1(2)(f) .

22. A failure to apply within the prescribed time to challenge jurisdiction and the resultant deemed submission to the jurisdiction pursuant to CPR 11(5) is not in my judgment an irrevocable submission. If that were so, the court's power retrospectively to extend time for making the application would be completely pointless. I therefore accept the defendant's submission that merely being late in making an application to challenge jurisdiction is not of itself sufficient to be an unequivocal submission.

23. The defendant's counsel therefore submitted that where, as here, an acknowledgement of service had been filed contesting jurisdiction, neither of the acts relied upon by the claimant were sufficient to render the position unequivocal.

24. The claimant's advocate submitted first that since 2 boxes were ticked on the acknowledgement of service, the effect of the defendant's request to extend time for the Defence was to abandon the challenge to jurisdiction – because if the application to challenge jurisdiction had been made, the time for the Defence would have ceased to run.

25. He also submitted that when the defendant did not proceed with the jurisdiction challenge, the disinterested bystander would have concluded that the jurisdiction challenge was being abandoned, because in order to challenge jurisdiction, it was necessary to make the application in time. He submitted that if a person has 2 possible routes, A and B, and only chooses B, then the irresistible inference is that he has abandoned A. He sought to distinguish this case from *Mouly*, in which the defendant had only ticked one box, indicating an intention to defend the claim.

26. I reject the claimant's submissions for the reasons given above. In my judgment, the fact that the defendant had ticked the box to challenge jurisdiction was a clear expression of his intention to do so. This prevented his subsequent acts (each of which were themselves equivocal) from being an unequivocal submission. In particular, the failure to apply to challenge jurisdiction within time was not in my judgment unequivocal given the defendant's entitlement, which he has now exercised, to seek an extension of time to do so.

27. I conclude therefore that the defendant has not submitted to the jurisdiction.

Extending time to challenge jurisdiction

28. The defendant's counsel accepted that an application to extend the time for applying to challenge jurisdiction (and for relief from the sanction imposed by not having done so in time) was necessary; and therefore, fell within the principles in *Denton*. The application was not opposed by the claimant who took a neutral stance.

29. As to the relevant principles, although applications for relief against sanctions are normally made by application notice supported by evidence, the court has a discretion to consider such an application without a formal application being made: see White Book, para 3.9.24.

30. As to the principles in *Denton*, they are conveniently summarised in the White Book at 3.9.3 and it is not necessary to set them out.

31. In the absence of opposition by the claimant, I am willing to exercise my discretion to consider the application for relief.

32. Turning to that application, the defendant's counsel relied upon *Mouly*. The delay in that case was 22 days which was "substantial", but was over a holiday period. The delay had not delayed the proceedings, or resulted in any additional costs or any other prejudice to the claimant. It was held to be not serious or significant. This meant that relief was granted even though the reasons for the delay were "unimpressive".

33. In this case, the delay is much longer than in *Mouly*: over 13 weeks. The defendant's counsel accepted that it was serious and significant; and that there was no evidence of any good reason for it.

34. I must therefore consider whether it would be right in all the circumstances, including those specifically identified in CPR 3.9 (i.e. the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules of court, etc) so as to enable the court to deal with the application justly.

35. In doing so the following factors are in my judgment relevant. First, as noted, the claimant is neutral and does not assert that it has suffered any prejudice. Secondly, the application for relief has not had any adverse impact on the conduct of this application or any other applications in this claim. It has not affected the time allowed by the court for the application and has had no adverse impact on other court users.

36. Thirdly, it was clear from the acknowledgement of service that jurisdiction was going to be in issue – unlike *Mouly*, where the claimant was not on notice of the jurisdiction issue. Fourthly, the claimant did not raise the point until its advocate's skeleton argument, even though it has filed evidence in opposition to the application. Finally, in my judgment, it would in all these circumstances be a disproportionate sanction to deprive the defendant of his ability to contest jurisdiction in this claim for a very substantial amount of money.

37. For these reasons, I will grant relief from sanctions and extend the time for making the application.

Construction of clause 17.3

38. It was common ground that the clause construed literally was self-contradictory. The claimant conceded (rightly) that the reference in cl.17.3(a) to "the English Courts" was a mistake, and was inconsistent with the 4 later references in the clause to "the DIFC courts".

39. The court can correct a mistake in a written instrument where it is satisfied that (i) that there is a clear mistake on the face of the instrument and (ii) it is clear what correction ought to be made in order to cure it: *Lewison, The Interpretation of Contracts, 6th Ed.* at [9.01]. I accept the defendant's submission (not really opposed by the claimant) that the mistake can only be corrected by taking the single reference to "the English courts" to be intended as a reference to "the DIFC courts". It is far more likely that a mistake was made once, than that it was made and repeated on 4 separate occasions over 3 different subclauses.

40. Although arguments to the contrary were ventilated in the course of the hearing, both sides agreed and invited me to proceed on the basis that the Letter was a Litigation Notice pursuant to cl. 17.3(a). I turn therefore to consider its effect.

41. The defendant submitted that its purpose was to enable the claimant to elect that the DIFC courts would have exclusive jurisdiction in any dispute. As noted, before service of the Notice, the claimant was, he submitted, free to choose any jurisdiction. Once served, both sides were contractually bound both not to invoke the arbitration clause (cl.17.2), and to not contesting that the DIFC courts should have exclusive jurisdiction. The claimant had therefore, elected to bring the claim in the DIFC courts and was contractually bound to adhere to that election.

42. The claimant's advocate submitted that the effect of clause 17.3(c) was to confer complete freedom on the claimant to bring proceedings in any country which would otherwise have jurisdiction whether or not it had served a Litigation Notice. This was, he submitted, the effect of the provision that clause 17.3 is for the benefit of the claimant only.

43. In support of this submission, he referred me to *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm). In it, the relevant clause was in the following terms, materially identical to those in this claim:

> "Clause 24 — Enforcement
>
> 24.1 Jurisdiction
>
> (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").

(b) The Parties agree that the courts of England are the most appropriate and the most convenient courts to settle Disputes and accordingly no Party will agree [*sic*, obviously a typographical error for argue] to the contrary.

(c) This Clause 24.1 is for the benefit of the Lender only. As a result the Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction. To the extent allowed by law the Lender may take concurrent proceedings in any number of jurisdictions."

44. As to this, Popplewell J held at [40]:

> "Clause 24.1(c) refers to the lender taking proceedings. Clause 24.1 is for the benefit of [the Lender] in the sense that Hestia and Sujana are obliged to sue in England but [the Lender] is not. But that does not disapply clause 24.1(a) to [the Lender] completely. Where it is Hestia or Sujana which brings suit against [the Lender] in England, clause 24.1(a) is not disapplied by the operation of clause 24.1(c). [The Lender] is thereby agreeing to be sued in England subject to the liberty conferred by clause 24.1(c). In those circumstances [the Lender] has agreed to be subjected to the exclusive jurisdiction of the English courts, subject to its right to bring claims (which may overlap) abroad pursuant to clause 24.1(c). Were it otherwise, clause 24.1(a) would be superfluous: if clause 24.1(c) permitted [the Lender] to insist on suing or being sued anywhere, or anywhere of competent jurisdiction, that would include England (given that this is an English law agreement and forum conveniens is conclusively determined by sub-clause (b))."

45. The judge continued at [42]:

> "Such asymmetric provisions have regularly been enforced by the court. As Professor Fentiman has observed in a recent article in the Cambridge Law Journal entitled "Universal jurisdiction agreements in Europe" (CLJ (2013) 72 (1) 24–27):
>
> > "Such unilaterally non-exclusive clauses are ubiquitous in the financial markets. They ensure that creditors can always litigate in a debtor's home court, or where its assets are located. They also contribute to the readiness of banks to provide finance, and reduce the cost of such finance to debtors, by minimising the risk that a debtor's obligations will be unenforceable. Such agreements are valid in English law … Indeed, despite their asymmetric, optional character it is difficult to conceive how their validity could be impugned or what policy might justify doing so … "

46. The claimant's advocate also referred me to *Lornamead Acquisitions Limited v Kaupthing Bank* [2011] EWHC 2611 (Comm), in which the relevant clause was also in materially identical terms:

"43.1 Jurisdiction of the English courts

(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a 'Dispute').

(b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(c) This clause 43.1 is for the benefit of the Finance Parties and Secured Parties only. As a result, no Finance Party or Secured Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties and Secured Parties may take concurrent proceedings in any number of jurisdictions."

47. The judge's decision in respect of that clause is at [99(vii)]:

> "Finally, and additionally, the English jurisdiction clauses were expressly stated to be for the benefit of Kaupthing and not Lornamead. Kaupthing was, therefore, entitled as a matter of contract to renounce such a jurisdiction clause in relation to this dispute, and had done so."

48. As to this, the defendant's counsel made the following submissions. First, he submitted that a contract must be construed against a particular factual matrix, so that the decisions in the two cases referred to above were not binding on this court. He did not however identify any aspect of the factual matrix which could point towards a different construction; and, even if not strictly binding, the conclusions on construction of materially identical clauses by two Commercial Court judges (both, later, Court of Appeal judges) is plainly highly persuasive.

49. Secondly, he submitted that if clause (c) meant that the claimant could choose the jurisdiction in which to sue, there was no need for the Litigation Notice procedure. I do not accept this submission. The Litigation Notice procedure triggers the contractual restrictions on the defendant from challenging the jurisdiction of the DIFC courts, or from bringing arbitration proceedings.

50. Thirdly, he submitted that the claimant's construction of clause (c) produces an inconsistency with (b) which provides "the parties agree", when it should consistently with (c) provide "the defendant agrees". I do not accept this submission. In my judgment, the net effect of clauses (b) and (c) is that only the defendant is bound by clause (b). The fact that this effect could have been achieved with drafting that expressly so provided does not detract from this. The drafting used in clause 17.3 is the standard drafting for asymmetric jurisdiction clauses - such as the materially identical clauses in *Mauritius Commercial Bank* and *Lornamead*, which were construed with the meaning contended for by the claimant. The defendant's construction would also mean that the first sentence in clause (c)

would either have no meaning at all, or have the pointless function of reiterating that only the claimant has the right to serve a Litigation Notice.

51. Fourthly, the defendant's counsel sought to distinguish *Mauritius Commercial Bank* and *Lornamead* on the grounds that, in this case, the Litigation Notice procedure follows after the agreement. The claimant can therefore, he said, make its decision as to where to sue later, and elect where to sue by sending the Litigation Notice. Having so elected, it is, he said, contractually bound to accepting the jurisdiction of the DIFC courts. I also reject this argument. In my judgment, there is no principled distinction to be drawn between contractual obligations arising at the time an agreement is entered into and contractual obligations arising in the performance of the agreement.

Conclusion

52. For these reasons, therefore, I dismiss the application.